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JUDICIAL REVIEW OF THE INTERSTATE COMMERCE COMMISSION

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HEARING

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BEFORE THE

SUBCOMMITTEE ON CRIME

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

SECOND SESSION

ON

S. 663 and H.R. 785

AMENDING TITLE 28 OF THE UNITED STATES CODE WITH
RESPECT TO JUDICIAL REVIEW OF DECISIONS OF THE
INTERSTATE COMMERCE COMMISSION

DECEMBER 10, 1974

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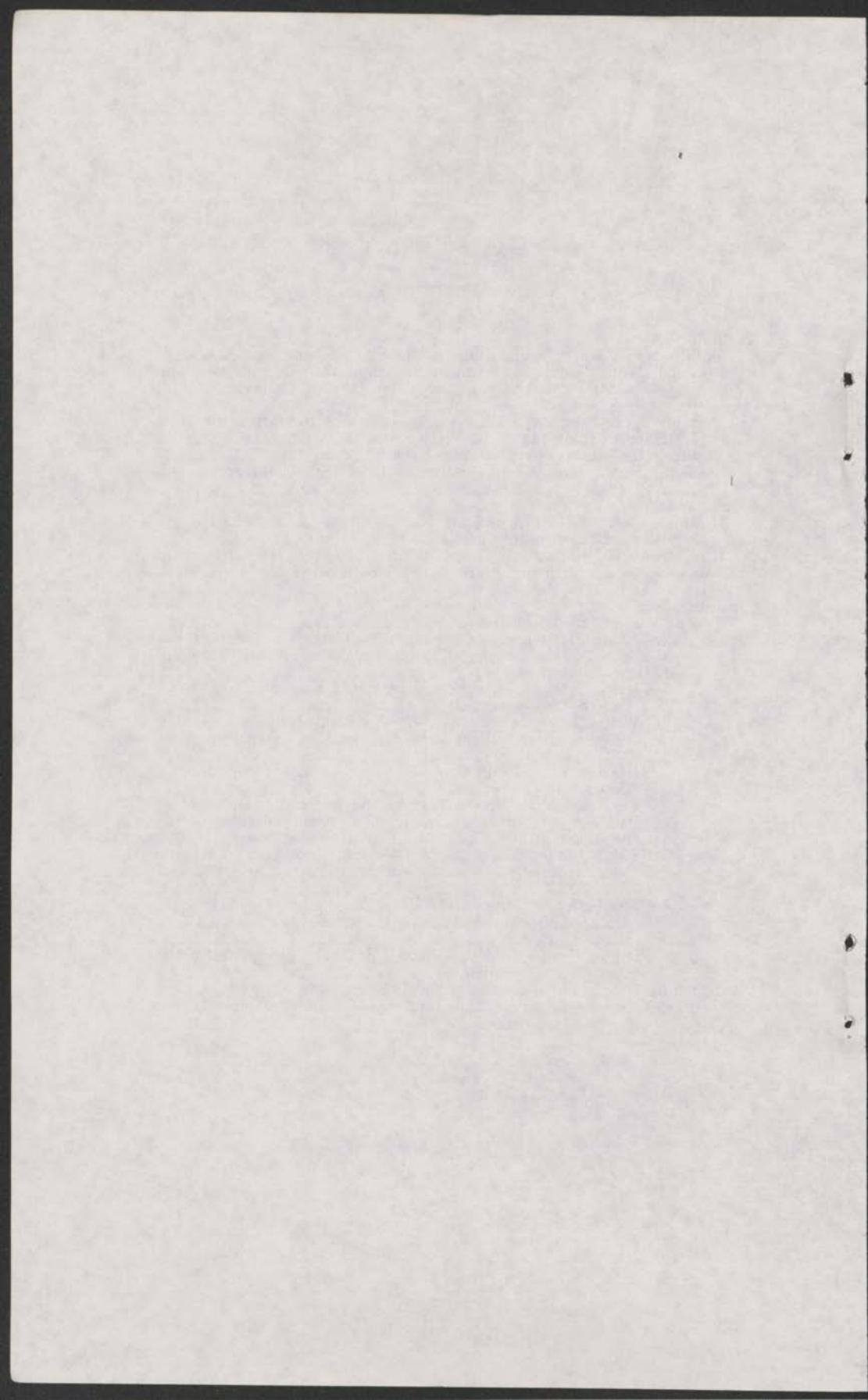
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JUDICIAL REVIEW OF THE INTERSTATE COMMERCE COMMISSION

TUESDAY, DECEMBER 10, 1974

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 8:55 a.m., in room 2218, Rayburn House Office Building, John Conyers, Jr. [chairman of the subcommittee], presiding.

Present: Representatives Conyers, Thornton, Cohen, Fish, and Froehlich.

Also present: Timothy J. Hart, assistant counsel; Dorothy C. Wadley, assistant to counsel; and Constantine J. Gekas, associate counsel.

Mr. CONYERS. The subcommittee will come to order. Good morning and welcome.

The Subcommittee on Crime meets this morning to consider S. 663, passed by the other body last year, and H.R. 785, a bill introduced in this Congress by our colleague on the Judiciary Committee, Congressman Wiley Mayne of Iowa. These two bills would amend chapter 128 of title 28 of the U.S. Code, that portion commonly known as the Hobbs Act, to make the orders of the Interstate Commerce Commission reviewable in the same manner as orders of other regulatory agencies.

This morning our subcommittee consists of my colleagues Hamilton Fish of New York, the gentleman from Arkansas, Mr. Ray Thornton, and the gentleman from Wisconsin, Mr. Harold Froehlich.

I will ask unanimous consent that my opening statement be introduced in the record, and without objection it will be so placed in the record.

[The statement referred to follows:]

OPENING STATEMENT OF THE HONORABLE JOHN CONYERS, JR.

Good morning and welcome.

The Subcommittee on Crime meets this morning to consider S. 663, passed by the other body last year, and H.R. 785, a bill introduced in this Congress by my colleague on the Judiciary Committee, Congressman Wiley Mayne of Iowa. These two bills would amend chapter 128 of title 28, United States Code—commonly known as the Hobbs Act—to make orders of the Interstate Commerce Commission, except those ordering the payment of money, reviewable in the same manner as orders of other regulatory agencies.

This legislation, like the Speedy Trial Act which we reported three weeks ago and which now awaits a rule for consideration by the full House, addresses a concern which I consider to be a major one now before the Congress: modernizing and improving the Federal judicial machinery to meet the needs of the twentieth century. The problem of antiquated judicial procedures is one of consistent his-

torical concern. The famed jurist Roscoe Pound told the American Bar Association in 1906 that the work of the courts in the twentieth century could not be carried on with the methods and machinery of the nineteenth century; sixty-four years later, speaking to the same group, Chief Justice Burger made this observation:

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

The bills we consider today deal with such antiquated procedures. Since 1913 with the passage of the Urgent Deficiencies Act, orders of the ICC have been reviewed in the United States District courts by panels of three judges, at least one of whom must be a judge of the court of appeals for the district in accordance with sections 2321 and 2325 of title 28 of the Code. The Hobbs Act, adopted in 1950, placed such appeals from other agencies in single-judge District courts, with further review to be conducted by the circuit courts of appeals and the Supreme Court upon petition for writ of certiorari. As it stands today, appeals from review of ICC orders by three-judge panels are taken directly to the Supreme Court on an expedited basis. In December 1972, the Study Group on the Caseload of the Supreme Court, chaired by Professor Paul Freund of the Harvard Law School, had this to say about the current review procedure:

"Review of ICC orders by a three-judge court with direct appeal to the Supreme Court is an historical anomaly. At one time there was similar review for other agencies, but this was changed in 1950, and review of the other agencies was transferred to the courts of appeals. The reasons given for making this change for the other agencies are fully applicable to the ICC . . .

"In recent years the Commission has abandoned its opposition to similar treatment for its orders. Proposals for review of ICC orders by the courts of appeals, supported by the Judicial Conference of the United States and, so far as we know, opposed by no one, have been before Congress for several years. Since many ICC cases are not of sufficient importance to require review by the Supreme Court, it is clear that the unique treatment of ICC orders is a burden on the Supreme Court that can no longer be justified."

Over thirty years ago, Mr. Justice Frankfurter described the three-judge review procedure as "a serious drain upon the federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice." We have with us this morning Chief Judge Harry Phillips of the Sixth Circuit, which covers the States of Michigan, Kentucky, Tennessee and part of Ohio. Judge Phillips has on many occasions served on panels reviewing Commission orders, and will enlighten us as to the time and expense involved in this procedure. During the fiscal year just completed, there were 249 cases which required the convening of three-judge panels, and appeals taken from ICC orders accounted for 51, or just over 20 percent, of this total. In addition to being a substantial burden on circuit court judges, there is evidence that direct appeal to the Supreme Court is a waste of that Court's time and is, in many cases, unnecessary. For example, in the October 1972 Term which the Court completed last year, it allowed and disposed of 26 such appeals, requiring full briefing and oral argument in only 5 cases.

There can be little doubt that this legislation carries wide support. The record compiled by Senator Burdick's Subcommittee on the Improvement of the Judicial Machinery reveals that, of the 10 chief judges of the Federal courts of appeals and 38 chief judges of Federal district courts who testified, all favored this reform. In testimony before Congressman Kastenmeier's subcommittee on similar legislation with a broader sweep, Judge J. Skelly Wright of the D.C. Circuit noted that the original problems for which three-judge courts were first conceived have been largely eliminated through other reforms, and that this procedure now generates rather than lessening litigation. I have statements of a similar nature, which I will include in our record, from the Solicitor General of the United States, the Antitrust Division of the Department of Justice, the Administrative Office of the United States Courts, The American Bar Association and ICC practitioners. All support the swift enactment of this legislation.

We also have with us representatives of the Commission itself who, according to their testimony on the other side, generally support this reform. As I understand it, they have two specific objections to the bills as presently drafted: first, they are opposed to allowing petitioners who appeal their administrative decisions

the option of filing in the District of Columbia as well as in their principal place of business; and second, they think it necessary to amend this legislation to clarify and preserve the Commission's right to defend its actions independent of the Department of Justice.

Given the fact that the need for this reform is great and that these bills suffer no major opposition, I think it would be unwise to belabor the general issues. In my view, it would be much more profitable to focus on these objections to determine if they are meritorious ones and, if so, take appropriate steps to satisfy them so that this Subcommittee may expedite this much-needed reform.

Mr. CONYERS. I want to take this time to say that, like the speedy trial bill which was reported 3 weeks ago from this subcommittee, this legislation addresses a concern which many of us see as a major one before this Congress. That is, the modernizing and improving of the Federal judicial machinery to meet the needs of the 20th century. The problem of antiquated judicial procedures is one of consistent historical concern. The famed jurist, Roscoe Pound, told the American Bar Association as far back as 1906 that the work of the courts in the 20th century could not be carried on with the methods and machinery of the 19th century.

Sixty-four years later, speaking to the same organization, Chief Justice Burger made this observation:

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

The bills today that we consider deal with such antiquated procedures and, since 1913, with the passage of the Urgent Deficiencies Act, orders of the ICC have been reviewed in the U.S. district courts by panels of three judges, one of whom, of course, must be a member of the court of appeals. The Hobbs Act, adopted in 1950, changed this by permitting appeals in single-judge district courts with further review to be conducted by the circuit courts of appeals and the Supreme Court on petition for a writ of certiorari.

As it stands today, appeals from the review of ICC orders by three-judge panels are taken directly to the U.S. Supreme Court on an expedited basis. This bill has been considered rather extensively in the other body and, prior to calling our first witness, I would like to place in the record a communication from W. Vincent Rakestraw, the Assistant Attorney General for Legislative Affairs, which sets forth the views of the Department of Justice on these bills. I would also like to place in the record a letter from Herbert E. Hoffman which includes the resolution and report of the House of Delegates of the American Bar Association. Mr. Hoffman is the director of the association's Governmental Relations Office.

Without objection, those items are entered into our record.
[The material referred to follows:]

DEPARTMENT OF JUSTICE,
Washington, D.C., December 9, 1974.

HON. PETER W. RODINO, JR.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

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

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

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

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

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

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

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

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

Third, placing review of ICC orders under the Judicial Review Act will ease the procedural and financial burden on private parties challenging ICC orders by requiring the agency, instead of the plaintiff, to file the administrative record with the reviewing court. The added cost to the government will not be undue, since the new Federal Rules of Appellate Procedure allow the agency to file a certified list of the materials comprising the record in lieu of reproducing or filing the original papers. Fourth, a quorum of the court of appeals will be able to decide

a case challenging an ICC order when one of the assigned judges has become incapacitated. See 28 U.S.C. 46(d). A quorum provision does not apply to three-judge district courts, and the Supreme Court has held that the participation of fewer than three judges renders the decision void. See *Ayrshire Corp. v. United States*, 331 U.S. 132 (1947). This becomes a particular hardship in the rare circumstance of the incapacitation or death of a judge after hearing but prior to decision.

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

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

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

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

Sincerely,

W. VINCENT RAKESTRAW,
Assistant Attorney General.

[The letter of the Solicitor General referred to above is reproduced here for purposes of clarity.]

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

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

DEAR SENATOR BURDICK: This is in reply to your letter of July 25, 1973, to the Attorney General, in which you refer to statements by former Solicitor General Griswold and Deputy Assistant Attorney General Wilson that the Solicitor General had "authorized" the Interstate Commerce Commission and the Federal Maritime Commission to represent themselves in the Supreme Court in cases where they were taking a position contrary to that of the United States.

You asked whether you correctly understood that their statements were not intended to suggest that without such authorization those agencies could not themselves have appeared.

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

Sincerely,

ROBERT H. BORK, *Solicitor General.*

AMERICAN BAR ASSOCIATION,
Washington, D.C., December 9, 1974.

Re: S. 663—Amending Title 28, U.S.C., With Respect to Judicial Review of Decisions of the Interstate Commerce Commission.

Hon. JOHN J. CONYERS, Jr.,
Chairman, Subcommittee on Crime, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: With reference to the Subcommittee's hearings on the above bill, I am pleased to advise you that the American Bar Association by action of the House of Delegates supports the repeal of 28 U.S.C. Sec. 2325, which provides for three-judge district courts with direct appeal to the Supreme Court of the United States for review of orders of the Interstate Commerce Commission.

The resolution adopted by the House of Delegates in February 1973, together with an explanatory report, is enclosed.

Sincerely,

HERBERT E. HOFFMAN.

Enclosures.

RESOLUTION ADOPTED BY THE AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES FEBRUARY 1974

Resolved, That the Congress repeal 28 U.S.C. § 2281 and 2282 which provide for a three-judge district court with direct appeal to the Supreme Court of the United States when the constitutionality of a state or federal statute is challenged and 28 U.S.C. § 2325 which provides for three-judge district courts with direct appeal to the Supreme Court of the United States for review of orders of the Interstate Commerce Commission; and

Further Resolved, That the President or his designee be authorized to urge the Congress to repeal these sections.

REPORT

In his address at the 95th Annual Meeting of the American Bar Association in San Francisco in August, 1972, entitled "The State of the Federal Judiciary—1972" (*ABA Journal*, Vol. 58, p. 1049-1053, Oct. 1972), Chief Justice Burger recommended elimination of three-judge district courts. The Chief Justice stated, in part, that such courts now disrupt district and circuit judges' work and that direct appeal to the Supreme Court, without the benefit of intermediate review by a court of appeals, has seriously eroded the Supreme Court's power to control its work load since appeals from such three-judge district courts now account for one in five cases heard by the Supreme Court. The Chief Justice further stated that the original reasons for establishing these special courts, whatever their validity at the time, no longer exist and that there are adequate means to secure an expedited appeal to the Supreme Court if the circumstances genuinely require it.

The Committee's consideration of this problem has revealed that the Chief Justice's views are overwhelmingly supported by the vast majority of federal circuit and district court judges. For example, in testimony given before the Senate Subcommittee on Improvements in Judicial Machinery on May 9 and 10, 1972, both Chief Judge Collins J. Seitz of the United States Court of Appeals for the Third Circuit and Chief Judge John R. Brown of the United States Court of Appeals for the Fifth Circuit vigorously urged the abolition of three-judge district

courts. In 1970 the Judicial Conference of the United States recommended repeal of this legislation (1970 *Rept. Jud. Conf.* 78-79) and in recent years the Interstate Commerce Commission has abandoned its opposition to repeal of 28 U.S.C. § 2325. Further, the Report of the Study Group on the Caseload of the Supreme Court dated December, 1972 (pp. 26-30) prepared for the Federal Judicial Center by a committee under the Chairmanship of Professor Paul A. Freund of Harvard Law School similarly recommended repeal of these sections.

Although there are other situations in which the statutes provide for a three-judge district court with direct appeal to the Supreme Court of the United States, *i.e.*, the Civil Rights Act of 1964 (42 U.S.C. §§ 1971g, 2000a-5(b), 2000c-6(b)), and the Voting Rights Act of 1965 (42 U.S.C. §§ 1973b(a), 1973c, 1973h(c)), the Committee does not, at this time, take a position with reference to these sections. The Committee intends to give the question of the repeal of these sections further study and will make its recommendations with respect thereto at a future time.

Respectfully submitted,

WARREN CHRISTOPHER,
WILLIAM P. DICKSON, JR.,
ROBERT J. KUTAK,
ROBERT A. LOFLAR,
FRANCIS T. P. PLIMPTON,
TERRY SANFORD,
JOSEPH D. TYDINGS,
THEODORE VOORHEES,
C. FRANK REIFSNYDER,
Chairman.

Mr. CONYERS. We will now call for our first witness, Hon. Harry Phillips, chief judge of the U.S. Court of Appeals for the Sixth Circuit.

Would you come forward? We are not going to swear you in. We will proceed in a more informal way. For my colleagues on the committee, Judge Phillips has been on the Federal appellate bench for 11 years. He has written extensively. He has been an Assistant U.S. State attorney general, a private practitioner, and was named in 1963 by the late President Kennedy to the sixth circuit bench, and he has been the chief judge of that circuit since 1969, where he continues to serve with distinction.

We have, sir, your statement, which will be entered into the record at this point and we invite you to proceed in any way that you want in summarizing it or making any additional comments in connection with the legislation under contemplation.

[The prepared statement of Hon. Harry Phillips follows:]

STATEMENT OF HON. HARRY PHILLIPS, CHIEF JUDGE OF THE SIXTH CIRCUIT

On behalf of myself and the other federal judges of the Sixth Circuit I wish to commend the action of this Subcommittee in scheduling hearings on S. 663. We are convinced that this proposed legislation will provide an expeditious review of decisions of the Interstate Commerce Commission, while at the same time effecting a more efficient use of judicial manpower. We, therefore, earnestly hope that the Committee will give its prompt approval to this bill and that the House will pass it and send it to the President before the adjournment of Congress.

From personal experience, I can testify that the review of ICC decisions by a three-judge District Court is *not* an efficient procedure. It makes common sense and will promote consistency to have ICC decisions reviewed by the Courts of Appeals, in the same manner as decisions of the other federal administrative agencies are reviewed, including the Federal Trade Commission, the Federal Communications Commission, the Federal Power Commission, the National Labor Relations Board and others.

During my more than eleven years as a Circuit Judge, I have served as a member of three-judge district court panels specially convened solely to review ICC decisions in a substantial number of cases—in my home state of Tennessee and also in Kentucky and on one case in the Southern District of Ohio.

The present procedure requires that ICC cases be heard only in the district of the residence or principal office of any of the parties bringing the action. Unless the case is filed in a city where a circuit judge and two district judges reside, a waste of judicial resources and public funds results because of the travel time that is necessary to convene the three-judge panel, frequently requiring overnight accommodations and meals while in travel status.

To sit on a three-judge district court in Memphis, the round trip traveling distance from my home in Nashville is 444 miles; in Knoxville, 394 miles; in Chattanooga, 248 miles; in Greeneville, Tennessee, 406 miles; in Louisville, Kentucky, 360 miles; and in Lexington, Kentucky, 466 miles. This requires one or more days of my time away from other duties.

Travel time is an even more acute problem in those circuits encompassing larger geographical areas.

At the present I am assigned to two ICC three-judge panels, one in Memphis and the other in Louisville, both of which probably will be heard in January 1975. Most of the nine judges of our court in Michigan, Ohio, Kentucky and Tennessee also are assigned at the present time to one or more ICC panels. If these cases could be heard by the Court of Appeals for the Sixth Circuit as all other agency actions are reviewed, they would be placed on the regular calendar in Cincinnati for hearing by a panel of three circuit judges during a regular term of court. Instead of traveling to a distant city, the three circuit judges would walk from their chambers in Cincinnati to a courtroom in the same building and hear arguments in five cases, including ICC cases, in one day.

Two busy district judges must leave their already congested dockets to sit in review of an ICC decision, an area of administrative law that is quite different from cases normally within the jurisdiction and experience of district courts. Relieving district judges of this responsibility will give them more time to devote to their more urgent duties, such as expediting trials in criminal cases.

The procedure provided by S. 663 also will avoid an unnecessary burden on the Supreme Court. The decisions of three-judge district courts by statute are appealable directly to the Supreme Court as a matter of right. From personal experience in hearing these cases, I can testify that there is rarely anything of sufficient importance or public interest in an ICC case to justify this preferred treatment and the burden it thrusts upon the Supreme Court.

Under S. 663, the Supreme Court would review decisions of Courts of Appeals in ICC cases by petition for certiorari, in the same manner that all other decisions of the Courts of Appeals, including those affecting other regulatory agencies, are reviewed.

By approving S. 663 this Committee will provide a review of ICC orders by circuit judges who are experienced in dealing with the decisions of other federal regulatory agencies. Furthermore, you will lighten the burden of district judges who, under mandate to expedite disposition of criminal cases, have extremely pressing demands on their time. To a lesser but important extent, you will lighten the workloads of circuit judges and Supreme Court Justices as well.

The need for this legislation is well documented by testimony of other witnesses and by Senate Report No. 93-500. It is not necessary for me to prolong this statement or to impose further upon the time of the Committee by repeating those facts. This proposed legislation has been recommended many times by the Judicial Conference of the United States. As of today it is nearer to enactment into law than it ever has been before. I am confident that, in urging the approval of this bill, I am expressing the views of every federal judge in the country.

Your favorable consideration of this matter will be deeply appreciated.

TESTIMONY OF HARRY PHILLIPS, CHIEF JUDGE OF THE SIXTH CIRCUIT

Mr. PHILLIPS. Thank you, Mr. Chairman, gentlemen of the committee.

On behalf of myself and all of the other Federal judges in the sixth circuit, I wish to commend and express appreciation for the action of this subcommittee in scheduling hearings today on S. 663. We are convinced that this proposed legislation will provide an expeditious review of the decisions of the Interstate Commerce Commission, while at the same time effecting a more efficient use of judicial manpower. We, therefore, earnestly hope that the committee will give its

prompt approval to this bill and that, and even though the hour is late, that the House will pass it and send it to the President before the adjournment of the present Congress.

From personal experience, gentlemen, I can testify that the review of ICC decisions by a three-judge district court is not an efficient procedure. It makes commonsense and will promote consistency to have ICC decisions reviewed by the courts of appeals, in the same manner as decisions of the other Federal administrative agencies are reviewed, including the Federal Trade Commission, the Federal Communications Commission, the Federal Power Commission, the National Labor Relations Board, and other Federal agencies.

During my more than 11 years as a circuit judge, I have served as a member of three-judge district court panels specially convened solely to review ICC decisions in a substantial number of cases, most of them in my home State of Tennessee and also in Kentucky and on one case in the southern district of Ohio.

The present procedure requires that ICC cases be heard only in the district of the residence or principal office of any of the parties bringing the action. Unless the case happens to be filed in a city where a circuit judge and two district judges reside, a waste of judicial resources and public funds results because of the traveltime that is necessary to convene the three-judge panel, frequently requiring overnight accommodations and meals while in travel status. I have a paragraph in my statement illustrating the mileage problem that we have, and our circuit is smaller than some of the others. I will not read these mileages. They are already in the statement. But every time I sit on the three-judge court outside of Nashville, it kills a day or more of my time, and the problem is even more acute in other circuits which are larger than the sixth circuit.

At the present time I am assigned to two three-judge ICC cases. One of them is in Louisville, Ky., the other is in Memphis, Tenn. We will hear those cases in January 1975, or perhaps a little later.

Now when I travel to Louisville, which is round-trip 360 miles, or when I travel to Memphis, which is 444 miles round-trip from Nashville, again, I will kill the greater part of 2 days to hear those cases. Those cases would be heard before our court in Cincinnati under S. 663. All of our sessions are held in Cincinnati. All I would have to do would be to walk down the hall to the courtroom and hear the ICC case along with four other cases the same morning, the same day. We hear five cases a day. An ICC case would be heard along with the other cases on our docket.

Instead of spending 2 days, I would spend only a fraction of 1 day in the hearing. That is the same way that we hear reviews from all of the other Federal administrative agencies.

Another disadvantage of the present procedure is this: It requires two busy district judges to leave their already congested dockets to sit in review of an ICC case. ICC law is an area of administrative law which is foreign to the day-by-day experience of the district judge.

I sat on an ICC case in Louisville not too long ago. One of the district judges had a criminal case that already was old, and he had to postpone that criminal case until a later date, a case that should have been tried 6 months earlier. Because of the convening of this three-judge court he postponed his criminal case until a later date and further delayed a criminal case that should have been tried that day

instead of the ICC case, to which the district judge had to devote his duties and his time under the present antiquated procedure.

And as pointed out by the chairman, the procedure provided by S. 663 also will avoid an unnecessary burden on the Supreme Court. The decisions of the three-judge district court are appealable directly to the Supreme Court as a matter of right. From personal experience, and basing my statement on personal experience, I can testify that there is rarely anything of sufficient importance or of public interest in the ICC case to justify this case receiving preferred treatment over all other cases that are heard before courts of appeals from administrative agencies and the burden that it thrusts upon the Supreme Court of the United States.

Under S. 663 the Supreme Court would review decisions of the court of appeals in ICC cases by petition for certiorari in the same manner as all of the decisions of the court of appeals, including those affecting other administrative agencies, are reviewed.

By approving S. 663 this committee will provide a review of ICC orders by circuit judges who are experienced with the decisions involving other Federal regulatory agencies. I do not mean to imply that circuit judges are more capable than district judges but we do have more experience with dealing with Federal regulatory agencies because that is a part of our jurisdiction.

This bill would lighten the burden of the district judges who need to devote their time to the speedy trial of criminal cases, which this committee recently has considered. It will lighten the burden of circuit judges by enabling us to hear these cases without spending so much time in travel, and it also will lighten the burdens of the Supreme Court Justices.

The need for this legislation is well documented by all the documents that appear in Senate Report No. 93-500, which already is a part of your record. It is not necessary for me to prolong this statement or to impose further upon the time of this committee by repeating these facts.

This proposed legislation has been recommended many times by the Judicial Conference of the United States, but to the best of my knowledge, today it is nearer to being enacted into law than it has ever been, although this bill has been before many sessions of the Congress. It already has passed the Senate and if the House can find time to approve it this session, it can become law this year without having to be reintroduced in the next session of the Congress.

Federal judges disagree on many subjects, gentlemen, but I am confident that when I make this statement today, I speak for a unanimous Federal judiciary. This would be one subject on which every Federal judge in the United States is in agreement.

In closing, I want to thank you again for conducting this hearing. I suppose there has never been a Congress in the history of this Nation where a Judiciary Committee has had more extraordinary responsibilities thrust upon it than has occurred during this session of the present Congress that you gentlemen have experienced.

Let me make one final statement before answering any question you may have. I read the statement of the Chairman of the Interstate Commerce Commission who will testify as a witness. The Interstate Commerce Commission asks this committee to place two amend-

ments on this bill. Of course, I am not authorized to speak for the Judicial Conference of the United States, and the Conference has approved the bill in its present form. Personally, I prefer to express no view on these amendments one way or another, because neither of the amendments will change the procedures that we are asking for consideration of these cases by courts of appeals. But I would urge that if the committee sees fit to adopt either or both of these amendments, that these amendments not be permitted to kill this bill in this session of Congress. If you do amend it, whatever amendment in your wisdom you decide to adopt, I would urge that those amendments be considered and added and not be permitted to let this bill bog down and die in the closing days of the present Congress.

Thank you very much.

Mr. CONYERS. Thank you very much, Judge Phillips. We appreciate your remarks and I find that your observation about the unanimity of the judiciary is quite accurate from everything I have heard. It is one of the reasons that the subcommittee felt impelled to, even in the closing days of this, the 93d Congress, to attempt to thoughtfully consider the matter before us and we appreciate you, as our leadoff witness, laying a basis for any questions that may arise about this legislation.

I would like to note for the record that my colleague from Maine, Bill Cohen, has joined us, and we are going to pass over him for questioning for just a little while and ask if the gentleman from New York, Mr. Fish, has any questions of our witness?

Mr. FISH. Thank you, Mr. Chairman, and I thank you, Judge Phillips, for being here this morning and giving us such a clear statement in support of this legislation.

Could I ask just one question, sir: Could you tell us how did the procedure for review of ICC decisions today—the present procedure before a three-man district court and to the Supreme Court, as a matter of right—how did this apparent anomalous situation as distinct from other regulatory agencies come to pass?

Mr. PHILLIPS. My understanding is that this has been the procedure since 1913, and most, if not all of the other regulatory agencies have been created since 1913. This is a carryover of an antiquated procedure that was adopted by Congress in 1913. I believe, that in the Senate document 93-500, the legislative history of that provision is covered in detail. It is really something that nobody has been interested in except the Federal judges, and you gentlemen and the gentlemen of the previous Congresses have had so many other pressing matters that just no Congress has gotten around to changing it.

Mr. FISH. There is no further justification of this present practice that you know of?

Mr. PHILLIPS. None whatever.

Mr. FISH. Thank you, Mr. Chairman.

Mr. CONYERS. You are welcome. The Chair recognizes the gentleman from Arkansas, Mr. Thornton.

Mr. THORNTON. Thank you, Mr. Chairman.

Mr. Phillips, I would like to join in commending you for this fine statement, and indeed, it is important that we reduce the workload on district judges and on the Federal judiciary. I am concerned somewhat

about the two questions to be raised by Mr. Stafford, and I appreciate that you have no comment to make on them.

I would like to ask specifically, in the event that this legislation does not go forward, have you experimented with the practice which was novel and tried by our three-judge court in Arkansas of having the one sitting judge hear the case with the consent of the parties and convening the other two judges after reviewing the written presentation as a matter of making the decision, instead of requiring the three judges to sit?

Mr. PHILLIPS. We have not done that in the sixth circuit because I have not thought that was in compliance with this statute. Perhaps it is, but the statute says there shall be three judges, and we have the three judges. Now the one judge handles the preliminary matters and can even issue a temporary restraining order on all preliminary matters leading up to the final hearing. But our practice in the sixth circuit is to have three judges each time.

We try, if it is a Michigan case, to appoint a Michigan circuit judge. If it is an Ohio case, an Ohio circuit judge. If it is in Kentucky, Kentucky circuit judge.

It just so happens that in my experience during my tenure, we have had some vacancies in Kentucky and illnesses in Kentucky, and for a considerable period of time I have been covering Kentucky and Tennessee both. But we have thought that the statute says three judges and we have always had three judges there for the hearing.

Mr. THORNTON. I think I agree that if the question were not agreed by the parties, that the proceeding could go forward as a preliminary matter, that three judges might indeed be required. But I am just throwing out the possibility that you might be able to shift more of the work into the preliminary stages, the gathering of evidence, a good bit of the work done at that stage rather than convening the three judges throughout the trial.

Mr. PHILLIPS. Thank you, sir.

Mr. THORNTON. I have no further questions.

Mr. CONYERS. The gentleman from Wisconsin, Mr. Froehlich.

Mr. FROEHLICH. No questions, Mr. Chairman.

Mr. CONYERS. I want to thank you very much, Judge. We appreciate your coming before us and your statement is, as I have said, consistent with all of the indications that we have received. This is perhaps one of the least controversial measures this subcommittee may ever have before it, even though there are some small differences that need to be resolved.

Mr. COHEN. Mr. Chairman, could I inquire just briefly?

Mr. CONYERS. Yes. Let me now recognize the gentleman from Maine, Mr. Cohen.

Mr. COHEN. Judge, do you put any credence in the ICC's objection to the alternate venue placing the jurisdiction or venue in the D.C. Circuit Court of Appeals?

Mr. PHILLIPS. Well, as I said a moment ago, I am in an awkward position. I am a member of the Judicial Conference of the United States and the Judicial Conference has approved the bill in the present form. Personally, I would prefer not to take a position on these amendments. I just hope that if the committee adopts the amendment, or either one of them, that it does not delay the bill.

As I understand the amendment, it would require these proceedings to be filed in the court of appeals of the residence or principal place of business of the parties and there would be no alternative jurisdiction in the Court of Appeals for the District of Columbia Circuit. I would much rather have the bill with this amendment than to have no bill at all.

Mr. COHEN. I guess I am asking you a personal opinion as opposed to a professional opinion, separated out from your position on the Judicial Conference as such, as to whether or not, from a judge's point of view, it would be better or more beneficial for the legal system to have circuit courts around the country become familiar with ICC matters, or whether, in fact, you get a more expeditious handling, more expertise developed with the D.C. Circuit Court of Appeals, and then directly, the Supreme Court.

I am just asking, from a judge's point of view, what is your opinion?

Mr. PHILLIPS. I really am not that conversant with how these cases are handled by the Court of Appeals for the District of Columbia Circuit. I do not claim to have any expertise in ICC matters. But if experience would give me expertise, I would be an expert. Every judge of the Court of Appeals of the Sixth Circuit has one or more of these cases now. I designated a panel yesterday in Cleveland, Ohio, for another ICC case, a circuit judge and two district judges to hear the case. Every circuit judge on the Court of Appeals of the Sixth Circuit, and I daresay that every circuit judge of every other circuit has already had a very considerable amount of experience with ICC cases in these three-judge panels, and I would really rather not express a view as to whether all of these cases ought to come to circuits outside the District of Columbia circuit or whether the parties should be permitted to have a choice as to filing in the District of Columbia or in another circuit.

That is a matter that addresses itself to the wisdom of the committee. I am repeating myself, but I would much rather have the bill with the amendment than to have no bill at all.

Mr. COHEN. Thank you very much.

Mr. CONYERS. Thank you, Judge. It is a pleasure to have had you before us this morning.

Mr. PHILLIPS. Thank you, sir.

Mr. CONYERS. Our next witness is the Chairman of the Interstate Commerce Commission, Mr. George Stafford, who was named the first permanent Chairman of the Commission in 1970, pursuant to Executive Reorganization Plan No. 1, and we welcome him before us at this time.

We have your prepared statement, Mr. Stafford, so if you would come forward at this point, your statement will be incorporated into the record in full, limiting the necessity of your reading it in its entirety.

The subcommittee is apprised of the two critical considerations that I would imagine you want to present, so that if you would introduce the member of your staff accompanying you, you may proceed in any way you choose.

[The prepared statement of Hon. George M. Stafford follows:]

STATEMENT OF GEORGE M. STAFFORD, CHAIRMAN, INTERSTATE COMMERCE COMMISSION

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

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

Before discussing specific provisions of S. 663, I should like to note that the Commission generally is in accord with the concept that its decisions be reviewed by the courts of appeals. In fact, revision of the law has been recommended to the Congress by the Commission since 1963. We fully agree with Chief Justice Burger and others who have commented that the three-judge court procedure is cumbersome and inefficient, and would add that a court of appeals is clearly a more appropriate forum for review of our orders than is a three-judge district court. Not only is the court of appeals the forum for review of orders of nearly all other Federal administrative agencies, but also various features of that review would correct what are presently problems in the three-judge district court procedure. For example, S. 663 would require that judicial review proceedings be instituted within 60 days after entry of the Commission's order, thereby providing a reasonable opportunity to seek review while protecting the integrity of transactions approved by the Commission against belated appeals. Under present law there is no such specific time limit, apart from the general statutes of limitations and concept of laches, within which review actions must be brought. In addition, providing for review in the courts of appeals would have the further effect of making applicable the provisions³ requiring the consolidation of multiple suits against a single order in one court and for the agency to provide the administrative record for the reviewing court. Under present law, there is no requirement that multiple suits be consolidated, and the burden is on the complainant to furnish the administrative record to the court.

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

CONTROL OF LITIGATION

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

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

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

³ 28 U.S.C. 2112.

⁴ 28 U.S.C. 2348.

⁵ 28 U.S.C. 2322.

⁶ 28 U.S.C. 2344.

⁷ 28 U.S.C. 2323.

that of the Department or, under section 2350, filing a petition for a writ of certiorari on its own.

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

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

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

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

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

In the past, the Department of Justice has opposed provisions similar to the amendment we propose here on the ground that such changes would, in the Department's view, alter the Attorney General's responsibility for primary control of this class of litigation. This, however, disregards what in fact is the existing procedure. As a practical matter, the Attorney General does not now manage or control the defense of Commission orders. On the contrary, the almost universal practice is the defense of the Commission's orders to be assigned to an attorney in the Office of the General Counsel of the Commission. The answers, briefs and the other pleadings in most of the actions challenging the validity of Commission orders do bear the name of the respective United States Attorneys and that of the Assistant Attorney General in charge of the Antitrust Division and his attorneys. However, this reflects only the fact that ordinarily the Department of Justice joins in the defense of the Commission's orders and subscribes to the position advanced by the Commission's counsel. In such cases, the role of the Department of Justice is largely passive and leaves to the Commission's counsel the responsibility for fashioning and presenting the written as well as oral arguments before the reviewing courts. At the Supreme Court level, the Solicitor General assumes a more active role in the litigation in cases where the Department and the Commis-

⁸ Nos. 72-214 and 72-433, Oct. Term 1972, decided June 18, 1973.

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

¹⁰ A case in point is *Louisville & Nashville R.R. Co. v. United States and Interstate Commerce Commission* (Ingot Molds Case), 392 U.S. 571 (1968). In that case the Commission held that the National Transportation Policy admonition that the inherent advantages of carriers be preserved enabled it to invalidate a proposed railroad rate reduction that would have undermined a 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 of Justice.

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

sion are in agreement, but even here there has previously been no question that the Commission has an independent right to pursue its own course of action in cases where there are differences between the two agencies.

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

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

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

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

OPTIONAL VENUE

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

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

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

¹¹ 28 U.S.C. 2322, 2323, 2344.

¹² "Under existing statutes, some independent regulatory agencies have been granted limited litigation authority. For example, the SEC and the FCC, in addition to possessing subpoena enforcement power, are empowered to bring an action in any federal district court to enjoin practices in violation of its governing statutes or any of its rules or regulation, 15 U.S.C. 77t(b), 79r; 16 U.S.C. 825m, 825f(c) * * *

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

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

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

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

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

In turn, I think we who are identified with the administrative agencies would better be able to perform our tasks, be more effective in our responses to the Nation's needs if we had the benefit of the reactions of the several Courts of Appeals rather than if we were accountable, for all practical purposes, to merely the United States Court of Appeals for the District of Columbia Circuit.

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

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

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

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

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

TESTIMONY OF HON. GEORGE M. STAFFORD, CHAIRMAN, INTER-STATE COMMERCE COMMISSION, ACCOMPANIED BY FRITZ R. KAHN, GENERAL COUNSEL

Mr. STAFFORD. Thank you, Mr. Chairman. I have with me at the desk my General Counsel, Mr. Fritz R. Kahn, and since you have indicated you would like to make this as short as possible, I will not read the statement.

We have been supporting the idea since 1963 that there needs to be a change in the method of judicial review, and we still have that position. But we do feel that the bill, as it passed the Senate, has two features in it that we feel require amendments. We were, of course, happy to hear Judge Phillips in his comments or views as he expressed them here. We recognize that the local bar in the Washington area is very desirous of having optional venue here. I suppose if I were a lawyer, and I am not—that's the reason I carry my general counsel with me everywhere I go—that if I were a lawyer and lived here I would want to have it all here, and I cannot blame them for that. But we feel it is much more advantageous to have these cases heard in the areas in which the cases came from. Moreover, we have some question about whether the Justice Department would take a position that would be beneficial to or support our position, the position that the Commission is taking.

We have had instances of this, and, while one official of the Justice Department indicated there would be no concern about this, another official of the Justice Department in a recent speech in Hawaii to the bar indicated the possibility of a different point of view.

So I would be happy to have you direct your questions to me.

However, my counsel will probably reply to most of the legal questions.

Mr. CONYERS. Well, just essentially, do you see any serious harm resulting if this alternative venue was opened up so that the district courts would be able to hear cases here in Washington?

Mr. STAFFORD. Fritz?

Mr. KAHN. Chairman Conyers, in the experience of the other agencies subject to Hobbs Act review, and our statement refers to the Federal Maritime Commission, the Federal Communications Commission and the Atomic Energy Commission, establishes beyond a doubt that with optional venue, the bar in the rest of the country would not participate significantly in the administrative practice of law. The practice would be concentrated in the District of Columbia.

The figures we show in this statement establish beyond a doubt that about 75 percent of all review cases arising out of administrative decisions would be brought in the District of Columbia. We believe that is a very unhealthy development. We think a proportionate share of the cases should be brought in Cincinnati, should be heard by Judge Phillips and the other members of the sixth circuit, and that simply would not be the case under optional venue.

We think the concerns expressed by some of the local bar, and I noted before the hearing that both the National Industrial Traffic League and the law firm of Donelan, Cleary, and Caldwell, which indeed happen to be one and the same since the law firm of Donelan, Cleary & Caldwell represents the National Industrial Traffic League, we think those concerns that optional venue is required to give the shippers of the country a fair shake, I think we believe that concern is wholly unfounded.

We very definitely believe, Chairman Conyers, that it would be detrimental to the effective administration of justice if there were optional venue in District of Columbia.

Mr. CONYERS. But are there any unhealthy consequences that would follow? I mean, the fact that the petitioner might elect to use

the Washington jurisdiction would not be complained of by you. You yourself are located and based here. I should not be surprised if you were here arguing just the reverse position, your agency would prefer this additional jurisdiction.

Mr. KAHN. Chairman Conyers, you are getting into an area that is very difficult to respond to on the record because we are getting into the decisions of the court. Let me assure you that we have talked many times with the members of the other agencies. We have talked with their general counsels, and the Interstate Commerce Commission which presently does not have review optionally in the District of Columbia, is the envy of every one of the agencies because we do not have to contend consistently, in 75 percent of the cases, with the District of Columbia circuit.

Mr. CONYERS. Well, is it that you do not like the decisions that come out of District of Columbia? Or do they know too much about administrative law?

What is the problem with this jurisdiction as opposed to any other one?

Mr. KAHN. Chairman Conyers, as Judge Phillips would support, I am sure, the other circuits view their role as exposing errors of law, determining whether the agency acted upon substantial evidence, determining whether agency decisions accorded with the law, and I regret that frequently we find, and the other administrative agencies find, the decisions of the U.S. Court of Appeals for the District of Columbia circuit go beyond that, and pretty soon, as the chairman's testimony expresses, the District of Columbia circuit becomes a super agency.

Mr. CONYERS. I recognize the gentleman from Maine, Mr. Cohen.

Mr. COHEN. Just a couple of questions, Mr. Chairman.

I think you indicated that if the alternative venue were allowed to be in District of Columbia appeals, that 75 percent of the administrative cases would thereby be vested, would be vested in the District of Columbia.

Is that correct?

Mr. KAHN. Yes, sir.

Mr. COHEN. Are you saying that 75 percent of all the administrative cases involve ICC?

Mr. KAHN. No, sir. I have said that in the case of the Federal Maritime Commission, for example, 37 out of 52 cases brought between 1965 and 1974 were brought in District of Columbia with respect to the FCC, out of 299 cases between 1970 and 1973, 237 were brought in District of Columbia.

I am saying that with respect to AEC, which is another agency under the Hobbs Act, 13 of 18 lawsuits were brought in District of Columbia.

We ask the question, why were they not brought elsewhere. In the case of the Interstate Commerce Commission, that agency is the largest of the administrative agencies in terms of its caseload. The ICC renders some 14,000 formal decisions each year. We feel very strongly that any aggrieved party has an inherent right of review. We find that 125 such actions are brought annually. This is a far larger number of cases seeking judicial review than affects any of the other agencies, and we are saying that 75 percent of these, some 90 cases,

will be thrust on the District of Columbia circuit if there were optional venue.

Mr. CONYERS. Would the gentleman yield?

Mr. COHEN. Yes.

Mr. CONYERS. Counsel and Chairman Stafford, you might want to consider this, maybe the reason those cases were brought in a larger percentage here is that it was more convenient for the parties that were litigating. It may have been less expensive, and there may have been an easier availability of the records of the agencies. Is that not a possible consideration?

Mr. KAHN. I would respectfully respond, Chairman Conyers, that that is not the case. The burden of producing the record at the plaintiff's request has been upon the agency, and we would have no greater difficulty producing the record in San Francisco as in Washington, D.C. With respect to the convenience of the parties, if we are talking about the complainant, recently we had a case brought by Japan Line in San Francisco. We cannot conceive how it would be any more convenient for Japan Lines to litigate its review in Washington, D.C. than in San Francisco.

It may be convenient to the bar, and that is precisely the point. The bar, the administrative bar would be concentrated in Washington, and while I am a member of that bar, and I look forward to the day, perhaps, when I can be in private practice in Washington, D.C. litigating on the other side of the table, I do not think that is necessarily a healthy development.

Mr. CONYERS. Well, as members of the bar, they advise their client where they might want to locate. I am sure if it is more convenient to hold a case in San Francisco, that the counsel will recommend that, even if the bar might be placed here.

Mr. KAHN. Chairman Conyers, Japan Lines found that they had very competent counsel in San Francisco, and San Francisco counsel did a very effective job in that case. If the bar were concentrated in Washington, D.C., Japan Line really would have no effective alternative but to litigate in District of Columbia.

Mr. CONYERS. Well, I thank the gentleman from Maine for yielding, but I find that your concern with where the bar operates and locates is certainly not, I think, a controlling factor in determining whether or not alternative venue should obtain here. I think we are overly concerned where a bar practice may locate. There is certainly a very logical reason how that could come about, but why would we want to preclude that? It is almost as if you were saying that, because the administrative bar is in fact located in Washington, we do not want to afford them that convenience, and that we should just eliminate the District of Columbia venue as a consideration.

Mr. KAHN. Mr. Chairman, at the present time, the Interstate Commerce Commission's bar is well scattered throughout the country. The complainants are assured of effective representation throughout the country.

I would turn your question around, Chairman Conyers, and ask of you, sir, are there any valid reasons why there should be optional venue in the District of Columbia? I can find none except the convenience of the local bar, and I think that that is an insufficient reason considering all the detriments that would flow from it.

Mr. CONYERS. Well, suppose it was more convenient for the parties. I mean, are there not any litigating parties in Washington.

Mr. KAHN. Those, of course, can bring their suits in the District of Columbia as they always have, and Chairman Stafford's testimony does indeed point out that an appropriate share is the District of Columbia business; 19 out of the 328 suits brought within the past 3 years were brought in the District of Columbia.

Mr. CONYERS. Thank you.

Mr. COHEN. Do you have any fear or opinion that the District of Columbia circuit engages in policymaking and would change decision on these matters?

Mr. KAHN. Yes, sir.

Mr. COHEN. Is that why you would prefer to see it spread to the other circuits?

Mr. KAHN. Yes, sir.

Mr. COHEN. Rather than your concern for the bar?

Mr. KAHN. Yes; part of it, yes, sir.

Mr. COHEN. Would you say that your principal concern is you feel they engage in too much policymaking rather than adhere to the strict limits of review by determining whether or not there is the evidence or the record supported it?

Mr. KAHN. Exactly, and a review of the cases, conversations with the agencies I am sure, sir, would persuade you of that.

Mr. COHEN. And you would prefer to see diversity as far as the places of litigation and also diversity as far as the opinions that might be rendered by the various circuit courts of appeals as opposed to the uniformity which you feel is more policymaking taken in preempting the ICC's jurisdiction?

Mr. KAHN. That is correct, sir.

Mr. COHEN. Thank you.

Mr. CONYERS. The gentleman from Arkansas.

Mr. THORNTON. Thank you, Mr. Chairman.

Turning to the other objection for a moment, are you equally opposed to the language of the bill with regard to responsibility for litigation, and are you not at all persuaded that the Attorney General has expressed a view that the Commission will continue to have the right to handle its own litigation?

Would you please express yourself on that point?

Mr. KAHN. Mr. Congressman, certainly that is a lesser concern. The United States now is named as a statutory party defendant, and we work very closely with the attorneys of the Department of Justice in the defense of Interstate Commerce Commission orders.

We probably would not have raised the point before this committee in the light of the assurances expressed to the Senate committee by the Solicitor General, Mr. Robert Bork, but for the fact that the Assistant Attorney General in charge of the Office of Legal Counsel, perhaps the highest authority, construing statutory provisions, in speaking to the bar in Honolulu, singled out the Interstate Commerce Commission as being the one agency that "has since 1913 represented itself before the Supreme Court."

Only last month, Mr. Congressman, the Interstate Commerce Commission itself argued a case coming to the Supreme Court from Portland, Oreg., a case in which we successfully petitioned the Supreme

Court for plenary review, even though the Solicitor General believed the case was inappropriate for Supreme Court review.

We simply want to have the assurance that the Interstate Commerce Commission, as it does now, has the right independently to present its views to the Supreme Court.

Now, I might note that we have found before the Supreme Court that, where there has been a divergence of views between ourselves and the Solicitor General of the United States, that the Supreme Court has upheld us as many times as it has turned us down.

Mr. THORNTON. Are you convinced that you do have that assurance that you would continue to have some representation rights under the language of the bill?

Mr. KAHN. No, sir. The language in the bill is the Hobbs Act language. Under the Hobbs Act, Assistant Attorney General Dixon said, Supreme Court litigation is concentrated in the Solicitor General. The Solicitor General is the one through whom the Government's litigation is channeled.

Now, in all fairness to Mr. Bork and his predecessors, they frequently, in cases of disagreement with an agency, will extend to the agency the right to petition for a writ of certiorari or the right to file a brief in opposition to a writ of certiorari, but the Interstate Commerce Commission presently does not have to bow to the wishes of the Solicitor General. We have a right independently to seek plenary review by the Supreme Court.

So we still have some doubt. We have the assurance from Mr. Bork given to the Senate, and that certainly is part of the legislative history. But I would note that Mr. Rakestraw's letter to this committee very lightly passes over the very precise question which we pose, and that is, in the absence of the acquiescence of the Solicitor General, does the ICC have the right to have its views presented to the Supreme Court?

Mr. THORNTON. I believe what you are stating—and correct me if I am wrong—is that presently you have certain rights to represent yourself under the law, that under the bill as proposed, those rights would be extinguished, and instead you would have a discretionary grant of authority to do so by the Solicitor General or Attorney General's office which might or might not be withdrawn.

Mr. KAHN. Yes, sir, that is precisely correct.

Mr. THORNTON. I have no further questions.

Mr. CONYERS. The gentleman from New York.

Mr. FISH. Thank you, Mr. Chairman.

At the outset I would like to yield to the gentleman from Maine.

Mr. COHEN. Thank you, Mr. Fish.

Under the existing procedure, the correct route of review is to the Supreme Court from the three judge panel, is that correct?

Mr. KAHN. That is correct. But if I might elaborate on that, Congressman Cohen, the practical matter is that the Supreme Court exercises the appellate jurisdiction as it does the certiorari jurisdiction, and the Commission finds it obtains review by the Supreme Court no more frequently than the other agencies.

Mr. COHEN. How many cases have been reversed by the Supreme Court for decisions in the three judge panel in the District for usurping the jurisdiction of the Commission, in other words, over-

stepping its bounds in the rights of review, by the substantial error tests and so forth? In how many cases, if you can tell me, or if you can furnish me with that information, has the Supreme Court actually overturned decisions of the circuit court of appeals here in Washington for exceeding its bounds?

Mr. KAHN. I would have no occasion to have analyzed the decisions of the other agencies.

Mr. COHEN. No; just for the ICC.

Mr. KAHN. For the ICC we have not had review by the U.S. Court of Appeals for the District of Columbia Circuit because our review is in the U.S. district court, and I am very pleased that our record of review in the U.S. district court has been very good.

Mr. COHEN. So that your fear that there is too much policymaking really obtains to other agencies rather than ICC?

Mr. KAHN. Yes, sir.

Mr. COHEN. You are not familiar with how many times the Supreme Court has overruled that court for having engaged in policymaking?

Mr. KAHN. No, sir.

Mr. COHEN. Thank you. That's all.

Thank you for yielding.

Mr. FISH. Going back to the line of questioning about the representation by the Department of Justice that the gentleman from Arkansas went into, as you know, section 6 of the bill that we are considering would amend 28 U.S.C. 2323, giving the Attorney General responsibility of representing the United States as main party. However, our bill does nothing to change the text of the second and fourth paragraph of that section, as I understand it, which reads:

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

And in the other paragraph, the Attorney General should not dispose of or discontinue such action or proceeding over the objection of such party or intervenor who may prosecute, defend, or continue such action or proceeding unaffected by the action or non-action of the Attorney General therein.

Mr. KAHN. Congressman Fish, if I understand the effect of the bill correctly, what this does is take out of the usual method of review to which we are now subject, the urgent deficiencies review, those cases which do not affect the payment of money. So this language remains only for the cases affecting the payment of money, if I understand the matter correctly. The effect of the bill, sir, is to put us under the Hobbs Act, and the Hobbs Act language which troubles us, sir, is 28 U.S.C. 2348, which says the Attorney General is responsible for and has control of the interests of the Government.

Mr. FISH. Mr. Chairman, would it be appropriate for me to ask Counsel if that conforms with his interpretation?

Mr. HART. As I read the Senate bill and as I read the legislative history and the report of the Senate, I do not think that is a proper reading of the language. As I look at chapter 157, there is no reference made in section 2323 to actions taken pursuant to the chapters which would indicate that this procedure, the rights of the Commission deal only with appeals pursuant to or actions concerning orders for the payment of money and the collection of fines, et cetera, section

2323. I might add that section 2348 also includes language which preserves the ICC's right, it seems to me, to proceed independent of the Department through the district and appellate courts, and section 2350 allows for the filing of certiorari petitions despite what the Solicitor General recommends or does.

Mr. KAHN. I do not want to labor the point, Counsel, but I think the procedures of chapter 157 come into play only by virtue of other judicial review provisions which no longer would obtain under the Hobbs Act.

Mr. HART. If that were the case, then why would this language not be repealed?

Mr. KAHN. The only repealer is with respect to the cases involving review of Interstate Commerce Commission orders other than those involving the payment of money.

The existing procedures would continue for the decisions involving money, reparations orders.

Mr. HART. That is as I understand.

Mr. FISH. If I could continue, Mr. Chairman, as I understand it, at one point because of a letter to Senator Burdick from the Solicitor General, that this met your objection and satisfied it.

Mr. KAHN. Yes, sir.

Mr. FISH. But subsequently, because of a recent speech, your fears have come back to surface. You referred, I believe, to a letter of December 9 from Assistant Attorney General for Legislative Affairs to Chairman Rodino, and I refer you to page 4 of that letter in which I would pick out two sentences in the middle paragraph, the second full paragraph. The first sentence is,

In all other material respects, the existing procedure will continue under this Statute. And the other sentence I refer you to in the middle of the paragraph says the ICC will retain its right to participate independently through all stages of judicial review.

And I wonder, are you familiar with this?

Mr. KAHN. Yes, sir, I read it before the hearing, and it was exactly this that prompted my concern, previously expressed. Assistant Attorney General Rakestraw avoided specifically dealing with whether, as Congressman Thornton pointed out, we would have this opportunity by suffrance of the Solicitor General or as a matter of statutory right.

Mr. FISH. Well, I see your point, that you certainly would feel better if it was a matter of statutory right. We face a practical problem with targeted adjournment of the Congress at the end of next week, in going back to the Senate with a version that is different from the one that passed that body, and I wonder if you care to comment on the feeling that this committee in its report on this bill made it very plain that they wanted you to have the independence.

Mr. KAHN. I think that would be very beneficial, Congressman Fish. The stronger the legislative history showing the Commission is assured of its right to independent action, the better.

Mr. FISH. Thank you very much.

Mr. CONYERS. Does counsel Tim Hart have any questions?

Mr. HART. Just in following up that line of questioning very quickly, Mr. Kahn, what this committee and the subcommittee must be concerned with is the problem of how best to legislative this concern.

Consider that, first of all, under the Hobbs Act presently, and under other provisions of the U.S. Code, this option of alternative venue is afforded to petitioners who appeal orders—the FCC, Department of Agriculture, the Federal Maritime Commission, and the AEC under the Hobbs Act, and under other provisions of the Code, the NLRB, the FCC, and FTC, and the CAB.

Now, is there anything about the practices and procedures of the ICC that would require or justify such a legislative exception?

Mr. KAHN. We believe so for the two reasons that I previously mentioned. One is, the volume of cases is substantially larger than that of the other agencies, with the possible exception of the NLRB, and second, we now find ourselves in the happy state of having an informed bar throughout the country, one that is well familiar with the ICC and the courts, and it would be a pity to lose the benefit of that and encourage the growth of a local bar that would specialize in ICC practice and judicial review.

Mr. HART. Does this situation of an informed bar throughout the country not exist with respect to the other agencies as well?

Mr. KAHN. Yes, now, yes, it is an accomplished fact, and it is too late to turn back the clock. We have a unique opportunity to prevent that from happening.

Mr. HART. Well, why should petitioners before those agencies be accorded the right to file, either in the D.C. Circuit or in one of the other circuits, where petitioners reviewing ICC orders would be foreclosed from having that option?

Mr. KAHN. If you want to encourage forum shopping, right, this is a splendid way of doing it. We think forum shopping is a bad practice.

Mr. HART. I see.

Thank you, Mr. Chairman.

Mr. CONYERS. Well, Mr. Stafford and Mr. Kahn, you have come before yet another body to offer your testimony. We are grateful to you. Most of us have had a chance to examine your comments in the other body at length, and we will add your statements and the reasons that you give for your position for our consideration of the legislation before us to that.

Thank you very, very much for your appearance here this morning.

Mr. STAFFORD. Thank you, Mr. Chairman.

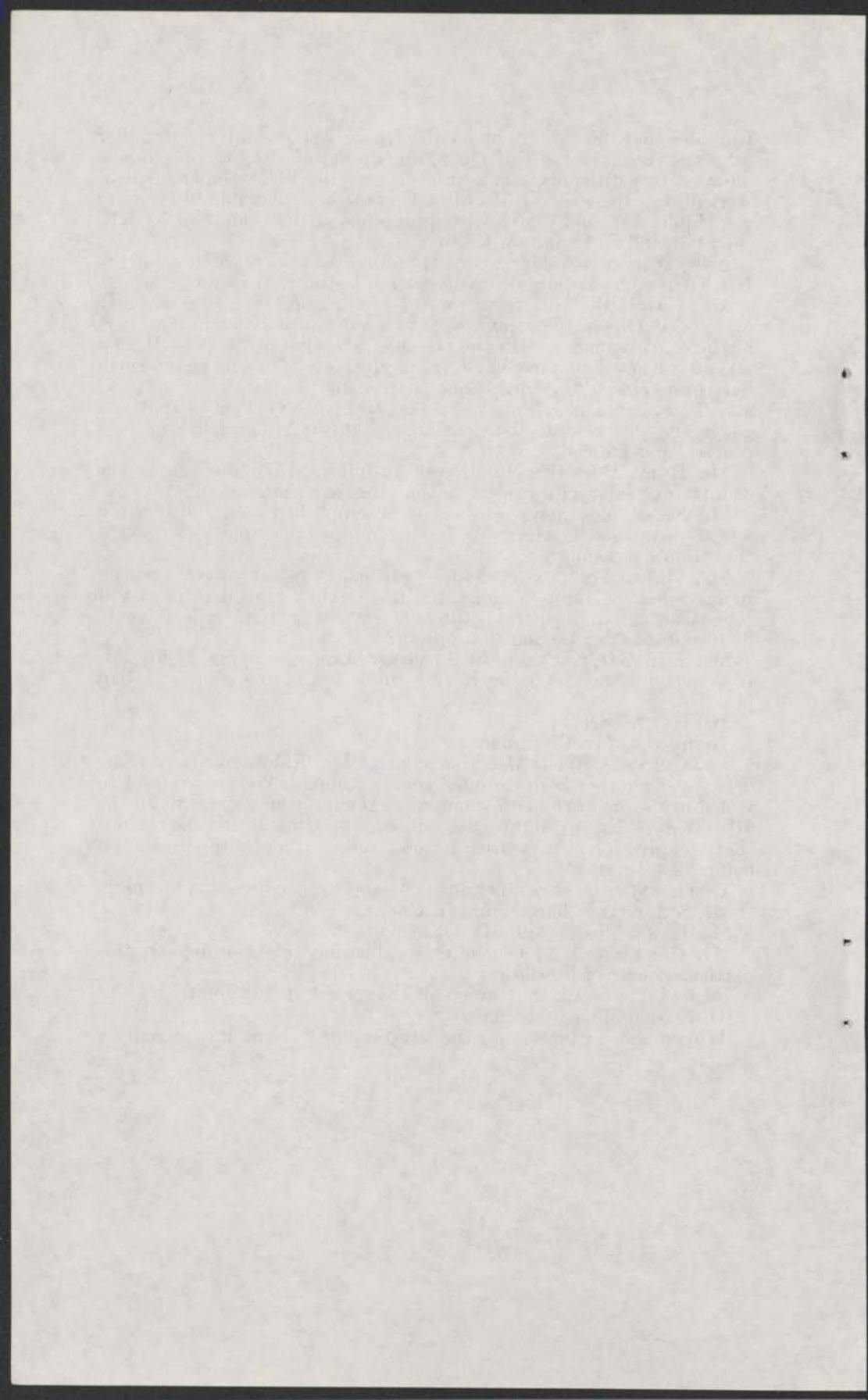
Mr. KAHN. Thank you, Mr. Chairman.

Mr. CONYERS. That concludes the hearing this morning on this particular piece of legislation.

I would like to ask that we go off the record at this point.

[Discussion off the record.]

[Whereupon, at 9:58 a.m., the subcommittee went into executive session.]



APPENDIXES

APPENDIX A.—CORRESPONDENCE

ADMINISTRATIVE OFFICE OF THE U.S. COURTS,
Washington, D.C., December 8, 1974.

MR. TIMOTHY J. HART,
Assistant Counsel, Subcommittee on Crime, House Judiciary Committee, House of Representatives, Washington, D.C.

DEAR MR. HART: I enclose a copy of the statement of the Honorable J. Skelley Wright in his testimony on S. 1876 given on behalf of the Judicial Conference of the United States before the Senate Judiciary Committee. I also enclose an extract of his House testimony on S. 271 taken from the hearings on that bill.

I further enclose a copy of a report of the so-called Freund Committee which, at pages 25-32, outlines some of the difficulties with the three-judge court procedure in general and with the three-judge court procedure in I.C.C. cases in particular at pages 27-28.

Finally, I enclose an article by a former attorney in this office entitled, *Three-Judge Courts: See How They Run*.

I hope these materials will be helpful at least in explaining the serious difficulties that the three-judge court procedure creates both in the district courts and certainly in the Supreme Court which, in addition to its other burdens, considers these cases on direct appeal.

If you have any further questions, please do not hesitate to call on us.

Sincerely,

CARL H. IMLAY, *General Counsel*.

Enclosures.

STATEMENT OF J. SKELLY WRIGHT, JUDGE, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I am Judge J. Skelly Wright and I appear before your Subcommittee today on behalf of the Judicial Conference of the United States to express the views of the Conference with respect to one aspect of S. 1876, namely the provision for three-judge courts contained in the proposed sections 1375 and 1376 which would be added to Title 28 of the United States Code.

While the Judicial Conference of the United States at its October 1971 session took the position that the proposals contained in S. 1876 are on the whole well conceived, workable and based upon acceptable compromise of variant views of the bench and bar, the Conference reiterated its preference for the bills it had approved in its October 1970 session designed to eliminate the requirement of a three-judge district court in cases seeking to restrain enforcement of state or federal statutes for repugnance to the Constitution and to provide for direct appeal to the Supreme Court in certain cases.

The Conference's position in opposition to three-judge courts is now generally embodied in H.R. 3805 of the 92nd Congress which would largely eliminate the use of this special kind of forum.

A. *The Three-Judge Court Procedure Constitutes a Substantial Burden on the Federal Judiciary*

The Judicial Conference has for some time been concerned with the increased judicial burden resulting from the convening of three-judge district courts in injunctive cases alleging unconstitutionality of federal or state statutes. In the five years from fiscal years 1965 through 1969, the number of three-judge district courts convened to hear injunctive cases mounting attacks on state statutes has increased over 100 percent, and the upward trend continues.¹ This burden is an addition to a severe backlog in disposing of cases generally and represents a subtraction from the time judges can devote to their other business.

¹ See compilation attached as "Attachment A."

Before reaching the issue of the continuing need for this special type of panel, I might briefly advert to the special burdens created by three-judge courts. Such a case first involves the time of the district judge in making a threshold determine whether the case is appropriate for a three-judge panel. If he so determines, he must notify the chief judge of the circuit, who must study the pleadings to decide whether the case is indeed one for three judges. If the chief judge of the circuit agrees the case should be heard by three judges he designates two other judges to sit with the first, one of whom must be a judge of the United States Court of Appeals. The hearing before the three judges must be given precedence and assigned for the earliest practicable day. This means that three federal judges must put aside their other judicial work and travel to one place of holding court and, with triple judge power, decide one case. While the statistical numbers of three-judge court proceedings are not highly significant, the time consumed by judges on these cases, both in traveling to the place of hearing and in hearing and deciding these cases, represents a serious diminution of their total time.

After this special three-judge district court has acted, any party may then appeal directly to the Supreme Court of the United States from the decision of the three-judge panel pursuant to 28 U.S.C. § 1253, thereby by-passing the United States Court of Appeals. The Supreme Court thus must dispose of a case, often involving delicate issues of federal-state relationships, on the skeletal record developed in an injunctive suit in the district court, without intermediate consideration by a court of appeals. The burden placed on the Supreme Court of disposing of these appeals, in addition to normal cases heard on the discretionary writ of certiorari, is formidable and has been growing. Professor Wright has provided this Subcommittee with the statistics to support this statement and I shall not repeat them. The time of the Supreme Court is extremely limited, and the direct appeal procedure preempts time which the Court might more adequately utilize on more compelling questions where a conflict of decisions in the courts below has developed. In short, original appellate review should be in the United States Courts of Appeals, as is normally the situation.

Despite this procedure for direct appeal to the Supreme Court, the burden of three-judge courts is not completely removed from the Courts of Appeals which are called upon to resolve the jurisdictional issue on appeal: (1) when one judge has failed to convene a three-judge court and either denies relief or sets the case down for further proceedings, and (2) where a three-judge court itself determines that the case is not properly before it. Since the case is not presented to the Court of Appeals on its merits, the relief granted can only be interlocutory. Thus all three tiers of federal courts are involved in this disruptive procedure.

B. The Original Reasons for the Three-Judge Court Have Disappeared

The original rationale for the three-judge court has long been obsolete and, as one commentator pointed out, began to disappear soon after the original legislation was enacted in 1910.² The requirements of a three-judge court were enacted by the Congress in Section 17 of the Act of June 18, 1910, 36 Stat. 539, 557. This legislation was responsive to the situation created by *Ex parte Young*, 209 U.S. 123 (1908), in the wake of which many railroads and utilities attacked state rate-fixing and tax laws, creating a deluge of applications for injunctive relief and races to the courthouse doors. In many cases injunctions were issued *ex parte* by federal judges having the effect of suspending enforcement of such state legislation. The impetus for the legislation was quite clear: the states were resentful of the authority of a single federal judge to nullify their regulatory policies. Under the procedures then in force the judges could issue temporary restraining orders *ex parte* and issue interlocutory injunctions on the basis of affidavits alone, and there were no limits on the judge's discretion to continue interlocutory injunctions and temporary restraining orders indefinitely. Section 17 of the 1910 legislation was intended to take this kind of authority away from a single judge and place injunctive suits before a three-judge panel. 45 Cong. Rec. 7253-7257.

The original problems were largely obviated two years after passage of the 1910 legislation when the federal equity rules were revised, extending to all injunctive cases much the same protective procedures which the 1910 Act had provided for the three-judge court proceeding (e.g., continuance of a 10-day restraining order was prohibited under any circumstances). Later two statutes further restraining the powers of federal courts to enjoin state action were enacted. In the Johnson Act of 1934, 48 Stat. 775 (now 28 U.S.C. § 1342), Congress took away injunctive power with respect to state public utility rate orders. In the Tax In-

² Ammerman, *Three Judge Courts: See How They Run*, 52 F.R.D. 293, 297 (1971).

junction Act of 1937, 50 Stat. 738 (now 28 U.S.C. § 1341), Congress restricted federal injunctions with respect to state taxes.

Although by the Judiciary Act of 1937, 50 Stat. 732, Congress extended the three-judge requirement to injunctive suits restraining federal laws, it did so in a period when numerous cases testing the constitutionality of the economic programs of the Depression years were of prime concern. This, however, was a transitory problem which was largely resolved by the Supreme Court's decisions defining the regulatory powers of the federal Congress. Also, a year after the 1937 Act was passed the Supreme Court decided that a single district judge has not only the power but also the duty to deny a statutory three-judge court when he is convinced that a "substantial constitutional question" is not presented. *California Water Service Co. v. City of Redding*, 304 U.S. 252. This spawned a new kind of litigation since parties could further litigate the jurisdictional issue. The powers of a single judge to dispose of a petition on jurisdictional grounds are to this day obscure, despite a 1942 Act (now codified as 28 U.S.C. § 2284(5)) which presumably would have denied him power to either dismiss or dispose of the case on the merits. In a 1962 case the Supreme Court held that that statute does not apply "when the constitutional issue presented is essentially fictitious."³

The proper channels for appealing the jurisdictional issue are likewise confusing. To quote Professor Wright on the subject:

"The rules on appellate review of whether a three-judge court was needed 'are so complex as to be virtually beyond belief.' The court of appeals may review if the single judge regards the federal claim as so insubstantial as to require dismissal for want of jurisdiction or if the single judge correctly concludes that three judges are not required and decides the merits of the case. If the single judge incorrectly believes that three judges are not required and proceeds to the merits, the remedy once was mandamus from the Supreme Court, but now appears to be an appeal to the court of appeals. If the court of appeals should fail to see that the case was one for three judges, and reviews on the merits, its decision is void.

"If a three-judge court is convened, but it determines that three judges were not necessary, appeal is to the court of appeals. If the special court is correctly convened and gives judgment on the merits, appeal lies directly to the Supreme Court. If judgment is given on the merits by a three-judge court but such a court was not required, appeal should be to the court of appeals rather than to the Supreme Court. * * *"⁴

In summary, the original problems for which the three-judge court was originally conceived have been largely eliminated by reforms in equity procedures now found in the Federal Rules of Civil Procedure. The three-judge court procedure generates rather than lessens litigation. Moreover, the ideal of providing an immediate forum for resolution of constitutional attacks on state and federal laws has been lost in the mazes of a procedural jungle.

C. Decisional Law Has Provided Its Own Safeguards Against Precipitous Injunctive Action by Federal Judges

In its recent opinions the Supreme Court has provided such restrictions on federal injunctions as to further obviate the need for three-judge courts.

In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court held that injunctive relief against a state criminal prosecution is not available except in exceptional circumstances, as where the prosecution is in the nature of a bad faith harassment of the defendant in the exercise of his federal rights. The Court has also required, as a general proposition, abstention from intervention by injunction or declaratory relief in ongoing state prosecutions,⁵ and in situations were the allegedly unconstitutional law has not yet been sought to be enforced against the petitioners and no threat of irreparable injury is demonstrated.⁶ The Supreme Court has in other recent decisions mandated abstention from intervention in state criminal processes which have not yet been resolved at the state level⁷ or in respect to issues which may be resolved on a different basis in pending state litigation.⁸ This pattern of decisions clearly precludes the sort of precipitous

³ *Bailey v. Patterson*, 369 U.S. 31, 33.

⁴ C. Wright, *Federal Courts* § 50 at p. 193 (2d ed. 1970). See also 9 J. Moore, *Federal Practice* ¶ 110.03[3] (2d ed. 1970).

⁵ *Samuels v. Mackell*, 401 U.S. 66 (1971).

⁶ *Moyle v. Landry*, 401 U.S. 77 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971).

⁷ *Peres v. Ledesma*, 401 U.S. 82 (1971).

⁸ *Byrne v. Karalecis*, 401 U.S. 216 (1971).

intrusion into state legal processes by a single federal judge which the original three-judge court act sought to control.

Thus the rationale which gave life to the three-judge court in 1910 has all but disappeared. We submit that as a general proposition the original reasons for the three-judge court have been largely dissipated by limiting statutes and decisions controlling the jurisdiction of the federal courts collaterally to review state laws, that the procedure compounds and confuses rather than simplifies orderly constitutional decision, and that the burden placed on panels of judges to handle these cases on an expedited basis is onerous in view of the mounting backlog of cases of no lesser order of priority. We therefore suggest deletion of the three-judge court provisions of S. 1876 as proposed in the Burdick amendment. We strongly oppose, however, incorporation of the Burdick amendment into S. 1876. S. 1876 is very controversial legislation. It will be long debated and subjected to innumerable amendments. It might not pass in any form in our time, whereas the need to relieve the federal courts of the unnecessary burden of three-judge district courts is urgent. The legislation to meet this need is uncontroversial. We ask, therefore, that legislative action be taken now eliminating the three-judge district court requirements of 28 U.S.C. §§ 2281 and 2282.

Thank you for this opportunity to express the views of the Judicial Conference here today.

COMPILATION A

TABLE 40.—*Three-judge court hearings by nature of suit, fiscal years 1963-71*

Fiscal year	Total	Review of ICC orders	Suits involving State or local laws or regulations		
			Civil rights	Reappor- tionment	Other actions
1963	129	67	19	16	27
1964	119	50	21	18	30
1965	147	60	35	17	35
1966	162	72	40	28	22
1967	171	64	55	10	42
1968	179	51	55	6	67
1969	215	64	81	1	69
1970	291	42	162	8	79
1971	318	41	176	2	99
Percent change: 1971 over 1970	9.3	-2.4	8.6		25.3

Note: Percent not computed where base is 25 or less.

THREE-JUDGE COURT AND SIX-PERSON CIVIL JURY

HEARING BEFORE THE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

SECOND SESSION

ON

S. 271

TO IMPROVE JUDICIAL MACHINERY BY AMENDING THE
REQUIREMENT FOR A THREE-JUDGE COURT IN CERTAIN
CASES, AND FOR OTHER PURPOSES

AND

H.R. 8285

TO AMEND TITLE 28, UNITED STATES CODE, TO PROVIDE IN
CIVIL CASES FOR JURIES OF SIX PERSONS, AND FOR
OTHER PURPOSES

OCTOBER 10, 1973 AND JANUARY 24, 1974

SERIAL NO. 27



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TESTIMONY OF HON. J. SKELLY WRIGHT, CHAIRMAN, JUDICIAL
CONFERENCE COMMITTEE ON FEDERAL JURISDICTION

Judge WRIGHT. Mr. Chairman, gentlemen, I am grateful for the opportunity to appear before you. I appear as a representative of the Judicial Conference of the United States, to express the Conference's views with respect to S. 271 which would repeal sections 2281 and 2282 of title 28 of the Judicial Code.

These sections require the convening of three-judge district courts wherever an injunction is sought restraining the enforcement, operation, or execution of a State or Federal statute on the ground of repugnance to the Constitution of the United States. S. 271 was originally drafted and sponsored by the Judicial Conference. In its present form, it is the same as the original draft of the Judicial Conference except that a three-judge district court for congressional and state-wide reapportionment is provided in cases where injunctions are sought.

This legislation concerns, as I have stated, only sections 2281 and 2282. It does not concern the three-judge district court provisions in the Civil Rights Act of 1964 or the Voting Rights Act of 1965, nor does it relate to the three-judge district court required for review of ICC orders.

Nor does it relate to the three-judge district court required under the Expediting Act in antitrust cases. Those later two statutes, the ICC review statute and the Expediting Act provisions relating to three-judge district courts, are the subject of legislation pending in both Houses of Congress, and both Houses are moving in the direction of eliminating the three-judge district court both for ICC review and for review of antitrust actions under the Expediting Act.

So, we speak this morning only of those limited cases which require three judges because an injunction is sought against the operation of a State or Federal statute because of repugnance to the Constitution.

The Judicial Conference has been concerned for many years about the burden of these cases. In the last 10 years, the number of three-judge district court cases under these two statutes has almost tripled. The number of cases, however, does not indicate the actual extent of the burden caused by these cases.

Before a three-judge district court case can even begin, a single judge must recognize it as a three-judge district court case. He must ask the chief judge of the circuit for the convening of a three-judge court. He must certify the necessity. The chief judge of the circuit then studies the certification. If he feels it wisely made, he appoints two additional judges, one of whom must be a court of appeals judge. Then the three judges must get together in some way. And in many areas of the country, these three judges will live in different parts of the circuit so that the first burden encountered in the convening of three-judge courts is the actual travel of the judges to the place where the trial will be held.

Then, of course, there is the problem of trying a case with three judges. There is the problem of ruling on evidence as the swift-moving events of the trial take place. Three judges cannot act with the same incisiveness as the single judge in making trial rulings as necessary during the trial of a fast-moving case.

In addition to the drain on judicial resources at the district and circuit levels caused by three-judge district courts, the drain on the Supreme Court's limited resources is even greater because the appeals in these cases go directly to the Supreme Court rather than to the court of appeals. And as we all know the number of cases reaching the Supreme Court is increasing each year. These cases are particularly difficult for the Supreme Court because they do not reach the court by application for writ of certiorari. They reach the Supreme Court by direct appeal.

And despite the fact that there is this direct appeal to the Supreme Court, very often courts of appeals are brought into the picture to determine whether or not the single judge has improperly failed to call a court or whether or not a court has been improperly impaneled with three judges. After the court of appeals makes its decision, the case goes back down to the district court where the decision of the court of appeals is implemented and the case starts all over again.

Now, the Judicial Conference would not have taken the position that it has with reference to three-judge courts if there remained any longer the reasons why three-judge district courts were originally created. Three-judge district courts came into being in 1910 as a result of legislation passed at that time. This legislation was a response to rulings by the Supreme Court of the United States which set at naught State legislation that sought to control in the public interest the burgeoning industrial revolution of the time. In a series of decisions led by *Ex parte Young*, the States felt that their processes were being paralyzed by the Supreme Court and so the Congress passed this three-judge legislation to protect the States against acts of one judge who without a hearing of any kind would grant preliminary injunctions restraining States from enforcing their own laws.

Now, the reason for this legislation disappeared almost as soon as it was passed. The equity rules were passed immediately, changing the procedures under which the injunctions were issued. The Congress itself reacted and passed the Johnson Act which prohibited Federal courts from restraining rate fixing by State commissions and the Tax Reform Act which prohibited Federal courts from enjoining State collection of taxes. So at least in these two important areas this three-judge court provision no longer was necessary.

The equity rules have now been written into the Federal Rules of Civil Procedures. In addition, there have been cases decided by the Supreme Court, a trilogy of cases known as the *Younger v. Harris* trilogy, which prohibit Federal courts from restraining State courts in the criminal field. No longer can Federal courts enjoin the enforcement of criminal statutes of the States unless there is obvious harassment on the part of the State official charged with the enforcement of the statute.

And so we suggest—and I am passing through quickly because I know you have a long morning—that the rationale that gave life to the three-judge court in 1910 has all but disappeared. We submit that as a general proposition the original reasons for three-judge courts have been largely dissipated by limiting statutes and decisions controlling the jurisdiction of Federal courts collaterally to review State laws and that the procedure, the three-judge district court procedure,

compounds, and confuses rather than simplifies orderly constitutional decisions and that the burden placed on panels of judges to handle these cases on an expedited basis is onerous in view of the mounting backlog of cases of no lesser order of priority.

That concludes my statement, gentlemen. If you have any questions I will be happy to answer.

Mr. KASTENMEIER. Thank you very much, Judge Wright, for a brief but fine statement, certainly to the point. And without objection, sir, your statement as submitted will be placed in the record in its entirety.

The prepared statement of Hon. J. Skelly Wright follows:

My name is J. Skelly Wright, and I appear before your Subcommittee today on behalf of the Judicial Conference of the United States to express the views of the Conference with respect to S. 271, which would repeal 28 U.S.C. §§ 2281 and 2282 of the United States Code. Those sections require the convening of a three-judge district court in cases where an injunction is sought restraining the enforcement, operation or execution of any state or federal statute for repugnance to the Constitution of the United States.

A. THE THREE-JUDGE COURT PROCEDURE CONSTITUTES A SUBSTANTIAL BURDEN ON THE FEDERAL JUDICIARY

The Judicial Conference has for some time been concerned with the increased judicial burden resulting from the convening of three-judge district courts in injunctive cases alleging unconstitutionality of federal or state statutes. In the five years from fiscal years 1965 through 1969, the number of three-judge district courts convened to hear injunctive cases mounting attacks on state statutes has increased over 100 per cent, and the upward trend continues.¹ This burden is an addition to a severe backlog in disposing of cases generally and represents a subtraction from the time judges can devote to their other business.

Before reaching the issue of the continuing need for this special type of panel, I might briefly advert to the special burdens created by three-judge courts. Such a case first involves the time of the district judge in making a threshold determination whether the case is appropriate for a three-judge panel. If he so determines, he must notify the chief judge of the circuit, who must study the pleadings to decide whether the case is indeed one for three judges. If the chief judge of the circuit agrees the case should be heard by three judges, he designates two other judges to sit with the first, one of whom must be a judge of the United States Court of Appeals. The hearing before the three judges must be given precedence and assigned for the earliest practicable day. This means that three federal judges must put aside their other judicial work and travel to one place of holding court and, with triple judge power, decide one case. While the statistical members of three-judge court proceedings are not highly significant, the time consumed by judges on these cases, both in traveling to the place of hearing and in hearing and deciding these cases, represents a serious diminution of their total time.

After this special three-judge district court has acted, any party may then appeal directly to the Supreme Court of the United States from the decision of the three-judge panel pursuant to 28 U.S.C. § 1253, thereby bypassing the United States Court of Appeals. The Supreme Court must thus dispose of a case, often involving delicate issues of federal-state relationships, on the skeletal record developed in an injunctive suit in the district court, without intermediate consideration by a court of appeals. The burden placed on the Supreme Court of disposing of these appeals, in addition to normal cases heard on the discretionary writ of certiorari, is formidable and has been growing. The time of the Supreme Court is extremely limited, and the direct appeal procedure preempts time which the Court might more profitably utilize on more compelling questions where a conflict of decisions in the courts below has developed. In short, original appellate review should be in the United States Courts of Appeals, as is normally the situation.

¹ See compilation attached as "Attachment A."

Despite this pressure for direct appeal to the Supreme Court, the burden of three-judge courts is not completely removed from the Courts of Appeals which are called upon to resolve the jurisdictional issue on appeal: (1) when one judge has failed to convene a three-judge court and either denies relief or sets the case down for further proceedings, and (2) where a three-judge court itself determines that the case is not properly before it. Since the case is not presented to the Court of Appeals on its merits, the relief granted can only be interlocutory. Thus all three tiers of federal courts are involved in this disruptive procedure.

B. THE ORIGINAL REASONS FOR THE THREE-JUDGE COURT HAVE DISAPPEARED

The original rationale for the three-judge court has long been obsolete and, as one commentator pointed out, began to disappear soon after the original legislation was enacted in 1910.² The requirements of a three-judge court were enacted by the Congress in Section 17 of the Act of June 18, 1910, 36 Stat. 539, 557. This legislation was responsive to the situation created by *Ex parte Young*, 209 U.S. 123 (1908), in the wake of which many railroads and utilities attacked state rate-fixing and tax laws, creating a deluge of applications for injunctive relief and races to the courthouse doors. In many cases injunctions were issued *ex parte* by federal judges having the effect of suspending enforcement of such state legislation. The impetus for the legislation was quite clear: the states were resentful of the authority of a single federal judge to nullify their regulatory policies. Under the procedures then in force the judges could issue temporary restraining orders *ex parte* and issue interlocutory injunctions on the basis of affidavits alone, and there were no limits in the judge's discretion to continue interlocutory injunctions and temporary restraining orders indefinitely. Section 17 of the 1910 legislation was intended to take this kind of authority away from a single judge and place injunctive suits before a three-judge panel. 45 Cong. Rec. 7253-7257.

The original problems were largely obviated two years after enactment of the 1910 legislation when the federal equity rules were revised, extending to all injunctive cases much the same protective procedures which the 1910 Act had provided for the three-judge court proceeding (*e.g.*, continuance of a 10-day restraining order was prohibited under any circumstances). Later two statutes further restraining the powers of federal courts to enjoin state action were enacted. In the Johnson Act of 1934, 48 Stat. 775 (now 28 U.S.C. § 1342), Congress restricted federal injunctions with respect to state taxes.

Although by the Judiciary Act of 1937, 50 Stat. 732, Congress extended the three-judge requirement to injunctive suits restraining federal laws, it did so in a period when numerous cases testing the constitutionality of the economic programs of the Depression years were of prime concern. This, however, was a transitory problem which was largely resolved by the Supreme Court's decisions defining the regulatory powers of the federal Congress. Also, a year after the 1937 Act was passed the Supreme Court decided that a single district judge has not only the power but also the duty to deny a statutory three-judge court when he is convinced that a "substantial constitutional question" is not presented. *California Water Service Co. v. City of Redding*, 304 U.S. 252 (1938). This spawned a new kind of litigation since parties could further litigate the jurisdictional issue. The powers of a single judge to dispose of a petition on jurisdictional grounds are to this day obscure, despite a 1942 Act (now codified as 28 U.S.C. § 2284(5)) which presumably would have denied him power to either dismiss or dispose of the case on the merits. In a 1962 case the Supreme Court held that that statute does not apply "when the constitutional issue presented is essentially fictitious."³

The proper channels for appealing the jurisdictional issue are likewise confusing. To quote Professor Wright on the subject:

"The rules on appellate review of whether a three-judge court was needed are so complex as to be virtually beyond belief. The court of appeals may review if the single judge regards the federal claim as so insubstantial as to require dismissal for want of jurisdiction or if the single judge correctly concludes that three judges are not required and decides the merits of the case. If the single

² Ammerman, *Three-Judge Courts: See How They Run*, 52 F.R.D. 293, 297 (1971).

³ *Railay v. Patterson*, 369 U.S. 31, 33 (1962).

judge incorrectly believes that three judges are not required and proceeds to the merits, the remedy once was mandamus from the Supreme Court, but now appears to be an appeal to the court of appeals. If the court of appeals should fail to see that the case was one for three judges, and reviews on the merits, its decision is void.

"If a three-judge court is convened, but it determines that three judges were not necessary, appeal is to the court of appeals. If the special court is correctly convened and gives judgment on the merits, appeal lies directly to the Supreme Court. If judgment is given on the merits by a three-judge court but such a court was not required, appeal should be to the court of appeals rather than to the Supreme Court. * * *"

In summary, the original problems for which the three-judge court was originally conceived have been largely eliminated by reforms in equity procedures now found in the Federal Rules of Civil Procedure. The three-judge court procedure generates rather than lessens litigation. Moreover, the ideal of providing an immediate forum for resolution of constitutional attacks on state and federal laws has been lost in the maze of a procedural jungle.

C. DECISIONAL LAW HAS PROVIDED ITS OWN SAFEGUARDS AGAINST PRECIPITOUS INJUNCTIVE ACTION BY FEDERAL JUDGES

In its recent opinions the Supreme Court has provided such restrictions on federal injunctions as to further obviate the need for three-judge courts. In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court held that injunctive relief against a state criminal prosecution is not available except in exceptional circumstances, as where the prosecution is in the nature of a bad faith harassment of the defendant in the exercise of his federal rights.

The Court has also required, as a general proposition, abstention from intervention by injunction or declaratory relief in ongoing state prosecutions,⁵ and in situations where the allegedly unconstitutional law has not yet been sought to be enforced against the petitioners and no threat of irreparable injury is demonstrated.⁶ The Supreme Court has in other recent decisions mandated abstention from intervention in state criminal processes which have not yet been resolved at the state level⁷ or with respect to issues which may be resolved on a different basis in pending state litigation.⁸ This pattern of decisions clearly precludes the sort of precipitous intrusion into state legal processes by a single federal judge which the original three-judge court act sought to control.

Thus the rationale which gave life to the three-judge court in 1910 has all but disappeared. We submit that as a general proposition the original reasons for the three-judge court have been largely dissipated by limiting statutes and decisions controlling the jurisdiction of the federal courts collaterally to review state laws, that the procedure compounds and confuses rather than simplifies orderly constitutional decision, and that the burden placed on panels of judges to handle these cases on an expedited basis is onerous in view of the mounting backlog of cases of no lesser order of priority.

Thank you for this opportunity to express the views of the Judicial Conference here today.

Mr. KASTENMEIER. For the benefit of the committee, Judge Wright, and for the record, would you tell us something about the Judicial Conference and its composition?

Judge WRIGHT. The Judicial Conference was created by an act of Congress. It is composed of the chief judge of each of the circuits, each of the 11 circuits, and one district judge from each circuit elected by the judges of the circuit so there are 22 members of the Judicial Conference, chaired by the Chief Justice of the United States. And the Judicial Conference functions through committees. There is a Com-

⁵ C. Wright, *Federal Courts* § 50 at p. 193 (2d ed. 1970). See also J. Moore, *Federal Practice* § 110.03[3] (2d ed. 1970).

⁶ *Samuels v. Mackell*, 401 U.S. 66 (1971).

⁷ *Boyle v. Landry*, 401 U.S. 77 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971).

⁸ *Perez v. Ledesma*, 401 U.S. 82 (1971).

⁹ *Byrne v. Karatezis*, 401 U.S. 216 (1971).

COMPILATION A.—THREE JUDGE COURT HEARINGS BY NATURE OF SUIT, FISCAL YEARS 1963-73

Fiscal year	Total	Review of ICC orders	Civil rights	Suits involving State or local laws or regulations	
				Reappor- tionment	Other actions
1963.....	129	67	19	16	27
1964.....	119	50	21	18	30
1965.....	147	60	35	17	35
1966.....	162	72	40	28	22
1967.....	171	64	55	10	42
1968.....	179	51	55	6	67
1969.....	215	64	81	1	69
1970.....	291	42	162	8	79
1971.....	318	41	176	2	99
1972.....	310	52	166	32	60
1973.....	320	52	183	7	78
Percent change: 1973 over 1972.....	3.2	10.2	-78.1	30.0

Note: Percent not computed where base is 25 or less.

mittee on the Criminal Law, there is a Committee on Judicial Administration, and there is a Subcommittee on Jurisdiction of the Court Administration Committee of which I happen to be chairman. It is this subcommittee that drafted the legislation. We sponsored it. The Judicial Conference now is sponsoring it. We have receded from the provision for an absolute repeal of 2281 and 2282 insofar as reapportionment cases are concerned, where those reapportionment cases involve congressional redistricting or statewide reapportionment. That change was added in the Senate Subcommittee on Improvements in Judicial Machinery and the Judicial Conference has now approved the legislation in its present form.

Mr. KASTENMEIER. So, we can note that you have been elected among your peers, I take it to this post.

You testified in the Senate on behalf of a similar measure; did you not?

Judge WRIGHT. Yes, sir.

Mr. KASTENMEIER. Or actually the same one?

Judge WRIGHT. The same one.

Mr. KASTENMEIER. In essence, as I understand it, presently there are two bills pending, H.R. 785 which would repeal the existing requirement that orders of the ICC would be subject to three-judge court proceedings and also S. 782 which would remove cases under the Expediting Act from three-judge court requirements. I assume the Judicial Conference supports both of those measures?

Judge WRIGHT. The Judicial Conference has supported both of those measures in the past.

Now, the ICC legislation has been the subject of much discussion between the Department of Justice and the ICC, the Commission itself.

And I am not familiar with the bill in its present form because the controversy there seems to be as to who will be the named party in review whether it be the United States or the Commission. What turns on that is who represents whom in the court of appeals, whether it be the Commission lawyers or the Department of Justice lawyers. Now, that is what held the bill up for several years and I understand that that problem has been resolved.

So the Judicial Conference has in the past approved all versions of the ICC review bills which eliminate three-judge district courts.

Mr. KASTENMEIER. Do I understand that the Judicial Conference does not object to continuing the three judge court requirements that come up under the Voting Rights Act of 1965 and the Civil Rights Act of 1964?

Judge WRIGHT. That matter has not come before the Judicial Conference. The number of cases generated from those statutes is miniscule and it is a matter of no great concern.

Mr. KASTENMEIER. But I would assume on principle the Judicial Conference is for the total elimination of three-judge courts except when you mention the reapportionment or redistricting cases? And does the Conference make a distinction in these two classes of cases?

Judge WRIGHT. The Conference has not been called upon to consider any proposed changes in the three-judge district court provisions in the Civil Rights Act of 1964 or the Voting Rights Act of 1965. And consequently the Conference has taken no position with reference to any proposed changes. I know of no such proposals and consequently I am not able to speak for the Judicial Conference with reference to that matter.

Mr. KASTENMEIER. Does the Judicial Conference object to the three-judge courts as a matter of principle or does it specifically address itself only to three-judge courts under certain statutory requirements?

Judge WRIGHT. Well, I think the Judicial Conference would have to study any proposal, for example, for changing the three-judge provisions of the 1964 Civil Rights Act. A case might be of such concern and importance that it should be treated in the first instance by a three-judge district court. For example, under the 1964 Civil Rights Act only the Attorney General can ask for a three-judge district court and that legislation provides that a three-judge district court shall be convened when the Attorney General asks for it in cases where he finds a pattern of discrimination in employment, et cetera, and consequently the Congress thought that this was an area of such importance that in the first instance a three-judge district court ought to consider it with the direct appeal to the Supreme Court, which would expedite the conclusion of the litigation. Now, it is conceivable that a three-judge district court would still be appropriate in those kinds of cases, but I am not in a position to speak for the Judicial Conference in connection with this particular subject.

Mr. KASTENMEIER. Precisely, what action did the Judicial Conference take in connection with three-judge courts or in connection with repeal of 28 United States Code sections 2281 and 2282?

Judge WRIGHT. Precisely the Committee on Court Administration drafted legislation which would repeal 2281 and 2282. That legislation was approved by the Judicial Conference and copies of the proposal were sent to the Judiciary Committee of the House and the Judiciary Committee of the Senate.

This was several years ago, and it has been the subject of legislative consideration since that time.

Mr. KASTENMEIER. To put your position into a rather different context then, is it your position or the position of the Conference that these provisions are now a burden as far as continuing the three-judge

district courts is concerned but that certain others including the Voting Rights Act of 1965 and the Civil Rights Act of 1964 and reapportionment or redistricting cases might not be a burden?

Judge WRIGHT. That is correct. The Conference addressed itself to the burden, exactly. The Conference does not want to challenge the wisdom of the Congress of the United States in deciding who and by how many judges cases should be heard.

The Conference does want to call to the attention of the Congress the burden that results from multiplying the judge power required in particular cases and the Conference's view was and is that under 2281 and 2282 the burden is very great.

Over 95 to 97 percent of the three-judge cases, with the exception of ICC cases, come from 2281 and 2282 and the Judicial Conference was therefore moved on its own initiative to draft legislation to have 2281 and 2282 repealed.

Mr. KASTENMEIER. I understand. And as a matter of fact it does not speak affirmatively of the retention of other three-judge courts other than 2281 and 2282?

It is merely silent as to whether those courts should continue, if as a matter of congressional policy as to whether those might still be necessary, is that correct?

Judge WRIGHT. That would be accurate, Mr. Chairman.

Mr. KASTENMEIER. Do any statistics exist which might be useful for us to justify to our colleagues in terms of judge man-hours or cost in dollars, the saving of which would justify affirmative action on this bill?

Judge WRIGHT. We have made no studies as far as I know, time studies with reference to three-judge district court cases. All we have with reference to them is our experience and the bare statistics as to the number and the increasing numbers. And as I indicated the number has trebled in the last 10 years. As far as the reapportionment cases are concerned, they are not a problem. There were only seven in the last fiscal year, 1973, and only one or two in fiscal 1971.

Mr. KASTENMEIER. Thus far, Judge Wright, I am not aware of any and I would ask you do you know of any cogent argument that could be made for the retention of three-judge courts under section 2281 or 2282 by potential litigants or others? Are you aware of any argument that could be made for retention,

Judge WRIGHT. I would think that if the same conditions which caused the passage of the legislation in 1910 came to pass again, there would be a basis for considering the legislation. You remember that legislation related only to attacks on State laws. In 1937, 2282 was passed and that involved attacks on Federal laws. There were conditions in 1937 which justified its passage and if those conditions recurred I would think that serious consideration should be given to doing something about them. In other words, where I think the Congress has a right to determine in its own mind whether or not there has been an abusive power on the part of other branches of government, where it has jurisdiction in the area, then it can act to correct what it feels is a vice.

Mr. KASTENMEIER. Thank you, Judge.

I yield to my friend from California, Mr. Danielson.

Mr. DANIELSON. I have no questions, Mr. Chairman. Thank you, Judge Wright.

Judge WRIGHT. Thank you.

Mr. KASTENMEIER. I would like to yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Judge Wright, I wonder if you have any idea what passage of this bill would mean as far as cutting down on appeals, direct appeals to the Supreme Court? I wonder, do you have any idea, or is it possible to project what this would save as far as your caseload is concerned?

Judge WRIGHT. Well, actually the number of cases going to the Supreme Court from three-judge district courts really is only 3 percent of the Supreme Court's calendar, overall calendar. But, the great majority of cases reaching the Supreme Court reached the Supreme Court on an application for a writ of certiorari and those cases as you know do not always result in appeals or hearings before the Supreme Court. As a matter of fact, less than 1 in 10 actually result in any work before the Supreme Court other than the action on the application itself. So, even though the percentage is small, the amount of work required by the Court in these three-judge cases is relatively large because, as I have indicated, these are direct appeals. Again, we have no time study which would indicate just how much of a Justice's time is spent with these cases.

Mr. RAILSBACK. And it would also save some time as far as the courts of appeals are concerned, because they would not have to decide the jurisdictional questions so it really would help to cut the caseload of both the Supreme Court and the court of appeals, is that correct?

Judge WRIGHT. Yes. The jurisdictional aspects of three-judge courts present a real problem.

One judge is asked for three-judge court. The chief judge of the circuit says no and then where do you go from there?

One judge gets his three-judge district court and then they decide that three judges really are not necessary. And then do you go to the Supreme Court or do you go to the court of appeals? It has been very unsatisfactory. Maybe there is a better way to do it but it has not been done properly up to this time.

Mr. RAILSBACK. Let me just ask you one last question. The bill before us does not repeal section 1253 which relates to the direct appeals from decisions of three-judge courts. I will just read it to you.

It says "Expect as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying after notice and hearing an interlocutory or permanent injunction in any civil action, suit or proceeding required by any act of Congress to be heard and determined by a district court of three judges."

We still are leaving intact a three-judge court in certain cases like the reapportionment cases, and also the voting rights cases and civil rights cases. I am just wondering, trying to recall if those cases, the civil rights cases, are those characterized as civil cases where they are seeking injunctive relief?

Judge WRIGHT. Yes they are and you have read the statute right. Direct appeal to the Supreme Court would be preserved in those cases

where three-judge district courts are preserved. But as I have indicated before the number of such cases is very small.

The reapportionment cases were seven last year and the number of the ones under the Civil Rights Act was even fewer, if my recollection is right, as well as the ones under the Voting Rights Act. So those cases really have not presented a problem. The cases that do present the problem, and that is merely because of the numbers, are the cases that arise under 2281 and 2282.

And I might say also that there is no opposition really to this bill as far as we can tell. The subcommittee in the Senate on Improvements in Judicial Machinery sent letters to the Attorney General of every State in the Union and asked for their comments on the bill, because there was some thought that perhaps because three-judge district court legislation had its genesis in protecting the States, there would be some reason why the States might want to retain the legislation; 38 attorneys general did not even answer the request of the subcommittee and of the other 12, 3 were in favor of the legislation, and about half a dozen misconstrued what the legislation was all about and there were 1 or 2 who really were opposed to it.

Mr. RAILSBACK. Then in addition the sponsors of the bill are really providing some additional protection for the States by giving them notice where as now they would not be getting such notice in certain cases?

Judge WRIGHT. Not only notice, but the right to intervene on the part of the Attorney General.

Mr. RAILSBACK. Right. The right to intervene. Thank you.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you very much for coming. Judge Wright. It is very nice to have you here.

Judge WRIGHT. Thank you.

Mr. DRINAN. One question I have about the incidence of civil rights litigation for a three-man district court. In the compilation after your fine statement, I see that civil rights in the last 10 fiscal years, with three-judge Federal courts, has increased from 19 in fiscal years 1963 to 183 in 1973. And it is very interesting to note that between 1969 and 1970 the number of civil rights cases with three-judge courts doubled from 81 to 162. I do not fully understand, therefore, your statement when you say that the incidence of three-judge Federal courts in civil rights cases is miniscule.

Judge WRIGHT. I was referring to the special three-judge district court cases under the Civil Rights Act of 1964, not under 2281 or 2282. I was referring only to those limited civil rights cases, for three-judge district court cases provided for in the Civil Rights Act of 1964 where the attorney general may ask for a three-judge district court in cases where he finds a pattern of discrimination in employment, in schools, or whatever. But that is a very limited, very limited group. There have been some under the Voting Rights Act of 1965 certainly as you know. But under the 1964 act there have not been any or any greater number.

Mr. DRINAN. Judge, would your proposed statute touch that particular area?

Judge WRIGHT. Not at all. Not at all.

Mr. DRINAN. All right. So, these 183 under civil rights would not be touched by this proposal you make?

Judge WRIGHT. Not at all.

Mr. DRINAN. You would be relieved by the ICC orders of 52 each year but then on the others, the 78, would all of them or most of them be taken care of by your proposal?

Judge WRIGHT. The ICC orders are the subject of other legislation which hopefully will pass soon. The other part of the statement is correct.

Mr. DRINAN. Seventy-eight would be eliminated?

Judge WRIGHT. Yes.

Mr. DRINAN. Well, I always find you very persuasive, judge, and I see no difficulty in accepting what you said so eloquently today. Thank you.

Judge WRIGHT. Thank you.

Mr. KASTENMEIER. Just a follow up then on the line of inquiry pursued by Mr. Drinan. In fact, under your present figures, we would be relieving the court, the court system, of providing a three-judge district court in 78 of 320 cases, in somewhat less than 25 percent of the cases, and the burden under present figures would be relieved so we should not misunderstand that this is the lion's share of the cases. It is, in fact, a minority of the cases, a quarter of them perhaps?

Judge WRIGHT. Maybe my mathematics are inaccurate, but this is the lion's share of the cases. The only case, looking at the compilation for 1973, fiscal 1973, the total of the three-judge cases, district court cases, is 320. Only 52 are ICC orders. Those 52 would not be affected by S. 271.

Mr. KASTENMEIER. Right.

Judge WRIGHT. The seven reapportionment would not be affected. But, all of the others, more or less all of the others would be affected, with the possible exception of any voting rights cases under the Voting Rights Act of 1965 that might be included in the other actions.

Mr. KASTENMEIER. I understood you to reply to Mr. Drinan, in reply to Mr. Drinan to say that the civil rights cases numbering 183 would not be affected by this legislation. Did I misunderstand you?

Judge WRIGHT. I did not intend to say that if I did. What I did intend to say was that civil rights cases brought under the special provisions of the act of 1964 which require a three-judge district court when the Attorney General of the United States certifies the necessity—they would not be affected and the number of such cases has been very, very small.

Mr. KASTENMEIER. Let me put the question this way to you, Judge Wright. How many civil rights would be affected, that is, how many civil rights cases are presently brought to a three-judge district court under 2281 and 2282? That of course we need to know.

Judge WRIGHT. In fiscal 1973 I would say close to 183.

Mr. KASTENMEIER. So all of those, all of those—well, so that the three-judge district court would not be available for civil cases under 2281 or 2282 henceforth and that presently is nearly 183 cases?

Judge WRIGHT. That is correct.

Mr. KASTENMEIER. And I think that raises a question. Do civil rights advocates accept this change? Do they know about it and do

they realize they will not have the option of having a three-judge district court under 2281 and 2282 henceforth?

Judge WRIGHT. I understand that the Civil Rights Commission, at the time it was chaired by Father Hesburgh, was contacted informally by the Subcommittee of the Senate Judiciary on Improvements in Judicial Machinery and asked for its views on S. 271. It did not take a position against it, and so I would assume that this is a fairly good indication that the civil rights people across the country are satisfied now to have one Federal judge handle their cases initially.

Mr. KASTENMEIER. Yes. The only reason someone might infer a different response on their part is the fact that as recently as fiscal 1972 they have been employing or entering into three-judge district courts in as much as 183 cases, more than half the total consisting of requests for three-judge district courts, and, therefore, one must believe that they feel that this is a desirable and favorable forum for them.

So it may be that the Civil Rights Commission has decided it can forgo the three-judge district court but one still is left with the impression that currently it is being widely used in civil rights cases by some litigants.

Judge WRIGHT. The figures here would support exactly what you say.

[Subsequently, Judge Wright submitted the following.]

U.S. COURT OF APPEALS,
Washington, D.C. October 10, 1973.

HON. ROBERT W. KASTENMEIER,
Rayburn House Office Building, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: At the hearing this morning you pointed out that of the total of 320 three-judge district court cases for fiscal 1973, 183 were "civil rights" cases, as shown in the statistics compiled by the Administration Office of the United States Courts. You also suggested that if the civil rights litigants in these 183 cases chose a three-judge district court, it might be possible that civil rights groups who bring such cases would be opposed to S. 271. I regret that I was not quick enough to make a proper response to your suggestion. When an action is brought for an injunction restraining the enforcement of a state or federal statute on the ground of unconstitutionality, under 28 U.S.C. §§ 2282 a three-judge district court is required. The litigants have no choice. Both Section 2281 and Section 2282 state that such an injunction "shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

I am advised that the Administrative Office is going to furnish the Subcommittee with a breakdown of the 183 three-judge district court cases filed in fiscal 1973 shown in its compilation as involving civil rights. It appears that a large number of the 183 cases are only tangentially related to civil rights.

It was a pleasure to appear before your Subcommittee this morning.

Sincerely,

J. SKELLY WRIGHT.

Mr. KASTENMEIER. Thank you.

Mr. DRINAN. Could I? Would the chairman yield for just a minute?

Mr. KASTENMEIER. Yes.

Mr. DRINAN. I am afraid I misunderstood Judge Wright. If that is the case and if I may pursue this just a moment I am looking forward to the testimony here of Mr. Dixon for the Department of Justice where on page 8 he says that S. 271 would not eliminate all three-judge courts. Such courts would be retained in certain ICC cases and certain civil rights cases. I am still uncertain which civil rights cases will be retained and which will not. Am I to understand that all

183 of these cases would henceforth be ineligible for Federal three-judge Federal courts?

Mr. KASTENMEIER. If I understood the response to me it was that only insofar as they are pursuing under 2281 or 2282 which have been the lion's share of the 183 current cases.

Mr. DRINAN. Well in view of that Mr. Chairman I would suggest that the Leadership Conference be asked to testify or to submit a statement and that other activist groups that do in fact litigate on behalf of civil rights and civil liberties be given notice of this hearing and that we get their views on the matter.

Mr. KASTENMEIER. I yield to the gentleman from Iowa.

Mr. MEZVINSKY. I just want to thank Judge Wright and I have no questions Mr. Chairman.

Mr. KASTENMEIER. If there are no further questions we are grateful to you, Judge Wright, for your appearance this morning. And the chair will say we will try to ascertain whether or not there is any interest, following the suggestion of Mr. Drinan, among civil rights litigants in retention of the three-judge district court.

Judge WRIGHT. I think that that would be an excellent idea. If three-judge district court cases are still being sought by civil rights litigants then they ought to be heard first to determine whether or not they believe the three-judge district court should be retained to protect their interests.

Mr. KASTENMEIER. Thank you, Judge.

Judge WRIGHT. Thank you, gentlemen.

Mr. KASTENMEIER. The Chair would next like to call on the Honorable Edward J. Devitt, chief district judge of St. Paul, and the Honorable Arthur J. Stanley, Jr., senior district judge, Leavenworth, Kans.

May I say I would ask you both to come up and each make a separate presentation, but because it is my understanding that the thrust of your presentations is very much in the same area it might be useful to ask you both to appear in tandem before the committee.

We appreciate your appearance this morning, and may I ask Judge Devitt, who is listed first, to proceed.

REPORT
OF THE
STUDY GROUP ON
THE CASELOAD
OF THE
SUPREME COURT



DECEMBER, 1972

WASHINGTON, D.C.

CASE LOAD OF THE SUPREME COURT

A. Appeals from Federal District Courts

(a) *Three-Judge Court Cases.* Although there are other situations in which the statutes provide for a three-judge district court with direct appeal to the Supreme Court, the most significant are those in which the constitutionality of state or federal statutes is challenged, 28 U. S. C. §§ 2281, 2282, and those for review of Interstate Commerce Commission orders, 28 U. S. C. § 2325. We recommend elimination of the three-judge court, and of direct review, in these classes of cases. The historical grounds for this jurisdiction, and its consequences in practice, have not been reviewed by Congress for more than a generation. In connection with such a reexamination Congress would have an opportunity to consider whether more recent special provisions for three-judge courts, in the Civil Rights Act of 1964 (42 U. S. C. §§ 1971g, 2000a-5 (b), 2000e-6 (b)) and the Voting Rights Act of 1965 (42 U. S. C. §§ 1973b (a), 1973c, 1973h (c)), should or should not be retained.

Review of ICC orders by a three-judge court with direct appeal to the Supreme Court is an historical anomaly. At one time there was similar review for other agencies, but this was changed in 1950, and review of the other agencies was transferred to the courts of appeals. 5 U. S. C. § 1032. The reasons given for making this change for the other agencies are fully applicable to the ICC.

"The provision for review by the Supreme Court in its discretion upon certiorari, as in the review of other cases from circuit courts of appeals, will save the members of the Supreme Court from wasting their energies on cases which are not important enough to call for their attention, and enable them to concentrate more fully upon cases which require their careful consideration. By allowing certiorari, the Court * * * will not any longer be required automatically to hear cases which are not of a nature to

merit its consideration." (H. Rep. 2122, p. 4, and S. Rep. 2618, p. 5, 81st Cong., 2d Sess. (1950).)

In recent years the Commission has abandoned its opposition to similar treatment for its orders. Proposals for review of ICC orders by the courts of appeal, supported by the Judicial Conference of the United States and, so far as we know, opposed by no one, have been before Congress for several years. Since many ICC cases are not of sufficient importance to require review by the Supreme Court, it is clear that the unique treatment of ICC orders is a burden on the Supreme Court that can no longer be justified.

THREE-JUDGE COURTS:

See How They Run!

by

HARRIS S. AMMERMAN *

* Legislative Assistant, Administrative Office of the United States Court.

Introduction:

Congress, at the urging of the Judicial Conference of the United States, has introduced a proposal for limiting the jurisdiction of the federal three-judge district court.¹ A report by the Conference's Committee² on Federal Jurisdiction states that "the convening of three-judge panels has in recent years given rise to an increased judicial burden." Three-judge courts hear injunction cases alleging unconstitutionality of federal or state statutes. The number of courts convened to hear such cases in the eight years from fiscal 1963 through 1970 has risen over 125 percent, and the upward trend shows no sign of abating, according to the Administrative Office of the United States Courts.³ The argument that a single judge should not be empowered to enjoin the enforcement of allegedly unconstitutional state statutes, because his sole judgment is apt to lack objectivity and careful deliberation, has been soundly rebutted over the years primarily because of the provision for expeditious appellate review. Meanwhile, the three-judge court has been untouched.

In its October 1970 meeting the Judicial Conference stated that not only has the work of the district and appellate courts been affected by the need to supply judges for the three-judge district courts but that the direct appeal from such courts to the Supreme Court has often brought that Court into the review process prematurely, placing the burden of direct appeal on the Supreme Court in many cases where the "winnowing" process of

1. See Appendix I for Three-Judge Court Statute (28 U.S.C. §§ 2281, 2282, 2283, 2284, and 1253).

United States, October 29-30, 1970 p. 78.

2. See Report of the Proceedings of the Judicial Conference of the

3. See, e. g., 42 Cong.Rec. 4846-59 (1908); 45 Cong.Rec. 7253-57 (1910).

appellate review at the courts of appeals level would have better served the interests of justice.

Representative Emanuel Celler, Chairman of the House Judiciary Committee, introduced H.R. 3805 (February 8, 1971), with the support of the Judicial Conference.⁴ The bill would amend sections 2281 and 2282 to eliminate the three-judge court requirement. It would not, however, affect other statutes which include special and independent provisions for three-judge courts, i. e., three-judge courts convened for the taking of land by the T.V.A.; for violations of the 1964 Civil Rights Act and Voting Rights Act of 1965; and I.C.C. matters affected by the proposed amendment to the Expediting Act.

Putting aside the criticisms that the three-judge court procedure is burdensome, there are still situations where federal-state relations are sufficiently delicate to justify the serious deliberation afforded by the three-judge panel. The drafters of H.R. 3805—or so it appears—believe that cases may still arise in the racial segregation area⁵ which warrant a special panel rather than a single judge. And, for this reason they have chosen not to tamper with three-judge court provisions now written into several civil rights statutes. Not all civil rights statutes, however, include three-judge court provisions. The justification which supports the need for three-judge court hearings in cases of racial discrimination does not exist in matters regarding the Interstate Commerce Commission, or condemnation proceedings under the T.V.A. Act.

What justification does the Judicial Conference of the United States have in proposing a sharp curtailment of the three-judge court procedure? The analysis which follows will attempt to review the substantive and administrative issues. In short, is the current procedure fraught with substantive and administrative encumbrances which outweigh its usefulness?

Those opposing a legislative curtailment of the three-judge court concede that such change would relieve the increased judicial burden, but at the price of creating apprehension that district court judges, sitting alone, would issue injunctive orders indiscriminately. Or worse, it is thought that claimants in state courts would deluge federal court judges with petitions for injunctive relief. This undoubtedly would cause difficulty were it not for two factors to be dealt with later—swift appellate review

4. See Appendix II (copy of H.R. 3805).

5. *Bailey v. Patterson*, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962).

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in the courts of appeals and recent rules in criminal cases expounded by the Supreme Court during its October 1970 Term.

I. ORIGINS:

A. Passage of the Original Act

The three-judge, direct appeal procedure was enacted in 1910 in response to the Supreme Court's decision in *Ex parte Young*.⁶ The Court's holding encouraged railroads and utilities to attack rate-fixing and tax laws, resulting in a deluge of injunctions by federal judges suspending such legislation.⁷ In *Ex parte Young*, the state statute in question fixed maximum rates for railroad operations within Minnesota. A federal district court, at the request of railroad shareholders, granted a temporary injunction to prevent the Minnesota Attorney General from enforcing the state law. The state argued that the exercise of such injunctive power would, in effect, deprive them of the right to regulate their own economic enterprises, and added that the action constituted a suit against the state barred by the eleventh amendment.⁸

The Minnesota Attorney General violated the district court injunction and petitioned the state courts for writs of mandamus directing the railroads to adopt and publish rates in conformity with the state law. After the federal district court cited him for contempt, the Attorney General brought an original habeas corpus proceeding in the Supreme Court, urging that the federal district court lacked jurisdiction over an official of the state. The Supreme Court denied the writ and held that the state's immunity from suit did not extend to cases brought to restrain state officers from enforcing unconstitutional state laws.⁹ The Supreme Court failed to calculate the repercussions of their decision which led to a flood of litigation advanced by the utilities.¹⁰

6. 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

citizens or subjects of any Foreign State." U.S.Const. amend. XI.

7. Comment, "The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism", 27 U.Chi.L.Rev. 555, 557 (1960).

9. *Ex parte Young*, 209 U.S. 123, 160, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

8. The eleventh amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by

10. *See e. g.*, *Railroad Commission v. Cumberland Tel. & Tel. Co.*, 212 U.S. 414, 29 S.Ct. 357, 53 L.Ed. 577 (1909); *City of Knoxville v. Knoxville Water Co.*, 212 U.S. 1, 29 S.Ct. 148, 53 L.Ed. 371 (1909); *Prentiss v. Atlantic Coast Line Co.*, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908).

Several states were resentful that their regulatory policies were so often doomed at the will of a single federal judge.¹¹ Temporary restraining orders, moreover, were often issued *ex parte*, and interlocutory injunctions could be issued on affidavits alone.¹² There was no statutory limitation on a single district judge's discretion to continue a temporary restraining order or interlocutory injunction, and such orders were often continued indefinitely. Federal-state relations were in sharp conflict.¹³

The 1910 Act required all applications for interlocutory injunction restraining the enforcement of allegedly unconstitutional state statutes to be "heard and determined" by a court of three judges, one being a circuit judge or Supreme Court Justice. Both parties to such a suit were given the right of direct appeal to the Supreme Court. The three-judge panel was to have precedence over other matters on the docket. Also, the Act provided for notice to the governor and the attorney general of the state involved, allowing them five days to respond.¹⁴

The Act's primary *raison d'être* was to limit single federal judges from freely issuing injunctions. Additionally, Congress felt the panels would improve the quality of deliberation preceding the issuance of injunctions.¹⁵ A three-judge panel, it was anticipated, would therefore protect the states from plaintiffs, skilled in shopping for judges who were inclined to be more sympathetic in an equity proceeding. At least for the specific purpose intended, the three-judge procedure worked—the states no longer were apprehensive about their jurisdiction being usurped, and the number of injunctions issued declined.¹⁶

Much has been added to the original 1910 Act. In 1913 orders of state administrative commissions were included in the procedure. The original act applied only to the interlocutory injunction, but in 1925, Congress extended the procedure to final injunctions. This extension applied only where an interlocutory injunction was sought in conjunction with a final order.¹⁷ The Court held that such change would correct the problem of a single judge deciding whether a final injunction would issue after a three-judge court had decided the question of the interlocutory

11. See 42 Cong.Rec., *supra*.

15. See 45 Cong.Rec., *supra*.

12. Hutcheson, "A Case for Three Judges", 47 Harv.L.Rev. 795 (1934).

16. Note, "The Three-Judge District Court; Scope and Procedure Under Section 2281", 77 Harv.L.Rev. 299, 300 (1963).

13. *Id.*, pp. 800-801.

14. 28 U.S.C. §§ 2281, 2282, 2284, 1253.

17. *Smith v. Wilson*, 273 U.S. 388, 47 S.Ct. 385, 71 L.Ed. 699 (1927).

order. Subsequently, Congress extended the three-judge, direct appeal procedure to suits involving the unconstitutionality of federal statutes.¹⁸ Finally when the statute was codified as section 2281 of the 1948 Judicial Code it was made applicable to any action in which either a preliminary injunction or a permanent injunction was sought.¹⁹

The history of the three-judge court is cast in a somewhat anomalous setting. Not long after its passage the needs for the Act began to disappear. Federal Equity Rules were adopted which limited a temporary restraining order to 10 days.²⁰ Basically, the Act left a single federal judge without much power even to determine whether or not a case fell under the Act. But the Supreme Court reinvested the federal judges with discretionary powers in several key decisions. *Ex parte Poresky*²¹ held that while a single judge could never pass on the merits of a complaint which fell within the terms of the Act, he had the power to dismiss such a case for want of jurisdiction. In *California Water Service Co. v. City of Redding*,²² the Court stated that a single judge not only has the power but also the duty to deny the statutory court whenever he is convinced that the Constitutional question before him is not a substantial one.

If the judge reaches the point of determining that a "substantial" issue is presented, has he not at least reached the threshold of the decisional process where the legal question is laid bare? It might be urged that the finding of substantiality incorporates by necessary inference, his judgment that a constitutional inconsistency does in fact exist. If so, is there any *real* distinction between the situations (1) where a district judge explores the merits of the cause of action to determine whether a "substantial" constitutional issue exists deserving a three-judge panel adjudication, and (2) a one-judge decision on the merits followed by appeal to a panel of three judges of the United States Court of Appeals?

B. Subsequent Statutes

In addition to the three-judge requirement pursuant to sections 2281 and 2282, Congress has by separate statutes seen fit to apply comparable procedures in other types of cases includ-

18. 28 U.S.C. § 2282.

19. 28 U.S.C. § 2281.

20. See Annotated Rules of Practice in the U. S., 584-951 (Dewhurst ed. 1914).

21. 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed. 152 (1933).

22. 304 U.S. 252, 58 S.Ct. 865, 82 L. Ed. 1323 (1938).

ing: actions for injunctions against the enforcement of orders of the Interstate Commerce Act;²³ certain anti-trust actions brought by the United States;²⁴ and certain discrimination cases brought by the United States.²⁵

II. APPLICABILITY OF THREE-JUDGE COURT PROCEDURE

A. Supreme Court Interpretation

The Supreme Court has long recognized the burdensome aspects of the three-judge court procedure, and has for this reason purposely narrowed its applicability to avoid obstructing the federal judicial dockets. Because the burdensome characteristics of the three-judge court have impinged directly on the procedural aspects of the system, the Supreme Court has deemed the statute not "a measure of broad social policy to be construed with great liberality, but * * * an enactment technical in the strict sense of the term and to be applied as such."²⁶

B. Statutory Requirements

For section 2281 to apply, a state statute or administrative order must be challenged, a state officer must be a party defendant, injunctive relief must be sought, and it must be claimed that the statute or order is contrary to the Constitution of the United States. The same rules are, in general, applicable to challenges to federal statutes under section 2282.²⁷

The word "statutes", the Supreme Court says, is "a compendious summary of various enactments, by whatever method they may be adopted, to which a State gives her sanction and is at least sufficiently inclusive to embrace constitutional provisions."²⁸ Municipal ordinances, however, are not "statutes" within the three-judge provision.²⁹ "That section," Justice Brandeis said in *Ex parte Collins*,³⁰ "was intended to embrace

23. 28 U.S.C. § 2325 (1964); 7 U.S.C. § 217 (1964). 27. C. A. Wright, *Law of Federal Courts*, 189 (1970).
24. 15 U.S.C. § 28 (1964); 49 U.S.C. § 44 (1964). 28. *American Federation of Labor v. Watson*, 327 U.S. 582, 592-593, 66 S.Ct. 761, 90 L.Ed. 873 (1946).
25. 42 U.S.C. §§ 1971, 2000a-5 (1964).
26. *Phillips v. United States*, 312 U.S. 246, 251, 61 S.Ct. 480, 85 L.Ed. 800 (1941); *See also Ex parte Collins*, 277 U.S. 565, 567, 48 S.Ct. 585, 72 L.Ed. 990 (1928); *Swift & Co. v. Wickham*, 382 U.S. 111, 128-129, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965).
29. *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *Perez v. Ledesma*, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971).
30. 277 U.S. 565, 567-569, 48 S.Ct. 585, 72 L.Ed. 990 (1928).

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a limited class of cases of special importance and requiring special treatment in the interest of the public * * * cases of unusual gravity." Ordinances, said one district judge, are numerous and often of little importance.³¹ Nevertheless, litigants continue to bring suit challenging the constitutionality of local regulations. Information available to the Administrative Office of the United States Courts does not show the number of such actions, nor are there available data on the number of three-judge hearings convened each year in suits attacking local regulations.³²

As indicated earlier, three-judge court jurisdiction is not invoked unless the suit to enjoin the operation of a state or federal statute is grounded on a claim of unconstitutionality. The claim, moreover, must rely on the federal and not a state constitution.³³ In addition to the Supreme Court's efforts in narrowing the application of the three-judge court jurisdiction, various courts have ruled that three-judges are not required: (1) if the action complained of is not, in fact, attributable to the statute alleged to be unconstitutional;³⁴ (2) if the injunction is sought only against an unconstitutional application of a statute and not the statute itself;³⁵ or (3) if the real question in issue is not the constitutionality of the statute itself but rather its applicability to the subject matter of the litigation.³⁶ These restrictions have held down the flow of litigation to the three-judge panel, but the Judicial Conference contends that the volume is still disruptive and burdensome.

C. Powers of a Single Judge

If federal jurisdiction is shown³⁷ and the case requires a three-judge court, the single judge must request the convening of the

31. *Calhoun v. City of Seattle*, 215 F. 226 (W.D.Wash.1914).

32. See 1970 Adm. Office U.S. Courts Ann. Rep., Table 28.

33. *Cook v. Burnquist*, 242 F. 321 (D. Minn. 1917).

34. *Farmer's Gin Co. v. Hayes*, 54 F. Supp. 43 (W.D. Okla. 1943).

35. *Phillips v. United States*, 312 U.S. 246, 252, 61 S.Ct. 480, 85 L.Ed. 800 (1941); *Faubus v. United States*,

254 F.2d 707, 805 (8th Cir.), cert. denied, 358 U.S. 829, 79 S.Ct. 49, 3 L.Ed.2d 68 (1958); *Sealy v. Department of Pub. Instruction*, 252 F.2d 808, 900 (3rd Cir.), cert. denied, 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1149 (1958).

36. *Maison v. Confederated Tribes*, 314 F.2d 169 (9th Cir. 1963).

37. *Van Buskirk v. Wilkinson*, 216 F.2d 735, 737 (9th Cir. 1954); *Ex parte Poresky*, 290 U.S. 30, 31, 54 S.Ct. 3, 78 L.Ed. 152 (1933).

panel. He has no authority to hear it on the merits.³⁸ This whole matter regarding the powers of a single judge in a case appropriate for three judges has been cloudy. *Ex parte Poresky*,³⁹ in 1934 held that a single judge could dismiss the action for want of jurisdiction, and that jurisdiction was lacking if the federal constitutional claim was insubstantial. This gave the single judge considerable power to explore the merits under the guise of determining the jurisdictional issue.⁴⁰

In 1942 the three-judge court statute was amended in an attempt to spell out the powers of a single judge.⁴¹ One of the provisions then added, now codified as 28 U.S.C.A. section 2284 (5), specifies that a single judge "shall not * * * dismiss the action, or enter a summary or final judgment." This statutory change was designed, it is argued, to overrule the *Poresky* doctrine which the lower courts refused to abandon.⁴² And the Supreme Court in response to this conflict has gone beyond the doctrine by approving this practice in *Bailey v. Patterson*.⁴³ Here, the Court said: "The statute comes into play only when an injunction is sought 'upon the ground of unconstitutionality' of a statute. There is no such ground when the constitutional issue presented is essentially fictitious."⁴⁴

The other powers of a single judge are defined in the statute. Only where there is a prayer for injunctive relief will a three-judge court be convened.⁴⁵ While the issuance of the injunction is properly decided by the three-judge court,⁴⁶ a single district judge has all but assumed the power to dismiss an application for a three-judge court if the requirements of equity jurisdiction are not stated on the face of the complaint. Thus, a single judge

38. *See e. g.*, *Ex parte Metropolitan Water Co.*, 220 U.S. 539, 31 S.Ct. 600, 55 L.Ed. 575 (1911). D.C. 219, 265 F.2d 593 (1959), mandamus denied, 361 U.S. 805, 80 S.Ct. 93, 4 L.Ed.2d 56 (1960).
39. 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed. 152 (1934). 43. 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed. 2d 512 (1962).
40. *See California Water Service Co. v. City of Redding*, 304 U.S. 252, 255, 58 S.Ct. 865, 82 L.Ed. 1323 (1938). 44. *Id.*, at p. 33, 82 S.Ct. at p. 551.
41. Act of April 6, 1942, ch. 210, 56 Stat. 199. 45. *Flemming v. Nestor*, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960); *Harlan v. Pennsylvania R. Co.*, 180 F.Supp. 725 (W.D.Pa. 1960).
42. *Klein v. Lee*, 254 F.2d 188 (7th Cir. 1958); *Carrigan v. Sunland-Tujunga Tel. Co.*, 263 F.2d 568 (9th Cir. 1959); *Eastern States Petroleum Corp. v. Rogers*, 105 U.S.App. 46. Note, "The Three-Judge District Court: Scope and Procedure Under Section 2281", *supra*, at 299, 309-310.

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has dismissed the complaint where there is no showing of irreparable injury, where there is an adequate remedy in the state courts, or where the plaintiff has "unclean hands."⁴⁷

Ordinary equity jurisprudence determines the success of the injunctive prayer in civil cases.⁴⁸ The requirements of equity jurisdiction are applied differently in criminal cases. Traditionally, federal courts have not interfered with enforcement of state criminal statutes. But exceptional circumstances will justify the issuance of an injunction against the enforcement of a state penal statute.⁴⁹ The boundaries of the exception have been redrawn recently in *Ledesma* and *Younger* to encompass only those cases in which the danger of irreparable loss is both great and immediate.⁵⁰ This policy of restriction is often justified on the ground that the principles of federalism and comity require federal courts to refrain whenever possible from interference in the administration of justice by the states.⁵¹ Thus, the equity jurisdictional requirements of irreparable injury and inadequacy of state remedy are strictly applied by federal courts in cases attacking state criminal statutes. In deference to this policy, the federal courts can only assume that a particular defendant will be fairly treated in the state courts and that an unconstitutional statute will be struck down by the state judiciary.⁵² A petitioner who chooses to attack the constitutionality of a state criminal statute will meet a difficult task in satisfying the initial requirements of equity jurisdiction; i. e., irreparable injury and inadequacy of state remedy. A single judge then may dismiss the complaint if it is clear that the elements for equitable relief are missing.

Commentators have argued that the statute's language has caused confusion and delay in the appellate courts because it is

47. Berg, "Three-Judge District Courts: some jurisdictional problems", 46 A.B.A.J., 291-292 (1960).

48. See Pomeroy, *Equity Jurisprudence* §§ 1337-410 (5th ed. 1941).

49. *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89, 55 S.Ct. 678, 79 L.Ed. 1322 (1935); *Fenner v. Boykin*, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927 (1926); *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 45 S.Ct. 141, 69 L.Ed. 402 (1924); *City of Houston v. Jas. K. Dobbs Co.*, 232 F.2d 428 (5th Cir. 1956); *Dombrowski v. Pfister*, 227 F.Supp. 556 (E.D.La.1964).

50. *Younger v. Harris*, *supra*; *Perez v. Ledesma*, *supra*.

51. "New D. C. Courts Endorsed", *Washington Post*, March 23, 1971; Note, "Three-Judge Court Reassessed: Changing Roles in Federal-State Relationships", 72 *Yale L.J.* 1646, 1649-52 (1963).

52. See *Chaffee v. Johnson*, 229 F.Supp. 445, 447 (S.D.Miss.1964); *Toth v. Silbert*, 184 F.Supp. 163, 168 (N.D. Ohio 1960); *Ford v. Attorney Gen.*, 184 F.Supp. 129, 133 (E.D. Pa.), *aff'd per curiam*, 364 U.S. 291, 81 S.Ct. 65, 5 L.Ed.2d 39 (1960).

difficult to determine whether a three-judge court is required in any given case.⁵³ Despite the Supreme Court's attitude in *Bailey v. Patterson*, the extent of the single judge's power to decide the preliminary questions is not clear. And the uncertain situation regarding appeals from decisions to convene or not to convene three judges, adds to the confusion. Additionally, the doctrine that a three-judge court is not required to enjoin enforcement of a statute which is "clearly unconstitutional"⁵⁴ or to refuse to enjoin a statute which is "clearly constitutional"⁵⁵ has created new pitfalls in litigation.

III. APPELLATE REVIEW

Appeals from three-judge courts (or refusals to convene them) fall into three categories. The courts of appeals will review if the single judge regards the federal claim as so insubstantial as to require dismissal for want of jurisdiction⁵⁶ or if the single judge concludes that three judges are not required and decides the merits of the case.⁵⁷

(1) Properly Convened Three-Judge Courts:

An appeal from a three-judge court which is properly convened under section 2281 is directly appealable to the Supreme Court by either party pursuant to section 1253.

(2) Improperly Convened Three-Judge Courts:

The decision of a three-judge court improperly convened is appealable to the court of appeals since the case should have been heard before a single district judge.⁵⁸ This does not preclude an appeal pursuant to section 1253, but it is advisable to file a concurrent appeal to the court of appeals. If the litigant appeals only to the Supreme Court and that court decides that the proper appeal is to the court of appeals because a three-judge court was improperly convened, there is a possibility that his

53. Section 2281 has been described as "long-winded, repetitive, and sloppy in draftsmanship", Currie, "The Three-Judge District Court in Constitutional Litigation", 32 U. Chi.L.Rev. 1, 12 (1964).

54. See *Bailey v. Patterson*, *supra*.

55. See *Ex parte Poresky*, *supra*.

56. *Jacobs v. Tawes*, 250 F.2d 611 (4th Cir. 1957); *Utica Mut. Ins. Co. v. Vincent*, 375 F.2d 129 (2nd Cir.)

cert. denied 389 U.S. 839, 88 S.Ct. 63, 19 L.Ed.2d 102 (1967).

57. *Wicks v. Southern Pac. Co.*, 231 F.2d 130 (9th Cir.) cert. denied, *Wicks v. Brotherhood of Maintenance, etc.*, 351 U.S. 946, 76 S.Ct. 845, 100 L.Ed. 1471 (1956); *Sardino v. Federal Reserve Bank*, 361 F.2d 106, 113-116 (2nd Cir.), cert. denied, 385 U.S. 898, 87 S.Ct. 203, 17 L.Ed.2d 130 (1966).

58. *Phillips v. United States*, *supra*.

filing time of 30 days will have lapsed. However, the court has in some cases offered relief for those not filing concurrent appeals.⁵⁹

(3) Improperly Refused Three-Judge Court by a Single Judge Who Decides the Case on the Merits:

If the single judge incorrectly believes that three judges are not required and proceeds to the merits, the remedy once was mandamus from the Supreme Court,⁶⁰ but now appears to be an appeal to the court of appeals.⁶¹ If the courts of appeals should fail to see that the case was one for three judges, and reviews on the merits, its decision is voidable by the Supreme Court.⁶²

A. Direct Appeal⁶³

The three-judge court procedure pursuant to section 1253 brings a large class of cases directly to the Supreme Court, which is not permitted to exercise its traditional right of selective jurisdiction.⁶⁴ Moreover, such direct-appeals pose a threat to an already crowded docket that included 3357 cases in 1969.⁶⁵ The Court already has insufficient time for the important cases before it.⁶⁶ The Court disposed of 2880 cases by denial or dismissal of certiorari in 1969, but that device is not available in three-judge cases. The policy of certiorari leaves it to the Court to determine on a discretionary basis which of the cases on the docket shall be once more reviewed. The various provisions for mandatory Supreme Court jurisdiction are diametrically opposed to that policy, presumably because of Congress' determination that certain classes of cases are important enough that Supreme Court review should not depend upon the Supreme Court's con-

59. *Pennsylvania Public Utility Commission v. Pennsylvania R. R. Co.*, 382 U.S. 281, 86 S.Ct. 423, 15 L.Ed. 2d 324 (1965).

60. *Ex parte Metropolitan Water Co.*, *supra*.

61. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 82 S.Ct. 1294, 8 L.Ed.2d 794 (1962).

62. *Stratton v. St. Louis S. W. Ry.*, 282 U.S. 10, 51 S.Ct. 8, 75 L.Ed. 135 (1930).

63. Comment, "Federal Jurisdiction—Three-Judge Courts—the recent

evolution in Jurisdiction and Appellate Review", 61 Mich.L.Rev. 1528-30 (1963); Comment, "The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism", 27 U.Chi.L. Rev. 555-564 (1960); Note, "The Three-Judge District Court and Appellate Review", 49 Va.L.Rev. 538, 546 (1963).

64. Hart, "The Time Chart of the Justices", 73 Harv.L.Rev. 84 (1959).

65. Note, "The Supreme Court, 1969 Term", 84 Harv.L.Rev. 32 (1970).

66. Hart, *supra*.

sent.⁶⁷ All too often the Court is forced into dealing with insignificant matters, according to Mr. Justice Harlan, "often either at the unnecessary expenditure of its own time or at the risk of inadequate appellate review if a summary disposition of the appeal is made."⁶⁸ Additionally, as already mentioned by the Judicial Conference of the United States, the direct appeal eliminates the opportunity for the refining analysis and argument obtained when a case comes through the courts of appeals.

IV. EFFECT ON THE COURTS

Administrative shortcomings of the special panel are seen in four categories: overcrowded docket; disruption of judges' schedule; absence of intermediate appellate procedure; and burden on the Supreme Court.

Trial and appellate schedules are obviously disrupted by a procedure which requires triple the judicial manpower normally needed to decide a controversy—especially since three-judge cases require prompt hearing. Disruptions are just as apparent when a second district judge and a judge of the court of appeals must leave their own benches.⁶⁹

The Judicial Conference has concluded that judicial disruption at the three-judge level itself constitutes a sufficient impediment to justify abandonment or severe limitation of the system. They conclude that three-judge hearings cause further confusion to already crowded dockets and divert judicial manpower from the task of clearing those dockets. Moreover, such disruptions are intensified where judgments are reversed because of incorrect assignment as between one and three-judge courts.⁷⁰ The relative infrequency with which three-judge cases have occurred in the past is not the basis for arguing for the alteration of section 2281. From 1963 to 1970, the average number of three-judge hearings per year was 176.6, distributed widely throughout the 10 circuits and the District of Columbia. The average number of civil and criminal trials completed during the same period was 12,858. Three-judge cases represented .013% of all criminal

67. See Hearings Before the Committee on the Judiciary on S. 2176, 74th Cong., 1st Sess. 20 (1935) (Senator Black).

68. *Brown Shoe Co. v. United States*, 370 U.S. 294, 365, 82 S.Ct. 1502, 1547, 8 L.Ed.2d 510 (1962) (concurring in part and dissenting in part).

69. See *e. g.*, 42 Cong.Rec. 4851 (1908).

70. See *e. g.*, *Ex parte Bransford*, 310 U.S. 354, 361, 60 S.Ct. 947, 84 L.Ed. 1249 (1940); *Willis v. Walker*, 136 F.Supp. 181 (W.D.Ky.1955); *Frasier v. Board of Trustees*, 134 F. Supp. 589 (M.D.N.C.1955); *Andrew G. Nelson, Inc. v. Jessup*, 134 F. Supp. 218 (S.D.Ind.1955).

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and civil trials completed in district courts during the eight year span.⁷¹ In recent years, though, the problem of crowding at the district court level has become more pressing than the statistics indicate.

In a recent interview⁷² the Assistant Director for Legal Affairs, Administrative Office of the United States Courts stated:

"The recommendation of the Judicial Conference of the United States to curtail three-judge district court cases is based in part upon the administrative difficulty in the convening of these courts.

"Although the number of these cases is relatively small, their impact upon the courts is considerably out of proportion to their number. The convening of a three-judge court disrupts trial schedules of two judges in a district court as well as the hearing schedule of a circuit judge. Frequently, judges are disqualified in cases of this type and it becomes difficult to locate a judge to serve on a panel. Where the case has been filed at a location away from a metropolitan area, special travel arrangements are required and expenses incurred just for the hearing of the one case. Decisions are made by the panel sometimes immediately following a hearing but often times further study is required and a decision must be made by telephone since it is difficult for the judges to reconvene again in conference. The writing of opinions is frequently assigned to district judges, who are not accustomed to writing opinions of this type as a routine matter. The result is that it sometimes takes them longer to do this work."

From fiscal years 1963 to 1970, three-judge court hearings increased from 129 to 291, or 125.6%, while from 1969 to 1970 alone the increase amounted to 76 or 35.3%. The greatest surge occurred in the category marked "civil rights". This category is misleading, although, because it contains a mixture of actions brought under section 2281, including those involving the 1964 Civil Rights Act and the Voting Rights Act of 1965.⁷³ At this

71. See Adm. Office U.S. Courts, Ann. Rep. 1963-1970 (Table C-7).

72. Unpublished remarks by Joseph F. Spaniol, Jr., Assistant Director for Legal Affairs, Administrative Office of the U. S. Courts (March 25, 1971).

73. *Id.* Note: "The category of civil rights cases in the Report of the Director of the Administrative Office includes many cases in which there have been insubstantial allegations of violations of civil rights sometimes coupled with other valid causes of action. Some cases are

writing, the Office of Procedural Studies and Statistics of the Administrative Office of the United States Courts has undertaken a survey to break-down the "civil rights" category.⁷⁴

The following table is an eight year summary of hearings by three-judge courts as compiled by the Administrative Office of the United States Courts (Annual Report 1970):

Three-Judge Court Hearings
by Nature of Suit
Fiscal Years 1963-1970

Fiscal Years	Total	Review of ICC Orders	Civil Rights	Suits Involving State or local laws or regulations	
				Reapportionment	Other actions
1963	129	67	19	16	27
1964	119	50	21	18	30
1965	147	60	35	17	35
1966	162	72	40	28	22
1967	171	64	55	10	42
1968	179	51	55	6	67
1969	215	64	81	1	69
1970	291	42	162	8	79

Percent Change *					
1970 over 1963	125.6	-37.3	752.6	-	192.6
1970 over 1969	35.3	-34.4	100.0	-	14.5

* Percent not computed where base is 25 or less.

difficult to classify so that any mention in the complaint and note on the report that a matter of civil rights is involved would result in the classifying of the case as a civil rights case."

74. Preliminary reports indicate that many of the three-judge cases are convened under section 2281 in connection with Title 42 section 1983 (Civil action for deprivation of rights), which has no three-judge court provision of its own. Therefore, Celler's proposed legisla-

tion, H.R. 3805, if passed would eliminate the necessity of three-judge courts in these types of civil rights actions. The bill, however, would not touch civil rights actions brought under the Civil Rights Act of 1964 or the Voting Rights Act of 1965, which include separate provisions embodying the three-judge court procedure. It is up to Congress to decide whether it is desirable to apply the three-judge procedure to only certain types of civil rights issues.

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V. H.R. 3805 (92nd Congress)

A. What the Bill Would Do:

H.R. 3805 would amend sections 2281 and 2282 to eliminate the three-judge court requirement. Depending on the statute involved in the litigation, it would provide for five days' notice to the Attorney General and Governor of the State or to the Attorney General of the United States and the appropriate United States Attorney. It would also add to chapter 81 of title 28, dealing with the jurisdiction of the Supreme Court, a new section 1259, providing for *direct* appeal of any preliminary or permanent injunction granted against the enforcement of a state or federal statute for repugnance to the Constitution either by the appropriate court of appeals or by the Supreme Court at the election of the Attorney General of the State or of the United States. (See Appendix II).

B. Arguments Supporting H.R. 3805:

Under the existing statutory procedure, a single district judge decides issues—on the merits—when state and federal laws are challenged on grounds of unconstitutionality, except that he does not have the power to grant injunctive relief. H.R. 3805 would grant the single federal judge this power under all actions brought under sections 2281 and 2282. Moreover, the states will be adequately protected against improvident use of equitable discretion by their right of appeal to the courts of appeals. It is expected that this right of appeal will provide the springboard to alter the three-judge court as proposed in H.R. 3805—improvident judgments on the district court level will be struck down by a court of appeals pursuant to 28 U.S.C. section 1291. In *Idlewild Bon Voyage Liquor Corp. v. Epstein*⁷⁵ the Supreme Court indicated for the first time that the intermediate courts of appeals could review a district judge's refusal to apply section 2281, thus disavowing its earlier suggestions that mandamus to the Court was the exclusive mode of obtaining review of such a decision.

Speedy review by the courts of appeals rebuts the argument that single district court judges are apt to favor indiscriminate and expedient injunctive orders rather than deliberations which are well-reasoned. The courts of appeals route is more advantageous than a three-judge district court because its view is nationally oriented. Moreover, a system of expedited appeals as of right from single judge district courts to the courts of appeals

75. 370 U.S. 713, 82 S.Ct. 1294, 8 L.Ed.2d 794 (1962).

in cases under section 2281 is a viable alternative to the current direct-appeal procedure because it would avoid the extremely disruptive withdrawal of an already overworked district judge from his own seat of jurisdiction without assurance that the three-judge tribunal to which he has been summoned, sometimes from a considerable distance, will ultimately be found to have been necessary.⁷⁶

As already intimated, the worst that could possibly happen if the three-judge court were limited in accordance with H.R. 3805, is that one district judge might indiscriminately grant temporary restraining orders. Conceding that such an order were wrongfully issued, a court of appeals would have to make room on its docket for the accelerated appeal. No doubt such a quick summoning of the appeals machinery would inconvenience the overall flow of judicial business. But, this inconvenience is not nearly as great as that presently felt by the convening of a three-judge court.

Perhaps the most salient argument in favor of H.R. 3805 is the expected relief to be given to the Supreme Court. The effect of reducing the number of direct appeals to the Supreme Court—whatever the number—justifies the current legislative proposal. Moreover, the Supreme Court undergoes an added burden because in direct appeal cases there is no review of the evidence first by an intermediate appellate court. And, where questions of evidence are raised the Supreme Court might be obliged to review the entire record to determine whether burdens of proof have been met or whether there is substantial evidence to support a finding. In other words, the Supreme Court does not have the benefit of a separate judicial examination of the questions of law raised on the appeal as it would had the appeal passed through an intermediate appellate court.

Moreover, by providing special judicial protection for violations of the 1964 Civil Rights Act and the Voting Rights Act of 1965,⁷⁷ H.R. 3805 offers Congress the opportunity to condition federal three-judge court jurisdiction according to the weight it feels necessary for a special class of Constitutional rights.

VI. CONCLUSION

Given the entire judicial docket in recent years, the number of three-judge courts convened to hear questions of the uncon-

76. See *e. g.*, *Ex parte Bransford*, *supra*; *Willis v. Walker*, *supra*; *Frasier v. Board of Trustees*, *supra*; *Andrew G. Nelson, Inc. v. Jessup*, *supra*.

77. 42 U.S.C. §§ 1973h, 2000a-5, 2000e-6.

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stitutionality of statutes and orders is small. Justification for altering the system is not necessarily to be found in the statistical tables. In fact, the numbers tend to be misleading. For example, the number of three-judge courts convened to hear injunction cases involving attacks on state statutes has risen over 192% in the eight years from fiscal 1963 to 1970, but the actual number in 1970 was a mere 79. If the number proliferates at the present yearly rate, then federal court dockets will be severely burdened. Irrespective of the frequency of its use, the Judicial Conference maintains that the three-judge court procedure is anachronistic and burdensome.

An often-used argument favoring the system is that it affords litigants a speedy and considered determination by the Supreme Court.⁷⁸ If a case is to be made for the preservation of the three-judge court, it must be advanced not on the rationale which first brought it into being some 60 years ago. Rather, the statutory court must be justified on its ability to solve contemporary problems.

In its October 1970 term the Supreme Court moved to further limit federal intervention in state criminal proceedings as initially expressed in *Dombrowski v. Pfister*, *supra*.

"Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate."⁷⁹

Presumably the effect of this holding will be to reduce the supervisory role of the federal courts and preserve the letter of federalism, so that at least in matters arising under state criminal statutes, the path for intervention is narrowed and state remedies will have to be exhausted without the possibility of issuance of interlocutory orders except under unusual cases.

H.R. 3805 appears to be designed to alleviate the administrative burden on time and energy of the federal judiciary. At least the three-judge court should be maintained to hear civil rights matters, but the justification does not extend to the several statutes exclusive of section 2281 which include three-judge court provisions. This is the one short-coming of the proposed bill. H.R. 3805 would not affect: certain actions under the anti-trust

78. See, e. g., Berg, ABA J., *supra*; Note, "A Survey of Three-Judge Requirement", 47 Geo.L.J. 161 (1958).

79. *Perez v. Ledesma*, *supra*, see also *Younger v. Harris*, *supra*.

statutes;⁸⁰ petitions for injunctions to restrain the enforcement of an order of the Interstate Commerce Commission;⁸¹ cases arising under condemnation proceedings under the T.V.A. Act.⁸² A major argument favoring the three-judge court procedure in civil rights cases is that it affords litigants direct access to the Supreme Court on issues which are certainly more sensitive than those presented in I.C.C., or anti-trust cases.

The rationale which gave life to the three-judge court in 1910 has all-but disappeared. With immediate access to the courts of appeals, states are no longer in jeopardy of having orders issued indiscriminately by single judges. Moreover, the Supreme Court has by decision limited the convening of three-judge courts in matters arising under state criminal statutes.

H.R. 3805 will relieve the current administrative and procedural burdens now caused by the convening of the three-judge court. This bill may raise some provocative questions, however. Some civil rights cases will be affected—others will not. Should I.C.C., anti-trust, or condemnation cases under the T.V.A. Act, which are handled under special three-judge panel provisions, be excluded from the reach of these proposed procedural changes? If we retain three-judge review in any proceedings, what is the continuing justification for such retention? These are issues which undoubtedly will be challenged in debate in the 92nd Congress.

80. 49 U.S.C. § 44.

82. 48 Stat. 70 (1933), as amended,
16 U.S.C. § 831x.

81. 28 U.S.C. § 2325.

APPENDIX I

CHAPTER 155—INJUNCTIONS; THREE-JUDGE COURTS

Sec.

- 2281. Injunction against enforcement of State statute; three-judge court required.
- 2282. Injunction against enforcement of Federal statute; three-judge court required.
- 2283. Stay of State court proceedings.
- 2284. Three-judge district court; composition; procedure.

§ 2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by re-

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straining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

§ 2282. Injunction against enforcement of Federal statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

§ 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

§ 2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. As amended June 11, 1960, Pub.L. 86-507, § 1(19), 74 Stat. 201.

§ 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

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APPENDIX II

92D CONGRESS
1ST SESSION

H.R. 3805

IN THE HOUSE OF REPRESENTATIVES

February 8, 1971

Mr. Celler introduced the following bill; which was referred
to the Committee on the Judiciary

A BILL

To eliminate the requirement of a three-judge district court in cases seeking to restrain the enforcement of State or Federal statutes for repugnance to the Constitution, and to provide for direct appeal to the Supreme Court in certain cases, 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 2281 of title 28, United States Code, is amended to read as follows:

“§ 2281. Injunction against enforcement of State statute

“A preliminary or permanent injunction restraining the enforcement, operation, or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes shall not be granted upon the ground of the unconstitutionality of such statute unless at least five days' notice of the hearing on the application for preliminary or permanent injunction is given to the Governor and attorney general of the State. Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof. In any such action in which the State is not a party the court shall permit the State to intervene as a party.

“A district court shall, before final hearing, stay any action pending therein to enjoin, suspend, or restrain the enforcement

or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court may vacate its stay after hearing upon ten days' notice served upon the attorney general of the State.

"The disposition of cases under this section shall be given precedence; the hearing thereof shall be held on the earliest practicable day."

SEC. 2. Section 2282 of title 28, United States Code, is amended to read as follows:

“§ 2282. Injunction against enforcement of Federal statute

"A preliminary or permanent injunction restraining the enforcement, operation, or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted unless at least five days' notice of the hearing on the application for preliminary or permanent injunction is given to the Attorney General of the United States, to the United States attorney for the judicial district in which the action is brought, and to such other persons as may be defendants. Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

"The disposition of cases under this section shall be given precedence; the hearing thereof shall be held on the earliest practicable day."

SEC. 3. Section 2284 of title 28, United States Code, is amended to read as follows:

“§ 2284. Three-judge district court; composition; procedure

"In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

THREE-JUDGE COURT

Cite as 52 F.R.D. 293

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"(2) In any such case in which an application for a preliminary injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

"(3) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

"(4) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for a preliminary injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing."

SEC. 4. In the analysis of chapter 155, title 28, United States Code, the items relating to section 2281 and section 2282 are amended to read as follows:

"2281. Injunction against enforcement of State statute."

"2282. Injunction against enforcement of Federal statute."

SEC. 5. (a) Chapter 81, title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1259. Direct appeal from judgment granting injunction against enforcement of State or Federal statute

"An appeal from a judgment granting a preliminary or permanent injunction against the enforcement of any State or Federal statute for repugnance to the Constitution of the United States shall lie directly to the Supreme Court if the Attorney General of the State or of the United States, depending on the statute involved, files in the district court a certificate stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice.

"The certificate must be filed within fifteen days after the filing of a notice of appeal. When such an order or certificate

is filed, the appeal and any cross-appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. That Court shall thereupon either (1) dispose of the appeal and any cross-appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the appropriate court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross-appeal therein had been docketed in the court of appeals in the first instance."

(b) The analysis of chapter 81, title 28, United States Code, is amended by adding at the end thereof the following new item:

"1259. Direct appeal from judgment granting injunction against enforcement of State or Federal statute."

92D CONGRESS
1ST SESSION

H.R. 3805

A BILL

To eliminate the requirement of a three-judge district court in cases seeking to restrain the enforcement of State or Federal statutes for repugnance to the Constitution, and to provide for direct appeal to the Supreme Court in certain cases, and for other purposes.

By Mr. Celler

February 8, 1971

Referred to the Committee on the Judiciary

REPORTS
OF THE PROCEEDINGS
OF THE JUDICIAL CONFERENCE
OF THE UNITED STATES

HELD AT
WASHINGTON, D.C.
MARCH 16-17, 1970

AND
OCTOBER 29-30, 1970

◆
ANNUAL REPORT OF THE
DIRECTOR OF THE ADMINISTRATIVE
OFFICE OF THE
UNITED STATES COURTS
1970

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1971

LEGISLATIVE MATTERS

The Conference approved in principle S. 3568 which would amend the Administrative Procedure Act to permit the naming of the United States as a defendant. The Conference specifically approved Section 2 of the bill, eliminating the jurisdictional amount requirement, and Section 3, providing for suit in the same judicial districts in which the federal official or agency may be sued.

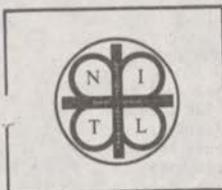
S. 4000 and H.R. 18485, relating to compensation to growers, manufacturers, packers and distributors for damage resulting from reliance on the official listing of cyclomates as a safe product, were considered by the Conference to be matters involving legislative policy on which the Conference should take no action.

THREE-JUDGE DISTRICT COURTS

The Conference noted from the Committee report the increased judicial burden which has resulted from the convening of three-judge district courts in injunction cases alleging unconstitutionality of federal or state statutes. Originally, three-judge district courts were conceived as a means of allaying concern of state officials directed at the granting of injunctions against enforcement of state statutes by a single federal judge. This concern has been lessened with the passage of time but the Committee reported that not only has the work of the district and circuit courts been affected by the need to supply judges for three-judge courts but also the direct appeal from such courts to the Supreme Court has often brought that Court into the review process prematurely and placed the burden of direct appeal on the Supreme Court in many cases where the winnowing process of appellate review at the circuit court level would have better served the interests of justice.

After reviewing the Committee report on this subject, the Conference approved draft legislation and authorized its transmittal to the 92nd Congress which would amend Sections 2281 and 2282 of Title 28, United States Code, to eliminate the three-judge district court requirement. The proposed legislation would provide for five days' notice to the Attorney General and the Governor of the

state or the Attorney General of the United States and the United States Attorney, depending on the statute involved in the litigation. It would also provide a new section 1259 of Title 28 providing for the direct review of any preliminary or permanent injunction granted against enforcement of a state or federal statute for repugnance to the Constitution by the appropriate court of appeals or by the Supreme Court at the election of the Attorney General of the state or of the United States, depending on the statute in suit. This legislative proposal would not affect three-judge courts convened for the taking of land by T.V.A., for violations of the 1964 Civil Rights Act, of the Voting Rights Act of 1965, nor would it cover I.C.C. matters affected by the proposed amendment to the Expediting Act.



THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

PROMOTOR OF SOUND
ECONOMICAL TRANSPORTATION

Office of the President • Main and 4th Streets • Winston-Salem, NC 27102

December 9, 1974

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Honorable John Conyers, Jr.
Chairman, Sub-Committee on Crime
House Committee on the Judiciary
Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Conyers:

The purpose of this letter is to express to you and to the members of the Sub-Committee on Crime the views of the National Industrial Traffic League with respect to two bills presently before your Committee for consideration (H.R. 785 and S. 663). Both bills propose to improve judicial machinery by amending Title 28, United States Code, with respect to judicial review of decisions of the Interstate Commerce Commission.

The National Industrial Traffic League which has been in continuous existence for more than 65 years is a voluntary organization of shippers and groups and associations of shippers located throughout the country. Its members conduct all forms of commercial and industrial enterprises and are substantial users of all modes of for-hire surface transportation subject to regulation under the Interstate Commerce Act and statutes supplementary thereto. The League has traditionally participated actively in proceedings before the Interstate Commerce Commission having a substantial and widespread impact upon the members of the shipping public. The League has generally participated in the court proceedings with respect to such litigations where judicial review has been sought.

The League and its members have a direct and vital interest in the bills under consideration. The League has had a continuing interest in this important subject over the years. The views of its membership were expressed in the 91st Congress, 2nd Session on S. 3597 pertaining to judicial review of decisions of the Interstate Commerce Commission and more recently to the Senate Sub-Committee on Improvement in Judicial Machinery regarding S. 663.

Honorable J. Conyers, Jr.
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In its letter to the Senate Sub-Committee the League expressed support for the provisions of S. 663 with one very important exception. The League opposed the proposed exception suggested by way of amendment to Section 2343 of Title 28, United States Code, which would exclude alternate venue in the United States Circuit Court of Appeals for the District of Columbia with respect to all rules, regulations or final orders of the Interstate Commerce Commission made reviewable by Section 2321 of Title 28, United States Code.

It is our understanding that while S. 663 was amended to allow alternate venue, H.R. 785 precludes such action. We wish to express our opposition to the exclusion of alternate venue.

In discussing this point, the League would emphasize that its members are located throughout the United States. Based upon the League's experience over the years it is its strong view that the party seeking judicial review should have the alternative of bringing suit where they reside or where they have their principal office or before the United States Circuit Court of Appeals for the District of Columbia. It is well known that the latter court, with its extensive experience in the review of the orders of other federal administrative agencies, has a reorganized and widely respected expertise in the handling of such matters.

It is also to be recognized that a substantial percentage of those practices before the Interstate Commerce Commission have their offices in the District of Columbia, at the seat of Government. At the option of those seeking judicial review of I.C.C. orders, the utilization of such counsel before the U.S. Circuit Court of Appeals for the District of Columbia would have obvious advantages of convenience and economy. At the same time, should such parties desire to seek judicial review where they reside or have their principal offices, under the League's suggested approach, they would have such option as well. Actually, the League is at a loss really to understand the opposition to alternate venue expressed by the Interstate Commerce Commission. At the very time when uniformity of judicial review procedures with respect to the federal administrative agencies including the I.C.C. is being sought, a fundamental variation vis-a-vis the Interstate Commerce Commission would only be justified for the most compelling reasons. Such reasons, in the view of the League, are entirely absent.

In its report, accompanying S. 663, the Committee on the Judiciary discussed the subject of venue. Therein the Committee stated "Section 5 of the bill as originally introduced provided that suits seeking judicial review of I.C.C. decisions could be brought only in the circuit where a petitioner resides or has his principal place of business.

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

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 Page three

" The I.C.C. has urged that venue should be restricted to the circuit in which the petitioner resides...The answer to this suggestion is that optional venue will exist under the bill as reported and thus it can be expected that the various numbered circuits will have the opportunity to review I.C.C. orders. It is important to remember that a party is not forced to seek review in the District of Columbia Circuit. If it is convenient for him, he may file an application for review in the circuit in which he resides.

" The I.C.C. also suggested that there would be 'a great jamup of cases' in the District of Columbia if optional venue was provided which would constitute a burden on that court...This concern seems to be without foundation since the total number of I.C.C. appeals (52 cases in both 1972 and 1973) constitutes less than 5 percent of the 1,360 total filings in the District of Columbia Circuit Court....

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

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

The League strongly feels that the above discussion provides ample reason for amending H.R. 785 by deleting the provisions which would prohibit the availability of alternate venue (a) where the petitioner resides or has its principal office or (b) before the United States Circuit Court of Appeals for the District of Columbia. Such alternate venue should be provided.

The League supports the Commission in its desire to have independent access to the Supreme Court. If it is not clear that the Commission would continue to have that right under the amended judicial review provisions, the League would have no objection to an amendment which would make such independent right clear.

The League wishes to express to the Sub-Committee and to you as its Chairman, our thanks for the opportunity to present the foregoing views on H.R. 785 and S. 663.

Very truly yours,

August Heist

August Heist,
 President

AH:job
 cc: Members

Sub-Committee on Crime

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TEL. (202) 783-1215

December 9, 1974

Honorable John Conyers, Jr.
 Chairman, Subcommittee on Crime
 Committee on the Judiciary
 House of Representatives
 Washington, D. C. 20515

Re: H.R. 785 and S. 663 (as amended), Judicial
 Review of Decisions of the Interstate
 Commerce Commission

Dear Mr. Conyers:

I appreciate the opportunity to express my views with respect to the above legislation. I previously testified before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, United States Senate, on July 19, 1974, with respect to S. 663. I did so as a private attorney specializing in representing parties before the Interstate Commerce Commission. I write to you in the same capacity. I wish to reiterate and express the same views which I expressed before the Senate Committee.

I support S. 663 as amended. I oppose S. 663 as originally drafted insofar as Section 5 of the draft bill insofar as it would deny the alternative venue of the United States Court of Appeals for the District of Columbia Circuit to those seeking judicial review of order of the Interstate Commerce Commission.

In my view those seeking judicial review of I.C.C. orders should have equal access to the alternative venue of the United States Court of Appeals for the District of Columbia Circuit just as do those parties seeking judicial review of the decisions of other regulatory agencies.

Report No. 93-500 accompanying S. 663 discusses the venue question at pages 4-6 and concludes at page 6 that:

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

I support the conclusion and the wisdom behind the conclusion reached by the Senate Committee. The draft provisions of H.R. 785 contained no limitation on the alternative venue. No exception was inserted which would deprive parties before the I.C.C. of seeking judicial review under the alternative venue provisions in the District of Columbia. We understand, however, that the Interstate Commerce Commission is opposed to the alternative venue provisions and seek the insertion of an exception to the normal alternative venue under the Hobbs Act. Like the Senate Committee, we submit that no strong arguments have been forwarded by the I.C.C. to justify treatment of appeals from their orders different from that of other agencies.

First, it is important to recognize that with respect to cases which would affect the railroads generally or the motor carriers generally, there are very broad options available to the railroad industry and the motor carrier industry in selecting a forum for judicial review. There are railroads everywhere. There are motor carriers everywhere. Thus, they can select a lead plaintiff in any circuit, including the District of Columbia. On the other hand, the shipping public which appears before the Interstate Commerce Commission often does so in individual cases where there are a limited number of shipper parties. Very few shippers reside or have their principal office in the District of Columbia. While it is true that there

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are associations with residence in or principal offices in the District of Columbia, such associations do not participate in all cases, even those cases of general significance. As respondents with respect to orders of broad application, all the railroads and motor carriers are included thereby establishing some with venue in the District of Columbia. In a word, the industries regulated by the I.C.C. will still have the alternative venue as a practical matter while the shipping public will not have such alternative venue in the District. We ask that the shipping public be give equal access to the District of Columbia Courts.

We disagree with any contention by the I.C.C. that most of the appeals of its decisions will be here in the District of Columbia. Parties will go where they believe they can obtain justice with dispatch and economy. The sophistication of the District of Columbia Court of Appeals in matters of administrative law, which sophistication is recognized by the General Counsel of the I.C.C., admittedly may attract parties to this circuit because they believe they can obtain justice here.

Some parties who have retained Washington counsel in connection with a matter before the Commission may feel it is most economical and efficient to have Washington counsel pursue judicial review here rather than obtain local counsel in some other circuit. We would point out that the travel savings alone accrue not only to the party but also to the Commission--a matter that should not be taken lightly. If more appeals from I.C.C. decisions are taken in the District of Columbia, the Commission stands to achieve substantial economies in the cost of defending its decisions.

If the denial of alternative venue is intended to preclude forum shopping, we submit, as pointed out above, that the limitation is more on the public appearing before the Commission than on the regulated industries. The regulated industries, the railroads and the motor carriers in particular, will still have the opportunity and flexibility to select what they believe is an appropriate forum.

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Contrary to the fears expressed by the Commission's General Counsel before the Senate Committee (Senate Hearings, page 23) we do not believe that there is "a certain amount of parochialism that develops as a result of having that review concentrated in the District of Columbia Circuit." Parochialism is far from a supportable challenge when directed against the broad scope of expertise evidenced by the District of Columbia Circuit. Broad expertise in matters of administrative law are to be found in this circuit. That expertise should be freely accessible to parties before the I.C.C., including shipper groups, as much as they are for all parties before other agencies.

We also disagree with contentions that the United States Court of Appeals for the District of Columbia Circuit has tended to become a super-administrative agency, seeming to conceive of itself as being better informed of the issues before them than the administrative agencies the decisions of which it reviews. Nor do we believe that this court either actually or apparently arrogates unto itself the right to delve into policy determinations, rather than limiting itself to exposing errors of law allegedly committed by the defendants. We believe they apply their expertise in the area of judicial review of administrative decisions in accordance with the appropriate limitations on that judicial review. The I.C.C. has nothing to fear from the District of Columbia Circuit. If the Commission's decisions are in accordance with law, they will be upheld; if not, they will be reversed as they should be.

Therefore, in considering the proposed legislation which would place judicial review of decisions of the Interstate Commerce Commission in the United States Courts of Appeal, we urge your Committee to provide alternate venue in the United States Court of Appeals for the District of Columbia Circuit with respect to review of decisions of the Interstate Commerce Commission.

Respectfully,

John M. Cleary
JOHN M. CLEARY *cm*

JMC/cec

APPENDIX B—RECENT DECISIONS OF THE UNITED STATES
SUPREME COURT REGARDING JUDICIAL REVIEW OF DECISIONS
OF THE INTERSTATE COMMERCE COMMISSION.

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U. S. SUPREME COURT REPORTS

10 L ed 2d

* [372 US 744]

*INTERSTATE COMMERCE COMMISSION, Appellant,

v

THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD CO. et al. (No. 108)

SEA-LAND SERVICE, Inc., Appellant,

v

THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD CO. et al. (No. 109)

SEATRAN LINES, Inc., Appellant,

v

THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD CO. et al. (No. 110)

UNITED STATES, Appellant,

v

THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD CO. et al. (No. 125)

372 US 744, 10 L ed 2d 108, 83 S Ct 1038

[Nos. 108, 109, 110 and 125]

Argued February 28, 1963. Decided April 22, 1963.

SUMMARY

Certain railroads proposed to establish reduced TOFC (trailer-on-flatcar) rates substantially on a parity with rates charged by coastwise water carriers transporting trailers and freight cars. Finding that the proposed TOFC rates were an initial step in a program of rate reduction that could threaten the continued existence of the coastwise water carrier industry, the Interstate Commerce Commission suspended the rates as inconsistent with the National Transportation Policy (49 USC preceding § 1). (313 ICC 23.) A three-judge United States District Court for the District of Connecticut set aside the Commission's order on the ground that at least on the present record, the imposition of a rate differential to protect water carriers was prohibited by 49 USC § 15a(3), which provides that "rates

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of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy." The court also stated that the Commission's reliance on the national defense factor mentioned in the National Transportation Policy (49 USC preceding § 1) was misplaced because the reference in the National Transportation Policy to the national defense represents merely a "hoped for 'end,'" not an operative policy. (199 F Supp 635.)

On appeals, the Supreme Court of the United States vacated the lower court's judgment, set aside the Commission's order, and remanded the case to the Commission. In an opinion by HARLAN, J., expressing the unanimous views of the Court, it was held that on the record the court correctly held that the Commission's rejection of the proposed TOFC rates was not consistent with § 15a(3), but that the court erred in determining that the needs of the national defense are not an operative part of the National Transportation Policy.

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Appeal and Error § 1340 — judgment setting aside ICC order — scope of review.

1. On appeals to the Supreme Court of the United States from the decree of a three-judge Federal District Court setting aside an Interstate Commerce Commission's order requiring railroads to cancel proposed TOFC (trailer-on-flatcar) rates, and enjoining the Commission from cancelling the TOFC rates which return at least the fully distributed costs of carriage, the rates in question on the appeals are not merely those proposed TOFC rates that return at least the fully distributed costs of carriage, but all of the proposed TOFC rates which were before the three-judge court.

Carriers § 243 — rates — responding to competition.

2. The purpose of 49 USC § 15a(3), which provides that "rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of a national transportation policy," is to permit railroads to respond to competition by asserting whatever inherent advantages of cost and service they possess.

Interstate Commerce Commission § 60 — powers — rates below cost.

3. The principal but not the only reason for the reference to the National Transportation Policy (49 USC preceding § 1) in 49 USC § 15a(3), which provides that "rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy," is to emphasize the Interstate Commerce Commission's power to prevent the railroads from destroying or impairing the inherent advantages of other modes of transportation, such as by setting a rate below its own fully distributed costs which would force a competitor with a cost advantage on particular transportation to establish an unprofitable rate in order to attract traffic.

Interstate Commerce Commission § 62 — rail and water rates — findings and conclusions.

4. Under 49 USC § 15a(3), which provides that "rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy," the Interstate Commerce Commission's findings

and conclusions are insufficient to support its rejection of proposed railroad TOFC (trailer-on-flatcar) rates substantially on a parity with the rates of coastwise water carriers transporting trailers and freight cars, where the Commission, without determining the inherent advantages of the carriers, bases its rejection of the TOFC rates on its findings and conclusions that (1) the proposed TOFC rates constitute destructive competition, water carriers needing a favorable rate differential in order to attract traffic, and (2) as an initial step in a program of rate reductions threatening the existence of water carriers, the proposed TOFC rates are inconsistent with the object of the National Transportation Policy (49 USC preceding § 1) of preserving a transportation system adequate to meet the needs of the commerce of the United States and of the national defense.

Carriers § 243 — rates — diverting traffic from other modes of transportation.

5. The setting of a carrier's rate at a particular level does not constitute an unfair or destructive competitive practice inconsistent with the National Transportation Policy (49 USC preceding § 1) merely because the rate will divert some or all of the traffic from a competing mode of transportation, even though the rate is selective in character and made in response to a particular competitive situation.

Interstate Commerce Commission § 139 — rates — review by courts.

6. On appeals from a decree setting aside an Interstate Commerce Commission order requiring the cancellation of railroad rates, the Supreme Court of the United States will not decide, in the absence of a determination by the Commission, the inherent advantages of competing modes of transportation, how such inherent advantages should be measured or protected, or whether the national defense or any significant segment of the nation's commerce depends upon the operation of certain carriers, but will leave such

questions for initial resolution by the Commission.

Interstate Commerce Commission § 16 — inherent cost advantage — burden of proof.

7. If a carrier shows that a proposed rate is just and reasonable from the standpoint of its own revenue requirements, it is for a protesting carrier who relies on a claim of inherent cost advantage to bear the burden of persuading the Interstate Commerce Commission of the existence of that advantage, although when such an issue is raised, each carrier should bring forward the data relating to its own costs that are required for resolution of the issue.

Carriers § 228 — rates — cost differences — effect.

8. Even though carrier A may have lower costs than carrier B, a rate established by B may be lawful even if it has the effect of diverting some or all of A's traffic, where the overall advantage rests with B because the cost difference is very slight and B's service is so superior as to outweigh any such marginal cost difference.

Carriers § 228 — rates — cost differences — effect.

9. A rate reduction by carrier B to the level of its out-of-pocket costs may be lawful where carrier A's cost advantage over B is so great that A is able to charge a profitable rate and still compete effectively.

Interstate Commerce Commission § 56 — rates — national defense.

10. Under the National Transportation Policy (49 USC preceding § 1), the Interstate Commerce Commission has power to regulate the reasonableness of interstate rates in light of the needs of national defense.

Interstate Commerce Commission § 56 — rates — powers.

11. Even though the statement of the National Transportation Policy in 49 USC preceding § 1 mentions, among its aims, the meeting of the needs of the national defense, normally, the

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more particularized mandates stated in that policy and the clear congressional design embodied in 49 USC § 15a(3) govern the lawfulness of proposed rates in a case involving intermodal competition, and the Interstate Commerce Commission may permit

them to be outweighed only when it is demonstrated that the proposed rates in themselves genuinely threaten the continued existence of a transportation system that is uniquely capable of filling a transcendent national defense or other public need.

APPEARANCES OF COUNSEL

Robert W. Ginnane, Warren Price, Jr., and Ralph S. Spritzer, argued the cause for appellants.
Carl Helmetag, Jr. argued the cause for appellees.
Briefs of Counsel, p. 1116, *infra*.

OPINION OF THE COURT

*[372 US 746]

*Mr. Justice Harlan delivered the opinion of the Court.

This case, involving four consolidated appeals from a three-judge District Court judgment setting aside an order of the Interstate Commerce Commission to the extent that it rejected certain proposed railroad rate decreases, brings before us important questions relating to the role of the Commission in its task of overseeing competition among different modes of transportation. The case is the first in which this Court has considered the interpretation and application of § 15a(3) of the Interstate Commerce Act, added by Congress in the Transportation Act of 1958.¹

I.

The two corporate appellants here, Sea-Land Service, Inc. (formerly Pan-Atlantic Steamship Corporation), and Seatrain Lines, Inc., are common carriers by water engaged in the Atlantic-Gulf coastwise

1. Section 15a(3) of the Interstate Commerce Act, 72 Stat 572, 49 USC § 15a(3), provides:

"In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which

trade; they are the only two companies now performing this service. Sea-Land, which had operated as a "break-bulk"² carrier for many years, in 1957 suspended that serv-

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ice and converted ^{four} ships into crane-equipped trailerships, each capable of holding 226 demountable truck trailers. With these ships, freight could be moved by highway trailers to the port of origin, the trailers lifted onto the ships, and the process reversed at the port of destination. As a result, Sea-Land was able to provide a motor-water-motor service which afforded door-to-door delivery of goods from and to all shippers and consignees, even if not situated on a railroad siding, in containers that would not have to be opened in transit. Traditionally water rates, including water-rail and water-motor rates, have been lower than the corresponding all-rail rates, and when Sea-Land inaugurated its new trailership service in 1957, it published reduced rates which were generally

the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

2. This break-bulk service involved the physical unloading of freight from rail car or truck and the loading of the cargo into the ships, with the operation reversed at the port of destination.

5% to 7½% lower than the corresponding all-rail boxcar rates. Some 700 of these reduced rates were placed under investigation by the Commission.

In Seatrain's service, freight is transported to the company's dock in railroad cars, the cars and their contents are then lifted onto Seatrain's vessels, and at destination the cars are unloaded and delivered by rail to the consignee. This rail-water-rail service is similar to railroad boxcar service, in that it permits carriage from shipper to consignee without breaking bulk when both shipper and consignee are located on railroad sidings.

Railroad "piggy-back," or trailer-on-flatcar (TOFC), service is like that provided by Sea-Land. A motor carrier trailer is hauled by road to a railhead, loaded onto a flatcar, and demounted at destination for delivery by motor carrier to the consignee.

Before 1957, railroad TOFC rates were generally higher than all-rail boxcar, water, and land-water rates. But in 1957, primarily in answer to the new improved service and lower rates offered by Sea-Land,

the appellee railroads proposed to establish, on an experimental basis, reduced rates on 66 commodity

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movements between certain *eastern points on the one hand and Fort Worth and Dallas, Texas, on the other.³ These rates, which were substantially on a parity with Sea-Land and Seatrain rates on the same traffic, were suspended and placed under investigation by the Commission. In December 1960 the commission disposed of 43 docket proceedings by issuing a consolidated report embracing the railroad TOFC rates involved here as well as a number of Sea-Land and Seatrain rates not now before us. 313 ICC 23.

The Commission found that the proposed TOFC rates were compensatory, that is, they equaled or exceeded out-of-pocket costs, for all of the listed movements by railroad-leased-flatcars capable of carrying two trailers (TTX cars), and for all but six of the listed movements by railroad-owned single trailer cars.⁴ The Commission further found that the proposed rates equaled or ex-

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ceeded fully *distributed costs⁵ for 43

3. Since the establishment of these reduced rates would leave higher rates in effect to and from certain intermediate points involving shorter hauls, thus violating the long- and short-haul provisions of § 4(1) of the Act, 49 USC § 4(1), the railroads also applied to the Commission for the relief from these provisions which § 4(1) permits the Commission to grant. This fourth-section application was denied by the Commission because, for reasons summarized in the text of this opinion, the Commission found the proposed TOFC rates not shown to be just and reasonable. With respect to the fourth-section application itself, the Commission noted that "[n]o shippers or receivers located at the intermediate points oppose the granting of fourth-section relief." 313 ICC, at 33. Indeed, no individual shippers came forward to urge that the selective character of the reduced TOFC rates here

involved in any way discriminated against them, and in this Court the National Industrial Traffic League, a nationwide organization of shippers, has filed a brief as amicus curiae urging affirmance of the decision below.

4. The rates for these six movements were withdrawn and are not at issue. (The Commission had stated that it had no way of knowing the percentages of TOFC traffic that would move in TTX cars and the percentage that would move in railroad-owned cars and had thus concluded that the rates for the six movements in question had not been shown to be compensatory.)

5. The Commission has stated, in discussing railroad costs, that:

"Fully distributed costs based on the out-of-pocket costs plus a revenue-ton and revenue ton-mile distribution of the constant costs, including deficits, indicate the

of the 66 movements by TTX cars and 14 of 66 movements by railroad-owned cars.

Having made these findings, the Commission addressed itself to what it considered the "most important" question—"whether these [TOFC] rates constitute destructive competition." 313 ICC, at 44. It noted at the outset that, apart from the question of rates, most shippers prefer rail service to Sea-Land and Seatrains service and that, in order to attract traffic, the latter carriers must therefore establish rates somewhat below those of the railroads. As to relative costs, the Commission stated that Sea-Land costs, both out-of-pocket and fully distributed, were below railroad TOFC costs for all 66 movements using railroad-owned flatcars and for all but 2 of the 66 movements using TTX cars. But the Commission explicitly refrained from relying on these findings. Instead it concluded that because of a number of factors:

"[W]e cannot determine on these records where the *inherent advantages* may lie as to any of the rates in issue. We must recognize, also,

revenue necessary to a fair return on the traffic, disregarding ability to pay." *New Automobiles in Interstate Commerce*, 259 ICC 475, 513 (1945).

6. The National Transportation Policy, 54 Stat 899, 49 USC preceding § 1, was added to the Interstate Commerce Act in 1940. It provides:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrim-

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inations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

7. In support of these conclusions, the Commission quoted with approval passages from a 1955 report of the United States Maritime Administration, "A Review of the Coastwise and Intercoastal

that cost is only one of the elements which may appropriately be considered in passing upon the lawfulness of rates. In the exceptional circumstances here presented, other considerations, herein discussed, appear to us determinative of the issues." 313 ICC, at 46. (Emphasis added.)

The Commission acknowledged that the recently enacted § 15a (3) prohibited it from holding rail rates up to a particular level merely to * [372 US 750] protect the traffic of another *mode but emphasized that the prohibition was qualified by the phrase "giving due consideration to the objectives of the national transportation policy declared in this Act." In this case, the Commission stated, the reduced TOFC rates were an initial step in a program of rate reductions that could "fairly be said to threaten the continued operation, and thus the continued existence, of the coastwise water-carrier industry generally." 313 ICC, at 47. Since in the Commission's view the coastwise shipping so threatened was important to the national defense, to the shipping public, and to the economy of ports and coastal areas,⁷ it con-

*[372 US 751]

cluded that the objectives *of the National Transportation Policy required the establishment and maintenance of a differential between rail rates and those of Sea-Land and Seatrain which would enable the coastwise carriers to continue their service. The Commission decided that an appropriate differential to accomplish this purpose would be 6% over Sea-Land rates for TOFC service and somewhat less than 6% for boxcar service. Accordingly, the proposed TOFC rates were ordered to be canceled, without prejudice to the filing of new schedules in conformity with the Commission's views.⁸

The appellee railroads then brought this action before a three-judge District Court seeking to have

*[372 US 752]

the Commission's *order set aside to the extent that it required cancellation of the proposed TOFC rates. In November 1961, the court handed down its opinion, setting aside the Commission's order in part and en-

joining the Commission from canceling TOFC rates which return at least fully distributed costs, except on the basis of certain specified findings. 199 F Supp 635. The court held that "at least on this record," § 15a (3) prohibited the imposition of a rate differential to protect the water carriers. The reference to the National Transportation Policy in § 15a (3), the court said, was intended to qualify the prohibition of mandatory differentials ". . . only when factors other than the normal incidents of fair competition intervened, such as a practice which would destroy a competing mode of transportation by setting rates so low as to be hurtful to the proponent as well as his competitor or so low as to deprive the competitor of the 'inherent advantage' of being the low-cost carrier." 199 F Supp at 642.

The court went on to discuss in some detail its understanding of the way in which costs of service for the different transportation modes were determined, the possible reasons why

Shipping Trades," which emphasized the national defense importance of break-bulk cargo ships; from a 1950 congressional report, S Rep No. 2494, 81st Cong, 2d Sess 17, which referred to "the importance to national defense of having domestic tonnage readily available"; and from a 1945 Commission decision, War Shipping Admin. T. A. Application, 260 ICC 589, 591, which spoke of the "dependency of ports and coastal areas upon the existence of water transportation."

8. Five of the 10 Commissioners then in office joined in the entire report. A sixth, Commissioner Hutchinson, concurred, stating that he was "in general agreement with the majority report," 313 ICC, at 50, adding his own view that "the ultimate effect of approval of the [TOFC] schedules would be to allow rates of the high-cost carrier [TOFC] to gravitate to a level whereby the low-cost carrier [sea-land] will be forced to go below its full costs in order to participate in the traffic." Id., at 51. He also expressed some doubt

as to whether a 6% differential was warranted. Commissioner McPherson, concurring in part, would have approved all compensatory rates but would have imposed no differential. Three Commissioners (Commissioner Freas, joined by Chairman Winchell and Commissioner Webb) dissented on the ground that the Act neither required nor permitted "blanket protection" for water carriers or for any mode of transportation. Id., at 51, 52.

In view of our disposition of this case, it is not necessary to consider whether, in light of Commissioner Hutchinson's concurrence, the "majority report" in fact represented the views of a majority of the Commission and, if not, whether the Commission's decision could be sustained in the absence of any rationale commanding the support of a majority of the agency. Cf. Securities & Exch. Com. v Chenery Corp. 318 US 80, 87 L ed 626, 63 S Ct 454.

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the Commission had been reluctant to accept relative costs as critical, and the precise circumstances under which the Commission could properly require cancellation of certain TOFC rates. Finally, in rejecting the argument that a differential was required in the interests of the national defense, the court stated that the reference to the national defense in the National Transportation Policy was merely a "hoped-for 'end,'" not an operative policy, and that in any event the Commission's conclusion with respect to the national defense was not supported by adequate evidence.

*[372 US 753]

*We noted probable jurisdiction, 371 US 808, 9 L ed 2d 52, 83 S Ct 20, because of the importance of the questions presented in effectuating the congressional design embodied in the Interstate Commerce Act.⁹

II.

The significance of § 15a(3) to the determination of these appeals can best be understood after consideration of the legislative history of this provision.

Section 15a(3) was the result of several years of congressional consideration of the problems of the transportation industry as a whole and of the railroads in particular. Concerned with their declining share in an expanding market, and with what they regarded as improper administrative interference with their efforts to compete, the

railroads vigorously supported legislation introduced in 1955 on the basis of a proposal by the Secretary of Commerce. HR 6141, 84th Cong, 1st Sess. This bill, which became known as "the three shall-nots," would have amended § 15a (1) of the Act to provide that in determining whether a rate is less than a reasonable minimum, the Commission ". . . shall not consider the effect of such charge on the traffic of any other mode of transporta-

*[372 US 754]

tion; or *the relation of such charge to the charge of any other mode of transportation; or whether such charge is lower than necessary to meet the competition of any other mode of transportation"

This bill was strongly opposed by the Commission and by other carriers, and died in committee. A substantially similar bill, however, was introduced in the next Congress, HR 5523, 85th Cong, 1st Sess, and the Commission renewed its opposition. When, after hearings, a Senate subcommittee recommended a bill to its parent committee, it explicitly rejected the three "shall-nots." But at the same time it expressed its concern with "over-regulation" and emphasized that its own proposal to add a new § 15a(3) was designed to encourage competition among the different modes and to permit each mode to assert its *inherent advantages*. S Rep No. 1647, 85th Cong, 2d Sess 10, 18-19.

9. There is some question as to precisely what rates are in issue here; the United States and the Commission suggest that these appeals relate only to the TOFC rates which are equal to or exceed fully distributed costs, since the court below did not enjoin the Commission from canceling compensatory TOFC rates under that level. As we read the opinion and judgment below, however, the Commission's order was set aside insofar as it

canceled *all* of the proposed TOFC rates before the court, and thus Headnote 1 any order entered by the Commission in the future with respect to those rates would be subject to full judicial review. Accordingly, we reject as too narrow the position that the relevance of the present appeals is limited to TOFC rates that return at least the fully distributed costs of carriage.

The bill at this stage provided that in a proceeding involving competition with another mode ". . . the Commission, in determining whether a rail rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by railroad and not by such other mode." *Id.*, at 18. (Emphasis added.)

At hearings before the full Senate Commerce Committee, the Commission opposed the bill as drafted, not because it disagreed with the principles set out in the subcommittee report but because it feared that the language used, particularly the italicized portion, was inconsistent with those principles and was substantially equivalent to the three "shall-nots." Hearings on S 3778 before the Senate Committee on Interstate and Foreign Commerce, 85th Cong, 2d Sess 165-185. In particular Commissioner (then Chairman) Freas expressed concern that if the Commission were foreclosed from considering the ef-

*[372 US 755]

fect *of a rate on a competing mode, it would be powerless to reject a railroad rate which covered the railroad's out-of-pocket costs, even if that rate had the effect of destroying the inherent advantages of a lower-cost carrier. He stated:

"Whenever conditions permit, given transportation should return the full cost of performing carrier service. . . . In many instances, however, the full cost of the low-cost form of transportation exceeds the out-of-pocket cost of another. If, then, we are required to accept the rates of the high cost carrier merely because they exceed its out-of-pocket costs, we see no way of preserving the inherent advantages of the low cost carrier." *Id.*, at 168.

Commissioner Freas made it clear that the Commission believed the railroads should be permitted to assert their inherent advantages too, *id.*, at 172, and suggested that any proposal specifically authorize the Commission to give "due consideration to the inherent cost and service advantages of the respective carriers," *id.*, at 169. In further discussion, it was indicated that it would be inconsistent with the National Transportation Policy to permit destruction of the inherent advantages of any mode of transportation, *id.*, at 170, 171, 177, and when Senator Potter suggested the deletion of the phrase "and not by such other mode" and the addition of a reference to the National Transportation Policy, Chairman Freas answered: "We will buy Senator Potter's suggestion." *Id.*, at 177, 178. Senator Potter's suggestion was adopted in the final version of the bill.

Other testimony of particular interest here is that of John L. Weller, President of Seatrain, who testified on behalf of Seatrain and Pan-Atlantic (now Sea-Land). In opposing the bill recommended by the subcommittee, Mr. Weller emphasized that he did not seek any more

*[372 US 756]

than *to make it possible for the Commission to preserve the inherent advantages of the water carriers he represented:

"As I explained, our kind of operation can only exist with a differential under the railroad rates; that is No. 1. *We are not entitled to have such a differential, nor do I urge one, except in the case where cost is lower than the railroad cost. We have no right to ask for anything more than that.*" *Id.*, at 30. (Emphasis added.)

The proposal reported out by the

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Senate Commerce Committee was in the form ultimately adopted by Congress and contained the key provision that rates "shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act." The Committee, quoting with approval the subcommittee's report, made it clear that the purpose of the proposal was to permit each mode of transportation to assert its "inherent advantages, whether they be of service or of cost." S Rep No. 1647, 85th Cong, 2d Sess 3. The new subsection, the Committee stated, was designed to reaffirm the intent of the 1940 Act, an intent that had been correctly construed by the Commission in 1945 in *New Automobiles in Interstate Commerce*, 259 ICC 475, but which, in the Committee's view, had not been consistently followed.¹⁰ The

* [372 US 757]

particular passage in *the New Automobiles decision which the Committee endorsed contained the statement:

"[T]here appears no warrant for believing that rail rates, for example, should be held up to a particular level to preserve a motor-rate structure, or vice versa." 259 ICC, at 538.

This theme—that Congress was firmly opposed to rates maintained by the Commission at an artificially high level merely to protect competing modes—was repeated in the House Commerce Committee report, HR Rep No. 1922, 85th Cong, 2d

Sess, and in the debates on the floor of both Houses. 104 Cong. Rec 10822, 10841-10843, 10858-10859, 12524, 12531, 15528. As stated by Representative Harris, Chairman of the House Commerce Committee, if a carrier could provide a rate that was "fully compensatory," the Commission could not force it up to a higher level "just because it is necessary to keep another mode of transportation in business." *Id.*, at 12531. The mood of Congress was perhaps best summarized by Senator Smathers when he said:

"[W]e are going to eliminate some of the paternalism which has heretofore existed in the minds of the Interstate Commerce Commission. I think we will breathe into our whole system of transportation some new competition, which of course is needed, because the public and the consumer will benefit therefrom." *Id.*, at 15528.

This revealing legislative history fills out the contours of § 15a(3). There can be no doubt that the purpose of this provision

Headnote 2 was to permit the railroads to respond to competition by asserting whatever inherent advantages of cost and service they possessed. The Commission, in the view of the proponents of the bill, had thwarted effective competition by insisting that

* [372 US 758]

each form of transportation *subject to its jurisdiction must remain viable at all costs and must therefore receive a significant share of the traffic. It had, in the words of one Congressman, become a "giant handicapper."¹¹

10. During the hearings, Senator Smathers had referred to several Commission decisions, e. g., *Petroleum Products in Ill Territory*, 280 ICC 681, 691 (1951); *Petroleum Products from Los Angeles to Arizona and New Mexico*, 280 ICC 509 (1951), which were believed to

have substantially departed from the principles laid down in *New Automobiles*. Hearings on S 3778 before the Senate Committee on Interstate and Foreign Commerce, 85th Cong, 2d Sess 174, 175.

11. Hearings, *supra*, note 10, at 82.

Moreover, it is clear that Congress did not consciously or inadvertently defeat this purpose when it included in § 15a(3) a reference to the National Transportation Policy. The principal reason for this

Headnote 3 reference, as the hearings show, was to emphasize the power of the Commission to prevent the railroads from destroying or impairing the inherent advantages of other modes. And the precise example given to the Senate Committee, which led to the language adopted, was a case in which the railroads, by establishing on a part of their operations a compensatory rate below their fully distributed cost, forced a smaller competing *lower cost* mode to go below its own fully distributed cost and thus perhaps to go out of business.

III.

We agree with the District Court that "at least on this record," the Commission's rejection

Headnote 4 of the TOFC rates here at issue and the requirement of a differential over the rates of the coastwise carriers were not consistent with the mandate of § 15a(3). In light of the findings and conclusions underlying the Commission's decision, and more particularly its putting aside the question of "inherent advantages," its insistence that TOFC rates, in the words of the prohibition in § 15a(3), "be held up to a particular level to protect the traffic" of the coastwise carriers cannot be justified on the basis of the objectives of the National Transportation Policy. Since the Commission appears to have relied principally on two aspects of that policy—(i) the prohibition of "unfair or destructive

*[372 US 759]

*competitive practices," and (ii) the objective of preserving a transpor-

tation system "adequate to meet the needs of the commerce of the United States . . . and of the national defense" (note 6, supra)—we shall consider each of these aspects separately.

1. *Unfair or Destructive Competitive Practices.*—If there is one fact that stands out in bold relief in the legislative history of § 15a(3), it is that Congress did not

Headnote 5 regard the setting of a rate at a particular level as constituting an unfair or destructive competitive practice *simply* because that rate would divert some or all of the traffic from a competing mode. Moreover, neither the Commission representative nor the witness who testified on behalf of the appellant carriers (supra, pp. 115, 116) took this position, since they too recognized that such an interpretation would be inconsistent with the mandate of the National Transportation Policy to "preserve the inherent advantages of *each*" mode of transportation. If a carrier is prohibited from establishing a reduced rate that is not detrimental to its own revenue requirements merely because the rate will divert traffic from others, then the carrier is thwarted from asserting its own inherent advantages of cost and service. Nor should the selective character of such a rate reduction, made in response to a particular competitive situation, be permitted, without more, to furnish a basis for rejecting the rate. Section 15a(3), in other words, made it clear that something more than even hard competition must be shown before a particular rate can be deemed unfair or destructive. The

Headnote 3 principal purpose of the reference to the National Transportation Policy, as we have seen, was to prevent a carrier

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from setting a rate which would impair or destroy the inherent advantages of a competing carrier, for example, by setting a rate, below its own fully distributed costs, which would force a competitor with a cost advantage on particular transportation to establish an unprofitable rate in order to attract traffic.

*[372 US 760]

*It is true that in the present case the Commission found that with respect to virtually all of the TOFC movements involved, Sea-Land's out-of-pocket and fully distributed costs were below those of the railroads. But the Commission at the same time explicitly stated that "we cannot determine on these records where the inherent advantages may lie as to any of the rates in issue." 313 ICC, at 46. (Emphasis added.) It is not for us to make this determination at this stage,

Headnote 6 or to decide in advance precisely how either carrier's inherent advantages should be measured or protected.¹² It may be, for example, that neither a comparison of "out-of-pocket" nor

a comparison of "fully distributed" costs, as those terms are defined by the Commission, is the appropriate method of deciding which of two competing modes has the cost advantage on a given movement.¹³ And even if the cost advantage on each movement were determined to lie with the coastwise carriers, it may be that some or all of the TOFC rates at issue here should be allowed

*[372 US 761]

to stand because they would not unduly impair that advantage.¹⁴ These and other similar questions should be left for initial resolution to the Commission's informed judgment.

The court below set out at some length its understanding of the Commission's methods of arriving at carrier costs, its analysis of the role of "value-of-service" concepts in rate making, and its views of the precise circumstances under which the Commission could lawfully disallow the TOFC rates at issue. We find it unnecessary to consider that discussion in this instance, since we hold only that on the present record, the disallowance of the rates in

12. It was argued below, and at least intimated here, that the railroads had failed to sustain the burden of proving that they had the relative cost advantage.

But we agree with the court **Headnote 7** below that if a carrier shows a proposed rate to be just and reasonable from the standpoint of its own revenue requirements, it is for a protesting carrier who relies on a claim of inherent cost advantage to bear the burden of persuading the Commission of the existence of that advantage. Of course, when such an issue is raised, each carrier should bring forward the data relating to its own costs that are required for resolution of the issue. See Various Commodities from or to Ark & Tex, 314 ICC 215.

13. The utility of the concepts of fully distributed and out-of-pocket costs may be limited to the area in which they have traditionally been used—that of determining the reasonableness of a rate from

the standpoint of a carrier's own revenue requirements. If so, some different measure may be preferred for comparing the costs of two or more modes of transportation.

14. Even though carrier A may have lower costs than carrier B, the overall advantage may rest with B, **Headnote 8** for example, if the difference in cost is very slight but the service of B is so superior as to outweigh any such marginal cost difference. In this event a rate established by B may be lawful even if it has the effect of diverting some or all of A's traffic.

Conversely, the cost advantage of A over B may be so great that even if B were to reduce its rate to the **Headnote 9** level of its out-of-pocket costs, A might be able to continue to compete effectively and still charge a profitable rate. In this event B's reduced rate would not appear to impair A's inherent cost advantage.

question was not adequately supported. Cf. *Securities & Exch. Com. v Chenery Corp.* 318 US 80, 87, 87 L ed 626, 631, 63 S Ct 454.

2. *The Needs of the Commerce of the United States and of the National Defense.*—The Commission gave considerable weight to the factor of "national defense" and perhaps of "commerce" in arriving at its decision. But the District Court discounted these factors, concluding that the reference in the National Transportation Policy to the national defense (and presumably to commerce as well) represented merely a "hoped-for 'end,'" not an operative policy. We disagree with this conclusion, but hold that the Commission's

Headnote 4 * [372 US 762]
reliance on these *factors was not supported by adequate findings or substantial evidence.

The primary reason for the reference to the National Transportation Policy in § 15a(3)

Headnote 3 was to confirm the Commission's power to protect the inherent advantages of all carriers from destructive competition. But we cannot conclude that this was the *only* reason, especially in view of the choice not to accept the Commission's proposal, which would have expressed the qualification in terms of the inherent advantage element alone. See p. 116, supra. Nor can we conclude that the statutory references to such vital considerations as national defense are mere window dressing, without any practical significance

Headnote 10 in terms of the Commission's function. "Congress unequivocally reserved to the Commission power to regulate reasonableness of interstate rates in the light of the needs of national defense." *United States v Capital Transit Co.* 325 US 357,

362, 89 L ed 1663, 1668, 65 S Ct 1176.

On the other hand, by recognizing the relevance of such considerations as national defense, we do not imply that these broad policy factors may be applied so freely as to nullify either the more particularized mandates of the National Transportation Policy or the clear congressional design embodied in § 15a(3). Normally, it is these more specific considerations that

Headnote 11 should govern the lawfulness of proposed rates in a case involving intermodal competition. Only under extraordinary circumstances may the Commission properly permit them to be outweighed. To justify such a result, we believe it must be demonstrated that the proposed rates in themselves genuinely threaten the continued existence of a transportation service that is uniquely capable of filling a transcendent national defense or other public need.

Measured against this standard, the Commission's conclusions cannot be sustained. The Commission did state that the proposed rates were an "initial step" in a program

* [372 US 763]
*of rate reductions that "can fairly be said to threaten" the existence of the coastwise carriers, but it made no findings, and referred to no supporting evidence, to the effect that these particular TOFC rates would drive the corresponding water carrier rates below a profitable level or otherwise endanger the carriers' survival. Cf. *Burlington Truck Lines, Inc. v United States*, 371 US 156, 167, 168, 9 L ed 2d 207, 215, 216, 83 S Ct 239; *Gilbertville Trucking Co. v United States*, 371 US 115, 130, 131, 9 L ed 2d 177, 188, 189, 83 S Ct 217. It is not enough to rely on the possible effect of other rate reductions not

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here in issue, a situation with which the Commission has ample power to deal if occasion arises.

(like the factor of inherent advantage) do not exist solely for the benefit of protesting carriers.

Nor did the Commission present an adequate basis for concluding that either the national defense or any significant segment of the country's commerce depends upon the

operation of Sea-Land
 Headnote 6 or Seatrain.¹⁵ We need not consider the question whether reliance on other additional sources might have been sufficient,¹⁶ for we believe that the question is one for initial determination by the Commission, and that all parties should have an opportunity to adduce relevant evidence, including any evidence tending to indicate that *disallowance* of the proposed TOFC rates might ad-

versely affect the commerce *or the national defense of the country. Once raised, these considerations

In conclusion: We agree with the District Court that the Commission's order, insofar as it related to the TOFC rates at issue, must be set aside. We disagree, however, with that court's determination that the needs of the national defense are not an operative part of the National Transportation Policy, and we deem it inappropriate to approve or disapprove of other aspects of the court's opinion. Accordingly, we decide that the judgment below should be vacated, the order of the Commission set aside to the extent that it related to certain railroad TOFC rates described herein, and the cause remanded to the Commission for further proceedings consistent with this opinion.

It is so ordered.

15. The materials relied upon by the Commission are referred to in note 7, *supra*. These materials were general in nature, and the most recent dated back to 1955. Further, they were not sufficiently related to the specific service rendered by Sea-Land and Seatrain, which, we were informed by Sea-Land's counsel at oral argument, have a combined total of only eight ships currently in operation.

16. The Commission in its brief has

cited the 1960 testimony of Vice Admiral Wilson and of the Mayor of Savannah, Georgia, in *Decline of Coastwise and Interoceanic Shipping Industry*, Hearings before the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess 83, 86, 105, 106, and has also cited a 1961 letter from Vice Admiral Sylvester to Senator Butler, reproduced at 107 Cong Rec 7299-7302.

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*AMERICAN COMMERCIAL LINES, Inc., et al., Appellants,

v

LOUISVILLE & NASHVILLE R. CO. et al. (No. 797)

AMERICAN TRUCKING ASSOCIATIONS, Inc.,
et al., Appellants,

v

LOUISVILLE & NASHVILLE R. CO. et al (No. 804)

THE AMERICAN WATERWAYS OPERATORS,
Inc., Appellant,

v

LOUISVILLE & NASHVILLE R. CO. et al. (No. 808)

INTERSTATE COMMERCE COMMISSION, Appellant,

v

LOUISVILLE & NASHVILLE R. CO. et al. (No. 809)

392 US 571, 20 L Ed 2d 1289, 88 S Ct 2105

[Nos. 797, 804, 808, and 809]

Argued April 23 and 24, 1968. Decided June 17, 1968.

SUMMARY

This case presented the basic issue whether the Interstate Commerce Commission's action in disallowing a rate reduction proposed by certain railroads was inconsistent with § 15a(3) of the Interstate Commerce Act, which governs ratemaking in situations involving intermodal competition between carriers. A subsidiary but related issue was whether the Commission adequately articulated its reasons for disallowing the proposed rate. In making such disallowance the Commission, pending a rulemaking proceeding then before it to examine the whole question of the cost standards to be used in situations involving intermodal competi-

tion, adhered to a comparison between fully distributed costs, rather than between out-of-pocket costs as urged by the railroads, as the basis for determining which of the two competing modes of transportation—the railroads or a combined barge-truck service—had the inherent advantage on the traffic in question. On review of the Commission's decision, the United States District Court for the Western District of Kentucky, sitting as a statutory three-judge court, held that the Commission's decision was erroneous. (268 F Supp 71.)

On appeal, the United States Supreme Court reversed. In an opinion by MARSHALL, J., expressing the views of seven members of the court, it was held that the initial determination of what method of costing should be used as the measure of inherent advantage in intermodal rate controversies is for the Interstate Commerce Commission, and that therefore, in view of the pending ratemaking proceeding before the Commission to examine the whole question of standards of costing in such cases, the District Court erred in rejecting the Commission's decision, and the grounds on which it was based.

HARLAN, J., concurred in the result, on the ground that it was best to do so rather than to express his views as a single Justice upon the issue, which the court shunned, regarding what standard of costing should be the criterion for determining which mode of transportation had the inherent advantage.

DOUGLAS, J., dissented, stating that he would affirm the judgment below for the reasons stated by the District Court in its opinion (268 F Supp 71), which in substance were (1) that the Commission's order lacked a rational basis and thus was arbitrary, and (2) that the order was inconsistent with the objectives and purposes of Congress in enacting § 15a(3) of the Interstate Commerce Act, and thus was not in accordance with law.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

- 13 AM JUR 2d, Carriers §§ 33-73, 192
- 5 AM JUR PL & PR FORMS, Carriers, Form 5:1732
- US L ED DIGEST, Carriers §§ 212, 243; Interstate Commerce Commission §§ 56, 60, 61, 62, 177, 178; Statutes § 160
- ALR DIGESTS, Carriers §§ 712, 716
- L ED INDEX TO ANNO, Carriers; Interstate Commerce Commission
- ALR QUICK INDEX, Carriers

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HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Interstate Commerce Commission § 60
 — powers — rates below cost

1. The principal but not the only reason for the reference to the National Transportation Policy (49 USC preceding § 1) in 49 USC § 15a(3), which provides that "rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the National Transportation Policy," is to emphasize the Interstate Commerce Commission's power to prevent the railroads from destroying or impairing the inherent advantages of other modes of transportation, as by setting a rate below their own fully distributed cost which would force a competitor with a cost advantage on particular transportation to establish an unprofitable rate in order to attract traffic.

Interstate Commerce Commission § 62
 — disallowance of rate reduction
 — intermodal competition

2. The Interstate Commerce Commission's disallowance of a rate reduction proposed by railroads, by utilizing fully distributed costs of the railroads as the basis for determining which of the two competing modes of transportation—the railroads or a barge-truck service—had the inherent advantage on the traffic in question, is, at the very least, presumptively in accord with the language of § 15a(3) of the Interstate Commerce Act (49 USC § 15a(3))—which provides that "rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the National Transportation Policy declared in this Act," (that is, "to provide for fair and impartial regulation for all modes of transportation subject to the provisions of the Act, so administered as to recognize and preserve the inherent advantages of each" (49 USC preceding § 1))—and

with the intent of Congress in utilizing that language.

Statutes § 160 — Interstate Commerce Act — administrative construction

3. In construing § 15a(3) of the Interstate Commerce Act (49 USC § 15a(3))—which provides that rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the National Transportation Policy declared in the Act—the decisive factor is what Congress meant in 1958 when § 15a(3) was enacted, and not what the Interstate Commerce Commission meant in a 1945 decision on the issue of competitive rate regulation.

Interstate Commerce Commission § 61
 — basis of rates — intermodal competition

4. The Interstate Commerce Commission, after due consideration, may, rather than must, decide that some other measure of comparative costs might be more satisfactory with respect to ratemaking in situations involving intermodal competition between carriers than the one it had traditionally utilized.

Carriers § 243 — rates — maximum revenue

5. The purpose of § 15a(3) of the Interstate Commerce Act (49 USC § 15a(3))—which provides that rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the National Transportation Policy—is not to enable railroads to price their services in such a way as to obtain the maximum revenue therefrom.

Carriers § 212 — relative administrative and legislative functions

6. If the theories advanced by economists as witnesses in a railroad rate

proceeding are as compelling as they feel they are in construing, contrary to the intent of Congress, a provision of the Interstate Commerce Act dealing with intermodal competition, Congress is the body to whom they should be addressed.

Carriers § 212 — rates — review — economic policy

7. The courts are ill-qualified to make the kind of basic judgments about economic policy sought by a carrier, such as a railroad, in a rate-making proceeding before the Interstate Commerce Commission in a situation involving intermodal competition; it would be particularly inappropriate for a court to award a carrier, on economic grounds, relief denied it by the legislature, as, for instance, was done by a Federal District Court in rejecting the Commission's disallowance of a rate reduction proposed by railroads which were in competition with a barge-truck service.

Carriers § 212; Interstate Commerce Commission § 56 — power — rates — economic policy

8. The Interstate Commerce Commission, as opposed to the courts, is not bound in ratemaking proceedings from making legislative judgments about matters of economic policy; it is precisely to permit such judgments that the task of regulating transportation rates has been entrusted to a specialized administrative agency rather than to courts of general jurisdiction.

Interstate Commerce Commission § 3 — power

9. The Interstate Commerce Commission must operate within the limits set out by Congress in enacting the legislation the Commission administers.

Interstate Commerce Commission § 61 — costing method — intermodal rate controversies

10. The initial determination of the question of what method of costing should be used in intermodal rate controversies as the measure of inherent

advantage of the competing carriers, is for the Interstate Commerce Commission.

Interstate Commerce Commission § 177 — review — disallowance of rate reduction

11. A Federal District Court, on review of the Interstate Commerce Commission's disallowance of a rate reduction proposed by railroads in a situation involving intermodal competition with a barge-truck service, is not justified in rejecting the Commission's decision because it adhered to a comparison between fully distributed costs rather than between out-of-pocket costs as the basis for determining which of the two competing modes of transportation had the inherent advantage on the traffic in question, where, by taking such action, the District Court totally ignored the temporary nature of the Commission's action due to the pendency of a rulemaking proceeding before it to examine the whole question of the cost standards to be used where comparisons of intermodal cost advantages are required, and instead went ahead and, in the guise of resolving the particular controversy over a single rate reduction, rendered a decision which, for all practical purposes, made the rulemaking proceeding moot, thus, in effect, refusing to permit the Commission to deal with the complex problems in the broad and more suitable context of a rulemaking proceeding; while there might be some justification for such a course when the applicable statute clearly requires the agency to arrive at a given result, the instant case is emphatically not such a situation, there being no justification for denying the Commission reasonable latitude to decide where it will resolve the complex issues, in addition to how it will resolve them.

Administrative Law § 25; Interstate Commerce Commission § 60 — power — rates

12. The principle that the legislative discretion implied in the rate-making power necessarily extends to

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the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself, applied to rate regulation carried out by the Federal Power Commission, is equally applicable to rate regulation carried out by the Interstate Commerce Commission, especially where the determination made on an interim basis is in general accord with both the legislative history of the statute involved and the results in prior cases decided by the agency.

Interstate Commerce Commission § 62
— authority — economic contentions

13. The Interstate Commerce Commission has ample authority to decline to deal with the broad economic contentions advanced by railroads in an individual rate case involving intermodal competition with a barge-truck service, where a rulemaking proceeding is pending before the Commission to examine the whole question of the cost standards to be used where comparisons of intermodal cost advantages are required.

Interstate Commerce Commission § 61
— ratemaking — intermodal competition

14. The Interstate Commerce Commission is not obliged to explain why it permits out-of-pocket ratemaking, in situations involving intermodal competition between carriers, where the competing carrier is unregulated and not where it is regulated, since § 15a(3) of the Interstate Commerce Act (49 USC § 15a(3)), which governs ratemaking in such situations, by its own terms applies only to "modes of transportation subject to this Act," which by definition means regulated carriers.

Interstate Commerce Commission § 61
— ratemaking — intermodal competition — inherent advantage

15. In an Interstate Commerce Com-

mission proceeding to determine which of two competing modes of transportation has the "inherent advantage" on the traffic in question for purposes of ratemaking under § 15a(3) of the Interstate Commerce Act (49 USC § 15a(3)), it is self-evident, regardless of the label used, that a carrier's "inherent advantage" of being the low cost mode on a fully distributed cost basis is impaired when a competitor sets a rate that forces the carrier to lower its own rate below its fully distributed costs in order to retain traffic.

Interstate Commerce Commission § 61
— intermodal rate controversy

16. It is proper for the Interstate Commerce Commission, as it has traditionally done, to take the position that a rate struggle between competing modes of transportation, which would be likely to eventually result in pushing rates to a level at which the rates would no longer provide a fair profit, should be prevented from commencing in the first place.

Interstate Commerce Commission § 62
— rate reduction — reasons for disallowance — intermodal competition

17. The Interstate Commerce Commission, upon disallowing a rate reduction proposed by railroads, adequately articulates its reasons for determining that the rate reduction would impair the inherent advantage enjoyed by a competing combined barge-truck service, where the Commission pointed out that the principle proposed by the railroads of using out-of-pocket costs as the basis on which inherent advantage should be determined, would, if recognized, permit the railroads to capture all the traffic that is presently carried by the barge-truck service because the railroad's out-of-pocket costs were lower than those of the barge-truck service.

APPEARANCES OF COUNSEL

Leonard S. Goodman argued the cause for appellants.

Harry C. Ames, Jr., argued the cause for appellants.

Daniel M. Friedman and Carl Helmetag, Jr., argued the cause for appellees.

Briefs of Counsel, p 1780, *infra*.

OPINION OF THE COURT

*[392 US 574]

*Mr. Justice Marshall delivered the opinion of the Court.

The basic issue in these cases is whether the action of the Interstate Commerce Commission in disallowing a rate reduction proposed by the appellee railroads, 326 ICC 77 (1965), was consistent with the provisions of § 15a(3) of the Interstate Commerce Act, 49 USC § 15a(3), added by 72 Stat 572 (1958), which governs ratemaking in situations involving intermodal competition. A subsidiary but related issue is whether the Commission adequately articulated its reasons for disallowing the proposed rate. A statutory three-judge court, upon appeal of the Commission's decision by the appellee railroads, held that the Commission's decision was erroneous on both of the foregoing grounds. 268 F Supp 71 (DC WD Ky 1967). Because of the importance of § 15a(3) as the primary guide to ICC resolution of rate controversies involving intermodal competition, we noted probable jurisdiction of the appeal taken by the Commission and the competing carriers from the decision

*[392 US 575]

of the District Court.¹ 389 US 1032, 19 L Ed 2d 820, 88 S Ct 782 (1968). For the reasons detailed below, we conclude that the District Court

erred in its rejection of the Commission's decision, and the grounds on which it was based, and we reverse.

I.

Since 1953 the movement of ingot molds from Neville Island and Pittsburgh, Pennsylvania, to Steelton, Kentucky, has been almost exclusively by combination barge-truck service, and since 1960 the overall charge for this service has been \$5.11 per ton. In 1963 the Pennsylvania Railroad and the Louisville & Nashville Railroad lowered their joint rate for this same traffic from \$11.86 to \$5.11 per ton. The competing barge lines, joined by intervening trucking interests, protested to the ICC that the new railroad rate violated § 15a(3) of the Interstate Commerce Act because it impaired or destroyed the "inherent advantage"² then enjoyed by the barge-truck service. The Commission thereupon undertook an investigation of the rate reduction.

In the course of the administrative proceedings that followed, the ICC made the following factual findings about which there is no real dispute among the parties. The fully distributed cost³ to the rail-

*[392 US 576]

roads of this service *was \$7.59 per

1. The United States, a statutory defendant in the District Court, supported the railroads' position there and has participated in support of them in the proceedings before this Court.

2. The term "inherent advantage" comes from the National Transportation Policy,

49 USC preceding § 1, and is incorporated by reference into § 15a (3) of the Interstate Commerce Act. The meaning of the term is the central issue in these cases and will be discussed in considerable detail, *infra*, at 579-594, 20 L Ed 2d at 1296-1306.

3. Fully distributed costs are defined

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ton, and the "long term out-of-pocket costs"⁴ were \$4.69 per ton. The fully distributed cost to the barge-truck service⁵ was \$5.19 per ton.⁶ The out-of-pocket cost⁷ of the barge-truck service was not separately computed, but was estimated, without contradiction, to be approximately the same as the fully distributed cost and higher, in any event, than the out-of-pocket cost of the railroads. The uncontroverted shipper testimony was to the effect

*[392 US 577]

that price was virtually *the sole determinant of which service would be utilized, but that, were the rates charged by the railroads and the barge-truck combination the same, all the traffic would go to the railroads.

The railroads contended that they should be permitted to maintain the \$5.11 rate, once it was shown to exceed the out-of-pocket cost attributable to the service, on the ground

broadly by the ICC as the "out-of-pocket costs plus a revenue ton and revenue-ton-mile distribution of the constant costs, including deficits, [that] indicate the revenue necessary to a fair return on the traffic, disregarding ability to pay." *New Automobiles in Interstate Commerce*, 259 ICC 475, 513 (1945).

4. The long-term out-of-pocket costs were computed under an ICC-sponsored formula which generally holds that 80% of rail operating expenses, rents and taxes are out-of-pocket in that they will vary with traffic. To this is added a return element of 4% on a portion of the investment (all the equipment and 50% of the road property), which is apportioned to all traffic on a proportional basis. Compare n. 3, *supra*.

5. This figure is not precisely a cost figure. Rather it is the barge fully distributed cost, plus the charge made for the truck portion of the service and the charge for barge-truck transfer. Since all parties seem willing to treat the figure as one of fully distributed cost for the barge-truck combination, no further mention will be made of its disparate elements.

6. Because the barge-truck rate of \$5.11 was below the fully distributed cost of the

that any rate so set would enable them to make a profit on the traffic. The railroads further contended that the fact that the rate was substantially below their fully distributed cost for the service was irrelevant, since that cost in no way reflected the profitability of the traffic to them. The barge-truck interests, on the other hand, took the position that § 15a(3) required the Commission to look to the railroads' fully distributed costs in order to ascertain which of the competing modes had the inherent cost advantage on the traffic at issue. They argued that the fact that the railroads' rate would be profitable was merely the minimum requirement under the statute. The railroads in response contended that inherent advantage should be determined by a comparison of out-of-pocket rather than fully distributed costs, and they produced several economists to testify

service, Division 2 of the ICC initially concluded that the barge-truck combination had forfeited its right to claim that its inherent advantage of lower fully distributed cost was being impaired by the railroads' setting of a matching rate. On reconsideration, the full Commission reversed this ruling by Division 2, observing that there was no evidence that the failure of the barge-truck rate to equal fully distributed cost was due to anything but the barge lines' ignorance of the precise amount of their fully distributed cost for this service. This determination is not challenged here by any party and we express no opinion on it.

7. Out-of-pocket costs have been regarded generally in these cases as equivalent to what economists refer to as "incremental" or "marginal" costs. Accordingly we shall equate the terms likewise, although we have no intention of vouching for the accuracy of that equation as a matter of pure economics. Cf. n. 4, *supra*. Such costs are defined generally as the costs specifically incurred by the addition of each new unit of output and do not include any allocation to that unit of pre-existing overhead expenses.

that, from the standpoint of economic theory, the comparison of out-of-pocket, or incremental, costs was the only rational way of regulating competitive rates.

The ICC rejected the railroads' contention that out-of-pocket costs should be the basis on which inherent advantage should be determined. The Commission observed that it had in the past regularly viewed fully distributed costs as the appropriate basis for determining which of two competing modes was the lower cost mode as regards particular traffic. It further indicated that the legislative history of § 15a (3) revealed that Congress had in mind a comparison of fully distributed costs when it inserted the reference to the National Transporta-

^{*}[392 US 578]

tion ^{*}Policy into that section in place of language sought by the railroads. The Commission also emphasized that there was a rulemaking proceeding pending before it in which the whole question of the proper standard of costing in situations involving intermodal competition was being examined in depth, and stated that "a radical departure from the fully distributed cost norm" would not be justified on the basis of the record before it in this case.

Having decided to utilize a comparison between fully distributed costs to determine inherent advantage, the Commission then concluded that the rate set by the railroads would undercut the barge-truck combination's ability to exploit its inherent advantage because the rate would force the competing carriers to go well below their own fully distributed costs to recapture the traffic from the railroads. Moreover,

8. A rate is compensatory in the sense used by the District Court any time it is greater than the out-of-pocket cost of the service for which the rate is set. The

since the result sought by the railroads was general permission to set rates on an out-of-pocket basis, the Commission concluded that eventually the railroads could take all the traffic away from the barge-truck combination because the out-of-pocket costs of the former were lower than those of the latter and, therefore, in any rate war the railroads would be able to outlast their competitors. Accordingly, the Commission ordered that the railroads' rate be canceled.

The District Court read the statute and its accompanying legislative history to reflect a congressional judgment that inherent advantage should be determined in most cases by a comparison of out-of-pocket costs and that, therefore, railroads should generally be permitted to set any individual rate they choose as long as that rate is compensatory.⁸

^{*}[392 US 579]

The court also held that the ^{*}Commission had failed adequately to articulate its reasons for deciding that the proper way of determining which mode of transportation was the more efficient was by comparison of fully distributed costs rather than out-of-pocket costs. Although this latter holding appears first in its opinion, it is evident that it must logically follow its ruling on the meaning of § 15a(3), since if Congress in enacting that section had already decided that inherent advantage should be determined by reference to fully distributed costs, there would be no special burden on the Commission to justify its use of them.

II.

This Court has previously had oc-

term fully compensatory is sometimes used to describe a rate in excess of fully distributed costs.

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casation to consider the meaning and legislative history of § 15a(3) of the Interstate Commerce Act in *ICC v New York, N. H. & H. R. Co.* 372 US 744, 10 L Ed 2d 108, 83 S Ct 1038 (1963) ("New Haven"), and both the ICC and the District Court have relied heavily on that decision as support for the conflicting results reached by them in these cases. Because the statute and its relevant legislative history were so thoroughly canvassed there, we shall not undertake any extended discussion of the same material here. Instead, we shall refer to that opinion for most of the relevant history.

So far as relevant here, § 15a(3) provides that: "[r]ates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

The National Transportation Policy, 49 USC preceding § 1, states that it is the intention of the Congress: "to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, so administered as to recognize and preserve the inherent advantages of each"

*[392 US 580]

*The enactment of § 15a(3) in 1958 was due primarily to complaints by the railroads that the ICC had main-

tained rates at artificially high levels in order to protect competing modes from being driven out of business by railroad competition.⁹ The bill that eventuated in the language that is presently § 15a(3) originally provided that the ICC, in considering rate reductions, should, in a proceeding involving competition with another mode of transportation, "consider the facts and circumstances attending the movement of the traffic by railroad and *not by such other mode.*" (Emphasis added.) 372 US, at 754, 10 L Ed 2d at 116. This language was objected to strongly by both the ICC and representatives of those carriers with which the railroads were in competition. See Hearings on S 3778 before the Senate Committee on Interstate and Foreign Commerce, 85th Cong, 2d Sess (1958). The basic ground of objection was that by looking only to the effect of a rate reduction on the carrier proposing it, the ICC would be unable to protect the "inherent advantages" enjoyed by competing carriers on the traffic to which a rate reduction was to be applied.

*[392 US 581]

*Unfortunately, the meaning of the term "inherent advantage," which is what the Commission is supposed to protect, is nowhere spelled out in the statute. The railroads argue, and the District Court held, that Congress intended by the term to

9. An illustration of such a case is the decision of the ICC that was reversed in the *New Haven* case. There the ICC had refused to permit the railroads to set a rate which was not only above their out-of-pocket cost for the service but was also above their fully distributed cost for approximately half of the movements involved. The Commission did not rely on a determination of which of the competing carriers had the inherent advantage as to costs, but instead decided broadly that the rate would eventually destroy the

coastwise shipping industry and therefore should be prohibited. This Court held that, in general, the ICC was required to determine which of the competing carriers possessed the inherent advantage before a rate could be ordered cancelled in order to protect a carrier's present rate. While the Court indicated that the Nation's defense needs might permit protection of even a higher cost carrier in some cases, it held that the ICC had not adequately shown *New Haven* to be such a case.

refer to situations in which one carrier could transport goods at a lower incremental cost than another. The fallacy of this argument is that it renders the term "inherent" advantage essentially meaningless in the context of the language and history of § 15a(3).

Since the pricing of railroad services below out-of-pocket or incremental cost would result in a net revenue loss to the railroad on the carriage, the ICC could prohibit such practices without reference to the costs of any other competing carrier. And this is precisely what the language of the bill as originally endorsed by the railroads would have provided by its use of the phrase "and not by such other mode." See *supra*, at 580, 20 L Ed 2d at 1297. This language was, however, rejected by the Congress and the alternative formulation proposed by the ICC, see Hearings, *supra*, at 169, was substituted for it.

[1-3] As this Court said in the New Haven case:
"The principal reason for this ref-

erence [to the National Transportation Policy] . . . was to emphasize the power of the Commission to prevent the railroads from destroying or impairing the inherent advantages of other modes. And the precise example given to the Senate Committee, which led to the language adopted, was a case in which the railroads, by establishing on a part of their operations a compensatory rate below their fully distributed cost, forced a smaller competing *lower cost* mode to go below its own fully distributed cost and thus perhaps to go out of business." 372 US, at 758, 10 L Ed 2d at 118.

*[392 US 582]

*Since these cases are identical to the example just described, it would seem that, at the very least, the result reached by the Commission here is presumptively in accord with the language of the statute and with the intent of Congress in utilizing that language.¹⁰

*[392 US 583]

*The District Court, however, ignored the above portion of the New

10. The appellees also contend, and the District Court held, that the statements in the legislative history of § 15a(3) that Congress intended to compel the Commission to return to the approach to competitive rate regulation it had utilized in the case of New Automobiles in Interstate Commerce, 259 ICC 475 (1945), indicate that out-of-pocket ratemaking was intended to be the rule in such cases. However, the passage quoted from New Automobiles simply states that the rates of one mode of transportation should not be held up merely to protect competing modes. It says nothing at all about inherent advantages.

The railroads argue that the basic thrust of the New Automobiles case was to compare costs on an out-of-pocket basis. And it is true that many of the comparisons there made were on that basis. However, an examination of what the Commission actually said and did in New Automobiles compels the conclusion that no flat rule of comparison of out-of-pocket costs was there laid down. For example, the Com-

mission concluded that on the basis of a comparison with the railroads, out-of-pocket costs for shipping automobiles, the truckers were the lower cost mode only up to 120 miles. On a fully distributed cost comparison the truckers were the lower cost mode up to 230 miles. 259 ICC, at 528. After discussing at some length the concept of reasonable minimum rates, the Commission ultimately concluded that generally the truckers had the cost advantage at distances up to 200 miles and that the railroads should be permitted to set rates that would permit them to compete for the longer-haul traffic. 259 ICC, at 539.

Given the fact that the Commission was dealing with an attempt by the truckers to get it to hold up railroad rates for distances even greater than 600 miles, it is not surprising that the issue of measuring inherent advantage as between fully distributed and out-of-pocket costs did not receive detailed consideration, since by either method the truckers were the low cost mode only up to a little more than

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Haven opinion and seized on certain other language therein to the effect that:

"It may be, for example, that neither a comparison of 'out-of-pocket' nor a comparison of 'fully distributed' costs, as those terms are defined by the Commission, is the appropriate method of deciding which of two competing modes has the cost advantage on a given movement." 372 US, at 760, 10 L Ed 2d at 119.

It coupled this language with its interpretation of § 15a(3) as having the purpose to promote "hard competition," and concluded that the Commission had the burden of justifying any departure from using out-of-pocket cost as the means of determining inherent cost advantage.

[4] We think that the District Court erred in its reading both of the prior New Haven decision and

200 miles. Thus it cannot fairly be said that New Automobiles represents a considered choice between the two methods of cost comparison. Rather what it stands for is the principle emphasized in the New Haven case that the rates of one mode should not be held up to protect the revenues of a competitor without regard to which is the low cost carrier.

[3] In any event, what matters so far as § 15a(3) is concerned is not what the Commission meant in New Automobiles but what Congress thought it meant in 1958 when the section was enacted. As we have shown in the text of the opinion above, Congress considered New Automobiles to stand for the principle that the rate structure of a competing mode should not be protected by the Commission simply to prevent it from losing business through competition.

11. The District Court also relied on the rejection of a similar proposal by truck and barge interests that fully distributed costs be the floor for reasonable minimum rates in the course of the enactment of the National Transportation Policy in 1940. It seems clear, however, that

of the extent to which Congress intended to foster intermodal competition. We note first that nothing in the language of the New Haven opinion indicates a preference for either out-of-pocket or fully distributed costs as a measure of inherent advantage; rather, all that is said is that the appropriate measure "may be" neither. Given the fact that the insertion of the reference to inherent

*[392 US 584]

ent advantage into *§ 15a(3) came about at the insistence of carriers that were demanding that fully distributed costs be the sole measure of that advantage,¹¹ we think that the clear import of the foregoing statement in the New Haven opinion was that the Commission *could*, after due consideration, decide that some other measure of comparative costs might be more satisfactory in situations involving intermodal competition than the one it had traditionally utilized.¹² That is a far cry from saying that it *must*.

one of the major reasons for the rejection of the so-called Miller-Wadsworth amendment by Congress was the possibility that its enactment would prevent low-value industrial and agricultural commodities from being carried at a rate low enough to make it economically feasible to ship them in interstate commerce. See generally Nelson, *Rate-Making In Transportation—Congressional Intent*, 1960 Duke L. J. 221, 228-238.

12. While it is true that, for varying and sometimes unexplained reasons, the Commission has not invariably used fully distributed costs as the basis for cost comparisons in situations involving intermodal competition, see 268 F Supp, at 78, it is also true that it has generally declared fully distributed cost comparisons to be preferable. Thus in the hearings on the bill that was to become § 15a(3), Commissioner Freas stated:

"Whenever conditions permit, given transportation should return the full cost of performing carrier service. . . . In many instances, however, the full cost of the low-cost form of transportation exceeds the out-of-pocket cost of another.

The District Court apparently believed that the Commission was required to exercise its judgment in the direction of using out-of-pocket

*[392 US 585]

costs as the rate floor "because that would encourage "hard"¹³ competition. We do not deny that the competition that would result from such a decision would probably be "hard." Indeed, from the admittedly scanty evidence in this record, one might well conclude that the competition resulting from out-of-pocket rate-making by the railroads would be so hard as to run a considerable number of presently existing barge and truck lines out of business.

We disagree, however, with the District Court's reading of congressional intent. The language contained in § 15a(3) was the product of a bitter struggle between the railroads and their competitors. One of the specific fears of those competitors that prompted the change from

the original language used in the bill was that the bill as it then read would permit essentially unregulated competition between all the various transportation modes. It was argued with considerable force that permitting the railroads to price on an out-of-pocket basis to meet com-

*[392 US 586]

petition would result in the "eventual complete triumph of the railroads in intermodal competition because of their ability to impose all their constant costs¹⁴ on traffic for which there was no competition.

The economists who testified for the railroads in this case all stated that such an unequal allocation of constant costs among shippers on the basis of demand for railroad service, i. e., on the existence of competition for particular traffic,¹⁵ was economically sound and desirable. Apart from the merits of this contention as a matter of economic theory,¹⁶ it

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is quite clear that it was a "conten-

If, then, we are required to accept the rates of the high cost carrier merely because they exceed its out-of-pocket costs, we see no way of preserving the inherent advantages of the low cost carrier." Quoted at 372 US, at 755, 10 L Ed 2d at 116.

13. The District Court ascertained the legislative purpose to promote "hard competition" from the following passage from the New Haven opinion:

"Section 15a(3), in other words, made it clear that something more than even hard competition must be shown before a particular rate can be deemed unfair or destructive. The principal purpose of the reference to the National Transportation Policy, as we have seen, was to prevent a carrier from setting a rate which would impair or destroy the inherent advantages of a competing carrier, for example, by setting a rate, below its own fully distributed costs, which would force a competitor with a cost advantage on particular transportation to establish an unprofitable rate in order to attract traffic." 372 US, at 759, 10 L Ed 2d at 118. Since the sentence following the term "hard competition" described an example of the competition prohibited by the Na-

tional Transportation Policy that is identical to the facts of the present case, the District Court's use of the term to reverse the ICC's decision here seems somewhat peculiar.

14. Constant costs are, broadly speaking, those items of expense which are incurred by a business regardless of the scale of its operations. They are essentially the equivalent to what is commonly called overhead expenses. For railroads constant costs include such items as real estate taxes, certain rents, much right-of-way maintenance expense and similar expenses.

15. Unequal allocation of constant costs as an element of the rate charged also occurs commonly where a bulky commodity is so low valued on a per ton basis that setting a rate by reference to the fully distributed cost of carrying the commodity would make it uneconomic to ship it. See n. 11, supra.

16. This Court is not particularly suited to pass on the merits of the economic arguments made by the railroads' expert witnesses in these cases. Moreover, their soundness is not especially relevant to the result we reach in the present posture of this controversy. However, because the

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tion that was not by any means wholly accepted by the Congress that enacted § 15a(3). One of the specific examples given of an unde-

economic testimony is emphasized so heavily by both the railroads and the United States in their arguments to us, we shall venture a few observations on it.

Most of the economic testimony is directed towards proving that the utilization of out-of-pocket costs in setting rates permits the railroads to maximize their profits. To the extent that out-of-pocket costs are accurately computed, that proposition appears uncontrovertible. The economists then go on to argue, in effect, that what is good for the railroads is good for the country. This argument is developed as follows. Whenever a railroad lowers its rate, the shipper to whom that rate is available benefits. As long as the rate is above the out-of-pocket cost of the service, the railroad benefits by obtaining the profits from traffic it formerly did not carry. The fact that a competing carrier may lose the revenue it previously earned by carrying the traffic is immaterial because the railroad's ability to make a profit by charging the lower rate shows that it is, in some sense, more efficient than its competitor.

In order to evaluate the foregoing argument certain other aspects of a railroad's operation must be kept in mind. The reason why a railroad's fully distributed costs are substantially greater than its out-of-pocket costs on any given traffic is, *inter alia*, because certain constant costs, see n. 14, *supra*, are allocated to that traffic on a proportional basis despite the fact that those costs will be incurred by the railroad whether it carries the particular traffic or not. These constant costs must be earned if the railroad is to stay in business. They are allocated proportionally on the theory that, all other factors being equal, such an allocation will be the best way of assuring that each shipper contributes his fair share towards covering the constant costs. Obviously to the extent that any shipper pays more of the constant costs than another without any good reason for so doing that shipper is, in some sense, discriminated against.

The railroad economists point out that, because constant costs by definition are not attributable to the carriage of any particular traffic, it is to some extent arbitrary to allocate them to particular traffic. They further contend that all shippers presently utilizing a railroad's serv-

ices are benefited when the railroad obtains additional traffic at a profit to it, because that profit can be used to pay a portion of the constant costs currently being charged wholly to them. The fact that charging a rate less than its fully distributed cost of carrying the traffic results in the shipper of that freight paying a disproportionately low share of the railroad's constant costs is considered to be outweighed by the overall benefit to the other shippers of having the absolute amount borne by them of the constant costs decreased by the profit earned on the traffic.

It seems apparent, however, that in a case where the sole reason that a rate below fully distributed cost is necessary to attract such additional traffic is the competition of another mode of transportation, that continued existence of that competition is also the sole economic justification for maintaining the rate at a relative level that favors one shipper over others. If the competing carrier is driven out of business because of its inability to match the railroad's lower rates set on an out-of-pocket basis, the economic justification for permitting the continuation of those low rates would seem to disappear. Yet the railroad economists assert that in such a situation the railroad should be required by the ICC to maintain the rate at its original level. The obvious reason for this position is that permitting a railroad to raise its rates once it had effectively destroyed a competitor in one area would enable it to price on an out-of-pocket basis in competition with another carrier in a different area thereafter and, in turn, drive that carrier out of business. Eventually a railroad could eliminate all its competitors whose out-of-pocket costs were higher than its own. After this was accomplished the railroad could re-price all its services on a fully distributed cost basis thereby eliminating all discrimination between its shipper customers.

Of course, the shippers formerly served by competing modes at rates profitable to them but lower than the railroad's fully distributed costs would at that point have lost the advantage of the low cost service. The only way to perpetuate the advantage previously enjoyed by those shippers would be, as the railroad economists recognized, artificially to maintain their rates at the former level despite the ab-

sirable practice, and accepted by the members of the Commerce Commit-

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tee *that drafted the statute as such, was a case in which certain railroads had engaged in day-to-day differential pricing on the carriage of citrus fruit from Florida depending on whether competitive carriage was

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available *by ship that day. See Hearings, supra, at 153-155. Similar complaints were made about seasonal variations in rates by railroads depending on whether winter conditions interfered with the carriage of freight by water. *Id.*, at 162-163. Yet, from an economic standpoint, such rate variations make perfect competitive sense insofar as maximization of railroad revenues is concerned.¹⁷

[5-7] The simple fact is that § 15a(3) was not enacted, as the railroads claim, to enable them to price their services in such a way

sense of present economic justification for such a low rate. (It is true that were the barriers to re-entry into the transportation market low, as asserted by the railroad economists, the potential competition created by the possibility of such reentry by a competing mode could furnish an economic justification for the continuance of the original low rate. However, there is no factual evidence in this record from which it can be concluded that barriers to re-entry are low enough to create such potential competition.)

If the only justification for the maintenance of a disproportionately low rate to some shippers is the fact that competition existed once upon a time for their business, would it be irrational to conclude that it would be preferable to keep the original competition in business to serve those shippers and to require the railroad to look elsewhere for additional revenue? Would it, for example, be possible for railroads to increase their revenues instead by increasing, through selective rate decreases, the volume of traffic shipped by persons who presently pay amounts in excess of the fully distributed cost for the service afforded them? These are only a few of the questions that come to mind when we attempt to evaluate the economic

as to obtain the maximum revenue therefrom. The very words of the statute speak of "preserv[ing]" the inherent advantages of each mode of transportation. If all that was meant by the statute was to prevent wholly noncompensatory pricing by regulated carriers, language that was a good deal clearer could easily have been used. And, as we have

*[392 US 590]

shown above, *at least one version of such clear language was proposed by the railroads and rejected by the Congress. If the theories advanced by the economists who testified in this case are as compelling as they seem to feel they are, Congress is the body to whom they should be addressed. The courts are ill-qualified indeed to make the kind of basic judgments about economic policy sought by the railroads here. And it would be particularly inappropriate for a court to award a carrier,

arguments made in this case. We do not pretend to be able to answer them. We merely note their existence as evidence that we do not find the arguments made to the ICC here as compelling as did the District Court.

Our discussion here should not be interpreted as a rejection of the basic economic points made by the railroads. It is merely intended to illustrate the desirability of having the initial resolution of these issues made by a tribunal, and in a proceeding, more suitable than the present one.

17. It is, of course, true that such discriminations need have no necessary relationship to a railroad's cost of service, whether that is computed on a fully distributed or out-of-pocket basis. On the other hand, it is also evident that what is basically at issue is a carrier's right to price discriminatorily, either between shipments or shippers, in order to maximize revenues by competition. By contrast it can be noted that the railroads have apparently retained their prior rate of \$11.86 per ton on ingot molds in areas where they have no competition from barge-truck service. The discrimination thus created is not too dissimilar from that embodied in the above examples.

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on economic grounds, relief denied it by the legislature. Yet this is precisely what the District Court has done in this case.

[8-10] We do not mean to suggest by the foregoing discussion that the Commission is similarly barred from making legislative judgments about matters of economic policy. It is precisely to permit such judgments that the task of regulating transportation rates has been entrusted to a specialized administrative agency rather than to courts of general jurisdiction. Of course, the Commission must operate within the limits set out by Congress in enacting the legislation it administers. But nothing we say here should be taken as expressing any view as to the extent that § 15a(3) constitutes a categorical command to the ICC to use fully distributed costs as the only measure of inherent advantage in intermodal rate controversies. As was stated in the New Haven case, it "may be" that after due consideration another method of costing will prove to be preferable in such situations as the present one. All we hold here is that the initial determination of that question is for the Commission.

[11] It is in this connection that the timing of this case takes on particular significance. We have already observed that the ICC has presently pending before it a broad-scale examination of the whole question of the cost standards to be used where comparisons of intermodal cost advantages are required. Rather than await the result of that rulemaking proceeding, the railroad

³[392 US 591]

*appellees here determined to attempt to raise precisely the same issues in a much more circumscribed proceeding by unilaterally reducing their rates on one item of traffic.

The District Court totally ignored the temporary nature of the ICC's action in this case and the pendency of the rulemaking proceeding. Instead, it went ahead and, in the guise of resolving this particular controversy over a single rate reduction, rendered a decision which, for all practical purposes, made the rulemaking proceeding moot. While there might be some justification for such a course when the applicable statute clearly requires the agency to arrive at a given result, this case is emphatically not such a situation. As this Court stated in *New Haven*, "[t]hese and other similar questions should be left for initial resolution to the Commission's informed judgment." 372 US, at 761, 10 L Ed 2d at 119.

The Commission stated here that it intended to exercise its informed judgment by considering the issues presented here in the context of a rulemaking proceeding where it could evaluate the alternatives on the basis of a consideration of the effects of a departure from a fully distributed cost standard on the transportation industry as a whole. Until that evaluation was completed, the Commission took the position that it would continue to follow the practice it had observed in the past of dealing with individual rate reductions on a fully distributed cost basis. The District Court, in effect, refused to permit the Commission to deal with the complex problems of developing a general standard of costing to use in determining inherent advantage in situations involving intermodal competition in the broad context of a rulemaking proceeding. Instead, it ordered the Commission to resolve those problems in the narrow context of this individual rate reduction proceeding.

We have already observed that the District Court erred in interpreting the New Haven decision to

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require *the Commission to permit out-of-pocket pricing in most instances. Given the fact that New Haven indicated that the Commission was to exercise its informed judgment in ultimately determining what method of costing was preferable, it is clear that the District Court also erred in refusing to permit the Commission to exercise that judgment in a proceeding it reasonably believed would provide the most adequate record for the resolution of the problems involved. We can see no justification for denying the Commission reasonable latitude to decide where it will resolve these complex issues, in addition to how it will resolve them. The action by the District Court here not only deprives the Commission of the opportunity to make the initial resolution of the issues but also prevents it from doing so in a more suitable context.

[12, 13] This Court has just recently held that the Federal Power Commission had the authority to fix rates on an area-wide basis rather than on an individual producer basis and that, in order to make such a procedure feasible, it had statutory authority to impose a moratorium upon rate increases by producers for a period of 2½ years after the setting of the area rate. *Permian Basin Area Rate Cases*, 390 US 747, 20 L Ed 2d 312, 88 S Ct 1344 (1968). The basis for this holding was the principle that the "legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself." *Id.*, at 776, 20 L Ed 2d at 341. That principle is equally ap-

plicable to rate regulation carried out by the ICC, especially where, as here, the determination made on an interim basis is in general accord with both the legislative history of the statute involved and the results in prior cases decided by the agency. Accordingly, we hold that the Commission had ample authority to decline to deal with the broad contentions advanced by the railroads in

*[392 US 593]

*this individual rate case and that the District Court erred in failing to recognize that authority.

[14] The District Court also objected to the failure of the Commission to explain why it permitted out-of-pocket ratemaking where the competing carrier was unregulated and not where the competitor was regulated. The short answer to this is that § 15a(3) by its own terms applies only to "modes of transportation subject to this Act," which by definition means regulated carriers. As a result any arbitrariness that may flow from the distinction recognized by the Commission between regulated and unregulated carriers in situations of intermodal competition is the creation of Congress, not of the Commission.

[15-17] The District Court also appears to have held that the Commission did not adequately explain how the rate set by the railroads would impair or destroy the barge-truck inherent advantage. Yet the Commission pointed out that the principle proposed by the railroads would, if recognized, permit the railroads to capture all the traffic here that is presently carried by the barge-truck combination because the railroads' out-of-pocket costs were lower than those of the combined barge-truck service. The District Court seems to have been impressed by the fact that the railroads were merely meeting the barge-truck

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rate, despite the uncontroverted evidence that given equal rates all traffic would move by train. Given a service advantage, it seems somewhat unrealistic to suggest that rate parity does not result in undercutting the competitor that does not possess the service advantage. In any event, regardless of the label used, it seems self-evident that a carrier's "inherent advantage" of being the low cost mode on a fully distributed cost basis is impaired when a competitor sets a rate that forces the carrier to lower its own rate below its fully distributed costs in order to retain the traffic. In

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addition, when a *rate war would be likely to eventually result in pushing rates to a level at which the rates set would no longer provide a fair profit, the Commission has tra-

ditionally, and properly, taken the position that such a rate struggle should be prevented from commencing in the first place. Certainly there is no suggestion here that the rate charged by the barge-truck combination was excessive and in need of being driven down by competitive pressure. We conclude, therefore, that the Commission adequately articulated its reasons for determining that the railroads' rate would impair the inherent advantage enjoyed by the barge-truck service.

The judgment of the District Court is reversed and the cases are remanded to that court with directions to enter a judgment affirming the Commission's order.

It is so ordered.

SEPARATE OPINION

Mr. Justice Harlan, concurring in the result.

As I understand the Court's position, it is that the Commission has not decided, and thus the Court need not decide, the question expressly left open in *ICC v New York, N. H. & H. R. Co.*, 372 US 744, 10 L Ed 2d 108, 83 S Ct 1038: whether out-of-pocket costs, fully distributed costs, or some third standard should be the criterion for determining, under § 15a(3) of the Interstate Commerce Act, 49 USC § 15a(3), and the National Transportation Policy (preceding § 1 of the Act), which mode of transportation has the in-

herent advantage. The reasoning of the Court's opinion is, I take it, that the Commission may properly adhere to a fully distributed costs standard pending its decision in a separate rulemaking proceeding, en-

* [392 US 595]

titled *Rules Governing the Assembling and Presenting of Cost Evidence, Docket No. 34013.

Although I do not doubt that an administrative agency may, where the orderly processes of adjudication or rulemaking require, defer the resolution of issues to more appropriate proceedings,¹ I should have

1. I do not, however, believe that the Court's position is really supported by its references to the area pricing and moratoria systems approved by the Court in the Permian Basin Area Rate Cases, 390 US 747, 20 L Ed 2d 312, 88 S Ct 1344. The Court's opinion in those cases emphasized that those administrative devices were warranted in light of the terms of the Natural Gas Act and of the extraor-

dinary difficulties of regulating independent producers of that commodity. I should not have thought it useful or desirable to extrapolate from those unusual circumstances any general extension of the discretion of administrative agencies. Of course, the specific proposition taken by the Court today from the opinion in those cases, which had in turn been taken from *Los Angeles Gas Corp. v Railroad*

had the greatest difficulty in saying that in fact this had occurred, or that had been intended to occur, in

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these cases." Nonetheless, *given both the Court's conclusion and the

Commission, 289 US 287, 304, 77 L Ed 1180, 1191, 53 S Ct 637, may be regarded as a general principle sustained by a number of the Court's opinions. The difficulty, I should have supposed, is that even that general proposition is only dimly relevant to the questions now before us.

2. The appearance and disappearance of the suggestion that these questions must be deferred pending the Commission's rulemaking proceedings on the presentation of cost evidence deserves a more complete chronicle than the Court has given. In 1965, more than three years after the Commission initiated its rulemaking proceeding, 27 Fed Reg 4102, and some two months before it decided these cases, the Commission held that "a comparison of out-of-pocket costs is the most appropriate method for ascertaining . . . inherent competitive advantage" where one of the competing modes is unregulated. The Commission found it unnecessary to defer that question, or even to mention its separate rulemaking proceeding. *Grain in Multiple-Car Shipments—River Crossings to the So.*, 325 ICC 752, 772.

In the present case, the report and order of the Commission's Division 2 indicated that it "adhere[d] to the utilization of fully distributed costs as the standard for determining the inherent advantage of low cost in the situation presented." 323 ICC 758, 762-763. The opinion did not pause to refer to the rulemaking proceeding. In the report and order of the full Commission on reconsideration, the only reference to the rulemaking proceeding was the brief passage quoted by the Court from the opinion's final section. 326 ICC 77, 84. The three dissenting members of the Commission found it unnecessary to refer to the rulemaking proceeding. *Id.*, at 85, 86, 90.

One year after its decision in these cases, the Commission had occasion to review its approach to these problems. Although the Commission adhered to its decisions in these cases and in *Grain in Multiple-Car Shipments—River Crossings to the So.*, *supra*, it did not find it necessary to advert to its separate rulemaking proceedings. It concluded that where the competition from a regulated carrier is

"relatively limited" it would apply the rule from *Grain in Multiple-Car Shipments*, and not that from these cases. There is no evidence whatever that the Commission regarded these two lines of authority merely as temporary expedients, useful only until more careful analysis is possible. *Wine, Pacific Coast to the East*, 329 ICC 167, 171-175. And see the concurring opinions of Vice Chairman Tucker and Commissioner Freas, *id.*, at 176, as well as the separate opinion of Commissioner Murphy, dissenting in part, *id.*, at 177.

Although the three-judge District Court set aside the Commission's order in these cases, it did not mention the rulemaking proceeding. 268 F Supp 71.

In its jurisdictional statement to this Court, the Commission adverted to the rulemaking proceeding only in a single sentence, with an identifying footnote, contained in the statement's conclusion. *Jurisdictional Statement in No. 809*, at 17. In the memorandum of the United States, urging that probable jurisdiction be noted, it was said that these cases "present a major issue reserved by this Court" in *New Haven*, which was "whether out-of-pocket costs, fully distributed costs, or 'some different measure' should be the criterion for determining which mode of transportation has the inherent advantage" *Memorandum for the United States 3-4*. In the various briefs presented to the Court in these four cases, including the briefs of the United States and of the Commission, I have looked in vain for any suggestion that, as the Court now holds, the Commission's opinion was intended merely to defer resolution of the question reserved in *New Haven*. Indeed, I have searched unsuccessfully in the Commission's brief for any reference, however fleeting, to the rulemaking proceeding. One might have supposed that if, as the Court now finds, the existence of the rulemaking proceeding was, in *the Commission's view*, decisive to the result of this case, the Commission would have found room in its brief of 51 pages at least to cite those proceedings. It is difficult to escape the inference that the Court has, on a basis that will doubtless prove as surprising to the parties as it did to me, simply postponed decision of a difficult issue.

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isolated statements in the Commission's opinion consistent with that conclusion, I believe it best to acquiesce in the result reached by the Court, rather than to express

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my views "as a single Justice upon the issue which the Court shuns."

I would be less than candid if I did not say that I regard this disposition of these cases as unsatis-

factory, for what is now done leaves this important question just where our decision of five years ago in the New Haven case left it, and new litigation will now be necessary to resolve the issue.

Mr. Justice Douglas, dissenting.

I would affirm the judgment below for the reasons stated by the District Court in 268 F Supp 71.

3. It is, however, proper to add that I have found no support in the record for the Court's suggestion that "the railroad appellees here determined to attempt to raise precisely the same issues [as in

the rulemaking proceeding] in a much more circumscribed proceeding by unilaterally reducing their rates on one item of traffic." Ante, at 590-591, 20 L Ed 2d 1303.

FLORIDA *v.* ALABAMA ET AL.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 37, Orig. Decided January 28, 1970

State of Florida's motion for leave to file complaint invoking Court's original jurisdiction fails to state claim warranting exercise of such jurisdiction.

Motion denied.

Claude R. Kirk, Jr., Governor of Florida, and *Gerald Mager* on the motion.

PER CURIAM.

On January 23, 1970, the plaintiff filed a motion for leave to file a complaint invoking the original jurisdiction of this Court naming 49 other States and Robert Finch, as Secretary of the Department of Health, Education, and Welfare, as parties defendant.

The alleged emergent nature of the claims for relief led the Court to give expedited consideration to the motion and proffered complaint and, having examined the complaint, we conclude it fails to state a claim against any of the defendants warranting the exercise of the original jurisdiction of this Court.

Accordingly, the motion to accelerate the time for responses to the proffered complaint and the motion for leave to file the proffered complaint are denied.

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UNITED STATES *v.* INTERSTATE COMMERCE
COMMISSION *ET AL.*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

No. 28. Argued October 21, 1969—Decided February 2, 1970*

In 1967 the Interstate Commerce Commission (ICC) approved a merger plan filed by the Great Northern Railway Co. (GN) and the Northern Pacific Railway Co. (NP) (collectively the Northern Lines), and three of their subsidiaries, the Pacific Coast Railroad Co., the Chicago, Burlington & Quincy Railroad Co. (Burlington), and the Spokane, Portland & Seattle Railway Co. (SP&S). The Northern Lines operate largely west from St. Paul, Minneapolis, and Duluth, across the Northern Tier of States to Spokane, Tacoma, and Portland. NP, with about 6,200 miles of track, runs generally to the south of GN, which operates about 8,200 miles of track. The Northern Lines jointly own and control the Burlington and the SP&S. The Burlington has 8,648 miles of track extending from Chicago to the Twin Cities and southwesterly to Missouri, Kansas, Colorado, and Montana, and by its subsidiaries reaches Houston and Galveston. The SP&S has more than 500 miles of mainline road in Oregon and Washington which provides the most direct route from Spokane to Portland and is of strategic importance to the Northern Lines. Rail competition in the Northern Lines' area is provided by GN and NP (the principal competitors), and the Chicago, Milwaukee, St. Paul & Pacific Railroad Co. (Milwaukee), which has not been an effective long-haul competitor, never having had adequate access to the Pacific Northwest gateways. Truck competition, present in the area for some time, is growing. GN's and NP's merger efforts span three-quarters of a century. The present merger plan was disapproved by the ICC in 1966 by a vote of 6 to 5, the ICC finding that: although the estimated annual savings would approximate \$25 million by the tenth year after merger, a significant source of

*Together with No. 38, *Brundage et al. v. United States et al.*, No. 43, *City of Auburn v. United States et al.*, and No. 44, *Livingston Anti-Merger Committee v. Interstate Commerce Commission et al.*, on appeal from the same court.

the savings would be the elimination of jobs; the merger would eliminate substantial competition between GN and NP; even with protective conditions for the benefit of the Milwaukee, it would remain a weak competitor; and the plan did not afford benefits of such scope and importance as to outweigh the lessening of rail competition in the Northern Tier. The ICC reopened the proceedings in 1967 and considered new evidence on savings to be realized from the merger, and the additional evidence resulting in the changed position of some of the major objectors to the plan. The ICC found that: the savings would be more than \$40 million a year by the tenth year; agreements with the employees had removed union objections to the merger and provided that no jobs would be eliminated except by attrition; and the applicants had accepted all protective conditions sought by Milwaukee; and acknowledged that it had failed to give appropriate weight to § 5 of the Interstate Commerce Act to facilitate rail mergers "consistent with the public interest." The ICC then re-examined the anticompetitive effects of the merger, weighing them against the savings and benefits to the public, shippers, and the roads, and, emphasizing the strengthened position of the Milwaukee, approved the plan because its benefits outweighed its anticompetitive effects. The three-judge District Court sustained the ICC, holding that the ICC was guided by the applicable legal principles and that its findings were supported by substantial evidence. Four appeals were taken: (1) the United States, through the Antitrust Division of the Department of Justice, argues that the ICC did not properly apply the standard of § 5 in determining that the merger was consistent with the public interest. It contends that when a merger will substantially diminish competition between two financially healthy, competing roads, the anticompetitive effects should preclude approval absent a clear showing that a serious transportation need will be met or important public benefits will be provided beyond the normal savings and efficiencies deriving from a merger; (2) the Northern Pacific Stockholders' Protective Committee challenges the exchange ratios agreed upon by the companies for their stock on the basis that NP's land holdings were insufficiently valued; (3) the City of Auburn, Washington (the western terminus for NP's transcontinental trains whose yard would be closed if the merger were approved), supports the Department of Justice's brief, and contends that the ICC failed to assess adequately the impact of the merger on affected communities; and (4) the Livingston Anti-Merger Committee urges that the ICC had no authority to

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approve the merger because the NP, the successor by purchase in 1896 to the Northern Pacific Railroad Co. (Railroad) does not own the franchise and right of way involved in the merger as Congress did not authorize the sale as required by Railroad's charter, and Railroad is not a party to the merger; and that if it is held that NP does own the franchise, no merger can take place without approval of Congress. *Held:*

1. The ICC's conclusion that the merger, as conditioned, comported with the public interest under the standards of § 5 of the Interstate Commerce Act, as amended by the Transportation Act of 1940, is supported by the findings which the ICC made on the basis of substantial evidence after measuring the competitive consequences of the merger against its resulting benefits. Pp. 506-516.

(a) Congress intended by the 1940 amendments "to facilitate merger and consolidation in the national transportation system," and that the industry "proceed toward an integrated transportation system" (*County of Marin v. United States*, 356 U. S. 412, 416, 418), and the congressional objective is not to be read as confining mergers to situations where weak carriers are preserved by combining with those that are strong. Pp. 508-511.

(b) Congress vested in the ICC the task of "apprais[ing] the effects of the curtailment of competition which will result from [a] proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy." *McLean Trucking Co. v. United States*, 321 U. S. 67, 87. Pp. 511-513.

(c) The ICC's determination that the conditions agreed to by the applicants, the attrition agreements with the employees, the enhanced savings, and manifold service improvements to shippers and the public, outweighed the loss of competition between the Northern Lines, is supported by substantial evidence. Pp. 513-516.

2. The ICC's determination that the stock exchange ratio applicable to Northern Pacific stockholders and Great Northern stockholders, which was established, after protracted arm's-length negotiations, with the approval of the companies and the large majority of their stockholders, is just and reasonable, is supported by substantial evidence, and the ICC's refusal to reopen the record for evidence to update it was not an abuse of discretion. Pp. 516-522.

3. The ICC found on the basis of substantial evidence that the merger's long-run effect would benefit the Northern Tier communities, including Auburn, even if that city's yard closed if the merger was approved. Since it now appears that the Auburn yard will remain open, the anticipated principal harm to the city because of the merger has disappeared, and *a fortiori* the ICC's refusal to take further evidence on the merger's impact on the city was not an abuse of its discretion. Pp. 522-524.

4. The ICC did not err in refusing to disapprove the merger because of the Livingston Anti-Merger Committee's contention that acquisition by NP of its railroad property resulted from invalid foreclosure proceedings, as the ICC could, for purposes of the merger proceeding, properly rely on "existing judicial records supplemented by opinions of two Attorneys General" on the title question which were adverse to the Committee's challenge; nor do the charter provisions of NP's predecessor in interest foreclose the ICC's approval of the merger. Pp. 524-530. 296 F. Supp. 853, affirmed.

Assistant Attorney General McLaren argued the cause for the United States. With him on the briefs were *Solicitor General Griswold*, *Deputy Solicitor General Springer*, and *Howard E. Shapiro*. *Louis B. Dailey* argued the cause for appellants in No. 38. With him on the briefs was *Harry Tyson Carter*. *Valentine B. Deale* argued the cause and filed briefs for appellant in No. 44. *Robert L. Wald* and *Joel E. Hoffman* filed a brief for appellant in No. 43.

Fritz R. Kahn argued the cause for appellee Interstate Commerce Commission in all cases. With him on the brief were *Robert W. Ginnane* and *Jerome Nelson*. *Hugh B. Cox* argued the cause for appellees Great Northern Railway Co. et al. in all cases. With him on the briefs were *Ray Garrett*, *D. Robert Thomas*, *Lee B. McTurnan*, *Michael Boudin*, *Anthony Kane*, *Louis E. Torinus*, *Earl F. Requa*, *Frank S. Farrell*, *Eldon Martin*, *R. T. Cabbage*, and *Richard J. Flynn*. *Fred H. Tolan*

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argued the cause for appellees Pacific Northwest Shippers in No. 28. With him on the brief was *Alan F. Wohlstetter*. *Raymond K. Merrill* argued the cause for appellee Chicago, Milwaukee, St. Paul & Pacific Railroad Co. in No. 28. With him on the brief were *Edwin O. Schiewe*, *Warren H. Ploeger*, *Thomas H. Ploss*, and *Edward H. Foley*. *Lee Johnson*, Attorney General of Oregon, and *Richard W. Sabin*, Assistant Attorney General, filed a brief for appellee Public Utility Commissioner of Oregon in No. 28.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The Interstate Commerce Commission orders that give rise to these appeals grow out of applications seeking approval of a merger plan filed by the Great Northern Railway Company and the Northern Pacific Railway Company (collectively the Northern Lines), and three of their subsidiaries—the Pacific Coast Railroad Company, the Chicago, Burlington & Quincy Railroad Company (Burlington), and the Spokane, Portland & Seattle Railway Company (SP&S). The Commission approved the merger and a three-judge Federal District Court for the District of Columbia affirmed the orders of the Commission.¹ We affirm the judgment of the District Court.

The factual and historical setting of the merger is important to an understanding of our disposition of these appeals. Great Northern operates some 8,200 miles of road located in 10 States and two Canadian provinces. Northern Pacific has approximately 6,200 miles of track in seven States and one Canadian province. The Northern Lines operate largely in the area west of St. Paul, Minneapolis, and Duluth, running from these points

¹ The three-judge court decision is reported as *United States v. United States*, 296 F. Supp. 853 (D. C. D. C. 1968).

across the Northern Tier of States (Minnesota, North Dakota, Montana, Idaho, and Washington) to Spokane, Tacoma, and Portland. The Northern Pacific's tracks run generally somewhat to the south of the Great Northern's. The Northern Lines jointly own and control the Burlington and the SP&S, while the Great Northern owns and controls the Pacific Coast Railroad Company. The Burlington's 8,648 miles of track extend from Chicago to the Twin Cities and generally southwesterly to Missouri, Kansas, Colorado, and Montana. By its subsidiaries² the Burlington reaches the Gulf of Mexico at Houston and Galveston. The SP&S has 599 miles of road in Oregon and Washington, of which 515 are mainline. This mainline provides the most direct route from Spokane to Portland and is of strategic importance to the Northern Lines because Spokane lies on their main transcontinental routes and Portland is an important West Coast terminal for both roads. The Pacific Coast has 32 miles of track, all in King County, Washington; its rolling stock and motive power are leased from the Great Northern.

Rail competition in the areas served by the Northern Lines is principally between three carriers: the Great Northern, the Northern Pacific, and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Milwaukee). Because the Burlington's routes largely complement those of the Northern Lines, there is no substantial competition between the Burlington and its corporate parents. The Great Northern and the Northern Pacific overshadow the Milwaukee and are each the principal competitor of the other. The Northern Lines carry the lion's share of traffic between the Twin Cities

²The Colorado & Southern Railway Company and the Fort Worth & Denver Railway Company are both controlled by the Burlington.

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and Duluth and the Pacific Northwest, both roads having good access to the Pacific Northwest through control of certain vital gateways in the area. Although the Milwaukee was designed and constructed to be a competitor of the Northern Lines, it has never accounted for a large percentage of the carriage across the Northern Tier States to the Pacific Northwest; it has never become a rate-making railroad. The explanation for this is that although possessing superior grades and a shorter route west of the Twin Cities, it has never had adequate access to the gateways of the Pacific Northwest, largely because of the Northern Lines' control of the SP&S. As a result, its role has been that of a short-haul carrier feeding much profitable long-haul traffic to the Northern Lines at St. Paul and Minneapolis.

The population of the Northern Tier region traversed by the Northern Lines and the Milwaukee is concentrated largely in its easterly and westerly extremities. The Northern Tier is rich in agricultural and mineral resources, and embraces the country's richest timber reserves. However, the markets for the products of the Northern Tier are limited in number and distant from the region; the major shipments must move east. Thus, transportation capable of carrying its bulk products at a rate low enough to permit participation in those markets is of extreme importance to the region. Rail transportation well serves this need. There has been historically, however, an imbalance between the low-rated agricultural, mineral, and forest produce traffic flowing out of the region, and high-rated manufactured goods flowing into the region. The former is traffic inherently suited to rail transport, but the latter is subject to incursions from other modes of carriage. Although water traffic in the Northern Tier is virtually nonexistent, truck competition has been present for some time and is growing.

Northern Pacific and Great Northern have long sought to merge into a single unified transportation system. In *Pearsall v. Great Northern R. Co.*, 161 U. S. 646 (1896), this Court ruled that an attempt to consolidate the operation of the two roads was contrary to a Minnesota statute prohibiting the consolidation of parallel and competing railroads. The next merger attempt was struck down in *Northern Securities Co. v. United States*, 193 U. S. 197 (1904), as contrary to the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1 *et seq.*³ Then the declining fortunes of rail carriers led Congress to enact the Transportation Act of 1920, 41 Stat. 456, which charged the Interstate Commerce Commission with the affirmative responsibility to formulate plans for simplifying the Nation's rail transport "into a limited number of systems." 41 Stat. 481. This engendered a third effort, under the Commission's auspices, to merge the Northern Lines.⁴ However, this effort foundered on the Commission's requirement that the Burlington be excluded from the Northern Lines system, and the Northern Lines were unwilling to consolidate without the Burlington.

I

The Present Merger

In 1955 the Northern Lines began investigating anew the possibility of a merger that would combine five roads—the Burlington, the SP&S, the Pacific Coast, and the Northern Lines—to form a New Company. Extensive negotiations dealing with all phases of the proposed merger were commenced. Five years later, in 1960, an agreement was finally reached. It provided that the Northern Lines, the Burlington, and the Pacific Coast

³ The vote in this historic case was 5 to 4 with one of the majority, Mr. Justice Brewer, joining on narrower grounds.

⁴ See *Great Northern Pacific R. Co. Acquisition*, 162 I. C. C. 37 (1930).

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be merged into New Company, which was to acquire the subsidiaries of the merged companies as well as all their leasehold, trackage, and joint-use rights in other carriers and the terminals incident thereto. New Company would lease the SP&S, thereby acquiring that road's subsidiaries and trackage rights.

The merger agreement further provided that Northern Pacific shareholders would receive common stock of New Company on a share-for-share basis. Great Northern stockholders would receive one share of New Company common for each share of Great Northern and, in addition, one-half share of New Company \$10 par 5½% preferred for each share of Great Northern held at the date of the merger, this preferred stock to be retired over a 25-year period, beginning at the fifth anniversary of the merger, and to be redeemable at the option of New Company any time after the fifth anniversary of the merger. The Burlington stock held by the Northern Lines, amounting to 97.18% of the total shares outstanding, would be canceled and the remaining shareholders given 3.25 shares of New Company common for each share of Burlington.

Commission Proceedings

First Report.—As a result of these renewed merger negotiations between 1955 and 1960, applications were filed in 1961 under § 5 of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U. S. C. § 5, seeking approval of the merger and authorization for the issuance of stock and securities, the assumption of obligations and other authority necessary to effectuate the merger.⁵ Extensive public hearings were held in 1961 and 1962 at

⁵ Among the allied transactions were the issuance of certain securities and the assumption of obligations and liability in respect of securities under § 20a of the Interstate Commerce Act, and the obtaining of certain extensions and abandonments of railroad lines under §§ 1 (18) to 1 (20), inclusive, of the Act.

which the Department of Justice, the Department of Agriculture, various railway employee groups, nine States or state regulatory agencies, and the Milwaukee and the Chicago & North Western Railway Company (North Western), *inter alia*, actively opposed the merger as proposed. Shippers and related interest groups appeared in support of the proposal. The Hearing Examiner submitted a report in 1964 recommending approval of the merger and the related transactions, subject to certain protective conditions. The Commission heard oral argument and in a report dated March 31, 1966 (First Report), rejected the Examiner's recommendation and disapproved the merger by a vote of 6 to 5.⁶

The applicants petitioned for a reconsideration, asserting that they were willing to accept all protective conditions sought by the Milwaukee and another affected road, the North Western, that they had entered into attrition agreements with the objecting unions for the protection of the employees, and that the merger would yield dollar savings greater than those estimated in the First Report. While this petition was pending before the Commission, the applicants entered into agreements with the North Western and the Milwaukee which provided that the merger applicants would agree to all the conditions sought by those roads; the Milwaukee and the North Western then agreed to support the merger.⁷ Thereafter, these roads withdrew their opposition to the merger and urged the Commission to approve it. Approval was advocated or objections withdrawn by a number of parties who had previously either completely opposed the merger or opposed it absent imposition of

⁶ 328 I. C. C. 460 (1966). The majority included Commissioners Bush, Tucker, Webb, Tierney, Brown, and Deason. Commissioners Tuggle, Freas, Murphy, Walrath, and Goff dissented.

⁷ The Northern Lines also agreed not to oppose the authorization of a proposed Milwaukee-North Western merger.

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adequate protective conditions. These included the Department of Agriculture, the Public Utility Commissioner of Oregon, and the States of North Dakota, South Dakota, Iowa, Wisconsin, and Michigan.⁸

Second Report.—On January 4, 1967, the Commission granted the application and reopened the proceedings for reconsideration and further hearings. Although the order by its terms reopened the proceedings on all issues, the hearing was limited to taking evidence on the question of the amount of savings the merger would produce in light of the agreement between the applicants and the Milwaukee and the North Western, and the other changes relevant to savings which had occurred after the close of the first hearing. Oral arguments followed. On November 30, 1967, the Commission handed down a report and order (Second Report) approving the proposed merger by a vote of 8 to 2 as consistent with the public interest and imposing certain conditions to protect other carriers.⁹ On April 11, 1968, the Commission denied an application for reconsideration.¹⁰

⁸ Petitions were also filed by the Northern Pacific Stockholders' Protective Committee seeking further hearings with respect to the justness and reasonableness of the terms of the merger agreement, and the Denver & Rio Grande Railroad seeking an investigation into the agreements entered into by the applicants with the Milwaukee and the North Western. These petitions were denied.

⁹ 331 I. C. C. 228 (1967). Commissioners Tuggle, Murphy, Walrath, Bush, Tucker, Deason, Stafford, and Syphers voted to approve the merger, while Commissioners Tierney and Brown dissented. Commissioner Hardin did not participate in the decision.

¹⁰ In this order the Commission modified one of the conditions placed on the merger by the order of November 30, 1967. On June 17, 1968, a further order was issued, ruling that the Milwaukee must be allowed to bring grain traffic through 11 gateways opened to it by conditions contained in the Second Report. Neither the order of April 11 nor that of June 17 was challenged in the District Court. Hence, they are not before us.

District Court Proceedings

The United States, acting through the Department of Justice, filed a complaint on May 9, 1968, in the United States District Court for the District of Columbia challenging the Commission order approving the merger. Other parties intervened, some as plaintiffs¹¹ and some as defendants.¹² After preliminary proceedings had resulted in a stay of the Commission's order *pendente lite*, the case was submitted on the merits to the three-judge court designated in accordance with 28 U. S. C. §§ 2325 and 2284. The court, in an opinion by Senior Circuit Judge Charles Fahy, unanimously sustained the Commission, holding that in approving the merger and the related transactions the Commission was guided by the applicable legal principles and that its findings were supported by substantial evidence. The court dismissed the complaints, vacated the stay *pendente lite*, and then stayed its order pending appeal to this Court. Upon the filing of appeals with this Court, we ordered a further stay pending final disposition.

II

The Appeals Here

Four appeals were taken from the District Court's judgment; the Department of Justice (No. 28), the Northern Pacific Stockholders' Protective Committee

¹¹ Attacking the merger were the following: the Northern Pacific Stockholders' Protective Committee; the City of Auburn, Washington; the State of Washington; the Board of Railroad Commissioners of Montana; the Livingston Anti-Merger Committee; and the Public Service Commission of Minnesota.

¹² The intervening defendants included the applicants, the Milwaukee, the Public Utility Commissioner of Oregon, and 230 Pacific Northwest shippers.

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(No. 38), the City of Auburn, Washington (No. 43), and the Livingston Anti-Merger Committee (No. 44).

Each of the four appellants attacks the approval of the merger on different grounds. Because these challenges cover every aspect of the merger, and because of the rather complex expositions of fact necessary to the disposition of each objection, these appeals will be dealt with *seriatim*. With the cases in this posture the Court must review the proceedings before the Commission to "determine whether the Commission has proceeded in accordance with law and whether its findings and conclusions accord with the statutory standards and are supported by substantial evidence." *Penn-Central Merger and N&W Inclusion Cases*, 389 U. S. 486, 499 (1968). It should be emphasized, however, as Mr. Justice Fortas noted, speaking for the Court in a similar context, "[w]ith respect to the merits of the merger . . . our task is limited. We do not inquire whether the merger satisfies our own conception of the public interest. Determination of the factors relevant to the public interest is entrusted by the law primarily to the Commission, subject to the standards of the governing statute." *Id.*, at 498-499.

The governing statute here is § 5 of the Interstate Commerce Act, as amended by the Transportation Act of 1940, 54 Stat. 905, 49 U. S. C. § 5. The Act provides that the Commission is to approve a proposed merger when it is "consistent with the public interest" and the terms of the proposal are "just and reasonable." In determining whether this standard is met, the Commission is to

"give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads

in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." 49 U. S. C. § 5 (2)(c).

In addition to the four factors listed above, the Commission must also consider the anticompetitive effects of any merger or consolidation, because under § 5 (11) of the Interstate Commerce Act any transaction approved by the Commission is relieved of the operation of the antitrust laws. *McLean Trucking Co. v. United States*, 321 U. S. 67, 83-87 (1944).

In its First Report the Commission found that the merger would result in improved service to shippers in areas served by the Northern Lines because it would enable the roads to make more efficient use of their facilities and would permit the use of the shortest and swiftest internal routes available. In addition, the merger was found to afford estimated savings of approximately \$25 million per year by the tenth year after merger. However, the Commission also found that as a consequence of the merger more than 5,200 jobs would be eliminated, this being a significant source of the reduced operating costs. The Commission then analyzed the anticompetitive impact of the proposal and found it would eliminate substantial competition between the Northern Lines in the Northern Tier. The Commission reasoned that even with protective conditions attached to the merger for the benefit of the Milwaukee, it would remain a weak carrier in the Northern Tier when compared with New Company. The Commission, by a vote of 6 to 5, as noted earlier, concluded that the proposed merger plan did not afford benefits of such scope and importance as to outweigh the lessening of rail competition in the Northern Tier; the merger was disapproved.

When the Commission reopened the proceedings in

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1967, it considered additional evidence including the changed positions of some of the major objectors, and new evidence on the savings to be realized from the merger; the Second Report was then issued. The Commission found that rather than the \$25 million previously estimated, in fact more than \$40 million per year in savings would be realized by the tenth year after merger. It also noted that agreements entered into by the applicants and their employees had removed objections of various unions to the merger and that no jobs would be eliminated except in the normal course of attrition. Aside from these changes, and the acceptance by the merger applicants of protective conditions sought by the Milwaukee, the record before the Commission was the same as that on which the First Report was based. The Second Report acknowledged that the First Report had failed to give appropriate weight to one of the aims of the national transportation policy and § 5 of the Interstate Commerce Act, to facilitate rail mergers "consistent with the public interest" in the development of a comprehensive national transport system, and that this had led the Commission to view the merger proposal too stringently. It then went on to re-examine the anti-competitive effects of the merger, weighing them against the savings and benefits to the public, shippers, and the roads, and, accentuating the new and strengthened competitive posture of the Milwaukee, it concluded that the merger proposal should be approved because its benefits outweighed its anticompetitive effects in the Northern Tier region.

That this was not an easy problem for the Commission is attested by the lengthy history of attempts to merge these lines which dates back three-quarters of a century. The efforts to establish a more unified rail transportation system in the Northern Tier represent a 20th

century phase of the development of the American West; it brackets a period of enormous growth and change, and of new developments in transportation and public needs. Against this background it is not surprising that the members of the Commission were divided 6 to 5 against the merger on the First Report in 1966 and 8 to 2 in favor of the merger on the Second Report in 1967 after changes had been made in the plan to meet many of the objections raised. Nor is it remarkable that two great departments of government, each charged with responsibility to protect the public interest, took opposing positions; vigorous advocacy of divergent views on this difficult problem has narrowed and sharpened the issues and aided the Court in their resolution, ensuring that no factor which ought to be considered would elude our attention.

Appellants' Contentions

(a) *No. 28, Department of Justice.*—The United States, through the Antitrust Division of the Justice Department, challenges the Commission's approval of the merger primarily on the ground that the Commission in the Second Report did not properly apply the standard of § 5 (2)(b) of the Interstate Commerce Act in determining that the merger is consistent with the public interest. The Department contends that under the statute when a proposed merger will result in a substantial diminution of competition between two financially healthy, competing roads, its anticompetitive effects should preclude the approval of the merger absent a clear showing that a serious transportation need will be met or important public benefits will be provided beyond the savings and efficiencies that normally flow from a merger. The Department urges that the instant case presents a merger between two financially healthy carriers, each of which is the prime competitor of the

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other in the area served. Admittedly the Commission found in its First Report that the merger would result in a "drastic lessening of competition." The Department argues that because no benefits are shown to flow from the merger beyond the economies and efficiencies normally resulting from unified operations, the Commission has not satisfied the statutory standard and that the District Court erred in refusing to enjoin the merger.

The Department maintains that prior to 1920 the antitrust laws and their underlying policies applied with full force to railroads and that the Transportation Act of 1920, which commanded an affirmative development by the Commission of a nationwide plan "for the consolidation of the railway properties of the continental United States into a limited number of systems," 41 Stat. 481, was primarily intended to promote the absorption of financially weak by strong carriers. To the extent that the 1920 Act did not intend to encourage rail mergers producing only the usual or "normal" kinds of merger benefits, the Department contends that the policies of the antitrust laws remain the guiding standard by which these consolidations are to be judged. The Transportation Act of 1940, according to the Department, did not alter this policy, but only eliminated the Commission's duty to formulate a national plan and to confine mergers to the four corners of this plan. The Department suggests that when the Commission is determining whether a merger or consolidation is consistent with the public interest, it must analyze the merger in terms of its anticompetitive impact and, if that impact would be great, then determine whether the merger is required by a serious transportation need or necessary to secure important public benefits. This standard, it urges, is "consistent with both the legislative history of [§ 5] and, more generally, with the goal of substantial

simplification of railroad systems that underlay the Transportation Acts of both 1920 and 1940."¹³

The Department of Justice is correct in stating that one focal point of concern throughout the legislative consideration of the problems of railroads has been the weak carrier and its preservation through combination with the strong. Congress saw that as one—but only one—means to promote its objectives. The 1920 statute as a whole also embodied concern for economy and efficiency in rail operations. See *Railroad Commission of California v. Southern Pacific Co.*, 264 U. S. 331, 341 (1924); *Texas & Pacific R. Co. v. Gulf, Colorado & Santa Fe R. Co.*, 270 U. S. 266, 277 (1926); *Texas v. United States*, 292 U. S. 522, 530 (1934); *United States v. Lowden*, 308 U. S. 225, 232 (1939). Thus, a rail merger that furthers the development of a more efficient transportation unit and one that results in the joining of a "sick" with a strong carrier serve equally to promote the long-range objectives of Congress and, upon approval by the Commission, both are immunized from the oper-

¹³ We might note that the substance of the Department's position with respect to the Commission's power to approve consolidations was presented to this Court by the Secretary of Agriculture in No. 31, O. T. 1943, *McLean Trucking Co. v. United States*, 321 U. S. 67 (1944), Brief for Secretary of Agriculture of the United States 38, 40, and to the three-judge court in the Seaboard-Coast Line merger litigation, *Florida East Coast R. Co. v. United States*, 259 F. Supp. 993, 1012-1013 (D. C. M. D. Fla. 1966), aff'd *per curiam*, 386 U. S. 544 (1967). In both of these cases, one decided in 1944 and the other in 1966, the Department's position was rejected. In addition, in 1962 a bill was before the Senate that would have imposed a moratorium on the Commission's approval of large railroad mergers that would otherwise violate § 7 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 18. The Department actively supported the bill. It was not reported out of committee. See Hearings on S. 3097 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 87th Cong., 2d Sess. (1962).

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ation of the antitrust laws. The policy of the 1920 Act has been consistently interpreted in this way. We find no basis for reading the congressional objective as confining these mergers to combinations by which the strong rescue the halt and the lame.

In *New York Central Securities Corp. v. United States*, 287 U. S. 12 (1932), this Court cautioned that

"[t]he fact that the carriers' lines are parallel and competing cannot be deemed to affect the validity of the authority conferred upon the Commission. . . . The question whether the acquisition of control in the case of competing carriers will aid in preventing an injurious waste and in securing more efficient transportation service is thus committed to the judgment of the administrative agency upon the facts developed in the particular case." *Id.*, at 25-26.

Although this decision was prior to the passage of the Transportation Act of 1940, that Act in no way altered the basic policy¹⁴ underlying the 1920 enactment. We recognized in *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U. S. 298, 319 (1954), that Congress adopted the recommendations of the Committee of Six when it passed the 1940 Transportation Act and relieved the Commission of its duty to promulgate a national railroad consolidation plan. That Committee's report recognized economies and efficiencies of operation as well as the elimination of circuitous routing to be benefits that could

¹⁴ The Commission apparently had no difficulty in approving a merger of the Northern Lines under a plan similar to that held violative of the Sherman Act in *Northern Securities Co. v. United States*, 193 U. S. 197 (1904). The Commission gave as one of the considerations leading it to approve the proposed merger, "the feasibility of making large operating economies." *Great Northern Pacific R. Co. Acquisition*, 162 I. C. C. 37, 47 (1930).

flow to the public through consolidations.¹⁵ As recently as *County of Marin v. United States*, 356 U. S. 412 (1958), this Court observed:

"The congressional purpose in the sweeping revision of § 5 of the Interstate Commerce Act in 1940 . . . was to facilitate merger and consolidation in the national transportation system. In the Transportation Act of 1920 the Congress had directed the Commission itself to take the initiative in developing a plan 'for the consolidation of the railway properties of the continental United States into a limited number of systems,' 41 Stat. 481, but after 20 years of trial the approach appeared inadequate. The Transportation Act of 1940 extended § 5 to motor and water carriers, and relieved the Commission of its responsibility to initiate the unifications. 'Instead, it authorized approval by the Commission of carrier-initiated, voluntary plans of merger or consolidation if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transactions met with certain tests of public interest, justice and reasonableness' (Emphasis added.) *Schwabacher v. United States*, 334 U. S. 182, 193 (1948). . . . In short, the result of the Act was a change in the means, while the end remained the same. The very language of the amended 'unification section' expresses clearly the desire of the Congress that the industry proceed toward an integrated na-

¹⁵ Report of Committee appointed September 20, 1938, by the President of the United States, to Submit Recommendations upon the General Transportation Situation, December 23, 1938, in Hearings on H. R. 2531 before the House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess., 259-308 (1939).

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tional transportation system through substantial corporate simplification." *Id.*, at 416-418. (Emphasis in original.) (Footnotes omitted.)

We turn now to consider the appropriate weight to be accorded by the Commission to antitrust policy in proceedings for approval of a merger. The role of antitrust policy under § 5 was discussed comprehensively and dispositively in *McLean Trucking Co. v. United States*, 321 U. S. 67 (1944), a case dealing with a merger of several large trucking companies. Since this Court has nowhere else dealt so definitively with this issue, the analysis by Mr. Justice Rutledge in the opinion for the Court merits extended quotation:

"The history of the development of the special national transportation policy suggests, quite apart from the explicit provision of § 5 (11), that the policies of the anti-trust laws determine 'the public interest' in railroad regulation only in a qualified way. And the altered emphasis in railroad legislation on achieving an adequate, efficient, and economical system of transportation through close supervision of business operations and practices rather than through heavy reliance on the enforcement of free competition in various phases of the business, cf. *New York Central Securities Corp. v. United States*, 287 U. S. 12, has its counterpart in motor carrier policy. . . .

"[T]here can be little doubt that the Commission is not to measure proposals for all-rail or all-motor consolidations by the standards of the anti-trust laws. Congress authorized such consolidations because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy. It was informed that this

policy would be furthered by 'encouraging the organization of stronger units' in the motor carrier industry. And in authorizing those consolidations it did not import the general policies of the anti-trust laws as a measure of their permissibility. It in terms relieved participants in appropriate mergers from the requirements of those laws. § 5 (11). In doing so, it presumably took into account the fact that the business affected is subject to strict regulation and supervision, particularly with respect to rates charged the public—an effective safeguard against the evils attending monopoly, at which the Sherman Act is directed. Against this background, no other inference is possible but that, as a factor in determining the propriety of motor-carrier consolidations the preservation of competition among carriers, although still a value, is significant chiefly as it aids in the attainment of the objectives of the national transportation policy.

"Therefore, the Commission is not bound . . . to accede to the policies of the anti-trust laws

"Congress however neither has made the anti-trust laws wholly inapplicable to the transportation industry nor has authorized the Commission in passing on a proposed merger to ignore their policy. . . . Hence, the fact that the carriers participating in a properly authorized consolidation may obtain immunity from prosecution under the anti-trust laws in no sense relieves the Commission of its duty, as an administrative matter, to consider the effect of the merger on competitors and on the general competitive situation in the industry in the light of the objectives of the national transportation policy.

"In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed

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consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' [Citations omitted.] If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order." *Id.*, at 83-88. (Footnotes omitted.)

Accord, *Minneapolis & St. L. R. Co. v. United States*, 361 U. S. 173, 186-188 (1959); *Seaboard Air Line R. Co. v. United States*, 382 U. S. 154, 156-157 (1965); see *Florida East Coast R. Co. v. United States*, 259 F. Supp. 993 (D. C. M. D. Fla. 1966), *aff'd per curiam*, 386 U. S. 544 (1967).

The Department urges that the Commission failed to give sufficient weight to the diminution of competition between the Northern Lines—in short, that it failed to strike the correct balance between antitrust objectives and the overall transportation needs that concern Congress. This contention tends to isolate individual factors that are to enter into the Commission's decision and view them as the controlling considerations. "Competition is merely one consideration here," *Penn-Central Merger and N&W Inclusion Cases*, 389 U. S. 486, 500 (1968). And, we might add, it is a consideration that is implied and is in addition to the four specifically men-

tioned in § 5 (2)(c) of the statute. In our view the Commission, in both reports, exhibited a concern and sensitivity to the difficult task of accommodating the regulatory policy based on competition with the long-range policy of achieving carrier consolidations. Indeed, this led the Commission to disapprove the merger by a margin of one vote in 1966 after five years of study because of specified infirmities in the plan. The Commission reached a different conclusion by a decisive vote in 1967 on a supplemental record which reflected substantial changes in the merger plan. Our review, like that of the District Court, reveals substantial record evidence to support the Commission's determination that the conditions agreed to by the applicants, the attrition agreements with the employees, the enhanced savings found in the Second Report, and the service improvements to shippers and the public found in both the First and Second Reports outweighed the loss of competition between the Northern Lines. Striking the balance is for the Commission and we cannot say that it did so improperly.

The benefits to the public from this merger are important and deserve elaboration. The Commission found that substantial service benefits would flow from the merger. Shippers will benefit from improved car supply, wider routing, better loading and unloading privileges, and improved tracing and claims service. New Company will be able to use the shortest and most efficient routes while eliminating yard interchange delays, thus providing shippers with faster service. The Commission found that the economies New Company will realize as a result of consolidating yards, repair facilities, and management, eliminating duplicate train services and pooling of cars and trains will result in lower rates to shippers and receivers. In addition, the opening of strategic gateways to the Milwaukee will remove artificial barriers to

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the development of new markets, sources of supply, and services.

The Milwaukee objections prior to the First Report were based on the adverse impact of the merger on its competitive position and, in turn, on shippers and the public. Following the First Report the Northern Lines accepted conditions urged by the Milwaukee. Under the new conditions the posture of the Milwaukee, lying largely between the two Northerns and handicapped by limitations at both eastern and western terminals, will be greatly improved. Absent the protective conditions it would continue to be virtually strangled by the unified system; with them the Milwaukee gives prospect of affording substantial competition to the merged lines and will be placed in the position that at its inception it hoped to achieve. Its past failure to become a meaningful competitor came in large part because its lines did not reach into Portland, Oregon, or into the southwest terminal of the Northern Lines in California. In a strictly competitive situation it is understandable that neither of the Northern Lines would interchange traffic with the Milwaukee except on its own terms and this destined that the Milwaukee would fail to become a true transcontinental line even though its western terminus lay within a few miles of Portland with the latter's access to the sea.

The Milwaukee north-south traffic on the West Coast was limited to the short run from Seattle to Longview, barely half the distance from the Canadian border to Washington's southern border. Moreover, westbound traffic destined for points on one of the Northern Lines was taken over by one of them at St. Paul or Minneapolis notwithstanding Milwaukee's line from there deep into Washington. In the proceedings prior to 1966 many objecting shippers joined the Milwaukee in pointing out that rates and limitations on Milwaukee's service

precluded full use of the Milwaukee to the disadvantage of both shippers and the carrier.

The conditions imposed by the Commission's Second Report will alter that situation and substantially enlarge the Milwaukee's competitive potential between St. Paul and Minneapolis and the West Coast due to enlargement of its long-haul capability. Shippers will be afforded more flexible service. Another condition attached to the Commission's approval will permit the Milwaukee to run lines from its present western terminus into Portland, giving it a link with the Southern Pacific. All this will enable the Milwaukee to compete with the Northern Lines for east-west traffic and some north-south traffic as well as linkage with Canadian carriers to the north, which was previously the exclusive domain of one or both of the Northerns. Other conditions of lesser consequence will buttress the newly designed competitive posture of the Milwaukee.

The contention that the Commission failed to project an analysis of the relative position of the Milwaukee *vis-à-vis* the merged Northerns discounts the difficulty of precise forecasts and tends to overstate the need for such projections. The Commission can deal only in the probabilities that will arise from the Milwaukee's improved posture as a genuine competitor for traffic over a wide area, something it had never been able to achieve. After the merger it will afford shippers a choice of routes and service negating the idea that all rail competition will disappear in the Pacific Northwest.

(b) *No. 38, The Northern Pacific Stockholders' Protective Committee.*—The Northern Pacific Stockholders' Protective Committee¹⁶ has appealed the District Court's affirmance of the Commission's approval of the pro-

¹⁶ Appellant Committee represents about 3% of Northern Pacific's stockholders, who hold approximately 5% of the outstanding shares of Northern Pacific.

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posed merger's stock exchange provisions. To put each of the Committee's contentions in perspective requires that we describe the source of the Committee's concern and how the applicants dealt with it in reaching the present merger terms.

The Committee's continuing opposition to the merger relates to Northern Pacific's land holdings. The Northern Pacific Railway Company holds more than two million acres in fee and has mineral rights in another six million acres. These lands are rich in natural resources, including coal, oil, and timber, and are important sources of income. The negotiations between the parties centered to a large extent on these lands. Northern Pacific's financial adviser had suggested that although Great Northern had a better history of earning power and its stock had generally sold at a level above that of Northern Pacific's, the large land holdings of the Northern Pacific with their vast resources were of sufficient worth to justify a share-for-share exchange ratio between the Great Northern and the Northern Pacific. The Great Northern, however, insisted on a 60-40 stock exchange ratio because of its traditional rail strength. After further negotiations the roads realized that the lands were a stumbling block to the merger and considered several modes of segregating them from Northern Pacific's rail properties. One was to create two classes of New Company stock, one being issued to Northern Pacific shareholders and representing the natural resource properties, and another being issued to both Great Northern and Northern Pacific shareholders and representing Northern Pacific's rail properties. The second solution considered was spinning off the natural resource lands into another corporation and using the proceeds from an issuance of its stock as a Northern Pacific contribution to the merger. Neither of these solutions was acceptable to the negotiators, the former because of the problems inherent in

administering a corporation for two classes of stockholders with divergent interests, and the latter because of potential litigation with bondholders and adverse tax consequences to Northern Pacific. The negotiators concluded that the merger plan must include the land holdings of Northern Pacific.

Thereafter both roads made concessions, the Great Northern abandoning its claim for a permanently larger share for its stockholders and the Northern Pacific abandoning its claim for immediate equality. The result was an exchange ratio giving immediate recognition to Great Northern's greater earning power and historically higher market price while giving Northern Pacific's shareholders equal participation in the earnings of the enterprise on a long-term basis. The terms of the merger, as worked out by the negotiators over a five-year period, were approved by both roads' financial advisors, their boards of directors and their stockholders.¹⁷ Shortly thereafter the Northern Pacific Stockholders' Protective Committee was formed.

When the merger proposal was submitted to the Commission for approval the Stockholders' Committee opposed the exchange ratio, pressing its claim that the natural resource lands were undervalued and that the Commission either should adjust the exchange ratio in accordance with the Committee's estimates of the property's worth or, preferably, should order the lands segregated and placed in a separate corporation, the stock of

¹⁷ Northern Pacific's shareholders approved the merger terms in 1961 by a vote of 73.81% to 6.64%, the remainder of the stock not being voted. In 1968 the shareholders again approved the merger's terms, as conditioned by the ICC's Second Report, 73.2% voting for and 2.57% voting against, the remainder not voting. Prior to both of these votes the members of the appellant Committee vigorously urged the shareholders to reject the merger as being unfair because of the low value given the natural resource properties.

which would be available to Northern Pacific shareholders. The Hearing Examiner's report reviewed the extensive negotiations between the parties and the modes by which they reached a valuation of the contribution each road's shareholders were making to New Company, concluding that there had been good-faith arm's-length bargaining and that the result of this bargaining fairly reflected each group of stockholders' contribution to New Company. The Examiner found the Committee's contention on value to be unsupported by record evidence and its spinoff proposal to be unfair to Northern Pacific shareholders. He recommended approval of the terms of the exchange.

The Commission's First Report, which disapproved the merger, did not reach the issue of the exchange ratio. When in 1967 the Commission reconsidered its earlier decision, it refused the Committee's request that it reopen the record for the taking of new evidence on the exchange ratio, but did hear oral argument on the matter. The Committee again pressed its contentions. The Commission's Second Report rejected the Committee's arguments upon basically the same grounds given by the Hearing Examiner in his 1964 Report.

The Committee continued its attack on the stock exchange ratio in the District Court and urged that the Commission had abused its discretion in refusing to reopen the record to receive updated evidence on the exchange ratio. The District Court ruled that the Commission's finding that the terms were just and reasonable was supported by substantial evidence. It also held that the evidence the Committee proffered was not of sufficient importance to have affected the ultimate fairness of the Commission's finding. The discretion exercised by the Commission in refusing to reopen the record was, therefore, found free from abuse.

The Committee now contends that the record lacks substantial evidence to support the Commission's determina-

tion that the exchange ratios are just and reasonable; that the Commission failed to consider the whole record before it; that the Commission erred, abused its discretion, or denied appellant due process of law in not permitting the record to be updated respecting the 1967 worth of the contributions being made by each group of shareholders, especially respecting Northern Pacific's natural resource properties; that the record does not contain substantial evidence to support the determination of the Commission that the proposed segregation of the natural resource lands is a proposal lacking merit and is unfair to Northern Pacific shareholders; and that the District Court erred in upholding the Commission's action. Our review leads us to reject these contentions.

Under § 5 (2) of the Interstate Commerce Act, the Commission is to approve only such merger terms as it finds to be just and reasonable. The Commission, as had the negotiators and the Hearing Examiner, fully considered the proposed segregation of the natural resource properties and concluded that it was neither feasible nor fair to Northern Pacific stockholders. That determination is supported by substantial record evidence. In passing we note that although the Commission in fulfilling its statutory responsibilities is to carefully review all of the terms of a merger proposal and determine whether they are just and reasonable, it is not for the agency, much less the courts, to dictate the terms of the merger agreement once this standard has been met. It can hardly be argued that the bargaining parties were not capable of protecting their own interests.

The Commission's unwillingness to reopen the record in 1967 for the taking of new evidence on the exchange ratio was not an abuse of discretion nor did it deny the appellant due process of law. What this Court said in

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Interstate Commerce Commission v. Jersey City, 322 U. S. 503 (1944), is applicable here:

"Administrative consideration of evidence—particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearing, as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body." *Id.*, at 514-515.

Moreover, as this Court noted in *United States v. Pierce Auto Freight Lines*, 327 U. S. 515 (1946), "it has been held consistently that rehearings before administrative bodies are addressed to their own discretion. . . . Only a showing of the clearest abuse of discretion could sustain an exception to that rule." *Id.*, at 535.

We find nothing in the Committee's arguments to persuade us that such an abuse occurred when the Commission refused to take further evidence on the question of each group of shareholders' contribution to the merger. *Schwabacher v. United States*, 334 U. S. 182 (1948), relied upon by the Committee, is not to the contrary.

That decision requires that the value of a stockholder's contribution to a merger be determined in accord with the "current worth" of his equity. That does not mean there must be a repeated updating of the evidence before the agency; in a complex merger such as this that would lead to interminable delay. A determination that the terms of a merger proposal fairly reflect the current worth of each shareholder's contribution meets the standards of *Schwabacher* if the agency had before it evidence as to the worth of the shareholders' contributions at the time of the submission of the proposal, and there is no showing that subsequent events have materially altered the worth of the various shareholders' contributions to the merger. The evidence the appellant Committee presents to this Court, purporting to show that Northern Pacific's stock is presently worth considerably more, *vis-à-vis* Great Northern's, than was the case at the time of the initial hearings, does show fluctuations in the worth of the two companies' stock. But we cannot say that those fluctuations, in the context of this merger proposal, are sufficient to show that the worth of the various shareholders' contributions to the merger has been materially altered. We agree with the District Court that the Commission's refusal to reopen the record for further evidence was not an abuse of discretion.

(c) *No. 43, City of Auburn*.—The City of Auburn, Washington, opposes the merger for the reasons set out in the brief of the Department of Justice, and, in addition, contends that the Commission failed to adequately assess the impact of the merger upon affected communities and explain why the benefits of the merger convincingly outweigh its adverse effects on these communities. Auburn also objects to the refusal to open the 1967 hearings for further testimony concerning the impact of the merger upon Auburn.

Auburn is a city of 19,000 inhabitants in western Washington, halfway between Seattle and Tacoma,

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which serves as the western terminus for the Northern Pacific's transcontinental trains. A substantial part of the city's economy is dependent upon that road's activity there. The record before the Commission indicated that if the merger were approved, the Auburn yard would be closed, and that the town of Everett, on the other side of Seattle, would become the western terminus for all of New Company's transcontinental trains.

Insofar as the city challenges the Commission's action on the same grounds as the Department of Justice, our disposition of the appeal in No. 28 applies here. As for the 1967 hearings, the city failed to object to the scope of the Commission's reopened hearings and made no attempt to present evidence at those hearings. Neither did it challenge the Commission's findings concerning the impact of the merger upon Auburn. Only when it came before the District Court did it raise its contentions. This alone might preclude its attack on the merger. But we need not decide that issue because we find that the Commission did not abuse its discretion in refusing to take evidence in 1967 as to the impact of the merger on Auburn.

In the record upon which the Second Report is based the Commission had evidence of the impact of the yard's closing on the city. Thus, even assuming the closing, the Commission found that the long-run effect of the merger would be to benefit communities in the Northern Tier, such as Auburn, and that the brief and transitory dislocations the merger would occasion were not sufficient to outweigh the merger's benefits. We find this to be a justifiable conclusion supported by substantial evidence on the record. We can hardly imagine any merger of substantial carriers that would not cause some dislocations to some shippers, some communities, and some employees.

The plans for the Auburn yard now seem to be altered; the applicants stated before the District Court and again

before this Court that they now intend to maintain the Auburn yard. As a result, employment in Auburn will be largely unaffected by the merger. Since we conclude that the Commission properly determined that Auburn's hardships and those of communities similarly situated, as posited on the record, did not warrant disapproval of the merger, it is difficult to imagine any basis upon which we might find the Commission to have abused its discretion in not taking further evidence on the merger's impact on Auburn when the principal harm of which the city earlier complained has disappeared.

(d) *No. 44, Livingston Anti-Merger Committee.*—Citizens of Montana, living in and about Livingston, Helena, and Glendive, who appear here as the Livingston Anti-Merger Committee, attack the merger on several grounds. As a prelude to discussing these contentions, the historical facts upon which the Committee's attack is based should be stated.

In 1864 Congress created the Northern Pacific Railroad Company (Railroad) and granted it authority to build a railroad from Lake Superior to Puget Sound. To subsidize this enterprise Congress granted Railroad a right-of-way and alternate sections of land along that right-of-way. According to the terms of Railroad's charter it could not encumber its franchise or right-of-way without congressional approval, and was not authorized to merge with another road, except under limited conditions not relevant here.¹⁵ In 1870 Congress passed a resolution allowing Railroad to issue bonds secured by its property and subject to foreclosure for default. Shortly thereafter a mortgage was pledged, only to be foreclosed in 1875. After the foreclosure proceedings the property was struck off to a committee of bondholders. Later, however, the property was returned to Railroad pursuant to a reorganization plan. Although Congress did not further author-

¹⁵ See Act of July 2, 1864, § 3, 13 Stat. 367.

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ize mortgaging of the franchise or right-of-way, Railroad again encumbered its property by pledging several mortgages. In 1896, after these mortgages had been defaulted upon and foreclosure proceedings had been commenced, a negotiated settlement was made which resulted in the property of Railroad being sold to the Northern Pacific Railway Company (Railway), which has operated under Railroad's franchise and upon its right-of-way ever since. Railway presently owns 97% of the stock of Railroad, which is no longer an operating company.

On the basis of these facts Livingston contends that the Interstate Commerce Commission had no authority to approve the proposed merger because Railway does not own the franchise and right-of-way involved in this merger, and Railroad is not a party to the merger. Livingston argues that the 1896 foreclosure was a sham and it actually was a sale of Railroad property to Railway; because Congress never authorized that sale, it is void. In addition, Livingston contends that the mortgages that led to the 1896 foreclosure were not authorized by Congress; therefore, they could not constitute the basis for a valid foreclosure and liquidation. The claimed consequence is that the title to the franchise and right-of-way remains in Railroad. Livingston argues that even if it should be held that Railway does own the franchise and right-of-way, under the 1864 charter of Railroad, to which Railway succeeded, no merger involving these properties can take place without congressional approval, and such approval has not been procured. Finally, Livingston urges that the Commission and the District Court failed to properly deal with these contentions and make specific findings as to the Commission's jurisdiction.

The Commission was presented with these arguments and found them to be without merit. The District Court affirmed the Commission, ruling that it had not erred in refusing to disapprove the merger because of appl-

lant's claims and had not erred in refusing to litigate their merits. We affirm the District Court. Section 5 (2)(a) of the Interstate Commerce Act provides in pertinent part:

"(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

"(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership" 49 U. S. C. § 5 (2)(a).

The premise of Livingston's position is that under this statute before the Commission can assume jurisdiction over a merger application it must determine that the applicants have proper legal title to the rights and property which they seek to bring into the merger. This is an erroneous assumption. The Commission is not required to deal with the subtleties of "good title" before assuming jurisdiction over a § 5 matter. Cf. *O. C. Wiley & Sons v. United States*, 85 F. Supp. 542, 543-545 (D. C. W. D. Va.), *aff'd per curiam*, 338 U. S. 902 (1949); *Walker v. United States*, 208 F. Supp. 388, 396 (D. C. W. D. Tex. 1962); *Interstate Investors, Inc. v. United States*, 287 F. Supp. 374, 392 n. 32 (D. C. S. D. N. Y. 1968), *aff'd per curiam*, 393 U. S. 479 (1969). And because a Commission order under § 5 (2) "is permissive, not mandatory," *New York Central Securities Corp. v. United States*, 287 U. S. 12, 26-27 (1932), the approval of a merger proposal does not amount to an adjudication on any such questions. These are matters for the courts, not for an agency that has responsibility in the realm of regulating transportation systems.

In the instant case there were ample grounds for the Commission's assumption of jurisdiction over the appli-

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cants. Although the validity of Railway's claim that it is Railroad's successor in interest and has good title to all of Railroad's rights and properties has never been judicially determined, this Court has impliedly recognized it several times. In *Northern Pacific R. Co. v. Boyd*, 228 U. S. 482 (1913), we held that a creditor of Railroad had an assertable claim against the equity of Railroad's shareholders represented by Railway's assets because the foreclosure amounted to little more than a judicially approved reorganization in which the shareholders of the old company became the shareholders of the new. As against a bona fide creditor of Railroad, we found the judicial sale ineffective to bar his rights. However, we also stated that

"[a]s between the parties and the public generally, the sale was valid. . . . [T]he Northern Pacific Railroad was divested of the legal title [to its properties]" *Id.*, at 506.

In *United States v. Northern Pacific R. Co.*, 311 U. S. 317 (1940), we described some of the history of the appellee company as follows:

"Pursuant to foreclosure proceedings the Northern Pacific Railway Company acquired title to the railroad, the land grant, and all other property of the original corporation and has since operated the road and obtained patents for millions of acres under the land grants." *Id.*, at 328.

In addition, Attorney General Harmon in 1897 advised the Secretary of the Interior that Railway had a right, as successor in interest of Railroad, to patents on land grants made to Railroad. 21 Op. Atty. Gen. 486. The Secretary of the Interior thereafter treated Railway as Railroad's legal successor and patented large amounts of land to Railway. When in 1905 the then Secretary of the Interior asked then Attorney General Moody, later an Associate Justice of this Court, about the right of

Railway to Railroad's land grants, Mr. Moody, after investigating the matter, reaffirmed his predecessor's conclusion that Railway was Railroad's legitimate successor in interest. 25 Op. Atty. Gen. 401. In 1954 a committee of Railroad's minority shareholders sued Railway seeking to have the 1896 foreclosure set aside and all titles and franchises declared to be in Railroad and to obtain an accounting from Railway for all properties and profits received from 1896 through 1954. In an exhaustive opinion Judge Edward A. Tamm of the United States District Court for the District of Columbia held the action barred by laches and dismissed the complaint. *Landell v. Northern Pacific R. Co.*, 122 F. Supp. 253 (D. C. D. C. 1954), aff'd, 96 U. S. App. D. C. 24, 223 F. 2d 316, cert. denied, 350 U. S. 844 (1955). In this context we think the Commission did not err in assuming jurisdiction over the applicants while refusing to adjudicate the merits of Railway's title. As the District Court stated, "[f]or purposes of merger proceedings it could rely on the existing judicial records . . . supplemented by the opinions of two Attorneys General."¹⁹

We are then faced with the contention of Livingston that Railway is prohibited from participating in the merger and that the Commission is barred from approving it by the terms of Railroad's charter. That charter does not authorize Railroad to merge with the applicant companies and prohibits the mortgaging of its property in the absence of congressional consent. If Railway is Railroad's successor in interest, Livingston contends, it is bound by the provisions of Railroad's charter, and those provisions would be violated by the proposed merger and issuance of securities incident thereto. Livingston argues that because the Act chartering Railroad is a law as much as it is a grant, see *Oregon & California R. Co. v. United States*, 238 U. S. 393, 427 (1915), it is bind-

¹⁹ 296 F. Supp. 853, 877 (D. C. D. C. 1968).

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ing upon the Commission and makes the Commission's approval of the merger unlawful. Livingston relies upon *Union Pacific R. Co. v. Mason City & Fort Dodge R. Co.*, 199 U. S. 160 (1905), as standing for the proposition that statutory restrictions on a predecessor federal railroad company survive a foreclosure sale and apply to a successor private railroad company operating on the original company's rights and franchise.

We do not find the *Mason City* decision to be controlling, despite its somewhat similar legal and factual context. In 1862 Congress chartered the Union Pacific Railroad Company and authorized it to build a trans-continental railroad. In 1865 Railroad, pursuant to congressional authorization, pledged a mortgage secured by its right-of-way and franchise to gain monies necessary for construction. In 1871 Congress granted Railroad authority to issue bonds for the construction of a bridge over the Missouri River, that grant being conditioned upon the bridge's being open for the use of all roads for a reasonable compensation, to be paid to the owner of the bridge. This condition was one generally inserted by Congress in statutes authorizing bridge construction. Sometime after the bridge was built the 1865 mortgage was foreclosed and the Union Pacific Railroad Company, a Utah corporation, purchased the assets of the federal corporation. It thereafter refused to allow any but its own trains to use the bridge, contending that as purchaser under the foreclosure of the 1865 mortgage, it was not bound by the 1871 statute's conditions. This Court rejected that contention and concluded that the conditions applied to the Utah corporation, reasoning that the purpose of Congress in authorizing the construction of the bridge required that the conditions appended to that authorization attach to the bridge and bind its owner.

The instant case is quite different. Here the provisions of the charter of Northern Pacific Railroad Company which are urged to bar this merger were directed only to

the operations of the federal corporation, not to the operation of the railroad. Thus, when the corporation's property was sold to another, the conditions of which Livingston speaks did not follow that property into the hands of the successor corporation. It therefore follows that the statute creating the Northern Pacific Railroad Company did not bar the Interstate Commerce Commission from authorizing a merger involving the Northern Pacific Railway Company, a Wisconsin corporation.²⁰ We find that the Commission acted within its authority in assuming jurisdiction over the instant merger proposal and that Railway is not barred by the statute from participating in that merger. We have considered Livingston's other contentions and find them to be without merit.

Conclusion

On the entire record we cannot say that the District Court erred in upholding the order set forth in the Second Report or that the Commission has done other than give effect to the Transportation Act of 1920 as amended in 1940, which vested in the Commission the responsibility of balancing the values of competition against the need for consolidation of rail transportation units.

The judgment of the District Court is therefore affirmed and the stay granted by this Court pending the resolution of these appeals is hereby vacated.

[Appendixes A and B follow this page.]

MR. JUSTICE DOUGLAS took no part in the decision of these cases.

²⁰ Appellees contend that under §§ 5 (11) and 20a (7) of the Interstate Commerce Act, 49 U. S. C. §§ 5 (11), 20a (7), the approval of a consolidation proposal operates to relieve the applicants from any inhibiting state or federal laws, that the charter of Railroad is such a law, and that approval of the instant merger proposal modifies any conflicting provisions in that charter. Since we do not find Railroad's charter to be binding upon Railway, we need not reach that contention.

Slip Opinion

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ATCHISON, TOPEKA AND SANTA FE RAILWAY
CO. ET AL. v. WICHITA BOARD OF TRADE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF KANSAS

No. 72-214. Argued February 28, 1973—Decided June 18, 1973*

The Interstate Commerce Commission (ICC), after hearings, approved imposition by appellant railroads of separate charges for inspection of grain while in transit, a service that had previously been provided under the line-haul rates. Appellees thereupon brought this action in District Court contesting the validity of the ICC order. That court found that the ICC had not adequately justified departure from its longstanding rule that such separate charges are unlawful unless the carriers can satisfy the burden that rests upon them of proving that their line-haul rates are insufficient to cover the total transportation service including the portion thereof for which separate charges are proposed. The court ordered suspension of the in-transit charges unless otherwise ordered by the court and remanded the case to the ICC. *Held*: The action of the District Court is affirmed as to the remand to the ICC and is reversed as to the injunction suspending the proposed charges. Pp. 5—, 352 F. Supp. 365, affirmed in part and reversed in part.

MR. JUSTICE MARSHALL, in an opinion joined by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN, concluded that:

1. The ICC, which justified its departure from its prior cases on the ground that the many rates involved rendered the previous requirement impractical and the new charges when added to the line-haul rates would not exceed the ICC-prescribed maximum rate level, has not stated its reasons with sufficient clarity

*Together with No. 72-433, *Interstate Commerce Commission v. Wichita Board of Trade et al.*, also on appeal from the same court.

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Syllabus

to facilitate proper judicial review of its approval of the in-transit inspection charges. Pp. 5-16.

2. Equitable considerations, including the doctrine of primary jurisdiction as applied to the facts of this case, required that the District Court refrain from expressing a view upon what it believed was permitted by national transportation policy before the ICC on remand could balance the conflicting interests of shippers, railroads, producers, and consumers in the proposed rate changes, cf. *Arrow Transportation Co. v. Southern R. Co.*, 372 U. S. 658; hence, it was improper for the District Court to enjoin implementation of the proposed new charges. Pp. 16-24.

MR. JUSTICE DOUGLAS concurred in the affirmance of the remand to the ICC.

MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN and MR. JUSTICE REHNQUIST, concurring in the reversal of the injunction, concluded that only the ICC was granted the statutory authority to suspend new freight rates for seven months and the District Court has no power to extend that period. Pp. 1-2.

MARSHALL, J., announced the Court's judgment and delivered an opinion, in which BURGER, C. J., and STEWART and BLACKMUN, JJ., joined. DOUGLAS, J., filed an opinion concurring in the affirmance of the remand to the Interstate Commerce Commission and dissenting from the reversal of the decree authorizing the injunction. WHITE, J., filed an opinion concurring in the reversal of the injunction and dissenting from the affirmance of the remand to the Interstate Commerce Commission, in which BRENNAN and REHNQUIST, JJ., joined. POWELL, J., took no part in the consideration or decision of the cases.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 72-214 AND 72-433

The Atchison, Topeka and
Santa Fe Railway Com-
pany et al.,
Appellants,

72-214 v.

The Wichita Board of
Trade et al.

Interstate Commerce Com-
mission, Appellant,

72-433 v.

Wichita Board of Trade.

On Appeals from the
United States District
Court for the District
of Kansas.

[June 18, 1973]

MR. JUSTICE MARSHALL announced the judgment of the Court, and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN join.

We noted probable jurisdiction in these cases to resolve two important questions relating to the proper role of courts in reviewing approval by the Interstate Commerce Commission of proposed rate increases by railroads. 409 U. S. 1005 (1972). First, under what circumstances may a reviewing court find that the Commission has failed adequately to explain its apparent departure from settled Commission precedent? Because the problem of determining what policies an agency is following, as a prelude to determining whether the agency is acting in accordance with Congress' will, is a recurring one, this issue raises general problems of judicial review of agency action. The second question in this case is a more limited one: in order to enjoin a proposed rate increase after

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a final order by the Interstate Commerce Commission, what sort of error must a District Court find in the proceedings of the Commission? We hold that in this case the Commission did not explain its apparent departure from precedent in a manner sufficient to permit judicial review of its policies, but that, nevertheless, that kind of error does not justify the District Court in entering an injunction against imposition of the rates pending review of the Commission's action on remand. We therefore vacate the judgment of the District Court and remand for the entry of a proper order.¹

I

In this case, the railroads proposed to establish a separate charge for inspection of grain while in transit.² In order to inspect the grain, the railroad cars loaded with it are stopped and placed on track facilities. A sample of the grain is taken, and the official grade is determined. Once the grade is known and the commercial value of the grain established, the shipper orders the car to proceed to the appropriate market. In-transit inspections have substantial advantages to shippers over

¹ We have previously stayed the judgment of the District Court on condition that appellant railroads keep accounts of the amounts received from the in-transit charges. 409 U. S. 801 (1972). We hereby direct the District Court to enter an order, consistent with this opinion, regarding the disposition of those amounts.

² Such a charge is already made for the first in-transit inspection in the Eastern Territory. The proposed rates would increase that charge from \$7.42 to \$14.33. There would be a slight increase in the currently effective charge for the second and subsequent inspections. A large majority of the number of in-transit inspections occur in the Western Territory, where most of this country's grain is produced and where no separate charge is now made for the first in-transit inspection. Only a few cars are stopped for more than one inspection. Thus, for convenience of exposition, we treat this case as involving a proposal for a separate new charge; that is the real effect of the railroads' proposal in most instances.

inspection at the destination. If the grain were to be found to be of a different grade than expected only after arrival at the destination, sending it to another market might be quite expensive. The advantages to purchasers of in-transit inspections, instead of inspection at the source that might satisfy shippers, are less marked but are nonetheless significant. The grain might deteriorate while in transit, thus leaving the purchaser with grain of a lower quality than he expected. And the possibility of bias of the inspector is greater if the inspection is made at the source.

The Commission found that "the orderly marketing of grain under present practices requires that a substantial portion of the commodity moving in commercial channels must be subjected to some form of sampling and inspection to determine grade or quality." 339 I. C. C. 364, 385 (1971).³ However, it also found that this sampling need not take place while the grain is in transit. The practice of in-transit inspections developed when federal law required inspections for the purpose of grading. 39 Stat. 483 (1916). But the diversion of grain from railroads to motor trucks made it difficult to enforce the inspection requirements. When trucks are used, in-transit inspections are not generally made. Thus, in order to simplify the movement of grain, Congress abolished the requirement of inspections. Pub. L. 90-487, 82 Stat. 761 (1968). In addition, the convenience of sampling at the source of the grain has increased with the widening reliance on low-cost mechanical samplers installed at grain elevators. The Commission therefore concluded that in-transit inspections were not necessary for the orderly marketing of grain.

³ The report of Division 2 of the Commission is found at 339 I. C. C. 364. The entire Commission "adopt[ed] and affirm[ed] the findings and conclusions reached" in that report. 340 I. C. C. 69, 70 (1971).

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It also concluded that in-transit inspections resulted in a substantial decrease in the number of freight cars available for general use.⁴ Relying on a variety of studies conducted by the railroads, the Commission found that each inspection kept a freight car out of use for roughly three days, and that the cumulative impact of the delays due to in-transit inspection is to reduce the available freight car fleet by several thousand cars.

Finally, the Commission considered whether the proposed separate charge for each in-transit inspection fairly reflected the cost to the railroad of such an inspection. Again it relied on quite detailed studies that established the cost of detaining a car, the cost of switching it on and off the main line, and the clerical costs of conducting inspections. The Commission concluded that the proposed charges were "not excessive in amount . . . on the basis of the convincing evidence of record showing the costs sustained by the railroads in performing the in-transit inspection service." 340 I. C. C., at 71-72.

Shippers who had objected to the proposed new charges before the Commission sought review of the Commission's order, and a statutory three-judge District Court was convened. The District Court found that these conclusions were supported by substantial evidence, and they are not challenged here. But the District Court held that the Commission had not adequately justified its failure to follow "its long-established rule that it will not allow a separate charge for an accessorial service previously performed as part of the line-haul rates without substantial evidence that such an additional charge is justified measured against the overall services rendered and the overall reasonableness of the increased line-haul rate resulting therefrom." 352 F. Supp. 365, 368. The Commission, although it analyzed the cost of each in-transit inspection,

⁴ For a description of the car-utilization problem, see *United States v. Allegheny-Ludlum Steel Corp.*, 406 U. S. 742, 745-746 (1972).

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had made no attempt to consider the reasonableness of continuing the existing line-haul rate, which included some charge for in-transit inspections. Instead, the Commission had attempted to distinguish this case from prior cases in which the rule was invoked, but the District Court, relying on *Secretary of Agriculture v. United States*, 347 U. S. 645 (1954), was "not convinced that the instant proceeding can be 'distinguished' as the Commission has indicated." 352 F. Supp. 365, 369.

Although the Commission must be given some leeway to re-examine and reinterpret its prior holdings, it is not sufficiently clear from its opinion that it has done so in this case. A reviewing court must be able to discern in the Commission's actions the policy it is now pursuing, so that it may complete the task of judicial review—in this regard, to determine whether the Commission's policies are consistent with its mandate from Congress. Since we cannot tell from the Commission's opinions what those policies are, we therefore agree with the District Court that the Commission's order finding the rates just and reasonable cannot be sustained.

II

Judicial review of decisions by the Interstate Commerce Commission in rate cases necessarily has a limited scope. Such decisions "are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power." *Manufacturers R. Co. v. United States*, 246 U. S. 457, 481 (1918).⁵ As this Court has observed, "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforce-

⁵ See also 5 U. S. C. § 706 (2).

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ment of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems." *Board of Trade of Kansas City v. United States*, 314 U. S. 534, 546 (1942).

The delegation to the Commission is not, of course, unbounded, and it is the duty of a reviewing court to determine whether the course followed by the Commission is consistent with its mandate from Congress. See *ICC v. Inland Waterways Corp.*, 319 U. S. 671, 691 (1943); *Burlington Truck Lines, Inc. v. United States*, 371 U. S. 156, 167-169 (1962). Cf. *NLRB v. Wyman-Gordon Co.*, 394 U. S. 759, 767 (1969). But a simple examination of the order being reviewed is frequently insufficient to reveal the policies that the Commission is pursuing. Thus, this Court has relied on the "simple but fundamental rule of administrative law," *SEC v. Chenery Corp.*, 332 U. S. 194, 196 (1947), that the agency must set forth clearly the grounds on which it acted. For "[w]e must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 511 (1935). See also *Phelps Dodge Corp. v. NLRB*, 313 U. S. 177, 197 (1941); *SEC v. Chenery Corp.*, 318 U. S. 80, 94 (1943). And we must rely on the rationale adopted by the agency if we are to guarantee the integrity of the administrative process. *SEC v. Chenery Corp.*, 318 U. S., at 88. Cf. *NLRB v. Metropolitan Life Ins. Co.*, 380 U. S. 438, 443-444 (1965). Only in that way may we "guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp. v. NLRB*, 313 U. S., at 194.

An agency "may articulate the basis of its order by reference to other decisions," *NLRB v. Metropolitan Life*

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Ins. Co., 380 U. S., at 443 n. 6. For "[a]djudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. See H. Friendly, *The Federal Administrative Agencies* 36-52 (1962). They generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of *stare decisis* in the administrative process, they may serve as precedents." *NLRB v. Wyman-Gordon Co.*, 394 U. S., at 765-766 (opinion of Fortas, J.). This is essentially a corollary of the general rule requiring that the agency explain the policies underlying its action. A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress.

There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to. From this presumption flows the agency's duty to explain its departure from prior norms. *Secretary of Agriculture v. United States*, 347 U. S. 645, 653 (1954). The agency may flatly repudiate those norms, deciding, for example, that changed circumstances mean that they are no longer required in order to effectuate congressional policy. Or it may narrow the zone in which some rule will be applied, because it appears that a more discriminating invocation of the rule will best serve congressional policy. Or it may find that, although the rule in general serves useful purposes, peculiarities of the case before it suggest that the rule not be applied in that case. Whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate.

A further complication arises when, as in the present case, the agency distinguishes earlier cases in which it

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invoked the rule. An initial step, and often the only one clearly taken, is to specify factual differences between the cases. Those factual differences serve to distinguish the cases only when some legislative policy makes the differences relevant to determining the proper scope of the prior rule. It is all too easy for a court to judge the adequacy of an asserted distinction in light of the policies the court, rather than the agency, seeks to implement; that is, after all, what an appellate court does with respect to courts of the first instance. Yet when an agency's distinction of its prior cases is found inadequate, the reviewing court may inadvertently adopt the stance it ordinarily takes with respect to other courts, and thereby may invade "the domain which Congress has set aside exclusively for the administrative agency," *SEC v. Chenery Corp.*, 332 U. S. 194, 196 (1947), that is, the choice of particular actions to carry out the broad policies stated by Congress. Instead, it is enough to satisfy the requirements of judicial oversight of administrative action if the agency asserts distinctions that, when fairly and sympathetically read in the context of the entire opinion of the agency, reveal the policies it is pursuing. So long as the policies can be discerned, the court may exercise its proper function of determining whether the agency's policies are consistent with congressional directives.

These principles gain content when applied to the present case. The District Court held that the Commission had not repudiated or adequately distinguished its prior cases establishing the rule that "it will not allow a separate charge for an accessorial service previously performed as part of the line-haul rates without substantial evidence that such an additional charge is justified measured against the overall services rendered and the overall reasonableness of the increased line-haul rate resulting therefore." While this is a fair summary of the Com-

mission's established practice,⁶ it conceals the apparent purpose of the rule, to protect two distinct classes: shippers who will continue to utilize the accessorial serv-

⁶The rule has been stated in other ways. See, *e. g.*, p. 4, *supra*. In *Transit Charges, Southern Territory*, 332 I. C. C. 664, 683 (1968), the Commission stated the rule in these terms: "[T]he proposed charge may not be divorced from the line-haul rate, for both, insofar as transit is concerned, are inextricably interdependent. [Citations omitted.] While it would seem preferable to have the various elements entering into, and constituting, the whole analyzed, if indeed they could be separated, the entire transportation service rendered, including transit, must be examined in relation to the total rates and charges assessed." The District Court reviewing that case rephrased the rule: "The question here is what should the carrier be paid for a service which it has been rendering, and has been charging for, and has been paid for (one knoweth not what) which it proposes to separate and charge separately for. Both the courts and the Commission have consistently held that what is a just and reasonable rate for the service to be separated and charged for separately cannot be determined by examining only the typical questions of cost, etc., with respect to the separate service. On the contrary, the typical questions must be directed to the overall or combined picture so that one may conclude (a) that the rate for the separated service, looked at by itself in the light of the applicable questions, is just and reasonable; and (b) that the remaining rate for the services, sans the separated service, is not rendered unjust or unreasonable." *Cincinnati, N. O. & T. P. R. Co. v. United States* (Civil Action No. 6992, U. S. D. C. Southern Ohio, Jan. 12, 1970), *aff'd*, 400 U. S. 932 (1970). The District Court continued, somewhat more obscurely: "Whether the examination is in terms of 'what portion of the line-haul rate represented the rate for the service to be separated,' or whether the search in terminology is for the answer to this question: Does the new aggregate rate, composed of line-haul plus transit rates represent a just and reasonable rate for all of the services (the aggregate of the severed and the non-severed)—the principle is the same." And in *Secretary of Agriculture v. United States*, 347 U. S. 645, 654 (1945), this Court referred to it as "the prevailing rule . . . that a service necessarily encompassed by the line-haul rate cannot be separately restated without examining the sufficiency of the line-haul rate to cover it."

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ice—in this case, those who will still have their grain inspected while in transit—and shippers who will not. To decide whether the Commission has adequately explained its failure to follow that rule, we must consider each class in turn, for the Commission may have made clear why it need not protect one class by invoking the rule but it may nonetheless have failed to say why it need not protect the other class.

In *Unloading Lumber in New York Harbor*, 256 I. C. C. 463 (1943), the Commission dealt with a proposal to charge separately for unloading, a service that was inextricably bound up with the line-haul service. Cf. *Secretary of Agriculture v. United States*, 347 U. S., at 648-649. The Commission said, "It follows that respondents may not now segregate a component of that [line-haul] service, making a separate charge therefor, without an adequate showing that the aggregate charge for the through service is reasonable." 256 I. C. C., at 468. The explicit purpose of the rule in this situation is to guarantee that shippers receiving the same service that they had previously received do not pay an unreasonable amount. See also *Duluth Dockage Absorption*, 44 I. C. C. 300 (1917); *Terminal Charges at Pacific Coast Ports*, 255 I. C. C. 673, 682 (1943). The rule, in this regard, is that the railroads must demonstrate both that the proposed charge is reasonable in light of the costs of the separate service, and that the total charge for line-haul plus the separate service is reasonable.

The Commission justified its departure from its prior cases by giving two reasons that relate to this aspect of the rule. First, it noted that "[t]he line-haul rates applicable on the grain to, from, and through [the] inspection points number in the thousands and, because of the complexities of the grain rate structures, vary to a large degree." Thus, applying the general rule "effectively precludes respondents from ever establishing a sepa-

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rate charge for the accessorial first stop for inspection regardless of the need for such a charge." Second, the Commission said that "the line-haul rate applicable to any movement of grain . . . when coupled with the proposed charge is less than the maximum reasonable level determined by this Commission. In no instance will the combined rate and charge exceed the maximum level prescribed in *Grain and Grain Products* [, 205 I. C. C. 301 (1934) and 215 I. C. C. 83 (1936)]." 339 I. C. C., at 386-387.

The maximum rates prescribed in *Grain and Grain Products* have been subjected to a large number of general rate increases.⁷ See, e. g., *Ex parte Nos. 265 and 267, Increased Freight Rates, 1970 and 1971*, 339 I. C. C. 125 (1971). In those proceedings, the Commission's focus is on the general revenue needs of the railroads. Across-the-board percentage increases are permitted without detailed examination of individual rates. As a result, there may be specific routes on which the maximum is in fact unreasonable, because, for example, the costs of operating those routes have not increased as rapidly as the costs elsewhere. Thus, the Commission has held that its approval of a general increase "does not have the effect of approving any particular increased rate as not being in excess of a maximum reasonable rate." *Coal from Illinois to Alton and East St. Louis*, 274 I. C. C. 637, 670 (1949). See also *Tennessee Produce & Chemical Corp. v. Alabama G. S. R. Co.*, 277 I. C. C. 207 (1950); *Brimstone R. Co. v. United States*, 276 U. S. 104 (1928). However, in other contexts, the Commission has treated the prescribed rates as modified by

⁷ Currently effective rates are, on almost every route, lower than the rates permitted by the general maximum. See 340 I. C. C., at 71. Often this results from competition from other modes of transport which forces rates below what the railroads would like to charge.

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general increases as "the best evidence of the reasonableness of corresponding rates at a . . . date" after the general increase. *Agsco Chemicals, Inc. v. Alabama G. S. R. Co.*, 314 I. C. C. 725, 733 (1961). Cf. *Public Service Comm'n of North Dakota v. Great Northern R. Co.*, 340 I. C. C. 739, 750 (1972).

The Commission thus has not determined that a rate which does not exceed the current general maximum is reasonable. A shipper can challenge any such rate as unreasonable and, if he succeeds, may recover reparations. In addition, the Commission may prescribe a rate to be charged in the future. 49 U. S. C. §§ 8, 9, 13 (1), 15(1); *ICC v. Inland Waterways Corp.*, 319 U. S. 671, 687 (1943). In such proceedings, the shipper must show that the rate charged was unreasonable. Cf. *Louisville & N. R. Co. v. United States*, 238 U. S. 1 (1915); *Shaw Warehouse Co. v. Southern R. Co.*, 288 F. 2d 759 (CA5 1961).⁸ In contrast, when a proposed rate increase is challenged by a shipper before it goes into effect, "the burden of proof shall be upon the carrier to show that the proposed changed rate . . . is just and reasonable." 49 U. S. C. § 15 (7).⁹

⁸ Mr. Justice White argues that, if a rate at the level of the general maximum is reasonable, and if the separate charge is reasonable, then surely a line-haul rate that is equal to the general maximum less the separate charge is reasonable. The flaw in his argument is that the Commission has never determined that rates at the level of the current general maximum are reasonable. That is, in the example suggested by Mr. Justice White, the Commission has not determined what he says that it has "previously found—that 120 is a reasonable charge for both services." Without this premise, his argument fails.

⁹ If the Commission finds that the proposed rates are unreasonable, rather than that the railroads failed to carry their burden of proof, that finding might be conclusive in a subsequent proceeding. Cf. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 258 (1913); *ICC v. Atlantic Coast Line R. Co.*, 383 U. S. 576, 590-594 (1966). This does not, however, affect the burden placed on carriers in the suspension proceedings.

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The Commission in this case referred to the burden that applying the rule would place on the railroads. It rather clearly intended by this to suggest that the importance of implementing the new charges and so of increasing the supply of available freight cars justified some modification of its usual allocation of the burden of going forward. Instead of requiring the railroads to produce substantial evidence that the total charges were reasonable, it would leave that determination to later proceedings in which a shipper seeking reparations might point to particular individual charges as unreasonable.

If this were all that was at stake, the Commission would have adequately identified the concerns behind its course—in light of the pressing need to increase the freight car supply, it was not too much to require that shippers carry the burden of going forward. Such an assessment would surely permit a reviewing court to determine whether the Commission's action was consistent with congressional transportation policy. Unfortunately, though, the change involved in making the shippers claim that particular rates are unreasonable is not all that is at stake. For in proceedings for reparations, there is also a change in the burden of proof: the shipper must produce substantial evidence that the rate is unreasonable. This would appear to affect the likelihood that the shipper will prevail. There is a zone in which rates are reasonable, *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506 (1935), and it would seem to be harder to establish that the proposed rates fell outside that zone than that they fell within it. Or so Congress believed, for it specified the allocation of the burden of proof in suspension proceedings as part of the cost to the carriers; in return for confining the power to suspend rates to the Commission, and so of eliminating the threat of long drawn out injunctive proceedings in the courts, Congress made the carriers carry

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a burden of proof that would otherwise not have been theirs. Cf. Part III, *infra*.¹⁰

The Commission did not suggest that its approval of the proposed rates on the grounds it gave would alter the usual practice in actions for reparations. Nor did it say why the need for an increased supply of freight cars justified a significant change in the burden of proof. In this sense, the Commission's action was, as the District Court noted, "discriminatory per se."

It is even harder to understand from the Commission's opinion why it departed from the rule in prior cases protecting shippers who decide not to have in-transit inspections. If the separate charges are to be effective in alleviating the car-shortage problem, there must be a substantial number of shippers who do not seek in-transit inspections. Yet according to the Commission, the railroads need not show that the present line-haul rates are reasonable charges for the services provided to shippers who do not seek in-transit inspections. It

¹⁰ The argument urged in support of the Commission's order is, in essence, that the separate charge approved by it was just like a general rate increase because of the breadth of its application. However, the Commission did not use the language characteristic of general increase proceedings. See, e. g., *Ex parte 259, Increased Freight Rates, 1968*, 332 I. C. C. 714, 715, 792 (1968). And, if this were just like a general rate increase, serious questions would arise about the jurisdiction of the District Court to review the Commission's order. See *Atlantic City Electric Co. v. United States*, 306 F. Supp. 338 (SDNY 1969); *Alabama Power Co. v. United States*, 316 F. Supp. 337 (DC 1969), both aff'd by an equally divided court, 400 U. S. 73 (1970). Yet, although the parties have cited those cases to us, see Brief of the Interstate Commerce Commission, at 35, Brief of the Secretary of Agriculture, at 18, Brief of Wichita Board of Trade, at 32, they have not contended at any length that the District Court lacked jurisdiction over this case. This suggests that the parties, including the Commission, do not interpret the Commission's opinion as resting on the similarity between this case and general rate increase cases.

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would appear, thus, that the Commission has approved a policy that discriminates against what it hopes will be a very large number of shippers; it seems to have tried to justify its policy by citing reasons that affect only a much smaller class.

Some of the shippers who previously sought in-transit inspections will no longer do so. Others had the opportunity for such inspections. Now the railroads propose to eliminate some of the service previously provided yet charge the same rates. The Commission in its prior cases has required railroads proposing a similar reduction in service either to show that the rates then in effect did not compensate them for the service, and thus that the service was being provided at no charge, or to reduce the existing rates. See, *e. g.*, *Transit Charges, Southern Territory*, 332 I. C. C. 664, 683 (1968); *Loading of Less-Than-Carload Freight at Norfolk Harbor*, 91 I. C. C. 394 (1924); *ICC v. Chicago, B. & Q. R. Co.*, 186 U. S. 320 (1902).

Nothing the Commission said suggests any reason why the railroads should not be required to follow the same rule in this case. At no time have rates ever been established, or found just and reasonable, when the railroads did not include the service of in-transit inspection. Perhaps the imperative need to increase the number of freight cars available to all shippers justifies some alteration of the general rule. Yet the Commission, when dealing with shippers who will continue to have in-transit inspections, invoked the fact that the new charges would not raise rates above those permitted by the general maxima. As to that class, the Commission apparently believed that it could not simply refuse to follow pre-existing practices on the ground of exigency alone. The Commission offered no reason to distinguish the larger class from the smaller one, in that respect. But it might be that rates for services including an in-transit inspec-

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tion, at the level of the general maximum, would be reasonable while rates for services without such inspections would be unreasonable at that level, or even below it. Thus, the fact that the new charges will not exceed the general maximum seems to have no bearing on the question of the reasonableness of the rates that will continue to be in force for now-reduced services.¹¹

Perhaps the current line-haul rates really do not include a substantial amount attributable to the cost of providing in-transit inspections. But cf. Transcript of Hearing, at 231-232, 258-266. Or perhaps the Commission has some reason to reinterpret the prior cases suggesting that its rule reflects a concern for rates that are "increased" simply because of a reduction in services.

As in *Secretary of Agriculture v. United States*, 347 U. S. 645, 652 (1954), the Commission may have reasons for "following a procedure fairly adapted to the unique circumstances of this case."¹² But, as in that case, it must make these reasons known to a reviewing court with sufficient clarity to permit it to do its job. Even giving the Commission's opinion the most sympathetic reading that we find possible, we cannot discover in it an expressed reason for permitting the railroads to reduce their services without showing that the rates they

¹¹ The Commission may have intended to leave this question for later proceedings. But this course runs into the difficulties noted above, *supra*, p. 13.

¹² On remand, the Commission might explain more fully the course it followed, or it might adopt a different course, for example, by requiring the carriers to demonstrate the reasonableness of the line-haul rates for services provided without an in-transit inspection on a representative sample of routes. Most of the prior cases in which the Commission invoked the rule involved quite limited problems, often confined to a single route. But cf. *Transit Charges, Southern Territory*, 332 I. C. C. 664 (1968). If the Commission then explained why that procedure was responsive to the needs of the particular case, the prerequisites of judicial review would be satisfied.

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propose to maintain are reasonable rates for the service they intend to provide.

III

After holding that the matter must be remanded to the Interstate Commerce Commission for further proceedings, the District Court ordered, "The proposed charges are suspended and shall be ineffective until and unless otherwise ordered by this Court." No reasons for such an order were given; the District Court did not, for example, specify the nature of the harm to the shippers that would, presumably, injure them irreparably. Nor did it explain the basis for its apparent belief that *Arrow Transportation Co. v. Southern R. Co.*, 372 U. S. 658 (1963), was distinguishable.

It was error to enter such an injunction. The District Court clearly had power to suspend the operation of the Commission's order pending the final determination of the shippers' suit. That power is given in terms by 28 U. S. C. § 2324: "The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action." But an injunction forbidding the railroads from implementing a proposed change in rates is not, strictly speaking, an injunction suspending the Commission's order. In this case, for example, the Commission's order stated, "the proposed new or increased charges for in-transit inspection of grain at various points in the United States are just and reasonable. . . ." The only consequence of suspending that order is that the railroads may not rely, in some subsequent proceeding, on a Commission finding that the proposed rates were just and reasonable. In an action for reparations, for example, the railroads could not gain any benefit from

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the purported Commission approval of the increases.¹³ See *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U. S. 370 (1932). See also 49 U. S. C. §§ 1 (5), 10 (1). The Commission's order also provided that the proceeding be discontinued, and suspension of the order requires the Commission to reopen its inquiry.

Carriers may put into effect any rate that the Commission has not declared unreasonable. 49 U. S. C. §§ 6 (3), 15 (1). Suspension of the Commission's order thus does not in itself preclude the carriers from implementing a new rate. The power conferred on the District Court by § 2324 does not in itself include a power to enjoin the railroads from implementing a proposed new charge. Rather, that power must be considered as at best ancillary to the general equitable powers of the reviewing court, and protective of its jurisdiction. See *Arrow Transportation Co. v. Southern R. Co.*, 372 U. S., at 671 n. 22; *Order of Conductors v. Pitney*, 326 U. S. 561, 567 (1946). Cf. *Pittsburgh & W. Va. R. Co. v. United States*, 281 U. S. 479, 488 (1930); 28 U. S. C. § 1651 (a). As this Court noted in *Scripps-Howard Radio, Inc. v. FCC*, 316 U. S. 4 (1942), such a power must be inferred from Congress' decision to permit judicial review of the agency action. "If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made." *Id.*, at 10.

Yet it would be surprising if that power could be exercised to the extent that it might substantially interfere with the function of the administrative agency. "The

¹³ The Commission may, of course, approve the rates on a theory similar to that discussed in Part II of this opinion, justifying its refusal to require a showing of reasonableness by the fact that that question would be open in subsequent proceedings. A suspension of the Commission order would then have almost no practical meaning.

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existence of power in a reviewing court to stay the enforcement of an administrative order does not mean, of course, that its exercise should be without regard to the division of function which the legislature has made between the administrative body and the court of review."

Ibid. Proper regard for that division of function requires that we hold erroneous the District Court's decision to enjoin not only the Commission's order finding the proposed rates just and reasonable but also the implementation of those rates.

In *Arrow Transportation Co. v. Southern R. Co.*, *supra*, this Court considered a similar problem. The Interstate Commerce Commission has the power to suspend proposed rate changes for seven months, while it proceeds to consider the reasonableness of the proposal. "If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate . . . shall go into effect at the end of such period." 49 U. S. C. § 15 (7). In *Arrow*, parties affected by proposed reductions sought an injunction against the implementation of the proposed reductions when, at the end of the suspension period, the railroads announced that they intended to put the new rates into effect. The Commission had not determined that those rates were reasonable. The Court concluded that Congress, by giving the Commission the power to suspend rates, had intended to preclude the courts from doing the same.

Here, of course, the Commission's proceeding has been concluded, or at least so the Commission thought when it entered its order. The terms of § 15 (7) do not specifically govern this situation. Nor is there any other provision in the relevant statutes depriving federal courts of their general equitable power to preserve the status quo to avoid irreparable harm pending review. Yet many of the considerations, relied on in *Arrow* and influencing this Court's definition of the proper relation between the courts and the Interstate Commerce Commission,

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must be drawn on to delineate guidelines for the exercise of the ancillary power, in a proceeding to review a Commission order, to enjoin a rate increase pending final determination of the suit.

The most important of these considerations is the group of policies that are encompassed by the term "primary jurisdiction." National transportation policy reflects many often-competing interests. Congress has established an administrative agency that has developed a close understanding of the various interests and that may draw upon its experience to illuminate, for the courts, the play of those interests in a particular case. Cf. *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U. S. 285 (1922); *United States v. Western Pacific R. Co.*, 352 U. S. 59 (1956). Ordinarily, then, a court should refrain from expressing a preliminary view on what national transportation policy permits, before the ICC expresses its view. But when a court issues an injunction pending final determination, one important element of its judgment is its estimate of the probability of ultimate success on the merits by the party challenging the agency action. *Virginia Petroleum Jobbers Assn. v. FPC*, 104 U. S. App. D. C. 106, 259 F. 2d 921, 925 (1958). Depending on the type of error the reviewing court finds in the administrative proceedings, the issuance of an injunction pending further administrative action may indicate what the court believes is permitted by national transportation policy, prior to an expression by the Commission of its view. This is precisely what the doctrine of primary jurisdiction is designed to avoid. Cf. *Order of Conductors v. Pitney*, *supra*; *Locomotive Engineers v. M.-K.-T. R. Co.*, 363 U. S. 528, 533 (1960). The fact that issuing an injunction may undercut the policies served by the doctrine of primary jurisdiction is

therefore an important element to be considered when a federal court contemplates such action.¹⁴

As we have indicated in Part II of this opinion, we require the agency to justify its departure from its prior decisions so that we may understand what policies it is pursuing. If a reviewing court cannot discern those policies, it may remand the case to the agency for clarification and further justification of the departure from precedent. But an injunction pending the completion of those proceedings would be warranted only if the reviewing court entertained substantial doubt about the consistency of the Commission's action with its mandate from Congress. Cf. *Virginian R. Co. v. United States*, 272 U. S. 658, 673 (1926).¹⁵ When a case is remanded

¹⁴ *Brotherhood of Locomotive Engineers v. M.-K.-T. R. Co.*, 363 U. S. 528 (1960), shows that not all judicial injunctions infringe on an agency's primary jurisdiction. There the Court noted that the District Court's "examination of the nature of the dispute is so unlike that which the [agency] will make of the merits of the same dispute, and is for such a dissimilar purpose, that it could not interfere with the later consideration of the grievance by the [agency]." *Id.*, at 534. Here, in contrast, the District Court must consider whether the Commission is likely to find reasons for its action that are consistent with congressional policy. Not only is such a question exceedingly complex, it is also just what the Commission itself must decide before approving the proposed new charges.

¹⁵ In some cases, the reviewing court might explicitly refrain from considering the likelihood of success on the merits in deciding whether or not to issue an injunction. Then, if the possibility of irreparable damage to the party seeking review or to other interests is great enough, an injunction may perhaps be justified. See, e. g., *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F. 2d 1197, 1205-1206 (CA2 1970); *Checker Motors Corp. v. Chrysler Corp.*, 405 F. 2d 319, 323 (CA2 1969). In this case, however, the District Court did not clearly refuse to assess the likelihood of ultimate success and, as indicated *infra*, the possibility of irreparable harm to the shippers is quite small.

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on the ground that the agency's policies are unclear, an injunction ordinarily interferes with the primary jurisdiction of the Commission.¹⁶ Cf. *Arrow Transportation Co. v. Southern R. Co.*, *supra*, at 669-670.

In addition, the reviewing court must consider whether irreparable harm will result if the injunction is not issued and the party seeking it prevails on the merits. *Order of Conductors v. Pitney*, *supra*. That too may interfere with the agency's primary jurisdiction. We deal here with a dispute between shippers and carriers. In

¹⁶ This analysis turns on the fact that type of error in this case involves precisely a failure by the Commission to do the job committed to it, the proper performance of which is a predicate of the doctrine of primary jurisdiction. Where the error might be considered purely procedural, for example, where the Commission failed to consider relevant evidence on grounds the reviewing court finds inadequate, the issuance of an injunction might not interfere with the agency's primary jurisdiction quite so severely. Yet even there, before issuing an injunction the reviewing court must consider whether the Commission would have come to a different conclusion had it considered the evidence. And that may sometimes impinge on the sphere committed to the Commission for initial decision.

This Court has distinguished between blatantly lawless action and mere procedural error in cases raising similar questions of the power of courts to intervene in administrative action. See *Oestereich v. Selective Service Board*, 393 U. S. 233 (1968); *Fein v. Selective Service System*, 405 U. S. 365 (1972).

Different considerations would come into play, too, when the reviewing court finds some failure by the carriers in the suspension proceeding, rather than a failure by the Commission to do its task. A reviewing court might find, for example, that the Commission's conclusion that the carriers had carried the burden of proof to justify the increase was not supported by substantial evidence. Although phrased as a finding of administrative error, this in fact relates to the presentation of evidence by the carriers.

Finally, this case involves only claims under the Interstate Commerce Act. Subsequent legislation might affect the relation between court and agency and so the propriety of injunctive relief. Whether it does so must be determined by examining that legislation.

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giving the Interstate Commerce Commission power to suspend proposed rate increases, Congress allocated the benefit and harm of a suspension. For a period of up to seven months, the carriers may not collect the increases if the Commission suspends them. The income that they might have gained is lost to them forever. Congress did provide protection to shippers for the period after the rates go into effect. The Commission may require the carriers to keep detailed accounts of the income received as a result of the increase. If the increase is ultimately found unjustified, the Commission may order a refund. 49 U. S. C. § 15 (7). Even if the Commission does not do so in a suspension proceeding, the shippers may recover reparations under some circumstances. 49 U. S. C. §§ 8, 9. Thus, it is often quite unlikely that shippers will be irreparably damaged by the implementation of a rate increase.¹⁷

There are, however, public interests at stake in this litigation, as well as the private interests of the shippers and carriers. The Commission found that inspection of grain is required for the orderly marketing of grain. 339 I. C. C., at 385. Inspections will thus continue to be made. But now, if the Commission ultimately approves the new charges, there will be a separate charge for them, either by the railroads under the new charges, or by someone else engaged in marketing grain. This extra cost must be absorbed by someone, perhaps by farmers, perhaps by the ultimate consumers of grain. See Transcript of Hearing 1299. The impact of rates on various

¹⁷ The interests of other carriers who might object to a proposed rate change are somewhat different. They are not damaged, as the shippers are, by out-of-pocket expenditures, and refunds or reparations do not remedy the loss of business that they might suffer. This factor would thus have less weight in suits by such carriers, although the problem of interfering with primary jurisdiction must still be considered.

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groups in this country is surely relevant to deciding that the rates are consistent with national transportation policy.

But the public interest is not a simple fact, easily determined by courts. Here, for example, the interests of farmers and consumers of grain must be balanced against the interests of producers and consumers of all sorts of other goods shipped by rail. For the premise of the Commission's action in this case was that separate charges for in-transit inspections would alleviate the freight car shortage. The shortage itself increases the cost of transporting a wide range of products by rail. Thus, the decision that must be made is whether the car shortage has a more significant impact on the national economy than does increased cost for grain products. Congress has committed that decision to the Interstate Commerce Commission in the first instance, and the extent of harm to farmers and consumers of grain cannot be estimated without interfering with the primary jurisdiction of the Commission.¹⁸

¹⁸ Although they are far less substantial than the problems of primary jurisdiction and irreparable injury, procedural problems might also arise when a district court considers a request for an injunction like that issued in this case. Review of Commission orders is by a three-judge district court. The United States is the defendant. 28 U. S. C. §§ 2321, 2322. Railroads who appeared before the Commission have a right to intervene, 28 U. S. C. § 2323, but they need not do so. If a railroad chose not to intervene, the District Court could not enjoin it from implementing the new charge. The plaintiffs could, of course, compel an unwilling railroad to appear. Fed. Rules Civ. Proc., Rule 19 (a). But, even though service of process is nationwide, 28 U. S. C. § 2321, some plaintiffs might find it difficult to serve every railroad that did not appear willingly. The presence before the reviewing court of all interested parties, or only some of them, is therefore relevant to the exercise of the court's discretion to enjoin a proposed rate increase. Like the other factors discussed in this opinion, this does not establish that the District Court lacks power to enjoin the implementation of proposed rate increases after a final Commission order, but it is a

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As this discussion shows, it is very likely that a decision to enjoin rates pending reconsideration by the Commission in order to clarify its policies will imply some view by the District Court about decisions committed to the Commission by the doctrine of primary jurisdiction. The District Court's power to enjoin rates, in order to protect its jurisdiction to review Commission orders, must therefore be exercised with great care and after full and detailed consideration of the problems set out above. It will not do to enter such an injunction in the off-handed manner of the District Court. Cf. *Virginian R. Co. v. United States*, 272 U. S. 658 (1926). Here the District Court could not consider the likelihood of success on the merits or where the public interest lies without infringing on decisions committed by Congress to the primary jurisdiction of the Interstate Commerce Commission, and the possibility of harm to the shippers was small. It was therefore improper to enter an injunction against the implementation of the proposed new charges.

In this case the Commission ordered the railroads to maintain records of the amounts collected as a result of the new charge. It may be that this adequately protects the shippers from irreparable damage, in light of the availability of actions for reparations. The Commission may determine on remand that some further steps must be taken to protect the shippers. But in any event, it is clear that the District Court should not have entered the injunction it did. The action of the District Court is affirmed as to the remand to the Commission and is reversed as to the injunction suspending the proposed charges.

So ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of these cases.

factor to be considered in determining whether to exercise equitable discretion to issue such an injunction.

SUPREME COURT OF THE UNITED STATES

Nos. 72-214 AND 72-433

The Atchison, Topeka and
Santa Fe Railway Com-
pany et al.,
Appellants,

72-214 v.

The Wichita Board of
Trade et al.

Interstate Commerce Com-
mission, Appellant,

72-433 v.

Wichita Board of Trade.

On Appeals from the
United States District
Court for the District
of Kansas.

[June 18, 1973]

MR. JUSTICE DOUGLAS, concurring in the affirmance of the remand to the Commission and dissenting from the reversal of the decree authorizing the injunction.

In my view the District Court was quite correct in issuing its injunction. *Arrow Transportation Co. v. Sou. R. Co.*, 372 U. S. 658, is not relevant here, for the reason that § 15 (7) only purports to control the suspension of rates up until the time the Commission has rendered a decision. After that decision has been made, the reviewing court has, I believe, the power to enjoin the affected rates. The new charges which the Commission would impose would have an immediate impact upon the grain marketing system. It would affect the volume of business of the grain merchants, it would affect the employment of grain inspectors, and it would result in lower prices being paid to the farmers. None of these incidences can be remedied under the existing statutory scheme, because none of these interests is enabled to

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bring suit for a later rate refund. Hence, in my view, the grain trade and the farmers need this interim protection lest in inspection the marketing system suffers severe attrition during the period of remand. The deciding principle is that the District Court sits as a court of equity, *United States v. Morgan*, 307 U. S. 183, 191, and as a court of equity has, I believe, ample power to protect the grain market nationally which would otherwise be without remedy under the existing statutory regime.

Jurisdiction is granted the District Court "to enforce, enjoin, set aside, annul or suspend" any order of the Interstate Commerce Act. 28 U. S. C. § 1336 (a). For years the type of order here involved* was not reviewable. See *Proctor & Gamble Co. v. United States*, 225 U. S. 282. But that "negative" order concept was abandoned in *Rochester Tel. Corp. v. United States*, 307 U. S. 125, 145. The provisions of the Urgent Deficiencies Act, 28 U. S. C. § 1336 (a), are an explicit grant of power to provide injunctive relief. Under that Act the "governing principle" is "that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interests the injunction will effect." *Inland Steel Co. v. United States*, 306 U. S. 153, 157. That power exists whether the Commission's authority over rates is challenged under 49 U. S. C. § 15 (1) as being unjust or unreasonable or under 49 U. S. C. § 15 (7) relating, as here, to "a new individual or joint rate, fare or charge." In all cases the District Court by reason of 28 U. S. C. § 1336 (a) sits as a court of equity.

*The order of Division 2 of the Commission provided that the proceeding "be, and it is hereby, discontinued." 339 I. C. C. 364, —. The order of the Commission *en banc* affirming is in 340 I. C. C. 69, —.

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On Appeals from the
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of Kansas.

[June 18, 1973]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE REHNQUIST join, concurring in the reversal of the injunction and dissenting from the affirmance of the remand to the Commission.

I dissent because the District Court erred both in holding that the Commission had inadequately explained the basis for its judgment and in suspending the new in-transit inspection tariff beyond the time the statute permits new rates to be suspended without a finding that they are unjust and unreasonable.

As to the latter, 49 U. S. C. § 15 (7) forbids the suspension of new freight rates for more than seven months without the requisite finding of unreasonableness by the Commission. Only the Commission may suspend in the first instance; and if the agency refuses to do so, the court is powerless itself to suspend. The Commission may postpone effectiveness of new rates for seven months, but if it does, the statute commands that, absent the appropriate order of the Commission within that period, "the proposed change of rate . . . shall go into effect" To permit the District Court neverthe-

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less to extend this period seems to me to be flatly contrary to the will of Congress. I therefore cannot join the Court's indication that, although the District Court has no statutory power to do so, it nevertheless retains sufficient power to enjoin the rates as "ancillary to the general equitable powers of the reviewing court, and protective of its jurisdiction." *Ante*, p. 18. As I see it, the District Court contravened the precepts of *Arrow Transportation Co. v. Southern R. Co.*, 372 U. S. 658 (1963).

As for the remand to the Commission, there is somewhat more to be said. The Commission found, and it is not questioned by the District Court or by the majority here, that in-transit inspection of grain is not an essential part of transportation service but only ancillary to it; that the premarketing inspection of grain, in transit or otherwise, is no longer required by federal law; that in-transit inspection of grain has been the regular practice in Western territory, to some extent in Southern territory, but not in Eastern territory; that the line-haul rates for grain in Western and Southern territories established by the railroads or prescribed by the Commission have provided one free in-transit inspection stop, but a separate charge for that service is the practice in Eastern territory;¹ and that, because of recent developments in-

¹ The Commission noted:

"It is again emphasized that the major impact of the proposal under consideration will be on the movement of grain in the western district. Most inspections occur in this territory. There is presently effective a separate charge for this service in the East. A substantial increase in those charges will result, however, if the proposed charges are permitted to become effective. The number of in-transit inspections in the South is limited and take place chiefly at the ports on export grain tonnage. There is little, if any, opposition to establishment of the charges in southern territory. Practically all of the controversy is concerned with establishment of the separate charge for the first inspection of grain within the western district."

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transit inspection is no longer an essential service for the orderly marketing of grain in Western and Southern territories. Furthermore, the unquestioned finding of the Commission was that the principal motivation for imposing a separate charge for in-transit grain inspection was not to increase railroad revenues through collection of the charge itself but to promote efficient utilization of freight cars by discouraging the practice of in-transit inspection which had proved extremely wasteful in terms of car utilization. The Commission finding, also undisputed, was that the separately stated inspection fee would discourage the practice of in-transit inspection, would contribute to a more efficient utilization of freight cars, and hence help relieve the unquestioned grain-car shortage.

With these important preliminary findings and conclusions behind it, the Commission examined in detail the reasonableness of the separate charge being imposed for in-transit inspection of grain. Its conclusion was that the charge was reasonable, a judgment not overturned either here or in the District Court. Finally, the Commission noted that by the terms of the new tariff itself, separate in-transit inspection charges could not be collected where the combination of the new, separate charge and the existing line-haul rate exceeded the maximum reasonable level of grain rates established in Docket 17,000, Part 7, *Rate Structure Investigation, Grain and Grain Products*, 205 I. C. C. 301 (1934); 215 I. C. C. 83 (1936), as raised by subsequent general revenue increases. Docket 17,000, Part 7, *Rate Structure Investigation*, was a major national effort, a comprehensive investigation of rates on agricultural products, and resulted, among other things, in the Commission prescribing maximum reasonable freight rate levels for movements of grain. Since that time, there have been general rate increases for revenue purposes, in the course of which

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the rates on grain and their structure as required by the 1934 and 1936 determinations have been given special attention. See for example, *Increased Freight Rates, 1967*, 332 I. C. C. 280, 300 (1968).

Under the new tariffs now filed, as I have said, if the applicable line-haul rate on the particular grain movement involved is at the maximum reasonable level theretofore prescribed by the Commission in previous proceedings, no separate in-transit inspection charge is imposed or allowable, nor may the combination of the new charge and the existing line-haul rate collected by the railroad exceed the maximum allowable rate as previously determined. This is the key to understanding that, in approving the separate inspection charge, the Commission did not ignore its longstanding rule that railroads may not impose separate charges for an ancillary service previously furnished under a line-haul rate unless both the reasonableness of the separate charge and the line-haul rate are scrutinized. *Transit Charges, Southern Territory*, 332 I. C. C. 664, 683-684 (1968), is, for example a relatively recent restatement of the rule.² The Commission thought this rule not controlling here because, in the first place, the magnitude of the task of justifying each one of a countless number of line-haul grain rates would, as a practical matter, prohibit the imposition of a separate in-transit inspection charge and so frustrate the important nonrevenue goal of discouraging in-transit inspection and so improving car utilization.

² The Commission's order was sustained, on other grounds, in *Cin. N. O. & T. R. P. Co. v. United States* (unreported) (SD Ohio 1970), aff'd 400 U. S. 932 (1970). The District Court sustained the Commission on the basis that the proposed increase in charges might well result in a substantial diversion of the considered traffic, with a diminution, rather than an increase, in revenues. In the present case, the Commission noted: "Similar conclusions are not warranted here."

But more fundamentally, the Commission in any event deemed the rule satisfied; for here the reasonableness of the line-haul rate was sufficiently examined and ensured by proof that the new charge was itself reasonable *and* by prohibiting its collection if the total cost of the grain movement—its line-haul charge plus the separate inspection charge—exceeded the maximum reasonable rate theretofore prescribed by the Commission, that is, the maximum reasonable rate the Commission had *theretofore prescribed for both the transportation service and the privilege of in-transit inspection.*

This approach seems straightforward and adequate. Keeping in mind that Docket 17,000, Part 7, as was customary in Western territory, prescribed rates for grain movements permitting one in-transit inspection without extra charge, let us assume, for example, that the maximum rate prescribed by the Commission for a particular grain movement with in-transit inspection privileges was 120. Assume further what is the recurring situation in the case before us—that the railroad is charging less than it may, say 100, for the grain movement with that privilege. The railroad then publishes a tariff under which the line-haul rate of 100 no longer entitles the shipper to in-transit inspection, and a separate charge of 20 is imposed on those who want that service. The line-haul charge plus the separate in-transit inspection charge does not exceed what the Commission has heretofore ruled the railroad may collect for both the transportation and the inspection service. This calculus seems to me an adequate basis for concluding that the line-haul rate of 100 is itself within the zone of reasonableness. If a railroad may charge 120 for a grain movement with in-transit inspection provided, and the inspection stop is proved reasonably worth 20, why should there also be occasion for considering the reasonableness of 100 as a

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line-haul rate and so proving again what the Commission previously found—that 120 is a reasonable charge for both services?

The District Court thought the Commission ignored *Secretary of Agriculture v. United States*, 347 U. S. 645 (1943), but I read that case far differently. There the Court, although being of the opinion that the Commission had not adequately explained why it was approving a separate charge without examining the legality of the line-haul rate, was careful to point out that the Commission was not precluded “from following a procedure fairly adapted to the unique circumstances of this case”; nor did the court question “the Commission’s power, under appropriate findings, to approve such unloading charges without pursuing one of these courses. In dealing with technical and complex matters like these, the Commission must necessarily have a wide discretion in formulating appropriate solutions.” *Id.*, at 652. That case does not stand for the rule that a separate charge for an ancillary service may in no circumstances be permitted without new proof in *that* proceeding of the reasonableness of the line-haul rate.

The prior decisions of the Commission relied upon by the District Court establish clearly enough that the Commission must be satisfied with the reasonableness of the line-haul rate as an exaction for the remaining services before approving a separate charge for a service previously covered by the line-haul rate. *Transit Charges, Southern Territory*, 332 I. C. C. 664 (1968); *Investigation and Suspension Docket No. 5146, Terminal Charges at Pacific Coast Ports*, 255 I. C. C. 673 (1943); *Reconsignment Case No. 3*, 53 I. C. C. 455 (1919); *Loading of Less-Than-Carload Freight on Lighters in Norfolk, Va., Harbor*, 91 I. C. C. 394 (1924). In these cases, the carriers simply failed to carry their burden of proof.

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The District Court also cited for this proposition *Grand Forks Chamber of Commerce et al. v. Great Northern R. Co.*, 321 I. C. C. 356 (1963), but the Commission in that case, see *id.*, at 360-362, did precisely what it has done in this one: it approved a separate in-transit inspection charge in the case of so-called Group 3 rates where the line-haul rate and the new charge together were less than so-called Group 1 rates prescribed in *Grain and Grain Products*, 205 I. C. C. 301, 315 I. C. C. 83, *supra*. See also *Public Service Comm'n v. Great Northern R. Co.*, 340 I. C. C. 739; *Alabama State Docks Dept. v. Alabama, T. & N. R. Co.*, 321 I. C. C. 347; *Agasco Chemicals v. Alabama G. S. R. Co.*, 314 I. C. C. 725.

Neither do I understand why the majority is comforted by the opinion in *Cincinnati N. O. & T. P. R. Co. v. United States*, — F. Supp. — (SD Ohio 1970), in which the District Court affirmed, but on very limited grounds (grounds that would save the case before us now), the Commission's disallowance of a separate transit charge for cotton movements but disapproved the stringent standard by which the Commission required the railroads to prove the reasonableness of the resulting line-haul rate. The District Court restated the prevailing rubric:

"The question here is what should the carrier be paid for a service which it has been rendering, and has been charging for, and has been paid for (one knoweth not what) which it proposes to separate and charge separately for. Both the courts and the Commission have consistently held that what is a just and reasonable rate for the service to be separated and charged for separately cannot be determined by examining only the typical questions of cost, etc., with respect to the separate service. On the contrary, the typical questions must be directed

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to the overall or combined picture so that one may conclude (a) that the rate for the separated service, looked at by itself in the light of the applicable questions, is just and reasonable; and (b) that the remaining rate for the services, sans the separated service, is not rendered unjust or unreasonable."

The District Court continued:

"Whether the examination is in terms of 'what portion of the line-haul rate represented the rate for the service to be separated,' or whether the search in terminology is for the answer to this question: *Does the new aggregate rate, composed of line-haul plus transit rates represent a just and reasonable rate for all of the services (the aggregate of the severed and the nonsevered)—the principle is the same.*" (Emphasis added.)

A few paragraphs later, the court repeated the same alternate approach. This Court affirmed the District Court summarily. 400 U. S. 932 (1970). In the case now before us the total of the line-haul rate and the separate in-transit charge will in no case exceed what the Commission has heretofore found to be a reasonable charge for the aggregate service.

The maximum permissible rates for grain movements with in-transit inspection privileges were established some years ago it is true, but they have been subject to repeated examination upon the occasions of general rate increases and, as this case itself shows, they are far from dead letters from the standpoint of either the railroads or the Commission. They remain the foundation of the Commission's opinion as to what just and reasonable grain rates are with in-transit privileges furnished by the railroad. I see no reason for now disagreeing with the Commission's judgment that the reasonableness of a line-haul rate lower than the maximum allowable

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has been sufficiently re-examined to permit imposition of a separate in-transit inspection charge, in itself found reasonable, when it is also determined that the existing line-haul rate and the new inspection charge together total less than the maximum Commission-prescribed rate for the two services combined. Surely this presents an inadequate occasion or context in which to frustrate what the Commission found to be a promising effort to solve a critical problem—the freight car shortage—by seeking to deter a wasteful practice not indispensable or even, in the Commission's view, unusually important to the orderly marketing of grain under modern conditions.

For these reasons, I respectfully dissent.



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