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# Legislation and Administration: Branch Banking -- Restrictive State Laws Considered in Light of the Public Interest -- Extention of National Power Over Banking

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## LEGISLATION AND ADMINISTRATION

BRANCH BANKING — RESTRICTIVE STATE LAWS CONSIDERED IN LIGHT OF THE PUBLIC INTEREST — EXTENSION OF NATIONAL POWER OVER BANKING. — “It is perfectly clear that [restrictive bank branching] laws show little regard for the public interest, that they are designed to protect the selfish interests of the less energetic or competent segments of the industry which cannot abide the prospect of competition. It is unfortunate that such laws do not meet the economic needs of the people and of the industries, but serve instead the determined opposition of parochial interests.”<sup>1</sup> These were the words of John J. Saxon, Comptroller of the Currency, in his decision of March, 1962, denying the merger of the Bank of Livonia and the National Bank of Detroit.

Then on September 24, 1962, addressing the American Bankers Association convention, Comptroller Saxon declared further that the power of states to regulate or prohibit branch banking hobbles competition, protects local monopolies, and threatens rather than strengthens the dual banking system.<sup>2</sup> Mr. Saxon's remarks, a calculated departure from his prepared text, presented an issue vigorously opposed by many of the bankers in the audience.<sup>3</sup>

At a time when the chief problem confronting the commercial banking system is the encroachment of competing nonbank intermediaries,<sup>4</sup> bankers adamantly oppose the one method of external expansion<sup>5</sup> most adaptable for their use in this competitive struggle.<sup>6</sup> Challenging the banks are insurance companies, savings and loan associations and mutual savings associations all of which can offer depositors more attractive returns on investments. The lack of strict regulations controlling their supply of money permits such establishments to bid on larger, more secure, and more profitable investment offerings.<sup>7</sup>

On the other hand, state and federal agencies strictly regulate the bank's discount rates and the interest rates payable to savers, both of which, in turn, determine to a large extent the amount of funds available to a bank.<sup>8</sup> Only by investing funds at attractive rates can banks cover expenses and remain financially stable.<sup>9</sup> Since the commercial banking system operates at greater efficiency when its money supply is expanding,<sup>10</sup> the more funds available for investment, the more stable a bank's position.

The prominence of branch banking as a means of expansion can be more clearly perceived by first placing it in the historical context of banking regulation,

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1 Merger of Bank of Livonia and National Bank of Detroit, 30 U.S.L. WEEK 2461, 2462 (U.S. Mar. 27, 1962).

2 Chicago Daily Tribune, Sept. 25, 1962, Sports-Business, p. 5, col. 1. Mr. Saxon's remarks were made a week after a 24-man committee submitted a set of 84 recommended changes for national banking laws and regulations; New York Times, Sept. 25, 1962, p. 49, col. 1.

3 Wall Street Journal, Sept. 27, 1962, p. 11, col. 1. Two days after Mr. Saxon spoke, the convention delegates adopted a resolution formalizing their opposition to any extension of national bank branching power.

4 Robertson, *Commercial Bank Growth Requires Important Changes*, The Commercial and Financial Chronicle, March 23, 1961, p. 12, col. 3.

5 Other methods generally include the chartering of new banks, the establishment of affiliate or satellite banks, holding company operations, and mergers. Chicago Daily Tribune, *supra* note 2, col. 2.

6 Accord *Branch, Chain and Group Banking*, 48 HARV. L. REV. 659 (1935).

7 Robertson, *supra* note 4, col. 4.

8 See generally *Bank Charter, Branching, Holding Company and Merger Laws: Competition Frustrated*, 71 YALE L. J. 502 (1926). “Since banks need sufficient deposits to maintain revenue-producing loan volume, each bank must offer depositors advantages at least as favorable as those provided by the other banks so that funds will not be attracted away.” The same reasoning applies to advantages offered by other types of financial institutions.

9 *Id.* at 503.

10 Robertson, *supra* note 4, col. 3.

then examining its purported evils in light of contemporary financial problems and investment requirements, and lastly, considering how the extension of national bank branching power is viewed as an important factor in American economic development. To such endeavor this article addresses itself.

### I. *The Historical Background of Branch Banking*

Shortly after the American Revolutionary War, some of the several states chartered banks so that by 1792 there were nine state banks in operation throughout the whole of the new nation.<sup>11</sup> At this time the Bank of the United States was established by federal charter and through an initial four branches began competing with the state banks.<sup>12</sup> In 1811, the Bank of the United States "failed of recharter for political and picayune reason;" nonetheless this first experiment in branch banking in the United States was quite successful.<sup>13</sup> As a consequence, when the Second Bank of the United States was established in 1816, it was able to operate with as many as 25 branches at one time.<sup>14</sup> However, the Bank was faced with continual constitutional criticism, until, during the third year of its existence, Chief Justice John Marshall set this legal controversy to rest by declaring in *McCulloch v. State of Maryland*: "[T]he act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land."<sup>15</sup> Thereafter the Bank prospered, became a "decided success, and served the country in an enviable manner."<sup>16</sup> But, in 1828 President Andrew Jackson manifested traces of hostilities which were soon to lead to a declaration of war against the Bank and its directors. With two successive blows he rang his opposition's death knell. The year 1832 recorded the President's veto of the bill for recharter, and the year of 1833 witnessed the removal of all federal deposits from the Bank under the order of Secretary of the Treasury Taney. Thereafter, "it became a political football until its demise in 1836."<sup>17</sup> However none of the attacks were "directed at the fact that it was a branch bank."<sup>18</sup>

In the meantime, the number of state-chartered banks continued to increase despite this competition. For instance, in 1816 there were 246 state banks, and in 1830 there were 330.<sup>19</sup> Many states also recognized the usefulness of branch banking, especially in Virginia, where branch banking was a successful experiment.<sup>20</sup> An analysis by George T. Starnes indicates:

The adoption in Virginia of the branch feature of the Scotch system was due, in part, to the lack of sufficient capital at any one place for the establishment of a bank. Each of the many small towns was anxious for banking accommodations, but none had sufficient capital to support an independent bank. As a result of this shortage of capital the branch system was regarded as the best method for collecting the scattered capital of the

11 CHAPMAN AND WESTERFIELD, *BRANCH BANKING* 27 (1942). The nine state banks then operating were: Bank of Massachusetts, Union Bank of Boston, Maryland Bank, Bank of North America, Bank of New York, Bank of Providence, Bank of Albany, Hartford Bank, and Bank of South Carolina.

12 *Id.* at 26. Branches were opened in New York, Boston, Baltimore and Charleston. By 1804 four others were established in Norfolk, Savannah, Washington and New Orleans.

13 *Id.* at 29. The defeat was registered by votes of 65 to 64 in the House and 18 to 17 in the Senate, the Vice-President voting to break the tie.

14 *Id.* at 30-31.

15 4 Wheat. 316, 424 (U.S. 1819). "But there is no phrase in the instrument (the constitution) which, like the articles of confederation, excludes incidental or implied powers." *Id.* at 406. "Let the end be legitimate, let it be within the scope of the constitution and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution are constitutional." *Id.* at 421. State regulation of banks was held valid as an exercise of the police power in *Noble State Bank v. Haskell*, 219 U.S. 104 (1911). Cf. generally *Munn v. Illinois*, 94 U.S. 114 (1875).

16 CHAPMAN AND WESTERFIELD, *BRANCH BANKING* 35 (1942).

17 *Ibid.*

18 *Id.* at 36.

19 *Id.* at 33.

20 *Id.* at 38.

State, with the idea of serving most efficiently the greatest number of people. It gave to the outlying agricultural districts more capital and led to her more rapid development.<sup>21</sup>

When the Second Bank of the United States closed in 1836 there were 421 state banks operating 146 branches, and these numbers increased somewhat irregularly so that by 1861 there were 1253 banks with state charters operating 174 branches.<sup>22</sup>

During the Civil War, mounting political and economic pressures called for the establishment of a federal banking system. But, Congress required the strong prompting of Secretary of the Treasury, Salmon P. Chase,<sup>23</sup> before it passed the National Bank Act of 1863<sup>24</sup> — the legal genesis of the present federal system.<sup>25</sup> Although further pressures were exerted to eliminate all state banks and pre-empt the field with the national bank,<sup>26</sup> the final version of the act omitted such provisions. This meant that under the 1863 legislation a federal-state duality was created and that commercial banking service in the United States would be provided mainly by institutions operating under charters and regulations issued by "either a state (as previously) or the Federal Government."<sup>27</sup>

In 1875, the Supreme Court made reference to the constitutionality of the Act and defined the lines of state control over national banks in *Farmers' and Mechanics' National Bank v. Dearing*:

The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of public service. . . .

[T]he States can exercise no control over them, nor in any wise affect their operation except insofar as Congress may see proper to permit.

The power to create carries with it the power to preserve.<sup>28</sup>

States, therefore, continued to regulate their own branch banks, leaving the question of national bank branches to Congress.

Whereas the earlier Banks of the United States had been authorized to, and did, operate branches,<sup>29</sup> silence in the National Bank Act, coupled with the absence of any strong desire to establish branches resulted in no federal branches and fewer than 200 state branches operating in 1900.<sup>30</sup> As the need for bank facilities grew, the managers of national banks felt restricted by their inability to expand and satisfy the demand for their services. Attempting to overcome this obstacle, one national bank established a branch in Missouri, a state with a statute expressly forbidding branching. The supposed basis for such action was contended to be the implied power of a national bank to establish branches as necessary and incidental to carry on the business for which it was established. However, in *First National Bank v. Missouri*, the Supreme Court construed the National Bank Act literally, holding that the phrase "an office" meant "one office" and thus expressly prohibited branches.<sup>31</sup> This conclusion destroyed any hope for implied branching power. The Court further held the state statute prohibiting branch banks to be validly applied to national banks, "as it does not frustrate the purpose for which

21 STARNES, SIXTY YEARS OF BRANCH BANKING IN VIRGINIA 28 (1931). Also in 36 JOUR. POL. ECON. 480 (1926).

22 CHAPMAN AND WESTERFIELD, *supra* note 16, p. 48.

23 FLUGEL AND FAULKNER, READINGS IN THE ECONOMIC AND SOCIAL HISTORY OF THE UNITED STATES 467 (1929).

24 12 Stat. 665 (1863).

25 The National Bank Act was passed on February 25, 1863, but was replaced and superseded by the act of June 3, 1864, the purpose being the elimination of certain defects. The latter act, 13 Stat. 99 (1864), is referred to in the current 12 U.S.C. § 38 (1958). 12 U.S.C. § 39 adverts to the former.

26 FLUGEL AND FAULKNER, *supra* note 23. Among others, Secretary Chase favored the abolition of state banks.

27 *Commercial Banking Bakes a Cake*, Banking, April, 1962, p. 43, col. 1.

28 91 U.S. 29, 33-34 (1875). [Emphasis added.]

29 Fordham, *Branch Banks as Separate Entities*, 31 COLUM. L. REV. 975, 976 (1931).

30 SOUTHWORTH, BRANCH BANKING IN THE UNITED STATES 22 (1928).

31 263 U.S. 640, 657 (1923).

the bank was created, or interfere with the discharge of its duties to the government, or impair its efficiency as a federal agency."<sup>32</sup>

The only national branches permitted to operate were those in existence when a bank (by exchanging its state charter for a national one) entered the federal system.<sup>33</sup> In answer to this problem, the McFadden Act was passed in 1927, to modify the situation by enabling national banks to branch citywide wherever state banks were accorded similar power.<sup>34</sup> Within 30 months, the number of branches operated by national banks increased from 406 to 993.<sup>35</sup>

The next significant enactment was the Banking Act of 1933.<sup>36</sup> Through the provisions of this Act, Congress exercised its power to permit state control over banking by admeasuring the branching power of national banks according to state law.<sup>37</sup> During the course of deliberations on the bill, statewide federal branching power was proposed, but eventually abandoned. "The one outstanding objection to the proposal was characterized by the committee chairman as founded upon a view of the opponents that it would constitute an invasion of the sovereign rights of the states for the Federal government to establish within their borders a species of banking not sanctioned by the local policy."<sup>38</sup> As finally adopted, the 1933 Act was intended to place both state and national banking systems upon an equal competitive plane.<sup>39</sup> Subsequent minor amendments to the Act in 1935, 1952 and 1962 further developed the policy of treating national and state banks as coequal.<sup>40</sup>

This admeasuring of national bank branching power focused attention on the several state branch banking laws. Only nine states had permitted statewide branching in 1925, but this number nearly doubled by 1935; the number of states allowing some form of branching less than statewide rose correspondingly from nine to thirteen.<sup>41</sup> At present, 16 states and the District of Columbia affirmatively authorize statewide branching,<sup>42</sup> and 14 permit some lesser degree of branching.<sup>43</sup> Branch banking is expressly prohibited in 17 states,<sup>44</sup> while the New Hampshire, Oklahoma,

32 *Id.* at 659. The court continued: "This conclusion would seem to be self-evident, but if warrant for it be needed, it sufficiently lies in the fact that national banking associations have gone on for more than half a century without branches and upon the theory of an absence of authority to establish them."

33 13 Stat. 484 (1865).

34 40 Stat. 1224 (1927), amending REV. STAT. § 5155 (1875). "(c) A national banking association may . . . establish and operate new branches within the limits of the city, town or village in which said association is situated if such establishment and operations are at the time permitted to state banks by the laws of the state in question." However, the act went on to make its branching provisions inapplicable where populations were less than 25,000.

35 Vol. FED. RES. BULL. 15 (1929).

36 48 Stat. 162 (1933). Entitled "an act to provide for the safer and more effective use of the assets of banks, to regulate interbank control, to prevent the undue diversion of funds into speculative operations, and for other purposes."

37 12 U.S.C. § 36(c) (1958).

38 37 OPS. ATT'Y GEN. 326 (U.S. 1933). "Objections actually voiced by individual members were of such import and indicated a view that most states did not permit branch banking." *Id.* at 327.

39 *Rushton v. Michigan National Bank*, 298 Mich. 417, 299 N.W. 129, 134 (1941).

40 For the 1935 and 1942 changes, see "Amendments," 12 U.S.C. § 36 (1958) at p. 1879; and for the 1962 modification, see Priv. L. No. 87, ch. 721, 76 Stat. 667 (1962).

41 *Branch, Chain and Group Banking*, 48 HARV. L. REV. 659, 660 (1935).

42 *Infra* notes 54 and 77-82. D.C. CODE ANN. § 26-103 (1961). (Approval and consent of the Comptroller.)

43 *Infra* notes 61, 62, 64, 69, and 70.

44 ALA. CODE tit. 5 § 125 (1958) (provision is made for local application though); ALASKA COMP. LAWS ANN. § 34-1-8 (1953) (statute permitting branches within 100 miles of the home office was repealed, effective May 1, 1959); ARK. STAT. ANN. § 67-319 (Supp. 1961) (countywide branching repealed in 1961); COLO. REV. STAT. ANN. § 14-1-63 (1953); FLA. STAT. ANN. § 659.06 (Supp. 1961) (only one place of doing business); ILL. ANN. STAT. ch. 16½, § 106 (Smith-Hurd Supp. 1961) (provision for no more than one banking house adopted at Nov., 1956 referendum election); IA. CODE ANN. § 528.51 (Supp. 1961); KAN. GEN. STAT. ANN. ch. 9, § 1111 (Supp. 1961) (unlawful to establish any branch); MINN. STAT. ANN. § 48.34 (1945); MO. STAT. ANN. § 362.105(1) (1949) (nowhere except its own banking

and Wyoming statutes are silent on the matter. However, it is interesting to note that of those states prohibiting branching, five allow "tellers' windows" at some point removed from the principal location.<sup>45</sup>

The thirty legislatures which permit some form of branching impliedly affirm that branching is in the public interest, at least to the extent that they allow, rather than absolutely prohibit, branching, and seek to regulate it as an exercise of their police power. As an example, Utah proclaims that "it is hereby declared to be in the public interest to validate, confirm and authorize . . . branches. . ."<sup>46</sup> On the other hand, states which expressly deny branching power also deny the possibility of any service to the public interest in these facilities. This article considers then the advantages, disadvantages and regulation of branch banking.

## II. *The Case for Extending Bank Branching Powers*

When contemplating any extension of branching power a legislature faces the problem of weighing the relevant factors. Proponents of the measure would point to practical considerations of public convenience and the economic advantages of growth and development. On the other side, the strongest reasons marshalled against such extension would be, first, that branches prevent adequate supervision and hence reduce safety, and secondly, that parent banks could acquire a concentration of financial resources which, in turn, would force other bankers to forego their independence.<sup>47</sup> The following discussion will analyze these objections, indicating how the first can be effectively regulated, and then showing where the concentration of resources effected through widespread branching recognizes and furthers the public interest to a greater extent than limited branching or the unit banking system.

### A. *Supervision*

Concern for effective supervision and control through examination by public officials is justifiable. For present purposes, an understanding of the problem can be simplified by concentrating on the reason for examination—the primary concern being prevention of a bank failure. Banking, being "an industry affected with public interest,"<sup>48</sup> falls within the regulation of government as a valid exercise of the police power.<sup>49</sup> In 1934 the Supreme Court declared that "the power to compel, beforehand, cooperation and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to

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house); MONT. REV. CODES ANN. § 5-1028 (1947); NEB. REV. STAT. § 8-1, 105 (Supp. 1961); N.D. CENTURY CODE ANN. § 6-03-14 (1959) ("This section shall not be construed as committing this state in any manner to a policy of branch banking."); PA. STAT. ANN. tit. 7, § 302.304 (1939); TEX. REV. CIVIL STAT. art. 342-903 (Supp. 1962) (no bank shall engage in business in more than one place); W. VA. CODE ANN. § 3131 (1961); WIS. STAT. ANN. § 221.04(f) (Supp. 1962) (no more than one office of deposit or discount; bank station allowed in any town completely surrounded by outlying waters with no bank in such town).

45 Statutes in Arkansas, Iowa, Kansas, Missouri, Nebraska and North Dakota permit "Tellers' windows" or "paying and receiving stations" at some place removed from the bank's main location. E.g., KAN. GEN. STAT. ANN. ch. 9, § 1111 (Supp. 1961): ". . . teller office . . . located within 2600 feet of the premises specified as its place of business . . . that the services of such teller office be limited to receiving deposits of every kind and nature, cashing checks or orders to pay, issuing exchange, and receiving payments payable at the bank." The Missouri Statute sets out the limited purpose of such provisions: "It is in the public interest that banking institutions be permitted to provide convenient banking service for the large proportion of people who must come to their banks by automobile." MO. STAT. ANN. § 362.107 (Supp. 1961).

46 UTAH CODE ANN. § 7-3-6.1 (Supp. 1961).

47 6 U. CHI. L. REV. 688 (1939).

48 Harfield, *Legal Restraints on Expanding Banking Facilities, Competition and the Public Interest*, 14 BUS. LAW. 1016, 1020 (1959).

49 *Nebbia v. New York*, 291 U.S. 502, 525-26 (1934).

the end."<sup>50</sup> This statement indicates the proper ends, and validates legislative regulation rather than unrestricted competition as the means to that goal.<sup>51</sup> Periodic or surprise examinations by the banking agencies represent the tool by which control is effected. To ascertain effective methods of control, one need only analyze the various state statutes which authorize branch banking.

Invariably, the primary requirement for the establishment of branch facilities, concerns maintenance of some fixed sum, as unimpaired or paid-up capital. California, for instance, provides in its Financial Code:

Before opening a branch office a bank or trust company shall have and shall thereafter maintain as long as the branch is operated, for each branch so opened paid-up capital in addition to the paid-up capital required by Chapter 3 of this division, equal to the following:

(a) If the branch office will be located in the city in which the head office of the bank is located or in a city in which the bank has already established a branch office, fifty thousand dollars (\$50,000).

(b) If the branch office is to be located elsewhere, the amount required by Chapter 3 of this division to open a new bank in the place in which the branch will be located, exclusive of the amount required for a trust department.

(c) If the branch is to engage in no other banking business than the trust business, fifty thousand dollars (\$50,000).<sup>52</sup>

The Connecticut requirement is somewhat stiffer, insisting that a state bank or trust company have "a combined capital and surplus of not less than one million dollars."<sup>53</sup>

Some states then add provisions denying access to a political subdivision wherein a bank already exists, be it village, city or county. Therefore, while generally providing for statewide branching, the states of Connecticut, Idaho, Louisiana, Oregon, South Dakota, Utah and Washington, by imposing additional restrictions, in effect prohibit the operation of branches in any political subdivision where a state or national bank is already located.<sup>54</sup> However, the four states of Connecticut, Idaho, Oregon and Washington grant an exception where the branch shall be acquired through the taking-over of an existing bank. And yet, there are further qualifications in these *build-it-up*, *tear-it-down*, and *rebuild-it* type statutes. First, Oregon applies its prohibition only to a "city, town, village or community of less than 50,000 population."<sup>55</sup> Connecticut and Washington give consideration to home office locations. Respectively, the former excludes branches only where another bank has its "main office,"<sup>56</sup> and the latter permits branches in a bank's own home office location regardless of another bank's presence.<sup>57</sup> To go outside the city or town in which the bank or trust company has its "principal place of business," the state of Washington requires that bank or trust company to "[take over or acquire] an existing bank, trust company or national banking association or the branch of any bank, trust company or national banking association operating in such city or town."<sup>58</sup>

Instead of granting statewide branching and then making exceptions, other legislatures take an opposite approach, enacting a law which prohibits branching

50 *Noble State Bank v. Haskell*, 219 U.S. 104, 112 (1911).

51 See generally Berle, *Banking Under the Anti-Trust Laws*, 49 COLUM. L. REV. 589 (1949).

52 CAL. FIN. CODE § 502 (1955). Concerning the amount required by Chapter 3, "Organization of Banks," CAL. FIN. CODE §§ 380, 381 and 382 establish "minimum paid-up capital" amounts which increase according to the population of the city of location.

53 CONN. GEN. STAT. REV. §§ 36-59 (1958).

54 CONN. GEN. STAT. REV. §§ 36-59 (1958); IDAHO CODE ANN. § 26-1001 (Supp. 1961); LA. REV. STAT. ANN. § 6:54 (1950); ORE. REV. STAT. § 714-050 (1961); S.D. CODE § 6.0402 (Supp. 1960); UTAH CODE ANN. § 7-3-6 (Supp. 1961); WASH. REV. CODE ANN. § 40.020 (1961).

55 ORE. REV. STAT. § 714.050 (1961).

56 CONN. GEN. STAT. REV. §§ 36-59 (1958).

57 WASH. REV. CODE § 30.40.020 (1961).

58 *Ibid.*

but then draws affirmative exceptions. These statutes permit a bank only to establish branches citywide, countywide or within some otherwise defined area. There are two states authorizing citywide branching—Georgia and New York. The Georgia statute, manifesting a legislative intent “to keep banking units from expanding into territories beyond their municipal corporate limits,”<sup>59</sup> allows a parent bank or a branch bank in existence before 1920<sup>60</sup> to “establish and operate a bank facility or facilities within the incorporated limits of the municipal corporation in which said parent bank or branch bank is situated.”<sup>61</sup> The New York law, after denying a bank or trust company the right to transact its business anywhere other than the place of its principal office, permits branching within that city or unincorporated village, if the population exceeds 30,000.<sup>62</sup> This 1961 law further expands the exception by permitting, de facto, the home office banks of New York City to branch into adjoining counties and allowing the banks of these counties to reciprocate:

[A] bank or trust company may open and occupy a branch office or branch offices in any city or village located in the banking district in which is located its principal office, provided, however, that a bank or trust company with its principal office in a city with a population of more than one million may open and occupy one or more branch offices in any county adjoining such city if such county has a population of more than seven hundred thousand; and further, provided, however, that any bank or trust company whose principal office is located in a county with a population of more than seven hundred thousand and which county adjoins a city with a population of more than one million may open and occupy one or more branch offices in such adjoining city whether or not such city is located entirely within one banking district. . . .<sup>63</sup>

Eight other states, Indiana, Massachusetts, Michigan, New Jersey, New Mexico, Ohio, Tennessee and Virginia, have statutes which basically grant countywide branching.<sup>64</sup> Yet, some of these have clauses which modify their broad license. Michigan, for example, permits a bank to

establish and operate a branch or branches within a village or city other than that in which it was originally chartered: Provided, That the village or city . . . is located in the same county in which the parent bank has its principal office or, if not in said county, then within 25 miles of said parent bank or in a contiguous county at a point more than 25 miles from the parent bank, if such county has no bank: Provided further, That no such branch shall be established in a city or village in which a state or national bank or branch thereof is then in operation.<sup>65</sup>

Indiana has devised an arrangement based on county and city population figures, with the added restriction of at least one mile distance to any existing bank or trust company.<sup>66</sup> New Jersey allows branching only “when each proposed branch will be established in a municipality in which no banking institution has its principal

59 Ga. Acts 1960, § 1 (“Legislative Intent”) at 67.

60 Prior to 1920 banks were permitted to operate branch facilities statewide, but from 1920 until the present law was passed in 1960, no new branch facilities were permitted.

61 GA. CODE § 13-203.1 (b) (Supp. 1961).

62 N.Y. BANKING LAWS § 105 (Supp. 1962).

63 *Id.*, § 105 (b).

64 IND. STAT. ANN. § 18-1707 (Supp. 1962); MASS. GEN. LAWS ANN. ch. 168 § 5 (1959); MICH. STAT. ANN. § 23.762 (1957); N.J. REV. STAT. § 17:9A-19 (Supp. 1961); N.M. STAT. ANN. § 48-2-17 (1953) (branch can be in the same county, or in a contiguous county or within 100 miles, if no bank is in that county under these last two standards); OHIO REV. CODE ANN. § 1103.09 (Page 1954) (“in other parts of the county”); TENN. CODE ANN. § 45-211 (1956) (no place other than the county wherein its principal office is located); VA. CODE ANN. § 6-26 (Supp. 1962) (city, town or county in which the parent bank is located, elsewhere only merger).

65 MICH. STAT. ANN. § 23.762 (1957).

66 IND. STAT. ANN. § 18-1707 (Supp. 1962). The “one mile” phrase has been interpreted to operate only between a branch and another bank’s main office, and not between branches of different banks. 47 OPS. ATT’Y GEN. 186 (Ind. 1950).



office or branch office;"<sup>67</sup> the Massachusetts statute is to the same effect.<sup>68</sup>

Kentucky, Maine and Mississippi circumscribe a somewhat larger area in which branches may be established by permitting such operations in contiguous counties as well as in the county which contains the bank's main office. However, Kentucky extends this power only to adjacent counties "in which there is no existing bank;" and Mississippi sets limits of a maximum 100-mile radius and of 15 branch banks, coupled with an exclusion from towns or cities of less than 3,100 population.<sup>69</sup> And finally, Hawaii enforces a hybrid arrangement whereby districts are established through the designation of certain Honolulu streets as boundaries, and then limiting banks to no more than three branches per district.<sup>70</sup>

These additional restrictions were the type of regulation referred to by John J. Saxon as hobbling competition and protecting local monopoly.<sup>71</sup> A single, weak bank lends little to the support of a community, but the establishment of a strong branch or the consolidation of two weak competitive branches often profits a community.<sup>72</sup> Towns which could reasonably expect industrial location or expansion find this development retarded by absence of sufficient investment resources in their area. Requested to approve a merger which would violate the Michigan branch bank law, the Comptroller declared in the recent *Bank of Livonia* ruling that his hands were tied by a law which shows little regard for the public interest.<sup>73</sup> "What public purpose is served by a law which prevents competitive offices of other banks in an area of 36 square miles with a population in excess of 70,000, which is an integral part of a single metropolitan area?"<sup>74</sup> In view of the potential of that community and the lack of competitive facilities, Mr. Saxon stated that he would have no hesitancy in approving a charter application "for a national bank which would be well managed, adequately capitalized, and backed by strong local interests."<sup>75</sup>

But, newly chartered banks require capital of ½ million to 1½ million dollars, where, as Mr. Saxon contends, branch facilities could meet the need with an investment of only \$75,000 to \$100,000.<sup>76</sup> It seems obvious, then, that unrealistic restrictions retard expansion. Some states, rather than imposing restrictions beyond capital requirements, recognize the public interest and allow for branching in broad, general terms, thus permitting the banking agency an opportunity to evaluate all the circumstances attendant to a branch application without being circumscribed by arbitrary limitations. The criteria they have established refer to: "the public convenience and advantage,"<sup>77</sup> or "that the public convenience will be served,"<sup>78</sup> or that there is "reasonable public demand,"<sup>79</sup> or that the branch "will promote the general good of the state,"<sup>80</sup> or, as in South Carolina, the state board must determine that a "branch bank will serve the public interest, taking into consideration local circumstances and conditions at the place where such . . . branch bank proposes to

67 N.J. REV. STAT. § 17:9A-19(B)(3) (Supp. 1961).

68 MASS. GEN. LAWS ANN. ch. 168, § 5 (1959).

69 KY. REV. STAT. § 287.180 (2) (Supp. 1962); ME. REV. STAT. ANN. ch. 59, § 19-C (Supp. 1961); MISS. CODE ANN. § 5228-5229 (1942).

70 HAWAII REV. LAWS ch. 178, § 39 (Supp. 1960).

71 Chicago Daily Tribune, Sept. 25, 1962, Sports-Business, p. 5, col. 1.

72 Gruis, *Anti-Trust Laws and Their Application to Banking*, 24 GEO. WASH. L. REV. 89, 105 (1955).

73 Merger of Bank of Livonia and National Bank of Detroit, 30 U.S.L. WEEK 2461, 2462 (U.S. Mar. 27, 1962).

74 *Ibid.* "This case furnishes almost as effective an illustration as could be imagined of the lack of economic basis and economic justification for many of the restrictive bank laws."

75 *Ibid.*

76 Chicago Daily Tribune, *supra* note 71, col. 2.

77 ARIZ. REV. STAT. ANN. § 6-223 (1956); CAL. FIN. CODE § 504 (1955); R.I. GEN. LAWS ANN. § 19-1-13 (1956).

78 DEL. CODE ANN. tit. 5, § 770 (1953).

79 N.C. GEN. STAT. § 53-62 (1960).

80 VT. STAT. ANN. tit. 8, § 501 (1958).

do business."<sup>81</sup> Without explicitly referring to the public interest, Maryland only requires capital stock graduated by population as a safety measure and Nevada merely specifies that "the written consent of the superintendent" be obtained.<sup>82</sup>

Once regulations sufficient to implement a criterion of the type just indicated could be promulgated, control would devolve to systematic inspections in determining that a liquid position continues. Still, examinations require manpower, and, since some states complain of currently understaffed banking agencies, any expansion of banking facilities might seriously aggravate the condition. The problem of examination fees, however, received consideration as early as 1911, when the Supreme Court declared: "[I]t has been held that inspections may be required and the cost thrown on the bank."<sup>83</sup>

Today, state banking agencies charge examination fees to a bank, generally based on the bank's capital irrespective of the time involved or the difficulties encountered.<sup>84</sup> Adjusting the rates to reflect these considerations would tend to serve a twofold purpose: to encourage proper accounting, and to allow an agency to maintain an adequate staff. While inspection may be difficult, it is neither impossible nor impractical. Such recognition leads to the conclusion that adequate control can be maintained through regulations similar to those employed in a majority of the states, and supervision can be effectuated through use of realistic examination systems.

### B. Concentration of Resources

Since communities seeking to develop their fullest potential look to financial institutions for resources, the inquiry here revolves around the merits of both single location unit banking and branch banking as sources of these funds. An institution which is slow in responding to demands for growth hinders the development of those dependent upon it. Difficulties in raising capital and in obtaining new charters inherently plague the unit bank system and cause it to react sluggishly when industry expands or when population shifts occur.<sup>85</sup> Furthermore, conservative lending policies explain a finding that small banks and unit banks place a smaller percentage of their assets in the lending market than do branch banks of comparable size.<sup>86</sup> To a greater extent than in a unit system of independent bankers, branches provide an area with a concentration of resources. The large unit banks continue to press for branching power, arguing that their single, central location leaves them remote from their customers as industry and population ebb to outlying areas.<sup>87</sup> They hasten to add that there is business where they want to go.<sup>88</sup>

The weaknesses of the unit system, however, are strong points for branch banking. As opposed to the single location of a large city unit bank, the branch system offers about four times as many offices,<sup>89</sup> and logically greater convenience to the public. At the same time, judging from data over the past twenty-one years, the public interest in safety and stability is not sacrificed. Analyzing he reasons behind the extremely low average rate of only four bank suspensions per year since 1941, John T. Masten, professor of Economics at the University of Kentucky, concludes that a contributing factor is the increasing concentration of banking brought about

81 S.C. CODE § 8-57 (Supp. 1960).

82 MD. ANN. CODE art. 11, § 28 (1957); NEV. REV. STAT. § 660.010 (1961).

83 Noble State Bank v. Haskell, 219 U.S. 104, 112 (1911).

84 E.g., ILL. ANN. STAT. ch. 16½, § 148 (3) (Smith-Hurd Supp. 1961).

85 Schweiger and McGee, *Chicago Banking*, 34 JOURNAL OF BUSINESS 203, 209 (1961).

86 *Id.* "Small banks had lesser average ratios of loans to capital funds than larger banks. If bank capital is a scarce commodity, volume of bank loans will tend to be reduced by a banking structure which places the limited supply of capital funds in institutions of smaller average size. For banks comparable as to capital and deposits, branch banks tended to lend more than unit banks."

87 *Branch Banking? The Debate Continues*, Banking, July, 1961, p. 14.

88 Harfield, *supra* note 48.

89 Schweiger and McGee, *supra* note 85.

through branching.<sup>90</sup> California, a state with branch banking and booming industrial expansion, finds even its smaller institutions happily stable.<sup>91</sup>

Yet other advantages are that since information relating to the parent bank is already available in the agency's files, branch applications can be processed more quickly than new charter applications; and, as indicated previously, the capital requirements for establishing a branch are considerably less than the amount needed to charter a new bank.<sup>92</sup> Branch operating expenses likewise diminish through centralization of many duplicate functions.<sup>93</sup>

### III. Extension of National Bank Branching Power

Financial investments by banking institutions contribute an important segment of the initiative needed to encourage growth in the economy. States which ignore or otherwise restrict the public interest factor when ascertaining bank branching policies not only fail to support the forward march of the economy, but in many ways manufacture artificial criteria which inherently impede full development. As indicated previously, the statutes of the fifty states reveal almost as many differing concepts of branch banking's relation to the public interest.<sup>94</sup>

Recognizing the dissimilarity of approach employed by the states, Comptroller Saxon indicated to the Federal Reserve System Board of Governors in a letter dated January 22, 1962: "It is regrettable that the law of New York, as well as the law of many other states, artificially inhibits normal, proper, and publically beneficial growth or expansion through branching, and consequently requires undue reliance on means other than branching. . . . Unfortunately . . . the Federal law is tied to such restrictive state statutes."<sup>95</sup> A case in point is the Comptroller's March, 1962, *Bank of Livonia* ruling, portions of which have been cited herein.<sup>96</sup>

As a remedy to this situation, Mr. Saxon would urge Congress to assume the initiative by considering, developing and adopting a normative policy of extended branch banking applicable to federally chartered national banks. Continuing in his letter to the Board of Governors, Saxon added, "We believe it to be imperative that the Congress promptly be asked to amend section 36 of the National Bank Act relating to branches so as to liberalize substantially the present authority and thereby also to develop a more consistent statutory policy in respect to branching in all the states. Such action by Congress is essential in order to eliminate or mitigate the harmful effects flowing from the present law."<sup>97</sup>

Other groups also urge a similar extension of national bank branching. The Committee for Economic Development's Commission on Money and Credit studied the problem of national bank branching from the viewpoint that "all research is to be thoroughly objective in character and the approach in each instance is to be from the standpoint of the general welfare and not from that of any special political or economic group."<sup>98</sup> Their conclusion recommended that "the provisions of the National Bank Act should be revised so as to enable national banks to establish

90 Masten, *Commercial Bank Failures in a Changing Economy*, The Commercial and Financial Chronicle, July 27, 1961, p. 13.

91 Block, *California Banks: Smaller Institutions Find Their Size an Asset, Not a Liability*, Barrons, June 12, 1961, p. 13.

92 Chicago Daily Tribune, *supra* note 71.

93 "The branch is able to dispense very largely with reserve and to obtain coin and currency from the parent office as it is needed, as a result it can ordinarily satisfy its requirements with a comparatively simple vault and equipment." Such savings are referred to as "internal economies." Willis, *Branch Banking*, 1 ENCYC. Soc. Sci. 679, 681 (1930 ed.).

94 See *supra* notes 42-45.

95 American Banker, Sept. 21, 1962, p. 7, col. 2.

96 Bank of Livonia, *supra* note 73.

97 American Banker, *supra* note 95.

98 Foreword to *Report of the Commission of Money and Credit* at v. (1961). [Emphasis added.]

branches within 'trading areas' irrespective of state laws, and state laws should be revised to provide corresponding privileges to state chartered banks.<sup>99</sup>

The latter provisions for parallel extension of state laws would evidently be necessary to preserve the state-federal duality since statutory provisions provide for relatively simple procedures when converting from state to federal charters and vice versa.

More recently, the so-called Saxon committee report submitted to President Kennedy in September, 1962, included as one of its major points a finding that national banks should be allowed to set up branches within a 25 mile radius of their main office, even though state law forbids branch banking.<sup>100</sup>

Trends in banking attitudes are presently controlled by state legislatures and their erratic approach to determining what constitutes the public interest and its relation to bank branching power. The need for a single-directed policy receives logical support when it is realized that many states condemn bank branches as inimical to the public interest while, conversely, many others visualize the same public interest as served by the establishment of branches. The thinking of public welfare-minded authorities and advisory groups indicates that Congress should be encouraged to assume the initiative and meet the requirement of the public interest by expanding the scope of national bank branching power.

#### IV. Conclusion

As many as fifty five years ago, Woodrow Wilson addressed the American Bankers' Association convention of 1908 and, without recommending specific steps, pleaded that bankers locate inexpensively managed facilities near the people.<sup>101</sup> Branch banking offers a secure method of accomplishing this immediate and practical end; and, realizing that the ultimate goal is economic expansion, it appears that branch banking satisfies that end as well.

It is submitted then, that efficient branching controls are indeed possible. Effectiveness has been proven in many states. Moreover, realistic branch banking provisions of the "trading area" type indicated above would provide a more desirable stimulus to economic development than the present divergent and restrictive state statutes. This probability is evidenced by successes dating back to experiences with early state banks, notably in Virginia, and the Banks of the United States.<sup>102</sup> In order to safeguard the financial structure of a community, considerations commonly suggested include the banking commission's evaluation of financial history, integrity, adequacy of capital structure, present and future needs of the community, managerial competence, backing by strong local interests,<sup>103</sup> and the actual effect on other community financial institutions.<sup>104</sup> Restrictive state laws and the ad-measuring of national bank power by these laws have grown to the point where they may be said to impair the efficiency of the federal government in promoting

99 "A 'trading area' is defined as a geographical area that embraces the natural flow of trade from an outlying geographical territory to and from a metropolitan center. It may be state-wide, less than state-wide, or more than state-wide. The task of drawing boundaries should be delegated to an appropriate governmental agency as was done in establishing Federal Reserve districts." *Id.* at 166.

100 *The Wall Street Journal*, Sept. 21, 1962, p. 22, col. 1.

101 Shapiro, *A New Public Policy Toward Bank Expansion*, *The Commercial and Financial Chronicle*, May 4, 1961, p. 12, col. 2. Mr. Shapiro notes that the majority of bankers have not heeded this advice.

102 *Supra* notes 13, 16 and 21.

103 Provisions for backing by strong local interests are designed to alleviate objections voiced toward absentee control.

104 See generally *Report of the Commission of Money and Credit*, *supra* note 89 at 166, and Kreps and Lapkin, *Public Regulation of Funds of Commercial Bank and Thrift Institutions*, 17 *JOURNAL OF FINANCE* 289, 297 (May, 1962).

economic development.<sup>105</sup> On such grounds, Congress, exercising its valid, implied powers, would be justified in granting national banks the ability to branch irrespective of state laws. Because of liberal federal-state bank charter exchange privileges,<sup>106</sup> any extension of branching power in the National Bank Act would compel state legislatures to follow in self-defense so as to preserve their interest in the banking duality,<sup>107</sup> and more significantly, would force the states to recognize the public interest.

State laws which absolutely prohibit branches or deny them access to political subdivisions where a bank already exists preclude any determination or real competitive effect, and thus ignore the public interest. Whereas competition is the cardinal precept of unregulated industries, in an industry affected with the public interest, such as banking, regulation is quite appropriate, but should be guided by the best interests of the public.<sup>108</sup>

Gaylord A. Freeman, president of the First National Bank of Chicago, having contacted the banking supervisors of states with branch banking, reported that only one supervisor expressed even a fear of monopoly, while the remainder were of the opinion that branching was in the public interest.<sup>109</sup> There is indication, therefore, that, in an industry where the public interest remains of primary concern, emphasis should be placed on the real effects of competition and not the artificial appearance of it. The New Jersey Supreme Court recently has held:

Mere sufficiency of existing facilities in the sense of some existing banking facilities more or less appropriately located in an area and furnishing the usual gamut of services, is not in and of itself sufficient basis to deny establishment of a new institution or branch if the general economy of the area and its reasonable potential are such that there is room for a further installation without causing excessive competition with real harm to any institution or unduly affecting the banking structure at large.<sup>110</sup>

This court recognized the public interest. It is unfortunate that the same public interest which renders bank regulation lawful tends to be disregarded by legislatures when considering restrictive branching statutes.

*James A. Wysocki*

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## URBAN MASS TRANSPORTATION — THE PROBLEM AND THE PROPOSED FEDERAL LEGISLATIVE SOLUTION.

### *Introduction*

On April 5, 1962, the Kennedy Administration sent to the Congress a document entitled, "Message From The President of the United States Relative To The Transportation System of Our Nation."<sup>1</sup> The significance of this Message was immediately apparent. Transportation is the biggest single combination of economic activity in the nation, employing a sixth of our labor force and accounting for a fifth of our gross national product. The Message was also unusually comprehensive. Yet, as must be the case, the very importance of the President's message

<sup>105</sup> Recall that in *First National Bank v. Missouri*, 263 U.S. 640 the court stated that a national bank was subject to a state branch banking law because the statute did not impair the bank's efficiency as a federal agency.

<sup>106</sup> 12 U.S.C. § 214 (1958).

<sup>107</sup> Fordham, *Branch Banks as Separate Entities*, 31 COLUM. L. REV. 975, 977 (1931).

<sup>108</sup> Harfield, *Legal Restraints on Expanding Banking Facilities, Competition and the Public Interest*, 14 BUS. LAW. 1016, 1020 (1959). At page 1030, Mr. Harfield concludes that the undirected, uncertain kind of regulation with us now is a serious threat to banking, and hence to the economy.

<sup>109</sup> *Branch Banking? The Debate Continues*, *supra* note 89. Illinois does not allow branch banking, but a proposal to permit branching within 15 miles of the home office is currently being considered.

<sup>110</sup> *Howard Savings Institution of Newark v. Howell*, 159 A.2d 113, 125 (1960).

<sup>1</sup> *Message from the President Relative to the Transportation System of Our Nation*, H.R. Doc. No. 384, 87th Cong., 2d Sess. (1962).

precipitated controversy. It seems quite certain that the heat of debate, so enkindled, is not likely to be completely extinguished for many years to come.

After postulating a "Basic National Transportation Policy," the Transportation Message takes up, under separate headings, intercity transportation (Part I), urban transportation (Part II), international transportation (Part III), and labor relations and research (Part IV). The scope of this article is that of the second topic, urban transportation, the only one which was immediately followed by Senate and House bills designed to enact into law the President's proposals. The subject will be discussed in three parts: first, a statement of the problem; secondly, a description of the Administration's proposals (as they were reported from the committees); and finally, concluding remarks as to the prospects of Congressional action in the field of urban mass transportation. The impact of "politics" on the issues arising out of the urban transportation problem is discussed below only indirectly and incidentally. The Administration's proposals are here discussed because, as will be pointed out, they are the proposals which most likely will be embodied into law, if, indeed, Congress does choose to legislate on the subject.

Federal assistance in the area of mass transportation has not gone entirely unacknowledged prior to the introduction of the President's Transportation Message. In the Housing Act of 1961, Congress created three programs designed to assist communities in improving their regional transportation systems: (1) grants for mass transportation demonstration projects not to exceed \$25 million;<sup>2</sup> (2) loans, up to \$50 million, for mass transportation facilities and equipment;<sup>3</sup> and (3) grants for urban planning which may or may not involve transportation systems, a program allotted \$75 million in federal funds.<sup>4</sup> These provisions, enacted as piecemeal

2 Housing Act of 1949, § 103(b), 63 Stat. 413, 414; 42 U.S.C. 1453 (1958), as amended by the Housing Act of 1961, § 303, 75 Stat. 149, 166 (1961). This \$25 million program is based on contract authority, for which the federal grant may cover up to two-thirds the cost of projects which will assist in carrying out urban transportation plans and research. The purpose of the program is to "stimulate fresh thinking and experimental undertakings which will bring about improved service and greater efficiency in the mass transportation field." The program is dependent on initiation of demonstration projects by local agencies. It does not authorize grants for research and development, prior to testing or demonstrating of new ideas or techniques and methods. Grants under the program may not be used for long-term capital improvements, a restriction which makes many worthwhile projects ineligible. "The program thus does not provide a complete set of tools for meeting the challenging problem of developing efficient and effective mass transportation systems needed as part of a balanced and integrated transportation program in urban areas." Committee on Banking and Currency of the House of Representatives, *The Urban Mass Transportation Act of 1962*, Subcommittee Print, 87th Cong., 2d Sess. 19 (1962). As of August, 1962, 13 formal proposals had been received by the Housing Administrator, two of which had been approved. One was to the City of Detroit, in the amount of \$224,000, and the other was a grant of \$10,000 to the University of Washington for study of uses of the monorail system operating in Seattle. S. Rep. No. 1852, 87th Cong., 2d Sess. 12 (1962).

3 Housing Amendments of 1955, §§ 201-207, 69 Stat. 643, 42 U.S.C. 1492 (1958), as amended by the Housing Act of 1961, § 501, 75 Stat. 149, 173 (1961). Loans at a low interest rate may be obtained through this program for the financing of mass transportation facilities and equipment, their acquisition, construction, reconstruction, and improvement. The rate of interest is determined by a formula which reflects the cost of money to the Treasury plus administrative expenses; for fiscal 1962, it was about 3¾ per cent. Usually the requirement is made that the use to which the loan is put be part of a comprehensive mass transportation plan, but exception is made for immediate urgent needs. Activity here has been limited, one reason being the poor financial condition of many transit systems which makes it impossible for their embarking on any project of significant size. Committee on Banking and Currency of the House of Representatives, *The Urban Mass Transportation Act of 1962*, Subcommittee Print, 87th Cong., 2d Sess. 19-20 (1962); S. Rep. No. 1852, 87th Cong., 2d Sess. 13 (1962).

4 Housing Act of 1954, § 701, 68 Stat. 643, 40 U.S.C. 461 (1958), as amended by the Housing Act of 1961, § 310, 75 Stat. 149, 170 (1961). This program, one of comprehensive planning for urban areas, has specifically included transportation needs since 1961. Most planning projects receiving section 701 grants include a transportation plan as an element of a larger, comprehensive plan, although specific grants for transportation projects alone are possible. Nineteen such projects were made in the fiscal year 1962, involving total Housing Agency grants of \$4.5 million. Six of these, with total Housing Agency grants of \$0.8 million,

amendments to previous housing acts, are generally regarded as stop-gap measures and no more than barely adequate. The grant programs were designed to terminate upon expenditure of the funds appropriated, and the authority to make loan commitments expired as of December 31, 1962.

It is necessary to note that the President's proposals are not the only ones receiving consideration by the Congress. There are at the present time at least a half-dozen bills on this subject before the House and Senate. These bills range from that of Senator Willis Robertson,<sup>5</sup> which provides for an extension of the experimental mass transportation program embodied in the Housing Amendments of 1961 just mentioned, to the bond guarantee program proposed by Senator Clair Engle of California.<sup>6</sup> To repeat, the reason the discussion to follow is limited to the bills flowing from the Transportation Message is that, should any significantly new proposals receive congressional approval, they most likely will be substantially in the form proposed by President Kennedy.

### I. *The Problem in Urban Mass Transportation*

The urban mass transportation problem has its roots in a twofold phenomenon which has been at work in the United States practically since the turn of the century, and particularly since the nation's postwar adjustment in the period following 1945. The two prongs of the problem are, first, the large increase in the total population during this period and more particularly the fact that, at least in the last decade, 85 per cent of that increase has taken place in metropolitan areas.<sup>7</sup> Compounding these difficulties has been the equally significant "birth of the suburb," evidenced by the fact that of the 85 per cent of the population increase which has taken place in metropolitan areas, three-fourths of this growth occurred outside the central cities.<sup>8</sup> A related phenomenon is the spectacular rise in popularity of the automobile since World War II. The singular importance of the motor vehicle is emphasized by the following finding of the House Banking and Currency Subcommittee which studied and held hearings on the problem of mass transportation:

[T]he motor vehicle, particularly the private automobile as a wholly flexible means of transportation, has been the most powerful single influence in encouraging the dispersed and sprawling patterns of residential, commercial, and industrial development which characterize much of urban and suburban America today.<sup>9</sup>

#### A. *Distortion in the "Transit Mix"*

While the upheavals created in the wake of the concomitant growths of cities and suburbs and the increases in people and cars have had widespread and

were exclusively section 701 projects; 13, with H.A. total grants of \$3.7 million, were projects being jointly assisted by the Housing Agency and the Bureau of Public Roads. Committee on Banking and Currency of the House of Representatives, *The Urban Mass Transportation Act of 1962*, Subcommittee Print, 87th Cong., 2d Sess. 18-19 (1962); S. Rep. No. 1852, 87th Cong., 2d Sess. 12 (1962).

<sup>5</sup> See S. Rep. No. 1852, 87th Cong., 2d Sess. 28-31 (1962); 165 Cong. Rec. 18237-39 (1962). For a list of 25 similar and identical bills, see *Hearings Before Subcommittee No. 3 of the Committee on Banking and Currency of the House of Representatives on H.R. 11158*, 87th Cong., 2d Sess. 51 (1962).

<sup>6</sup> S. 2390, 87th Cong., 2d Sess. (1962). See *Hearings Before a Subcommittee of the Committee on Banking and Currency of the United States Senate on Urban Mass Transportation*, 87th Cong., 2d Sess. 3-24 (1962). An identical bill was proposed by Representative McDonough in the House. H.R. 9525, 87th Cong., 2d Sess. (1962). See *Hearings Before Subcommittee No. 3 of the Committee on Banking and Currency of the House of Representatives on H.R. 11158*, 87th Cong., 2d Sess. 51-56 (1962). The McDonough-Engle bill, with some qualification, was endorsed by Housing Administrator Robert C. Weaver as complementary to the Administration's proposals. See *Hearings on H.R. 11158, supra*, at 60-61, 81.

<sup>7</sup> Committee on Banking and Currency of the House of Representatives, *The Urban Mass Transportation Act of 1962*, Subcommittee Print, 87th Cong., 2d Sess. 17 (1962).

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

varied effects upon the contemporary scene, it is primarily one such effect which is central to the present critical situation in mass transportation. That result is the severe imbalance, or rather distortion, in what transportation experts call the "transit mix" — that relation which one mode of transportation bears to all other modes in the varying proportions at which the populace selects one over another. Americans in recent years have been turning, in overwhelming proportions, to private automobiles rather than transit facilities of the various types for transportation in and around urban areas. Thus it is, on the one hand, that over 85 per cent of urban travel is by automobile,<sup>10</sup> that the 11 per cent of our streets and highways located in metropolitan areas carry 44 per cent of the nation's road vehicular-miles,<sup>11</sup> that 29 per cent of the \$1.5 billion spent on highway projects in 1961 by federal and state governments went to 33,000 miles of city streets and expressways.<sup>12</sup> And yet, on the other hand, the number of revenue passengers carried by buses and streetcars declined by 22 per cent in the years 1956 to 1960,<sup>13</sup> in the last ten years ridership on all forms of mass transportation has declined 38 per cent,<sup>14</sup> and 211 transit companies have been sold and 152 abandoned in the United States since January 1, 1954.<sup>15</sup> These statistics demonstrate the desperate squeeze in which mass transportation systems now find themselves — declining patronage coupled with increasing capital and operating expenses causing private bus and rail carriers to increase fares, trim service, and defer maintenance and replacement, actions which simply drive away more riders and accelerate the downward spiral.

To some degree, any particular transit mix is the result of the commuter's choice, although as a use-relation among modes of transportation becomes more and more lopsided, other factors force the public's decision by sheer lack of alternatives. However, the problem is more complex and the prospects more frightening when present trends are projected into the future.

It is estimated that by 1980 the total population of the United States will reach 250 million, and an expected three out of every four persons will be living within urban areas.<sup>16</sup> At that time some 140 million people, over half of the population, will be living in 40 great urban complexes, each having a minimum population of one million yet together comprising less than two per cent of the nation's land area.<sup>17</sup> Simultaneously, the present number of 70 million registered vehicles in the United States is expected to rise to well over 115 million by 1980 — an increase of 64 per cent, with most of the increase expected to occur in the metropolitan areas.<sup>18</sup> It is this sobering prognostication which, more than anything else, has caused the great majority of the nation's mayors, city planners, and transportation experts to conclude the only solution is to invoke now a systematic redress of the over-all urban transit mix.

### *B. The Alternative to Mass Transit*

Foremost of the inferences to be drawn from these predictions is an estimation of the cost of the alternative to mass transit systems — the continued expansion and development of the nation's highway facilities. Almost universally, these costs are described as prohibitive. As of 1962, urban highway construction averaged

10 *Hearings Before Subcommittee No. 3 of the Committee on Banking and Currency of the House of Representatives on H.R. 11158*, 87th Cong., 2d Sess. 93 (1962).

11 *Id.* at 140.

12 *Id.* at 93.

13 S. Rep. No. 1852, 87th Cong., 2d Sess. 4 (1962).

14 *Hearings Before a Subcommittee of the Committee on Banking and Currency of the United States Senate on Urban Mass Transportation*, 87th Cong., 2d Sess. 55 (1962).

15 S. Rep. No. 1852, *supra* note 13, at 5.

16 *Id.* at 4.

17 *Ibid.*

18 *Senate Hearings*, *supra* note 14, at 54.



between \$5 million and \$20 million a mile in built-up areas.<sup>19</sup> For example, a 15-mile inner loop proposed for Washington, D.C., will cost \$300 million, as will a 22-mile highway along the Delaware River in Philadelphia.<sup>20</sup> Moreover, the American Municipal Association has estimated that if five of the most advanced transit systems in the country — those in New York, Chicago, Boston, Philadelphia, and Cleveland — were to lose just their rail commuter service, it would cost \$31 billion, with 30-year, 4 per cent financing, to construct the highways necessary to serve a comparable number of people.<sup>21</sup>

But construction costs are not all involved in the highway alternative to mass transit systems. Downtown parking costs are currently soaring to heights at which it is now virtually impractical for private enterprise to enter the field, at least when the structure of parking rates is to be maintained at a level considered to be attractive to the public. With the need becoming more and more pressing, city governments have seen fit to provide parking facilities on their own, often involving huge initial investments. For example, Brooklyn, New York, has constructed a \$2.46 million civic center garage providing space for 693 cars at a cost per space of about \$3,556.<sup>22</sup> Furthermore, the land space alone required for metropolitan parking facilities raises additional problems. Mayor Robert F. Wagner of New York City estimated that 250 additional acres of parking space would be required if the rail commuters from Westchester County alone were to take to the highways.<sup>23</sup>

Moreover, there are the related yet necessary costs which accompany this alternative to mass transit. Such costs are those involved in traffic safety and control,<sup>24</sup> air pollution,<sup>25</sup> relocation,<sup>26</sup> and the loss of tax revenues,<sup>27</sup> to name a few. All are significant, perhaps the last mentioned being most important, inasmuch as practically all urban dwellers are now shouldering burdensome tax levies. Also, metropolitan areas have suffered losses of investment capital where their only access is by way of concrete and asphalt. Finally, there is the related problem which many transportation specialists feel would never be completely solved by more highways — that of rush-hour traffic. There is evidence that this problem alone costs the Nation about \$5 billion a year in time and wages lost, extra fuel consumption, faster vehicle depreciation, lower downtown commercial sales, lower taxes, and the like.<sup>28</sup>

With the dangers of allowing this imbalance to enhance itself unchecked and the real need for a comprehensive, well-planned redress of the urban transit mix now clearly apparent, initiators of such programs are presently faced with problems

19 *Id.* at 53.

20 *Ibid.*

21 *Senate Hearings, supra* note 14, at 55.

22 *Id.* at 54.

23 *Hearings on H.R. 11158, supra* note 10, at 374.

24 Traffic control and safety costs have in recent years become extremely high with regard to both manpower and equipment. *E.g.*, on Manhattan Island, south of 20th Street alone, there are more policemen working to alleviate traffic congestion than there are people in all Federal agencies working to improve mass transportation throughout the country. The Manhattan project referred to "involves a central control room that receives reports of developing traffic congestion from policemen in 15 radio cars, 15 men on motorcycle, and 1 police helicopter." *Senate Hearings, supra* note 14, at 54.

25 The Senate Banking and Currency Subcommittee was told that in approximately 90 per cent of the urban areas in the United States, there are air pollution problems that need attention, and that the automobile is a major contributor to air pollution in every urban area. S. Rep. No. 1852, *supra* note 13, at 11.

26 President Kennedy stated in his Transportation Message that the interstate highway program is displacing 15,000 families and 1,500 business concerns a year. He called for the authorization of relocation provisions similar to those applicable to the urban renewal program for both mass transportation and the Federal-aid highway programs. *President's Message, supra* note 1, at 13. The costs referred to here are those borne by the families and businesses which are forced to move from highway rights-of-way.

27 These costs arise as tax ratable property is supplanted by tax-free rights-of-way. See *Senate Hearings, supra* note 14, at 54.

28 *Id.* at 57.

of finding a suitable remedy for these transportation ills. For the most part, they are problems of finance. It is this situation which many feel emphasizes the need for federal assistance such as is proposed in the Kennedy Administration's Mass Transportation Bill of 1962.

### C. *The Problems of Financing Mass Transportation*

Basically there are two problems of a financial nature. First there is the obvious problem of attempting to achieve a balanced urban transit network when Federal assistance legislation grossly favors highways over subways. As Senator Harrison Williams of New Jersey, who sponsored the President's bill in the Senate, said before the Senate Banking and Currency Subcommittee:

When State or local governments begin searching for an answer to a particular traffic problem, they are faced with the overwhelmingly powerful economic fact that in most cases they need put up only 10 per cent of the cost for a highway solution, whereas they must contemplate bearing 100 per cent of the cost of a transit solution, whether it involves improving a rail line, buying a new fleet of buses, providing fringe area parking, establishing a downtown distributor system, or whatever.<sup>29</sup>

The second financial problem facing transit planners is the sheer magnitude of the capital investment required for facilities and equipment needed in comprehensive transit systems. In a report submitted to the Secretary of Commerce and the Housing Administrator by the Institute of Public Administration it was estimated that total capital requirements for mass transportation in the next decade would be \$9.8 billion.<sup>30</sup> This estimate is made up of the following: \$2.8 billion for presently planned new systems; \$1.7 billion for extensions of existing systems; \$4.3 billion for rehabilitation and replacement; and \$1 billion for new projects now being considered for initiation in the next ten years.<sup>31</sup> For all these purposes, the costs of rights-of-way and structures are estimated at \$6.4 billion and rolling stock at \$3.4 billion.<sup>32</sup>

Certainly a large share of the total capital cost could expect to be met from the fare box. But just as certain is the fact that a certain margin must be provided from sources other than revenues. Thus, Mayor Wagner, realizing the immensity of the investment demands mass transit will exert on metropolitan New York in the next 20 years (when regional population is expected to rise from the present level of 16 million to 25 million), was impelled to say, commenting on the President's proposal:

The assistance provided in this measure is not large. Our own New York City transit system could easily if it were so provided—which it is not— itself, absorb more than the total \$500 million in the bill for necessary new extension, new rolling stock, and relief of overcrowding.<sup>33</sup>

Not only are the demands upon the cities large in size, but the need for assistance from outside is felt, or will be felt, by practically every community experiencing a need for mass transit facilities.<sup>34</sup>

29 *Id.* at 56. The 9 to 1 ratio is applicable only to the 41,000-mile Interstate System now well under way and scheduled for completion in 1972. This program is said to be contributing substantially to the solution of the urban transportation problem. Over 5,000 miles, or 13 per cent, of the System are in urban areas, but they will account for 45 per cent of the total expenditure. The regular Federal-aid highway program called the ABC program, is financed by matching contributions from the Federal and State governments. These funds are traditionally authorized biennially by the Congress, the latest provision being \$925 million for each of the years 1962 and 1963. In 1961, 29 per cent of these funds were spent in urban areas. See *Senate Hearings, supra* note 14, at 77; *Hearings on H.R. 11158, supra* note 10, at 104-114.

30 S. Rep. No. 1852, *supra* note 13, at 6.

31 *Ibid.*

32 *Ibid.*

33 *Hearings on H.R. 11158, supra* note 10, at 372-73.

34 This need is being widely felt. For example, subway rail transit systems are considered for expansion in New York, Philadelphia, Boston, Chicago, and Cleveland; are well along in the planning stage in Los Angeles, San Francisco, Washington and Atlanta; and are being given preliminary consideration in Pittsburgh, St. Louis, Baltimore, Buffalo, and New Jersey. See *Business Week*, May 5, 1962, pp. 31-32. See *Hearings on H.R. 11158, supra* note 10, at 64.

The great size of the capital requirements needed to place mass transportation on its feet is a difficulty also experienced by many of the Nation's smaller cities, particularly those which are beginning to taste the bitter fruits of increased rates of growth and the ever-accompanying traffic congestion. A recent survey of such cities and towns by the American Transit Association indicates that there are about 60 cities of 25,000 population or more which have no public transportation service at all.<sup>35</sup> The survey also revealed that 69 per cent of their membership responding to a questionnaire stated that replacement of buses was their most pressing problem, and 42 per cent indicated that an outright subsidy was the only form of assistance which could be effective because of their poor financial condition.<sup>36</sup> It is clear that the financial problem is one facing large and small cities alike.

#### D. Other Problems

Finally, there are two further problems—not of a financial nature—which city planners and transit authorities must deal with, problems which also have a bearing on the need for and desirability of an exercise of federal responsibility. For one thing, there are the difficulties arising from the fact that the problem of providing adequate mass transportation service long ago spilled over the boundaries of many local political jurisdictions. Today, some 53 of our 200-odd metropolitan areas either border on or cross over State lines.<sup>37</sup> Agreements or compacts between jurisdictions of different States for the purpose of planning or carrying out mass transportation systems do not currently enjoy the legal basis provided for other social programs, such as those encompassed by the Housing Act of 1954 as set forth in Section 701 (f) of that Act.<sup>38</sup>

Then, there is the problem of assuring promoters, investors, Congressmen, and even transit officials themselves that mass transportation facilities are what the public wants and that the people will use them once the money is spent. This problem really is no more than a restatement of the fact that any particular transit mix is, in part—depending upon the availability of alternatives—a product of individual selection. The question posed by this problem was one asked repeatedly by members of the House and Senate during the hearings held on the President's bill, and is, in the main, probably unanswerable in any definite sense. However, recent experiences in the field strongly indicate that public reaction is favorable. For example: (1) Upon undertaking a modernization program, the New York subway system in 1961 had an increase of 20 million riders over 1960.<sup>39</sup> (2) Toronto, the only city in North America currently engaged in the construction of a rapid transit system, in five years has experienced a 17 per cent increase in assessed valuation along the right-of-way. This amounted to an \$88 million increase in valuation, yielded \$4 million in increased revenues, and was enough to amortize the annual debt service on the project.<sup>40</sup> In fact, the Toronto system was so successful that a \$200 million expansion program was started in 1961.<sup>41</sup> (3) The program for mass transportation which was enacted into the 1961 Housing Act,

35 S. Rep. No. 1852, *supra* note 13, at 8.

36 *Hearings on H.R. 11158, supra* note 10, at 46.

37 S. Rep. No. 1852, *supra* note 13, at 10.

38 Housing Act of 1954, 68 Stat. 640, 40 U.S.C. 461 (1958). Section 701(f) reads as follows:

(f) The consent of the Congress is hereby given to any two or more States to enter into agreements or compacts, not in conflict with any law of the United States, for cooperative efforts and mutual assistance in the comprehensive planning for the physical growth and development of interstate, metropolitan, or other urban areas, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts.

39 S. Rep. No. 1852, *supra* note 14, at 9.

40 S. Rep. No. 1852, *supra* note 13, at 9.

41 Time Magazine, Nov. 23, 1962, p. 13.

extremely modest in its provisions, has been very active. To indicate the extent of interest, Dr. Robert C. Weaver, Housing Administrator, testified before the House Subcommittee that up to and including the third week of April, 1962, his agency had received 177 inquiries, statements of problems, and requests for assistance, representing communities in 43 states, including the District of Columbia and Puerto Rico.<sup>42</sup>

It is also arguable that the mere attractiveness of the new, modern mass transit facilities is evidence in itself that the public will turn to that form of transportation. The proposed San Francisco Bay rapid transit system, the first in this country since Cleveland's in 1955, is a fine example. This system will be controlled by computer for safety and service, will utilize modern, comfortable, electrically powered trains operating at top speeds of 70 miles an hour and at average speeds, including all station stops, of more than 50 miles an hour.<sup>43</sup> The system will provide service as frequently as every 90 seconds during peak commuting hours, and will include the shuttling of trains from Oakland to San Francisco through a six-mile tube under the bay.<sup>44</sup> Advocates of mass transit who stand on such evidence do so on the assumption that a great many people would be amenable to a means of transportation which would cut their travelling time by as much as two-thirds, and that every commuter finds rush-hour traffic jams tiring and frustrating. The plausibility of these assumptions would appear obvious.

Such, then, is the situation now existing in mass transportation, its meaning for the future, and the case for comprehensive reform. It can hardly be questioned that the quality and quantity of urban mass transportation will intimately affect the lives of millions of Americans in the last decades of the twentieth century and beyond.<sup>45</sup>

## II. *Analysis of the Urban Mass Transportation Bill of 1962*<sup>46</sup>

The urban mass transportation recommendations made by the President in his Transportation Message were introduced in the form of identical bills, in the Senate on April 5, 1962 (the date of the Message itself), and on April 9, 1962, in the House of Representatives. The Senate measure, S. 3126, was sponsored by a group of 21, headed by Senator Harrison J. Williams, Jr. of New Jersey.<sup>47</sup> Its counterpart, H.R. 11158, was sponsored by New York's Representative Abraham J. Multer, who also served as chairman of the subcommittee which held hearings on the bill in the Lower Chamber. When reported some months later from the respective committees, the Senate version appeared as S. 3615, and that of the House as H.R. 11158, as amended.

As was the case in former congressional legislation in the area of housing development and urban renewal, the constitutional basis for the Administration's bills was the general welfare as embodied in the Preamble to the Federal Constitution. Explicit reference to the national welfare was made throughout the Presi-

42 *Hearings on H.R. 11158, supra* note 10, at 243.

43 *Time Magazine, supra* note 41, at 13.

44 *Ibid.*

45 *President's Message, supra* note 1, at 10.

46 The discussion which follows is based upon a supplementary report entitled "Section-By-Section Analysis of the Urban Mass Transportation Bill of 1962," evidently prepared by the Administration and dated April 5, 1962. It was included in the hearing reports of the respective Committees on Banking and Currency in both the House (*Hearings Before Subcommittee No. 3 of the Committee on Banking and Currency of the House of Representatives on H.R. 11158, 87th Cong., 2d Sess. 22-26 (1962)*) and Senate (*Hearings Before a Subcommittee of the Committee on Banking and Currency of the United States Senate on Urban Mass Transportation, 87th Cong., 2d Sess. 42-45 (1962)*). All references to this analysis below will be cited to the proper place in the hearing report of the House of Representatives.

47 The group included Senators Williams of New Jersey, Beall, Bible, Bush, Case of New Jersey, Clark, Dodd, Douglas, Engle, Gruening, Humphrey, Javits, Kuchel, Long of Hawaii, Long of Missouri, Morse, Muskie, Smith of Massachusetts, Symington, Young of Ohio, and Cooper.

dent's Message, and was given broad and forceful enunciation in the opening two paragraphs:

An efficient and dynamic transportation system is vital to our domestic economic growth, productivity, and progress. Affecting the cost of every commodity we consume or export, it is equally vital to our ability to compete abroad. It influences both the cost and the flexibility of our defense preparedness, and both the business and recreational opportunities of our citizens. This Nation has long enjoyed one of the most highly developed and diversified transportation systems in the world, and this system has helped us to achieve a highly efficient utilization of our manpower and resources.

Transportation is thus an industry which serves, and is affected with, the national interest. Federal laws and policies have expressed the national interest in transportation particularly in the last 80 years: through the promotion and development of transportation facilities, such as highways, airways, and waterways; through the regulation of rates and services; and through general governmental policies relating to taxation, procurement, labor, and competition.<sup>48</sup>

From this, it would appear that there is little or no doubt as to the constitutional appropriateness of the provisions of the two bills, now to be discussed.

*Section 1. Short Title.* The first section of the bill provides that it may be informally cited by its short title—the "Urban Mass Transportation Act of 1962."

*Section 2. Findings and Purposes.* Subsection (a) of the policy provision of the bill, embodies a finding of the Congress that the increasing concentration of the Nation's population in urban areas generally is such that it crosses boundary lines of local jurisdictions and often extends into two or more states.<sup>49</sup> It declares that the deterioration or inadequate provision of urban transportation services and facilities, intensified traffic congestion, and the lack of coordinated transportation and other development planning is jeopardizing the welfare and vitality of urban areas, the satisfactory movement of people and goods within such areas, and the effectiveness of housing, urban renewal, highway, and other federally-aided programs.

Section 2(b) states the purposes of the Act to be: (1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods in cooperation with mass transportation companies both public and private; (2) to encourage the planning and establishment of areawide urban mass transit systems needed for economical and desired urban development, again in cooperation with both public and private mass transportation companies; and (3) to provide assistance to state and local governments and instrumentalities thereof, and mass transportation companies both public and private, in financing such systems, to be operated by public or private agencies as determined by local needs.

*Section 3. Federal Financial Assistance.* Subsection 3(a) of the bill authorizes the Housing and Home Finance Administrator<sup>50</sup> to make grants or loans, subject to limitations in the bill, to assist states and local public bodies in financing the acquisition, construction, and improvement of mass transportation facilities and equipment. These facilities and equipment would be for use in urban mass transportation service or in coordinating such service with highway and other transportation in urban areas.<sup>51</sup> Terminal facilities, land, buses and other rolling stock, and any other real or personal property required would be eligible for assistance. Although rights-of-way would be included as eligible, no land would be accepted for assistance if it is proposed for use as a public highway. "Ferries serving

48 *President's Message, supra* note 1, at 1.

49 See text at note 37, *supra*.

50 The Housing and Home Finance Administrator also administered the experimental loan and grant programs of 1961. See notes 2-4, *supra*.

51 The bill reported out of the Senate Committee on Banking and Currency, S. 3615, at this point adds, in parentheses, words not found in the House bill (H.R. 11158): "(including commuter service into or between such areas)" S. 3615, 87th Cong., 2d Sess., p. 3, ll. 9-10 (1962).

commuters over a prescribed route would be eligible if they are part of a coordinated transportation system serving the urban area."<sup>52</sup>

Subsection 3(a) stipulates that, under no circumstances, may a private company be an applicant for federal financial assistance. Perhaps understandably, this restriction precipitated a good deal of discussion in the hearings, particularly when Housing Administrator Weaver took the stand to defend and explain the President's proposals. Dr. Weaver attempted to make clear the fact that this requirement is not intended to influence a determination as to whether the transit facilities in any particular area are to be publicly or privately operated. In so doing, he referred to a statement which President Kennedy made, anticipating the contention that the bill favored public over private ownership and operation of transit facilities, in his Transportation Message: "The program is not intended to foster public as distinguished from private mass transit operations."<sup>53</sup> Elucidating further, Dr. Weaver described the purpose of requiring that only public bodies be eligible for grants or loans under section 3:

The difficulty here (of providing private companies with assistance) is that the whole concept is a dual one. First, the concept that this assistance from the Federal Government should be a part of an areawide transportation plan which is part of an areawide comprehensive development, and, second, that the community should make the decision whether it wants to use any combination of these. Therefore, in order to assure adequate concern with the planning requirements which we have, which would be a determination of the nature of the planning on a local level rather than on the Federal level, and the proper mix that the locality wants, we have insisted, and still insist, that these loans should be made through a public agency which has the overall responsibility and can perform these functions.<sup>54</sup>

Thus, while it is clear that an applicant for a loan or grant under this section must be a public body, it is not required that the public body itself operate the transit facilities and equipment. "The applicant could, for example, acquire buses and lease them to a private transit company, or it could contract with the private transit company itself to acquire the buses and operate them according to a previously agreed program. Title to such buses could remain in some cases in the hands of a third party, such as in an equipment trust transaction."<sup>55</sup> The restriction, then, emphasizes the bill's concern with the need for local planning on a comprehensive basis, and the flexibility which such an approach necessarily entails when consideration is made of the preferences for and circumstances surrounding ownership and operation in each individual application.

Subsection 3(a) further requires that the applicant, in order to obtain a grant or loan, must be determined by the Administrator to (1) possess the legal, financial, and technical capability of carrying out the proposed project, and (2) have satisfactory continuing control over the use of the facilities and equipment involved. These requirements are thought necessary to assure that the aided project will make its maximum contribution to an effective mass transportation system and to assure that public funds will continue to be devoted to the intended public purpose.<sup>56</sup>

It is also here stipulated that where a private mass transportation company operates the new system under a lease arrangement with the local public body, the applicant shall give full consideration to the exercise of continuing control through the appropriate existing regulatory agency. A showing to that effect must be made to the Administrator as a part of the application.

52 S. Rep. No. 1852, *supra* note 13, at 14.

53 *President's Message*, *supra* note 1, at 11.

54 *Hearings on H.R. 11158*, *supra* note 11, at 68.

55 *Id.* at 22.

56 H.R. 11158 also requires the Administrator to be given reasonable and enforceable assurances of performance under the contract by the applicant, primarily to safeguard the interests of the Federal government. H.R. 11158, 87th Cong., 2d Sess., pp. 13 (ll. 19-24) to 14 (ll. 1-4), (1962).

Finally, subsection 3(a) states that federal assistance granted or loaned under this section may not be used for operating subsidies. An assisted project would have to consist of the provision of new, or the improvement of existing, transit facilities and equipment. "Ordinary repairs and maintenance would not be considered as an improvement under this bill."<sup>57</sup>

Under subsection 3(b) no grant or loan could be made for the purpose of either acquiring the facilities or other property of a private transit enterprise, or for providing by contract or otherwise for the operation of buses or other vehicles<sup>58</sup> in competition with an existing transit company unless the applicant certifies to the satisfaction of<sup>59</sup> the Administrator that (1) such a grant or loan is essential to the efficacy of the transit program concerned, (2) the program provides equality of opportunity for participation in mass transit systems to private companies, to the maximum extent feasible, and (3) in the event such private facilities are acquired, just and adequate compensation be made to any private operator so affected for infringement of his vested interests.<sup>60</sup>

*Section 4. Long-range Program.* Section 4 sets forth the terms and conditions regularly applying to the loans and grants authorized under section 3. Except as provided in the emergency program described below under section 5, no such loan or grant could be provided unless the Housing Administrator determines that the facilities and equipment for which the assistance is sought are needed for carrying out a program for a unified or officially coordinated urban transportation system as a part of the comprehensively planned development of the urban area.<sup>61</sup> As to the meaning of this requirement, the following explanation was given:

This does not mean that such a program has to set forth a specific schedule for a series of detailed projects, which together would comprise a complete transportation system for the urban area. . . . It does mean, however, that a transportation plan must have been prepared which sets forth the basic framework of the highway network and the mass transportation system needed for the urban area, that the proposed project is needed for this mass transportation system, that there is a program for the establishment of the system, and that the system will be administered either by one agency or by officially coordinated agencies. Also, the proposed transportation plan itself must have been prepared by an organization, or officially coordinated organizations, carrying on a continuing areawide program of comprehensive planning, under which comprehensive plans for the urban area have already been prepared in sufficient detail to provide a satisfactory basis for the highway and mass transportation plans.<sup>62</sup>

In no event may any loan or grant made under section 3 be provided unless the assistance sought is not otherwise available on reasonable terms. In making this determination, and all others under section 4, the Administrator is authorized to establish his own criteria. Where the planning and organizational requirements described above are met, section 4(a) of the bill authorizes the Housing Administrator to provide federal grants in accord with a formula which is designed to take into consideration the availabilities of revenues to meet debt service on

57 S. Rep. No. 1852, *supra* note 13, at 14.

58 S. 3615, perhaps inadvertently, here omits the phrase, "or other vehicles." S. 3615, *supra* note 51, at p. 4, l. 21.

59 S. 3615 here omits the phrase, "to the satisfaction of." *Id.* at l. 22.

60 Instead of the phrase, "for infringement of their vested interests," S. 3615 speaks in terms of compensation for "acquisition of their franchises or property." *Id.* at p. 5, ll. 4-7.

61 At this point, the respective authors of the two bills sought to further delineate the scope and intent of their legislation. The House, in H.R. 11158, did so by requiring that "Where facilities and equipment are to be acquired which are already being used in mass transportation service in the urban area, the program must provide that they shall be so improved, modernized, merged, or extended that they will better serve the transportation needs of the area." H.R. 11158, *supra* note 56, at p. 15, ll. 13-18.

On the other hand, at the exact same place in the bill, the Senate stipulated that a comprehensive transit program desirous of Federal aid under the Act should "encourage, to the maximum extent feasible, the participation of private enterprise." S. 3615, *supra* note 51, at p. 5, ll. 17-19.

62 *Hearings on H.R. 11158, supra* note 10, at 23.

proposed projects, and is also designed to require the locality itself to provide a matching grant in addition to any revenue financing for the project. These federal and local grants would be based on the "net project cost" of the project, defined as that portion of the project cost which the Administrator estimates cannot reasonably be financed from revenues. A federal grant could be made up to two-thirds of this net project cost.

The remainder of the net project cost must be provided by the local community from sources other than federal funds, and, by definition of the net project cost, other than anticipated revenues. Such would normally be done through the issuance of bonds based on the taxing powers of the local government, transit authority, or other local public body. The reasoning behind the formula itself, from the point of view of the local community, is expressed in the following testimony of Dr. Weaver:

The substantial contribution required from the localities would be important as evidence of a firm local determination of the need for the project and of a real and continuing local concern for care and efficiency in the expenditure of funds. We believe, on the other hand, that the required one-third local contribution would be as much as reasonable in view of the localities' limited taxing powers and the great demands being made on their treasuries. The proposed two-thirds Federal contribution would be similar to that under the urban renewal program.<sup>63</sup>

Logically following from the nature and philosophy of the formula is the requirement of section 4(a) that no portion of the one-third net project cost for which the locality is responsible can be refunded or reduced unless there be a corresponding and proportional reduction of the federal grant. Thus, surplus project revenues could be used to reduce fares or increase service, as the locality might wish, but any attempt to reduce the net project cost with such funds must turn to the advantage of both the federal and local bodies, in the proportion at which they contributed.

Subsection (b) of this section, which details the manner by which the Administrator will finance grants under the Act, differs significantly in the two bills. The funding of aid grants under the House bill (H.R. 11158) is based on annual congressional appropriations. This version stipulates, in an effort to make full use of all funds authorized: (1) any amount once appropriated shall remain available until expended, and (2) any amount authorized but not appropriated for any fiscal year may be appropriated for any succeeding fiscal year.

On the other hand, the bill reported by the Senate (S. 3615) gives to the Administrator authority to contract to make grants up to specified amounts which vary according to year. This provision, incidentally, is the controversial Williams Amendment,<sup>64</sup> introduced on April 19, 1962, by the Senator of that name and amended to the Senate bill by the committee. Supporters of contract authority, which is based on a similar provision in the Housing Act of 1949 dealing with slum clearance and urban renewal, are firmly convinced such a funding arrangement is crucial if the program is to have any effect. It is their contention that without assurance that the federal government's contribution will be forthcoming in succeeding years, no one will invest in the needed revenue bonds issued by local governments. They also feel that, inasmuch as the Administrator of the Mass Transportation Act is required to demand assurances on the part of the local communities for continuing performance upon reception of federal aid under section 3, it is only right that the federal government give assurances of continuing performance on its part.<sup>65</sup>

Under the contract version, grants may be made not to exceed \$100 million,

<sup>63</sup> *Id.* at 59.

<sup>64</sup> See *Senate Hearings*, *supra* note 14, at 50-51 where the text of the amendment is printed in full.

<sup>65</sup> See S. Rep. No. 1852, *supra* note 13, at 18-19; *New York Times*, April 25, 1962, p. 41, col. 8.



which limit is to be increased by \$200 million at the end of the first year and again by that amount at the end of the second year. Identical amounts are made available for grants by yearly appropriation in H.R. 11158. Thus, both bills are the same in their authorization of \$500 million for grants under section 3 over a three-year period. Moreover, both bills provide that advance or progress payments can be made on account of any such grant.

Subsection (c) specifies that, where the planning and organizational requirements have been complied with, loans may be made under section 3 of the bill subject to the same restrictions and limitations that apply to the present temporary mass transportation loan program. Thus, such loans would be limited to the balance of the present \$50 million authorization for mass transit provided (within the community facilities program) by Title II of the Housing Amendments of 1955,<sup>66</sup> with no expiration date. It is further provided that the authority delegated in section 203 of such Amendments shall hereinafter be exercised by the Housing Administrator solely to obtain funds for loans under section 3 of this bill. Finally, in no case could both a loan and a capital grant be made for the same project, although, of course, this would not prevent a loan for one project and a grant for another within the same comprehensive transportation system.<sup>67</sup>

*Section 5. Emergency Program.* Section 5 provides that, for the first two years, loans and grants could be made under section 3 of the bill in emergency situation even though certain of the regular planning requirements in section 4 had not been met. These emergency loans and grants could be made where (1) the program for the development of a unified or officially coordinated urban transportation system, referred to in section 4(a), is under active preparation but is not yet completed; (2) the facilities and equipment for which the assistance is sought can reasonably be expected to be required for such a system; and (3) there is an urgent need for the preservation or provision of such facilities and equipment. The type of situation anticipated by the authors of the bill in this regard was illustrated in the Senate report on S. 3126:

An example of such a situation would be where land use and other comprehensive development plans have not yet been completed for an urban area, or where a general urban transportation plan for the area coordinated with such development plans has not been completed, but the proposed project would assist an existing transportation system which reasonably may be expected to be required for the urban area and which is in urgent danger of losing needed rights-of-way or in urgent need of modernization.<sup>68</sup>

The emergency federal grants would be for one-half rather than one-third of net project cost. Where this section is used, the local contribution must therefore be one-half net project cost also. However, if a project did meet the full planning requirement within three years from the time of such a grant, section 5 provides that the project would then qualify for an additional grant equal to the difference between a two-thirds grant and a one-half grant — i.e., an additional grant of one-sixth net project cost. The same proportional refund provisions would apply to these grants as to a regular two-thirds grant.

*Section 6. Research, Development, and Demonstration Projects.* This section of the bill authorizes a research, development, and demonstration program for all phases of urban mass transportation. Demonstration grants could be made without the present restrictions against grants for over two-thirds of net project cost or for major long-term capital improvement. The power to undertake such grants lies with the Administrator, but he must determine, prior to his acting under this section, that such grants will assist (1) in the reduction of urban transportation needs, (2) the improvement of mass transportation service, and (3) the contribution of such service toward meeting total urban transportation needs at minimum cost. Carrying

<sup>66</sup> 69 Stat. 643, 42 U.S.C. 1492 (1958), as amended by the Housing Act of 1961, § 310, 75 Stat. 149, 170 (1961).

<sup>67</sup> S. Rep. No. 1852, *supra* note 13, at 19.

<sup>68</sup> *Id.* at 20.

out the project may be the Administrator himself, or he may contract for its operation through other Federal agencies, public or private institutions, or individuals, as the circumstances warrant.<sup>69</sup> Finally, in fulfilling his obligations under this section, the Administrator is authorized to request and receive any appropriate data or information, from public or private sources.

Funds to finance these research and demonstration grants would come from not more than \$30 million of the total mass transportation grant authorization of \$500 million as provided in section 4(b). A second source of funds would be the unobligated balance of the amount available for mass transportation demonstration grants pursuant to the proviso in section 103(b) of the Housing Act of 1949<sup>70</sup> — it being stipulated that these funds are to be used only for financing projects under this section.

*Section 7. Relocation Requirements and Payments.* Section 7(a) of the bill requires, for any project assisted by a section 3 grant or loan, that an adequate relocation program be carried on for families displaced by the project, and that an equal number of decent, safe, and sanitary dwellings be provided in areas of comparable desirability and convenience, at prices the displaced families can afford.

Section 7(b) defines the term "relocation payments" to mean payments by the applicant to individual families, business concerns, and nonprofit organizations for their reasonable and necessary moving expenses and any actual direct losses of property except good will or profit, for which reimbursement or compensation is not otherwise made, resulting from their displacement by the project. This section authorizes the payment of such assistance subject to regulations prescribed by the Administrator, but limits it to \$200 in the case of an individual or family (it could be a fixed amount); or \$3000 (or, if greater, the total certified actual moving expense) in the case of a business concern or a nonprofit organization. No local contribution would be required for relocation payments, said payments being financed from the Federal grant funds authorized in section 4 of the bill.

These relocation provisions are substantially the same as those under the urban renewal laws. The report of the Senate Subcommittee stated, in general terms, how members of the Subcommittee hoped the relocation payments would be made:

[I]t is expected that the local public body will administer [the relocation provisions] with a degree of efficiency and compassion as is being done by the urban renewal local public agencies. In fact, such a program might be carried out through or jointly with these local public agencies.<sup>71</sup>

*Section 8. Coordination of Federal Assistance for Highways and for Mass Transportation Facilities.* Section 8 provides that the Housing Administrator and the Secretary of Commerce shall consult on general urban transportation policies and programs and shall exchange information on proposed projects in urban areas. Commenting on this section, the Senate Subcommittee said:

One of the gratifying results of the past year's work on mass transportation problems has been the excellent cooperation between the Housing Administrator and the Secretary of Commerce. Nothing is more important for urban transportation than the achievement of full cooperation in the planning, development, and operation of all forms of transportation in any urban area.

Clearly, such local and regional coordination requires continuing close working relations among Federal agencies which administer programs bearing on transportation in urban areas. Much has been accomplished in this direction, and enactment of section 8 of the bill would express the

69 H.R. 11158 at this point adds a provision to the effect that where any demonstration project involves facilities and equipment, and revenue is derived therefrom, the Administrator is required to stipulate to the applicant that any such net revenues be paid to him, upon certain conditions, until the amount of the payments equals one-third of the amount of the cost of the project. H.R. 11158, *supra* note 56, at p. 18, ll. 17-24.

70 63 Stat. 413, 414; 42 U.S.C. 1453 (1958), as amended by the Housing Act of 1961, § 303, 75 Stat. 149, 166 (1961).

71 S. Rep. No. 1852, *supra* note 13, at 21.

clear congressional intent that Federal urban transportation policies and programs and assisted projects be continuously coordinated.<sup>72</sup>

*Section 9. Interstate Compacts to Implement Comprehensive Urban Planning.*<sup>73</sup>

This section of the bill seeks to amend section 701(f) of the Housing Act of 1954<sup>74</sup> to broaden the advance congressional consent now provided in that subsection for interstate compacts or other agreements relating to urban development. Section 701(f) now allows only the establishment of agencies or other cooperative interstate efforts relating to comprehensive planning. The proposed amendment would also authorize the establishment of agencies or other cooperative efforts in carrying out mass transportation or other urban development programs.

*Section 10. General Provisions.*<sup>75</sup> Subsection 10(c) of this section, *inter alia*, defines the term "urban area" to mean "any area that includes a municipality or other built-up place which is appropriate, in the judgment of the Administrator, for a public transportation system to serve commuters or others in the locality, taking into consideration the local patterns and trends of urban growth. . . ."<sup>76</sup> The Senate Committee commented upon this definition in the following manner:

The bill reported by the committee did not limit assistance under its provisions to communities of any designated size. Smaller cities and communities also have urgent mass transportation problems. Yet it must be obvious that the most immediate need for assistance in solving problems of urban transportation exists in the metropolitan centers of the Nation. Certainly, while the need for assistance in meeting these problems cannot be and is not in the bill measured by considerations of size alone, it is the hope of the committee that, in the administration of this legislation the Administrator would, as a practical matter, give priority to helping communities which have the most critical needs, giving consideration to all factors including size, density of population, and the extent to which such problems have adversely affected growth and economic development.<sup>77</sup>

From this, it is clear, the force of the bill is directed toward the Nation's larger municipalities.

Also significant is the definition of "mass transportation" which is said to mean "transportation by bus or rail or other conveyance, either publicly or privately owned, serving the general public (but not including charter or sight-seeing service) and moving over prescribed routes."<sup>78</sup>

The last significant provision in this section,<sup>79</sup> subsection 10(e), is that which limits grants made under section 3 (other than section 7(b) relocation payments) for projects in any one state to 12½ per cent of the amount of grant funds authorized in section 4(b).<sup>80</sup> Insight in to the motivating influence behind this

<sup>72</sup> *Id.* at 22.

<sup>73</sup> H.R. 11158 as reported, does not include this provision. See H. Rep. No. 1961, 87th Cong., 2d Sess. 14 (1962).

<sup>74</sup> 68 Stat. 640, 40 U.S.C. 461 (1958), as amended by the Housing Act of 1961, § 310, 75 Stat. 149, 170 (1961).

<sup>75</sup> Because § 9, above, was not included in the House bill reported out of the Committee, the section numbers of the two bills of course no longer correspond. Reference hereafter is made to the section numbers as they appear in the Senate version of the bill, S. 3615.

<sup>76</sup> S. 3615, *supra* note 51, at p. 12, l. 24 - p. 13, ll. 1-5.

<sup>77</sup> S. Rep. No. 1852, *supra* note 13, at 23.

<sup>78</sup> S. 3615, *supra* note 51, at p. 13, ll. 6-10.

<sup>79</sup> The Senate bill does include a provision dealing with the related problem of air pollution and its control. Being impressed with testimony attesting to the fact that the motorized vehicle is one of the greatest contributors toward air pollution in our urban areas, the Senate committee added the following provision:

Sec. 12. In providing financial assistance to any project under section 3, the Administrator shall take into consideration whether the facilities and equipment to be acquired, constructed, reconstructed, or improved will be designed and equipped to prevent and control air pollution in accordance with any criteria established for this purpose by the Secretary of Health, Education, and Welfare. S. 3615, *supra* note 51, p. 15, ll. 1-8.

<sup>80</sup> S. 3615 adds to this stipulation the following: ". . . except that the Administrator (without regard to the foregoing limitation) may make additional grants in accordance with section 4 aggregating not to exceed 10 per centum of such amount." *Id.*, at p. 13, ll. 21-24.

provision is not hard to come by, for it would appear that the authors have "pork barreled" an otherwise effective bill by giving Alaska, Arizona, and Nevada the dubious right of equal participation under its terms with New York, California, and Pennsylvania. It might be hoped that the definition of "urban area," along with the wise discretion allowed the Administrator, would offset the diffusing effect of subsection 10(e). However, this remains to be seen. "Hope" such as this, and as that manifested by the Committee in commenting on the definition of "urban area," was not enough for Senator Prescott Bush, a one-time cosponsor of the bill:

In my judgment, the majority hopes that the Federal assistance provided by the bill will be concentrated in the great metropolitan areas of the Nation, New York, Chicago-Milwaukee, Philadelphia-Camden, Washington, St. Louis, San Francisco, Los Angeles, Boston, and so forth, but is afraid to so provide unequivocally in the bill for fear of losing votes.<sup>81</sup>

Whether or not such concern for votes makes for good legislation, it most assuredly makes for good politics. It seems, on its face, to have been considered a necessary evil.

Such, then, are the main features of the Mass Transportation Bill of 1962. With the exception of the Williams Amendment, the amended definition of "urban area," and the inclusion of section 10(e), President Kennedy's original proposals seem to have survived unscathed. Yet, the bill failed to pass into law.

### *III: Prospects for Adoption of the Urban Mass Transportation Bill*

Generally speaking, there were just two reasons why the Mass Transportation Bill of 1962 was not enacted into law by the 87th Congress in its Second Session. Stated in their most obvious terms, the reasons are (1) the bill did not receive universal support, and (2) for that reason, the bill did not get to a vote in either the Senate or the House in 1962.

Opposition to the proposals for mass transportation as they were reported out of the Committees on Banking and Currency in the House and Senate appeared to emanate from two related, but not allied, political camps. First there were those of the politico-economic persuasion which decried federal aid to urban mass transit in whatever form it might take. Secondly, there were those who, not being opposed to such assistance by the federal government on fundamental terms, did find themselves in conflict with one or more of the provisions of H.R. 11158 or S. 3126. Yet whatever be the theoretical justification for their opposition, it would appear that the positions of these two groups can be reduced to the following six arguments:

(1) It is neither economically nor politically sound to establish as fundamental federal policy the subsidization of public transportation in urban areas, both from the viewpoint of the social inequities involved and the extremely large sums of money such a program would entail.<sup>82</sup>

(2) By advancing aid to local governmental agencies and not through the States or directly to private companies, the bill jeopardizes the position of private

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This provision would allow the Administrator to distribute an additional 10 per cent of the authorization among all the States which have received 12½ per cent.

81 S. Rep. No. 1852, *supra* note 13, at 34.

82 See the dissenting views of Representatives Kilburn, Derwinski, Harvey, and Rousselot in H. Rep. No. 1961, 87th Cong., 2d Sess. 15-22 (1962); the individual views of Representative Derwinski in H. Rep. No. 1961, 87th Cong., 2d Sess. 23-24 (1962); the individual views of Senator Robertson in S. Rep. No. 1852, 87th Cong., 2d Sess. 28-31 (1962); the individual views of Senator Capehart in S. Rep. No. 1852, 87th Cong., 2d Sess. 32 (1962); the individual views of Senator Bush in S. Rep. No. 1852, 87th Cong., 2d Sess. 33-34 (1962); testimony in behalf of the American Farm Bureau Federation in Hearings Before a Subcommittee of the Committee on Banking and Commerce of the United States Senate on Urban Mass Transportation, 87th Cong., 2d Sess. 314-19 (1962); testimony in behalf of the Chamber of Commerce of the United States in Hearings Before a Subcommittee of the Committee on Banking and Commerce of the United States Senate on Urban Mass Transportation, 87th Cong., 2d Sess. 397-404 (1962) and in Hearings Before Subcommittee No. 3 of the Committee on Banking and Currency of the House of Representatives on H.R. 11158, 87th Cong., 2d

enterprise in the transit industry and increases the degree of federal intervention in and control of local public matters.<sup>83</sup>

(3) The problem of urban mass transportation is one which local public and private bodies have the ability to solve on their own, and for that reason federal intrusion into the area is unjustified.<sup>84</sup>

(4) The situation in urban mass transportation has been greatly exaggerated and constitutes an acute problem in only a relatively few larger metropolitan areas; for this reason, federal intrusion into the area is unjustified.<sup>85</sup>

(5) Because of the seriousness of the problems in urban mass transportation and the heavy demands which can be expected to be made on the administrators of such meager assistance resources, consideration should be given to some other means of solving the existing problems.<sup>86</sup>

(6) Specific objection to (a) the contract authority contained in S. 3126 in lieu of the more conventional annual or biennial appropriation of funds; (b) the two-thirds-one-third formula instead of a 50-50, matching grant formula for contributions; (c) the provision allowing as much as 22½ per cent of the total authorization to go to one state included in S. 3126; (d) the failure to include an acceptable definition of "urban area" which omission enables funds to be channeled to extremely small municipalities; and (e) the failure to include a suitable definition of "mass transportation" to ensure that those receiving aid function regularly in the service of the general public.<sup>87</sup>

To test the wisdom of these arguments, because of their political orientation, is not within the purview of this discussion. But it is clear that their presence in large part was the cause of the two bills not being brought before the floor of either the Senate or the House of Representatives.

It will be recalled that the original urban transit proposals were submitted by the Administration to Congress late in the last full session of Congress. They were included in the *President's Message on the Transportation System of Our Nation*, sent to Capitol Hill from the White House on April 5, 1962, only a little over four months before adjournment. At first, both Houses reacted swiftly to the measure. Hearings in the Senate were concluded by April 27, and the Committee in the House wound up its hearings about two weeks later, on May 11. As was printed in *Business Week* on April 14, "This proposal, of substantial political appeal to big cities, is getting a priority push from the Administration in hopes it will be enacted before this fall's elections."<sup>88</sup> It looked as if it would.

But even before the respective Committees in the two Houses of Congress published their reports on the bills (July 3, in the Senate; August 7, in the House), it was apparent that the two versions would differ in significant respects. That necessitated, as a practical matter, a conference of the leaders of Congress to iron out the variances and seek a compromise solution which could be presented on the floor for debate and vote. No such compromise was forthcoming. Possibilities of passage dimmed lower as Senators and Representatives faced other extremely important measures in a crowded agenda and the possibility of delayed adjournment — a possibility which eventualized into the longest peacetime session in history. Finally, on September 5, the *New York Times* reported that the House Rules Committee had shelved the bill, killing it for the present session. Contradicting earlier analyses, the reason given was that "key leaders were loath to vote heavy spending

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Sess. 581-608 (1962). See also, *inter alia*: Wall Street Journal, May 2, 1962, p. 14, col. 4-5; New York Times, May 10, 1962, p. 34, col. 5; Duns Review, June, 1962, pp. 44-47; National Review, April 24, 1962, pp. 277-78.

83 *Ibid.*

84 *Ibid.*

85 *Ibid.*

86 *Ibid.*

87 *Ibid.*

88 *Business Week*, April 14, 1962, p. 125.

in an election year."<sup>89</sup> This virtually killed the Senate's version also, because traditionally Congressional leaders are reluctant to bring up controversial legislation for a record vote in only one House, and thereby force their members to take a public position without any possibility of new legislation. On September 15, upon a motion to send the bill to the Senate Commerce Committee for further study, it was clear that the Senate would take no final action in 1962.

Without doubt, the matter of urban mass transportation will be raised again during the current session of Congress. Most likely, the proposals made will take substantially the same form as those of H.R. 11158 and S. 3126. The Administration feels that its measures met with general acceptance inside the Congress and without, and it will surely continue to press for their adoption.<sup>90</sup> The two bills received enthusiastic bipartisan support from many Congressmen last year, particularly from the large and influential group who were their sponsors. Yet no one denies the controversial nature of this legislation. And no one can be assured at this point of its outcome.<sup>91</sup>

Whether the proposals here examined succeed or fail, one thing is certain: our problems as a nation regarding urban mass transportation will not soon be over nor will they cease upon the enactment of any one piece of legislation. But just as clear is the fact that the action, or lack of it, taken by the present Congress will have a vital effect on the future financial security and operating efficiency of the nation's transportation system.

*Franklin A. Morse II*

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AIRLINE ROUTE ABANDONMENT AND TEMPORARY DISCONTINUANCE — STATE  
OPPOSITION TO CAB PRE-EMPTION.

### I. Introduction

The Civil Aeronautics Board, in 1938, was empowered to authorize the abandonment of any air route where "upon application of [the interested] air carriers, after notice and hearing, the Board shall find such abandonment to be in the public interest. . . . The Board may by regulations or otherwise, authorize such temporary suspension of service as may be in the public interest."<sup>1</sup> Until very recently, no cases arose to question the application of this section of the act. But, now, state commerce commissions which possess regulatory powers over intrastate airline flights are currently disputing the CAB's claim of absolute power in this area. The CAB contends that once it grants an airline a certificate of abandonment for an intrastate route any state agency is without jurisdiction to force continuation of service. The states maintain that no airline may cease flying between intrastate stops without their approval.

<sup>89</sup> New York Times, Sept. 5, 1962, p. 41, col. 1.

<sup>90</sup> "With regard to the substance of any bill enacted by the Congress in this field, it is our belief that the Administration's proposal of this year met with general acceptance. Therefore, I would expect that the prospects are quite good that any bill enacted will be in substantially the same form." Letter of Nov. 2, 1962, from Lee C. White, Assistant Special Counsel to the President, on file in the Notre Dame Law Library.

<sup>91</sup> Perhaps the only intervening occurrence of any importance since the adjournment of Congress in September, 1962, was the passage of the \$790 million bond issue in San Francisco in the November elections. Undoubtedly there will be those who will cite this as an indication of the desire of the public to obtain mass transit facilities, and there will be others who will see it as a sign that the problem of mass transportation can be well handled on the local level. It would appear that the changes in the make-up of the Congress as of November, 1962, will have little effect on the success or failure of the bill.

<sup>1</sup> Federal Aviation Act of 1958, § 401(j), 72 Stat. 756, 49 U.S.C. § 1371(j) (1958). Note that the Federal Aviation Act of 1958 incorporated and superseded the Civil Aeronautics Act of 1938, 52 Stat. 973.

## II. *The Recent Conflict*

The conflict has crystallized in the courts of Illinois and Nebraska. In Illinois, American Airlines, a trunk-line carrier,<sup>2</sup> sought to suspend its service to Peoria and Springfield on its flights between Chicago and St. Louis. At the same time, Ozark Airlines, a local service carrier,<sup>3</sup> desired to alter its service pattern, in order to operate one-stop flights between Chicago and St. Louis via either Springfield or Peoria but not both. Ozark further wished to take over all intermediate point service between Chicago and St. Louis, which had been provided by American. The Board, after having given notice and considered memoranda in opposition and in support of the proposal, but without granting a hearing, granted both applications for a temporary period. It had found that the markets involved were essentially short-haul and thus best suited to service by a local service carrier. Moreover, it had concluded that competition between American and the federally subsidized Ozark was unnecessary and uneconomical.

On appeal by the City of Springfield, the Springfield Airport Authority and the Association of Commerce & Industry of Springfield, this order was affirmed in the District of Columbia Circuit Court of Appeals.<sup>4</sup> The petitioners, there, had urged that a hearing was essential to the validity of the order. However, Circuit Judge Fahy declared that the CAB need not conduct a hearing to determine whether or not the temporary suspension was in the public interest. "The omission in section 401 (j) of language explicitly dispensing with a hearing is explained by the inclusion of language authorizing the Board to adopt a procedure for accomplishing temporary suspension 'by regulation or otherwise.'"<sup>5</sup> Answering the further contention that the Board had gone beyond what it purports to do, and has permitted an actual abandonment of service rather than a temporary suspension, the judge replied:

Petitioners rely upon the circumstances that under the order American will sell equipment not required during the period of suspension, with the consequence that a later hearing on the application for amendment of the certificate will not be a fair hearing because a situation will have arisen, due to the so-called temporary suspension, which will prevent restoration of the previous position even if the amendment is later shown not to be justified. Further, it is asserted that Ozark, in rearranging its service under the suspension order, will acquire a historical interest in the market between St. Louis and Chicago, thus again prejudicing the fairness of the subsequent hearing on the certificate amendment, and, moreover, that the order makes a number of positive findings of fact which it will not be possible for the Board as a practical matter to disregard. These intangibles do exist but we are not justified because of them in making the choice petitioners insist upon, namely, to hold that the hearings required before the changes become permanent will be futile unless a hearing is held on the temporary changes. We must assume that the Board, subject to judicial review, will decide as it should when, after a hearing, it comes to the taking of permanent action; that is to say, we may not now assume an erroneous final decision because of the temporary decision.<sup>6</sup>

After the issuance of the CAB's order, American filed its application with the Illinois Commerce Commission requesting approval for the discontinuance of this service, for a time as long as the Board's order remains in effect. The Illinois Commerce Commission, however, denied the request, forcing American to bring its case before a state court.<sup>7</sup>

<sup>2</sup> A trunk line is one certified primarily for long-haul operations between major metropolitan centers.

<sup>3</sup> A local-service line is one certified to provide short-haul service between smaller cities and to link such smaller cities to the larger metropolitan centers with which they have a community of interest.

<sup>4</sup> *Springfield Airport Authority v. CAB*, 285 F.2d 277 (D.C. Cir. 1960).

<sup>5</sup> *Id.* at 279.

<sup>6</sup> *Id.* at 279-80.

<sup>7</sup> In the Cook County Circuit Court, the Illinois Commerce Commission won the case. Before appeal was taken, the case was settled out of court. This information was received

In Nebraska, the CAB authorized Frontier Airlines to discontinue intrastate flights over an unprofitable northern Nebraska portion of the route between Omaha, Nebraska and Casper, Wyoming. This route included the intermediate points of Lincoln, Columbus, Norfolk, Ainsworth, Valentine, and Chadron, Nebraska, as well as the Wyoming cities of Lusk and Douglas. The Board in this case found that the continued operation of Frontier over the described route would require a considerable subsidy. This cost, it believed, would outweigh any inconvenience to the public because of service suspension. Thus the CAB authorized a temporary discontinuance of service. Nebraska obtained review and again the question, whether a hearing was required before the CAB could issue a temporary suspension of service, was before a United States court of appeals. Here, the Eighth Circuit answered:

While we recognize the routine of notice and hearing is a common method of disposing of complex and controversial matters and has been said to be based on procedural due process where property rights are involved, we are not prepared to hold that that pattern is obligatory, where, as here, the applicable statute authorizes Board action "by regulations or otherwise" and there is no due process question with respect to the applicant's property rights.<sup>8</sup>

Pursuant to the temporary order, the carrier notified the cities involved of its intention to suspend the service in the near future. Immediately following this announcement, Nebraska's Railway Commission promulgated and adopted the rule that no aircraft carrier operating in intrastate commerce could discontinue service without the Commission's permission. The state then obtained an injunction in the district court of Cherry County, Nebraska, prohibiting the carrier from suspending service over the route in question. Again an airline is forced to listen to and rebut a state's argument while the CAB would not hear it.<sup>9</sup>

The states thus are restricting the abandonment of local service to the detriment of a national air system. They are trying to force airlines to furnish a maximum of local flights so that the local passengers will have the utmost convenience. However, the states appear to give no thought to the over-all consequences of operating flights at an astronomical loss on air transportation in general. It is in this context that the pre-emption problem must be examined.

### III. *Pre-emption Under Analogous Transportation Law*

Although no precedents involving this problem exist, similar conflicts have been litigated under the railway section of the Interstate Commerce Act.<sup>10</sup> For instance, in 1921, the Interstate Commerce Commission authorized the abandonment of a railroad, all of whose track was located within a single state. Texas sought an injunction in its own court against this action, claiming the discontinuance was in violation of state law and that the railroad could not take such action without state approval.<sup>11</sup> The Supreme Court accepted this contention, stating:

*The road lies entirely within a single state, is owned and operated by a corporation of that state and is not a part of another line. Its continued operation solely in intrastate commerce can not be of more than local concern. Interstate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a branch or extension whose unremunerative operation might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce.*

from Edward V. Hanrahan, Special Assistant Attorney General for the State of Illinois, in letter of January 2, 1963, on file in Notre Dame Law Library.

8 *Nebraska Department of Aeronautics v. Civil Aeronautics Board*, 298 F.2d 286 (8th Cir. 1962).

9 The case in Nebraska is before the Supreme Court of Nebraska, General Number 35315.

10 § 400 (18), 41 Stat. 477 (1920), 49 U.S.C. 1(18) (1958).

11 *Texas v. Eastern Texas R.R. Co.*, 258 U.S. 204, 216-17 (1921).



A few years later, however, the Court underscored the limits of the *Texas v. Eastern Texas R.R. Co.*<sup>12</sup> decision. In *Colorado v. United States*<sup>13</sup> an injunction was sought against the Colorado & Southern Railway Co. to prevent it from abandoning an intrastate route under a certificate of public convenience and necessity that had been granted by the Interstate Commerce Commission. Mr. Justice Brandeis, speaking for the majority, held the *Eastern Texas* doctrine to the narrow situation where a railroad's entire line is within the same state and it is owned and operated by a corporation of that state. Brandeis then set forth the idea of pre-emption in the field of carrier legislation:

The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its federal duty. . . .

The sole objective of paragraphs 18-20 [of the Transportation Act] is the regulation of interstate commerce. Control is exerted over intrastate commerce only because such control is a necessary incident of freeing interstate commerce from unreasonable burdens, obstructions, or unjust discrimination from operating a branch at a large loss. Congress has power to authorize abandonment, because the State's power to regulate and promote intrastate commerce may not be exercised in a way as to prejudice interstate commerce. . . .

This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. *The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon efficient performance of the transportation system as a whole.* . . .

The exercise of federal power authorizing abandonment is not an invasion of a field reserved to the State. . . . Because the same instrumentality serves both, Congress has power to assume not only some control but paramount control, insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate commerce may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission.<sup>14</sup>

The same view was expressed in *Transit Commission v. United States*,<sup>15</sup> where it was held that the ICC had the power to authorize the abandonment of a branch of the Long Island Railway, although the company's entire line was wholly within the state of its incorporation and the bulk of its traffic was intrastate and only a slight amount was interstate. The prerequisite to the exercise of this power was the finding that the continued operation of the intrastate service would result in serious depletion of the revenues of the whole system and thus burden interstate commerce.

This decision struck down whatever remaining vitality was to be found in the *Eastern Texas* case. The Court here seemed to completely reverse the holding of 1921, and did so without even mentioning the existence of the opposite view.

From the latter two cases the conclusion must be that where the interstate and intrastate operations of a rail carrier are closely interrelated, the exclusive power to control the operations of the carrier lies with the federal government.

It is suggested that the result for air carriers should be the same. The intrastate and interstate air services are "inextricably intertwined," and the manner in which the intrastate service is performed necessarily affects the interstate service.

It is first observed that the federal acts which led to pre-emption in regard to rail routes are quite similar to the Federal Aviation Act of 1958, concerning the

12 258 U.S. 204 (1921).

13 271 U.S. 153 (1927).

14 *Id.* at 162-166 (emphasis added).

15 284 U.S. 360 (1931).

scope and criterion for abandonment. Section 401 (j) of the Federal Aviation Act requires that "No carrier shall abandon any route, or part thereof, for which a certificate has been issued by the Board, unless, upon the application of such air carrier, after notice and hearing, the Board shall find such abandonment to be in the public interest."<sup>16</sup> The act further finds "public interest" to be the equivalent of public convenience and necessity.<sup>17</sup> The Interstate Commerce Act provides that "no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."<sup>18</sup> The similarity appears deliberate. It appears, therefore, that no reason exists for not following the *Colorado* case in air law. The conclusion should be that federal law has pre-empted the field in regard to the control of air routes.

This view need not stand simply on a comparison of statutory language. It is further supported by the Supreme Court's judgment in *Hines v. Davidowitz*.<sup>19</sup> There the test, for deciding when a state may not lawfully exercise control over a matter upon which Congress has legislated, was held to turn on the question whether the state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>20</sup>

The Congressional purpose in the Federal Aviation Act is the establishment of an adequate air transportation system, with subsidy support being provided when the Civil Aeronautics Board determines such support is needed.<sup>21</sup> In Illinois and Nebraska, the Board concluded that a temporary discontinuation of the service would best serve the general air transportation system. Obviously, the Congressional objective is impeded by inconsistent state action which requires federally authorized and supported service to be continued despite the Board's determination to the contrary.

Moreover, the fact that federal money is issued to support airlines, especially small airlines such as Frontier and Ozark,<sup>22</sup> vividly points out the need for dominance of federal law over establishment and abandonment of routes for air carriers. If such dominance did not exist, the Treasury would be burdened by expenditures of public funds in support of airlines, flying routes which the CAB found not to be in the public interest. The carrier, itself, would be forced to operate at huge deficits that could easily lead to bankruptcy; at the least, it would be financially weakened to the point that it could not fully carry out all the duties, created by its federal certification.

Finally, there has been federal pre-emption in other areas of air law. Under the Civil Aeronautics Act, predecessor of the Federal Aviation Act of 1958, the problem of creditor's lien priorities was held to be determined by federal law. And the Federal Aviation Act, itself, was found absolute in the problem of the issuance of stock by a federally certified air carrier.

First, in the case of *In re Veteran's Air Express Co.*,<sup>23</sup> a creditor attempted to obtain lien rights under California law in preference to those rights of the War Assets Administration, which had advanced federal money to buy the planes. The lat-

16 §401(j), 72 Stat. 754 (1958), 49 U.S.C. § 1371(j) (1958).

17 § 102, 72 Stat. 740 (1958), 49 U.S.C. § 1302 (1958).

18 *Supra* note 6.

19 312 U.S. 52 (1941). This case held that the Federal Alien Registration Act of 1940 precludes enforcement of state alien registration acts.

20 *Id.* at 67.

21 § 102, 72 Stat. 754 (1958), 49 U.S.C. § 1302 (1958).

22 Air carriers can be divided into five classes: the domestic trunk line carriers, the local service carriers, the all-cargo carriers, the supplemental air carriers and international air transportation carriers. The local service carriers are the only group of airlines that are now receiving subsidies; and it is estimated that they will never become self-sufficient. Ozark and Frontier are classified in this group. See Fulda, *The Regulation of Aviation*, 19 A.B.A. ANTI-TRUST SECTION REP. 377 (1962).

23 76 F.Supp. 684 (D.N.J. 1948).

ter agency contended that it had complied with the provisions of the Civil Aeronautics Act, concerning registration of all aircraft conveyances, and by that action had a lien superior to any lien state law might affect. In sustaining this contention, and holding exclusive control of airplane conveyances was with the Administrator of Civil Aeronautics to the exclusion of states, the New Jersey federal district court reasoned:

Since, then, this court is of the opinion that the regulatory provisions of recordation in accordance with the Civil Aeronautics Act is within the scope of Federal Law in a field of Federal competence, the lien claim by the United States of America is senior to any claim established under a State Law affecting the same object.

No condition or requirement, inconsistent with the express will of Congress in matters such as this over which it has constitutional authority, may be established by any state in derogation of the rights and interests of the United States in the proper conduct of the affairs of government. This last statement needs no monotonous recital of authorities for its substantiation.<sup>24</sup>

The same result was reached in *United States v. United Aircraft Corporation*,<sup>25</sup> where the United States district court in Connecticut said: "The Congress has pre-empted the field of conveyancing of interests in aircraft and portions thereof, to facilitate the control and promotion of air commerce. The power to do so may not be denied."<sup>26</sup>

No reason can be suggested for holding that if Congress pre-empted the field of conveyancing it did not pre-empt the field of route extension and abandonment, for the latter field requires even more control to achieve the purpose of the act namely an adequate air transportation system.

A related problem was dealt with in *United Air Lines, Inc. v. Nebraska State Railway Commission*,<sup>27</sup> where the power of the state to require federally certified air carriers to obtain state approval for the issuance of stock and security and to comply with certain required accounting practices was denied. The Nebraska Supreme Court based its decision on the need for uniformity in the field. If uniformity is required in the area of accounting methods, surely it is needed in the establishment and abandonment of routes.

#### IV. *The State's Argument*

However, it is from a case decided under the Civil Aeronautics Act that the strongest argument for the state can be found. In *People v. Western Air Lines*,<sup>28</sup> the California courts propounded the doctrine that federal law did not pre-empt the field in the area of rate regulation and that states may regulate intrastate rates notwithstanding any federal action in the field.

In this case, the Supreme Court of California ruled that the Civil Aeronautics Act could be divided into two types of regulations — one over safety factors<sup>29</sup> and the other over economic factors. The court stated that "Congress has not sought to extend the economic regulation of the Board to intrastate transportation of persons or property other than mail; nor has it attempted to oust the states of control over such rates."<sup>30</sup>

Among the regulations which the California court felt were economic, and thus not pre-empted by the federal laws, were sections 401-416 of the Civil Aeronautics Act which included the provision requiring Board certification for abandon-

<sup>24</sup> *Id.* at 690-91.

<sup>25</sup> 80 F.Supp. 52 (D.Conn. 1948).

<sup>26</sup> *Id.* at 54.

<sup>27</sup> 172 Neb. 784, 112 N.W.2d 414 (1961).

<sup>28</sup> *People v. Western Air Lines*, 268 P.2d 723, appeal dismissed 348 U.S. 859 (1954).

<sup>29</sup> The Civil Aeronautics Act of 1938, under which *Western Air Lines* was determined, vested the former CAA with safety and economic rule making and adjudicatory powers. But, pursuant to the Federal Aviation Act of 1958, the safety regulatory authority was transferred to the CAA.

<sup>30</sup> *Supra* note 28, at 736.

ment. The court concluded that the federal law has not pre-empted the field in this area. The court further supported its position by stating that the regulation of intrastate fares of common carriers traditionally has been subject to state regulation.

But *Western Air Lines* does not supply a strong position for the states. The case can be discredited on one of the following grounds: 1. It is clearly out of line with the other authorities. The cases of *United Air Lines v. Nebraska State Railway Co.*<sup>31</sup> and *In re Veteran's Air Express Co.*<sup>32</sup> are examples of federal pre-emption in areas of economic regulations. Therefore, the distinction drawn by the court is without value. 2. In *Western Air Lines* there was no problem of formal Board determination as to what the intrastate rate should be, but rather there was an attempt by the state to collect the statutory fine from an airline for raising rates without authorization. It is suggested that had the Board settled on intrastate rates or had it determined that the rate set by the state was discriminatory as to interstate traffic the result would have been different. 3. As the *Colorado* case pointed out, route regulation has always been considered under exclusive federal control. 4. Congress did not use language in the Civil Aeronautics Act that is found in other carrier legislation — such as that concerning motor carriers<sup>33</sup> and water carriers<sup>34</sup> under the Interstate Commerce Act — to the effect that such regulation shall not be construed to interfere with the exclusive power of the states to regulate intrastate commerce. Under laws with such language pre-emption still exists. Therefore the failure to use the restrictive words strongly suggests that exclusive federal control of air law was contemplated by this act.

### CONCLUSION

As was shown above, the Congressional purpose of an adequate over-all air-transportation system would be impeded, if states were free to burden air carriers with regulations for doing business. Thus the Federal Aviation Act should give complete control over route certification and abandonment to the CAB to avoid such evils. This result is approved in *Northwest Airlines, Inc. v. Minnesota*<sup>35</sup> where Justice Jackson stated:

Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protections so far as transit is concerned, it owes to the Federal Government alone and not to any state government.<sup>36</sup>

It is submitted that any state control over the air transportation industry should be severely limited because the nature of the industry requires but one master to adequately serve the country.

*Frank J. Duda, Jr.*

<sup>31</sup> *Supra* note 25.

<sup>32</sup> *Supra* note 23.

<sup>33</sup> § 202(b), 49 Stat. 543 (1935), 49 U.S.C. § 302(b) (1958): "Nothing in this chapter shall be construed to affect the powers of taxation of the several states or to authorize a motor carrier to do an intrastate business on the highways of any state or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

<sup>34</sup> § 303, 54 Stat. 931 (1940), 48 U.S.C. § 903(j) (1958): "Nothing in this chapter shall be construed to interfere with the exclusive exercise by each State of the power to regulate intrastate commerce by water carriers within the jurisdiction of such State."

<sup>35</sup> 322 U.S. 292 (1944).

<sup>36</sup> *Id.* at 303.

RAPID SHAVE IN THE FIRST CIRCUIT COURT OF APPEALS — TELEVISION ADVERTISING AND THE FEDERAL TRADE COMMISSION (PART II).

*Editor's Note:* In its May issue of 1962, the LAWYER presented an article which surveyed the FTC's recent activity in the area of deceptive television advertising (37 NOTRE DAME LAWYER 524). A great deal of emphasis was there given to what is popularly labeled the *Sandpaper Mask* or *Rapid Shave* case. Subsequently, the case was appealed from the Opinion of the Commission to a United States court of appeals. That which follows is a short comment on the result of the appeal.

In the wake of advertising's aggressive advance to stimulate the nation's buying habits,<sup>1</sup> the Honorable Bailey Aldrich of the First Circuit found the petition to review the case of *Colgate-Palmolive Co. v. FTC* "noteworthy principally because of the extremes to which the dispute has led the parties."<sup>2</sup>

However, this is the first case, concerning deceptive television advertising, to have reached the heights of a United States court of appeals. If there is significance in the Federal Trade Commission's search for a standard in the largely uncharted area of deception by television commercial, Judge Aldrich chose to ignore it. Yet, to this regard, Commissioner Elman carefully set out the FTC's position in the opinion below.<sup>3</sup> It appeared to be a position well taken, although it required further refinement. The loudest criticism from admen, however, was sounded against the hard-nosed cease and desist order which accompanied the agency's decision.<sup>4</sup> This too was the primary subject of the First Circuit's consideration.

Briefly, there was involved here a television commercial which purported to prove the moisturizing qualities of Rapid Shave by demonstrating its effectiveness on "tough, dry sandpaper." The video portion of the commercial showed a safety razor being quickly drawn across what appeared to be a sheet of sandpaper that had just been lathered with Palmolive's "super-moisturizing" shaving cream. A single stroke left behind a clean diagonal path — proof of the "fastest, smoothest shaves possible." But, instead of using actual sandpaper, the demonstration employed a simulated mock-up of sand on plexiglass. The proposed justification, that the mock-up was necessitated by technical difficulties in pictorial representation, was met by the hard fact that real sandpaper of the type depicted could not be immediately shaved as demonstrated. Such sandpaper, in truth, could not be cleanly shaved until "upwards of an hour"<sup>5</sup> of soaking. On December 29, 1961, the Commission declared that this demonstration was deceptive. The First Circuit, although expressing the view that there was little injury to the public, concurred on appeal.

The Commission's decision was backed by a final order which, in part, forbade Colgate-Palmolive Company, the manufacturer, and Ted Bates & Company, its advertising agency, from misrepresenting in any manner the quality or merits of Rapid Shave or any other shaving cream. But the great source of difficulty was centered in another section of the order. In the first paragraph, this order boldly directed respondents to cease and desist from representing pictures, depictions, or demonstrations of shaving cream or *any other product* as "genuine or accurate," when in fact they are not so, or when they do not prove the quality or merits of any such product.

In their briefs to the court of appeals, Colgate and Ted Bates raised the cry

1 See *Time Magazine*, Oct. 12, 1962, p. 85.

2 *Colgate-Palmolive Co. v. FTC*, 310 F.2d 89, 90 (1st Cir. 1962).

3 *Colgate-Palmolive Co. and Ted Bates & Co., Inc.*, No. 7736, Opinion of the Commission, Dec. 29, 1961.

4 E.g., New York attorney, Sidney A. Diamond, said that "this case can set a pattern which will put even more teeth in the Federal Trade Commission than the dreaded temporary restraining order that FTC Chairman Paul Rand Dixon is asking for authority to issue." As quoted in *Advertising Age*, Jan. 15, 1962, p. 94, col. 1.

5 *Colgate-Palmolive Co. v. FTC*, *supra* note 2, at 91.

that the above order was both vague and ambiguous, and too broad in relation to the violations found in the 60 seconds of commercial.

Concerning the argument that the order is ambiguous, particular emphasis was given to the phrase, "genuine or accurate." Ted Bates, under the assumption that the words, "genuine" and "accurate," are used to mean something different from the other, reasoned:

A variant, that can and does arise, occurs when an unretouched photograph exaggerates the virtues of a product or denigrates those of a competing product. In such a case, use of the unretouched photograph would presumably violate the order because it would not be "accurate," but any change in the article photographed, or in the picture — to make it accurate — would apparently run afoul of the "genuine" requirement. That the order can create such a dilemma demonstrates its absurdity.<sup>6</sup>

In rebuttal, the FTC simply urged that the "argument as to the meaning of the individual words of the order is nothing more than an exercise of semantics."<sup>7</sup> However, the definitions of the two words demonstrate more than a shade of difference — "accurate," as a term of relation, means careful conformity to the truth or some standard, while "genuine," an absolute term, is defined to mean authentic or proceeding from the reputed source, origin or author.

Perhaps the Commission intended to set up an either-or standard for determining deception. But, if this was its intention, it failed to specify the factors that decide which standard will be invoked in any given case. Moreover, Commissioner Elman declared that even assuming Rapid Shave was truthfully described, "the commercial would be deceptive within the meaning of the statute, in the manner in which they deliberately misinform the viewer that what he sees being shaved is genuine 'tough, dry sandpaper,' rather than a plexiglass mock-up."<sup>8</sup> Reinforcing this stand, the case of *FTC v. Algoma Lumber Co.*<sup>9</sup> was cited for the following: "[T]he public is entitled to get what it chooses," and, "substitution would be unfair though equivalence were shown."<sup>10</sup>

Colgate's brief to the court of appeals challenged such authority:

Neither the *Algoma* case nor the other cases referred to in the Commission's brief set any kind of precedent for the new mock-up doctrine of the Commission. In *Algoma*, there was a misrepresentation as to the properties of the product: yellow pine was misrepresented as white pine and there was evidence that not only was yellow pine not as good but the public understood that it was not as good. In the other cases, there were misrepresentations as to endorsement of the product, of the origin of the product, of the fact that the product was repossessed, etc.

These cases created a standard with which there is no disagreement by Colgate; they stand for the proposition that a product must have the quality or attribute which materially induces its purchase.<sup>11</sup>

Judge Aldrich manifested his agreement, when he said: "We see no objection to obvious fancy, provided there is no underlying misrepresentation. But respondents' difficulty is that they do not come under any such principle."<sup>12</sup> In other words, Colgate and Bates fell precisely within their own interpretation of the *Algoma* case. The court agreed with the FTC that the sandpaper shaving demonstration did not prove that "super-moisturized Palmolive Rapid Shave can do the same for you." It was immaterial that Rapid Shave may well possess adequate shaving qualities, where the principal inducement to buy was the misrepresentation

6 Brief for Petitioner Bates, p. 32, *Colgate-Palmolive Co. v. FTC.*

7 Brief for Respondent FTC, p. 45, *Colgate-Palmolive Co. v. FTC.*

8 Opinion of the Commission, *supra* note 3, at 10.

9 291 U.S. 67 (1934). It is interesting to note that the FTC did not cite the *Algoma* case for this proposition in its brief to the court of appeals.

10 Opinion of the Commission, *supra* note 3, at 12.

11 Brief for Petitioner Colgate, p. 13, *Colgate-Palmolive Co. v. FTC.*

12 *Colgate-Palmolive Co. v. FTC*, *supra* note 2, at 92. Note the court's use of the word "respondents" in describing Colgate and Bates. Despite the fact that they are petitioners to the court of appeals, they have retained the designation given to them by the FTC's complaint.

that it had a moisturizing power which could shave the gritty surface of sandpaper. Returning to the contention that the language of the order was ambiguous and vague, Bates pressed the attack further:

Nature is not black-and-white, but advertising—both print and television—frequently is. In order to reproduce products in black-and-white to resemble those products as they appear in nature, it is frequently necessary to change the colors being photographed. Thus, for example, unless coloring is added to frozen orange juice, it will look like milk in a black-and-white picture. And unless the color of instant iced tea is intensified by the addition of a coloring agent, a black-and-white photograph of it will look like ordinary ice water.

Yet the addition of the coloring agent in a frozen orange juice or instant iced tea advertisement—to *eliminate* inaccuracy in a black-and-white photograph and to recapture the truth that a poor method of reproduction would otherwise destroy—would seem to violate the order. . . .<sup>13</sup>

Finally, the First Circuit itself, in questioning the FTC's counsel during oral argument, found the Commission's position indefensible:

What the viewers are interested in, and moved by, is what they see, not by the means. We suggested to counsel that this could be readily tested. Suppose, in the case of color television, a milk producer wishes to advertise the rich quality of his cream. Obviously he cannot use a foreign substance so that his product will appear yellower and richer than it is. But, equally, should he be allowed to use his own cream if he knows that by the normal photographic process its color would be changed so as to appear substantially better on the screen than it was? We suspect the Commission would think it clear he could not. Yet if he used an artificial substance in order to produce the exactly correct appearance, under the Commission's rule there would be deceit. Counsel gave no answer. We are not critical of counsel, because we think his client has left him without one.<sup>14</sup>

Television demonstrations which are not "genuine," cannot be considered illegal per se. The court, therefore, in its consideration of the FTC's order, indirectly has sought to clarify the guidelines for permissible product demonstration or depiction on television. It seems that the FTC could easily correct this part of the order to the court's satisfaction by eliminating the word "genuine." The result, then, would be simply to forbid "demonstrations which represented a product as doing something that it could not do, or as appearing to have qualities which it did not possess."<sup>15</sup>

The other part of the order, prohibiting the misrepresentation of the quality or merits of Rapid Shave or any other shaving cream *in any manner*, was given no direct or specific mention by Judge Aldrich. Nor, is it entirely clear that what the court said concerning the broadness of the order has application to this part.

Turning now to the scope of the FTC's command to cease and desist, the First Circuit made this suggestion for redrafting:

Under our construction there is no showing of any "method" or "practice" in the sense discussed by the Commission in its opinion. Respondents' only offense was the making of a single misrepresentation about a single product. The fact that this was accomplished by a "demonstration" did not warrant a broad order against all future misrepresentations of any kind by demonstrations any more than the fact that a misrepresentation was made in print would justify an order against all future misrepresentations of any kind by printing. The Commission has revealed that it is well aware of the scope to be applied to single misrepresentations, and we need say no more on this subject.<sup>16</sup>

But there is more to be said on the subject. The Supreme Court has often declared that the FTC has wide discretion in its formulation of a remedy adequate to prevent other related unlawful practices.<sup>17</sup> It draws only this exception—the

13 Brief for Petitioner Bates, pp. 31-32.

14 Colgate-Palmolive Co. v. FTC, *supra* note 2, at 93-94.

15 *Id.* at 93.

16 Colgate-Palmolive Co. v. FTC, *supra* note 2, at 94-95.

17 For a most recent instance, see *FTC v. Henry Broch & Co.*, 368 U.S. 360 (1962). Further see DAVIS, 1 ADMINISTRATIVE LAW TREATISE § 8.19 (1958).

remedy selected must have a reasonable relation to the unlawful practices found. In *FTC v. Mandel Bros.*,<sup>18</sup> the Court ruled that "Where the episodes of misbranding have been so extensive and so substantial in number as they were here, we think it permissible for the Commission to conclude that like and related acts of misbranding should also be enjoined as a prophylactic and preventive measure."<sup>19</sup>

To justify its discretion in this case, the Commission said that the problem of deceptive television advertising is "one with which both respondents have had prior experience."<sup>20</sup> To substantiate its statement, the Commission cited three cases which had recently been on its dockets. First, the Colgate toothpaste "invisible shield of protection" advertising campaign was shattered, when the FTC found that the commercials involved led the television viewer to believe that Colgate's with Gardol affords complete protection against tooth decay.<sup>21</sup>

The second and third cases concerned Ted Bates & Company. This advertising agency was first involved in a case dealing with television demonstrations which purported to prove the ability of Life cigarette's filter to absorb tar and nicotine. After the FTC issued a complaint against these representations, Brown & Williamson Tobacco Company and Ted Bates consented to discontinue the commercials.<sup>22</sup> But Bates was again one of the recipients of a FTC complaint in a subsequent case. There, the cause of disturbance to the Commission was a commercial which pictured what appeared to be drops of moisture on Blue Bonnet's oleomargarine and on butter, but not on a competitive brand of oleomargarine. It was charged that the moisture drops were magnified, that they were not actually moisture drops produced by the products but were applied for the demonstration, and that they were not determinative of the flavor or quality of the product as stated by the announcer. The respondents in this case also entered into a consent decree.<sup>23</sup> When Bates questioned the propriety of the Commission's reference to the above cases, the FTC offered this reply to the court of appeals: "Although these orders were entered by consent agreements reciting that they were 'for settlement purposes only,' and not admissions of violations of law, the Commission is certainly not precluded from noting the existence of such proceedings to show that Bates has had prior experience with 'the problem of deceptive television advertising.'"<sup>24</sup> It is interesting to note that Justice Whittaker, joined by Justices Frankfurter and Harlan, in the dissent of *FTC v. Henry Broch & Co.*,<sup>25</sup> observed that the Opinion of the Commission in the *Rapid Shave* case showed responsible awareness of the "appropriateness of the scope of an order to restrain illegality."<sup>26</sup>

Judge Aldrich made a second suggestion in his direction to the Commission to prepare a new order. He said that with respect to Bates & Company, there may well be a distinction between principal and agent. "[W]e have reservations as to how far it is appropriate to go in the case of an agent, in the absence, at least, of any suspicion on its part that the advertisement is false."<sup>27</sup>

The FTC, faced with the alternative of petitioning the Supreme Court for review or complying with the demands of the court of appeals, chose the latter course. On February 18, 1963, the Commission issued a reworded Proposed Final Order and an opinion to explain its position.

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18 359 U.S. 385 (1959).

19 *Id.* at 393.

20 Opinion of the Commission, *supra* note 3, at 25.

21 Colgate-Palmolive Co., No. 7660, Opinion of the Commission, Mar. 9, 1961.

22 Brown & Williamson Tobacco Corp., No. 7688, FTC Consent Order, Feb. 24, 1960.

23 Standard Brands, Inc., No. 7737, FTC Consent Order, June 1, 1960.

24 Brief for Respondent FTC, pp. 48-49, footnote 32.

25 368 U.S. 360 (1962).

26 *Id.* at 369.

27 Colgate-Palmolive Co. v. FTC, *supra* note 2, at 95.



The principal section of this new order streamlined the language of the former directive to prohibit both Colgate and Bates from:

Advertising any product by presenting a visual test or demonstration represented to be actual proof of a claim made for the product, where the test or demonstration does not constitute actual proof because a mock-up or substitute material or article is used in the test or demonstration instead of the *genuine material or article represented* to be used therein.<sup>28</sup>

It is noted that the troublesome word "genuine" has not been removed from the order. The previous "genuine or accurate" standard is now replaced by "genuine material or article represented." The Commission, however, attempts to quiet any objection in its accompanying opinion:

To avoid any possible misunderstanding of its position, the Commission emphasizes that its proposed order here would not prohibit *per se* the use of a mock-up in television commercials, e.g., where it precisely depicts a substance or material that cannot accurately be reproduced on the television screen. As we recognized in Point II . . . the limitations of television photography might in some circumstances permit use of such a mock-up. But it is one thing to use a mock-up merely as a substitute for an article whose image becomes distorted when photographed; it is something entirely different to use the mock-up in a "test" or "demonstration" of the advertising product's claimed qualities, and to represent it as being the genuine article.<sup>29</sup>

Significant also is the fact that the Commission persisted in the broad scope of its order.

Concerning the court's second suggestion for redrafting, the Commission conceded to Bates the defense of proving that it neither had knowledge of the falsity of the sandpaper demonstration nor had any reason to question its truthfulness. But the advertising agency was once again specifically named in the order. Commissioner Elman declared that "it would be strange indeed if Bates as the moving party in originating, preparing, and publishing the commercials, and having full knowledge not only that the claim was false but that the 'proof' offered to the public to support it was a sham, should be relieved from responsibility."<sup>30</sup>

The FTC, it would appear, has not capitulated but merely withdrawn to regroup its forces: "We believe it would be more orderly, less productive of delay, and in the public interest for the Commission now to remove the defects in its order found by the Court of Appeals, so that if there should be occasion for further judicial review, it will not be clouded by uncertainty as to the basis and breath of our decision."<sup>31</sup> Undoubtedly, Colgate and Bates will find the new order unacceptable. The only question which remains is whether they have tired of the battle. If not, the FTC is now prepared to take its case to the Supreme Court, if necessary. Certainly, the *Rapid Shave* case is of substantial importance as a landmark from which the Commission can direct its policy in safeguarding the television viewer from deception.

*Norman E. Matteoni*

<sup>28</sup> Colgate-Palmolive Co. and Ted Bates & Co., Inc., No. 7736, FTC Proposed Final Order, Feb. 18, 1963. (Emphasis added.)

<sup>29</sup> Colgate-Palmolive Co. and Ted Bates & Co., Inc., No. 7736, Opinion of the Commission on Remand, Feb. 18, 1963, p. 14, footnote 12.

<sup>30</sup> *Id.* at 13.

<sup>31</sup> *Id.* at 2.