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Abolishing a Federal Agency: The Interstate Commerce Commission

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Abolishing a Federal Agency: The Interstate Commerce Commission

Congress has, from time to time, enacted legislation to discontinue a federal agency and either redistribute or discontinue its functions. Abolishment of an agency or its functions has often been politically challenging because of the potential impact on stakeholders with competing interests. Frequently, it has also been administratively complex, involving myriad decisions about policies and the distribution of functions and resources during the winding down of the abolished agency.

This report takes a closer look at the abolishment of one particular agency—the Interstate Commerce Commission (ICC)—and most of its functions. It reviews, in historical context, the ICC’s establishment, growth, decline, and elimination.

During the mid-1800s, railroads became key for rural growers, mining companies, and others to transport goods to urban centers. The nature of rail transportation and national and state government policies led to powerful railroad companies that were monopolistic in some geographic areas and ruinously hypercompetitive in others. Responding to public opinion and stakeholder advocacy, Congress established the ICC to defend the public from these practices, primarily through adjudication of grievances.

Although some considered the newly established ICC to be relatively weak and ineffective, Congress greatly expanded the ICC’s authority and responsibilities during the first part of the 20th century. World War I led the federal government to take control of the railroads. Following the war, the railroads were returned to private control. Rather than returning to its pre-war role as a regulator of privately owned and operated railroads, however, the ICC was charged with broader responsibilities in managing the industry in the context of U.S. commerce. The railroad industry was weakened by the Great Depression and increasing competition from other transportation modes—particularly trucking. These challenges led Congress to further adjust the ICC’s role from protecting those served by powerful railroad companies to managing the economics of the transportation sector in the public interest.

During the 1970s, Congress and the President, with the support of some stakeholders, found agreement on incremental deregulatory measures that greatly diminished the role and power of the ICC. Legislation to abolish the commission outright was introduced at least as early as 1970, but such proposals did not see significant congressional action over the next two decades. During the 103rd Congress (1993-1994), bipartisan discontent with the ICC provided the political context for its elimination. ICC abolishment advocates circumvented the authorizing committee leaders’ support of the ICC by initiating the abolishment process, on a bipartisan basis, through the appropriations process. In response to significant cuts to the ICC’s appropriation and the promise of further cuts to follow, the Clinton Administration and authorizing committees developed legislation to wind down and abolish the agency and many of its functions and to transfer the remaining functions to the Department of Transportation.

The case of the ICC illustrates that the abolishment of an agency and its functions—particularly one as powerful and integrated into American life as the ICC once was—can be a complex, multifaceted, incremental, and lengthy legislative and administrative process. In general, the case appears to have resulted from phenomena and considerations that might have relevance in other contexts, including changes in the environment within which the agency operated, reevaluation of the relevance of its missions, recommendations from third-party and congressional studies, and other evolving policy and political considerations, such as deregulatory trends and efforts to reduce government spending.

Contents

Agency “Abolishment” in an Evolving Bureaucracy.....	1
The Case of the Interstate Commerce Commission	2
Establishment	2
Growth in Duties and Authorities.....	5
Expanded Authority and Reach in the First 30 Years	5
War-Time Federal Control of the Railroads and a Changed Role for the ICC	6
The Great Depression and the Erosion of the Railroad Shipping Monopoly.....	7
Concern About the Administration of the ICC and Similar Agencies.....	9
Critique of Independent Regulatory Commission Model	9
Senate Select Committee to Investigate the Executive Agencies	10
Post–World War II Assessment of Executive Branch Organization: Regulatory Agencies	11
Transportation Policy Studies	13
A New Department of Transportation	14
Ash Council Recommendation: Reorganize Federal Regulation.....	14
Reduction of Surface Transportation Regulation and Early Efforts to Abolish the ICC.....	15
Incremental Deregulation of Surface Transportation.....	16
Presidential Proposal to Abolish the ICC.....	18
Legislative Path to Abolishment	19
Appropriating Toward Abolishment	19
Authorization and Transfer Decisions and Agency Termination	20
Administrative Implementation of Abolishment.....	23
Considerations for Congress.....	24
The Congressional Role in Reshaping the Federal Bureaucracy	24
The Decline and Abolishment of the ICC	26

Tables

Table 1. Interstate Commerce Commission Employment	6
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Contacts

Author Information.....	27
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Agency “Abolishment” in an Evolving Bureaucracy

More than two centuries of legislative and administrative actions by successive generations of elected and appointed officials have created an evolving federal bureaucracy¹ of diverse organizations and processes. The contours and scope of the federal government reflect changing national contexts and needs, the influence and decisions of policymakers with diverse policy preferences and differing viewpoints about the role of government, and ongoing competition between Congress and the President to influence the behavior of agencies.

Congress has, from time to time, enacted legislation to consolidate or discontinue a federal agency and either redistribute or discontinue its functions. Where Congress has eliminated an agency, it has also made some determination about whether or not the federal government will continue to carry out the functions that had been the statutory responsibility of the abolished agency.

Where a determination has been made that the federal government will continue to carry out the agency’s functions, Congress has often transferred these to new or existing government or quasi-governmental organizations.² Congress might take such steps where an agency’s execution of its functions or its coordination with other agencies is at issue. For example, the Homeland Security Act of 2002 abolished the Immigration and Naturalization Service, a subunit of the Department of Justice, and transferred its functions to several different subunits within the newly established Department of Homeland Security.³

At other times, Congress has abolished an agency in the context of a broader congressional assessment of the policy area(s) covered by the agency and the authorities it has exercised. In such cases, Congress has not only abolished the agency, but it has repealed, without replacement, the statutes underlying some or all of the agency’s authority and discontinued or greatly reduced the functions the federal government would continue to carry out.

This report discusses what is perhaps the quintessential example of the abolishment of an agency and discontinuation of many of its functions. The Interstate Commerce Commission (ICC) was statutorily established in 1887, grew to be a powerful regulatory agency with far-reaching authority, declined in stature and authority, and was ultimately abolished by Congress in 1995. Its abolishment might best be understood in historical context by addressing several questions: Where did the agency come from, how did it change, and how did its economic and political context change? The report begins by providing background about the agency’s establishment and

¹ In this report, *bureaucracy* means the collection of governmental entities that are charged with implementing public laws fairly and impartially. In this context, it is not used to mean red tape or inflexible officialism.

² In this context, *quasi-governmental organizations* means statutorily established organizations with public and private features.

³ P.L. 107-296, 116 Stat. 2135. See, especially, §§471, 441, and 451(b). Other examples of reorganizations involving redistribution of an agency’s functions include the Foreign Affairs Reform and Restructuring Act of 1998 (P.L. 105-277, Division G; 112 Stat. 2681-761), which abolished the United States Arms Control and Disarmament Agency and transferred its functions to the Department of State (§§1211-1212), abolished all but two subunits of the United States Information Agency and transferred its functions to the Secretary of State (§§1311-1312), and abolished the United States International Development Cooperation Agency—with the exception of the Agency for International Development and the Overseas Private Investment Corporation—and transferred its functions to agencies in which they had been vested prior to a 1979 reorganization plan (§§1411-1412). The act also provided for abolishment of some functions through repeal of their authorizing statutes (e.g., §§1222, 1336, and 1422). The Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203; 124 Stat. 1376) abolished the Office of Thrift Supervision, an agency within the Department of the Treasury (§313). The act transferred the office’s functions to the Board of Governors of the Federal Reserve System, the Comptroller of the Currency within the Department of the Treasury, and the Federal Deposit Insurance Corporation (§312(b)).

growth. It then provides the context for the ICC's gradual decline during the 1950s and 1960s. The report then chronicles the reassignment or discontinuation of the ICC's functions from the 1970s through the 1990s and its abolishment in 1995. The report concludes with observations drawn from this case study and potential considerations with regard to legislative efforts to abolish agencies and their functions.⁴

The Case of the Interstate Commerce Commission

In late 1995, with bipartisan support, Congress passed, and President Bill Clinton signed, legislation to abolish the ICC and transfer most of its remaining functions to a newly established agency in the Department of Transportation (DOT), the Surface Transportation Board.⁵ In part, this development could be attributed to the political and policy context of that time.⁶ The abolishment of the ICC in 1995 may also be seen as the final step in a multi-decade process during which its administrative effectiveness and regulatory mission were questioned and its authority and resources reduced. Concerns about the ICC's structure and effectiveness, as well as that of other independent regulatory agencies, had been voiced as early as the 1930s. Congress and the President had been actively reconsidering the ICC's regulatory mission since the 1970s.

Establishment

During the middle of the 1800s, railroads became key for rural farmers, mining companies, and others to transport goods to urban centers. The nature of rail transportation and national and state government policies led to rate wars in some areas and monopolistic practices in others.⁷ Some corridors, such as the one between New York and Chicago, offered enough traffic to merit multiple rail lines. In these areas, rival railroad companies were either competing intensely, leading to "ruinous rate wars," or collaborating through price fixing and pooling agreements, among other arrangements.⁸ While the former dynamic could be temporarily favorable for shippers, it was destabilizing for the railroads and long-term commercial exchange. Collaborative arrangements, in turn, allowed railroads to raise rates beyond a competitive price point. Rural regions were usually served by one rail line, and shippers had no alternative way to transport their goods. The railroad company could charge elevated, and sometimes ruinous, rates to shippers and rural residents. In response, many states developed regulatory regimes for railroad activity within their borders. For a time, these regulatory actions could legally impact commerce outside of the state's borders. Nonetheless, they proved insufficient for addressing interstate issues.

⁴ The report's discussion of the evolution of interstate transportation issues and policy development and the impact of regulation in this area is limited to the role of changes in these areas in congressional debates about the ICC's establishment, evolution, and abolishment. For an account of the evolution of the ICC that includes a discussion of the role of federal courts, see Ari Hoogenboom and Olive Hoogenboom, *A History of the ICC: From Panacea to Palliative* (New York: W. W. Norton, 1976). For more on transportation issues and policy development, see this listing of transportation-related CRS products: <https://www.crs.gov/iap/transportation>. Similarly, the report's discussion of potential constitutional issues related to the structure of independent regulatory commissions is limited to those that arose during congressional consideration of the ICC's structure and authorities.

⁵ P.L. 104-88; 109 Stat. 803. In 2015, Congress enacted legislation to move the Surface Transportation Board out of DOT and established it as an independent regulatory agency. P.L. 114-110, §3(b); 49 U.S.C. §1301.

⁶ See, for example, "Interstate Commerce Commission," *CQ Almanac 1995*, 51st ed., pp. 3-36-3-38 (Washington: Congressional Quarterly, 1996).

⁷ Paul Stephen Dempsey, "The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America's Infrastructure," *Marquette Law Review*, vol. 95, no. 4 (Summer 2012), pp. 1151-1189. See, especially, "The World Before the Interstate Commerce Commission," pp. 1154-1160.

⁸ Dempsey, "The Rise and Fall of the Interstate Commerce Commission," pp. 1155-1156.

Responding to public opinion and stakeholder advocacy, Members of Congress introduced bills to regulate interstate railroad transportation of passengers and property at the national level as early as 1868, but the House and Senate long expressed differing views on how to address the issues. In 1886, the House and Senate passed competing railroad regulation bills. The bills were referred to a conference committee, where the two chambers soon appeared to be deadlocked.⁹

In the same year, the Supreme Court ruled that state regulation that impacted commerce beyond the regulating state's borders was unconstitutional.¹⁰ A 1976 House committee report on regulatory reform characterized the opinion this way:

Although not ruling against the ability of the State to regulate the fares and charges of the railroads, the Court drew a clear distinction between the broader and more inclusive interstate and the more restricted intrastate regulation. The States could not, the Court decided, "attempt to apply to transportation through the entire series of States ... its own methods to prevent discrimination in rates." The Court held that this type of "regulation of commerce," was "national in character" and therefore the responsibility of the Congress of the United States.¹¹

This decision put additional pressure on the conference committee to come up with an agreement, and it arrived at a compromise bill that was then enacted in early 1887.¹² The new statute not only nationalized interstate railroad regulation, but it established the ICC, the first regulatory commission in American national government.¹³

The ICC was not initially established with the level of authority and independence that it later achieved. Rather, the ICC's creation was the first of a series of congressional actions that aimed to regulate a powerful, complex industry fairly and with a minimum of political influence.

During its first two decades, some considered the ICC to be relatively weak and ineffective.¹⁴ The agency's enabling act provided general constraints on the terms and costs set by railroads for interstate shipping.¹⁵ The new agency was intended to take part in enforcing these constraints but had limited power to do so:

⁹ Robert E. Cushman, *The Independent Regulatory Commissions* (New York: Oxford University Press, 1941), pp. 40-44; and U.S. Congress, House Committee on Interstate and Foreign Commerce, Subcommittee on Oversight and Investigations, *Federal Regulation and Regulatory Reform*, 94th Cong., 2nd sess., October 1976, p. 332-333 (hereinafter, *Federal Regulation and Regulatory Reform*). House-passed legislation was generally stronger and provided for enforcement through the courts. The Senate bill would have established general standards and vested administration of those standards in a new federal commission.

¹⁰ *Wabash, St. Louis and Pac. Ry. v. Illinois*, 118 U.S. 557 (1886).

¹¹ *Federal Regulation and Regulatory Reform*, p. 332 (footnotes omitted). The source of the quotations of the Court's opinion within the excerpt may be found at 118 U.S. 577 (1886).

¹² An act to regulate commerce, February 4, 1887; 24 Stat. 379.

¹³ Related agency models had been under development in the preceding decades in Great Britain and a number of American states. See Marshall J. Breger and Gary J. Edles, "Established by Practice: The Theory and Operation of Independent Federal Agencies," *Administrative Law Review*, vol. 52 (2000), pp. 1119-1128; and Cushman, *The Independent Regulatory Commissions*, pp. 19-36.

¹⁴ For a discussion of the congressional and presidential dynamics underlying the commission's establishment and its perceived weakness during its early years, see Jed Handelsman Shugerman, "The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Tenure of Office Act, and the Rise of Modern Campaign Finance," *Journal of Law and Politics*, vol. 31, no. 2 (Fall 2015).

¹⁵ An act to regulate commerce, February 4, 1887; 24 Stat. 379.

The commission had no power to fix a railroad rate. It could, however, upon complaints duly filed, find a rate to be unreasonable and unjust, issue an order against it, and then seek from the courts their aid in enforcing its order.¹⁶

The ICC was empowered to receive complaints about rail carriers, to investigate the complaints, to require testimony and the submission of documents, and

to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured.¹⁷

Although the ICC's duties were quasi-judicial in nature, the commission did not have the power to enforce its own decisions and orders. Instead, the law provided that

whenever any common carrier ... shall violate or refuse or neglect to obey any lawful order or requirement of the Commission, ... it shall be the duty of the Commission, and lawful for any company or person interested in such order or requirement, to apply, in a summary way, by petition ... to the circuit court of the United States ...; and the said court shall have power to hear and determine the matter.¹⁸

Consequently, the actions of the ICC lacked finality, making the agency weaker than it would have been otherwise.¹⁹

As first established, the ICC was located within the Department of the Interior. Many administrative matters of the commission required the Secretary of the Interior's approval.²⁰ In 1889, Congress amended the establishing statute to move the commission out of the department.²¹ The purpose of this change does not appear in the legislative history of the 1889 statute. One scholar later attributed the change to the Administration's request:

In 1889 at the twice-repeated request of the Secretary of the Interior Congress took the commission out of that department, abolished all of the Secretary's supervisory authority over the commission, and made it for the first time completely independent and self-sufficient.²²

Louis Brownlow, a public administration scholar who criticized the independent regulatory commission model, testified in 1951 that the change was related to a contemporaneous presidential transition:

It depends upon what committee in Congress the matter came before. The first regulatory commission was the Interstate Commerce Commission. It was first set up in the Department of the Interior. Then there was a Presidential election and Mr. Reagan of Texas,

¹⁶ Cushman, *The Independent Regulatory Commissions*, p. 39.

¹⁷ An act to regulate commerce, February 4, 1887, §14; 24 Stat. 379, at 384.

¹⁸ An act to regulate commerce, February 4, 1887, §16; 24 Stat. 379, at 384-385.

¹⁹ The ICC's reliance on federal courts to support its orders was particularly problematic because the courts were generally hostile to the commission's quasi-judicial powers. Hoogenboom and Hoogenboom, *A History of the ICC*, pp. 32-33.

²⁰ For example, decisions regarding staff hires, salaries, and expenditures required the Secretary's approval (Act of February 4, 1887, §18; 24 Stat. 379, at 386). There were few federal agencies outside of departments at that time. With regard to the decision to place the ICC within the Department of the Interior, one scholar found that it "appears to have been a sort of carry-over from earlier proposals and a reflection of the idea that the new agency ought not to be left in a vacuum" (Cushman, *The Independent Regulatory Commissions*, p. 62).

²¹ An act to amend an act entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eight-seven, March 2, 1889, §7; 25 Stat. 855, at 861.

²² Cushman, *The Independent Regulatory Commissions*, p. 67.

the author of the interstate commerce bill said that since a railroad lawyer named Ben Harrison had been elected President, he did not trust the President any more with this matter, so he invented the idea of an independent commission.²³

Growth in Duties and Authorities

During the ensuing decades, Congress added executive and quasi-legislative powers to the agency's initial adjudicatory authorities. In addition, Congress expanded the agency's reach to include other industries, mostly in the transportation sector. Following World War I, developments in transportation led Congress to change the ICC's role from protecting those served by the industry to managing the economics of an industry in the public interest.

Expanded Authority and Reach in the First 30 Years

During the 1890s and the first few years of the 20th century, Congress passed the first statutes that expanded the authority and reach of the ICC. In 1893, railroad worker safety legislation was enacted, and the ICC was given the responsibility of administering related inspections, supervision, and referral to U.S. attorneys of violations.²⁴ Whereas the commission's work had initially been quasi-judicial, this statute added responsibilities that were executive in nature. The same year, Congress addressed one of the agency's perceived shortcomings by passing legislation to compel the testimony of witnesses before the commission.²⁵

In 1906, Congress passed the Hepburn Act, strengthening the ICC.²⁶ The statute enhanced the commission's authority and broadened the scope of its jurisdiction. It explicitly gave the commission the power to hear complaints about the railroads and to establish new rates when resolving these complaints. The agency's jurisdiction was widened to include additional railroad classes as well as railroad-related fixtures and conveyances, such as bridges and certain ferries.²⁷

Congress acted again to strengthen the ICC with the passage of the Mann-Elkins Act of 1910.²⁸ Among other changes, the statute empowered the commission to suspend railroad rate increases for up to 10 months pending investigation; allowed it to initiate its own inquiries; and expanded its jurisdiction to include telegraph, telephone, and cable companies.²⁹ Over the next four years, Congress passed four other statutes that vested additional functions in the ICC, mostly by expanding its enforcement responsibilities.³⁰

²³ U.S. Congress, Senate Committee on Labor and Public Welfare, Subcommittee to Study Senate Concurrent Resolution 21, *Establishment of a Commission on Ethics in Government*, 82nd Cong., 1st sess., June and July 1951 (Washington: GPO, 1951), p. 213. For more on Brownlow's work related to the independent commission model, see "Critique of Independent Regulatory Commission Model," below.

²⁴ An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes, March 2, 1893, 27 Stat. 531. The statute is also known as the Safety Appliance Act.

²⁵ An act in relation to testimony before the Interstate Commerce Commission, and in cases or proceedings under or connected with an act entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and amendments thereto, February 11, 1893; 27 Stat. 443.

²⁶ P.L. 59-337; 34 Stat. 584.

²⁷ Hoogenboom and Hoogenboom, *A History of the ICC*, pp. 52-53.

²⁸ P.L. 61-218; 36 Stat. 539.

²⁹ P.L. 61-218, §7. The cable companies referred to in the statute were those associated with the telecommunications technologies of the time rather than television content providers of more recent years.

³⁰ The Locomotive Boiler Inspection Act (P.L. 61-383; 36 Stat. 913), passed in 1911, increased the ICC's safety (continued...)

War-Time Federal Control of the Railroads and a Changed Role for the ICC

The entrance of the United States into World War I, in April 1917, altered the role of the federal government and the ICC in the regulation of the railroads. Within a year, the imperatives of the war effort led President Woodrow Wilson and Congress to centralize control over the rail industry in a new United States Railroad Administration that had been established separately from the ICC.³¹ In addition to providing the executive with new authority to control the operations of the railroads, Congress transferred ratemaking authority to the President, subject to circumscribed ICC review.³² Although the Railroad Administration dominated railroad regulation throughout World War I and during the early post-war period, the ICC remained active in carrying out its other responsibilities and in supporting the work of the Railroad Administration.

Table I. Interstate Commerce Commission Employment
Selected Years, 1898-1993

Year	Workforce	Year	Workforce
1898	142	1948	2,301
1904	147 ^a	1958	2,260
1907	279 ^b	1968	1,897
1912	773	1978	2,168
1916	2,243	1983	1,267
1920	1,754	1988	711
1928	2,032	1993	647
1938	2,430		

Source: Unless otherwise noted, workforce data are drawn from annual reports of the U.S. Civil Service Commission (USCSC), 1898-1938: USCSC, *Monthly Report of Federal Employment, 1948-1968*; USCSC, *Monthly Release: Federal Civilian Workforce Statistics, 1978*; U.S. Office of Personnel Management (OPM), *Monthly Release: Federal Civilian Workforce Statistics, 1983*; and OPM, *Employment and Trends: Federal Civilian Workforce Statistics, 1988-1993*. Data are for June of the year specified.

Notes:

- a. Bureau of the Census, *The Executive Civil Service of the United States*, Department of Commerce and Labor, 1904, p. 10.
- b. Bureau of the Census, *Statistics of Employees: Executive Civil Service of the United States 1907*, Department of Commerce and Labor, 1908, p. 47.

Some scholars have viewed the war-time changes of the late 1910s as transformative for the ICC and its role in the industries it regulated:

enforcement authority. The Panama Canal Act (P.L. 62-337; 37 Stat. 560), enacted in 1912, gave the ICC the responsibility of enforcing certain of its provisions related to railroad company ownership of ships using the canal. The Valuation Act (P.L. 62-400; 37 Stat. 701), enacted in 1913, directed the agency to “investigate, ascertain, and report the value of all the property” owned by each of the railroads within its jurisdiction. In 1914, Congress passed the Clayton Antitrust Act (P.L. 63-212; 38 Stat. 730), which charged the ICC with enforcing its provisions with regard to industries within its purview.

³¹ On December 26, 1917, President Wilson “took possession and assumed control ... of all the rail or combined rail-and-water systems of transportation” in the United States by proclamation (ICC, *Report of the Interstate Commerce Commission, 32nd Annual Report to Congress*, Washington, DC, December 1, 1918, p. 1; hereinafter, *ICC 32nd Annual Report*). On the President’s recommendation, Congress passed the Federal Railroad Control Act to provide explicit statutory authority for this action (An Act of March 21, 1918; 40 Stat. 451).

³² Cushman, *The Independent Regulatory Commissions*, p. 108.

War-time experience left an impress upon the railroad industry, upon government policy, and upon public opinion that made possible enlargements of the powers of the Interstate Commerce Commission at the close of the war which, without that experience, would have been impossible for many years to come.³³

Following the war, Congress passed the Transportation Act of 1920, ending federal control of the industry and returning the nation's railroads to private control.³⁴ Some observers regarded this statute as the nation's "first constructive railroad policy."³⁵ Rather than returning to its pre-war role as a regulator of privately owned and operated railroads, the ICC was charged with broader responsibilities in managing the industry in the context of U.S. commerce. The law increased the ICC's power and changed its role from that of a regulator protecting those served by the industry to that of a regulator managing its economics.

While some saw this change as an appropriate recognition of "government responsibility to see that an efficient and self-sustaining transportation should prevail,"³⁶ others detected a transformed mission at odds with the commission's original mandate:

The Transportation Act of 1920 was the first of a series of laws passed over the course of two decades that embodied an entirely new type of mandate. First, the laws were often distinctly anticompetition rather than antimonopoly. The power to set minimum rates and the duty to oversee the orderly development of an industry—the principal additions of the 1920 act to the ICC's responsibilities—have a distinctly different philosophy than did the maximum-rate regulation and the clear prohibition against the short-haul long-haul rate differentials which were established in 1887. Second, the delegation of responsibility to the regulatory agency ceased being specific. No longer was the mandate simply to prevent certain reasonably well understood (if not well defined) practices. Agencies were now given very general, unspecified authority to manage an industry in the "public interest."³⁷

The Great Depression and the Erosion of the Railroad Shipping Monopoly

The combination of a severe economic downturn and ongoing changes in the freight transportation industry led Congress to act again in 1933. The Great Depression diminished railroad business by half between 1929 and 1932.³⁸ The developing trucking industry had been increasing its share of freight transportation since World War I, particularly in urban areas. As trucking grew, it began to erode the railroads' long-time monopoly.³⁹

The Emergency Railroad Transportation Act of 1933⁴⁰ was among the emergency measures quickly enacted early in the Franklin D. Roosevelt presidency. Among the act's provisions was the creation of a Federal Coordinator of Transportation who could be appointed through the advice and consent process or designated by the President from among ICC members. This coordinator "was to promote action by the railroads to reduce duplication of services and

³³ Cushman, *The Independent Regulatory Commissions*, p. 105.

³⁴ P.L. 66-152; 41 Stat. 474. The act returned the railroads to private control in March 1920.

³⁵ Cushman, *The Independent Regulatory Commissions*, p. 115.

³⁶ Cushman, *The Independent Regulatory Commissions*, p. 115.

³⁷ Roger C. Noll, *Reforming Regulation: An Evaluation of the Ash Council Proposals* (Washington, DC: Brookings Institution, 1971), pp. 37-38.

³⁸ Hoogenboom and Hoogenboom, *A History of the ICC*, pp. 119-120. "Tonnage and revenues were halved from 1929 to 1932. In 1929 railroads carried 1,419 million tons of freight for \$4,899 million; in 1932 they carried 679 million tons for \$2,485 million."

³⁹ Hoogenboom and Hoogenboom, *A History of the ICC*, pp. 120-121.

⁴⁰ P.L. 73-68; 48 Stat. 211.

facilities, and to permit the joint use of terminals and trackage. He had broad power to promote actions for the elimination of railroad wastes in general.”⁴¹

Over the next two years, the Federal Coordinator of Transportation submitted four reports to Congress. In part, the reports documented the effects of the continuing national economic downturn and increased competition for freight traffic on the vitality of the transportation industry. As one 1934 report noted:

The past 15 years have been a period of great change, development and adjustment in transportation, not only in this country but all over the world. There has been an extraordinary growth in the use of other means of transporting persons and property as a substitute for railroad transportation. Two of these means were new, the highway motor vehicle and the airplane. One, the pipe line, had been in use for many years but experienced a sudden and rapid new development. Another, carriage by water, is one of the oldest forms of transportation but has recently gained in relative importance in this country, principally through the opening of the Panama Canal and the improvement of inland waterways....

These extraordinary changes and developments in transportation have inevitably brought with them problems which have been intensified by the depression and which require the most serious consideration.⁴²

In 1936, the authorization of the Federal Transportation Coordinator was allowed to expire.⁴³

Among the recommendations included in the reports was an expansion of the scope of ICC regulatory authority to include shipping by truck and over water. The aim of such regulation would be to increase the financial stability of the industries and to increase efficiency through coordination. With the Motor Carrier Act of 1935,⁴⁴ Congress expanded the ICC’s regulatory authority to encompass bus lines and trucking.

Congress declined to give the ICC regulatory authority over shipping by water at that time, however. Instead, it passed the Merchant Marine Act of 1936, which vested that authority in a newly established U.S. Maritime Commission.⁴⁵ The Transportation Act of 1940⁴⁶ further expanded the ICC’s regulatory authority to include inland and coastal shipping. However, overseas shipping remained under the authority of the U.S. Maritime Commission.

⁴¹ Cushman, *The Independent Regulatory Commissions*, p. 132.

⁴² U.S. Congress, Senate Committee on Interstate Commerce, *Regulation of Transportation Agencies: Letter from the Chairman of the Interstate Commerce Commission*, a report of the Federal Coordinator of Transportation on the regulation of transportation agencies other than railroads and on proposed changes in railroad regulation, 73rd Cong., 2nd sess., March 10, 1934, S.Doc. 73-152 (Washington: GPO, 1934), pp. 1-3.

⁴³ Cushman, *The Independent Regulatory Commissions*, p. 141.

⁴⁴ P.L. 74-255; 49 Stat. 543.

⁴⁵ P.L. 74-835; 49 Stat. 1985.

⁴⁶ P.L. 76-785; 54 Stat. 898.

The reports also opined that regulation of air transportation, as it evolved, should be placed in the ICC.⁴⁷ In 1934, Congress gave the ICC authority to regulate air mail.⁴⁸ The 1937 report of the Senate Select Committee to Investigate the Executive Agencies, discussed further below, recommended the further transfer of air transportation regulatory functions to the ICC.⁴⁹ The following year, however, Congress instead vested air regulatory authority in the Civil Aeronautics Authority, which was established as an independent regulatory commission.⁵⁰ The ICC's air mail authority was among the functions that were transferred to the new agency.⁵¹

The railroad industry experienced economic growth in the final years of the Depression, and this growth increased during World War II.⁵² After the war, however, the industry again declined.⁵³ The Transportation Act of 1958 authorized government-backed loans through the ICC for railroads and gave the ICC certain powers over the discontinuation of unprofitable interstate and intrastate rail services.⁵⁴

Concern About the Administration of the ICC and Similar Agencies

The growing regulatory role in the U.S. economy of the ICC and similar commissions during the first half of the 20th century was accompanied by criticism from public administration scholars. This included general critiques of the independent regulatory commission model as well as ICC-specific analyses.

Critique of Independent Regulatory Commission Model

In 1937, the presidentially established Brownlow Committee issued a report of its findings and recommendations after a review of administrative management in the executive branch. Among other findings, the committee argued that the structure of independent regulatory commissions was inconsistent with the constitutional framework underlying the federal bureaucracy:

⁴⁷ The Federal Transportation Coordinator declined to recommend legislation on this topic, noting that "Congress has under consideration and doubtless shortly will enact measures intended to meet immediately urgent conditions, which measures may materially change the present set-up and the problems of the industry." Instead, one of the reports laid down a marker for potential future action:

It is well ... to record at this time the carefully considered belief that regulation, when undertaken, should be placed in the hands of the Interstate Commerce Commission. This agency could perform the work expertly and at small added cost. The addition of this function would represent a logical rounding out of the program of regulation of the several agencies of transportation which is recommended elsewhere in this report (U.S. Congress, Senate Committee on Interstate Commerce, *Regulation of Transportation Agencies*, letter from the chairman of the Interstate Commerce Commission, 73rd Cong., 2nd sess., March 10, 1934, S.Doc. 73-152 [Washington: GPO, 1934], p. 53).

⁴⁸ P.L. 73-308, §6; 48 Stat. 933, at 935.

⁴⁹ U.S. Congress, Senate Select Committee to Investigate the Executive Agencies of the Government, *Investigation of Executive Agencies of the Government*, preliminary report pursuant to Senate Resolution 217 (74th Congress), 75th Cong., 1st sess., August 19, 1937, S.Rept. 75-1275 (Washington: GPO, 1937), pp. 446-448.

⁵⁰ P.L. 75-706; 52 Stat. 973.

⁵¹ P.L. 75-706, §203(a); 52 Stat. 982.

⁵² Hoogenboom and Hoogenboom, *A History of the ICC*, pp. 142-144. U.S. Bureau of the Budget, War Records Section, *The United States at War: Development and Administration of the War Program by the Federal Government*, prepared under the auspices of the Committee of Records of War Administration, 1946, pp. 155-163.

⁵³ Hoogenboom and Hoogenboom, *A History of the ICC*, pp. 145-146.

⁵⁴ Daniel P. Loomis, "The Transportation Act of 1958," *The Analysts Journal*, vol. 14, no. 5 (November 1958).

These independent commissions have been given broad powers to explore, formulate, and administer policies of regulation; they have been given the task of investigating and prosecuting business misconduct; they have been given powers, similar to those exercised by courts of law, to pass in concrete cases upon the rights and liabilities of individuals under the statutes. They are in reality miniature independent governments.... The Congress has found no effective way of supervising them, they cannot be controlled by the President, and they are answerable to the courts only in respect to the legality of their activities.⁵⁵

More specifically, the committee found fault with the vesting of both executive and quasi-judicial functions in a single agency.⁵⁶ According to the report, an agency's executive functions should be under the direction of the President, and only quasi-judicial functions should be exercised with independence. The report singled out the ICC as the epitome of such a wrongly constructed agency, notwithstanding its overall positive assessment of the organization's work:

The first Federal regulatory commission stands out as the most conspicuous and successful. With a staff of nearly 2,000 and a budget of six millions, it regulates and manages the land transportation system of the Nation. Its powers are legislative, administrative, and judicial.... It is, in short, a little government in itself, set up for the purpose of governing the railroads—a sort of fourth department for the administration of a single function of vast importance.⁵⁷

The report recommended the work of the commissions be placed under appropriate departments, with strictly judicial functions to be carried out with continued semi-autonomy from the executive. Congress did not take up this recommendation.

Senate Select Committee to Investigate the Executive Agencies

Early in 1936, the Senate established the Select Committee to Investigate the Executive Agencies of the Government.⁵⁸ The purview of the committee was wide.⁵⁹ In August 1937, the committee issued a report that touched on many different activities and agencies of the executive branch.⁶⁰

With regard to federal regulation of transportation, the committee noted the ICC's "positive responsibility ... to control the degree and character of competition among the various carriers" and the federal policy of coordinating transportation modes so as to supplement, rather than merely compete with, one another.⁶¹ The committee found that the federal government's efforts to strengthen the transportation industry were piecemeal, emphasizing, separately, the development

⁵⁵ U.S. Congress, Senate, *Report of the President's Committee on Administrative Management*, 75th Cong., 1st sess., 1937, S.Doc. 8 (Washington: GPO, 1937), p. 40. The committee was formally known by the name in the title of the report, but it has commonly been called the Brownlow Committee, after its chair, Louis Brownlow.

⁵⁶ *Ibid.*, pp. 39-42.

⁵⁷ *Ibid.*, p. 210.

⁵⁸ S.Res. 217 (74th Congress); February 24, 1936.

⁵⁹ The purpose of the select committee was

to make a full and complete study of all the activities of the departments, bureaus, boards, commissions, independent agencies, and all other agencies of the executive branch of the Government with a view to determining whether the activities of any such agency conflict with or overlap the activities of any other such agency and whether, in the interest of simplification, efficiency, and economy, any of such agencies should be coordinated with other agencies or abolished or the personnel thereof reduced (Senate Resolution 217 [74th Congress]).

⁶⁰ U.S. Congress, Senate Select Committee to Investigate the Executive Agencies of the Government, *Investigation of Executive Agencies of the Government*, preliminary report pursuant to Senate Resolution 217 (74th Congress), 75th Cong., 1st sess., August 19, 1937, S.Rept. 1275 (Washington: GPO, 1937).

⁶¹ *Ibid.*, p. 437.

of individual forms of transportation, or modalities.⁶² The committee recommended, among other remedial actions, the consolidation of promotional activities for individual modalities into one newly created DOT and the consolidation of regulatory activities across modalities in the ICC.⁶³

Post–World War II Assessment of Executive Branch Organization: Regulatory Agencies

In 1949, the statutorily established Commission on Organization of the Executive Branch of the Government (also known as the Hoover Commission) addressed the topic of independent regulatory commissions, generally, in its broad study of the federal government organization and management.⁶⁴ Its report provided recommendations that were intended to give regulatory entities improved administrative functioning, including:

- vesting in the commission chair all of its administrative responsibilities;
- providing that commissioners could continue to serve past the ends of their terms, pending appointment of successors;
- increasing the salaries of commissioners and agency staff;
- permitting the commission to delegate routine work to staff; and
- transferring the ICC’s equipment inspection and safety functions to the Department of Commerce.⁶⁵

Many of the Hoover Commission’s recommendations provided the basis for reorganization plans submitted by the Truman Administration under then-available presidential reorganization authority (see text box below). One plan would have vested responsibility for routine ICC

⁶² Ibid., pp. 437-438.

⁶³ Ibid., pp. 438-451.

⁶⁴ Commission on Organization of the Executive Branch of the Government, *Hoover Commission Report on the Organization of the Executive Branch of the Government: Regulatory Commissions* (New York: McGraw-Hill, 1949; hereinafter, *Hoover Commission Report*). This commission, the first of two chaired by former President Herbert Hoover, has commonly been referred to as the first Hoover Commission.

⁶⁵ *Hoover Commission Report*, pp. 5-12.

administrative matters in its chair.⁶⁶ The Senate rejected this reorganization plan, however, and no substantive changes were made to the organization of the ICC at the time.⁶⁷

President Richard Nixon submitted a similar plan in 1969 that was not rejected. As a result, certain executive and administrative functions became vested in the presidentially designated ICC chair.⁶⁸ Changes to the ICC's organization were also made by statute. For example, a provision of the Omnibus Reconciliation Act of 1982 reduced the number of commissioners from 11 to 5 and the length of their terms from 7 years to 5 years.⁶⁹

Presidential Reorganization Authority (Inoperative)

Between 1932 and 1984, Congress periodically delegated authority to the President to develop plans for reorganization of portions of the federal government and to present those plans to Congress for consideration under special expedited legislative procedures.⁷⁰ The statute has since expired and is no longer in effect. Prior to 1984, under these procedures, the President's plan would go into effect unless one or both chambers of Congress passed a resolution rejecting the plan, a process referred to as a "legislative veto." This process favored the President's plan because, absent congressional action, the default was for the plan to go into effect. Unlike the dynamics under the regular legislative process, the burden of action under these versions of presidential reorganization authority rested with opponents rather than supporters of the plan.

Presidents used this presidential reorganization authority regularly, submitting more than 100 plans. The plans proposed a variety of changes, from relatively minor reorganizations within individual agencies to the creation of large new organizations, including the Department of Health, Education, and Welfare in 1953; the Environmental Protection Agency in 1970; and an independent Federal Emergency Management Agency in 1979.

Presidents sometimes submitted plans that abolished federal organizational structures. In some cases, plans also abolished certain functions. Under the most recently enacted version of the statute, a plan could abolish "all or a part of the functions of an agency, except that no enforcement function or statutory program [could] be abolished by the plan" (5 U.S.C. §903(a)(2)).

Abolishment provisions from reorganization plans that went into effect include, for example, the following:

- Reorganization Plan No. III of 1940 abolished specified offices within the Departments of the Treasury, the Interior, Agriculture, and Labor and transferred their respective functions.⁷¹

⁶⁶ Reorganization Plan No. 7 of 1950, submitted on March 13, 1950. In a special message transmitting this plan and 12 others, President Truman wrote:

Since the creation of the Interstate Commerce Commission in 1887, the board or commission has been an established form of Federal organization for regulatory activities. The plural membership of each of these agencies has been based, presumably, on the usefulness of deliberation in the rulemaking and adjudicative processes. However, ... each of these agencies has become, in addition to a deliberative body, an organization of staff elements whose work must be programmed and whose members must be recruited, supervised, and led.... The commissions, concerned primarily with the substantive problems of regulation and with the adjudication of cases, cannot give adequate attention to the day-to-day executive direction of complex organizations. To the extent that they have concerned themselves with administrative problems, the unwieldiness of the structure has sometimes rendered administration slow, cumbersome, and indecisive. Accordingly, ... each of these plans vests in the Chairman, in each case, responsibility for appointment and supervision of personnel employed under the commission, for distribution of business among such personnel and among administrative units of the commission, and for the use and expenditure of funds (Harry S. Truman, "Special Message to the Congress Transmitting Reorganization Plans 1 through 13 of 1950," American Presidency Project, <https://www.presidency.ucsb.edu/node/230735>).

⁶⁷ S.Res. 253 (81st Congress).

⁶⁸ Reorganization Plan No. 1 of 1969, submitted on July 22, 1969.

⁶⁹ P.L. 97-253, §502; 96 Stat. 763, at 806.

⁷⁰ The President's reorganization authority is codified at Title 5, Sections 901-912, of the *U.S. Code*. The statute expired on December 31, 1984 (§905(b)). For more on the history and usage of this authority, see CRS Report R44909, *Executive Branch Reorganization*, by Henry B. Hogue.

⁷¹ 54 Stat. 1231.

- Reorganization Plan No. 2 of 1946 abolished the U.S. Employees' Compensation Commission and the Social Security Board and transferred their functions. The plan abolished the Federal Board for Vocational Education and the Board of Visitors of St. Elizabeth's Hospital and their respective functions.⁷²
- Reorganization Plan No. 3 of 1946 abolished the Bureau of Marine Inspection and Navigation and several related boards and transferred their functions. The plan also abolished specified functions of the National Labor Relations Board.⁷³
- Reorganization Plan No. 1 of 1947 abolished specified functions related to agricultural marketing orders. The plan also abolished the Office of Contract Settlement and transferred its functions.⁷⁴
- Reorganization Plan No. 21 of 1950 abolished the U.S. Maritime Commission and transferred its functions.⁷⁵
- Reorganization Plan No. 1 of 1957 abolished the Reconstruction Finance Corporation and transferred its functions.⁷⁶
- Reorganization Plan No. 7 of 1961 abolished the Federal Maritime Board and transferred its functions.⁷⁷
- Reorganization Plan No. 5 of 1966 abolished the National Capital Regional Planning Council and its functions.⁷⁸

Transportation Policy Studies

Following enactment of the Transportation Act of 1958, the Senate commissioned a committee study group to take on a more comprehensive study of transportation policies to inform future administrative and legislative efforts. The group released a comprehensive study in January 1961 that came to be known as the “Doyle Report,” after its staff director, John P. Doyle.⁷⁹

The Doyle Report criticized, among other things, the fractured federal organization of transportation promotion and regulation functions.⁸⁰ The report asserted that a lack of coordination among the ICC, the Civil Aeronautics Board (CAB, which regulated air transportation),⁸¹ and the Federal Maritime Board (FMB, which regulated the merchant marine)⁸² had led to “jurisdictional disputes; to interagency disagreements in specific areas of transportation policy; and to actions by one regulatory agency without regard to the effect on modes of transport subject to regulation by another agency.”⁸³ The study group found that the three agencies, initially given regulatory functions, had also taken on non-regulatory functions, such as promoting the regulated industry (CAB and FMB) and administering a guaranteed loan program (ICC). The report discussed additional “comingling of legislative, executive, and judicial functions” at the

⁷² 60 Stat. 1095.

⁷³ 60 Stat. 1097.

⁷⁴ 61 Stat. 951.

⁷⁵ 64 Stat. 1273.

⁷⁶ 71 Stat. 647.

⁷⁷ 75 Stat. 840.

⁷⁸ 80 Stat. 1611.

⁷⁹ U.S. Congress, Senate Committee on Interstate and Foreign Commerce, *National Transportation Policy: Preliminary Report*, committee print, prepared by Special Study Group on Transportation Policies in the United States, 87th Cong., 1st sess., January 3, 1961 (Washington: GPO, 1961), pp. 727-729; hereinafter, “Doyle Report.”

⁸⁰ See, generally, Doyle Report, Part III, pp. 93-118.

⁸¹ CAB was a successor agency to the Civil Aeronautics Authority, which had been established by the Civil Aeronautics Act of 1938.

⁸² FMB was a successor agency to the U.S. Maritime Commission, established by the Merchant Marine Act of 1936. See “The Great Depression and the Erosion of the Railroad Shipping Monopoly,” above.

⁸³ Doyle Report, p. 94. The report noted that joint boards had been established to address these issues. It argued, however, that these boards had pointed to the coordination problem but did not solve it.

CAB and ICC, asserting that the agencies served “as rulemaker, investigator, prosecutor, judge and jury.”⁸⁴

Drawing from prior studies and proposals as well as its own analysis, the study group recommended, among other things, consolidation of economic regulation and closely related functions across shipping and travel modalities into an independent Federal Transportation Commission responsible to Congress and establishment of a new DOT to carry out most non-regulatory federal government transportation policy functions.⁸⁵

Just as the Doyle Report was issued, James M. Landis, a former law school dean and member of several federal regulatory commissions, released a report on federal regulatory agencies at the request of President-elect John F. Kennedy.⁸⁶ Like the 1949 Hoover Commission report on regulatory commissions, the Landis report described what it characterized as organizational and administrative deficiencies of regulatory agencies generally, as well as those of individual agencies. With regard to the ICC, the Landis report recommended, among other suggested remedies, that the executive and administrative functions related to the day-to-day operation of the ICC be vested in a chair appointed through the advice and consent process from among its members.⁸⁷ This official would lead policy formulation and represent the commission before Congress and the public. The report also recommended permitting delegation of decisionmaking powers to subordinate officials, subject to commission administrative review.⁸⁸

A New Department of Transportation

In March 1966, President Lyndon B. Johnson proposed the establishment of a DOT. He stated that he was following recommendations put forward during the previous 30 years, including the mid-1930s Senate Select Committee to Investigate the Executive Agencies of the Government, the 1949 Hoover Commission, and the 1961 Doyle study.⁸⁹ Congress took up the President’s proposal, and the Department of Transportation Act was enacted on October 15, 1966.⁹⁰ The act transferred to the Secretary of Transportation certain ICC functions pertaining to railroad safety laws and employee service hours, motor carrier safety laws, and transportation of explosives, among other effects.

Ash Council Recommendation: Reorganize Federal Regulation

In 1969, President Nixon established an Advisory Council on Executive Organization (also known as the Ash Council) to assess executive branch arrangements and offer proposals for improved organization.⁹¹ The council reviewed independent regulatory agencies, among other

⁸⁴ Doyle Report, p. 95.

⁸⁵ Doyle Report, pp. 111-115.

⁸⁶ The report was reprinted for general use by a Senate subcommittee. U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, *Report on Regulatory Agencies to the President-Elect*, committee print, prepared by James M. Landis, 86th Cong., 2nd sess., December 1960 (Washington: GPO, 1960).

⁸⁷ *Ibid.*, pp. 37-38.

⁸⁸ The report recommended that these and other changes to the ICC be made by reorganization plan, a process involving expedited congressional consideration that was then available to the President (pp. 65-66).

⁸⁹ U.S. Congress, House, *Proposed Department of Transportation*, message from the President of the United States transmitting a proposal for a Cabinet-level DOT consolidating various existing transportation agencies, 89th Cong., 2nd sess., March 2, 1966, H.Doc. 89-399 (Washington: GPO, 1966).

⁹⁰ P.L. 89-670; 80 Stat. 931.

⁹¹ U.S. President (Nixon), “President’s Advisory Council on Executive Organization,” *Weekly Compilation of* (continued...)

topics. Chief among their findings was that these agencies, including the ICC, were “not sufficiently accountable for their actions to either the Congress or the President because of the degree of their independence and remoteness in practice from those constitutional branches of government.”⁹² The council argued that independence from the President and Congress was not necessary because procedural requirements and judicial review would guarantee fair and just commission actions.⁹³ Furthermore, the council found that the commission agency form was poorly suited to foreseeing and responding to changes affecting a regulated industry, such as related technological developments, economic trends, and other environmental changes. It also contended that the judicial functions of such commissions conflicted with policymaking responsibilities, because the case-by-case adjudicatory activities of the former were poorly suited to the acquisition of the broader perspectives of the latter.

With regard to the ICC, specifically, the Ash Council proposed that the ICC, CAB, and FMC “be abolished and their regulatory responsibilities combined within a new transportation regulatory agency headed by a single administrator.”⁹⁴ The council’s report argued that such a single administrator could provide focused leadership in solving the nation’s transportation problems and simplify coordination with related federal agencies. Individual cases would be considered by a single examiner, reviewed by the administrator, and subject to judicial review by a newly established Administrative Court of the United States. These proposals were not adopted.

Reduction of Surface Transportation Regulation and Early Efforts to Abolish the ICC

The independent ICC was established to counterbalance the monopolistic and powerful railroad industry, which then dominated interstate transportation. By the 1970s, however, the surface transportation sector had changed significantly, and railroads were in relative decline.⁹⁵ As discussed below, through the 1970s and 1980s, many policymakers questioned whether the ICC’s regulatory role was still needed and whether its regulations were worth the estimated cost to the economy. The agency’s organization and management also continued to be the subject of criticism. Although legislation to abolish the commission outright was introduced at least as early

Presidential Documents, vol. 5 (April 5, 1969), pp. 530-531. The council has generally been known as the Ash Council in reference to its chair, Roy L. Ash. Ash had been president of Litton Industries, and he went on to serve as a director of the Office of Management and Budget under Presidents Nixon and Ford.

⁹² The President’s Advisory Council on Executive Organization, *A New Regulatory Framework: Report on Selected Independent Regulatory Agencies* (Washington: GPO, 1971), p. 4. Other agencies named in this group included CAB, FMC, the Federal Trade Commission, the Securities and Exchange Commission, the Federal Power Commission, and the Federal Communications Commission.

⁹³ In the words of the report:

Political pressure coming from Congress or the executive branch unquestionably impinges on the impartiality of commission proceedings. But the procedural requirements of adequate notice and fair hearing, as well as the availability of judicial review, help to assure, as much as anything, a just result in particular proceedings. In the opinion of several observers of the regulatory process, the fairness of regulatory decisions results more from the mechanics of internal decisionmaking and breadth of perspective of the regulators than from the fact of bipartisan representation on the commissions (*ibid.*, p. 17).

⁹⁴ *Ibid.*, p. 61. This proposal was similar to one offered by two members of the Hoover Commission. See *Hoover Commission Report*, pp. 19-22.

⁹⁵ The decline of the railroads led to the enactment of rescue legislation. The 1970 Passenger Service Act created a quasi-governmental corporation, the National Railroad Passenger Corporation (Amtrak), to take over bankrupt intercity passenger railroads, and the Regional Rail Reorganization Act of 1973 established another quasi-governmental corporation, Consolidated Rail Corporation (Conrail), to take over northeastern and midwestern rail carriers. (See *Federal Regulation and Regulatory Reform*, p. 340.)

as 1970,⁹⁶ such proposals did not see significant action until the 1990s. (See “Legislative Path to Abolishment,” below.) During the intervening period, Congress passed legislation to reduce the size of the ICC and the scope of its authority.

Incremental Deregulation of Surface Transportation

By the 1970s, decades of incremental legislative and administrative decisions about the ICC’s role, scope of responsibilities, organization, and processes had resulted in arrangements that were criticized by many and seemingly favored by no one. As discussed above, the ICC’s growth and evolution were accompanied by sometimes conflicting missions—such as promotion and regulation of the same industries—and conflicting priorities. A 1976 congressional study of federal regulation described these conflicts this way:

Two factors explain the lack of clarity in the Commission’s mission. First, during the 89 year history of the Commission, the Congress has amended and extended the Commission’s mission to include new social, political and economic goals based on its current perception of the surface transportation problem. At the same time, Congress has not removed past directives. Second, the Congress has assigned to the Commission responsibility for difficult decisions on issues the Congress chose not to assess in the turbulence of the political arena. In doing so, it never told the Commission “how” to solve the issues but wrote general instructions to enforce the law in such a way as to guarantee the “public convenience and necessity.” The effect was to transfer conflicts among contending interests from the Congress to the Commission.⁹⁷

During the 1970s, the United States faced a combination of relatively high unemployment and relatively high inflation that prompted policymakers to uncover and eliminate any unnecessary governmental burdens on national economic activity. Presidents Gerald Ford and President Jimmy Carter each urged Congress and executive branch agencies to reconsider the economic impact of federal government regulation of the private sector.⁹⁸ Congressional committees conducted oversight hearings on, and studies of, regulation and regulatory reform that included

⁹⁶ S. 4371 (91st Congress), a bill to “abolish the Interstate Commerce Commission at a future date and to establish a commission to make recommendations with respect to carrying out the functions of the Interstate Commerce Commission after such date” was introduced by two Democratic Senators on September 22, 1970. Similar legislation was introduced at the beginning of the following Congress, on February 8, 1971, by a bipartisan group of Senators. See S. 649 (92nd Congress).

⁹⁷ *Federal Regulation and Regulatory Reform*, p. 343.

⁹⁸ In an October 8, 1974, address to Congress, President Ford stated:

I ask the Congress to establish a National Commission on Regulatory Reform to undertake a long-overdue total reexamination of the independent regulatory agencies. It will be a joint effort by the Congress, the executive branch, and the private sector to identify and eliminate existing Federal rules and regulations that increase costs to the consumer without any good reason in today’s economic climate (Gerald R. Ford, “Address to a Joint Session of the Congress on the Economy,” American Presidency Project, <https://www.presidency.ucsb.edu/node/255930>).

President Carter made regulatory reform a key priority of his Administration. He addressed both the substance of regulation—that is, what was regulated—and the process. See, for example, this excerpt from his 1978 State of the Union address:

I have also set up an interagency committee to help regulatory agencies review the economic effects of major regulations, so that we can be sure that the costs of each proposed regulation have been fully considered. In this way we will be able to identify the least costly means of achieving our regulatory goals (Jimmy Carter, “The State of the Union Annual Message to the Congress,” American Presidency Project, <https://www.presidency.ucsb.edu/node/245130>).

the views of economists, regulatory officials, and representatives of the regulated industries, among others.⁹⁹ Among the industries investigated was surface transportation.¹⁰⁰

From the late 1960s through the early 1990s Congress reduced the ICC's size and authority. Average employment at the ICC dropped from 2,344 employees in 1960 to 608 employees in 1994.¹⁰¹ A series of transportation-regulation-related acts enacted during this period reduced the scope of the agency's mission and influence.

The Railroad Reorganization and Regulatory Reform Act of 1976 reduced the ICC's regulatory authority over railroads, giving rail companies greater flexibility over rate-setting, among other changes.¹⁰² This legislation coupled deregulation with an authorization for public funding of modernization and other support for struggling railroads in the Northeast and Midwest, and it had bipartisan support.¹⁰³

The Federal-Aid Highway Act of 1976 established a National Transportation Policy Study Commission (NTPSC).¹⁰⁴ The purview of the commission was broader than transportation regulation: It was to "make a full and complete investigation and study of the transportation needs and of the resources, requirements, and policies of the United States to meet such expected needs."¹⁰⁵ The commission comprised some 19 members, including Members of Congress and members of the public.

In 1979, NTPSC published a report arguing that regulation was often more costly than the economic issues it was intended to address and that even reasonable regulation would become outdated as the economy and its sectors change.¹⁰⁶ Among other recommendations, the commission advocated further regulatory reductions and the merging of the ICC, FMC, and CAB into a single organization that would "perform the residual regulatory functions."¹⁰⁷ This consolidated agency would have been headed by a commission, rather than a single administrator, as had previously been recommended by the Ash Council.

In 1980, President Carter and Senator Ted Kennedy championed, and Congress passed, legislation to deregulate the trucking industry, further diminishing the ICC's authority.¹⁰⁸ The measure faced

⁹⁹ See, for example, U.S. Congress, Senate Committee on Government Operations, *Regulatory Reform—1974: Part 1*, hearings on S. 704, S. 770, S. 3604, S. 4155, S. 4167, and S.J.Res. 256, 93rd Cong., 2nd sess., November 21, 22, and 25, 1974 (Washington: GPO, 1974); and U.S. Congress, Senate Committee on Government Operations, *Regulatory Reform—1974: Part 2*, hearing on S. 704, S. 770, S. 3604, S. 4145, S. 4167, and S.J.Res. 256, 93rd Cong., 2nd sess., November 26, 1974 (Washington: GPO, 1975).

¹⁰⁰ See, for example, *Federal Regulation and Regulatory Reform*, pp. 327-376. U.S. Congress, Senate Committee on Governmental Affairs, *Study on Federal Regulation*, prepared pursuant to S.Res. 71 to study the purpose and current effectiveness of certain federal agencies, 95th Cong., 2nd sess., December 1977, S.Doc. 95-91 (Washington: GPO, 1977), pp. 150-198.

¹⁰¹ ICC, *ICC94: Interstate Commerce Commission, 108th Annual Report* (Washington, DC: GPO, 1995), p. 116.

¹⁰² P.L. 94-210, February 5, 1976; 90 Stat. 31. The statute was also known as the 4R Act.

¹⁰³ "Compromise Rail Revitalization Bill Approved," *CQ Almanac 1975*, 31st ed. (Washington, DC: Congressional Quarterly, 1976), pp. 757-763.

¹⁰⁴ P.L. 94-280, §154; 90 Stat. 425, at 448.

¹⁰⁵ P.L. 94-280, §154(a)(2).

¹⁰⁶ NTPSC, *National Transportation Policies Through the Year 2000*, final report of the NTPSC, June 25, 1979, p. 249. Members of the commission included, for example, Representative Bud Shuster, who was the chair of the House Committee on Transportation and Infrastructure as well as chair of the study commission; the head of Southern Pacific Company, a major rail system concern; the head of a pavement company; the head of a logging company with a large trucking fleet; and the head of several Texas-based construction and transportation companies.

¹⁰⁷ NTPSC, *National Transportation Policies Through the Year 2000*, executive summary, p. 7.

¹⁰⁸ P.L. 96-296, Motor Carrier Act of 1980, July 1, 1980; 94 Stat. 793.

opposition from the American Trucking Association and the Teamsters Union. Consumer groups, shippers, and agricultural interests supported it, however, and it was enacted with bipartisan support.¹⁰⁹

The Staggers Rail Act of 1980 was enacted later that year, further reducing the ICC's railroad regulatory authority.¹¹⁰ The Association of American Railroads and railroad-related labor groups supported the measure. Initially the coal industry, coal-dependent utilities, shippers, ports, and consumer groups opposed the legislation. However, at least some of the opposition diminished as provisions easing the interested parties' concerns were added.¹¹¹

Presidential Proposal to Abolish the ICC

During his second term, President Ronald Reagan called for abolishing the ICC. The President's message to Congress transmitting the Administration's FY1987 budget included the ICC among "government programs [that] have become outmoded, have accomplished their original purpose, represent an inappropriate area for Federal involvement in the first place, or are marginal in the current tight budgetary environment."¹¹² The budget's abolishment proposal was discussed during congressional hearings, but legislation to take this step was not formally considered during the 99th Congress (1985-1986).¹¹³ Administration-drafted legislation to end all ICC regulation of trucking and many other industries, to abolish the ICC, and to transfer remaining railroad freight regulatory functions to DOT was forwarded to Congress early in the 100th Congress (1987-1988).¹¹⁴ The legislation was introduced in the House but not acted upon.

Despite the deregulation of major portions of the transportation sector in the 1970s and a diminishment of the ICC's size and scope of responsibilities, proponents of agency abolishment were unable to make legislative headway during the 1970s and 1980s—even with presidential support. Opponents of further deregulation and agency abolishment included groups representing the regulated industries and their employees, chairs of the committees of jurisdiction in the House and Senate, other congressional supporters, and leaders of the ICC.¹¹⁵

¹⁰⁹ "Congress Clears Trucking Deregulation Bill," *CQ Almanac 1980*, 36th ed. (Washington, DC: Congressional Quarterly, 1981), pp. 242-248.

¹¹⁰ P.L. 96-448, October 14, 1980; 94 Stat. 1895.

¹¹¹ "Bill Deregulating Railroads Approved," *CQ Almanac 1980*, 36th ed. (Washington, DC: Congressional Quarterly, 1981), pp. 248-255.

¹¹² Ronald Reagan, "Message to the Congress Transmitting the Fiscal Year 1987 Budget," American Presidency Project, <https://www.presidency.ucsb.edu/node/254338>.

¹¹³ See, for example, U.S. Congress, House Committee on Energy and Commerce, Subcommittee on Commerce, Transportation and Tourism, *Staggers Rail Act*, parts 1 and 2, 99th Cong., 2nd sess., February 6 and March 13, 1986 (Washington: GPO, 1986).

¹¹⁴ The ICC-related provisions were included as Title IV, Subtitle C, of the Administration's proposed Trade, Employment, and Productivity Act of 1987. U.S. Congress, House, *The Trade, Employment, and Productivity Act of 1987*, message from the President of the United States transmitting a draft of proposed legislation, 100th Cong., 1st sess., February 19, 1987, H.Doc. 100-33 (Washington: GPO, 1987). See also H.R. 5384 (100th Congress). Notwithstanding this proposal, President Reagan proclaimed April 3, 1987, as "Interstate Commerce Commission Day" in honor of its 100-year anniversary as an agency. It appears that he was, in part at least, responding to a joint resolution requesting for such a proclamation. Although the proclamation honored its past work, it included the view that the "Commission's role in regulating transportation has changed constantly and is changing even now; regulation by government is giving way to regulation by market competition, and both the transportation industry and the consumer are better off as a result." Ronald Reagan, "Proclamation 5624—Interstate Commerce Commission Day, 1987," American Presidency Project, <https://www.presidency.ucsb.edu/node/252615>.

¹¹⁵ Kirk Victor, "Code Blue," *National Journal*, August 13, 1994, p. 1909. For a discussion of the arguments articulated by opponents of abolishment, see "Authorization and Transfer Decisions and Agency Termination," below.

Legislative Path to Abolishment

In late 1995, President Clinton and the 104th Congress came to a bipartisan agreement to abolish the ICC. As discussed above, the groundwork for consensus had been laid in prior decades by marked changes in views about government regulation and economic growth generally, analyses of fundamental changes in the surface transportation sector—particularly in the power and role of railroads—and the ICC’s role in regulating and promoting that sector, unfavorable analyses of the ICC’s administrative effectiveness, and an incremental reduction in the agency’s authority and resources. In addition, the political context of the 103rd and 104th Congresses provided a window of opportunity for legislative action. Republican Members pursued a further reduction in federal surface transportation regulatory authority and closure of the ICC. Support for these measures grew to encompass a number of Democratic Members as well. The Clinton Administration, which initially opposed abolishment during the 103rd Congress, had, by the beginning of the 104th Congress, reframed it as part of its initiative of reinventing government.¹¹⁶

Appropriating Toward Abolishment

The chair of the House Energy and Commerce Committee, which shared jurisdiction over the ICC, was among the opponents of closing down the agency, making it unlikely that such legislation would move forward in the House.¹¹⁷ The abolishment of the ICC was largely set in motion during the 103rd Congress through the FY1994 and FY1995 appropriations processes, thus bypassing the authorizing committees. During consideration of the FY1994 appropriations bill for DOT and related agencies, amendments to eliminate the ICC’s funding were introduced.¹¹⁸ Neither of these amendments was adopted, but they drew bipartisan support in each chamber.¹¹⁹

Proponents of disbanding the ICC again attempted to use the appropriations bill to achieve their goal the following year. A House floor amendment to completely defund the ICC in the FY1995 transportation funding bill was adopted with bipartisan support.¹²⁰ Although the amendment

¹¹⁶ For example, in his 1995 State of the Union address, President Clinton stated:

The reinventing Government report is getting results. And we’re not through. There’s going to be a second round of reinventing Government. We propose to cut \$130 billion in spending by shrinking departments, extending our freeze on domestic spending, cutting 60 public housing programs down to 3, getting rid of over 100 programs we do not need, like the Interstate Commerce Commission and the Helium Reserve Program (President Bill Clinton, “Address Before a Joint Session of the Congress on the State of the Union,” *Weekly Compilation of Presidential Documents*, vol. 31 [January 24, 1995], pp. 96-108, 99).

¹¹⁷ See, for example, Representative John D. Dingell, “Amendment Offered by Mr. Kasich,” House debate, *Congressional Record*, vol. 140, part 9 (June 16, 1994), pp. 13189-13190.

¹¹⁸ “Transportation Programs Score Big Gains,” *CQ Almanac 1993*, 49th ed., pp. 663-670 (Washington: Congressional Quarterly, 1994).

¹¹⁹ “House Votes: 453. HR 2760. Fiscal 1994 Transportation Appropriations—Interstate Commerce Commission,” *CQ Almanac 1993*, 49th ed., p. 110-H (Washington: Congressional Quarterly, 1994); “Senate Votes: 302. HR 2750. Fiscal 1994 Transportation Appropriations—Interstate Commerce Commission,” *CQ Almanac 1993*, 49th ed., p. 39-S (Washington: Congressional Quarterly, 1994).

¹²⁰ Jon Healey, “Kasich Scores a Victory as House Cuts Spending,” *CQ Weekly*, June 18, 1994, pp. 1510, 1378; “HR 4556. Fiscal 1995 Transportation Appropriations—Interstate Commerce Commission,” *CQ Almanac 1994*, 50th ed., p. 74-H (Washington: Congressional Quarterly, 1995).

would have eliminated the agency's funding, it would not have eliminated its statutory functions. The Clinton Administration opposed this amendment.¹²¹

The Senate's version of the FY1995 transportation funding bill proposed to cut the agency's funding by a third, which was in line with legislation to eliminate certain ICC functions that was then making its way through Congress.¹²² Conferees on the legislation agreed to the Senate provision.¹²³

As part of his 1995 State of the Union address, President Clinton called for spending reductions, cutting outdated and unneeded programs "like the Interstate Commerce Commission," and "getting rid of unnecessary regulations and making them more sensible."¹²⁴ In his proposed budget for FY1996, President Clinton called for phasing out the ICC by eliminating "most remaining motor carrier regulatory functions and some rail functions that have outlived their usefulness." Those functions vested in the ICC that were not eliminated were to be transferred to DOT, the Department of Justice, or the Federal Trade Commission.¹²⁵

As ICC abolishment legislation was under consideration, Congress passed appropriations generally in line with the President's proposal as well as the trend established in the FY1995 measure. The Department of Transportation and Related Agencies Appropriations Act, 1996, funded the ICC at less than half of its FY1995 budget, and more than a third of the FY1996 appropriation was set aside for severance and closing costs.¹²⁶ The act also appropriated funds for the yet-to-be-determined agency charged with carrying out the ICC's remaining functions.¹²⁷

Authorization and Transfer Decisions and Agency Termination

The FY1995 and FY1996 ICC appropriations set a time frame for the decline and end of the agency's operational funding, but they did not establish which, if any, additional ICC authorities would be transferred nor which agency or agencies would carry out the functions that remained in law.

As bipartisan House support for defunding the ICC became evident during consideration of its FY1995 appropriations in June 1994, other Members and stakeholders expressed opposition to its demise. ICC leaders, senior Democratic Members of Congress, and the regulated industries—which stood to lose the benefits of established relationships and regulatory arrangements—all voiced such opposition in congressional committee hearing rooms and on the House floor.¹²⁸ Representatives of the regulated industries spoke against defunding the ICC without repealing the statutes it enforced, transferring the independent ICC's authorities to DOT (which was perceived

¹²¹ President Bill Clinton, "Statement of Administration Policy: H.R. 4556—Department of Transportation and Related Agencies Appropriations Bill, FY 1995," July 19, 1994, American Presidency Project, <https://www.presidency.ucsb.edu/node/329900>.

¹²² The legislation, the Trucking Industry Regulatory Reform Act of 1994, was enacted as Title II of P.L. 103-311 (108 Stat. 1673, at 1683).

¹²³ P.L. 103-331; 108 Stat. 2471.

¹²⁴ U.S. President (Clinton), "Address Before a Joint Session of the Congress on the State of the Union," *Weekly Compilation of Presidential Documents*, vol. 31 (January 24, 1995), pp. 96-108, 99.

¹²⁵ U.S. Office of Management and Budget, *Budget of the United States Government, Fiscal Year 1996* (Washington: GPO, 1995), pp. 154-155.

¹²⁶ P.L. 104-50; 109 Stat. 436. See Title II, Related Agencies, "Interstate Commerce Commission," 109 Stat. 452.

¹²⁷ U.S. Congress, House Committee on Appropriations, Making Appropriations for the Department of Transportation and Related Agencies, for the Fiscal Year Ending September 30, 1996, and for Other Purposes, conference report to accompany H.R. 2002, 104th Cong., 1st sess., October 20, 1995, H.Rept. 104-286.

¹²⁸ Victor, "Code Blue," p. 1909.

to have a more political decisionmaking context), losing regulatory arrangements that at least some carriers and shippers perceived as economically beneficial, and losing regulatory expertise then resident at the ICC, among other concerns.¹²⁹

Around the same time, Congress and the Administration were preparing for the potential winding down and abolishment of the ICC. For example, the Trucking Industry Regulatory Act of 1994, which eliminated additional ICC regulatory functions, required the ICC and DOT to submit studies of ICC functions to relevant congressional committees. The ICC report was to identify and analyze “all regulatory responsibilities of the Commission [and to] ... make recommendations concerning specific statutory and regulatory functions of the Commission that could be eliminated or restructured.”¹³⁰ DOT was to

study the feasibility and efficiency of merging the Interstate Commerce Commission into the Department of Transportation as an independent agency, combining it with other Federal agencies, retaining the Interstate Commerce Commission in its present form, eliminating the agency and transferring all or some of its functions to the Department of Transportation or other Federal agencies, and other organizational changes that lead to government, transportation, or public interest efficiencies. The study [was to] consider the cost savings that might be achieved, the efficient allocation of resources, the elimination of unnecessary functions, and responsibility for regulatory functions.¹³¹

The ICC submitted its report in October 1994, and DOT did so in July 1995.¹³² DOT reported seeking input from all stakeholders, “including carriers, shippers, intermediaries, labor, the insurance industry, and government agencies identified as potential locations for necessary ICC functions.”¹³³ DOT recommended further reductions in the ICC’s regulatory functions—more, apparently, than the ICC had recommended in its report.¹³⁴ With regard to the ICC as an agency, DOT recommended its abolishment and a transfer of functions to existing entities:

Given the dramatic reductions in regulatory authority recommended in this report, it is clear that there is no longer any need to maintain ICC as an independent agency. Furthermore, given that the functions to be retained are quite diverse (e.g., maintaining of motor carrier insurance, railroad rate oversight), we do not believe that it makes sense to consolidate these functions, either in a separate agency or in a single, discrete agency within DOT....

DOT recommends ... transfer of the [ICC’s] remaining critical functions to DOT and other Federal agencies. The relatively few functions that truly require independence can be properly insulated within DOT in the same way that sensitive aviation functions inherited after sunset of the Civil Aeronautics Board are currently performed. All the other

¹²⁹ Opposition of the Administration and regulated industries to defunding the ICC was voiced in a July 1994 Senate committee hearing, among other venues. U.S. Congress, Senate Committee on Commerce, Science, and Transportation, Subcommittee on Surface Transportation, *Oversight of the Interstate Commerce Commission*, 103rd Cong., 2nd sess., July 12, 1994, S.Hrg. 103-884 (Washington: GPO, 1995). The opposition to ICC abolishment, as well as support for this step, was articulated during House debate over the FY1995 defunding amendment. See “Amendment Offered by Mr. Kasich,” House debate, *Congressional Record*, vol. 140, part 9 (June 16, 1994), pp. 13185-13195.

¹³⁰ P.L. 103-311, §210(a); 108 Stat. 1689.

¹³¹ P.L. 103-311, §210(b).

¹³² ICC, *Study of Interstate Commerce Commission Regulatory Responsibilities, Pursuant to Section 210(a) of the Trucking Industry Regulatory Reform Act of 1994*, October 25, 1994; DOT, *Report on the Functions of the Interstate Commerce Commission*, July 1995 (hereinafter, *ICC Study* and *DOT Study*).

¹³³ *DOT Study*, p. 4.

¹³⁴ Research for this report included a review of the *DOT Study*. A copy of the *ICC Study* could not be located. With regard to a comparison of the recommendations of the two studies, the DOT report stated that DOT “has given serious consideration to the recommendations of ICC in assessing the merits of eliminating or restructuring the current functions and responsibilities of ICC. This report reflects a different view from that taken by ICC and generally concludes that government should retain fewer functions” (p. 3).

ministerial ICC functions that should be maintained can be fit in easily within DOT, DOJ, and elsewhere, with greater budget savings than any other option.¹³⁵

During the first three months of 1995, subcommittees of the House Committee on Transportation and Infrastructure held hearings on the disposition of the ICC's rail and trucking regulatory authorities.¹³⁶ Witnesses included representatives from the regulated industries and other affected groups, as well as officials from DOT and the ICC. One key area of disagreement among stakeholders was whether some of the ICC's functions needed to continue to be carried out by an entity with independence from political leaders in the executive branch. A witness from the General Accounting Office (now the Government Accountability Office) summarized stakeholder differences this way:

The transportation community is divided over how best to handle the elimination of ICC. While there is general agreement that certain rail and motor carrier regulatory functions could be eliminated, there is less agreement on where remaining functions should be placed. The division splits largely on the basis of the size of the firms. Generally, smaller shippers and carriers tend to favor an independent body within DOT—the FERC-like option—because they believe that the other options could compromise the independence of the decision-making process. The larger carriers tend to favor the complete elimination of surface transportation regulation. In the carriers' view, further reductions in the regulatory burden would enhance their competitiveness and enable them to respond more quickly to changes in the marketplace.¹³⁷

By late November 1995, the House and Senate had each passed ICC termination legislation. Both versions of the bill provided for greatly reduced regulation of railroads and trucking companies. They each established an independent board within DOT that would carry out certain adjudicatory functions transferred from the ICC. The remaining ICC functions that had not been eliminated were to be transferred to DOT. Differences between the two versions were resolved in conference, and the ICC Termination Act of 1995 was enacted on December 29, 1995.¹³⁸

Among other provisions, the new law established a three-member Surface Transportation Board (STB) as an independent agency housed within DOT.¹³⁹ Like the members of the ICC, the members of the STB were protected from at-will removal by the President, giving them a measure of insulation from political pressures.¹⁴⁰ The ICC Termination Act also provided that STB members and employees, when performing their duties, “shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent of any other part of the Department of Transportation.”¹⁴¹

¹³⁵ DOT Study, p. 121.

¹³⁶ U.S. Congress, House Committee on Transportation and Infrastructure, Subcommittee on Railroads, *Disposition of the Railroad Authority of the Interstate Commerce Commission*, 104th Cong., 1st sess., January 26, and February 22, 1995 (Washington: GPO, 1996); and U.S. Congress, House Committee on Transportation and Infrastructure, Subcommittee on Surface Transportation, *The Disposition of the Interstate Commerce Commission's Motor Carrier Functions*, 104th Cong., 1st sess., March 3, 1995 (Washington: GPO, 1995).

¹³⁷ General Accounting Office, *Interstate Commerce Commission: Impacts of Eliminating or Transferring Motor Carrier and Other Functions*, GAO/T-RCED-95-119, March 3, 1995, p. 9. The acronym FERC refers to the Federal Energy Regulatory Commission, a collegial body that had been established within the Department of Energy with a level of independence similar to that of freestanding independent regulatory commissions.

¹³⁸ P.L. 104-88, December 29, 1995; 109 Stat. 803. Among other differences, the Senate bill would have abolished the Federal Maritime Commission and transferred its functions to the new board. The House version did not include this provision, and it was dropped in conference.

¹³⁹ P.L. 104-88, Title II.

¹⁴⁰ P.L. 104-88, §201, amending 49 U.S.C. §701(b)(3); 109 Stat. 932-933.

¹⁴¹ P.L. 104-88, §201, amending 49 U.S.C. §703; 109 Stat. 934.

The act vested in the STB “core rail functions” and “certain non-rail adjudicative functions.” In general, non-adjudicative motor carrier functions, such as licensing, were transferred to other parts of DOT, particularly the Federal Highway Administration.¹⁴²

The Surface Transportation Board Reauthorization Act of 2015 moved the STB out of DOT and established it as a freestanding independent agency.¹⁴³ The 2015 measure also increased board membership from three to five.

Administrative Implementation of Abolishment

Most of the functions that remained vested in the ICC at the time of its termination were transferred to the new STB or DOT.¹⁴⁴ The ICC Termination Act also provided for the transfer from the ICC to the STB or DOT of assets, personnel, and legal documents and proceedings.¹⁴⁵ It provided that the incumbent members of the ICC would become members of the STB and finish the terms to which they were originally appointed.¹⁴⁶ It also provided for the resolution of other transition-related matters, such as the disposition of ICC personnel who would either be transferred or lose their positions in the process.¹⁴⁷

Unless otherwise provided, the act was to go into effect on January 1, 1996, three days after enactment.¹⁴⁸ Many termination and transfer provisions included later effective dates, however, allowing for a more gradual transition for the affected agencies and regulated industries. With regard to existing legal authorities, the act provided:

All orders, determinations, rules, regulations, permits, grants, loans, contracts, agreements, certificates, licenses, and privileges—

(1) that have been issued ... by the Interstate Commerce Commission ... or by a court of competent jurisdiction, in the performance of any function that is transferred by this Act or the amendments made by this Act; and

(2) that are in effect on the effective date of such transfer....

shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by the [STB], any other authorized official, a court of competent jurisdiction, or operation of law. The Board shall promptly rescind all regulations established by the Interstate Commerce Commission that are based on provisions of law repealed and not substantively reenacted by this that are based on provisions of law repealed and not substantively reenacted by this Act.¹⁴⁹

The act included similar continuity provisions with regard to ICC proceedings, lawsuits, and other legal activities.

¹⁴² U.S. Congress, House Committee on Transportation and Infrastructure, Subcommittee on Railroads, *Reauthorization of the Surface Transportation Board*, hearings, 105th Cong., 2nd sess., March 12, April 22, May 6, and May 13, 1998, S.Hrg. 105-58 (Washington: GPO, 1998), p. 55.

¹⁴³ P.L. 114-110; 129 Stat. 2228. The act amended Title 48, Subchapter I, of the *U.S. Code*, and the amended provisions may be found at Title 49, Sections 1301-1326.

¹⁴⁴ P.L. 104-88, Title I.

¹⁴⁵ P.L. 104-88, Title II, §§203 and 204.

¹⁴⁶ P.L. 104-88, §201.

¹⁴⁷ P.L. 104-88, §203.

¹⁴⁸ P.L. 104-88, §2.

¹⁴⁹ P.L. 104-88, §204(a).

In its first annual report, the new agency described its progress in paring back regulations and administrative proceedings during the transition from the ICC to the STB, in part, as follows:

[T]he Board ... intended to proceed as expeditiously as its limited resources would allow to issue new regulations to reflect the new law and to conform existing regulations previously administered by the ICC.... [T]he regulations in existence at the time of the ICC's abolition applied, as appropriate, until pertinent regulatory changes were made.

The Board has updated the ICC's regulations to reflect the elimination of discontinued functions and the transfer of functions to the Board and to FHWA [the Federal Highway Administration in DOT]. Certain of the changes in the regulations were ministerial, such as revised nomenclature, while others reflected substantive changes in the statute or modified internal Board procedures to improve efficiency....

[T]he Board has been responsible for completing all cases pending before the ICC at the time of its abolition that relate to functions that were retained and transferred to the Board. Cases pending at the ICC, but determined by the Board to involve functions eliminated by the [ICC Termination Act], have been terminated. Cases pending at the ICC involving motor functions that were transferred by the [ICC Termination Act] to DOT have been transferred to FHWA for final disposition.¹⁵⁰

Considerations for Congress

As the central actor in the establishment and reorganization of executive branch institutions, policies, and processes, Congress has sometimes abolished agencies and their functions. Should Congress elect to consider legislation to eliminate additional federal agencies and functions, the history of the ICC might provide useful information about issues that could arise and the remedies that might be tried during that process. The applicability of the lessons of the ICC case to other potential agency abolishments might be limited by differences in historical context, congressional dynamics, stakeholder communities, and policy context, among other factors.

The Congressional Role in Reshaping the Federal Bureaucracy

Primary constitutional responsibility for the structural organization of the executive branch, as well as the creation of the principal components of that branch, rests with Congress.¹⁵¹ Through the legislative process, Congress has established departments, agencies, commissions, offices, and other federal entities, vesting them with authorities and duties and providing them with the resources to carry out their functions. Occasionally, Congress has provided the President or agency heads with circumscribed authority to make organizational changes.

The organizational arrangements of the executive branch are under continual congressional review through authorization, appropriations, and oversight processes. Audits, evaluations, and recommendations by the Government Accountability Office, inspectors general, task forces, commissions, and government watchdog groups assist Congress in overseeing and rethinking the agency structures that carry out federal laws.

¹⁵⁰ STB, *1996/1997 Annual Report*, March 16, 1998, p. 58.

¹⁵¹ Congress, in exercising its powers to legislate under Article I, Section 8, and other provisions of the Constitution, is empowered to provide for the execution of those laws by officers appointed pursuant to the Appointments Clause (art. II, §2, cl. 2). In addition, under the Necessary and Proper Clause (art. 1, §8, cl. 18), Congress has the authority to create and locate offices, establish their powers, duties, and functions, determine the qualifications of officeholders, prescribe their appointments, and generally promulgate the standards for the conduct of the offices.

Congress has made changes—large and small—to the federal bureaucracy in response to economic, technological, and social developments; evolving policy questions and preferences; the influence and decisions of generations of policymakers with differing views about the role of government in American life; and ongoing competition between Congress and the President to control policy refinement in the course of the implementation of statutes in the executive branch. The text box below identifies provisions that are often included in legislation that effects such reorganizations.

As part of this evolutionary process, Congress has abolished many of the federal entities it had previously established. Most such cases occur as part of broader reorganizations, where organizational structures perceived as outdated, unnecessary, or inappropriate are scrapped in favor of organizational arrangements that, it is hoped, will better carry out the abolished entities' aims. Such reorganizations have generally involved the transfer of many functions, personnel, and resources to other existing or new governmental organizations. This might occur, for example, as an effort to change the way the functions are carried out or to increase coordination among agencies with overlapping or complementary missions.¹⁵²

Less commonly, the abolishment is accompanied by, or follows, a broader congressional rethinking of the agency's mission and a repeal of most or all of its functions. This might occur, for example, in response to evolving economic, technological, or social trends and related changes in views about the role of the federal government.

Examples of Provisions in Reorganization Legislation

Past legislative initiatives to reorganize federal government agencies, including those that have abolished existing agencies in the process, have often included provisions such as these:

- the purpose(s) of the reorganization;
- definitions of key terms in the act;
- statement of policy;
- abolishment of existing agency, as appropriate;
- repeal of discontinued authorities;
- establishment of new agency, its purpose, and its components, as appropriate;
- leadership positions, including titles, appointment authorities, qualifications (if any), compensation levels, and reporting relationships;
- responsibilities and authorities of the new agency (usually vested in the agency's top leader or board/commission);
- specification of the terms of any transfers among agencies of existing functions, personnel, assets, components, authorities, programs, or liabilities;
- conforming provisions that reassign existing authorities or responsibilities to the agency that will be carrying them out;
- effective dates for carrying out the act's provisions; and
- required reports by the agency head to Congress upon implementation of the act.

Statutes that replace existing agencies have sometimes specified what will happen to the appointed leaders of these organizations. In most cases, if a new presidentially appointed, Senate-confirmed leadership position is

¹⁵² For example, the Homeland Security Act of 2002 brought together homeland security functions of a number of agencies from across the executive branch and placed them under the umbrella of a newly created Department of Homeland Security (DHS). Some agencies were abolished in the process, but their functions were transferred to DHS and have continued to be carried out by subunits within that department. For example, the Immigration and Naturalization Service of the Department of Justice was abolished, and most of its functions were transferred to DHS subunits, such as Immigration and Customs Enforcement and Citizenship and Immigration Services. See P.L. 107-296, §§441, 451(b), and 471.

established, the position must be filled, from the time of its establishment, through the advice and consent process. In some cases, however, the incumbent of a related, existing position might be “grandfathered,” temporarily or permanently, into the new position. Potential confusion over congressional intention in this area might be avoided if provisions specifically state whether or not an existing officeholder is to occupy a new position and, if so, the maximum duration of such an arrangement.

The Decline and Abolishment of the ICC

The case of the ICC is an example of the abolishment of an agency and most of its functions, albeit a gradual and incomplete elimination.¹⁵³ Established in the late 19th century to defend the public from monopolistic or hypercompetitive practices of powerful railroad companies, the ICC had become, by the 1970s, a manager of the country’s surface transportation. Economists were rethinking the costs and benefits of government regulation of the transportation sector, among other parts of the economy. Congress and the President, with the support of some stakeholders, found agreement on deregulatory measures that greatly diminished the role and power of the ICC. By the early 1990s, diminished support for the ICC combined with a new President who had campaigned on cutting waste in, and improving performance of, the federal government allowed ICC abolishment advocates to succeed in eliminating the agency and many of its remaining functions.

Although illustrative of an abolishment process, however, the ICC case does not provide a broadly applicable pathway for elimination of an agency and its functions. Not all, or perhaps any, of the environmental changes, critical study, and political dynamics that led to the agency’s demise would necessarily apply to another agency. But the ICC case illustrates that the abolishment of an agency and its functions—particularly one as powerful and integrated into American life as the ICC once was—can be a complex, multifaceted, incremental, and lengthy legislative and administrative process.

Government reorganizations—including those that abolish agencies—are often cast in terms of potential administrative benefits, such as improved program effectiveness, greater efficiency, reduced cost, and improved policy integration across related programs. In addition, reorganization efforts often have spoken or unspoken policy and political goals and outcomes.¹⁵⁴ Achieving policy consensus typically involves many stakeholders and can take time. In turn, the political nature of reorganization arises from the fact that it redistributes power and resources, and interests inside and outside the federal bureaucracy stand to gain or lose in this process. Even where consensus can be established, almost no agency abolishment is unanimously agreed to. Employees in the agencies that are abolished or otherwise reorganized are often among the most directly impacted, but outside interests—such as those that are regulated by or receive benefits from such agencies—are affected as well.

Congressional committees may also be impacted by a reorganization, either directly through potential jurisdictional changes or indirectly through constituent groups. Although agency

¹⁵³ Alternatively, the ICC case might be seen by some as a hybrid of the two abolishment archetypes, as some of its functions were not repealed but transferred to the STB and the Federal Highway Administration in DOT. However, the scale of the abolishment of the ICC and its functions can be seen in the much smaller footprint of the STB. As shown in **Table 1**, the ICC workforce shrank from 2,168 in 1978 to 647 in 1993. By comparison, the STB was budgeted for 135 positions in FY1998.

¹⁵⁴ See Harold Seidman and Robert Gilmour, *Politics, Position, and Power*, 4th ed. (New York: Oxford University Press, 1986). Although partisan conflict may develop in relation to a particular reorganization, the term *political* as used here refers to the process that determines, as Harold Lasswell put it, “who gets what, when, how.” Harold D. Lasswell, *Politics: Who Gets What, When, How* (New York: McGraw-Hill, 1936).

abolishment and a related reorganization may, from the perspective of abolishment advocates, have beneficial outcomes over time, such a change is disruptive, at least in the short term. It is likely to upset existing power dynamics, rearrange relationships, create uncertainty and anxiety, and generally interrupt the flow of work. Unintended consequences can also emerge if key dynamics are not foreseen and mitigated.

Policymakers agreed to ICC defunding and abolishment legislation over the course of three years—a relatively short period. In retrospect, however, these changes can be seen as an unsurprising consequence of a longer-term policy debate. The evolution of these debates reflected, and perhaps contributed to, changing views among policymakers of both major political parties over more than two decades, and the final measures were enacted on a bipartisan basis. The longer period of debate and incremental reductions in regulatory functions also provided stakeholders with an opportunity to adapt to and shape the changes. Stakeholders—such as shippers, agency employees, the regulated transportation industries, and transportation workers—also had opportunities to weigh in on the need for and direction of changes to government functions and organizations.

The reduction of ICC’s authority and resources appears to have been driven by decreasing confidence of policymakers in the match between the agency and its programs, its mission, and contemporary conditions and needs in its policy arena. This led to a gradual erosion in the agency’s duties, ultimate abolishment of the agency itself, and transfer of its remaining duties to DOT.

Although some of the criteria that appeared to be determinative in the decisions to make these changes were case-specific, others might be applied more broadly. In general, the changes appear to have resulted from common factors, including assessments of changes in the environment within which the ICC operated, reevaluation of the relevance of its missions, recommendations from third-party and congressional studies, and other evolving policy and political considerations, such as deregulatory trends and efforts to reduce government spending. As Congress considers issues of government organization and activities prospectively, many of these phenomena and considerations may be of continued relevance to policymakers, interested stakeholders, and the public at large.

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