

# THE ICC RE-EXAMINED: A COLLOQUY

## I. THE ORGANIZATION OF TRANSPORT REGULATION

*In re: Huntington: The Marasmus of the ICC: The Commission, The Railroads, and the Public Interest*, 61 YALE L. J. 467 (1952), and *Williams: Transportation Regulation and the Department of Commerce*, 62 YALE L. J. 563 (1953).

### SAMUEL P. HUNTINGTON:†

Mr. Williams' criticisms in *Transportation Regulation* are in effect limited to my recommendation in the *Marasmus* that the regulatory functions of the ICC should be placed within the Department of Commerce and should be subject to the general policy guidance of the Secretary of Commerce. He does not defend the existence of the ICC as such; he does not question the desirability of transferring the ICC's executive functions to the Department of Commerce; nor does he raise issue with the idea of dividing regulatory functions among three separate commissions.

On the general issue of whether or not transportation regulation should be placed within an executive agency, Mr. Williams argues that "rate-making and regulation are legislative in character." In the first place, there is nothing in law or fact which makes these activities more "legislative" than any other activities performed by the Government. Regulation is "legislative" only in the sense that the performance of regulatory activities by the Government derives its justification from Article I of the Constitution and can only be undertaken by virtue of an act of Congress. But except for those few functions of Government which can be traced directly to constitutional grants of power to the president, this is true of all activities of the Federal Government. The communication activities of the Post Office are just as much "legislative" in character as the regulatory activities of the ICC, and, as Mr. Williams notes, Congress has frequently delegated regulatory functions to executive branch agencies. Nor can the more specific function of rate-making be considered primarily "legislative." For rate-making is a form of price control and price control functions have normally been exercised by the executive branch. This is true of over-all emerg-

ency price controls and the more specialized price controls such as those exercised by the Secretary of Agriculture.

Mr. Williams also argues that it violates the theory of the separation of powers for Congress to make unnecessary delegations of power to the executive. The assumption behind this is that if Congress does not delegate this power to the executive branch it will retain this power itself. The idea is that Congress gives away something when it assigns a function to an executive agency which it does not give away when it assigns this function to some other kind of agency. This theory is fallacious because it assumes that what does not belong to the executive branch must belong to the legislative branch. Actually Congress has no more effective means of exercising control over independent commissions than it has for exercising control over executive agencies. The techniques of congressional influence—statutory definition of policy and organization, investigations, appropriations, senatorial approval of appointments—are the same in each case. Executive control over independent commissions is much weaker of course than over executive agencies, but this does not mean that congressional control is thereby strengthened. Instead it merely means that the total political control over these agencies is that much less, and it was for this reason that the President's Committee on Administrative Management described independent commissions, in 1937, as a "headless 'fourth branch' of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers."

The theory of the independent commission also suffers from certain internal contradictions. On the one hand, the claim is frequently made, as Mr. Williams did, that their functions are primarily "legislative" in character. On the other hand, in order to justify freedom from executive control,

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it is also frequently argued, as by the chairman of the ICC in 1937, that these agencies are not "policy-making" agencies. Quite obviously the commissions cannot be one and not the other. The legislative function is the policy-making function. If the commissions are legislating, then they are also policy-making, and should be subject to effective control by the politically responsible branches of the Government. If they are not policy-making, then they are not legislating, and the claim that their functions are peculiarly "legislative" in character must fall by the wayside.

Mr. Williams also argues that whereas cabinet secretaries do not mind being overruled by the ICC it would be "distinctly unpleasant" for them to be overruled by another cabinet officer. However, every cabinet officer frequently undergoes the experience of having another cabinet officer veto a proposal of his when the major responsibility for the policy concerned lies with the opposing official. Furthermore, since all the departmental heads would be part of the same official family there is a much greater likelihood of more effective coordination of transportation regulation with the activities of the other departments.

The final argument of Mr. Williams with respect to the general issue of putting regulation in the executive branch is that the growth of executive power tends to lead to totalitarianism. The real danger of totalitarianism, however, stems not from executive power but instead from irresponsible power whether it is wielded by a chief executive, an independent commission, or the legislature. In fact, a strong, responsible executive is the best possible insurance against the development of totalitarianism. Where totalitarian parties have come into power, they have done so largely as a result of the chaos and indecisiveness caused by a lack of positive leadership. A system of legislative supremacy is much more likely to produce this sort of chaos than a system which permits strong, responsible executive leadership. Hitler came to power not because the Reichstag delegated powers to Chancellor Brüning but rather because, prior to that time, the Reichstag had been unable to deal effectively with the problems confronting Germany. The United States and Great Britain are fortunate in that they both have vigorous executive institutions. Totalitarianism is a much greater danger in France with its

system of chaotic legislative government than it is in these two countries with their strong, responsible executives.

The problem which constantly comes up in any analysis of regulation is how to achieve political control in the good sense without achieving it in the bad sense. In a democracy, general policies should be decided by the citizen body, by elected officials directly responsible to the citizen body or a portion thereof, or by appointed officials directly responsible to elected officials. On the other hand, in the determination of specific cases with a limited number of parties-in-interest, it is desirable to minimize political control so as to prevent the democratic process from becoming perverted as an instrument of improper influence. The dilemma then is how to achieve democratic control of general policy and yet also prevent improper "political influence" in specific cases. It would be easy to name various agencies in the executive branch whose general policies have been responsible and democratic but whose specific actions have been improperly influenced either by congressmen or presidential cronies. In contrast, the ICC is a good example of an agency where the value of democratic control has been sacrificed to prevent improper influence. As a result, the Commission's general policies have irresponsibly benefitted one particular interest group, but there has never been anything remotely resembling improper influence or scandal about the decision of specific cases.

The best way out of this dilemma is, I believe, to put the regulatory commissions within an executive department and give the head of that department general policy control over the commissions. At the same time, the departmental head should not have the power to fire members of a commission nor should he have the power to dictate the results of specific proceedings. The head of the department should be able to issue general policy directives, particularly where the commissions develop contradictory policies. Each commission should decide its cases on their merits in accordance with these directives. This balance between commission and departmental secretary is a difficult one to maintain, but there is no reason why it should be an impossible one.

Mr. Williams argues that the proposals of the original article, by giving the Secre-

tary of Commerce some authority over transportation regulation, would cause drastic changes in regulatory policy each time a new secretary came in. This hardly seems likely. Every cabinet officer is to a large degree bound by the general policies established by his predecessors. He can modify them, to be sure, but he can only modify them within limits. Precedent, the pressure for continuity, and the dependence of the secretary on civil servants for advice and guidance are powerful factors militating against drastic change. It would seem that this suggested division of labor between semi-permanent commissions and the politically-appointed secretaries would offer an excellent means of balancing continuity of policy against flexibility and the necessity of alteration of policy to meet changing needs.

### G. DICKERMAN WILLIAMS:†

Transportation regulation is not a proper function of the Department of Commerce nor of the executive branch of the Government. Apparently I did not make clear my opinion that the ICC should not be abolished and that its regulatory functions should not be divided among three separate commissions. That conclusion seemed implicit in my opposition both to the transfer of its regulatory functions to the Department of Commerce and to the creation of the super-commission which would be necessary to resolve conflicts between any three separate commissions such as envisaged by Prof. Huntington. Prof. Huntington's argument seems to come down to the proposition that the transfer to the executive branch will eliminate the ICC's need for political support from the railroads. He seems overly optimistic in thinking that the Department will not develop sympathy for railroad problems to the extent the ICC has. Since the Department's promotional responsibilities in the fields of aviation and shipping tend to give it a sympathetic approach towards carrier problems, it might find

a similar responsibility towards the railroads which, according to the Supreme Court [263 U.S. 456, 478 (1924)] are presently under the "fostering guardianship" of the ICC, whose successor the Department would by hypothesis have become. Moreover, the Department's close association with business interests provides a conservative atmosphere which is dispelled only when the incumbent secretary is an aggressive liberal, an infrequent event. The *Washington Post* [May 18, 1953, p. 5, cols. 1-2] has reported that the present Secretary of Commerce favored, and the ICC opposed, a bill to expedite action on general rate increases sought by the railroads. Applying Prof. Huntington's theory that bureaucratic attitudes are determined by political support, this report would indicate that the Department is now more dependent than the ICC on the railroads.

It is true that with the Government as complex as it is today, and with so many important matters demanding the attention of both the president and Congress, the direct access to the president that is provided by location in a cabinet level department can be enormously valuable to any agency. In this sense Prof. Huntington is correct that regulation by an executive department would tend to lessen the need for political support from the railroads or any other interest. A better solution is greater consciousness on the part of Congress, especially through the Commerce and Appropriation Committees, of its guardianship of the ICC. Unless there is, some sudden whirlwind may blow up, and when it has died down the ICC may be in the Department of Commerce or another executive department.

Prof. Huntington provides no illustrations for his statement that cabinet officers frequently overrule each other. All I can say is that when I was in the Government it happened very rarely and, when it did, the results were painful.

Prof. Huntington has somewhat elaborated his proposal that his three commissions be subject to the policy guidance of the Secretary. If the Secretary of Commerce can issue policy directives, on the basis of which the commissions must decide specific cases, he becomes the final administrative authority in regulation. Even if he does not decide specific cases, he can con-

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trol their decision—which amounts to the same thing. This would be particularly true under Prof. Huntington's plan which charges the Secretary with the duty of reconciling conflicts between his three commissions.

Prof. Huntington asserts that the policy of a governmental department does not change drastically with the appearance of a new secretary. For that reason he discounts my argument that the numerous changes in both the personnel and the economic philosophy in the office of the Secretary of Commerce would cause an undesirable lack of continuity in transportation regulation. Prof. Huntington would hardly make this assertion if he had been living in Washington in the last few months. There were sharp changes in policy and policy-making personnel at the Commerce Department even when new secretaries were appointed during the administrations of Presidents Roosevelt and Truman, although the new appointments were in no way connected with any change in the national administration. Department reorganizations by Secretary Wallace were particularly drastic. This is all as it should be—*within the executive branch*. It would be most inappropriate in a regulatory body.

Prof. Huntington makes another remarkable argument when he states that rate-making and other transportation regulation is not legislative in character but is rather executive action authorized by Congress. I commend to his attention *Panama Refining Co. v. Ryan* [293 U.S. 388 (1935)], the most detailed exposition in recent times of the theory of the delegation of the legislative power confided to Congress by Article I of the Constitution. In this opinion the Court [p. 427] expressly mentions "the authority of the ICC" as resting "upon this principle" of the delegation of legislative power. The authority for executive action comes, on the other hand, from Article II of the Constitution. In the *Panama Refining* case, Section 9 of the National Industrial Recovery Act and the action of the President thereunder were held unconstitutional because that action, legislative in character, had been authorized by Congress without standards and limits essential to valid delegation.

It is of course true that legislative power is often, if not usually, delegated to officers of the executive branch, as in the case of

emergency price controls to which Prof. Huntington refers. But the Federal Power Commission, the National Labor Relations Board and the Federal Communications Commission are analogous to the ICC, and if price controls become permanent, an independent agency presumably would be created. In my opinion, the world's experience in recent decades in the absorption of power by the executive decisively teaches that such delegations should be to independent agencies unless strict necessity otherwise requires. As Mr. Justice Frankfurter said in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* [343 U.S. 579, 593 (1952)]:

"For them [the draftsmen of the Constitution] the doctrine of separation of powers was not mere theory; it was felt necessity. Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded—too easy. The experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires."

Under Article II of the Constitution it is the duty of the president to "recommend" to Congress "such Measures as he shall deem necessary and expedient." It is consistent with and implements this provision for the Secretary of Commerce, as the officer of the executive branch charged with "over-all policy" in transportation, to present such relevant views or evidence as he may have to Congress or its delegates, the regulatory agencies. The mere presentation of those views, if at all cogent, exerts a certain pressure in favor of their adoption partly because of their persuasiveness and partly because of the prestige inherent in any presentation by the executive branch. I see no objection to pressure so defined and limited. I oppose such pressure as exists or might exist by virtue of policy directives or influence over salaries, appropriations, and subordinate personnel. For this reason, and on grounds more fully stated in my previous article, I am against Prof. Huntington's proposal for the transfer of rail, water, and highway regulation to the Department of Commerce.

## II. THE RELATIONSHIP OF THE ICC WITH THE RAILROADS

*In re*: Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952), and Morgan, *A Critique of "The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest,"* 62 YALE L.J. 171 (1953).

Dr. Morgan's *Critique* answered the propositions set forth in Professor Huntington's *Marasmus*. For the convenience of our readers, Professor Huntington's replies to the *Critique* and Dr. Morgan's rejoinders appear side by side under each of the original proposition headings—Professor Huntington's in the left-hand column and Dr. Morgan's in the right-hand column of each page. (Eds.)

MAJOR PROPOSITION A. *Since the 1920's the ICC has been closely affiliated with the railroads and has usually tended to act favorably towards the interests of the railroads in situations where those interests conflict with the interests of other groups.*

### SAMUEL P. HUNTINGTON:

This major proposition and its sub-propositions were concerned with the impact of ICC action on the interests surrounding the Commission. They were not concerned with the economic or social wisdom or unwisdom of these actions. Yet Dr. Morgan seemed to assume that because it was argued that ICC policy has tended to favor the railroads that consequently this policy was being condemned as "wrong," "erroneous," or "nefarious." He mistook a descriptive proposition concerned with the impact of ICC policy for a normative proposition concerned with the desirability of that policy. He attempted to prove that the actions of the Commission are economically sound, legally justified, or in the public interest. He did not disprove the propositions advanced in the original article. There could, indeed, be little better proof of these propositions than Dr. Morgan's efforts to explain and defend the undeniable facts which support them. To analyze ICC policy as Dr. Morgan proposes would require hundreds of pages.

### CHARLES S. MORGAN:†

Prof. Huntington would reject as irrelevant any discussion concerned with the economic or social wisdom of Commission actions. He seems to state that it is possible to describe the impact of a Commission action without knowing the reasons for the action. Only by knowing the action, however, can the reaction be grasped. The *Critique* answered the question whether, in fact, the railroads were "favored" and some other interest was "alienated." Thus, denial of an increase in rail rates needed to afford adequate service would not benefit the public. Finding where the "advantage" lies in a decision or policy requires far more than a superficial treatment of a kind which tends to put every rate increase down as a "favor" to the railroads and a "disfavor" to shippers. Realism is sacrificed in thus setting up an antithesis of interests. While Prof. Huntington himself may not condemn alleged "favoritism" of the railroads, he laid the basis in *Marasmus* for reader condemnation of the Commission.

SUBPROPOSITION A1. *The railroads generally praise and support the Commission and its work.*

### PROF. HUNTINGTON:

The evidence relevant to this proposition in the *Marasmus* consisted of a careful survey of railroad opinion as revealed

### DR. MORGAN:

Prof. Huntington grants that railroad criticism of the time used in reaching rate-level decisions is relevant, as is railroad

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PROF. HUNTINGTON:

in the testimony of railroad officials before congressional committees, editorials in trade publications such as *Railway Age*, public statements by railroad officials, publications of the Association of American Railroads, and other miscellaneous sources including appraisals of railroad attitudes such as that made by the Hoover Commission staff. These sources indicated that in the past fifteen to twenty years the railroads have been highly satisfied with the Commission and have generally praised its worth. The expressions of praise and satisfaction were found to be far stronger and far more numerous than the occasional railroad criticisms of the Commission. Dr. Morgan did not reject this evidence of railroad support for the Commission. Instead in his brief passage dealing with railroad attitudes, he selected from the original article that evidence which was presented to show the nature and extent of railroad opposition to the Commission and reproduced this in his *Critique* as if it were the entire story.

In this section Dr. Morgan also listed a few specific issues with respect to which the railroads have recently criticized the Commission. Now, nobody will argue that the railroads and the Commission agree 100 percent of the time. That is not the issue. The issue is whether or not they generally praise, support, and defend the Commission. In the face of the overwhelming evidence presented in the original article, Dr. Morgan cannot disprove this proposition by citing a few exceptional circumstances in which the railroads have opposed the Commission.

*SUBPROPOSITION A2. The railroads have generally defended the independence of the Commission against attempts to subject it to the influence or control of other government agencies.*

PROF. HUNTINGTON:

The *Marasmus* showed that the railroads have consistently defended the independence of the ICC by (1) resisting attempts to subject it to executive control, (2) opposing the creation of new agencies which might rival the Commission, and (3) opposing the interference of existing agencies with the Commission.

Dr. Morgan's first argument was limited to defending and justifying the

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opposition to the Commission's restrictive policy on rail-motor operations. On the other hand, he overlooks what was set out in *Critique* on these additional points: (a) railroad efforts to correct by legislation alleged Commission favoritism to motor carriers in the granting of operating rights; (b) railroad opposition to the class rate decision; (c) railroad disappointment in decisions which involved rail and motor or water rates; (d) railroad inability to budge the Commission very far from its policy of denying volume-minimum ("trainload") rates; (e) railroad opposition to severe reductions of capitalization in reorganization proceedings, and objections to decisions on various unification applications; (f) railroad opposition to certain financial requirements; and (g) the Commission's rejection of the railroads' proposal that it be authorized to pass on public transportation projects and assess user charges. This list is very far from complete, but the subjects mentioned go to the very core of railroad operations. An evaluation of all phases of the subject, based on an understanding of the issues involved, leaves no question that the list of differences between the railroads and the Commission, while different in kind, is at least as great as a list that might be compiled of issues which other carriers would like the Commission to have handled differently. Where, in the light of the foregoing, is the "affiliation" Prof. Huntington alleges? What has become of the "few" exceptions?

DR. MORGAN:

Prof. Huntington attempts to write down the importance of the support of the Commission's independence by other carriers, shippers, and members of Congress. The reader must judge this weighing of the evidence. It should not be difficult to understand that the railroads, in opposing attempts which would lessen the independence of the Commission, were attending to their own interests in these matters

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actions of the railroads in defense of Commission independence. For instance, he stated that the opposition of the railroads to the appearance of federal departments before the Commission is a "natural attitude." He thus admits that the railroads do so defend the Commission which was, of course, the only point made in the original article. And, in any event, given the general affiliation between the railroads and the Commission, this author would be the last person in the world to deny that railroads' attitude was not a "natural" one.

In this same discussion, Dr. Morgan demonstrated again his inability to distinguish between factual and normative statements. He quoted, for instance, a sentence from the *Marasmus*, and added appropriate emphasis: "Attempts by existing agencies to influence or *dictate* ICC policy through intervention in proceedings before the Commission, *informal pressure upon commissioners, or by other means*, have been severely attacked by the railroads." He then commented: "It suffices here to italicize language which appears to recognize neither statutory duties nor ethics in interagency relations." The implication of course is that the statement in the *Marasmus* was a defense of the activities of these other agencies rather than a factual description of the interaction of pressure groups about the Commission. Unable to deny the fact that the railroads have regularly defended the Commission against other agencies, Dr. Morgan attempted to discover moral judgments where none exist.

Dr. Morgan's second point was that interest groups other than the railroads have at times defended the independence of the ICC. This is perfectly true: occasionally other groups have come to the aid of the Commission. The attitudes of these other groups have fluctuated, however, and they have at times been with the Commission and at times opposed to the Commission. The railroads have been alone, on the other hand, in their consistent defense of the ICC. No other group has been as active, voluble, or effective in this respect. The support of these other groups has been incidental to that of the railroads, and the fact that this incidental support has existed in no way diminishes the close and continuing affiliation between the railroads and the Commission.

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and were concerned only incidentally with the Commission as such. The beginning, at least, of a complete breakdown of administrative regulation in the transportation field was involved in some of these proposals. An issue of vital importance to the future of rail and other interests was at stake.

Prof. Huntington again fails to distinguish between what is primary and what is incidental when he states that railroad opposition to the appearance of other departments before the Commission is a "defense" of the Commission. Railroad opposition stems entirely from efforts to protect railroad interests. As a matter of fact, motor carriers resent the appearance of Government departments at hearings on their applications to increase rates.

The same fallacy is found in Prof. Huntington's mention of railroad opposition to "dictation" of ICC policy by other agencies. It is questionable whether the practices mentioned actually occur. Efforts on the part of anyone to go "around the record" by discussion of pending decisions with commissioners would be comparable to trying to influence the decisions of judges. Persons who represent private interests before the Commission realize the question of ethics involved, and it is reasonable to assume that attorneys for other Government agencies are equally respectful of the proprieties.

SUBPROPOSITION A3. *The railroads have consistently supported the expansion of the power of the ICC.*

PROF. HUNTINGTON:

The evidence from railroad statements and publications supporting this proposition is clear and incontrovertible, and Dr. Morgan did not attempt to gainsay it. Instead he made five other arguments which may be summarized as follows:

(1) ICC regulation of motor and water carriers was required by "economic realities" and "stark economic fact."

Dr. Morgan's statement may or may not be true, but its truth or falsity does not have any relation to the truth or falsity of the point at issue.

(2) Railroad support for the expansion of ICC power was an effort to "get simple justice."

The significant fact is not whether the railroad cause was just or unjust but that the railroads thought they could best secure their ends by expanding the power of the Commission.

(3) Other groups in addition to the railroads and the Commission advocated the expansion of ICC power over the motor and water carriers.

Dr. Morgan, however, also admitted that the railroads were the principal force working for this legislation. The activities of other groups were distinctly incidental.

(4) The motor carrier industry is better off now than it was eighteen years ago when it was brought under ICC regulation.

Again the argument has no relevance to the proposition that railroads have supported the expansion of ICC power.

(5) The ICC has not supported the attempts by the railroads to expand its jurisdiction over the airlines.

This is perfectly true. It is also irrelevant to an argument dealing with the attitudes and actions of the railroads towards the ICC.

SUBPROPOSITION A4. *The ICC has generally favored the railroads in conflicts between their interests and those of other groups with respect to the general level of rates and fares.*

PROF. HUNTINGTON:

The *Marasmus* pointed out that there had been a marked shift in the attitude of the ICC in favor of railroad requests for

DR. MORGAN:

There was no questioning in *Critique* of the fact that the railroads have supported expansion of the Commission's functions in various ways. Prof. Huntington again, however, finds indication of an interest in the Commission as such, whereas it should be obvious that the railroads' compelling desire was to secure more comprehensive and necessarily unified regulation. The effort to show an "affiliation" therefore fails. As any support for regulation by non-railroad interests necessarily weakens his argument, Prof. Huntington belittles the amount of support from these sources.

DR. MORGAN:

A more accurate statement of what took place will dispel the illusion of "affiliation" that Prof. Huntington tries to



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general rate advances during the 1920's. This point was substantiated by comparing the relationship between freight rates and wholesale prices during each of these periods. The principal cases in which the Commission has dealt with passenger fares, express rates, commutation fares, and other special types of charges were likewise cited as evidence of the Commission's generally favorable attitude towards railroad demands. It was also pointed out that the Commission had alienated from it, as a result of its actions, various shipper interests, and numerous state and local interests.

Dr. Morgan did not in substance deny the conflict which Commission action has caused between the Commission and the other interests mentioned above; he merely attempted to defend the Commission viewpoint. Other arguments in this category related to the economic wisdom and general desirability of Commission action in approving railroad requests. Typical of these is his statement with respect to the 1920 general rate advance:

"It is not true that the 1920 increase favored the railroads. Earnings in this period helped railroads to acquire credit which permitted a large modernization program beginning in 1923. The country profited greatly from this program."

Obviously every decision of the Commission should benefit the country. The issue is not whether the Commission acted in the "public interest" but rather how it interpreted the public interest in choosing among the competing interests which appear before it. The argument of the *Marasmus* was that the Commission has interpreted "public interest" to mean "railroad interest."

Another argument in the *Critique* was that the Commission has passed along to the motor and water carriers the general rate increases granted the railroads. As Dr. Morgan himself recognized, however, the initiative in all these increases has come from the railroads and the Commission has approved these "across the board" rises because it felt them necessary to meet railroad needs. In fact, the Commission has rendered the incidental benefits to the other carriers somewhat nugatory by per-

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create. In 1920, as was generally anticipated in view of the worn-out condition of rail facilities and the emphasis which the Transportation Act of 1920 placed on adequacy of railroad earnings, there was a substantial increase in the freight rate level. In 1922 the Commission ordered a 10 percent reduction; in 1926 it denied an application for a general increase in western district rates. Beginning in the mid-twenties, the Commission earnestly endeavored to give agriculture rate relief, but the Supreme Court in large part negated its efforts to do so. In 1931, though the railroad credit position was extremely poor, the Commission temporarily granted a comparatively small part of an application for increased rates. In 1933 it denied reductions requested by shippers. In 1935 it permitted certain moderate, emergency increases and in 1936 allowed certain of them to stay in, though others were removed. Higher costs led to a 10 percent increase in 1938 (5 percent in the case of agricultural commodities) and to an increase in 1942, though the latter increase was removed over railroad opposition when a war volume of traffic no longer made it necessary. Inflation after the war ran costs up; freight and passenger rate increases followed. This record certainly affords no basis for Prof. Huntington's statement that there was a "generally favorable attitude" toward the railroads' demands.

Another statement in the *Critique* was to the effect that railroad costs and not wholesale prices require consideration in fixing rate levels, that tying rates to prices would defeat shippers' interest in rate stability, that, other tests of reasonableness being met, the Commission must allow carriers to earn, if possible, a fair rate of return, and that the rates of return have averaged less than a fair return on a reasonable rate base. The relevancy of this argument arises from the fact that shippers do not expect railroads (or other carriers) to operate at an unreasonably low level of earnings; aside from their basic fairness, they realize their own needs for adequate facilities and service. The latest general increase in rail rates, less than requested, carried an expiration date. A petition to have it made permanent was recently denied.

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mitting the railroads to exempt from the full increases those commodities for which there is sharp competition with the water and motor carriers.

Dr. Morgan made one point which has some elements of validity to it. This is his reference to the conflict between the Commission and the railroads over various legislative proposals designed to permit the railroads to put into effect general rate increases upon thirty days' notice to the Commission. This is part of the dissatisfaction which the railroads have manifested in recent years with Commission delay in approving increases. It should be pointed out, however, that the Commission in the most recent general rate advance case, *Ex Parte 175*, granted "the railroads practically all that they asked for," [132 Railway Age 37, Apr. 28, 1952] and is making various attempts within the limits of its decreased viability to be quicker in meeting railroad demands.

The final and most lengthy criticism which Dr. Morgan made in his discussion of this subproposition related to the index of freight rates used in the comparison between the levels of freight rates and wholesale prices. Dr. Morgan's charge against this index was that it reflects not only changes in the level of rates but also changes in the composition of traffic. This criticism is quite valid. But the index used in the *Marasmus* has the advantage over others in that it has been adjusted for changes in the length of haul. For the years it covers, this index is far and away the best available indication of the level of freight rates. In fact, it is the only such index which is reasonably accurate. While changes in the composition of traffic undoubtedly throw it off to a certain extent, they do not invalidate it as a test of the validity of the proposition that the Commission tended to act unfavorably toward the interests of the railroads before 1920 and favorably toward those interests since 1920. Only in 1947 did the Commission develop a better index, and this shows that between 1947 and 1950 railroad rates went up 25 percent whereas wholesale prices increased only 18.6 percent.

DR. MORGAN:

The *Critique* further stated that water and motor carriers have derived great benefit from "following the rails up" after general increases in rail rates. Prof. Huntington states in reply that the railroads initiated the increases, and that the "across-the-board" increases were made because they were considered necessary to meet railroad needs. The increases, however, involved the same considerations as, and were no different in purpose from, the advances given the railroads. Water carriers could scarcely have exerted the initiative, since rail rates generally constitute a ceiling on water rates, and, under its statutory authority, the Commission could not have required shippers to pay higher rail charges to protect water carriers. Motor carriers, not parties to the rail proceedings, had to justify proposed increases in regular course; advances in rail rates laid a basis for more increases, but the fact that rail rates went up did not of itself entitle motor carriers to like increases.

Prof. Huntington now admits as "quite valid" the criticism as to the effect on the freight rate index of variations in types of traffic, but still thinks the chart is properly adjusted for changes in length of haul. He claims the index "is far and away the best available indication of the level of freight rates." "In fact," he adds, "it is the only such index which is reasonably accurate." As no one else has attempted a comprehensive index covering such a span of years, the comparison is without point. The index was definitely discredited when offered by a witness in a Commission proceeding.

SUBPROPOSITION A5. *The ICC has generally favored the railroads in conflicts between their interests and those of other groups in the area of monopoly and antitrust.*

PROF. HUNTINGTON:

The *Marasmus* pointed out that the Commission endorsed the railroads' use of collective price-fixing arrangements, and that it failed to cooperate with the Department of Justice in Sherman Act prosecutions.

Dr. Morgan attempted to show that there was no significant change in ICC policy in the area of monopoly and antitrust before and after 1920. It was pointed out in the *Marasmus*, however, that the Commission did not receive significant powers with respect to competition until the Transportation Act of 1920, and that consequently it "only rarely" acted in this area before that date. Hence it is rather difficult to discern the significance or relevance of Dr. Morgan's arguments on this point.

Dr. Morgan pointed out that the Commission-sponsored Reed-Bulwinkle Act, which was designed to exempt railroad rate bureaus from the antitrust laws, was supported by some non-railroad groups, and that it exempted water and motor carrier bureaus as well as railroad ones. The entire controversy over this bill, however, concerned the railroads' bureaus which had been under attack by the Department of Justice. The railroads stood to gain the most from the bill (since it would block antitrust prosecutions directed at them); they were the strongest force pushing for the bill; and they were aided with the full support of the Commission. Obviously any bill exempting railroad rate bureaus would also have to exempt those of other carriers subject to Commission regulation. Obviously also, since the interests opposed to this legislation were also very strong (it was passed over a Presidential veto), it was sound political strategy for the ICC-railroad bloc to get as much support as possible. That other groups received incidental benefits as a by-product of this legislation cannot obscure the facts that it was designed primarily to help the railroads and that the Commission was its active sponsor.

Dr. Morgan also argued that since the passage of the Reed-Bulwinkle Bill the Commission has not followed a "lenient" policy in its interpretation of that Act. Nonetheless, all the major agreements filed with the Commission under the act have been approved and this has frequently occurred over the opposition of the Department of Justice.

DR. MORGAN:

The *Critique's* general answer to this proposition was that the Commission, observing its governing statutes, has applied the will of Congress to particular situations. Prof. Huntington makes no allowance whatever for statutory duty; it suffices for him if he can find some interest which dislikes a given line of decisions. If, however, the Commission followed the views of another agency when it considered these views inconsistent with its own statutes, its viability in Congress, in the courts, and elsewhere would fall to zero in record time. The Commission's "tough" but intelligent and informed policy of maintaining competition where it is in the public interest is well understood.

Prof. Huntington, forced to concede that shippers were almost unanimously in favor of the 1948 rate-bureau legislation and that other carriers supported this legislation, turns to the argument that the railroads stood to gain most and that the other agencies therefore received only "incidental benefits as a by-product of this legislation." Since certain motor carrier bureaus were under attack at the time, and as motor and water carriers subsequently filed a substantial number of agreements, the interest of these carriers in the rate-bureau legislation was far from merely "incidental." Moreover, railroad and Commission views on aspects of this legislation diverged.

Prof. Huntington further asserts that "all the major agreements filed with the Commission under the Act have been approved." The facts show how erroneous this statement is. As of early June 1953, 44 applications had been filed under Section 5a, of which 15 were pending for decision. Of the 29 decided cases, only 6 (4 rail and 2 motor carrier) were approved as submitted. Six others were dismissed, of which one was reopened and denied and another was approved after amendment of the agreement. One was denied and there has been no further action. Sixteen (5 railroad, 3 water carrier, and 8 motor carrier) were approved subject to conditions.

SUBPROPOSITION A6. *The ICC has generally favored the railroads in conflicts of interest between the railroads and the motor carriers.*

PROF. HUNTINGTON:

With respect to the burden of proof required for rate reductions, Dr. Morgan apparently misunderstood the argument of the *Marasmus* and in addition misinterpreted the facts of the situation. The Interstate Commerce Act as it stood in 1935 required railroads to sustain the burden of proof for rate increases by showing that they were reasonable, non-prejudicial, and otherwise lawful. There was no comparable requirement with respect to rate reductions and the courts had held that such justification was not necessary for decreases. The Motor Carrier Act [1935] was silent as to the burden of proof on motor carriers for both increases and decreases. The ICC nevertheless held that motor carriers had to sustain the burden of proof for decreased rates but need not do so for increased rates. In 1938 Congress amended the law to require motor carrier justification for increased rates in exactly the same manner as that required of the railroads. Despite the fact that courts had previously held that this language meant that the burden of proof did not have to be sustained for decreases, the Commission from 1938 through 1940 still required the motor carriers to carry this burden even though the railroads with exactly the same statutory language did not have to do so.

On the issue of railroad penetration into motor carrier freight operations the *Critique* attempted first to justify ICC policy and then to minimize the extent to which this policy has actually permitted railroads to acquire motor carrier operating rights. During the first ten years after the passage of the Motor Carrier Act, however, the railroads consistently pressed for entrance into the motor carrier field. By 1944, 83 out of 131 Class I railroads reported motor operations of one sort or another. The ICC commented upon the large number of railroad cases coming before it and observed that railroad acquisitions of "hitherto independent motor carriers have continued in substantial number." The Commission went on to say that, in addition to this "continuing program of acquisition by purchase," numerous railroads had "filed successive applications under Section 207 of the Act for grants directly to them of authority to initiate new motor carrier operations." The Commission's cognizance of this trend did

DR. MORGAN:

The *Critique's* statement on burden of proof in rate cases removed errors in the *Marasmus* and was itself factually correct. It was stated clearly that the Commission has disallowed reductions in motor rates on lack of evidence that the rates would be compensatory. The law in so many words did not require this action, but the declaration of policy and other provisions of the Motor Carrier Act [1935], called for steps to protect the industry from ruinous internal competition. Also noted there was the fact that railroads, despite the lack of a specific statutory requirement, long had produced evidence in justification of rate reductions. Prof. Huntington in effect is asserting that motor carriers should have been permitted to put in any rates they chose, whatever the effect on other motor carriers and shippers. Legislation, enacted without opposition, corrected obvious defects in the law.

Prof. Huntington quotes certain statistics and statements as evidence that the motor carriers' concern for the preservation of independent trucking was justified. Making a selective use of a Commission staff report, he gives an exaggerated idea of rail participation in motor transportation. He omitted the most significant figure in that report; that all operations, measured in vehicle-miles, by or for Class I railroads in 1944 were only 3.9 percent of the operations conducted by all Class I intercity motor carriers of property. A recently released study [Bureau of Transport Economics and Statistics, *Motor Operations of Railroads*, Statement No. 5221, p. 97] shows a reduction from 3.9 percent in 1944 to 2.3 percent in 1948. Moreover, some of the 83 railroads Prof. Huntington cited as having motor operations in 1944 had only very minor ones.

Prof. Huntington gets into further difficulty by stating that the rate of growth of rail-controlled motor carrier operations, 1944 to 1946, "generally exceeded that of the industry as a whole." He confines his figure for rail operations to "eleven large carriers" controlled by railroads and compares it with a figure for all Class I carriers. However, motor freight carriers controlled by Class I railroads had a smaller percentage of total intercity motor freight revenue in 1951 than in 1948. Their portion of total operating revenue, tons

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not, however, result in any significant change in its attitude, and by 1947 the ICC had approved railroad applications in well over a hundred cases. The rate of growth of railroad-controlled motor carrier operations during this period generally exceeded that of the industry as a whole: From 1941 to 1946 the total operating revenue of all Class I intercity motor carriers increased 75.8 percent; the operating revenues of eleven large railroad-controlled motor carriers increased 142.3 percent. The railroads, moreover, have frequently praised this policy permitting them to enter into motor transportation and have urged the Civil Aeronautics Board to adopt the same policy with respect to railroad entrance into air transportation.

*SUBPROPOSITION A7. The ICC has generally favored the railroads in conflicts of interest between the railroads and the water carriers.*

PROF. HUNTINGTON:

One of Dr. Morgan's criticisms related to Commission policy on rail rates for traffic which has a prior or subsequent haul by water. Dr. Morgan here misconstrued and misunderstood the nature of the evidence and the argument presented in the *Marasmus*. Initially, before it became dependent primarily upon railroad support, the Commission held that railroads could not discriminate against water carriers by charging higher rates on traffic moved by those carriers. In the 1930's, however, the Commission altered this policy and held that railroads might apply different proportional rates to ex-water and ex-rail traffic. This new doctrine was subsequently applied in the *Mechling* line of cases, permitting the railroads to discriminate against ex-barge grain moving by rail out of Chicago. Eventually Commission action in these cases was overruled by the Supreme Court. [330 U.S. 567 (1947)].

Dr. Morgan correctly pointed out, as was also noted in the *Marasmus*, that the *Rail and Barge Joint Rates* case of 1948 [270 I.C.C. 591] was in part favorable and in part hostile to the interests of both railroads and water carriers. The significance of the case, however, lies in the length of time which it took the Commission to come to a decision. The original complaints in this case were filed twenty years before the case was decided, and the main complaint thirteen years before the deci-

DR. MORGAN:

carried, and vehicle-miles also declined. Prof. Huntington may have included the passenger revenue of rail-controlled motor carriers. If so, he has confused the issue because independent motor carriers of passengers, with minor exceptions, have not questioned rail-controlled bus operations.

DR. MORGAN:

The Commission's first decision in the *Mechling* cases came before the Supreme Court and was not set aside. Its second decision was reversed. The Court, whose membership had changed in the interval, was divided in both instances, as was the Commission. The Commission decision would have given the railroads less than the adjustment they requested.

Prof. Huntington now attributes to this writer the thought that the *Rail and Barge Joint Rates* decision was in part favorable to railroads and in part unfavorable to water carriers. As noted in *Critique*, the decision favored water carriers only and was possible only by stretching the statutes in their behalf. Only the railroads appealed to the courts or requested vacation of the order; water carriers did not file for reconsideration. The Inland Waterways Corporation got what it asked for but has never used it. The delay in reaching the decision, though largely inherent in the situation as it developed, was unusual, but the Hoover staff study reflected misinformation on the barge lines' attitude. The principal dissatisfaction with the delay—uncertainty of the outcome—affected rail and water carriers alike. In any event, technological considerations and increased labor costs have led water carriers to show less and less and now almost no interest in traffic of the type principally involved in joint rates. The practical effect of the

PROF. HUNTINGTON:

sion. As the Hoover Commission staff study noted:

"The long delay was, no doubt, satisfying to rail carriers while exceedingly irksome to the barge lines. It contributed to the charge, frequently made by water carriers and occasionally by motor carriers, that the Commission is rail-minded." [Commission on Organization, Staff Report on the I.C.C. I-56 (1948)].

With respect to post-World War II Commission action on railroad rate reductions in competition with water carriers, Dr. Morgan cites a number of recent cases—many occurring after publication of the *Marasmus*—in which the Commission has denied railroad requests for competitive rate reductions and approved similar water carrier requests. It cannot be assumed, however, that these few instances represent a general change in Commission policy.

MAJOR PROPOSITION B. *The viability of the ICC as an administrative agency is declining as the Commission gradually loses its administrative effectiveness, political support, and public prestige.*

PROF. HUNTINGTON:

This proposition assumes that any government agency in order to exist and prosper must have sources of political support strong enough to maintain its appropriations and statutory authority and to protect itself against opposing groups with hostile interests. The *Marasmus* showed that the ICC, as a result of its close affiliation with the railroads, had alienated other potential sources of political support. The opposition of these other groups plus the gradual decline of the political strength of the railroads has consequently caused the "marasmus" of the Commission.

Dr. Morgan first challenged the validity of applying this type of analysis to the ICC. He referred to this technique of analysis as a "doctrine" and implied that it is somehow immoral to attempt to describe the behavior of an agency in these terms. However, viability analysis as a technique can be neither moral nor immoral; it is ethically neutral. It is one

DR. MORGAN:

delay is therefore exaggerated.

Prof. Huntington acknowledges the *Critique's* evidence of recent decisions in which the Commission has denied rail applications for reductions in rates and others in which it has approved reductions proposed by water carriers. As he has advanced little evidence of his own, no weight can be given his statement that the cases referred to are only a "few instances."

DR. MORGAN:

If, in this practical world, the Commission's behavior should be such as will advance its "viability," the question naturally arises as to what Prof. Huntington means by an agency's having strong sources of political support. By his reasoning, if railroads approve a given action or policy, effective "viability" is sacrificed; if other interests approve a certain action, "viability" is gained. How, then, are these other interests to be converted from an attitude of "alienation" to one of support of the Commission? Prof. Huntington presumably proposes that the Commission should render decisions or adopt policies which do not "favor" railroads but which will be acceptable to these other interests. As he considers the legality or wisdom of a Commission action irrelevant, he doubtless would say that the Commission is simply in an unfortunate position if it must render decisions which will lessen its "viability" with non-railroad interests.

PROF. HUNTINGTON:

thing to say that agency *X* must do *Y* in order to maintain its political support. It is quite something else to say that agency *X* is justified in doing *Y* in order to maintain that support.

Dr. Morgan was hard put to find evidence that the ICC is not on the skids. Indeed, he even argued that the Commission urgently needs to develop a more effective public relations program and closer relationships with executive agencies and the Congress. The fact of the Commission's marasmus is one point upon which virtually all groups concerned with the Commission are agreed. In its last annual report the Commission itself admitted that it suffered from:

"[A]n impairment of efficient administration, a growing inability to perform the functions and duties required by the Interstate Commerce Act and related acts, and a weakening of the Commission's ability to carry out the regulatory and judicial authority delegated to it by the Congress." [66 I.C.C. ANN. REP. 144 (1952)].

Commissioner Arpaia has similarly referred to the "swelling tide of criticism" of the ICC [Transport Topics, Sept. 22, 1952], and it has been reported that plans are afoot in the Department of Commerce to transfer the Commission's executive functions to the Department. [91 Traffic World 25-6, Feb. 21, 1953]. The most significant evidence of the decline of the Commission, however, comes from the railroads themselves. *Railway Age*, for instance, stated that:

"Many people have noted, usually with sympathetic concern, the troubles which have been afflicting the Interstate Commerce Commission. . . . The undeniable shrinkage of the agency's position in public esteem has been ascribed to numerous and complex causes—but it isn't necessary to seek a multiplicity of subtle explanations when plain starvation is as evident as it is here. No horse is able to do twice the work on half the feed." [132 *Railway Age* 61, June 23, 1952].

DR. MORGAN:

Prof. Huntington's statement that the Commission must maintain adequate political support, but that actions to this end do not imply immorality, leaves one very perplexed. If the Commission were to make "viability" a test in rendering decisions, it would have to ignore or purposely construe the law to achieve that end. How such an action could not be immoral (aside from its unlawfulness) is difficult to see. Prof. Huntington's effort to label his "viability" test as a "descriptive process" must be rejected, since it calls for a flouting of the law, all rules of evidence, and the Commission's duty. Its connotations are vicious in nature.

Prof. Huntington's references to lack of adequate funds indicates a misunderstanding, and losses of functions should materialize before they enter the discussion.

SUBPROPOSITION B1. *Non-railroad interest groups affected by Commission action have become alienated from the Commission.*

PROF. HUNTINGTON:

Only the motor carriers can express that industry's view on the ICC. In 1946 the American Trucking Association stated that "The Commission's interpretations of its authority disclose a definite pattern of favoring the railroads to the detriment of other types of carriers." In 1948 the managing director of the ATA labeled the Commission "railroad minded." In 1951 the ATA again expressed concern over the Commission's railroad partiality and recommended:

"a reorganization of the ICC under which separate Commissions would be established to regulate rail, water, and motor carriers, and freight forwarders, with an appellate commission having jurisdiction over controversies involving two or more classes of carriers."

This year the newly-formed Trucking Industry National Defense Committee instituted a new drive to free the motor carriers from ICC control. Members told President Eisenhower that the ICC was "dominated" by the railroads and that the bulk of its personnel were "railroad-minded." They pointed out that the ship lines and air lines were regulated by separate commissions and urged that a Federal Motor Transport Commission be created to take over motor carrier regulation from the ICC. [91 *Traffic World* 14, Feb. 1953].

What is true of the motor carriers is also true of the other non-railroad interests surrounding the Commission. Dr. Morgan did not even deny that the water carriers are basically opposed to the Commission. Instead he expressed the hope that the water carriers will in the future come to a "wider realization of the value and need of regulation by the Commission." The airlines are not, of course, regulated by the Commission, but the railroads have been active in attempting to expand the ICC's powers into this area. This has met the united resistance of the air carrier industry.

DR. MORGAN:

The answer which Prof. Huntington's type of analysis requires is suggested by his definition of "viability." It is a simple factual one: Do motor carriers wish to reduce the Commission's appropriations, curtail its powers to an important extent, or transfer its functions to another agency? The answer is that no serious effort to reduce the Commission's authority or any efforts to reduce its appropriation have been made. [91 *Traffic World* 37, Apr. 25, 1953]. Motor carriers, favored with intelligent leadership, alert to their own interests, and knowing the Commission's work, realize that their problems must be dealt with in a common forum with other modes of transportation and that they cannot expect to win all their cases. Attention should be called to the fact that Trucking National Defense Committee has been sponsored by the head of the leading labor organization in the trucking field, with the collaboration of a leading manufacturer of truck trailers and one large motor carrier. This Committee has not spoken for the motor carrier industry and, until it gets the industry behind it, it will carry little weight in behalf of Prof. Huntington's argument.

Some coastwise and intercoastal water carriers have been critical of the Commission because it has not given them a desired degree of relief from harsh post-war conditions, though by now most of such carriers must realize the statutory limitations imposed on the Commission. Particular decisions may be objected to by water carriers in these or other areas. There is no move, however, to revoke present regulation. Water carriers definitely would protest and, it may be added, Congress would be most unlikely to find merit in a proposal reversing an established policy or divorcing such regulation from that of other agencies.

It is true that the air lines do not wish to be put under the Commission's jurisdiction. The Commission, in this writer's view, is not asking for jurisdiction in this field. The "united resistance" of the airlines has disappeared. A vice-president of a large line recently advocated placing air carriers under the Commission.



*SUBPROPOSITION B2. Other government agencies concerned with Commission action have become alienated from the Commission.*

PROF. HUNTINGTON:

The *Marasmus* suggested that one useful index of agency viability was the pattern of court action in sustaining or invalidating agency decisions. An agency which is able to make its orders stick and secure judicial approval is obviously in a better position than one whose orders are periodically overruled by the judiciary. Cases listed in the Commission's annual reports revealed that since the 1930's there has been a steady decrease in the proportion of cases in which the Supreme Court sustained the Commission. This proportion was found to be 93 percent between 1936 and 1940, 82 percent from 1941 through 1945, and 74 percent from 1946 through 1950.

*SUBPROPOSITION B3. Congress is becoming increasingly alienated from the Commission.*

PROF. HUNTINGTON:

As Dr. Morgan correctly noted, "a basic test of 'viability' is to be found in the attitude of Congress toward the Commission." The clearest manifestation of congressional attitude towards any agency is congressional action on appropriations for that agency. Congress has exhibited a complete lack of sympathy for the Commission in this respect. Congress has consistently cut the ICC's budget far below the sums approved by the Budget Bureau, much less the original requests made by the Commission itself. The net appropriations of the Commission available for general expenses other than salary increases and overtime pay decreased from \$7,867,000 in fiscal 1940 to \$6,580,642 in fiscal 1953. During the same period the average employment dropped from 2,439.9 in 1940 to an estimated 1,634.0 in 1953. In its report for 1952 the Commission stated that it was suffering from

"(1) serious delays in production of work; (2) casual and superficial consideration of many important matters, which results in a growing number of complaints that formal proceedings, records, tariff publications, carriers' records, transportation problems, and

DR. MORGAN:

On Prof. Huntington's own basis of testing "viability," the Commission's record of legal victories was 89 and 81 percent of the decisions summarized in the Commission's last two annual reports. In the term which began in October 1952, the Commission won all nineteen three-judge cases, only three of which were reported in the annual report. Although gratifying, these figures do not establish that the Commission is on a new high plateau of performance. No agency could expect to win substantially all of its cases, and either reversals or affirmations may be bunched in a given period.

DR. MORGAN:

To prove that inadequate Commission funds indicate loss of "viability" in Congress, Prof. Huntington must be able to show that the inadequacy reflects the direct use of the "power of the purse" to bring the Commission into line. Most of the Commission's financial difficulties can be traced to the government's general economy drive in process for several years. The Commission is only one of the regulatory or kindred agencies which have complained about appropriations inadequate for the work load imposed. The economy drive reached a climax in the consideration of the appropriations for fiscal 1954. The ICC received a small increase (\$280,500) over 1953, but 25 percent more than what it received in 1946. There were kindred agencies which did not fare so well. The CAB and SEC received less for 1954 than 1953; the FTC the same amount. The Commission therefore was not singled out for harsh treatment. For the years 1946-1954, comparing the ICC to five other regulatory agencies (FCC, FTC, FPC, SEC and CAB), the following statistics are significant: The ICC's initial appropriation was closest to the President's budget estimate in two of the nine years and was farthest from it in only one year. The ICC's initial

PROF. HUNTINGTON:

many other matters are not adequately analyzed or reviewed; and (3) inability to recruit new employees to be trained in order to fill positions to be vacated by experienced employees." [61 ICC ANN. REP. 143-4 (1952)].

In general, the congressional attitude towards the ICC appears to be best summed up by the late Senator Tobey, who recently described the Commission as being "railroad minded" and in need of an "injection of hormones." [91 Traffic World 21, Apr. 4, 1953].

*SUBPROPOSITION B4. The Commission is administratively ineffective and inefficient, suffers from undue passivity, and is losing transportation leadership to other agencies.*

PROF. HUNTINGTON:

The recently released Wolf management survey, made under the auspices of the Senate Interstate and Foreign Commerce Committee, substantiates the administrative marasmus of the Commission:

"When authority and responsibility for the performance of administrative duties and operations are divided among coequal executives, experience has shown that inefficiency, economic waste, delays in procedures, poor coordination, and lack of administrative programs are the results.

"Our survey of the organizational structure and operations of the Interstate Commerce Commission confirms the disadvantages inherent in its present multiple-executive type management.

...

"The present number of 15 bureaus, some organized according to specific functions, others according to types of carriers, presents obstacles to efficient administration. Related activities are not grouped together, which has led to duplication and overlapping of functions and a lack of coordination of the activities of the bureaus.

DR. MORGAN:

appropriation fell below the budget estimate by a maximum of 10 percent; for the other agencies the maximum range was from 10 to 20 percent. For the years 1946-1952, comparing the same six agencies: The ICC and one other agency received final appropriations which exceeded the budget estimate in four years; the other four agencies had such an excess in only two or three years. In no year was the ICC's final appropriation, when compared to the budget estimate, the lowest among the six agencies.

DR. MORGAN:

The Wolf organization made a brief survey and offered certain recommendations. The Commission has accepted these recommendations "in principle" and now is engaged in considering which of them require implementation. These recommendations consist essentially of introducing both more line organization and more functional organization. For ten years the Commission has carried forward functionalization of its work. The Wolf report in this respect would merely continue this trend.

Prof. Huntington relies on the existence of special investigatory bodies to prove the inadequacy and reluctance of the Commission in transportation planning. Part of the legislative work of the Federal Coordinator of Transportation undoubtedly could have been, and some of it would have been, carried out by the Commission if this special agency had not been set up. The Commission had made two nationwide investigations of the need for federal motor carrier regulation and had made recommendations to and appeared before Congress on this subject; the Coordinator's work in this respect was a follow-up. The Commission noted that it had no authority to investigate the question of need for more extensive regulation of water carriers. The Coordinator's studies of terminal unifications might not have strained the Commis-

PROF. HUNTINGTON:

"When services and functions are not well coordinated, when staffs are not well informed on policies and over-all programs, experience has shown that there usually develops a sluggishness and awkwardness in the work process. The present operations within the Commission are no exception. . . ."

The Wolf report pointed out that of the 1,019 employees of the Commission rated as GS 7 or over, 65.3 percent were at least fifty years old. Two hundred eighty key persons were found to be 60 years old or older, and 93.2 percent of these were eligible to retire. The Commission's manpower situation, the report declared, is "serious and requires early action." The survey authors further stated that:

"This situation is aggravated by a Personnel Office with inadequate personnel programs.

"Unless the Personnel Office is able to initiate and effectively carry out much needed personnel programs, there is little likelihood that the quality of supervision will improve or that the Commission can successfully delegate additional responsibility and authority to its staff."

On the issue of Commission passivity and lack of initiative, particularly in connection with program development, Dr. Morgan argued that the Commission is severely limited by its statutory mandate. Actually, this is not the case: The Transportation Act of 1940 makes the Commission responsible for administering and enforcing the Interstate Commerce Act in such a manner as to achieve the broad objectives which Congress has defined in the National Transportation Policy. This responsibility is one which Congress has assigned to the Commission alone and the Act obviously permits the Commission to take the initiative in meeting national transportation problems. Yet the Commission has consistently failed to discharge this responsibility and consequently it has had to be assumed by other agencies.

It is, thus, only because the ICC chooses to interpret its powers in such a narrow

DR. MORGAN:

sion's powers unduly, but a change in the law similar to that provided in the Emergency Railroad Transportation Act of 1933 (setting aside the antitrust laws) would have been necessary for it to have done comparable work. The Coordinator's studies of means of effecting improvement and reduction of waste in rail freight and passenger service and operations could have been made by the Commission, with the aid of outside specialists. On the other hand, it would have been beyond its powers, inappropriate, and fatal from the viewpoint of "viability" for the Commission to have made a study comparable with the Coordinator's treatment of public aids, Government ownership, comparative labor standards, and other labor matters in rail, motor, and other forms of transportation. This analysis of the Federal Coordinator of Transportation generally applies to the 1940 Board of Investigation and Research, whose record was not impressive. The fact that the Committee of Three for Immediate Relief for the Railroads was set up by the President caused its recommendations, of a kind which could have been made in the ICC's *Annual Report*, to be of greater interest than ordinarily. And the Committee of Six covered work which in part was foreign to the Commission's field. As Prof. Huntington makes much of the National Transportation Policy (which he construes too broadly), it should be noted that three of the special organizations mentioned above were created before 1940 and one was created at the time the Policy was enacted in 1940.

On the positive side, the Commission has exerted an immense amount of leadership and initiative in the years in which it is supposed to have fallen ill of "marasmus." For example: a substantially complete national uniformity of class rates and a national freight classification; the Commission's far-reaching and violently attacked decision to do away with undesirable leasing practices in motor transportation; its work in bringing about a reduction of railroad funded debt and fixed charges through reorganizations and otherwise and in requiring competitive bidding in the sale of railroad securities; its vital contributions to the national defense and to rail and motor safety; its development of cost and waybill analyses; its handling of

PROF. HUNTINGTON:

and negative fashion that it is unable to act effectively in transportation policy development. This Commission negativism is in itself, of course, an indication of the low viability of the Commission. An agency with high viability is always alert to new needs and to the opportunities to develop and extend its responsibilities.

DR. MORGAN:

the very controversial and important question of adequate compensation for rail carriage of the mail; its many legislative recommendations and its appearances before congressional committees to defend its recommendations and to oppose what it deemed undesirable legislation, such as the "quick-increase" bill and the modification of Section 15(1) proposed by the railroads; and its frank discussion in its annual reports of many important and timely problems. This partial list, when viewed against the Commission's daily workload, is an impressive indication that the Commission has continued to show "alertness to new needs" and willingness and ability, within the limits of obtainable funds, to grapple with problems, including some involving matters over which the Commission has no jurisdiction but which affect its work.

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