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91-44 JUDICIAL REVIEW OF ORDERS OF THE INTERSTATE COMMERCE COMMISSION

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HEARING

BEFORE THE

SUBCOMMITTEE ON SURFACE TRANSPORTATION

OF THE

COMMITTEE ON COMMERCE

UNITED STATES SENATE

NINETY-FIRST CONGRESS

FIRST SESSION

ON

S. 2242 and S. 2244

TO AMEND SECTION 17 OF THE INTERSTATE COMMERCE
COMMISSION ACT TO PROVIDE FOR JUDICIAL REVIEW OF
ORDERS OF THE INTERSTATE COMMERCE COMMISSION,
AND FOR OTHER PURPOSES; AND S. 2244, TO AMEND
SECTION 212(a) OF THE INTERSTATE COMMERCE COM-
MISSION ACT

OCTOBER 7, 1969

Serial No. 91-44

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JUDICIAL REVIEW OF ORDERS OF THE
INTERSTATE COMMERCE COMMISSION

HEARING

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JUDICIAL REVIEW OF ORDERS OF THE INTERSTATE COMMERCE COMMISSION

TUESDAY, OCTOBER 7, 1969

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

The subcommittee met at 10:40 a.m., in room 5110, New Senate Office Building, the Honorable Vance Hartke, chairman of the subcommittee, presiding.

Present: Senators Hartke and Pearson.

OPENING STATEMENT BY THE CHAIRMAN

Senator HARTKE. The committee will come to order and we will continue this morning on the hearings on S. 2242 and S. 2244.

This is concerned with two bills which have been recommended by the Interstate Commerce Commission. The first bill, S. 2242, would amend section 17 of the Interstate Commerce Act to provide for judicial review of orders of the Interstate Commerce Commission.

S. 2242, proposes to change existing judicial procedures in certain respects. The most important proposed change would be to substitute judicial review of ICC orders in the courts of appeals for review of those orders by three-judge district courts. The decisions of the courts of appeals would be reviewable by the Supreme Court by writ of certiorari rather than by appeal.

The other bill is S. 2244 which would amend section 212(a) of the Interstate Commerce Act in the following respects: (1) to make motor carrier operating authorities subject to suspension, change, or revocation for willful failure to comply with any provision of chapter 39, title 18, United States Code, explosives and other dangerous articles; and (2) to provide that the Commission may, upon reasonable notice, suspend motor carrier operating authorities for failure to comply with insurance regulations issued by it pursuant to section 215 thereof.

The bills along with agency comments will be inserted in the record at this point.

Staff member assigned to this hearing: A. Daniel O'Neal.

(S. 2242 and S. 2244 follow:)

[S. 2242, 91st Cong., 1st 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 appeals 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 provisions 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. The jurisdiction of the courts of appeals shall be invoked by the filing of a petition as provided in this subsection.

“(b) The venue of any proceeding under this section or principal office of any of the parties filing the petition for review is located.

“(c) (1) 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: *Provided*, That, upon the filing of a petition within sixty days of the date of service of the order complained of, the court, for good cause shown, may extend the time for filing a petition to review such order for an additional period not exceeding sixty days. 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 entitled 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 may be represented by counsel in any proceeding to review

such order. Communities, associations, corporations, firms, and individuals whose interests 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 or a judge thereof 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 of this Act and section 3 of the Act of February 19, 1903 (48 U.S.C. 43), 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.

[S. 2244, 91st Cong., 1st Sess.]

A BILL To amend section 212(a) of the Interstate Commerce Act, as amended, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (a) of section 212 of the Interstate Commerce Act (49 U.S.C. 312(a)), is amended as follows:

(1) The second sentence is amended by inserting after the phrase "promulgated thereunder", the words "or under sections 831-835 of title 18, United States Code, as amended".

(2) The first proviso is amended by inserting immediately after the phrase "or to the rule or regulation thereunder", the words "or under sections 831-835 of title 18, United States Code, as amended".

(3) The second proviso is amended by inserting "215", immediately after "211(c)".

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., July 17, 1969.

The Honorable WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: We refer to your letter of June 2, 1969, asking for our comments on S. 2242. The bill would amend Section 17 of the Interstate Commerce Act, 49 U.S.C. 17, to provide for judicial review of orders of the Interstate Commerce Commission by United States courts of appeals. Current provisions for judicial review of Commission orders involving only the payment of money or of Commission orders made pursuant to the referral of a question or issue by a district court or the United States Court of Claims would not be changed. All other orders of the Commission would be made subject to the procedures set forth in the bill.

At present, most Commission orders, exclusive of those involving only the payment of money or referral questions, are subject to judicial review by specially convened United States District Courts of three judges, one of whom must be an appeals court judge. Direct appeal from these courts to the Supreme Court of the United States is permitted as a matter of right. S. 2242 would change this by vesting review jurisdiction in the United States courts of appeals. Final judgments of these courts and orders of these courts granting or denying interlocutory injunctions would be made subject to review by the Supreme Court of the United States only by the discretionary writ of certiorari.

Although the current judicial review procedures have been in effect for over fifty years, proponents of change say that the United States district courts have no uniform rules for handling these review cases and that in consequence they are heard on an *ad hoc* basis by the different district courts. On the other hand, it is said that the courts of appeals have uniform rules of procedure for judicial review of administrative orders and will therefore be able to review Commission orders on a more uniform basis.

An excellent and detailed analysis of the bill's provisions, and the reasons therefor, is contained in the justification statement made when the bill was introduced, *Congressional Record*, May 26, 1969, page S. 5599, and there is little we can add to that analysis. We do have some suggestions, however, which your Committee may wish to consider. The Interstate Commerce Commission has recommended that judicial review provisions in the appellate courts be provided by an amendment to Section 17 of the Interstate Commerce Act so that such provisions will appear in the basic act which the Commission is required to administer.

However, Chapter 158 of the Judicial Code, 28 U.S.C. 2341-2351, now provides for judicial review by the courts of appeals of orders of the Federal Communications Commission, the Federal Maritime Commission, the Atomic Energy Commission, the Secretary of Agriculture, and the Maritime Administration. If uniformity of procedure in the appellate courts is deemed to be of paramount importance, your Committee might wish to consider the amendment of Chapter 158 to include the Commission and Commission orders, rather than the present proposed amendment to Section 17. Also, the Committee might wish to consider subjecting Commission orders to the same kind of judicial review procedures now provided for orders of the Civil Aeronautics Board in 49 U.S.C. 1486. This statute is commendable for its clarity and brevity.

There appears to have been a printing error in the venue provision (section 2(b)) of the bill. It may have been intended to read: "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, or in the United States Court of Appeals for the District of Columbia." The underlined words are not included in the bill.

The cases involving orders of the Interstate Commerce Commission in which our office is interested usually involve reparations proceedings or referrals of questions or issues by district courts and the Court of Claims, and arise out

of the audit here of Government transportation accounts. The procedures for review of these orders would not be affected by this proposed legislation. We therefore have no recommendation to make as to the action to be taken on S. 2242, although we have no objection to its favorable consideration by your Committee.

Sincerely yours,

R. F. KELLER,
(For the Comptroller General of the United States.)

OFFICE OF THE SECRETARY OF TRANSPORTATION,
Washington, D.C., October 7, 1969.

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

DEAR MR. CHAIRMAN: This letter is in reply to your request for the views of the Department with respect to S. 2242, 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 appeal, 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 judicial reform which the bill would produce 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. practices in this respect to that of other Federal administrative agencies.

Certain functions of the Interstate Commerce Commission were transferred to the Department of Transportation in 1966. The Department of Transportation Act, which transferred the functions requires that they be accomplished in the same manner as when the functions were exercised by the I.C.C. This requirement has raised a question of whether judicial review of the transferred functions must remain as it was immediately preceding transfer, irrespective of whether the judicial review provisions of the I.C.C. Act are subsequently amended. As a consequence, were the subject bill enacted as presently drafted, it would eliminate three-judge district court reviews for any I.C.C. orders, but Department orders respecting those matters transferred from I.C.C. could still be subject to that outmoded and awkward form of judicial review.

Therefore, to eliminate any ambiguity, we suggest the following amendment to S. 2242.

Renumber section 3 of S. 2242 as section 4, and add a new section 3 to be inserted as follows:

SEC. 3, Section 17(10) (a) through (d) and (f) through (h) of the Interstate Commerce Act, as amended by this Act, shall apply to judicial review of orders and actions of the Secretary of Transportation in the exercise of the functions, powers, and duties transferred to the Secretary from the Interstate Commerce Commission by the Department of Transportation Act (80 Stat. 931).

The Department of Transportation believes that the bill would produce a change which is most desirable and long overdue. However, we express no opinion with regard to the proposed section 10(e) of the bill, which would permit the Commission to be represented by its own counsel before the court of appeals. Inasmuch as the executive departments would be represented by the Justice Department before the court of appeals concerning appeals from Commission orders, we defer to that Department on the merits of the proposed section 10(e).

Subject to the foregoing comment, we recommend enactment of S. 2242 because in our judgment it would 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,

CHARLES D. BAKER.

OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., October 8, 1969.

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. 2242, 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. 2242 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 first 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. That chapter applies not only to civil actions to set aside orders of the Commission but also to actions brought to enforce such orders or to collect fines, penalties

and forfeitures. The bill 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 purpose 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.

Because S. 2242 significantly departs from this important standard of efficient executive administration, the Department of Justice opposes the enactment of S. 2242 unless the bill is first amended to preserve the existing role of the United States as statutory defendant in cases seeking judicial review of ICC orders.

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,

RICHARD G. KLEINDIENST,
Deputy Attorney General.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., June 11, 1969.

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

DEAR MR. CHAIRMAN: We have your letter of June 2, 1969, requesting your comments on S. 2244, which you introduced at the request of the Interstate Commerce Commission. A companion bill, H.R. 10852, is pending in the House of Representatives.

S. 2244 would amend section 212(a) of the Interstate Commerce Act, 49 U.S.C. 312(a), to authorize the Interstate Commerce Commission to suspend, change or revoke a carrier's operating authority for willful failure to comply with laws relating to the transportation of explosives and other dangerous articles, 18 U.S.C. 831-835, and to suspend operating authority for a carrier's failure to comply with insurance regulations issued under section 215 of the Act, 49 U.S.C. 315.

This would seem to be a logical concomitant of the authority the Commission already has to suspend or revoke operating authorities for violations of safety rules and regulations promulgated by the Department of Transportation. The Commission has asked for this authority at least since 1957; it would also help make uniform, as between Parts II and IV of the Act, the procedure for revoking operating certificates. S. 2244 is similar to S. 753, 90th Congress, 1st Session, one of several bills on which the Subcommittee on Surface Transportation of your Committee held hearings in May and June 1967.

Enforcement of safety regulations and uniformity of enforcement among the several transportation modes are not directly related to the functions of our Office. They are, however, in the public interest and we have no objection to favorable consideration of S. 2244 by your Committee.

Sincerely yours,

R. F. KELLER,
(For the Comptroller General of the United States.)

OFFICE OF THE SECRETARY OF TRANSPORTATION,
Washington, D.C., July 7, 1969.

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 concerning S. 2244, a bill:

"To amend section 212(a) of the Interstate Commerce Act, as amended, and for other purposes."

S. 2244 would amend section 212(a) of the Interstate Commerce Act (49 U.S.C. 312(a)) to (1) make interstate motor carriers covered by the Act subject to suspension, change, or revocation of their operating authority for willful failure to comply with any provision of Chapter 39, title 18, United States Code (Explosives and Other Dangerous Articles); and (2) to provide that the Commission may, upon reasonable notice, suspend motor carrier operating authorities for failure to comply with insurance regulations issued by it pursuant to section 215 of the Act (49 U.S.C. 315).

Under present law, the Department of Transportation has authority to regulate explosives and other dangerous articles transported by motor carriers (see DOT Act, P.L. 89-670, section 6(e) (4), 80 Stat. 931, 939). However, existing law does not provide authority to DOT or to the ICC to suspend and revoke the operating certificate of any carrier for violation of the explosives act.

Subsection 3 of the bill would amend the second proviso in section 212(a) of the Interstate Commerce Act which provides for the suspension, upon notice, but without hearing, of motor carriers' and brokers' operating authorities for failure to comply with brokerage bond regulations and tariff publishing rules. Present law does not provide for suspension on short notice for failure to maintain proof of cargo, public liability, and property-damage insurance under section 215 of the Interstate Commerce Act. As a result, the only remedy presently available under section 212(a) is revocation of the carriers' authority.

At present all insurance filings made with the ICC are on a "continuous until cancelled" basis with a minimum 30-day cancellation provision. The motor carrier is immediately notified of an insurance cancellation and has ample time to make new arrangements. If replacement insurance is not received by the cancellation date, the ICC must commence lengthy show cause proceedings to obtain compliance or to revoke the operating authority. If losses occur during these proceedings the public may be adversely affected. This bill would remedy this situation by providing for the suspension, upon notice and without hearing, when insurance lapses or is cancelled without replacement until compliance is effected.

The Department of Transportation supports enactment of the provision of S. 2244 to allow suspension or revocation of the operating authority of interstate motor carriers which willfully violate the laws relating to explosives and other dangerous articles. We feel that such action would be an effective means of preventing these violations, which constitute a large percentage of total motor carrier violations. This Department has 56 cases involving violations of the Explosives and Other Dangerous Articles Regulations out of a total of 366 motor carrier safety cases pending. Violation of those Hazardous Material Regulations can result in serious consequences to the public through explosion or chemical, radioactive, or biological contamination of the environment. We agree that it is important that violators of these regulations should be subject to having their operating authority suspended or revoked at least to the same extent as violators of the Motor Carrier Safety Regulations.

We also believe the ICC proposal to permit the temporary suspension without hearing of the operating certificates of motor carriers and brokers who fail to maintain cargo, public liability, and property-damage insurance in effect is meritorious and a reasonable and necessary safeguard to the traveling and shipping public.

For the foregoing reasons the Department of Transportation favors enactment of S. 2244.

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,

CHARLES D. BAKER,
Deputy Under Secretary.

The first witness to appear will be the Honorable Virginia Mae Brown, Chairman of the Interstate Commerce Commission.

Good morning.

STATEMENT OF VIRGINIA MAE BROWN, CHAIRMAN, INTERSTATE COMMERCE COMMISSION; ACCOMPANIED BY GEORGE M. STAFFORD, VICE CHAIRMAN; FRITZ R. KAHN, ACTING GENERAL COUNSEL; AND JOHN FRISTOL

Mrs. BROWN. Good morning, Mr. Chairman.
Senator HARTKE. How are you this morning?

Mrs. BROWN. Fine.

Mr. Chairman, members of the subcommittee:

I am pleased to appear before the subcommittee today to offer the Commission's views and support for two bills that we recommended. For convenience, I will discuss them in numerical order.

S. 2242 provides an amendment to section 17 of the Interstate Commerce Act. Section 17 is the statutory basis for the Commission to make orders, and the amendment contained in S. 2242 would provide a new procedure for the judicial review of these orders by vesting exclusive jurisdiction in the U.S. Courts of Appeals.

Before proceeding further, I would like to mention that Judge John Biggs, Chairman of the Committee on Court Administration of the Judicial Conference of the United States, is unable to be here to testify today due to an illness he is recovering from. However, he wanted you to know that the Conference supports S. 2242, and he regrets that he cannot be here to tell you himself. We also regret his absence, but we welcome his support, and wish him a speedy recovery.

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.

Enactment of S. 2242 will require that the Commission's orders be reviewed in the same general manner as orders of all other major Federal regulatory agencies, such as CAB, FCC, FMC, and NLRB,

to name a few. However, consistency with the review procedures of these other agencies is not the reason for the change we seek in our procedure. Rather, there is a very practical reason, reflecting the typical reviewing task of the courts of appeals as compared with that of the district judges. With the changed review procedures for other agencies brought about in 1950 and which I have already mentioned, district judges seldom, if ever, review orders of Federal agencies. Courts of appeals, on the other hand, are regularly engaged in such review and have rules governing these proceedings. In fact, these courts are now applying uniform rules promulgated by the Supreme Court. Contrast this orderly manner of conducting appellate litigation with the fact that there are no court rules governing review proceedings of the Commission's orders in the three-judge courts. Procedures determined on such an ad hoc basis are simply not conducive to the systematic dispatch of the public's transportation business.

At this point I will provide a short description of the principal features of S. 2242. In appendix B, a comparative analysis of the bill in relation to the existing procedure is set forth, and I believe the committee would find it helpful to refer to that chart as I am discussing the major changes. However, all such changes made by S. 2242 are detailed there for your information. I would also like to call your attention to minor typographical errors in the bill, and these are noted in appendix C.

As I have previously indicated, the major change made by S. 2242 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. 2242 covers judicial review of all final orders of the Commission issued under any of the four parts of the Interstate Commerce Act.

The venue for filing a petition is set forth in paragraph (b) of S. 2242, 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 service of the order complained of. 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. 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. 2242, like 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. For example, in the so-called Northern Lines merger, now before the Supreme Court, challenges were made in the district courts in Washington, New York, and the District of Columbia. 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 consuming for all concerned. Providing for judicial review in the courts of appeals would largely put an end to this problem and such change is very desirable.

This bill also changes existing case law with regard to the submission of the complete record of a 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. 2242, the Commission would be required to file the record with the clerk of the court of appeals in which the proceeding is pending. 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. In the experience of other agencies, most of this reproduction cost falls upon the private appellants.

S. 2242 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, and CAB, which are named as the respondents in suits seeking judicial review of their orders, and 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 has been previously opposed by the Department of Justice. Aside from the fact that the Commission's attorneys are already 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 items 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 S. 2242 deals with review of decisions rendered by the courts of appeals in the Supreme Court and certain miscellaneous provisions such as repeal of laws specifying the existing procedure. They are discussed in items 6-8 of the chart and I will not elaborate on them here.

One additional matter relating to S. 2242 does require discussion this morning, and it was worked out only yesterday. As you know, certain functions of the Commission, principally safety matters, were transferred to the Department of Transportation after it was established by the Congress. The legislation providing for the transfer, it has been discovered, provides for judicial review of those safety matters in the same manner as in practice at the time of transfer.

In other words, enactment of S. 2242 in its present form will not affect review of the DOT matters I have mentioned. Therefore, at the request of the Department of Transportation, I wish to offer an amendment which will remedy the situation and provide the same method of review in the future by the courts of appeals as we recommend for the Commission orders.

To provide for the amendment in S. 2242, renumber present section (3) as section (4) and insert a new section as follows:

(3) Section 17(10) (a) through (d) and (f) through (h) of the Interstate Commerce Act, as amended by this act, shall apply to judicial review of orders and actions of the Secretary of Transportation in the exercise of the functions, powers, and duties transferred to the Secretary from the Interstate Commerce Commission by the Department of Transportation Act. (80 Stat. 931.)

I also wish to offer for the record a copy of a letter from the Department to me explaining this situation more fully, and stating their support for the bill.

(The letter from the Department of Transportation follows:)

OFFICE OF THE SECRETARY OF TRANSPORTATION,
Washington, D.C., October 6, 1969.

HON. VIRGINIA MAE BROWN,
Chairman, Interstate Commerce Commission,
Washington, D.C.

DEAR MADAM CHAIRMAN: This letter is to advise that the Department of Transportation strongly supports the purposes of S. 2242, 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."

We believe that the bill would produce a change which is most desirable and long overdue, and that it would lead to an efficiency of appellate process and uniformity of practice respecting I.C.C. actions which argues for prompt enactment.

However, certain functions of the Interstate Commerce Commission were transferred to the Department of Transportation in 1966. The Department of Transportation Act, which transferred the functions, requires that judicial review of certain of these functions be accomplished in the same manner as when they were exercised by the Commission. This requirement has raised a question of whether judicial review of the transferred functions must remain as it was immediately preceding transfer, irrespective of whether the judicial review provisions of the Interstate Commerce Act are subsequently amended. As a consequence, were the subject bill enacted as presently drafted, it would greatly improve the Commission's review machinery, but this Department could still be subject to the outmoded and awkward form of review respecting those matters transferred from the Commission.

To eliminate any ambiguity, we would, therefore, appreciate your bringing this matter to the attention of the Committee when the Commission is requested to testify, and we respectfully suggest that the following amendment to the bill be submitted for the Committee's consideration.

Re-number section 3 of the bill as section 4, and add a new section 3 which reads as follows:

SEC. 3. Sections 17(10) (a) through (d) and (f) through (h) of the Interstate Commerce Act, as amended by this Act, shall apply to judicial review of orders and actions of the Secretary of Transportation in the exercise of the functions, powers, and duties transferred to the Secretary from the Interstate Commerce Commission by the Department of Transportation Act (80 Stat. 931).

Your cooperation in this matter would be greatly appreciated.

Sincerely,

CHARLES D. BAKER.

Mrs. Brown. At this time I would like to comment briefly on S. 2244. This bill would amend section 212(a) of the act to give the Commission additional power over motor carrier operating authorities in two instances where it is presently lacking. The first instance is for willful failure of a carrier to comply with any provision of the Explosives Act. While the Commission has no safety responsibility relating to explosives since establishment of the Department of Transportation and the subsequent transfer of such responsibility to it, neither the Department nor the Commission has authority to suspend or revoke a carrier's certificate for violation of the Explosives Act. Such authority is essential to maintain compliance with the Explosives Act, and we believe it should be vested in the Commission. For that reason, we urge amendment of section 212(a) to enable us to suspend, change, or revoke a motor carrier's authority for such violation.

The second area involves failure of a carrier to maintain proof of cargo, public liability, and property damage insurance required by section 215 of the act. We need authority to act immediately, on short notice, upon such failure of the carrier in order to protect the public. At present, the only remedy available is revocation of a carrier's certificate. However, a proceeding of this nature is time consuming as a show cause order must be issued as a first step to obtain compliance or revocation.

Insurance filings with the Commission are on a continuous until canceled basis with a minimum 30-day-notice period. When a carrier's insurance is canceled, it has time during the notice period to obtain new coverage, and, if it does not, our only recourse is to then seek revocation. We believe the risk of serious consequences to the public during the time this proceeding is conducted is obvious and must be corrected.

The Commission already has authority under part IV of the act to suspend freight forwarder permits on short notice for failure to meet insurance requirements. Considering the number of certificated motor carriers and the nature of their operations in comparison to that of forwarders, it is even more important that we have similar authority over them. As to motor carriers themselves, we already have authority to deal on short notice with failure to comply with tariff publishing rules. The need of the public for protection from carriers operating without insurance is every bit as essential. We, therefore, recommend amendment of section 212(a) so that we may meet this need.

I wish to thank the members of the subcommittee for consideration of S. 2242 and S. 2244 and urge your favorable disposition of them.

Thank you.

(The appendixes follow:)

APPENDIX A

GENERAL SUMMARY OF EXISTING LAW AND S. 2242 DEALING WITH JUDICIAL REVIEW AND ENFORCEMENT OF MATTERS ARISING UNDER THE INTERSTATE COMMERCE ACT AND RELATED STATUTES

I. Single-judge United States districts courts.

1. All cases arising under the Interstate Commerce Act involving fine, 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 appeals 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 judgment 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 of S. 2242, 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 appeals with appeal to the Supreme Court by a writ of certiorari (Section 1 of S. 2242)

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. 2242 WITH EXISTING LAW

EXISTING LAW

S. 2242

Item 1—Jurisdiction

[p. 1, lines 1-10, p. 2, lines 1-15]*

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) the pay 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. Review in the Supreme Court by writ of certiorari.

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.

*Refers to page and lines of S. 2242.

Item 2—Venue

[p. 2, lines 16-18]

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 suites brought against the same order in different courts.

b) In addition, by virtue of paragraph (c) (ii) [p. 3, lines 10-11] of this bill, which incorporates by reference 28 U.S.C. § 2112, permits the consolidation of multiple suits.

[p. 2, lines 19-25, p. 3, lines 1-25; p. 4, lines 1-11]

Item 3—Practice and Procedure

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. Contents of the petition are not specified as covered by Appellate Rule 15 which requires the petition to specify parties seeking review, the respondent and the order or decision to be reviewed.

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 procedures.

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.

APPENDIX B—Continued

Item 3—Practice and Procedure—Con.

[p. 2, lines 19-25, p. 3, lines 1-25;
p. 4, lines 1-11]—Continued

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 12-23]

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.

Item 5—Stays and Preliminary Injunctions

[p. 4, lines 24-25; p. 5, lines 1-24;
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 and permits stays to be granted by the court or a single judge thereof.

Item 6—Review by the Supreme Court

[p. 6, lines 9-21]

a) Provides for direct appeal from a three-judge court 28 U.S.C. § 1253.

a) Paragraph (g) provides that review following a decision of court of appeals shall be by writ of certiorari within 45 days after entry of the lower court's judgment.

Item 7—Service of Process, etc.

[p. 6, lines 22-25; 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.

Item 8—Repeals

[p. 7, lines 3-15]

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. 2242. Method of handling cases pending in district courts as of date of enactment set forth.

Item 9—Effective Date

[p. 7, lines 16-17]

Not applicable

a) Section 3 provides for this Act to become effective 60 days after enactment.

APPENDIX C

CORRECTIONS

1) On sheet 2, section (b), beginning line 16, the phrase "shall be in the judicial circuit in which the residence" was omitted and should be inserted following "section."

2) On sheet 3, line 15, "attached" which appears there should be "attacked."

3) On sheet 6, line 24, "sections 20, 23" which appears there should be "sections 20 and 23."

Senator HARTKE. Any questions, Senator Pearson?

Senator PEARSON. You go ahead.

Senator HARTKE. In regard to the proposed amendment making the Commission the defendant rather than the U.S. Government, have you found any instances where there appears to be an attempt to influence the Commission as a result of the failure of the Government to defend at the present time through the Justice Department?

What do you feel is the cause for their failure to exercise the authority to defend the actions of the Commission in the name of the U.S. Government?

Mrs. BROWN. Well, I think as we tried to put forth in the statement, it may be a difference in both statutory construction and policy.

Senator HARTKE. What I was really asking, I can understand the difference in statutory construction, but what about policy? Have you found any cases where there has been an expression that they did not agree with your policy and therefore are basically attempting to demonstrate that disagreement by not exercising the authority required under the law?

Mrs. BROWN. As to a specific case, I am going to ask Mr. Kahn, the general counsel, if he would do so.

Mr. KAHN. Mr. Chairman, I think an example might be the so-called English modes case where there was no question that the Interstate Commerce Commission under the statute was obliged to give effect to the inherent advantages of the contending modes of carriers involved in that case.

There a disagreement arose between the Interstate Commerce Commission and the Department of Justice, as to whether the Commission might as a matter of policy look to a fully distributed cost as distinguished from a marginal out-of-pocket cost.

The Antitrust Division of the Department of Justice declined to defend the order of the Commission on the ground that we had selected the wrong cost standard for determining inherent advantages.

Senator HARTKE. Was it their contention in that case that the law gave the Department of Justice the authority to decline to act?

Mr. KAHN. Mr. Chairman, they confessed error in responding to the complaint filed in that case and they elected not to defend the order of the Commission. The Attorney General believes he has that authority.

Senator PEARSON. Did you go ahead and defend in your own right?

Mr. KAHN. We nevertheless went ahead and defended in our own right and were sustained by the Supreme Court.

Senator PEARSON. How does this occur? Can you furnish this committee a list¹ of the cases of a policy difference between yourself and the Justice Department?

Mr. KAHN. We would be pleased to.

Statistically, it happens infrequently but it seems to happen in many important cases. The Northern Lines case that the chairman mentioned in her testimony was another good example where the Interstate Commerce Commission, after very careful consideration of the record, determined that the merger of the Great Northern and Northern Pacific Railroads should be authorized.

The Antitrust Division again not only confessed error but actually brought the principal suit, and the lead appeal for the Supreme Court is the *United States v. the United States*.

Senator PEARSON. Would you let us have a list of those important issues?

Mr. KAHN. Yes.

Senator PEARSON. I notice that the Justice Department, Mr. Chairman, made no comment on S. 2242. Did we give them adequate notice?

Senator HARTKE. Yes, they have been given notice.

Senator PEARSON. And they have not responded at all?

Senator HARTKE. They just have not responded yet.

Senator PEARSON. Mr. Chairman, I think we should tell them to respond.

Senator HARTKE. I think so, too, and we will do that. I want to move to the other phase of that and that is aside from the policy matter, the question of statutory interpretation.

Is this a frequent cause of the refusal to defend?

Mrs. BROWN. It has been a cause for refusal but as to how frequent it is I will ask the counsel.

Senator HARTKE. All right, in the important cases. Has that caused a great difficulty for you?

Mr. KAHN. I think in instances of disagreement as to statutory construction, that perhaps arises less frequently than do cases in which there is a disagreement as to the policy in implementing the statutory—the statute requirements.

Mrs. BROWN. But each of these cases that has been mentioned, Mr. Chairman, and the others which will be on this list, happen to be very important cases not only for the Interstate Commerce Commission, but for the country.

Mr. KAHN. I would suggest in the response we will be making for the record, as requested by Senator Pearson, that we would include a full list of cases where there has been a disagreement between the Department of Justice and ourselves identifying whether these are matters of policy or matters of construction.

Senator HARTKE. I think that would be helpful. The reason I raise this question, is that I think this is a bigger question than the Commission here. I raised the question of statutory construction in the Supreme Court whether authority to determine legislated intent was in the Attorney General or whether it should lie more with Congress.

¹ See list on p. 39.

It would seem such authority should not sometimes be with a department of the Government which might find it's not in agreement with the legislative purposes stated by Congress.

I could outline a number of cases, some of them have been quite politically oriented. But you know politics is one of our problems. But this time, I am not saying the administration, being Republican controlled, and Congress being Democratically controlled, there could be many differences of policy.

Let me ask you this: In regard to provisions of temporary injunctive relief, would the Commission's amendment make such remedy less available than existing law?

Mr. KAHN. The existing law provides, Mr. Chairman, and the filing of the complaint in seeking judicial review in Interstate Commerce Commission, the report order, does not stay automatically. To secure a stay pending judicial review an interlocutory injunction must be obtained from the three-judge reviewing court.

This normally is entered after hearing and upon a finding of immediate and irreparable injury. Pending the convening of the three-judge panel a single member thereof is empowered to enter a temporary restraining order. That is the procedure in substance, and it would be continued under the bill before you. Last year the bill that this committee considered would have provided only for a stay pending review by the court of appeals.

By implication that would require the concurrences of at least two judges. The bill before you specifically permits a single member thereof to grant a stay. So we would submit that the procedures now being considered by the committee is essentially the same as has been under the existing statute and it would be no more difficult for an aggrieved party to obtain a stay required by emergency conditions than he would presently have.

Senator HARTKE. Well, let me give you a case. We have had passenger train discontinuances. Could an injunction be obtained more easily under the amendment or would it be more difficult?

Mr. KAHN. In our view it would be no more difficult. If the public were threatened by a discontinuance from passenger service, today we would be able to secure an order from a single judge upon demonstrating immediate irreparable jurisdiction; the same thing could be obtained under this legislation.

Senator HARTKE. In the hearings last year one of the arguments made was that the record on review procedures would add unnecessary expenses.

Mr. KAHN. We don't agree with that, Mr. Chairman. At the present time the complainant must furnish the district court the entire verbatim record before the Interstate Commerce Commission which obliges the complainant to purchase a transcript of the oral testimony, reproduce the exhibits, and the entire material must be filed, after certification by the secretary of the Commission, with the clerk of the court.

The new procedure that this bill would provide is that being followed by the court of appeals in reviewing other agency orders and permits the parties simply to have as much of the record as is pertinent and as is agreed by the parties is required for effective review

by the court to be reproduced, not by printing but by any legible means of reproduction.

We think the sum and substance of all this is that the cost burden upon the parties seeking review indeed will be less than it is under existing procedures. In the so-called joint appendix that the court of appeals has uniformly adopted is another very effective device for reducing the cost in submitting the record to the reviewing court.

Senator PEARSON. Let me ask a question on that. In addition to uniformity, it is your view that to go to the court of appeals rather than the three-judge court gives you a set procedure?

Mr. KAHN. That is correct, sir.

Senator PEARSON. Rather than going to the three-judge court which, as you described it, there would be uniformity?

Mr. KAHN. That is right, that would provide consistency and within just the task of reviewing ICC orders, we would have uniformity for the first time.

Senator PEARSON. That is a convenience to you; is it also a convenience for those seeking a review?

Mr. KAHN. We think it is. Because the complainant today does not know when he files his papers in a particular court what procedure that will follow because there is no procedure being followed by the three-judge court.

In some instances the court will be satisfied with a single copy of the record, for example. In other instances they will want three. In other instances they will certify that report be certified by the secretary. These things will become standardized, among other things.

Senator PEARSON. Is there any other reason for this legislation?

Mr. KAHN. We think, among other things by requiring first of all, the filing of the complaint within 60 days of the entry of the Commission's order, which filing of a petition of review sets into motion the machinery of the courts of appeals, that the whole review process will be appreciably shortened in time.

We have had some cases with the three judges in district courts that have dragged on for 2 and as many as 5 years. We think that is very unlikely to happen through this procedure.

Senator HARTKE. In regard to the second bill, 2244, who would determine whether there was a willful noncompliance of the explosive act?

Mr. FRISTOL. Mr. Chairman, the Department of Transportation would determine that.

Senator HARTKE. They would make the determination?

Mr. FRISTOL. Yes.

Senator HARTKE. After they have made the determination, would that determination, if it were certified, be the basis for you making a finding for action?

Mr. FRISTOL. Yes, sir, it would be certified to us.

Senator PEARSON. I think, Mr. Chairman, we ought to press them a little further on that.

Senator HARTKE. Thank you very much for coming.

Mrs. BROWN. Thank you very much.

Senator HARTKE. The next witness we have is Harry Breithaupt, Jr., general solicitor for American Railroads.

**STATEMENT OF HARRY J. BREITHAAPT, JR., GENERAL SOLICITOR,
ASSOCIATION OF AMERICAN RAILROADS**

Mr. BREITHAAPT. Good morning, Mr. Chairman and Senator Pearson.

Mr. Chairman, I have a very brief statement and I am not going to take the subcommittee's time to read even that.

Senator HARTKE. All right. The entire statement will appear and you can say whatever you want to say.

Mr. BREITHAAPT. We approve the objectives of the bill and, in general, approve the particulars of the bill.

I want to comment only on one or two things that have already arisen this morning. I have called attention at the end of my prepared statement to two obvious typographical errors.

I want also to say that I have not heretofore heard of or had an opportunity to analyze or weigh the new amendment that was proposed by the Commission this morning with respect to judicial review of certain DOT matters. I would appreciate an opportunity to give that further study and, if desirable, submit something for the record.

Senator HARTKE. All right. If you would let us know what your opinion on that is we would appreciate it.

Mr. BREITHAAPT. I shall. In addition I would like to call the committee's attention, without going into great detail, to what I consider to be certain ambiguities.

In paragraph 10(f) of the bill, beginning at the bottom of page 4, having to do with the matter of temporary restraining orders, interlocutory injunctions, that sort of relief.

I just find the particulars in that regard ambiguous in that two or three provisions seem to be made with different requirements for obtaining the same results.

I would like an opportunity, if it please the committee, to explain my position in detail to the staff and even to talk to the Associate General Counsel of the Commission about it. I really don't think it would serve any useful purpose to explore it here unless you wish me to do so.

Senator HARTKE. That would be fine. This would just be for clarification purposes?

Mr. BREITHAAPT. Yes, with no argument as to the objective.

With those very brief remarks, Mr. Chairman, I conclude.

Senator HARTKE. All right. Thank you. I have no questions.

Senator PEARSON. I have no questions.

Senator HARTKE. Thank you, sir.

(The full statement follows:)

**STATEMENT OF HARRY J. BREITHAAPT, JR., GENERAL SOLICITOR, ASSOCIATION OF
AMERICAN RAILROADS**

My name is Harry J. Breithaupt, Jr. I am General Solicitor of the Association of American Railroads, with office at Washington, D.C. My appearance here today is for the purpose of expressing the support of the Association of American Railroads for S. 2242.

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 most other principal Federal regulatory agencies.

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 United States 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 United States courts of appeals, with Supreme Court review only by 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 proceeding in these special courts develops its own rules, so to speak. This, understandably, can lead to a certain amount of uncertainty and even confusion.

S. 2242 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, etc. A substantially similar bill, S. 2687 (90th Congress), was favorably reported by the Commerce Committee last year and passed the Senate September 5, 1968.

The Association of American Railroads supports the bill and urges its favorable consideration.

[NOTE.—There appear to be two typographical errors in S. 2242 as introduced. On page 2, after line 16, certain language seems inadvertently to have been omitted. It is likely that the words "shall be in the judicial circuit in which the residence" should be inserted between lines 16 and 17. Paragraph (b) of subsection (10) of section 17 would then read: "(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."

On page 6, in line 25, the parenthetical reference to the United States Code should probably be "(49 U.S.C. 43)", section 3 of the Elkins Act, instead of to section 43 of Title 48.]

Senator HARTKE. Next witness will be Peter T. Beardsley, general counsel, American Trucking Associations, Inc.

STATEMENT OF PETER T. BEARDSLEY, GENERAL COUNSEL, AMERICAN TRUCKING ASSOCIATIONS, INC.

Mr. BEARDSLEY. Good morning, Mr. Chairman, Senator Pearson.

Mr. Chairman, if it is all right with you I may skip as I go along.

My name is Peter T. Beardsley and I am general counsel of American Trucking Associations, Inc., 1616 P Street NW., Washington, D.C. 20036. You are probably familiar with our organization, but for the record let me say that ATA is the national trade association of the motor carrier industry. It represents all types of motor carriers, and has affiliated associations in every State and the District of Columbia.

We appreciate the opportunity to submit our comments on S. 2242. As the national representative of the trucking industry, ATA regularly participates before the ICC in proceedings of general interest to the industry and, over the years, we have participated in numerous court cases seeking to have Commission orders set aside.

We have become accustomed to the three-judge court procedure which has been the system provided for review of ICC orders for many years. While charges have been made by some that the system is an anachronism, our experience in the proceedings in which we have participated has been that the cases have been progressed with considerable

dispatch. Based on that experience, we believe that the factors of time and expense in processing a case through a three-judge court compare very favorably with review of agency decisions in the courts of appeal. In fact, in its memorandum dated October 10, 1968, bringing forward its earlier recommendation that ICC orders should be reviewed by courts of appeal, the Committee on Judicial Review of the Administrative Conference of the United States stated:

It would seem that Court of Appeals Review of administrative orders, as a general rule, may require a little longer period of time than does the three-judge system now in use for the ICC.

If I may say here, I disagree with Commission counsel with respect to the belief that the court of appeals review will significantly speed up review of ICC decisions. I don't believe that is so.

Senator PEARSON. Did you say the Administrative Office of the U.S. Court had a position in regard to S. 2242?

Mr. BEARDSLEY. No, sir. I simply referred to the memorandum of the Committee on Judicial Review of the Administrative Conference of the United States and pointed out on page 2 of my testimony that they have indicated if anything that court of appeals review will probably take a little longer than three-judge review.

Senator PEARSON. The reason I ask the question is that the U.S. Office of the—

Mr. BEARDSLEY. Yes, I understand that. I think we are dealing solely with the time question here.

Senator PEARSON. All right.

Mr. BEARDSLEY. The changes in court review provided by the bill will require us to "unlearn" the present system and learn the new one. But this factor does not, we believe, justify opposition to the bill. If review by the courts of appeal—instead of three-judge courts—and the substitution of a petition for certiorari to the Supreme Court for the present right of appeal seems, in the opinion of Congress, to represent an improvement in the method provided for review of ICC orders, we do not believe we should oppose the bill. We do, however, have serious reservations about certain provisions of S. 2242, and wish to record our comments respecting them.

The bill provides that until the record has been filed in the court of appeals "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 attacked in a petition for review." This language gives unreasonable and arbitrary power to the ICC. We think parties which have gone to the trouble and expense of subjecting an order of the Commission to court review are entitled to that review, and should not be subjected to the uncertainties inherent in the quoted language. Under the present system of court review of ICC orders, the Commission sometimes "recalls" a case from the courts, and modifies its decision or order under review. But even after all the years of court review under the present system, there is serious doubt that the Commission has the right to do so. The Commission usually obtains the permission of the court wherein the complaint attacking its order has been filed before reopening its docket. And the court usually gives the plaintiffs an opportunity to argue, if they wish to, that the court should decide the

issue as presented and not allow the Commission an opportunity to "recooper" its decision in an effort to make it less vulnerable to attack. We think this is as it should be.

Why should Congress allow the parties to ICC proceedings to institute legal action to challenge its orders in Federal courts and, at the same time, allow the Commission to largely frustrate such court review by allowing it to be the sole judge of whether complaints filed with the courts to set aside its orders shall be heard as originally filed? We recommend that the language beginning with "Until" at line 11 of page 3 of the bill and ending with "review" at line 15 be eliminated. This would place the discretion which the bill, as now worded, would grant to the Commission in the hands of the Federal courts, where it properly belongs.

Senator PEARSON. Let me have an example of that.

Mr. BEARDSLEY. There is one in the Supreme Court right now. The Commission issued certain temporary authority—

Senator PEARSON. Are we talking about the existing procedures in law or are you talking about that which is proposed?

Mr. BEARDSLEY. I am dealing with the provision in the bill which would place in the discretion of the Commission the sole determination as to, once a petition for review has been filed, the bill gives the Commission authority at any time, for all practical purposes, let me put it, to in effect withdraw that order, reopen its docket, come to another decision and maybe have a decision that it would consider less vulnerable for attack in court.

Senator PEARSON. Can't they do that now?

Mr. BEARDSLEY. Not as a matter of discretion. When this is done the Commission usually goes to the court and gets the court's permission to, in effect, withdraw and reopen its dockets and the court usually gives the parties an opportunity that filed the complaint to say "no, you shouldn't do this."

It seems to me this discretion belongs in the court. Once that petition to review an ICC order has been placed there the discretion as to whether to hear that case on the record made before the Commission prior to the time that complaint is filed, it seems to me that should belong in the court.

Senator HARTKE. You are complaining about the fact that they could arbitrarily do it at any point in the procedure?

Mr. BEARDSLEY. I don't think it is at any point but it is pretty well into the proceeding, let's put it that way.

Senator PEARSON. Do I understand that under the present procedure in a review of an ICC order before the Federal court, that at any time they must now go in and ask leave of the court to withdraw their previous order. Then that's served but under the provisions of 2242 they may do so without permission of the court?

Mr. BEARDSLEY. I am not trying to make a blanket statement to that effect. I am saying that in my experience the Commission usually, in the vast majority of cases, gets the permission of the court to do that.

If I may, I would point out that we have a case right now in the Supreme Court in which that's one of the questions involved. After the Commission took certain action that we and various other parties challenged, the Commission without obtaining an agreement from anybody reopened its docket.

Now, in addition to other matters that are involved, the district court held that the Commission didn't have the authority to do that and we support that stand and this is one of the questions in the case in the Supreme Court. I am saying this bill gives the Commission carte blanche to do this and we believe once the petition for review has been filed and the report of the Commission is there for review by the Federal court that the discretion to, in effect, wipe the thing out or hold it in abeyance for a further review by the Commission ought to rest with the court, and not the Commission.

Senator PEARSON. I am inclined to agree with you, it ought to take place in the jurisdiction of the court. What I am trying to find out is whether or not you are complaining about existing circumstances or new provisions in this bill?

Mr. BEARDSLEY. No, sir, I am not complaining about existing circumstances.

Senator HARTKE. As I understand, though, this discretion only exists with the Commission up until the time that the record is filed.

Mr. BEARDSLEY. Yes, but as I read the statutory provisions which have to be interwoven with this bill, the record isn't filed when you file your complaint, the Commission has quite some time and under this bill the Commission won't have to file the whole record, just a certified list of materials. I will come to that in due course, Senator Hartke.

Senator HARTKE. Well, up until the time the issues are joined, is there a better way to cut it off? I think there should be some authority, there might be an occasion here for them to move in this area if something occurred that might demonstrate that they were wrong.

Mr. BEARDSLEY. Let's say something did occur. Under the present system, if the Commission in effect wants to confess error, I don't think there would be any problem in getting an agreement from the courts and other parties to go back and re-do the thing properly.

I don't think the Commission should have carte blanche as this bill gives it to simply, after a hearing before the Commission, believing they were dead wrong in a decision they made, having gone into court and filed a petition and you are ready to go to trial on whether the Commission made an error or several errors—

Senator HARTKE. That is the point. You say ready to go to trial. Should you be able to force upon them the record at an earlier date?

Mr. BEARDSLEY. I mean ready to go to trial, you have taken the first step you can take in court, you have filed your petition for review and perhaps the Commission has filed an answer. Why should the agency be able to frustrate you at that stage of the game and say well, we decided to take the matter back and look at it again. It might be important, for example, in getting a judicial interpretation of what the provisions of the law means. You might call it a declaratory order.

It would be most interesting to the whole industry to know what a particular provision of the law means. But the ICC could frustrate that court review, prevent it from passing on the question, and on the second go around, when they reopen the docket and perhaps avoid the question at all; I just give you this as an example of the kind of thing that could be done when you give carte blanche to the Commission as this bill does, to in effect start all over again at an agency level.

Senator PEARSON. It appears whenever that would happen it would be in situations where you were in a pretty strong position.

Mr. BEARDSLEY. I think I would agree with you, Senator.

Senator PEARSON. If that is the case, what difference is there to you if you filed your appeal and are in a strong position with substantial arguments and the ICC realizes the errors of their ways and pulls it out. Haven't you in effect prevailed?

Mr. BEARDSLEY. No, indeed. On the second go around you might not be in nearly as strong a position. I have had the Commission diametrically change its position 100 percent.

Senator PEARSON. Isn't that favorable to you?

Mr. BEARDSLEY. Not necessarily. An issue that may be subsidiary to an issue of first importance on the first go around could become an issue of first importance on the second go around and that's why you brought your suit in the first instance.

Senator PEARSON. I take the concept that once you have been in court the jurisdiction of the court controls the modifications of position. But it sounds like once you have them in there on an issue you want to keep them there and resolve it.

Mr. BEARDSLEY. All I am saying, Senator, is that we are not asking that the Commission be put into a straight jacket and never be allowed to recall. We are simply saying that the discretion to do that should lie with the court once the petition to review is there.

That doesn't mean the court isn't going to let the Commission do it. In fact, they will do it in most instances, but at least it is fairer to the parties. Maybe in nine cases out of 10 it would go back. But in that one case if there is a good reason why it shouldn't go back, the court would have the discretion to say "No," we are not going to let you do it.

As previously noted, ATA often participates in proceedings brought to review ICC orders. In most cases, we have been simply one of several parties plaintiff. *American Trucking Associations, Inv. v. United States*, 364 U.S. 1 (1960). In others, however, we have been the only plaintiff. *American Trucking Associations, Inc. v. United States*, 260 F. Supp. 386 (D. D.C. 1966). In the first cited case, our standing to sue, along with that of the other plaintiffs, was challenged by intervening defendants, though not by the Commission itself. The district court decided ATA had no standing to sue, but the Supreme Court reversed, holding that we did have such standing (364 U.S. 17-18 (1)).

In the second cited case, the Commission challenged our standing to sue. The district court held that ATA did have standing to bring the complaint (260 F. Supp. 387, n. 2). We mention this history because of our concern that the bill as drafted, could be interpreted as indicating an intent to debar our association, and others of similar nature, from filing a petition to review an ICC order. The bill provides that any "party aggrieved" by a final reviewable order may file such a petition. Further on, the bill authorizes, "associations," among others, to intervene in proceedings brought by others to review ICC orders.

In order to avoid an interpretation which would prevent us, in appropriate cases, from seeking review of such orders, we ask that the following language be inserted immediately following "order" in line 23, page 2 of the bill:

Nothing herein shall be construed as depriving any community, association, corporation, firm, or individual of the right to file petitions for review of final orders of the Commission where, prior to enactment hereof, such communities, associations, corporations, firms, or individuals, had standing to seek review of the Commission's orders.

Many ICC proceedings involve a large number of complicated, diverse facets. Because of this, the determination of whether or not to appeal its decisions often presents questions requiring more detailed consideration than would the ordinary court case. Under the present system, there is no time limit for review of ICC decisions with the result that it has to rely on the doctrine of "laches" when it believes a party has waited too long to file a complaint. While we do not quarrel with the idea that there should be a definite time limit within which to seek review of ICC decisions, we believe that the 60-day period provided by the bill may be too short in some cases. We recommend a period of at least 90 days, retaining the provision of the bill which would allow the court of appeals to extend the period for up to 60 days.

In this same connection, the bill provides that the time period for filing petitions to review ICC orders begins to run upon the date of service of a "final order." Unfortunately, the Commission's rules of practice are not such a model of clarity that parties can always readily ascertain what is a "final order." The ICC's rules are both general, and special; that is, rules relating to the issuance of temporary authority.

What might be a reviewable order under the special rules might not be under the general rules. The latter rules provide—when an order of one of the Commission's divisions would otherwise be "final"—that the parties may seek a finding by the Commission that the proceeding is one of "general transportation importance."

If the Commission makes such a finding, then the otherwise "final" order becomes reviewable by the entire Commission. We do not intend to suggest that the ICC, in defending its orders, attempts to defeat justice by reliance on procedural trickery. But we do recommend that unless and until the Commission's rules of practice have been clarified to the point that any lawyer practicing before it has no excuse for not knowing when an ICC order is—in fact and in law—a final order, the bill should specifically provide that the courts of appeal have discretion to receive a complaint which may be late filed if the court believes that the late filing is justified on the basis that the Commission's rules are sufficiently ambiguous to justify counsel in believing that the petition for review was timely filed even though the court's interpretation of the Commission's rules might differ from that of counsel's. And there may be other instances in which late filing would be excusable. We recommend striking the period after the word "days" in line 2, page 3, of the bill and inserting the following language:

And provided further, That the court may permit the filing of a petition to review an order after the time provided has lapsed upon a showing of reasonable grounds for failure to timely file.

The Administrative Conference recommended that:

"Until such time as procedures are developed whereunder the Commission may use mechanical facilities and methods for the production of the record in its proceedings in such form as to obviate printing or other reproduction of the record for judicial review, and provision is made for the designation of record after the filing of briefs, as recommended by the Conference, the record on appeal should consist of the entire record before the Commission, and should be transmitted to the court within the time allowed for the filing of briefs."

We submit that this recommendation should be followed, in order to make it as easy and inexpensive as possible for parties to seek review of ICC orders in courts of appeal. But S. 2242 ignores this recommendation, and, instead, by incorporating the provisions of section 2112 of title 28, U.S. Code, would allow the Commission to file in the courts of appeals merely a "certified list of the materials comprising the record," as provided in paragraph (a) of the cited statutory provision.

Rule 15(c) of the rules of appellate procedure require that a copy of the petition for review shall be served "on all parties who shall have been admitted to participate in the proceedings before the agency other than respondents to be served by the clerk, and shall file with the clerk a list of those so served." This requirement is particularly onerous in connection with review of ICC proceedings, which sometimes involve literally hundreds of parties, many of whom would not have the slightest desire to participate in court proceedings to review ICC orders.

The ICC presently notifies all parties to its proceedings whenever court action is brought to review one of its orders. In view of this situation, we recommend that the bill provide that parties which participated in the ICC proceedings need not be served with a copy of the review petition. This could be accomplished by substituting a comma for the period after "United States" in line 5, page 3, of the bill, and adding: "but the provisions of Rule 15(c) relating to service upon parties participant in the proceedings before the agency shall not apply."

The language of the bill which would become subsection 10(f) of section 17 of the Interstate Commerce Act, is ambiguous and almost certain to lead to confusion and conflicting interpretations in the several courts of appeal. It first states that "the court of appeals or a judge thereof" shall have discretion to restrain or suspend ICC orders pending "final hearing" on the petition.

The bill next provides that application for an "interlocutory injunction" shall not be heard except upon at least 5 days' notice to the Commission and the Attorney General. First off, since the bill makes the Commission the statutory defendant, and requires the Attorney General to intervene in the proceeding if he desires to participate, plaintiffs seeking review of Commission orders should not be required to notify the Attorney General with respect to any phase of the entire proceeding unless and until he has intervened therein.

The bill next provides that in cases where "irreparable damage" would be caused petitioner, the court of appeals (no mention of a single judge) may, on hearing, after "reasonable notice"—presumably

something less than 5 days—to the Commission and the Attorney General, suspend, but not for more than 60 days, the order of the Commission under review.

In addition, the court could not issue such an order based on irreparable damage unless it followed the rigid procedure specified in the bill. Next, the bill provides that the court may extend the stay or suspension of the Commission's order "until decision on the application" for interlocutory injunction.

Thus, the language of the bill seems—at one and the same time—to provide that either a court of appeals, or one of its judges, may grant a stay with respect to the Commission's order under review, provided the application therefor is not based on irreparable damage—frankly, that is what most applications are based on, to my knowledge—and that such a stay shall remain effective until "final hearing and determination of the petition" to review the order.

On the other hand, where irreparable damage is alleged, only the court, and not a single judge thereof, may grant an "interlocutory injunction." We realize that this section of the bill follows very closely existing statutory language (28 U.S.C. paragraph 2349(b)). But the statute referred to was enacted only in 1966, and we believe its language is by no means entirely clear.

We submit there is a need for revision to simplify the meaning of this portion of the bill, and to make clear that the court of appeals, or a single judge thereof, may stay the Commission's order under review until the final decision thereon. To accomplish these objectives, we suggest elimination of the language of the bill, commencing with line 24, page 4, through line 8, page 6, and the substitution therefor of the following:

(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 or a judge thereof, for good cause shown, may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. Where application is made to suspend or restrain the enforcement, operation, or execution of, or to set aside, in whole or in part, any order reviewable under this section, reasonable notice of the hearing thereon shall be given to the Commission and, in proceedings in which he has intervened, to the Attorney General of the United States. The hearing upon such an application 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.

Finally, we wish to point out an inaccurate reference in the bill. Concerning reviewability by the Supreme Court, the bill would make section 2101(e) of title 28, United States Code, applicable. The act of May 24, 1949, ch. 139, paragraph 106(b), 63 Stat. 104, redesignated subsection (e) of section 2101 as subsection (f). From a perusal of these subsections, it is apparent that the latter is the correct reference.

In conclusion, we summarize our recommended amendments to the bill:

1. The bill should provide that courts of appeal—not the Commission—should determine whether or not petitions brought to review ICC orders, should be heard, as originally filed. The Commission

should not have complete discretion, after petition has been filed to review its order, to reopen its proceedings and reconsider the matter which led to that order.

2. The bill should provide that any party which had standing, prior to its enactment, to bring suit to set aside an ICC order shall continue to have such standing.

3. The bill should allow 90 days from the date of service of an ICC final order to file petition for review thereof.

4. The bill should allow courts of appeal, in appropriate circumstances, to entertain late-filed petitions to review ICC orders.

5. The bill should require the Commission to file in the courts of appeal the entire record of the proceeding before it—not merely a list of the materials comprising that record.

6. The bill should provide that petitioners for review of ICC orders are not required to serve copies of their petition upon the parties participant in the ICC proceeding.

7. The bill should require notice to the Attorney General with respect to applications for stay orders only in those cases in which he has intervened.

8. The language of proposed subsection 10(f) of section 17, governing stay of ICC orders pending review, should be clarified as set forth herein.

9. The reference to section 2101(f) of title 28, United States Code (p. 6 of the bill), is incorrect and should be changed to 2101(e).

If the changes suggested herein are made, we would not oppose enactment of S. 2242.

Senator HARTKE. Thank you. I think you raised some interesting and pertinent points and we certainly will go over them in detail.

Do you have any questions, Senator?

Senator PEARSON. I don't think so, thank you.

Senator HARTKE. You did not comment on S. 2244. Do you have any comment on that at all?

Mr. BEARDSLEY. No, sir; I don't. We are looking at it now and we may submit a letter with respect to that. I am not sure we will but I don't have any specific comment at this time.

Senator HARTKE. All right.

The next witness will be Mr. Hollis Duensing, vice chairman of the Committee on Legislation for the Association of Interstate Commerce Commission Practitioners.

Good morning, sir.

STATEMENT OF HOLLIS G. DUENSING, VICE CHAIRMAN, COMMITTEE ON LEGISLATION, ASSOCIATION OF INTERSTATE COMMERCE COMMISSION PRACTITIONERS

Mr. DUENSING. Good morning, Mr. Chairman.

My name is Hollis G. Duensing. I am an assistant general attorney with the Association of American Railroads and am appearing here today on behalf of the Association of Interstate Commerce Commission Practitioners. This organization was founded in 1929, and is the commission's bar. Its 3,600 members represent all phases of surface transportation and shipper interests in proceedings before the Inter-

state Commerce Commission. As vice chairman of the committee on legislation, I have been requested by the president, Mr. James A. Bistline, and by the executive committee of the association to appear and to testify in general support of the provisions of S. 2242.

While the association does favor this proposal, it would like to suggest to the subcommittee at least one modification of S. 2242. This suggestion deals with the matter of venue. As presently written, the bill would provide for venue in the judicial circuit in which the residence or principal office of any of the parties filing a petition for review is located. The association believes that, in addition, venue should lie in the District of Columbia circuit. This was the position advanced by this association in testimony before this subcommittee on a similar bill S. 2687, in the 90th Congress.

Under the venue provision in the bill, few proceedings to review Commission decisions would come before the U.S. Court of Appeals for the District of Columbia 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. The change which is here recommended could be accomplished by inserting a comma at the end of the proposed subsection (1) (b) and adding the words "or in the District of Columbia."

In its testimony before the subcommittee last year on S. 2687, the practitioners association suggested that subsection (10) (c) (i) contain a provision permitting a petition for review to be filed after the expiration of the initial 60 days but only by leave of the court upon a showing of reasonable ground for failure to file the petition theretofore. This recommendation has already been adopted in part since the present bill, S. 2242, provides that the court may extend the time for filing a petition to review for 60 days if a request is filed and good cause is shown within the initial 60 days. The association does not oppose the language of the present bill.

Senator HARTKE. That might make good sense but I would like to see something done someplace else besides good old District of Columbia. I would like to see decentralization of some authority. I just raise that comment.

Senator PEARSON. Your proposal would be the venue as set forth in the bill or this, whatever was the choice of the petitioner?

Mr. DUENSING. Yes, sir.

The Association of Interstate Commerce Commission Practitioners favors the change in procedure for review of Interstate Commerce Commission orders embodied in S. 2242 and believes that the uniformity in review of such agency proceedings which would result from its enactment would be beneficial.

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

Senator HARTKE. Thank you very much, sir.

Senator PEARSON. I have no questions.

Senator HARTKE. Thank you, sir.

The next witness will be Vernon V. Baker on behalf of the Motor Carrier Lawyers Association.

STATEMENT OF VERNON V. BAKER ON BEHALF OF THE MOTOR CARRIER LAWYERS ASSOCIATION

Mr. BAKER. Mr. Chairman, members of the subcommittee, my name is Vernon V. Baker. I am an attorney, presently in private practice and formerly was an examiner and official of the Interstate Commerce Commission. I am appearing in behalf of the Motor Carrier Lawyers Association, pinch-hitting for the chairman of its legislative committee, Mr. Charles Ephraim, who is unavoidably absent from the city.

The Motor Carrier Lawyers Association, founded shortly after enactment of part II of the Interstate Commerce Act, has more than 500 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 last year, the membership of the association devoted much time to an analysis and discussion of bills pending in the last Congress (S. 2687 and H.R. 13927) designed for the same purpose as S. 2242 which is before you today. After thorough discussion, the association voted to oppose those bills, and its views were presented to your committee. I have been directed to appear today and reaffirm the association's opposition.

I am certain that the witnesses who preceded me will have discussed in detail the changes in procedure which would be effected by enactment of S. 2242. Thus, I will not burden you with repetition concerning all the details of the bill. The primary purpose of S. 2242 is to transfer from three-judge U.S. district courts to courts of appeals judicial review of orders of the Interstate Commerce Commission, except those involving only the payment of money.

The Motor Carrier Lawyers Association opposes the bill on the following principal grounds:

1. The proposed new procedure would result in substantially increasing the costs and difficulties of private parties who wish to appeal to the courts from administrative decisions which they deem to be unreasonable or contrary to law.

2. Under the provisions of S. 2242, the procedure for obtaining temporary restraining orders would be made more cumbersome and, we believe, may result in failure to secure adequate relief in emergency situations.

3. As in most instances where existing law is changed, doubts will be created respecting the scope of the changes intended, which will have to be resolved by interpretation over a period of years; whereas, the existing statutory provisions for appeal are well understood, having received the benefit of court interpretation for more than 50 years.

The existing procedure for review by three-judge district courts has been followed since 1913. The members of my association are of the view that this procedure has worked reasonably well. A variety of arguments have been advanced to support the proposed change.

It is argued, for example, that the change would provide greater uniformity of review procedure and serve the convenience of the Commission and the courts. However, it has been noted by the Commission that nearly half of these cases are now brought in cities where courts of appeals sit. District courts with more than one judge likewise sit in these same cities. Further, more than one three-judge case, including those involving constitutional issues, are often pending in the same court and on many occasions the court sets more than one for oral argument in sequence.

Whatever the impact of such arguments, we firmly believe that the change will not serve the convenience of the general public. Presently, a party dissatisfied with a Commission decision or 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.

It has been said that the bill would relieve private litigants from the present burden of filing with the court a certificate copy of the record before the Commission. This so-called relief is more apparent than real. A party appealing from a Commission order usually has copies of the record and is only required to take these to the Commission and have them certified. S. 2242 provides that the Commission shall file the "record on review" with the appellate court. However, the Federal Rules of Appellate Procedure provide that an agency may merely file a list of the documents comprising the record. It will then be incumbent upon an appellant to have the pertinent portions of the record reproduced for use of the appellate court.

The matter of expense is an important factor when the average motor carrier is concerned. As of June 30, 1968, there were subject to the jurisdiction of the Interstate Commerce Commission more than 16,000 motor carriers, scattered throughout the United States. Of these, only about 1,700 are class I carriers; that is carriers having annual operating revenues of \$1 million or more. About 11,600 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.

Aside from the expense and inconvenience of having to go before a court of appeals, from a psychological standpoint we believe that private litigants are likely to feel better and more justly served when their grievances may be settled by a court in their home district.

In testifying on S. 2687 in the last Congress in opposition to a proposal that the District of Columbia Court of Appeals be given alternate jurisdiction, the Commission's General Counsel stated:

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.

It would appear that there is even greater value in having cases filed in the immediate district in which the particular transportation problem geographically will be located.

The Association also is concerned over the proposed change in procedure in respect of temporary restraining orders. The language of the bill is a part ambiguous and threatens to bar effective review.

Under existing law (28 U.S.C. sec. 2284), a district judge may grant a temporary restraining order to prevent irreparable damage. Notice to the Commission and the United States is not a necessary prerequisite to obtaining a temporary restraining order although we believe such notice is generally given. In any event any person aggrieved by issuance of a temporary restraining order may move to set it aside.

The present procedure enables a party, upon proper showing, to obtain a temporary restraining order very quickly where the circumstances so require. Such circumstances can exist when the Commission's order would otherwise be immediately effective, for example, when the Commission approves a motor carrier temporary operating authority or permits a railroad train discontinuance.

An illustration of the latter is afforded by a case which recently received wide publicity and with which I am sure this committee is familiar. In that case, when the Commission denied reconsideration of its decision permitting discontinuance, the railroad involved stopped its train in the middle of its run, short of its scheduled destination, and required passengers to get off and proceed by other means of transportation.

Failure promptly to obtain a temporary restraining order by aggrieved parties can permit so significant a change in position by the favored carrier as to render further review efforts highly problematical.

As indicated, S. 2242 is somewhat ambiguous in respect to a temporary stay or suspension. The first sentence of subsection (f) provides that the court of appeals or a judge may restrain or suspend the operation of an order pending final hearing. But subsequently the same paragraph contains more specific provisions which require action by the court after a formal hearing and reasonable notice to the Commission and the Attorney General. Thus, it appears that the action of at least two judges would be required and more formal proceedings would be necessary.

Under existing law, it is not required that the applicant for a temporary restraining order or interlocutory injunction, as a condition to its issuance, file a bond to indemnify a party affected against damages he may suffer. Proceedings before the Interstate Commerce Commis-

sion involve matters of public interest. Judicial review is in a sense an extension of the administrative process for determination of matters of public concern. The courts have recognized this and generally do not require an appellant to post a bond to indemnify a party who may be affected by a restraining order or temporary injunction. Such a requirement for all practical purposes frequently would result in precluding effective judicial review.

If S. 2242 is enacted, it appears that an indemnity bond would be required in each case in which a restraining order or interlocutory injunction is granted, and the court could not in its discretion dispense with such requirement. Rule 65 of the present rules of civil procedure, governing injunctions, provides that no restraining order or preliminary injunction shall issue except upon the giving of adequate security by applicant for the payment of such costs and damages as may be suffered by any party found to have been wrongfully enjoined or restrained, but paragraph (e) of this rule specifically excludes from its purview actions under title 28, United States Code, section 2284, required to be heard and determined by a district court of three judges, such as we are concerned with here. However, if S. 2242 is enacted, actions to set aside ICC orders no longer would be heard by three-judge district courts and the exemption in paragraph (e) of rule 65 would not be applicable. In cases such as those involving mergers of railroads or motor carriers, train discontinuance cases, and many others, the posting of such a bond would not be practicable and effective judicial review would be precluded.

We are doubtful as to the reasons for, and the effect of, the proposed change in the language of the law in respect of orders of the Commission which could be reviewable. Section 2321, title 28, United States Code, which would be repealed, authorizes suits to set aside any "order" of the Interstate Commerce Commission, and section 17(9) of the Interstate Commerce Act provides that a suit to set aside a "decision, order or requirement" may be made under the same provisions as are applicable to suits to set aside "order". S. 2242 would vest jurisdiction in the courts of appeals to "enjoin, set aside, annul, or suspend all final orders." Query: Is it intended to change the substantive law as to the decisions, orders, and requirements which may be reviewable?

As an example, I might mention the train discontinuance cases. In some situations the Commission made no order at all. They merely announced they decided not to investigate. There is no order as such.

Paragraph (c) (ii) of the bill provides that until the record has been filed in the court of appeals "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 (sic) in a petition for review." We believe that this provision gives an unreasonable power to the Commission after jurisdiction of a matter has been vested in a reviewing court.

After parties have gone to the trouble and expenses of bringing an action in court, the Commission should not be permitted arbitrarily to recast its decision in an effort to make it less vulnerable to court review. After institution of an action for review, the Commission

should not be permitted to modify its decision except upon leave of the court after a motion upon which all parties may be heard.

In conclusion, it is the position of the Motor Carrier Lawyers Association that enactment of S. 2242 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 in many cases make the seeking of review prohibitive, regardless of the merits in particular cases.

The association is grateful for this opportunity of presenting its views to you.

Senator HARTKE. Thank you for your testimony.

In view of the fact there have been some questions raised concerning this legislation, and since this is legislation which has been introduced at the request of the Interstate Commerce Commission, I am going to ask the Commission to respond to the testimony of the witnesses here which is in opposition or seeks modification of the proposed law.

Thank you.

Senator HARTKE. These hearings are adjourned.

(Whereupon, at 12 noon, the subcommittee was adjourned.)

ADDITIONAL STATEMENTS AND LETTERS

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE CHAIRMAN,
Washington, D.C., October 10, 1969.

Honorable VANCE HARTKE,
*Chairman, Subcommittee on Surface Transportation, Committee on Commerce,
U.S. Senate, Washington, D.C.*

DEAR SENATOR HARTKE: This is in response to your invitation extended at the time of the hearing on October 7, 1969, on S. 2242 for the Interstate Commerce Commission to comment upon the testimony of the witnesses who followed the Commission.

Witnesses appeared on behalf of the Association of American Railroads, the Association of Interstate Commerce Commission Practitioners, the American Trucking Associations and the Motor Carrier Lawyers Association. Of these only the latter expressed unqualified opposition to the legislation. The witness for the trucking association testified that it would not oppose the bill if certain amendments were adopted, and since his recommendations were the most comprehensive and embraced those advanced by the other witnesses, I shall treat *seriatim* with the suggestions he offered.

The witness took issue with the Commission's characterization of the present procedures for judicial review as an "anachronism". As the Senate Committee on Commerce noted last year in reporting favorably a bill almost identical to the present one, S. Rep. No. 1499, 90th Cong., 2d Sess., p. 2, the present procedure, adopted in 1913, has been criticized by members of the Federal judiciary as being "cumbersome" and "inefficient". It also has been criticized by the Administrative Conference of the United States, and remedial legislation was recommended as early as 1962 by the Special Advisory Committee on Interstate Commerce Commission Practice and Procedure.

We have difficulty perceiving how any of the provisions in the bill now before you would enable the Commission to frustrate judicial review. The provisions, contained in proposed section 17(10)(c)(ii) of the Interstate Commerce Act, enabling the Commission to modify or set aside a challenged order until such time as the record is lodged in the reviewing court do little more than make explicit what has been the practice all along. We believe the criticism that such a course would give the Commission a second opportunity to reach a defensible result is without merit. Certainly, it is a basic tenet of administrative law that an agency be afforded the opportunity to correct any errors brought to its attention before a reviewing court seizes upon them to overturn the agency's actions. If the Commission can reach a more desirable result in a reopened proceeding, thereby obviating altogether the need for judicial review or narrowing the matters in issue and, hence, conserving the time and energy of the reviewing court, we would think that would be highly desirable. The practice before the courts reviewing the Commission's orders should not be a contest in which the record of wins and losses is paramount; rather it should be a means for achieving just and reasonable results, with as little expenditure of time and money as is possible. We believe the bill, as presently worded, facilitates this end, and in this regard we note that it is similar to other statutes providing for judicial review of agency actions, as for example, 15 U.S.C. § 45(h).

The fear that an association may lose such standing as it presently enjoys to obtain judicial review of Commission orders is unfounded. The bill's requirement that judicial review be had upon petition of a "party aggrieved" comprehends the standard which now obtains under section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702. Under it right to obtain judicial review is conferred upon a "person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action".

It was suggested that a 60-day period within which a petition seeking judicial review of a Commission order be filed affords a petitioner too little time and should be extended to 90 days. This suggestion fails to take into account that the bill itself provides that "the court, for good cause shown, may extend the time for filing a petition to review . . . for an additional period not exceeding 60 days."

What constitutes a final order, for purpose of judicial review, has not heretofore posed an appreciable problem and should be no more difficult to ascertain under the bill, if enacted, than it has been under section 17 (9) of the Interstate Commerce Act or section 10(c) of the Administrative Procedure Act, under the provisions of which only final orders of the Commission have been reviewable. Under the proposal before you, as under the present law, a Commission determination not to enter upon an investigation of a proposed rate change or a proposed change in passenger train operations would not be reviewable, as the Commission in neither instance would have entered an order, final or otherwise.

The suggestion that the Commission be obliged to lodge with the reviewing court the verbatim transcript, exhibits and other documents comprising the entire record upon which the assailed order was entered would impose a costly and wholly unnecessary burden upon the agency, a burden that a complainant now normally bears. The bill, which in this particular follows the universal practice for reviewing the actions of other administrative agencies, would permit the utilization of the shortened procedure provided in section 2112 of Title 28 of the United States Code and, in turn, that contemplated by Rule 17 of the Federal Rules of Appellate Procedure. As we testified at the time of the hearing, this would permit the submission of the record in the form of an abbreviated appendix to the briefs, as provided by Rule 30 of the Federal Rules of Appellate Procedure, with resultant savings of time and expense to all of the parties, as well as to the reviewing court.

The bill requires that service of the petition for review be made only upon the Commission and the Attorney General of the United States. The requirement of Rule 15 of the Federal Rules of Appellate Procedure that copies thereof be served on all of the parties to the agency proceeding in which the assailed order was entered, in our judgment, is no less than fairness requires and certainly imposes no undue hardship upon the petitioner. In any event, if that Rules imposes an onerous burden upon litigants, this bill would seem to be an inappropriate vehicle for amending it.

The bill that was considered by your Committee last year, S. 2287, provided for a stay pending review only upon order of the reviewing court. By implication this would have necessitated the concurrence of at least two judges and would have precluded the entry of a stay order by a single judge, as is now permissible. To meet the objection of some who feared the inflexibility of such a requirement, the Commission's draft bill was reworded to insert the phrase "or a judge thereof" in the first sentence of what would be section 17(10) (f) of the Interstate Commerce Act. We acknowledge that, without more, the insertion has created an ambiguity. We would suggest that the first sentence be reworded to read, as follows: "The filing of the petition to review shall not of itself stay or suspend the operation of the order of the Commission, but the court of appeals or a judge thereof shall have discretion to restrain or suspend, in whole or in part, the operation of the order pending hearing and determination upon petitioner's application for a temporary stay or suspension, as hereinafter provided." We think no further clarification is required.

The bill does not require the filing of a bond or other appropriate security by a petitioner seeking a stay pending review, although Rule 18 of the Federal Rules of Appellate Procedure would give the reviewing court discretion to order such relief. Reviewing courts presently have such discretion, and there is no reason to believe that the burden upon petitioners under the bill would be any greater after the bill's enactment than it now is upon complainants.

The Association of Interstate Commerce Commission Practitioners has renewed its recommendation for alternate venue in the District of Columbia. Under the bill, as presently worded, venue would lie in the judicial circuit in which the residence or principal office of any of the parties filing a petition for review is located. This provision is drawn from the present practice, as set forth in section 1398 of Title 28 of the United States Code, and would continue the convenience of litigation in the local or nearby courts.

Alternate venue in District of Columbia, while provided in the Hobbs Act, 28 U.S.C. § 2343, and certain other review statutes, is not universal. Orders of the Federal Trade Commission, for example, are reviewable only in the circuit of the petitioner, and we are not prepared to say that a review of that agency's orders has been less effective than that of the Civil Aeronautics Board, for example, where the review statute of which provides for alternate venue in the District of Columbia.

On the contrary, we see an affirmative disadvantage in having the review of the Commission's order concentrated in the District of Columbia, as it would be, if an alternate venue provision were added to the bill. We think that the give and take of local venue—of having the courts of appeals for the other circuits become familiar with the work of the Commission and, in turn, acquainting the Commission with the attitudes and concerns of the courts, situated away from Washington—offers very real advantages not lightly to be surrendered.

I trust the foregoing comments, more lengthy than I had anticipated they would be, may be of assistance to you in your consideration of S. 2242. Enclosed is the list of cases in which the Department of Justice declined to defend challenges of orders of the Interstate Commerce Commission covering 1966 to 1969, which I agreed at the time of the hearing I would send you. If there is anything further I can do, I should be pleased to oblige.

Sincerely,

VIRGINIA MAE BROWN, *Chairman.*

[Enclosure.]

LIST OF CASES IN WHICH THE DEPARTMENT OF JUSTICE DECLINED TO DEFEND CHALLENGES OF ORDERS OF THE INTERSTATE COMMERCE COMMISSION (1966-1969)

Louisville & Nashville R.R. Co v. U.S. & I.C.C. USDC WD Ky., CA #5227; I&S 8028, Ingot Molds, Pa. to Steelton, Ky., 326 I.C.C. 77; 268 F. Supp. 71, 392 U.S. 571 (1968) sustained.

In this case the Commission held that the National Transportation Policy admonition that the inherent advantages of carriers be preserved enabled it to invalidate a proposed railroad rate reduction that would have undermined a barge line cost advantage, when measured by fully distributed cost. The Department confessed error and contended that this constituted a holding up of a rate to a particular level to protect the traffic of another mode of transportation, in violation of section 15a(3) of the Interstate Commerce Act. The Supreme Court sustained the position of the Commission over the continued objection of the Department.

Trans-Cold Express, Inc. v. U.S. & I.C.C. USDC ND Texas, CA #3-1365; No. MC-114045 (Sub-154), *Trans-Cold Express, Inc., Ext.—Confectionary Products*; Dismissed with prejudice.

In this case the Commission denied the plaintiff's application for additional motor carrier operating authority, upon concluding that the evidence did not establish that the public convenience and necessity required a grant. The Department filed a neutral answer, and subsequently the complaint was dismissed with prejudice.

City of Chicago & Bd. of Trade v. U.S. & I.C.C. USDC ND Ill., ED, CA #66 C-524; No. 34348, *Bd. of Trade of the City of Chicago v. Illinois Central R. Co.*, 325 I.C.C. 412; 329 I.C.C. 529; 291 F. Supp. 858, 394 U.S. 717 (1969) sustained.

In this case the Commission held that railroad rates on soybeans from Illinois origins to Chicago were not prejudicial of that port even though equal to the rates to New Orleans. The complainants charged that the Commission should have found violations of section 3(1) of the Interstate Commerce Act, and the Department filed a neutral answer. The district court, reversed in part, the findings of the Commission, for lack of substantial evidence, and on appeal the Supreme Court sustained the district court's judgment.

Association of American Railroads v. U.S. & I.C.C. USDC Md., CA #17342; No. 32406 (Sub-1), *Inspection, Testing & Maintenance of Air Brake Equipment*, 310 I.C.C. 420; 329 I.C.C. 442 dismissed.

In this case, instituted before the Commission's safety jurisdiction was transferred to the Department of Transportation, the Commission declined to modify inspection rules under the Power Brake Act, 45 U.S.C. § 9, because the proposed change would not have affected safety of operations but was modified simply by a

desire to achieve economies. The Department filed a neutral answer to the complaint, which was dismissed by order of the court, after the Commission had reopened its proceeding.

Erie-Lackawanna R.R. Co. et al. v. U.S. & I.C.C. USDC SDNY, CA #66-2860, 2903, 2914 F.D. 21989, Pennsylvania R.R.—Merger—New York Central R.R. Co., 327 I.C.C. 475; 328 I.C.C. 304; 330 I.C.C. 328; 331 I.C.C. 643; 334 I.C.C. 25; 259 F. Supp. 964, 386 U.S. 372, 279 F. Supp. 316, 389 U.S. 486 sustained.

In this case the Commission authorized the merger of the Pennsylvania and New York Central Railroads, conditioned among other things, to require the inclusion of the financially distressed New Haven. The Department filed a neutral answer to the complaint which had charged that the Commission failed adequately to consider the impact of the merger upon certain small railroads in the area and to safeguard sufficiently their future well being. After very extensive litigation, the Supreme Court upheld the Commission's report and order.

T. I. McCormack Trucking Co., Inc. v. U.S. & I.C.C. USDC N.J., CA #314-67; No. MC-C-2998, T. I. McCormack Trucking Co., Inc.—Investigation & Revocation of Certificates, 102 M.C.C. 577; 298 F. Supp. 39 (1969) reversed.

In this case the Commission construed the complainant's certificate so as to preclude its operations heretofore conducted. The Department filed a neutral answer, and subsequently the reviewing court remanded the proceeding to the Commission.

United-Buckingham Freight Lines v. U.S. & I.C.C. USDC Nebr., CA #1278-L; No. 34492, The AT&SF Ry Co., et al. v. Earl T. Morris, et al., 329 I.C.C. 326; 288 F. Supp. 883 (1968) reversed & remanded.

In this case the Commission determined that the railroads had successfully shown the unreasonableness of motor carrier rates when they introduced regional cost studies. The Department filed a neutral answer, and subsequently the district court remanded the proceeding to the Commission to permit the motor carriers to offer evidence that the regional cost studies were not representative of the particular movement involved.

Truck Transport, Inc. v. U.S. & I.C.C. USDC ED Mo., ED, CA #68 C 96(1); No. MC-113325 (Sub-46), Slay Transportation Co., Inc., Ext.—Madison County, Ill., 106 M.C.C. 872 300 F. Supp. 159 (1969) sustained.

In this case the Commission authorized the transportation by truck of limestone products from Mosher, Missouri, to Madison County, Ill., over the objections of plaintiff, a competing motor carrier. The Department filed a neutral answer. Upon review the court determined that substantial evidence and the legitimate inferences drawn therefrom supported the Commission's findings and conclusions.

U.S. v. U.S. & I.C.C. (Northern Lines) USDC DC, CA #1132-68; F.D. No. 21478, Great Northern Pacific & Burlington Lines, Inc.—Merger, etc.—Great Northern Ry. Co., 331 I.C.C. 869; 331 I.C.C. 228; 331 I.C.C. 460; 296 F. Supp. 853 (1968) sustained.

In this case the Commission authorized the merger of the Great Northern, Northern Pacific and Burlington Railroads, upon finding, among other things, that the economies and efficiencies the merger would yield would offset any disadvantages resulting from the loss of competition between the carriers. Suit to set aside the Commission's order was brought by the Department, which also pressed for a stay of consummation of the transaction pending judicial review. The lower court sustained the Commission's actions and the case is pending upon appeal to the Supreme Court.

Alabama Power Co. v. U.S. & I.C.C. USDC DC, CA #2970-68; Ex Parte No. 259, Increased Freight Rates, 1968; 332 I.C.C. 590 and 714.

Atlantic City Electric Co. v. U.S. & I.C.C. USDC SDNY, CA #69 Civ. 800; Ex Parte No. 259, Increased Freight Rates, 1968; 332 I.C.C. 590 and 714.

Electronics Industries Assn. v. U.S. & I.C.C. USDC DC, CA #1059-69; Ex Parte No. 259, Increased Freight Rates, 1968; 332 I.C.C. 590 and 714.

These three suits challenged the validity of the Commission's approval of increased railroad rates, occasioned by escalating labor and other costs. The Department filed a neutral answer, and the cases remain pending in the district courts.

International Transport, Inc. v. U.S. & I.C.C. USDC WD Mo., SW, CA #2136; No. MC-C-5766, International Transport, Inc.—Investigation & Revocation of Certificates, 108 M.C.C. 275.

In this case the Commission construed the certificate of a hauler by truck and concluded that its franchise did not permit its transportation of 500-pound bombs capable of manual handling. The Department confessed error, and the case remains pending in the district court.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES,
Washington, D.C., October 16, 1969.

HON. VANCE HARTKE,
Chairman, Subcommittee on Surface Transportation,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I understand that the Subcommittee on Surface Transportation has under consideration at present S. 2242, one major aspect of which is to provide that judicial review of orders of the Interstate Commerce Commission should be before United States Courts of Appeal, as is the case of most of the other major regulatory agencies, rather than before special Three Judge District Courts as is now provided by law.

On December 11, 1968, the Administrative Conference of the United States adopted a recommendation on this subject, a copy of which, with supporting report, is enclosed. I believe this material is relevant to your deliberations and, if agreeable to the Subcommittee, it might appropriately be made a part of the record of the hearings.

Sincerely,

JERRE S. WILLIAMS, *Chairman.*

[Enclosures.]

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

RECOMMENDATION 8—JUDICIAL REVIEW OF INTERSTATE COMMERCE COMMISSION ORDERS

Recommendation

Judicial review of orders of the Interstate Commerce Commission in cases where at present a special three-judge District court is used under 28 U.S.C. 2325 should be by petition to review in the United States Courts of Appeals in the same general manner as review of agency orders under the Judicial Review Act of 1950, 28 U.S.C. (Supp. II, 1967) 2341-2352.

COMMITTEE ON JUDICIAL REVIEW, OCTOBER 10, 1968

Memorandum in support of the recommendation concerning judicial review of Interstate Commerce Commission orders.—For historical reasons, procedures for review of orders of the Interstate Commerce Commission differ from the usual patterns, which have developed governing judicial review of administrative action. Since 1903 orders of the Commission (other than those involving only the payment of money) have been reviewed by three-judge district courts specially constituted under authority of 28 U.S.C. 1336, 2284, and 2325. The decisions of these courts may be taken to the Supreme Court by direct appeal rather than by petition for certiorari.

The 1961-62 Administrative Conference of the United States considered the question fully and concluded that the reasons for conforming procedures for review of these orders to accepted concepts of judicial review far outweigh the reasons for perpetuating present procedures. In particular, substitution of the court of appeals for three-judge district courts and elimination of direct appeals to the Supreme Court would reduce the heavy strain on judicial resources imposed by the convening of three-judge district courts and lighten the docket of the Supreme Court. Recommendation 3 of the 1961-62 Administrative Conference proposed the elimination of the use of special three-judge district courts for review of these ICC orders and the substitution of review in courts of appeals as is generally the case with orders of other Federal regulatory agencies. Recommendation 4 proposed further procedures for improving judicial review of ICC orders, all of which were designed to increase efficiency and save time, effort, and expense in appellate procedures.

Identical bills incorporating the substance of Recommendations 3 and 4 were introduced in the 90th Congress, Second Session as S. 2687 and H.R. 13927. S.

2687 was passed by the Senate, 114 Cong. Rec. S10282 (Sept. 5, 1968), but no action was taken in the House of Representatives. It appears likely that the bills will be reintroduced in the next session of Congress.

The reasons that supported Recommendations 3 and 4 remain as valid today as they were six years ago. A detailed statement of those reasons is contained in the reports submitted by the Committee on Judicial Review to the previous Administrative Conference in support of Recommendations 3 and 4, attached hereto as Appendix I. We urge the reaffirmation of these recommendations.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

APPENDIX I: 1961 RECOMMENDATIONS 3 & 4 WITH SUPPORTING REPORT

Recommendation No. 3

It Is Recommended That.—(1) review of Interstate Commerce Commission orders should be upon appeals to the United States Courts of Appeals in all cases where at present a special three-judge court is used; district courts should be relieved of their jurisdiction of such cases under 28 U.S.C. 1336, and the courts of appeals should have exclusive jurisdiction to review these orders of the Commission;

(2) final review of orders of the Interstate Commerce Commission by the Supreme Court of the United States should be only by petition for a writ of certiorari;

(3) review of Interstate Commerce Commission orders should be permitted in any judicial circuit wherein is the residence or principal office of the party or any of the parties filing the request for review.

Recommendation No. 4

It Is Recommended That.—Procedures for judicial review of orders of the Interstate Commerce Commission by courts of appeals should incorporate the following features:

(1) A limit of 60 days should be imposed as the time within which a petition for review must be filed in any case for which the present statutory provisions do not fix a period for filing petitions for review, such 60-day period to run from the date of entry of the order appealed from or entry of an order denying reconsideration thereof where petitions for reconsideration are allowed by the Commission's rules, whichever is later.

(2) Appeals should be commenced by the filing of a petition for review in the form of a notice of appeal.

(3) Anyone seeking review should be required to serve notice of appeal upon all parties to the proceeding before the Commission, the Department of Justice, and the Commission.

(4) When several appeals are taken from the same order of the Commission, the venue should be determined by the first notice of appeal to be filed, and all subsequent appeals should be considered as taken to the same court, consolidated therewith, and handled as one appeal.

(5) The Commission should provide the record of its proceedings on appeal and should transmit the record to the court. Until such time as procedures are developed whereunder the Commission may use mechanical facilities and methods for the production of the record in its proceedings in such form as to obviate printing or other reproduction of the record for judicial review, and provision is made for the designation of record after the filing of briefs, as recommended by the Conference, the record on appeal should consist of the entire record before the Commission, and should be transmitted to the court within the time allowed for the filing of briefs. The record should be returned to the Commission upon final decision of the appeal.

RECOMMENDATIONS OF THE COMMITTEE ON JUDICIAL REVIEW

Recommendations in Group I

We ask that the Administrative Conference of the United States adopt the following recommendations: 1. The Administrative Conference recommends that review of Interstate Commerce Commission orders should be by appeal to the Courts of Appeal in all cases where at present a special three judge court is used.

District Courts should be relieved of their jurisdiction under 28 U.S.C. 1336 and the Courts of Appeal should have exclusive jurisdiction to review these orders of the Commission.

2. The Administrative Conference recommends that final review by the Supreme Court of Interstate Commerce Commission orders should be only by petition for a writ of certiorari.

3. The Administrative Conference recommends that review of Interstate Commerce Commission orders should be permitted in any judicial circuit wherein is the residence or principal office of the party or any of the parties filing the request for review.

4. The Administrative Conference recommends that there should be a 60 day time limit on all appeals from Interstate Commerce Commission orders to the Courts of Appeal. Notice of appeal should be filed within 60 days after entry of the order appealed from or after entry of an order denying reconsideration of such order where petitions for reconsideration are allowed by the Commission's rules, whichever is later.

5. The Administrative Conference recommends that the Interstate Commerce Commission should provide and transmit the record upon appeal. Until effectuation of the Recommendations in Group II, the record on appeal should consist of the entire record before the Commission and should be transmitted to the Court within the time allowed for submission of the final briefs of appellees on the appeal. The record should be returned to the Commission upon final decision of the appeal, or upon the printing of the record on appeal to the Supreme Court, whichever is earlier.

6. The Administrative Conference recommends that when several appeals are taken from the same order of the Interstate Commerce Commission, the venue should be determined by the first notice of appeal to be filed, and all subsequent appeals should be considered as taken to the same court and consolidated therewith and handled as one appeal.

7. The Administrative Conference recommends that appeals from Interstate Commerce Commission orders should be commenced by the filing of a petition for review in the form of a notice of appeal.

8. The Administrative Conference recommends that anyone seeking review of an Interstate Commerce Commission order should be required to serve notice of appeal upon all of the parties to the proceeding before the Commission, and upon the Department of Justice, and the Commission. Anyone who is a party to the proceeding before the Commission may intervene as of right in the review proceedings by giving timely notice thereof to the Court, the Commission, the Department of Justice, and all the other parties within 30 days after receiving notice of the appeal. Thereafter, intervention may also be allowed at the discretion of the court.

Note: None of the above recommendations are intended to change the present law with respect to reviewable acts, the scope of review, or the existing allocation of responsibility and authority between the Commission and the Department of Justice in actions to review or set aside orders of the Commission.

Comments:

1. Under the present system, orders of the ICC are reviewed by specially-constituted three-judge federal district courts, 28 U.S.C. 1336, 2284, 2325. It should be noted, however, that so-called reparation orders of the ICC are reviewable by single judge district courts, although these make up only a minor part of judicial review of ICC orders. For all other orders, exclusive jurisdiction for review rests with three-judge district courts; this system has been in effect since February, 1903, although its present statutory base is the Urgent Deficiencies Act of 1913.

2. To the best of our knowledge, the ICC is the sole agency of the United States Government the orders of which are reviewable by three-judge courts. The systems for orders of other agencies, such as the FCC, which formerly were so reviewable have now been changed to provide for review by the Courts of Appeals.

Note: We understand that, with respect to the Department of Agriculture, some use has been made of three-judge courts for review of some D/A programs pursuant to the provisions in 28 U.S.C. Secs. 2281-2282, in connection with injunctions. We are, however, of the opinion that this is a relatively minor problem and should be handled separately from the present problem.

3. The decisions on ICC orders by three-judge district courts now may be appealed directly to the United States Supreme Court. (This is *not* a certiorari proceeding.)

4. In the six-year period from July, 1955 to June, 1961, 398 actions challenging orders of the ICC were instituted. Of these, 159 came in the period of July, 1959 to June, 1961. Orders under attack most often were those involving: rate questions, the grant or denial of certificates of public convenience and necessity and permits; the interpretation of such certificates and permits; mergers and acquisitions; and abandonment and extension of railroad lines.

5. The average length of time from the filing of the complaint to the division in the district courts, with respect to those cases terminated during the three-year period ending June, 1961, was approximately nine months. Several cases pending for more than two years make that figure somewhat misleading.

6. By and large, with some exceptions, review of the orders of federal administrative agencies is by the Courts of Appeals. This includes the Federal Communications Commission, the Federal Maritime Board, the Federal Power Commission, the Federal Trade Commission, the Securities and Exchange Commission, and the National Labor Relations Board.

Thus it would seem that the trend of modern review statutes is toward use of the several Courts of Appeal. Furthermore, while we understand that some trouble has resulted so far as the FCC is concerned, chiefly because of dual avenues of appeal, it would appear that this trend has been generally efficacious.

7. Although we do not as yet have access to complete data for all of the Courts of Appeals, it would seem that Court of Appeal review of administrative orders, as a general rule, may require a little longer period of time than does the three-judge system now in use for the ICC. For the Court of Appeals for the District of Columbia, which perhaps is the most important of the several circuits so far as review of administrative orders is concerned, the median length of time for review of such orders during the past three fiscal years is as follows:

Fiscal Year 1959: Approximately 9 months.

Fiscal Year 1960: Approximately 10.6 months.

Fiscal Year 1961: Approximately 10.5 months.

In our judgment, however, this fact—even if it is borne out by data from the other Courts of Appeal—should not be considered conclusive of the question under discussion. At least the following other factors must be weighed and evaluated before reaching a conclusion: (a) the differences, if any, in the type of orders reviewed by the Courts of Appeals from the other agencies as compared to those reviewed by three-judge courts; (b) the importance to be given to the most efficient use of the time of district judges; is the small gain worth the time and trouble of convening three-judge courts? (c) the possible greater degree of expertise in judges of the Courts of Appeals in reviewing administrative orders as compared with the district judges; and (d) the desirability of whether ultimate review by the Supreme Court should be by appeal or by the discretionary writ of certiorari. We believe that the possible—although not yet proved—saving in time for review is outweighed by the other factors mentioned.

8. There is the question whether final review by the Supreme Court should be by appeal as of right or by discretionary writ of certiorari. Although we recognize that arguments may be found on both sides, it is our belief that final review by the Supreme Court of ICC orders should be by writ of certiorari. Our reasons for this position include: (i) apparently, many appeals today from three-judge courts are handled strictly on the pleadings, with no more attention being given to them than for a denial of certiorari in other cases; (ii) the Supreme Court has been criticized of late for assuming too heavy a load; (iii) we perceive no reason why transportation is any more important to the American people than communications, labor relations or natural gas matters, all of which are now subject to final review only by certiorari.

9. Should all of the Courts of Appeal be utilized in review of ICC orders or only one (e.g., the Court of Appeals for the District of Columbia)? There are arguments both ways. Reference to a single Court of Appeals permits the judges of that court to become highly skilled in the intricacies of the agency and thus to render decisions and opinions of high quality. On the other hand, it seems

that the ICC bar is relatively decentralized throughout the United States and it might place a burden upon litigants and their attorneys to have to resort to one Court of Appeals only.

We believe that it is in the interests of furthering progress while placing as minimal a strain on existing procedure as is possible to provide for resort to the several Courts of Appeals.

10. There is no statutory time limit for the institution of actions to review orders of the ICC, other than reparation orders, but the doctrine of laches does apply. We believe that there should be a fixed time limit, and accordingly recommend the provision of 60 days as that limit.

11. Under present procedure, the party seeking review of an ICC order has to furnish a copy of the record before the Commission, get it certified by the Commission, and file it in court. This is at the expense of the party seeking review. Unlike other agencies, the ICC is not required to supply or file the record of its proceedings with the court.

Although we understand that the plaintiff need not file a certified copy of the entire record before the ICC unless he attacks the substantiality of the evidence to support the Commission's conclusions (as he usually does), and also that the record is not printed unless an appeal is taken to the Supreme Court and that Court consents to hear the case on oral argument, we believe that the ICC procedure with respect to the record should be brought into conformity with that of other agencies.

12. Under present procedure there is no provision for consolidating into a single court multiple suits against a single ICC order. We understand that it frequently happens that several actions are started in two or more districts. In our opinion, this practice should be brought into consonance with modern review statutes by a provision that the first notice of appeal to be filed should determine venue, and that all other appeals of that order should be consolidated therewith.

13. The form of review of ICC orders should be changed from the present, original action to that of an appeal, commenced by a petition for review in the form of a notice of appeal.

14. Under present procedure, in actions to set aside ICC orders, the United States is the only necessary party upon whom service of process is required. Other parties to the case before the ICC usually do not have actual notice that the case is being reviewed. We believe that all parties should be notified. Accordingly, we recommend that provision be made for the burden of giving notice of appeal from an ICC order to be placed upon the appellant, that party to be responsible for service of appropriate notice upon all parties to the proceeding before the ICC and upon the ICC and the Department of Justice.

15. The Judicial Conference adopted a resolution in 1943 to the effect that "review of orders of the Interstate Commerce Commission . . . now reviewable by a district court of three judges from whose decision an appeal lies to the Supreme Court, should be made upon petition to the appropriate circuit court of appeals on the record made before the administrative body; that any further review should be by the Supreme Court on petition for writ of certiorari, and that the United States and the Commission should each have the right to petition for writ of certiorari." This action by the Judicial Conference was taken as a result of a representation by Chief Justice Harlan F. Stone in 1942 that, under existing law, "the time of the Supreme Court was being taken in the consideration of appeals of right from three-judge district courts in relation to orders of the Interstate Commerce Commission which did not involve issues important enough to go to that Court, and that the method of review ought to be by certiorari, optional with the court, as is most other cases." (Hearings before Subcommittee No. 3 and Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, on H.R. 1468, H.R. 1470, and H.R. 2271 of the 80th Congress, and Hearings before Subcommittee No. 2 on H.R. 2915 and H.R. 2916 of the 81st Congress) (1949) (the chronology is set out therein on page 78 et seq., in a letter dated January 23, 1947, from the Director of the Administrative Office of the United States Courts to the Speaker of the House of Representatives).

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Washington, D.C., October 24, 1969.

Hon. VANCE HARTKE,

Chairman, Subcommittee on Surface Transportation,
5202 New Senate Office Building, Washington, D.C.

DEAR SENATOR HARTKE: The Railway Labor Executives' Association must oppose the enactment of S. 2242 for the following stated reasons:

1. Under the proposed new Section 17(10) (a) orders which are *effective* but have not become "final" in a technical sense because not yet reviewed by the I.C.C. on reconsideration would not be subject to a temporary restraining order (TRO) and therefore the public would be deprived of all right to secure the temporary restraint of such immediately effective orders.

2. Petitions for reconsideration do not stay automatically initial decisions issued by the full Commission and such decisions are issued frequently as immediately effective. S. 2242 would prevent temporary restraint of such orders.

3. Section 17(10) (d) would appear to restrict the right of intervention in judicial review proceedings. Today any party in interest may intervene in such a proceeding. Under proposed Section 17(10) (d) only those "whose interests will be affected if an order of the Commission is or is not enjoined . . .". The quoted clause is not defined and could well be interpreted to exclude many parties who are "parties in interest" under present law.

4. Proposed Section 17(10) (f) will effectively destroy the TRO as a protection to the public as it places impossible requirements upon those whose only protection is the TRO. It would require security which many cannot afford to pay; a hearing for which there is absolutely no time; and a decision by two judges which are often impossible to secure—generally, it is most difficult to find one judge with the time to hear the case for a TRO. The TRO, if granted despite all these obstacles, would be limited to 60 days which in many ICC Cases would not give the Commission time to review the case on reconsideration before the court would be compelled to act.

The proposed law also would require the party requesting the TRO to demonstrate personal irreparable injury rather than a showing of general irreparable injury. Often a party who is able to get to the court can demonstrate irreparable injury but not to himself. For example, a company seeking such an order could show irreparable injury to certain of its employees or officers but not to the company itself.

5. The proposed Section 17(10) (c) (i) would restrict judicial review to those who were parties to the Commission proceedings. Often those who were irreparably injured by an ICC order were not parties to the Commission proceeding. Such injured parties would be effectively deprived of judicial review.

6. The cost of litigation would be substantially increased by transfer of jurisdiction from the District Courts to the Courts of Appeal. Printing bills alone would probably deter most effective citizens from seeking court relief which is now available to them.

The proposed law undoubtedly would be beneficial to the Commission and its legal staff because it would prevent most attempts to secure temporary restraining orders and would virtually guarantee that any such attempts would be unsuccessful. But that result would not further justice. To the contrary, it would fort justice and encourage government by administrative fiat.

For the foregoing reasons, we must respectfully oppose the enactment of S. 2242.

Sincerely yours,

DONALD S. BEATTIE,
Executive Secretary.

STATEMENT OF MARK GOLDSTEIN, ASSISTANT CORPORATION COUNSEL, CITY OF CHICAGO

Mr. Chairman, Members of the Committee, my name is Mark Goldstein. I am Assistant Corporation Counsel of the City of Chicago with offices at 511 City Hall Building, Chicago, Ill. 60602. This statement is submitted by the City of Chicago in opposition to S. 2242, introduced May 26, 1969 by request of the Interstate Commerce Commission. A similar bill was introduced in the 90th Congress (S. 2687) and was reported favorably by your committee. S. Rept. No. 1499,

Judicial Review of I.C.C. Orders (Aug. 2, 1968). City of Chicago did not learn of the proposed legislation until the matter reached the House. We submitted a detailed statement to the House Committee on Interstate and Foreign Commerce. Hearings on H.R. 13927, *Judicial Review of I.C.C. Orders*, pp. 48-53 (Serial No. 90-48).

S. 2242 would transfer judicial review of orders of the Interstate Commerce Commission ("Commission") from the U.S. district courts (which have had jurisdiction since the year 1913) to the U.S. courts of appeals; ultimate review by the U.S. Supreme Court would be changed from the present direct appeal from the three-judge district courts, in favor of a petition for certiorari to the high court. However, as part of the transfer of judicial review jurisdiction, S. 2242 contains many new provisions which would sharply curtail the right to effective judicial review.

The proposed legislation is in the form of an amendment to section 17 of the Interstate Commerce Act, plus the repeal of sections 2321-25, inclusive, of Title 28 of the United States Code. The legislation is sponsored by the Commission's Office of General Counsel.

Our opposition to the proposed legislation, in its present form arises from the participation of the City of Chicago in numerous passenger train discontinuance proceedings under section 13a(1) of the Interstate Commerce Act, 49 U.S.C. 13a(1).¹ Our objections run to the fact that S. 2242 would cut off important substantive and procedural rights presently available to City of Chicago, and to other communities and to the public generally, in seeking effective judicial review of unlawful agency action in approving a given passenger train discontinuance. Enactment of S. 2242 would virtually preclude judicial review, both from the standpoint of effectiveness as well as substantially increasing the cost of filing law suits.

Chicago is the leading railroad center of the country. The railroad industry plays an important role in the economy of the area. Chicago is the leading interchange point for passengers traveling over more than one railroad for their journey. As the nation's leading convention city, Chicago is anxious to have adequate passenger transportation facilities available by all modes of transportation so as to provide ready access to and from all parts of the country. In accordance with assuring this necessary passenger service, City of Chicago, through its corporation counsel, reviews all railroad passenger discontinuance proceedings instituted at the Commission which might affect Chicago and, where the facts warrant, participates in the proceeding.

The Present Procedure for Judicial Review of Passenger Train Discontinuances.—The present procedure for judicial review of railroad passenger train discontinuances can best be described by recent illustrations. City of Chicago was a participant to the Commission proceeding involving the proposed discontinuance of the "Hummingbird" trains operated by Louisville & Nashville Railroad Company ("L&N").² The "Hummingbird" formerly operated with the "Georgian" trains, the latter already being the subject of judicial review.³ Discontinuance of the "Hummingbird" was placed under investigation by the Commission on April 24, 1968 and operation required pending hearing and decision in the investigation, but not for a longer period than the four month period provided by statute. The four-month expiration date was September 7, 1968.

On Friday, September 6, at 9:30 AM, Division 3 of the Commission released its decision and report finding that continued operation of the "Hummingbird" is not required by public convenience and necessity and would unduly burden interstate commerce. It is the practice of the agency to so release its decision on the final day before expiration of the four month statutory period without prior notice to the protesting parties.

Upon review of the report, it was concluded to seek immediate court action. This "review" consisted of telephone conversations because, of course, copies of the 16-page report with 4 pages of attached appendices were available only in Washington, D.C.

¹ Enacted as part of Transportation Act of 1958, 72 Stat. 571.

² Finance Docket No. 25047, *Louisville & Nashville Railroad Company Discontinuance of Trains Nos. 6 and 7 Between New Orleans, La., and Cincinnati, Ohio*, 330 I.C.C. 720.

³ *City of Chicago v. United States*, 294 F. Supp. 1103 (N.D. Ill. 1969); probable jurisdiction noted 395 U.S. 957 (1969).

Emergency court action was required, because the discontinuance could not otherwise be restrained since it would become effective the next day (Saturday). An attorney was dispatched from Washington, D.C., to Chicago by air with copies of the Commission's decision—the complaint had to be drawn aloft. Simultaneously, an attorney for the Tennessee Public Commission departed from Nashville, Tenn., for Chicago. Witnesses had to be secured immediately for an emergency court hearing on a temporary restraining order that afternoon. Counsel for the railroad (headquartered at Louisville, Ky.), the United States and the Commission had to be notified immediately.

We were ready to proceed at 2 PM at the U.S. District Court in Chicago. However, the judge previously assigned to hear procedural matters in the suit already filed in the companion "Georgian" case⁴ was engaged in jury trial, necessitating hearing before another judge who happened to be available that Friday afternoon. The restraining order was entered at about 4 PM.⁵

Another example of judicial review involved the "Seminole" train, operated jointly by three railroads between Chicago, Ill., and Jacksonville, Fla.⁶ The initial decision of Division 3 of the Commission was released at 9:30 A.M. on November 14, 1968.⁷ Because of congested air transportation between Washington, D.C., and Chicago, Ill., we were unable to secure a copy of the 29-page printed report, so that the hearing had that afternoon before a federal judge in Chicago was without the benefit of the Commission's reasoning.

These examples are described to illustrate the difficulties present even under the present set up, which difficulties would be greatly magnified under S. 2242; indeed, it is my opinion that judicial review would be impossible in virtually all instances.

Once the temporary restraining order is issued, it is the usual practice to file a petition for reconsideration to the Commission. This is required in most discontinuance cases since the decision is made by Division 3 of the Commission, and does not constitute a "final order" under the Commission's rules.⁸

The temporary restraining order would be continued in effect (subject to review by the three-judge panel) pending the Commission's disposition of petitions for reconsideration. This period usually exceeds 60 days because protestants have 30 days to file their petitions, the carrier has 20 days to reply thereto, and the Commission itself must thereupon re-evaluate the matter. Upon issuance of the order on reconsideration, assuming the Commission affirms the initial decision of Division 3, the court would next consider whether an interlocutory injunction should issue.

The burden is usually upon plaintiffs to the action to see to it that the court is furnished with a certified copy of the transcript made at the Commission. This is of very little expense since one or more of the protestants has usually ordered the daily hearing transcripts for its own use in preparing briefs to Division 3.

In short, to seek judicial review of an I.C.C. train-off decision, which would be impaired if the trains are discontinued pending such review, requires a high degree of coordination and cooperation by all counsel. Judicial review is not expensive.

THE PROPOSED PROCEDURE

S. 2242 would drastically modify the present procedure. Indeed, it is doubtful that the public's right to judicial review could be maintained at all.

1. *Final Order*.—Section 2321 of Title 28, which would be repealed, presently governs suits "to enforce, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission." Section 17(9) of the Interstate Commerce Act provides that a suit to set aside a *decision, order or requirement* may be made under the same provisions as are applicable to suits to set aside *orders*.

The new section 17(10) (a) and 17(10) (c) (i) would not carry over the *order* from 28 U.S.C. 2321 into the proposed new section 17(10) of the Interstate Commerce Act. Rather, the U.S. courts of appeals would have exclusive jurisdiction to "enjoin, set aside, annul or suspend, in whole or in part, all *final orders* of the

⁴ See fn. 3. The action was filed May 27, 1968.

⁵ *Tennessee Public Service Commission v. United States*, 294 F. Supp. 1106 (N.D. Ill. 1969); probable jurisdiction noted 395 U.S. 957 (1969).

⁶ *City of Chicago v. United States*, 300 F. Supp. 115 (N.D. Ill. 1969).

⁷ *Illinois Central R. Co. Change in Service*, 333 I.C.C. 853 (1968).

⁸ 49 CFR 1100.101(a) (2).

Interstate Commerce Commission. . . ." The proposed change from *order* in the present statute to *final order* might very well be construed to preclude the present practice of instituting actions in train-off cases, before the final order is issued upon reconsideration, in order to save the train and not to prejudice the Commission in its deliberations on reconsideration. A three-judge court for the Middle District of Pennsylvania gave considerable attention to this question. *City of Williamsport v. United States*, 273 F. Supp. 899 (M.D. Pa. 1967).

2. *Decisions of the Full Commission.*—The new section 17(10) (a) restricts the court of appeals to final orders made reviewable in accordance with the provisions of the present section 17(9). The latter specifies that after an application for rehearing, reargument, or reconsideration of any decision, order or requirement of a *division*, an individual *commissioner* or *board* has been denied or otherwise disposed of, a suit to set aside such decision, order or requirement may be brought under those provisions of law applicable in the case of suits to set aside orders of the Commission. It sometimes occurs that train-off decisions are rendered by the entire Commission rather than by Division 3. *Chesapeake & Ohio Ry. Co.—Discontinuance of Trains*, 333 I.C.C. 95 (1968); *Southern Pac. Co. Discontinuance—Ogden to Oakland*, 333 I.C.C. (1968); *Southern Pac. Co. Discontinuance*, 333 I.C.C. 783 (1969). Such decisions are presently reviewable by a court on the merits without filing a petition for reconsideration with the Commission. 28 U.S.C. 1336(a). The distinction between a Commission decision and a division decision is vital. See: *Transamerica Freight Lines, Inc. v. United States*, 258 F. Supp. 910 (D. Del. 1966). In the ordinary case handled by a division of the Commission, a petition for reconsideration by statute acts to stay the division's order if the order has not yet become effective. 49 U.S.C. 17(8). On the other hand, a petition for reconsideration of a Commission decision does not act to stay the order of the Commission. S. 2242 would create serious problems.

3. *Intervention.*—S. 2242 would restrict the present right of communities to intervene in judicial review proceedings. At present section 2323 of Title 28, which would be repealed, permits any party in interest to the proceeding before the Commission to have an absolute and unqualified right to intervene in court. In repealing section 2323, the proposed section 17(10) (d) of the Interstate Commerce Act would qualify this absolute right of intervention by adding, "whose interests will be affected if an order of the Commission is or is not enjoined. . . ." This may create harassment by the Commission or other parties.⁹

4. *Temporary Restraining Order.*—The new section 17(10) (f) would drastically revise and sharply curtail the present right of communities to seek a restraining order in obtaining effective judicial review in passenger discontinuance cases. The Commission's Acting General Counsel, in explaining the purposes of the proposed legislation on June 27, 1969, complained of the "ease with which counsel have been able to see a single local judge to secure a restraining order" and made reference to "the revolving door to a district judge's chambers."¹⁰

A. *Security.*—The public parties to judicial review of train discontinuances presently are not required to post security because Rule 65(e) of the Federal Rules of Civil Procedure expressly exempts, by its terms, actions brought in three-judge district courts under section 2284 of Title 28. The posting of security would effectively destroy judicial review in discontinuance cases. The six district judges at Chicago who have thus far issued or reviewed temporary restraining orders in train-off cases have all declined to require posting of security. See also *City of Williamsport v. United States*, 237 F. Supp. 899, 903-4 (M.D. Pa. 1967); *Florida East Coast Railway Company v. United States*, 228 F. Supp. 340 (M.D. Fla. 1964); *Campbell Sixty-Six Express, Inc. v. United States*, 253 F. Supp. 613 (W.D. Mo. 1966); *Tennessee Public Service Commission v. United States*, 275 F. Supp. 87, 91 (W.D. Tenn. 1967). In removing I.C.C. orders from section 2284, there is a serious question as to whether the exemption from security will continue to apply.

B. *Hearing.*—S. 2242 would impose a statutory requirement that a hearing be held in order to secure a temporary restraining order, whereas a hearing is now discretionary with the district court judge. The statutory requirement for a hearing, which would seem to imply adequate notice to the adversary to attend the

⁹ See problems of Pottsville, Pa. in intervening in railroad merger case. *Borough of Mosaic v. United States*, 272 F. Supp. 513, 518 (M.D. Pa. 1967), vac. and rem. *Penn.-Central Merger Cases*, 389 U.S. 486, 506-7, 531 (1968).

¹⁰ Kahn, Fritz R., *Judicial Review*, 36 I.C.C. P.J. 1982, 1987-8 (Sept.-Oct. 1969).

hearing, would be impracticable and impossible in many situations. The Commission's custom of releasing its discontinuance orders at the latest possible time, will simply prohibit a hearing in the conventional sense.

C. *Two-Judges*.—S. 2242 would imply that at least two judges concur in the issuance of a temporary restraining order, whereas at present only one district judge is required.¹¹ It is not always easy to reach one judge to issue out a restraining order. The requirement that a hearing be held before two judges would be especially burdensome, if possible at all. I wish to impress upon the Committee that we have no advance warning as to when the Commission will issue a discontinuance report. The hour of 3 PM on Fridays is a favorite time for the Commission in passenger discontinuance cases.

D. *Terms of Restraining Order*.—S. 2242 would transfer section 2324 of Title 28 over into 49 U.S.C. 17(10) (f) but would tighten up the requirement for a restraining order by addition of the word "discretion". Further, the duration of the restraining order would be restricted to a maximum of 60 days, whereas no maximum period is now specified. The proposed restriction would impair judicial review of train-off cases since the Commission is not ordinarily expected to issue a final order within 60 days from the initial decision of its Division 3 authorizing discontinuance. Since an interlocutory injunction would not ordinarily issue until after a final order of the Commission, the right of communities and the public to effective judicial review would be impaired if not destroyed.

E. *Irreparable Damage*.—The proposed new section 17(10) (f) requires a showing of irreparable damage to the party filing a petition for review. At present, 28 U.S.C. 2284 merely specifies that irreparable damage be shown. In view of the practice of the Commission to release its train-off decisions only hours before the discontinuance is scheduled to become effective, it is impossible to have all of the adversely affected parties made plaintiff at the time the suit is filed—certain communities and labor organizations have procedures which do not allow the immediate filing of legal actions. Accordingly, it is the present practice of City of Chicago to introduce testimony at an emergency court hearing demonstrating irreparable damage to the traveling public and to railway labor as well as to the City of Chicago itself. Yet these other interests may not formally become a party plaintiff until a week or so later. The present power of a judge to look at the overall public—not just the party formally bringing the action—would be curtailed by S. 2242.

5. *Standing to Sue*.—The proposed new section 17(10) (c) (i) would restrict judicial review to those persons who were parties to the Commission proceedings. At present, it is only requisite that a plaintiff suffer legal wrong because of agency action, or be adversely affected or aggrieved by agency action. 5 U.S.C. 702. Because of the "domino" tactics of the railroad industry, whereby discontinuance of one segment of a train gives rise to subsequent successive proposals to discontinue other parts of the train, it is important that judicial review not be restricted to a particular Commission proceeding.¹²

6. *Cost of Litigation*.—S. 2242 by transferring jurisdiction to the courts of appeals, would substantially increase the cost of seeking judicial review. This is because, as the Commission's Chairman testified, the petitioners usually must foot the bill for printing a joint appendix for the court of appeals. The joint appendix consists of relevant portions of the Commission's proceedings, and would be a heavy if not prohibitive expense. At present under the three-judge district court procedure, City of Chicago need only have its copy of the transcript of the Commission proceedings certified by the agency itself. Our only out-of-pocket expense would be the stenographer's minutes of the hearings, which may have been ordered previously anyway for use in preparing briefs to the Commission. But even where the hearing transcripts were not purchased for use in the

¹¹ *Ibid.*

¹² The "Georgian-Hummingbird" provides a good illustration. Chicago & Eastern Illinois Railroad Company (C&EI) discontinued its segment (Chicago, Ill.-Evansville, Ind.) of joint C&EI-L&N "Georgian" trains operating between Chicago, Ill., and Atlanta, Ga., without posting notices at stations served by the "Georgian" between Evansville, Ind., and Atlanta, Ga. Based upon the loss of the Chicago business, resulting from the C&EI discontinuance, L&N then proposed to discontinue the connecting "Hummingbird" train between Cincinnati, Ohio, and New Orleans, La. At that point the Metropolitan Government of Nashville and Davidson County, Tenn., joined City of Chicago in a suit to review the C&EI discontinuance. Nashville would not have standing to do this if S. 2242 is enacted.

Commission proceedings, our maximum expense for securing the volumes for Commission certification usually would run about \$500.00.

Printing of the agency hearings would be a much greater additional expense—running into at least several thousand dollars per court case. This would limit the number of judicial review proceedings in which the City of Chicago could participate.

THE LACK OF JUSTIFICATION FOR CHANGE

This is not the first attempt to repeal the three-judge court review of I.C.C. orders. Similar proposals of the Judicial Conference of the United States have been unsuccessful. See H.R. 5488 (81st Cong., 1949); H.R. 1468 and H. Rep. 1619-21 (80th Cong., 1948); Hearings before Subcommittee of House Committee on Judiciary on H.R. 1468, 1470 and 2271 (80th Cong.) and H.R. 2915 and 2916 (81st Cong.). An identical recommendation was made by the Administrative Conference of the United States in December 1961.

The Commission's justification is based upon the asserted lack of District Court rules and multiple suits challenging the same I.C.C. order in the current *Northern Lines* merger case. Enactment of S. 2242 would provide that the first party to win the race to the courthouse to attack a Commission order would be the winner, to which court all subsequent suits must be transferred.

District Court Rules.—Three-judge district courts are employed in cases involving matters other than review of I.C.C. decisions. Statistics introduced in previous hearings before this Committee indicate that only about 40 percent of the cases in 1966 and 1967 involved I.C.C. orders. Hearings on S. 2687, *Judicial Review of I.C.C. Orders*, 90th Cong., 2d Sess., 25 (1968). The ordinary rules apply without any apparent difficulty.

Northern Lines.—Judicial review of the Commission's approval was instituted first by Auburn, Wash. in Washington, then by security holders in New York, and finally by the Department of Justice in Washington, D.C. The first two plaintiffs subsequently agreed to join the United States suit filed last in Washington, D.C. However, under S. 2242, all parties would have deferred to Auburn, Wash. (1960 Pop. 11,693), since its suit was filed first. Certainly the Commission, with its counsel located in the Nation's capital, should not complain of having its merger order heard there when the various plaintiffs, employing the flexibility provided by the three-judge court procedure, select the most convenient forum.

CONCLUSION

I appreciate the opportunity to submit this statement in opposition to S. 2242.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS,
SUPREME COURT BUILDING,
Washington, D.C., June 9, 1969.

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

DEAR SENATOR MAGNUSON: This is in reply to your letter of June 2, 1969, transmitting for study and report S. 2242, 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 Judicial Conference of the United States at its meeting in September, 1968, considered the provisions of similar legislation in the 90th Congress, H.R. 2687 as amended, and reaffirmed its endorsement of the bill and approved the amendments to the bill as reported out of committee.

As requested, we enclose thirty copies of our reply.

Sincerely,

WILLIAM E. FOLEY,
Deputy Director.

JUDICIAL REVIEW OF ORDERS OF THE INTERSTATE COMMERCE COMMISSION

The Interstate Commerce Commission recommends that section 17 of the Interstate Commerce Act be amended so as to provide for judicial review of the Commission's orders by the United States Courts of Appeals.—Judicial review of orders of the Interstate Commerce Commission is governed presently by 28 U.S. Code §§ 1253, 1336, 1398, 2284, and 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 present statutory provisions for judicial review of the Commission's orders originated in the Urgent Deficiencies 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.

The existing procedures for judicial review of the Commission's orders have been subject to considerable criticism by members of the bar and the judiciary who have recommended that the Commission's orders be subject instead to review by the several United States courts of appeals. This change was also recommended in 1962 by the Special Advisory Committee on Interstate Commerce Commission Practices and Procedures (an advisory committee on practitioners established by the Commission) and the Administrative Conference of the United States in 1961. In 1968, it was also generally endorsed by the Judicial Conference of the United States and the Association of the Interstate Commissioner, Practitioners, an organization representing a substantial segment of the Commission's bar.

In providing for judicial review in courts of appeals, with review in the Supreme Court by the discretionary writ of certiorari, enactment of this recommendation would make orders of the Commission reviewable in the same general manner as all other major federal regulatory agencies, i.e., CAB, FCC, FMC, SEC, FTC, and NLRB.

There are certain advantages in providing for judicial review in the courts of appeal. Those courts are regularly engaged in the review of orders issued by various Federal agencies while most district courts rarely do so. The courts of appeals also operate under the uniform Federal Rules of Appellate Procedure, promulgated in 1968 by the Supreme Court under 28 U.S.C. § 2072 (Supp. III 1967). In contrast, there are no specific rules governing review proceedings in three-judge district courts, with the result that procedures in such courts are on an *ad hoc* basis.

The attached draft bill, implementing this recommendation, 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. In this respect, it follows 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 (1964); section 5, as amended, of the Federal Trade Commission Act, 15 U.S.C. 45(b)-(j) (1964); and section 9, as amended, of the Securities Act of 1933, 15 U.S.C. 77i (1964).

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 forth the provisions, more particularly described below, for judicial review of the Commission's orders. In general, these provisions have been written so as to conform with the Fed-

eral Rules of Appellate Procedure* since the statute, 28 U.S.C. 2072 (Supp. III, 1967), authorizing the establishment of these rules provides, in pertinent part, that "all laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." These rules are subsequently referred to as the Appellate Rules.

JURISDICTION

Paragraph (a) of the draft 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, as would cases involving fines, etc.

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 provisions in 28 U.S.C. §1398(a) (1964) 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.C. § 2112(1964) 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 opportunity for challenge, the security of transactions authorized by the Commission.

To avoid the working of any injustice in situations where the 60-day limitation provides insufficient time for the bringing of an appeal, this provision also provides for the filing of a petition by an appellant with the court for an extension of time, not exceeding 60 additional days, within which to file a petition for review. Second, the 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 thus 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, NLRB, FPC, CAB, and FCC in that those agencies are named as the respondents in suits seeking judicial review of other 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. The draft bill does not attempt to prescribe the contents of the petition for review, this matter being covered by Appellate Rule 15 which simply requires the filing of a simple petition specifying the parties seeking review, the respondent, and the order or decision to be reviewed.

RECORD ON REVIEW

Under existing case, though not statutory, 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 Commis-

*The Appellate Rules together with the notes of the Advisory Committee on Appellate Rules are reproduced in 43 F.R.D. 61-62(1968). See also Symposium on Federal Rules of Appellate Procedure, 28 *Fed. B. Jr.*, (Spring 1968).

sion. *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 appeals in which the proceeding is pending the record on review, as provided in 28 U.S.C. § 2112 (1964). Providing for review of the Commission's orders in the courts of appeals would make applicable automatically (i.e., without specific reference) the provisions of 28 U.S.C. § 2112 and the provisions of Appellate Rules. This change 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 under Appellate Rule 17(b). 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 Appellate Rules that the parties reproduce, by printing or otherwise, those portions of the Commission record upon 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 cost falls upon the private appellants.

The record filing and reproduction requirements of the various courts of appeals have been standardized by virtue of the promulgation of the Appellate Rules. Appellate Rule 32 permits reproduction of briefs and records by "any duplicating or copying process capable of producing a clear black image on white paper," thus sharply reducing the expense involved to parties seeking review of a Commission order.

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 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, (1964) 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 (1964).

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 *Aberdeen & Rockfish R. Co. v. United States*, 270 F. Supp.

705 (E.D. La. 1967). 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 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) of the bill deals with the question of stays and interlocutory injunctions pending review of Commission orders in substantially the same manner as existing law, 22 U.S.C. § 2284 (1964). This subject is governed by Appellate Rule 18 which in pertinent parts states:

"The motion [for a stay] shall be filed with the clerk and normally will be considered by a panel or division of the court but in exceptional cases where such procedure would be impractical due to the requirements of time, the application may be made to and considered by a single judge of the court."

REVIEW IN THE SUPREME COURT

Under the present law, 28 U.S.C. 1253 (1964), 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 consideration), it will issue an order summarily affirming or 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.

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 (1964) 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 (1964), 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 carriers subject to the jurisdiction of the Commission 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 (1964), 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 section 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.

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 appeals 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 provisions 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. The jurisdiction of the courts of appeals shall be invoked by the filing of a petition as provided in this subsection.

“(b) The venue of any proceeding under this section 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: *Provided*, That, upon the filing of a petition within sixty days of the date of service of the order complained of, the court, for good cause shown, may extend the time for filing a petition to review such order for an additional period not exceeding sixty days. 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 entitled 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 may be represented by counsel in any proceeding to review such order. Communities, associations, corporations, firms, and individuals whose interests 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 or a judge thereof 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 section 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, of this Act and section 3 of the Act of February 19, 1903 (48 U.S.C. 43) 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.

SUSPENSION AND REVOCATION OF MOTOR CARRIER OPERATING AUTHORITY FOR
NONCOMPLIANCE WITH RULES, REGULATIONS OR ORDERS

The Interstate Commerce Commission recommends that section 212(a) of the Interstate Commerce Act be amended in the following respects: (1) to make motor carrier operating authorities subject to suspension, change, or revocation for willful failure to comply with any provision of Chapter 39, title 18 United States Code, Explosives and Other Dangerous Articles; and (2) to provide that the Commission may, upon reasonable notice, suspend motor carrier operating authorities for failure to comply with insurance regulations issued by it pursuant to section 215 thereof.

The purpose of this recommendation is to subject motor carrier operating authorities to suspension, change, or revocation for willful failure to comply with any provision of the Explosives Act. It is also designed to permit suspension of motor carrier operating rights, upon notice for failure to comply with the Commission's insurance regulations.

Section 6(e) (4) of the Department of Transportation Act transfers the Commission's authority relating to explosives and other dangerous articles to the Department of Transportation. Neither the Department of Transportation nor the Commission has the authority to suspend or revoke a certificate of any carrier for violation of the Explosives Act. However, we believe that to effect compliance with the Explosives Act is essential that the Commission be given the authority to suspend and revoke certificates for serious violations of such Act. Consequently, we request that section 212(a) be amended to give the Commission this authority.

The second proviso in section 212(a) provides for the suspension, upon notice, but without hearing, of motor carriers' and brokers' operating authorities for failure to comply with brokerage bond regulations and tariff publishing rules. It does not, however, provide for suspension on short notice for failure to maintain proof of cargo, public liability, and property-damage insurance under section 215. As a result, the only remedy presently available under section 212(a) is revocation of the carriers' authority. All insurance filings made with the Commission are on a "continuous until cancelled" basis with a minimum 30-day cancellation provision. The motor carrier is immediately notified of an insurance cancellation and has ample time to make new arrangements. If replacing insurance is not received by the cancellation date, we now must commence lengthy and time-consuming show cause proceedings to obtain compliance or to revoke the operating authority. Approximately 400 such proceedings are commenced annually. The public may be adversely affected should losses occur during these proceedings.

Section 410(f) is a counterpart of section 212(a) and contains a provision similar to the second proviso of section 212(a). The second proviso in section 410(f), however, provides for suspension on short notice of freight forwarder permits for failure to comply with the cargo insurance provisions under section 403(c) and the public-liability and property-damage insurance provisions under section 403(d). Our recommendation would bring section 212(a) into further conformity with section 410(f) by removing this distinction.

From the standpoint of the traveling and shipping public there is as much reason to require motor carriers to keep their cargo and public-liability and property-damage insurance in force as there is to require freight forwarders to keep their insurance in effect. It is therefore desirable in the public interest that the Commission have the authority to suspend motor carrier rights, on short notice, when insurance lapses, or is cancelled without replacement, until compliance is effected. The prospect of such action by the Commission should act as a deterrent to violations of this nature. An investigation under section 204(c) is not a satisfactory answer to the problem since such proceedings are sometimes necessarily lengthy and the public may be adversely affected should losses occur while it is pending.

The amendments proposed in this recommendation would enable the Commission to administer the enforcement provisions of part II of the Act more effectively.

Attached is a draft bill giving effect to the above recommendation.

A BILL

To amend section 212(a) of the Interstate Commerce Act, as amended, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (a) of section 212 of the Interstate Commerce Act (49 U.S.C., sec. 312(a)), is amended as follows:

(1) The second sentence is amended by inserting after the phrase "promulgated thereunder", the words "or under Sections 831-835 of title 18, United States Code, as amended."

(2) The first proviso is amended by inserting immediately after the phrase "or to the rule or regulation thereunder", the words "or under Sections 831-835 of title 18, United States Code, as amended."

(3) The second proviso is amended by inserting "215", immediately after "211(c)".

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To amend section 212(a) of the Interstate Commerce Act, as amended, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (a) of section 212 of the Interstate Commerce Act (49 U.S.C., sec. 212(a)), is amended as follows:

- (1) The second sentence is amended by inserting after the phrase "and United States Code," the words "or under Section 231-235 of title 49, United States Code, as amended."
- (2) The first proviso is amended by inserting immediately after the phrase "or to the rule or regulation prescribed," the words "or under Sections 231-235 of title 49, United States Code, as amended."
- (3) The second proviso is amended by inserting "212," immediately after "211(e)."