

2-1-1966

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Recommended Citation

J. C. Blaine, *The Role of the ICC in the Administration of the National Transportation Policy*, 44 N.C. L. REV. 357 (1966).

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THE ROLE OF THE ICC IN THE ADMINISTRATION OF THE NATIONAL TRANSPORTATION POLICY

J. C. D. BLAINE*

The provisions of the Interstate Commerce Act form the basis for government regulation of interstate transportation subject to the jurisdiction of the Interstate Commerce Commission.¹ They constitute a body of law that empowers the Interstate Commerce Commission to intervene in such activity in the implementation of policy within the guidelines set by the Congress in its declaration of a national transportation policy. It may be said that the Congress determines the scope of the policy and the end-results sought, whereas the Commission acting within its statutory powers brings into being the policy in keeping with its interpretation of the broad congressional objectives. If the Commission is properly to fulfil its task, greater reconciliation will have to be achieved between the provisions of the act and the objectives of national policy proclaimed by the Congress.

The primary issue confronting the Congress in the formulation of an effective national transportation policy is whether interstate transportation is to be competitive, to continue as a regulated activity, or be nationalized. It is the policy of the federal government to permit interstate transportation to be conducted by private enterprise subject to regulation in the public interest. This policy is adhered to rather than a policy of reliance upon competition or of outright nationalization of this sector of the economy.

In contrast, the general policy with respect to the other sectors of the economy, except public utilities, is to place greater reliance upon competitive forces. It is assumed under conditions of free

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¹ Interstate Commerce Act of Feb. 4, 1887, ch. 104, 24 Stat. 379, added by Act of Aug. 9, 1935, 49 Stat. 543; Act of Sept. 18, 1940, 54 Stat. 929; Act of May 16, 1942, 56 Stat. 284; Act of Aug. 12, 1958, 72 Stat. 568 (codified in scattered sections 49 U.S.C.). See U.S. CONST. art. I, § 8, which provides in part that the regulation of the commerce among the several States is a matter delegated to the federal government. (The so-called commerce clause.)

competition that there prevails a relatively high degree of freedom of entry into and exit from markets for given products or services; that there exists a relatively large number of suppliers and buyers, so large in fact that no single individual or group can affect the prices of the products or services offered in such markets; and that the products or services are homogeneous. In general, the markets are usually described as competitive if these conditions, in a large measure, apply to them, and as monopolistic when they are lacking to a significant degree. When the monopoly element becomes so predominant that it endangers the common good, regulation may be deemed essential in order to safeguard the public interest.

The Act to Regulate Commerce of 1887² created the Interstate Commerce Commission as an administrative arm of the Congress for the purpose of interpreting and administering its provisions in accordance with the intent of the Congress. The Commission combines within a single administrative agency legislative, administrative and judicial powers. Its activities concern those issues involving socio-economic as well as legal considerations. In general, the problems that come before the Commission are oriented to broad social and economic issues solution of which depends more on the interpretation of facts than upon the application of rules of law. In many instances "expertise" is required for their adjudication because of the highly technical and specialized areas involved. The combination of powers, which permits the Commission to initiate action, investigate, hold hearings, and adjudicate disputes of the nature indicated above, gives it flexibility and continuity in the application of the provisions of the act.

The original act was basically anti-monopoly in nature and was designed to curb the abusive monopoly practices of railroads operating in interstate commerce. By its enactment, the federal government inaugurated a policy of regulation by administrative tribunals. Underlying this legislation was the assumption that railroads were "natural monopolies" that, if left to manage their own affairs, would operate in a manner detrimental to the public interest.

The major purpose of the act was not achieved fully. Strong opposition and effective lobbying by the railroads and adverse decisions of the Supreme Court relevant to the Commission's inter-

² Act of Feb. 4, 1887, ch. 104, 24 Stat. 379. In 1920 the short title the Interstate Commerce Act was authorized, 41 Stat. 474 (1920), 49 U.S.C. § 27 (1964).

pretation of the scope of its own power denied the Commission the authority to prescribe rates and to prevent certain discriminatory practices of the railroads.³ By the end of the nineteenth century, the Interstate Commerce Commission had been stripped of its essential regulatory powers and reduced largely to the status of a fact-finding agency.

Following a period referred to as the "doldrums" (decade beginning with 1897), the authority of the Interstate Commerce Commission was strengthened by amending legislation.⁴ In general, the national transportation policy followed prior to 1920 was essentially one of enforcing competition between railroads and water carriers operating in interstate commerce as a means of holding in check the monopoly powers of the former. During World War I, the operations of the railroads were assumed by the federal government, but in 1920 their control and operation were returned to the private owners. The amending act of that year made for changes in transportation policy that stressed a more positive approach to the interstate transportation situation.

The original act had stressed the curbing of the monopoly element, whereas the Transportation Act of 1920 encouraged the voluntary combinations of the railroads in keeping with an over-all plan which the Congress had instructed the Commission to prepare.⁵ The act also permitted pooling agreements between railroads subject to the approval of the Commission. It was hoped that these changes would promote better services for the public. To provide for greater financial stability, the Commission was empowered to regulate the security issues of railroads and to fix their charges as a basis for a fair return of the fair value of railroad property.⁶ It was also authorized to regulate the extensions and abandonments of railroad lines, which it was assumed would result in greater financial stability of railroads and assure the public of more adequate transport service.

³ *ICC v. Cincinnati, N.O., Tex. Pac. Ry.*, 167 U.S. 479 (1897); *ICC v. Alabama Midland Ry.*, 168 U.S. 144 (1897).

⁴ Two important amending acts were: Hepburn Act, 1906, ch. 3591, 24 Stat. 379 (codified in scattered sections of 49 U.S.C.) and Mann-Elkins Act, 1910, ch. 309, 36 Stat. 539 (codified in scattered sections of 49 U.S.C.).

⁵ Transportation Act, 1920, ch. 91, §§ 400-41, 41 Stat. 474-99 (codified in scattered sections of 49 U.S.C.).

⁶ The fair rate of return on a fair value of property doctrine has been replaced by one that makes no reference to a specific percentage return but which provides for reasonable charges to the users, charges that will move the traffic, and an adequate return to the carriers, Interstate Commerce Act, ch. 91, § 15a, 48 Stat. 220 (1933), 49 U.S.C. § 15a (1964).

The jurisdiction of the Interstate Commerce Commission was extended after 1920 to interstate motor and water transportation and freight forwarders.⁷ This extension of the Commission's authority made for needed changes in the national transportation policy both with respect to intramodal and intermodal competition. In addition, coordination of the several forms of transportation took an added importance.

The situation relative to interstate transportation since World War II stands in sharp contrast to that which existed during the last quarter of the nineteenth century. During this period the monopoly element of the railroads has given way to pervasive competition due in large part to the introduction of highly specialized forms of transportation made possible by the application of advanced technology. This has created difficult problems requiring the application of new policy concepts. In coping with these problems, the Commission has been restricted by a legislative lag and a declaration of national transportation policy that needs restatement in the light of these changed circumstances. Greater attention needs to be focused upon the equitable treatment of carriers between and within the different modes of transport; cost of service rate-making; acquisitions and mergers; intramodal and intermodal competition; and coordination in implementing a transportation policy conducive to an effective system of *workable competition*. Under such market conditions regulation would be kept to a minimum and reliance would be placed upon competitive forces consistent with the public interest.

An important problem confronting the Interstate Commerce Commission is the reconciliation of the conflicting interests between the modes of transport and those between carriers and the users of transport facilities. It also has the problem of reconciling the conflicts between the private and public interests with respect to interstate transportation as well as those issues between the several states and the federal government bearing upon interstate commerce.

In dealing with these issues, greater reliance will have to be placed upon the administrative agency technique functioning in con-

⁷ Motor Carrier Act, 1935, ch. 498, 49 Stat. 543; Transportation Act of 1940, ch. 722, tit. II, § 210, 54 Stat. 929, 49 U.S.C. §§ 901-23 (1964) (water carriers); Act of May 16, 1942, ch. 318, §§ 1-3, 5, 6, 56 Stat. 284 (codified in scattered sections of 49 U.S.C.). At present the Commission has regulatory powers over domestic interstate transportation with the exception of air transportation.

junction with the legislative process of the Congress and the adjudicative process of the courts, if an effectively integrated transportation system is to be achieved. This appears unavoidable as our economy becomes more fragmented into highly specialized and interdependent segments requiring greater coordination. The impact of advanced technology is necessitating a "systems" approach that treats the several modes of transport as integral parts of the total transportation system functioning as a part of the societal complex. To attain this integration, the regulatory process will need increased flexibility and continuity in dealing with controversial issues involving socio-economic as well as legal problems. Sole reliance upon administrative agencies in the regulation of interstate transportation is not sufficient because of the need for amending laws and the judicial review of agencies' decisions as to questions of legality.

The multiplicity of administrative agencies, particularly in connection with the regulation of interstate transportation, has posed problems for the Congress and the Administration in matters affecting the attainment of an effective national transportation policy. President Kennedy, while President-elect, was successful in having the Landis Committee established to investigate matters affecting the efficiency of federal administrative agencies. The Interstate Commerce Commission was included among the agencies covered in the report of this committee.⁸ The report recommended the establishment of an Office for the Coordination and Development of Transportation at the executive level.⁹ It was also proposed that the President be empowered to appoint the chairman of the Interstate Commerce Commission, which would give him greater persuasive power over the conduct of that agency.¹⁰ To date the Commission has been successful in staving off the implementation of this proposal even though the President has this authority with respect to the other federal commissions.

In general, it may be said that the Landis Report supported the continuation of the multiple administrative agency form of regulation relative to transportation but advocated increased executive

⁸ REPORT ON REGULATORY AGENCIES TO PRESIDENT-ELECT (1960). Submitted by the Chairman of the Subcommittee on Administrative Practice and Procedure to the Committee on the Judiciary of the United States Senate, December 1960, 88th Cong., 2d sess.

⁹ *Id.* at 85, recommendation No. 6.

¹⁰ *Id.* at 84-85, recommendation No. 2.

leadership with respect to the conduct of such agencies.¹¹ No mention was made of combining the existing commissions, having regulatory powers with respect to interstate transportation, into a single commission as a means of attaining greater coordination, nor was there any suggestion of establishing a Department of Transportation. Coordination of all federal commissions was to be achieved at the executive level though the Office for the Oversight of Regulatory Agencies, purpose of which would be to assist the President in carrying out his responsibility of assuring the efficient execution of the laws administered by such agencies.¹²

A Special Study Group on Transportation (Doyle Committee), authorized by the Congress,¹³ submitted a preliminary draft of its report on January 3, 1961.¹⁴ The report supported the administrative agency method of regulation and made specific recommendations for achieving greater coordination of regulatory policy affecting interstate transportation. It proposed the creation of a single Federal Transportation Commission consisting of fifteen members to be appointed for terms of office of ten years. The new commission was to be organized on a functional basis at the top echelon and was to be responsible to the Congress.¹⁵ It was to have vested in it the regulatory powers of the Interstate Commerce Commission, the Civil Aeronautics Board, and the Federal Maritime Commission. In order to achieve greater coordination of administrative functions, the report proposed the establishment of a Department of Transportation with cabinet representation.¹⁶ The administrative functions of the Offices of the Department of Commerce, Bureau of Public Roads, Federal Aviation Agency, Maritime Administration, St. Lawrence Seaway Corporation and other such divisions of the federal government involved in interstate transportation were to be placed under this new department. In addition, it was recommended that there should be enacted a single Federal Transportation Act

¹¹ PHILLIPS, *THE ECONOMICS OF REGULATION* 717 (1965).

¹² REPORT ON REGULATORY AGENCIES TO PRESIDENT-ELECT, *op. cit. supra* note 8, at 86, recommendation No. 13.

¹³ S. 29, S. 151, 86th Cong., 1st Sess. (1960); S. 244, 86th Cong., 2d Sess. (1960).

¹⁴ NATIONAL TRANSPORTATION POLICY (Comm. Print 1961), Preliminary Draft of a Report prepared for the Committee on Interstate and Foreign Commerce, United States Senate, by the Special Group on Transportation Policies in the United States, 87th Cong., 1st Sess. (Jan. 3, 1961).

¹⁵ *Id.* at 107-09.

¹⁶ *Id.* at 111-15.

that would consolidate federal transportation laws,¹⁷ which it was hoped would eliminate inconsistencies and ambiguities. It was further proposed that a Joint Congressional Committee of Transportation be established to act as a clearing committee for transportation bills pending before the Congress.¹⁸

Structurally speaking, two methods of achieving regulation of interstate transportation by employing the administrative agency technique present themselves. First is the multiple commission method involving coordination of their respective activities by some form of an oversight agency at the executive level. Second is the single commission responsible for all modes of domestic interstate transportation, which would achieve the necessary coordination of policy within itself. It is here assumed that the single commission method, insofar as interstate transportation regulation is concerned, would provide more effective integration of the transportation regulatory policy than the multiple commissions acting under an oversight office method. This assumption is predicated upon the belief that there would be less compartmentalized thinking within a single commission responsible for all modes of transportation than under a system involving several separate commissions responsible for different modes subjected to a separate coordinating agency. At present there exist multiple transportation regulatory commissions without a coordinating body.

The conditions under which the Commission has had to function have not been conducive to an aggregate approach to interstate transportation. The pressures arising from numerous dockets awaiting consideration, inadequacies of competent staff, and the practice of rendering decisions on a case-by-case basis have forced it to forego, in large measure, more comprehensive policy considerations. Because of these factors, the Commission has had to devote too much of its time to specific issues of specific companies at specific times.¹⁹ It is surprising that the Commission has performed its duties as effectively as it has, considering the restrictions imposed by an act that is so greatly in need of revision and a declaration of national policy that consists of so many generalities.

¹⁷ *Id.* at 119-53.

¹⁸ *Id.* at 100-07.

¹⁹ Message from the President of the United States Relative to the Transportation System of Our Nation, H.R. Doc. No. 384, 87th Cong., 2d Sess. (1962).

Some relief has been afforded the Commission in procedural matters. It is able to spread its work-load more effectively than previously by establishing appellate divisions and divisions consisting of not less than three members and delegating powers and duties to them.²⁰ Furthermore, it has the authority to empower individual commissioners or boards, made up of not less than three eligible employees, to be responsible for designated duties. There are at present three regular divisions: Division 1, which deals with operating rights; Division 2, with rates, tariffs, and valuation; and Division 3, with finance, safety, and service.²¹

There should be greater exploitation of the possibilities for achieving increased efficiency in handling the expanding work-load of the Commission through the delegation of authority and responsibility for the certain duties to such boards, to individual Commissioners, and to responsible and competent personnel of the staff of the Commission, subject to review, if necessary, of an appellate board or the Commission as a whole.

The piecemeal manner in which the Interstate Commerce Act has been amended from time to time has resulted in a micro rather than a macro outlook toward the national transportation issues. This approach may have served satisfactorily when the railroads were the dominant mode, but under the existing conditions, where several modes are involved, it is inadequate and has resulted in what the late President Kennedy referred to as "a chaotic patchwork of inconsistent and often obsolete legislation and regulation."²² Too much stress has been given to the piecemeal method of amending the act and too little to the need for its over-all revision and for a restatement of the national transportation policy in order to bring it more in line with the regulatory requirements of present-day interstate transportation. If a more adequate utilization of our resources is to be achieved, we cannot continue to look at transportation as a fragmented structure but must deal with it as an integrated system.

Prior to 1940, the Congress had set forth restricted declara-

²⁰ U.S. GOV'T ORGANIZATION MANUAL 445 (1963-64).

²¹ Rupert L. Murphy, "Development, Organization and Responsibilities of the Interstate Commerce Commission," an address delivered before officials of the Commission of the European Economic Community, Brussels, Belgium, January 17, 1963.

²² Message from the President of the United States Relative to the Transportation System of Our Nation, *op. cit. supra* note 19.

tions of policy with respect to interstate transportation. Two examples of such declarations were those enunciated in conjunction with the enactment of the Transportation Act of 1920 and the Motor Carriers Act of 1935. The former was concerned primarily with the promotion, encouragement and development of interstate water transportation,²³ whereas the latter was concerned primarily with interstate motor transportation.²⁴ The existing declaration of the national transportation policy, as a preamble to the Transportation Act of 1940, encompasses all modes of domestic transportation subject to the jurisdiction of the Interstate Commerce Commission. It reads as follows:

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 *to 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 discrimination, undue preference 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.²⁵

The above declaration places little if any reliance upon competition but relies upon intervention or administered action for its effectiveness as indicated by the words or phrases in italics. It is basically a statement of objectives. No direct reference is made with respect to the need for the maximum use of our human and material resources in achieving the needed mobility for effective economic growth.

There was considerable agitation for a complete revision of the Interstate Commerce Act and a restatement of the national policy

²³ Transportation Act, 1920, ch. 91, §§ 400-41, 41 Stat. 474-99 (codified in scattered sections of 49 U.S.C.).

²⁴ Motor Carrier Act, 1935, ch. 498, 49 Stat. 543 (codified in scattered sections of 49 U.S.C.).

²⁵ 54 Stat. 899 (1940) (preamble), 49 U.S.C. ch. 12 (preamble) (1964). (Emphasis added.)

following the end of World War II. Because of the altered circumstances in relation to interstate transportation during the post-war period, it was felt that our regulatory policy should be brought more in line with the needs of the new competitive situation. Several investigating committees were established during this period and their reports stressed the need for regulatory reform.

The Presidential Advisory Committee on Transportation Policy and Organization (the Weeks Committee) was established by President Eisenhower and submitted its report in 1955.²⁶ The report directed its attention to the lag that existed between regulatory changes and the requirements of the new post-war transportation situation. It asserted that many of the provisions of the Interstate Commerce Act were obsolete, which limited severely the efficiency of the nation's transportation. It was maintained that since 1920, when the railroads were still in a relatively strong monopoly position, a transportation revolution had taken place due largely to the introduction of highly specialized modes of transport made available by advanced technology.²⁷ In spite of this revolution, no major revision of the Interstate Commerce Act had been made that would permit the commission to cope more adequately with the conditions of pervasive competition. In fact, the report concluded that regulation had been increased rather than decreased during this period, which made for uneconomical allocation of resources devoted to transportation.

The report took to task the existing national transportation policy as being inadequate. It maintained that that policy had failed to provide an effective transportation system making the fullest use of technological improvements and to allocate properly the traffic among the various modes in keeping with their inherent advantages. The report proposed a substitute declaration of national transportation policy that placed greater emphasis upon the "free enterprise system of dynamic competition"²⁸ for the proper functioning of interstate transportation, which would minimize the need for economic regulation. The underlying assumption was that the greater reliance upon competitive forces would make for more effective

²⁶ REVISION OF FEDERAL TRANSPORT POLICY (1955) (A report to the President prepared by the Presidential Advisory Committee on Transport Policy and Organization.)

²⁷ *Ibid.*

²⁸ *Id.* at 8.

allocation of human and material resources dedicated to this sector of the economy than is achieved under the existing regulatory policy. It was held that this proposed substitute declaration of national transportation policy, if accepted, would be consistent with the public interest. In addition, it was believed that if this proposed policy were adhered to, it would make for a more viable common carrier segment as the foundation of the American transportation structure by freeing it from restrictions imposed upon it by excessive regulation.

It is essential to bear in mind that economic regulation, if it is kept to a minimum and administered in a fair and impartial manner, will not necessarily result in a transportation policy which will provide a transportation system that will meet the public interest test. Economic considerations need to be reconciled with social and political considerations if the public interest is to be adequately protected.

In 1960 President Eisenhower created another committee to investigate the national transportation situation and to submit to him recommendations regarding transport policy. The committee, known as the Mueller Committee, submitted its report to the President in March 1960.²⁹ This report was not as positive in its recommendations as the Weeks Report, especially with respect to dynamic competition. In fact, it did much to offset the enthusiastic support given this factor in the previous report. In general, it concluded that the national transportation structure was unbalanced and consisted of a loose grouping rather than a system of modes. To achieve better balance, it favored increased competition among the carriers rather than centralized regulation. In the opinion of the members of the committee, intervention should be resorted to only when there are threats of destructive competition. The Mueller Report shifted the emphasis from the need for immediate change in transport regulatory policy, which would place increased reliance upon vigorous competition as advocated in the Weeks Report, to a more gradual change that would ultimately give greater recognition to competitive forces.

The Doyle Committee Report, referred to previously,³⁰ criticized the existing declaration of national transportation policy and also

²⁹ DEPT. OF COMMERCE, FEDERAL TRANSPORTATION POLICY & PROGRAM (1960) (Mueller Report).

³⁰ See text accompanying notes 13-14 *supra*.

proposed a substitute declaration, which it held was clearer and more embracing than the existing declaration.³¹ The proposed statement of national transportation policy stressed coordination of the several modes, which it was assumed, would be conducive to the development of a more highly integrated transportation system in which the common carrier would play an essential role in meeting the needs of the public. The report did not reject the administrative agency method of regulation, but advocated greater coordination in procedure and transportation law. Absent from the proposed declaration of national transportation policy was reference to increased reliance upon competition as a controlling factor in interstate transportation. The policy would rely greatly upon intervention for its effectiveness in attaining the promotional and regulatory programs in transportation through fostering a safe, adequate and coordinated national system of transportation. Stress was placed upon service and cost characteristics of each mode as a part of the total transportation system with particular attention being given to the national public interest. Such a policy, it was assumed, would also provide for the achievement of closer cooperation and coordination with respect to transportation between the federal government and the governments of the several states.

The reports of the Weeks Committee and the Doyle Committee presented two basically different philosophies with respect to transportation policy. The former emphasized the need for relying upon competition, under the assumption that dynamic competition had become sufficiently pervasive to justify this approach, whereas the latter emphasized the need for continued reliance upon regulation under the assumption that the market forces left to themselves would not achieve the desired end-results, which are here taken to be a highly coordinated transportation system that will render the best service at the least cost to the public. This can only be attained when each mode or combination of modes is making its greatest economic contribution to the total transportation complex.

A cursory examination of the transportation situation will reveal that it does not conform to the basic assumptions for conditions of free competition set forth above.³² Transportation is a complex economic sector wherein the monopoly element varies for different

³¹ NATIONAL TRANSPORTATION POLICY, *op. cit. supra* note 14, at 38-39.

³² See pp. 357-58 *supra*.

modes. It is therefore not a matter of whether or not there should be regulation but how much regulation should be imposed upon carriers.

Regulation is here interpreted to be a corrective measure made necessary by the absence of effective competition. During the period following the close of World War II, competition became more pervasive in the transportation sector, which required that the source of power of the Interstate Commerce Commission, the Interstate Commerce Act, should be amended and the congressional directive, the declaration of the national transportation policy, should be restated to give increased recognition to competition consistent with the public interest.

One of the most significant events affecting transportation in this Nation during the post-war era was the Special Message on Transportation delivered by President Kennedy to the Congress on April 5, 1962.³³ This message brought together the basic issues affecting present-day transportation and set forth recommendations and directives concerning procedure and policy matters, many of which had been set out in previous reports. In general, the address supported increased reliance upon competitive forces to guide the performance of intercity transportation in interstate commerce and less reliance upon regulation and subsidies. This, if achieved, would greatly reduce the role of the Interstate Commerce Commission, especially with respect to matters affecting rate-fixing relevant to deregulated commodities.

To some, the President's special message was an admission of the failure of the regulatory process to achieve an effective transportation system and a more adequate allocation of resources among the several modes.³⁴ Regardless of the interpretation placed upon the message, it is clear that the President believed that if there is to be increased competition with respect to intercity transportation, greater equality of regulation would be essential between carriers operating in interstate commerce. This he felt could be achieved best by deregulation. Basic to this problem is the issue of exempt commodities in relation to water and motor transportation and their extension to other carriers. Concomittant with this problem is the

³³ Message from the President of the United States Relative to the Transportation System of Our Nation, *op. cit. supra* note 19.

³⁴ Peck, *Competitive Policy for Transportation*, in PERSPECTIVES ON ANTI-TRUST POLICY 244-72 (Phillips ed. 1965).

question of the extent to which the Interstate Commerce Commission should be allowed to exercise control over the rates of these commodities if the exemptions were extended to other carriers, especially the railroads.

In brief, the President's message recommended that artificial distortions and inefficiencies should be removed from federal transportation policy.³⁵ Equal opportunities should be afforded for the interplay of competitive forces. It was also proposed that there should be instituted a more equitable taxation policy, a system of user charges, and more equal promotion practices in connection with interstate transportation. Such steps, it was assumed, would lead to greater equality among the different modes of transportation. The President placed his faith in "unsubsidized privately owned facilities, operating under the incentives of private profit and the checks of competition to the maximum extent practicable."³⁶ It was within this framework of equal competition that he felt the national transportation policy should be instituted with a view to attaining the needed mobility for rapid economic growth at the lowest economic and social cost.

Following the Special Message of the President, the Secretary of Commerce transmitted drafts of two bills covering many of the recommendations contained in it.³⁷ Hearings were held before the House Interstate and Foreign Commerce Committee during June, July and August of 1962. Companion bills were introduced in the Senate and referred to the Senate Commerce Committee, which also held hearings.³⁸

When the Eighty-eighth Congress convened, two bills³⁹ covering the recommendations set forth in the President's Special Message on Transportation were transmitted to the House Interstate and Foreign Commerce Committee as H. R. 4700 and H. R. 4701. Hearings were held on these bills during April and May 1963.⁴⁰

³⁵ Message from the President of the United States Relative to the Transportation System of Our Nation, *op. cit. supra* note 19, at 4.

³⁶ *Ibid.*

³⁷ H.R. 11583, H.R. 11584 87th Cong., 2d Sess. (1962) (introduced May 3).

³⁸ S. 3242, S. 3243, 87th Cong., 2d Sess. (1962) (introduced May 3).

³⁹ President's Letter of Transmittal, March 5, 1963.

⁴⁰ Transportation Act of 1963, *Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives*, on H.R. 4700 and H.R. 4701, 88th Cong., 1st Sess., pt. 1 (1963) (April 30; May 1-9).

H. R. 4700⁴¹ was the most controversial of the two bills and dealt with the recommendation to extend the bulk commodities exemptions as provided in Part III of the Interstate Commerce Act (water transportation)⁴² and the agricultural and forestry products exemptions as provided in Part II (motor transportation)⁴³ in a manner that would place common carriers under the jurisdiction of the Interstate Commerce Commission on a more equal competitive basis. If this recommendation were enacted into law, it would severely restrict the rate-determining powers of the Interstate Commerce Commission relevant to the deregulated commodities. It would, in fact, deprive the Commission of its authority to fix rates on these commodities but would allow it to retain the authority to challenge such rates shown to be unjustly discriminatory, unduly or unreasonably preferential or prejudicial.

H. R. 4701⁴⁴ was an omnibus bill incorporating many of the other recommendations set out in the special message which it was assumed would strengthen the Interstate Commerce Act and aid the Commission in the process of implementing a national transportation policy that would give greater recognition to the interplay of competitive forces in interstate transportation. This was to be accompanied by the encouragement of experimental rates by carriers; the encouragement of intercarrier joint rates and through routes; the discouragement of illegal motor carrier operations in interstate commerce; an increase in civil liabilities for violations of transportation laws; and the transfer of financial assistance programs from the Interstate Commerce Commission and the Civil Aeronautics Board to the Department of Commerce.

The House Committee on Interstate and Foreign Commerce, following the hearings on the two bills, brought together what were considered to be the most significant proposals. These were incor-

⁴¹ H.R. 4700, 88th Cong., 1st Sess. (1963): a bill to exempt certain carriers from minimum rate regulation in the transportation of bulk commodities, agricultural and fishery products, and passengers, and for other purposes (substantially the same as H.R. 11583, 88th Cong., 2d Sess. (1963)). Companion bill in Senate Commerce Committee S. 1061, 88th Cong., 2d Sess. (1963).

⁴² 54 Stat. 899 (1940), as amended, 49 U.S.C. § 903(b) (1964).

⁴³ 54 Stat. 899 (1940), as amended, 49 U.S.C. § 303(23)(b)(6) (1964).

⁴⁴ H.R. 4701, 88th Cong., 1st Sess. (1963): a bill to provide for strengthening and improving the national transportation system and for other purposes. (Substantially the same as H.R. 11584, 88th Cong., 2d Sess. (1963)). Companion bill in the Senate Commerce Committee S. 1062, 88th Cong., 2d Sess. (1963).

porated into a committee print of a draft bill which, together with a section-by-section description of its provisions, was circulated for a period of two and one-half months.⁴⁵

In his State-of-the-Union Message to the second session of the Eighty-eighth Congress, President Johnson referred briefly to the need for the passage of transportation legislation.⁴⁶ In his Budget Message to the Congress on January 21, 1964, he urged the passage of and gave his endorsement to the proposed transportation legislative program of the late President Kennedy:

Major proposed revisions in our national transportation policy are also pending before the Congress. These proposals would make substantial contributions toward a more efficient transportation system *by placing greater reliance on the forces of competition* and improving the effectiveness of Government regulation. Extensive hearings have been held on these proposals and I recommend their prompt enactment.⁴⁷

The President's letter dated January 27, 1964, to Senator Magnuson, chairman of the Senate Commerce Committee, and Congressman Oren Harris, chairman of the House Committee on Interstate and Foreign Commerce, urged the removal of inequities among the several modes of transport:

Our tangled transportation policies must be reformed. Necessary changes should be directed to the achievement of a fast, safe, and economical transport system. *This system must respond to changing private and public demands, at the lowest costs consistent with the public interest.*

The role of the government is to provide, to the greatest extent possible, a framework that encourages constructive competition. Only where this is not possible should other means of assuring inexpensive and efficient transportation be considered.⁴⁸

In January 1964, the House Committee on Interstate and Foreign Commerce drafted a proposed bill, H. R. 9903,⁴⁹ popularly

⁴⁵ HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 88th Cong., 1st Sess., A BILL TO AMEND THE INTERSTATE COMMERCE ACT AND THE FEDERAL AVIATION ACT OF 1958 (Comm. Print 1963).

⁴⁶ State-of-the-Union Message to Congress, H.R. Doc. No. 251, 88th Cong., 2d Sess. 104 (1964).

⁴⁷ Budget Message of the President, 1965—Message from the President of the United States, H.R. Doc. No. 265, 88th Cong., 2d Sess., 110 CONG. REC. 704, at 709 (1964). (Emphasis added.)

⁴⁸ Text of the President's Letter, January 27, 1964, *Congressional Quarterly* Weekly Report No. 6, Feb. 7, 1964, pp. 286-88. (Emphasis added.)

⁴⁹ H.R. 9903, (Report No. 1144) Calendar No. 477, 88th Cong., 2d Sess.

referred to as the Transportation Amendments of 1964.⁵⁰ This draft was basically the same as the committee-print draft and incorporated many of the recommendations discussed previously. The proposed bill had as its primary purpose the strengthening and development of the common carrier segment of the national transportation structure in order to permit economical service without discrimination among such carriers and at the same time assure adequate transportation to satisfy the needs of the rapidly expanding economy and national defense. Underlying this purpose was the basic policy of equality of opportunity for both carriers and users under conditions of more effective competition.

The major provisions of the draft bill provided for the repeal of the commodities clause; the payment of reparations by motor carriers and freight forwarders; the establishment of a joint board made up of representatives of the Civil Aeronautics Board, the Federal Maritime Commission and the Interstate Commerce Commission with power to determine joint rates and through routes; the strengthening of the Interstate Commerce Commission with the authority to cooperate with states in enforcing laws with respect to unlawful acts and safety provisions; the extension of agricultural and fishery commodities exemptions to all modes of transport but requiring them to file with the Interstate Commerce Commission, for public inspection, the rates for such commodities within thirty days after shipment; the reduction of the number of bulk commodities per vessel exempted from economic regulation applicable to interstate water carriers from three to one; the granting of power to the Interstate Commerce Commission to suspend, change or revoke authority to operate for failure to provide service; and the withdrawal of immunity from the antitrust laws with respect to conference rate-making on agricultural commodities.

The bill, which was considered to have good possibilities of receiving favorable treatment, soon encountered opposition. The House Rule Committee in April passed by an eight-to-six vote a motion to defer action on the bill, which had been before it since

(1963), referred to the House Committee on Interstate and Foreign Commerce, February 5, 1964 and committed to the Committee of the Whole House of the State of the Union and ordered printed February 18, 1964.

⁵⁰ Transportation Amendments of 1964, House Report No. 1144: Report of the Committee on Interstate and Foreign Commerce on H.R. 9903, together with Supplement Views, 88th Cong., 2d Sess., February 18, 1964.

February 20.⁵¹ To many this action portended its death. Strong opposition to the bill continued to mount. At a meeting held in Washington in February 1964, the Anti-Monopoly Transportation Conference was organized to fight the passage of this bill. It was backed primarily by water carriers and the coal industry, who actively lobbied against the bill.⁵²

The House Interstate and Foreign Commerce Committee approved four major revisions for H. R. 9903 on April 23, in hopes of obtaining the approval of the House Rules Committee for the bill.⁵³ The change in the "commodities clause" was to be restricted to only railroad-owned, -mined or -manufactured commodities other than coal. This change was designed to gain the support of the coal industry for the bill. It was provided in the bill that the number of bulk commodities carried by water exempt from regulation was to be reduced from three to one per vessel. The proposed revision would limit the reduction to two commodities. It was hoped that this change would appease the water carrier industry. One of the provisions of H. R. 9903 was that carriers would be required to file rates on shipments of grains and other agricultural and fishery products with the Interstate Commerce Commission not later than thirty days after shipments were made. It was proposed that this should be changed to read at least twenty days before such shipments. This would insure that such rates would be available for public inspection prior to the time of shipments. It was also provided that the Interstate Commerce Commission should have the power to prohibit rates that were unreasonably preferential, prejudicial and discriminatory with respect to these deregulated commodities. Without this latter revision, the immunity from the antitrust laws, as provided by section 5a of the Interstate Commerce Act, would not apply to these commodities and with section 3 of the act covering discriminatory practices excluded, the Interstate Commerce Commission would be without power to intervene with respect to rates set on these deregulated commodities. This revision was therefore designed to meet the concern of the Commission in this connection.

⁵¹ *Transportation Rate Regulation*, CONGRESSIONAL Q. 732 (Weekly Report No. 16, April 17, 1964).

⁵² *Intensive Lobbying Surrounds Death of Transport Bill*, CONGRESSIONAL Q. 925 (Weekly Report No. 19, May 8, 1964) (A good résumé of the opposition to this bill.)

⁵³ *Harris Compromises*, 20 CONGRESSIONAL Q. ALMANAC 555 (1964).

In spite of these efforts, the House Rules Committee on April 28, 1964, voted against clearing the bill, which was for all practical purposes the end of the road for it. A vote to reconsider the committee's action was also defeated.⁵⁴ The setback although severe can be considered only temporary because ultimately basic changes will have to be made if there is to emerge a more effective national transportation policy in keeping with the needs arising from changed circumstances affecting interstate transportation. To attain this goal an adequate framework of law will be essential in order that the Interstate Commerce Commission may direct its efforts to achieve a more competitive situation.

There were two alternatives that could have been followed in attempting to get some sort of legislation enacted. One was to break down the bill into several bills that could be introduced in a piecemeal manner with the hope of having some of the less controversial parts enacted into law. The other was to resort to a discharge petition to by-pass the House Rules Committee. This latter alternative was assumed to be impractical at the time. The former course of action was followed in general, and several bills were introduced subsequently.⁵⁵

The Magnuson-Cotton bill (S. 2796), an amended version of H. R. 9903, was referred to the Senate Commerce Committee on May 1, 1964. It dealt primarily with illegal trucking activities through increased federal and state cooperation.⁵⁶ Opposition arose to part of this bill from the private carriers. They were opposed to the provision that would enable any person to seek an injunction in federal courts to restrain private motor carriers who were believed to be operating in clear and patent violation of the provisions of the Interstate Commerce Act. The private carriers feared that if this provision were enacted into law it would deprive them of the expert knowledge of the Interstate Commerce Commission with respect to their operations. There would be little assurance that the federal court and the Interstate Commerce would agree as to what constituted illegal trucking operations. The private carriers were also concerned over the provision of the bill providing for increased penalties

⁵⁴ *Transportation Rate Regulation*, CONGRESSIONAL Q. 869 (Weekly Report No. 18, May 1, 1964).

⁵⁵ *Harris Transportation Measure is Killed as Rules Committee Refuses Clearance*, *Traffic World*, May 2, 1964, p. 17.

⁵⁶ S. 2796, 88th Cong., 2d Sess. (1964).

for violations of the Interstate Commerce Commission's safety regulations and the extension of civil forfeiture to cover unlawful operations of motor carriers. A resolution setting forth their position was passed by the Private Carrier Conference in May 1964.⁵⁷

The Central West Shippers Board also protested the enactment of this bill on the ground that public hearings should be held on it before any legislative action was taken.⁵⁸ There was also opposition to the bill from agricultural interests. Nevertheless, the Senate Commerce Committee gave its approval to the Magnuson-Cotton Transportation Bill on July 9, 1964, but no further action was taken.

The Harris Omnibus Transportation Bill (H. R. 5041) was referred to the House Interstate and Foreign Commerce Committee on February 24, 1965, and hearings were held on it by that committee during March 1965,⁵⁹ and the bill approved. It was an outgrowth of H. R. 9903, which had been refused clearance by the House Rules Committee in April of 1964.⁶⁰ The companion bill, S. 1727, was also considered and passed by the Senate Commerce Committee. The Congress completed action on the bill on August 19, and it was sent to the President for his signature, which was affixed on September 6, 1965.⁶¹

The new act⁶² provides for federal-state cooperation in motor carriage agreements for the enforcement of standard federal economic and safety laws and regulations for the establishment of standards for the registration of federal certificates and permits with the state agencies; assists in the enforcement of motor transportation laws by extending the civil forfeiture provisions of the act and increasing the amounts of maximum forfeitures; provides for recovery of reparations from motor carriers and freight forwarders; and encourages inland water transportation by inserting a new section in Part III of the Interstate Commerce Act—section 312(a) of Title 49—which provides that no certificate or permit

⁵⁷ *Private Carrier Conference to Oppose 'Senate Transport Act of 1964'* (S. 2796), *Traffic World*, May 30, 1964, p. 37.

⁵⁸ *Central West Shippers Board Want No Action on S. 2796, Pending Hearing in Senate*, *Traffic World*, June 13, 1964, p. 39.

⁵⁹ H.R. 5401, 89th Cong., 2d Sess. (1965).

⁶⁰ CCH Cong. Index, 5371 (legislative summary of important dates relative to H.R. 5401).

⁶¹ *President Johnson Signs H.R. 5401 Into Law Bringing Praise from I.C.C., Industry Itself*, *Traffic World*, Sept. 11, 1965, p. 79 (good summary of act).

⁶² Public Law 89-170, 89th Congress, H.R. 5401, Sept. 6, 1965.

shall be suspended or revoked unless the holder fails to comply with an order of the Commission requiring him to furnish transportation upon reasonable request.

Because of effective lobbying by vested interests and the need for compromising of controversial issues, no major revision of the Interstate Commerce Act has been achieved as yet. Resort has been made to piecemeal revisions with respect to certain sections of the act, but in many instances the proposed amendments were so compromised that much of their substance was lost. At least some provisions have been enacted that deal with illegal haulage by motor transportation, and immediate steps are being taken to make them effective. Many of the recommendations set forth in the Special Message on Transportation by President Kennedy in 1962, having to do with more equality among modes of transport as the foundation for more effective competition on interstate transportation, still await passage into law.

In a nationwide television press conference, President Johnson disclosed that transportation policy will be included in substantive legislation he intends to propose to the Congress in 1966.⁶³ In preparation for this, he revealed that he will establish a National Transportation Council headed by Alan S. Boyd, Undersecretary of Commerce for Transportation, to prepare new legislation for the coming year and to carry out an extensive review of the national transportation situation.⁶⁴

In view of the top priority given to transportation and the urgency for corrective legislation stressed in the Presidential Special Message on Transportation delivered to the Congress on April 5, 1962, and President Johnson's support of that legislative program, the transportation legislative record since then is not a creditable one.

It is to be hoped that the forthcoming recommendations for congressional action with respect to the national transportation situation in the coming session of the Congress will be comprehensive and not confined to piecemeal amendatory action directed to the Interstate Commerce Act. The recommendations of the Administration should also include proposals for the reorganization of the regulatory structure and procedure, a reassessment of the national transportation policy relevant to promotion and regulation of inter-

⁶³ *Transport Policy Message High in His 1966 Plans President Johnson Says*, *Traffic World*, Aug. 28, 1965, p. 26.

⁶⁴ *Ibid.*

state transportation, and ways and means of achieving a more highly coordinated system of transportation.

Some progress has been achieved in enacting noncontroversial amendments to the Interstate Commerce Act, but there still remains the need for amending the act to provide for greater equality of the treatment between the several modes of transport with regard to promotional and regulatory policies affecting interstate transportation. If a more satisfactory competitive situation is to prevail, the bulk commodities exemptions applicable to interstate water transportation and agricultural and fishery products exemptions applicable to interstate motor transportation will have to be either extended to all carriers alike or repealed, thereby subjecting such commodities to rate regulation by the Interstate Commerce Commission. If greater equality among the carriers is a goal of our regulatory policy, provision should also be made for the implementation of a fair and impartial system of user charges applicable to carriers using public supported "ways."

The recommendations should include proposals that grant the Interstate Commerce Commission greater freedom with respect to rates in order to encourage and permit increased research and experimentation in this area. This freedom should make for a more constructive approach to rate problems as a basis for the simplification of the rate structure. The increased utilization of containerization of freight shipments and of piggy-back operations are demanding a more enlightened approach to rate determination. The application of electronic data-processing to transportation information is opening up new horizons in rate-making based upon the cost of service. In addition, the recommendations should include legislation that will encourage, and, where considered essential in the public interest, make mandatory the establishment of intermodal joint rates and through routes.

The administration's transport legislative recommendations should contain proposals for the reorganization of the federal transportation regulatory and administrative procedures. The existence of multiregulatory and administrative agencies, each responsible for different segments of interstate transportation is not conducive to an integrated approach, but tends to foster instead a compartmentalized approach to regulatory and promotional policies affecting interstate transportation. Serious consideration should be given to

the recommendations set out in the Doyle Committee Report in this report.⁶⁵

The Congress should be encouraged to re-examine the characteristics of our transportation structure as a basis for changing it into a coordinated system. Attention should be directed to the need for drafting a master plan to which intramodal and intermodal mergers and acquisitions should be required to conform in keeping with the objectives of the national transportation policy relevant to a more fully coordinated transportation system.

⁶⁵ See text accompanying notes 15-18 *supra*.