



*United States*

**SELECTION OF COURTS OF APPEALS  
TO DECIDE MULTIPLE APPEALS**

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**HEARING**

BEFORE THE

**SUBCOMMITTEE ON ADMINISTRATIVE LAW AND  
GOVERNMENTAL RELATIONS**

OF THE

**COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES**

**NINETY-EIGHTH CONGRESS**

**FIRST SESSION**

ON

**H.R. 3084**

**SELECTION OF COURTS OF APPEALS TO DECIDE MULTIPLE APPEALS**

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OCTOBER 5, 1983

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**Serial No. 19**



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# SELECTION OF COURTS OF APPEALS TO DECIDE MULTIPLE APPEALS

WEDNESDAY, OCTOBER 5, 1983

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND  
GOVERNMENTAL RELATIONS  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to call, at 9:30 a.m., in room 2226, Rayburn House Office Building, Hon. Sam B. Hall, Jr. (chairman of the subcommittee) presiding.

Present: Representatives Hall, Mazzoli, Boucher, and Kindness.

Staff present: William P. Shattuck, counsel; Janet S. Potts, assistant counsel; David Karmol, associate counsel; and Florence T. McGrady, clerical staff.

Mr. HALL. The Subcommittee on Administrative Law and Governmental Relations will come to order.

We are happy to have all of you here with us today to discuss H.R. 3084, to amend title 28, United States Code, to provide for the selection of the court of appeals to decide multiple appeals filed with respect to the same agency order.

Our witnesses today will be Hon. Loren Smith, Chairman, Administrative Conference of the United States; accompanied by Mr. Stephen Babcock, Executive Director, and Mr. Richard K. Berg, General Counsel; and representing the Administrative Office of the U.S. Courts, Mr. Leland V. Beck, counsel, Legislative Affairs Office.

I think we understand what this bill's about. I've noticed from reading the testimony that it's all rather short. I will place in the record for posterity's sake the purpose of this bill and a little background.

The purpose of H.R. 3084 is to simplify the selection of the proper court to handle the judicial appeal of an agency action in those cases where appeals are filed in more than one court of appeals.

Often, more than one party files a judicial challenge to the validity of an agency order. Many statutes do not specify a particular circuit as the court to handle these challenges, therefore venue is proper in any of the circuits. If appeals are filed in more than one circuit, a single one must be selected to handle the appeal.

Until 1958, agencies had the option of selecting which circuit would have venue. Since this appeared to result in an unfair advantage to the agency, title 28 was then amended to provide that

the court of venue would be the court where the appeal of an agency order was first filed.

This "first-to-file" rule was intended to introduce balance and fairness into the selection of a court of venue by simply allowing the circuit of the first challenge to be the court of venue.

However, the 1958 amendment had an unintended result. Many lawyers believe that particular circuits will be more sympathetic to their client's arguments. Thus, "races to the courthouse" frequently occur, with each lawyer trying to file first in the circuit he or she feels will be sympathetic. Courts have increasingly been faced with nearly simultaneous filings of challenges to the same order.

Races to the courthouse have become highly sophisticated. Messengers are assigned to hover around agency offices waiting for the exact moment an order is issued. Other messengers, armed with forms for filing the appeal, are stationed at the offices of the clerks of various circuits. The two are connected with long-distance telephone lines and walkie-talkies. The result is that filings are frequently made in various circuits within minutes, or even seconds, of each other.

In 1980, the Administrative Conference of the United States described the situation that has developed, and I quote:

The "first-to-file" rule has become less and less useful as the choice of forum has become more significant in lawyers' minds, and races to the courthouse have proliferated and methods of conducting the races have become more refined.

Races are now sometimes decided by seconds, or fractions of seconds, if they can fairly be said to have been decided at all. (There is no single finish line to cross or tape to break; time-stamping machines in clerks' offices are not synchronized.) Moreover, races will be even harder to judge as agencies adopt regulations designed to make the races fairer and more civilized, specifying the date and time in which agency orders are deemed to have been issued.

That's Administrative Conference Recommendation No. 80-5, dated December 12, 1982.

Races to the courthouse have resulted in some unfortunate consequences for the system of justice. Since these races are based on the theory that one court will interpret the law differently from another court, they detract from the public's perception of the Federal courts as impartial, consistent dispensers of justice.

Moreover, these races produce no economic benefit, yet often cost private participants tens of thousands of dollars. In addition, once the race is completed, these parties, including Federal courts and agencies, must then expend more resources on wasteful litigation to determine who won the race and which is the appropriate circuit for review.

In 1980, and again in 1981, the Committee on the Judiciary favorably reported a provision like that contained in H.R. 3084 as part of the omnibus regulatory reform bill. A similar measure was adopted by the Senate in 1982 as part of the Senate regulatory reform bill. The provision has generally been considered to be non-controversial and to contain a significant improvement in the way venue is determined in cases of multiple filings.

Provisions of H.R. 3084 provide that the Administrative Office of the U.S. Courts is to choose a court of venue from among those circuits in which petitions to review an agency order have been filed. This choice must be made by a system of random selection.

A party wishing to qualify for the random selection procedures will have to meet two conditions. First, the party must file an appeal of the agency order within 10 days after issuance of the order. Second, the party must give the agency written notification of this filing within the same 10-day period.

If the agency receives notices indicating that such appeals have been instituted in two or more circuits, the agency must promptly identify those circuits to the Administrative Office of the U.S. Courts. The Administrative Office must choose one of these circuits to handle the appeal.

The system for collection shall include one entry for each circuit in which proceedings are pending, rather than one entry for each petitioner or proceeding. As soon as practicable after the agency notifies the Administrative Office of multiple filings, the Office will conduct a random selection among those circuits where appeals have been filed.

The Administrative Office would have only the ministerial duty of devising and administering a random selection scheme. It would not be authorized to make decisions of a judicial nature, such as interpreting the statute or determining which court ultimately should hear a case.

The circuit chosen at random will take jurisdiction over all review proceedings dealing with the same order. This court will retain its existing power to transfer for the convenience of the parties in the interest of justice.

This bill does not change existing standards for transfer. It also does not cover cases where venue is specified by statute to lie in one particular circuit, or cases which are filed in the district courts.

During the period before the random selection, any court of appeals in which a proceeding has been filed may postpone the effective date of the agency order for not more than 15 days. The purpose of this time limitation is to minimize forum shopping for temporary stays and to insure that judicial comity does not prevent the selected court from lifting a stay. No change is made to the existing standards for granting stays of agency orders.

Finally, no random selection will be required if a second proceeding is commenced more than 10 days after issuance of the agency order or if all proceedings are filed later than 10 days after the issuance of the order. In these cases, the first-to-file rule will continue in effect. If a party files for review within 10 days of the issuance of the order, but does not properly notify the agency in writing of this filing, the circuit in which the party filed would not qualify for the random selection procedure unless another party, who timely filed in that circuit, has properly notified the Administrative Office.

In addition, when only one petitioner has filed an appeal, or when all petitioners have filed in the same circuit, no selection is necessary.

I have read that rather extensive purpose of this bill as a background for the purpose of placing into the record the real idea behind this, which I do not think is controversial.

[A copy of H.R. 3084 follows:]

98TH CONGRESS  
1ST SESSION

# H. R. 3084

To amend title 28, United States Code, to provide for the selection of the court of appeals to decide multiple appeals filed with respect to the same agency order.

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## IN THE HOUSE OF REPRESENTATIVES

MAY 23, 1983

Mr. SAM B. HALL, JR. (for himself and Mr. KINDNESS) introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

To amend title 28, United States Code, to provide for the selection of the court of appeals to decide multiple appeals filed with respect to the same agency order.

1     *Be it enacted by the Senate and House of Representa-*  
2     *tives of the United States of America in Congress assembled,*  
3     That (a) section 2112(a) of title 28, United States Code, is  
4     amended by striking out the last three sentences and insert-  
5     ing in lieu thereof the following: "If proceedings are institut-  
6     ed in two or more courts of appeals with respect to the same  
7     order, the court in which the agency, board, commission, or  
8     officer concerned is to file the record shall be determined as  
9     follows:

★

1           “(1) If within ten days after issuance of the order  
2           the agency, board, commission, or officer receives writ-  
3           ten notice, in a manner that the agency shall prescribe  
4           by rule, that proceedings have been instituted in two or  
5           more courts of appeals, the agency, board, commission,  
6           or officer shall, promptly after the expiration of that  
7           ten-day period, so inform the Administrative Office of  
8           the United States Courts and shall identify each such  
9           court in which such proceedings are pending. As soon  
10          as is practicable after receiving such notice, the Ad-  
11          ministrative Office of the United States Courts shall  
12          designate one court, according to a system of random  
13          selection, from among those identified by the agency,  
14          board, commission, or officer, and the record shall be  
15          filed in the court so designated.

16           “(2) If within ten days after issuance of the order  
17          the agency, board, commission, or officer has received  
18          written notice, as provided in the rules prescribed pur-  
19          suant to paragraph (1) of this subsection, that proceed-  
20          ings have been instituted in only one court of appeals,  
21          the record shall be filed in that court notwithstanding  
22          the institution of any proceedings in any other court of  
23          which such written notice was not received by the  
24          agency, board, commission, or officer within that ten-  
25          day period.

1           “(3) In all other cases, the record shall be filed in  
2       the court in which proceedings with respect to the  
3       order were first instituted.

4 All courts in which proceedings have been instituted with  
5 respect to the same order, other than the court in which the  
6 record is filed pursuant to this subsection, shall transfer those  
7 proceedings to the court in which the record is so filed. For  
8 the convenience of the parties in the interest of justice, the  
9 court in which the record is filed may thereafter transfer all  
10 the proceedings with respect to that order to any other court  
11 of appeals. Until the record concerning an order is filed in a  
12 court pursuant to this subsection, any court of appeals in  
13 which proceedings with respect to that order have been insti-  
14 tuted within ten days after the issuance of such order may, to  
15 the extent authorized by law, postpone the effective date of  
16 the order as necessary to permit the designation of a court  
17 pursuant to paragraph (1) of this subsection. Such action by  
18 the court may thereafter be modified, revoked, or extended  
19 by the court in which the record is filed or by any other court  
20 of appeals to which the proceedings are transferred.”.

21       (b) Section 604(a) of title 28, United States Code, is  
22 amended by redesignating paragraph (17) as paragraph (18)  
23 and by inserting immediately after paragraph (16) the follow-  
24 ing new paragraph:

1           “(17) Where proceedings with respect to an order  
2 of any agency, board, commission or officer have been  
3 instituted in two or more courts of appeals and the  
4 agency, board, commission, or officer, pursuant to sec-  
5 tion 2112(a)(1) of this title, has been notified of such  
6 proceedings within ten days after issuance of the order,  
7 administer a system of random selection to determine  
8 the appropriate court in which the record is to be  
9 filed;”.

10       SEC. 2. The amendments made by the first section of  
11 this Act shall take effect one hundred and eighty days after  
12 the date of the enactment of this Act.



Mr. HALL. We are at this point glad to proceed further with these bills. We have two members of the committee, Mr. Kindness and Mr. Boucher, who are here, and we would at this time hear from Mr. Loren Smith, Administrative Conference of the United States.

Mr. Smith, you may proceed.

**TESTIMONY OF LOREN A. SMITH, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ACCOMPANIED BY STEPHEN L. BABCOCK, EXECUTIVE DIRECTOR, AND RICHARD K. BERG, GENERAL COUNSEL**

Mr. SMITH. Mr. Chairman, thank you. I think you've introduced the two members of my staff who accompany me. To my left is Stephen Babcock, my executive director; and to my right is Richard Berg, the general counsel of the administrative conference.

I would make, if I may, three brief observations before a few brief comments on this bill. First, I'd like to thank your staff and the staff of the committee, Bill Shattuck, Janet Potts, and David Karmol. They have been truly concerned with improvement of the administrative process and are true friends of that process. It's a great credit to this committee to have Bill, Janet, and Dave here and exercising the kind of concern for the process that is needed.

Second, Mr. Chairman, I think you and Congressman Kindness deserve a vote of thanks for sponsoring this particular bill. I know this morning when I woke up to the radio, I noticed on the report on WTOP on "What's Happening Today on the Hill" that I listened to some of the great items that were being debated and didn't notice this committee listed among those things that were controversial enough, I guess, to make the morning news.

I guess when you're dealing with a bill of this kind, there's not really much political credit for making this kind of improvement. It isn't often appreciated by the mass media, but I think the kind of work that this committee is doing is terribly important and in terms of real effects on the economy and lives of individuals and costs that are imposed by the governmental system, the work of this committee is critical, and this kind of bill represents that type of effort that doesn't really gain any political credit or points, but is making a real contribution to the administrative process. I commend the committee for taking this matter up as an individual bill.

The third brief comment is that I think there are some very real and critical issues facing the country with respect to regulatory relief, issues relating to the cost imposed upon the economy by regulations, the way we can make those regulations more fair and more efficient. Those issues are certainly important.

However, there are other issues, like race to the courthouse, where there's almost unanimous support for the principle. It is, in a sense, a technical change, but a technical change that will save real people real money and make the court system more credible and more efficient.

I think it's important to try, in the interest of efficiency, to pass those things that don't require a broad public debate, as many parts of the regulatory reform bill do, to pass these things which

everyone can agree on and which will make a real improvement in the system as quickly as possible.

I think your effort to take this bill out of the other issues of regulatory reform is an important one.

With respect to the bill, as you've noted, our testimony is relatively brief. We've testified before this committee on this particular issue before. We think that H.R. 3084 is a very good bill. We are testifying on behalf of the administrative conference in favor of it. The conference has considered not the specific bill, but it's considered the specific issue in identical terms and through recommendation 80-5, which was adopted before I became chairman, the conference strongly—as I remember, unanimously—supported the proposition expressed by your bill today.

With respect to the race to the courthouse, I'm reminded of a phrase from another area of the law, that of redeeming social value. The race to the courthouse, as depicted in the appendix we've attached to our testimony from the Wall Street Journal, serves no redeeming social value. It only brings discredit upon the judicial system and it costs, as I said, real people real dollars and inhibits the interests of justice.

We would strongly support the bill and would be happy to answer any questions on it. Thank you, Mr. Chairman.

Mr. HALL. Are you asking that your testimony be made a part of the record?

Mr. SMITH. Yes, Mr. Chairman, I am.

Mr. HALL. Without objection, it will be so made.

[The statement of Mr. Smith follows.]

HEARING BEFORE THE  
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS  
OF THE SENATE JUDICIARY COMMITTEE

ON

H.R. 3084

To amend title 28, United States Code, to provide  
for the selection of the court of appeals  
to decide multiple appeals filed with respect  
to the same agency order ("Race to the Courthouse")

TESTIMONY OF

LOREN A. SMITH, CHAIRMAN

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Accompanied by:

Stephen L. Babcock  
Executive Director

Richard K. Berg  
General Counsel

October 5, 1983

SUMMARY OF TESTIMONY

1. The Administrative Conference strongly supports enactment of H.R. 3084, which would implement Conference Recommendation 80-5 by eliminating the "race to the courthouse" with respect to court of appeals review of certain agency actions.

2. This legislation is simple and non-controversial, and should be considered separately from the omnibus regulatory reform legislation.

3. Insofar as there are differences between H.R. 3084 and the comparable provision in the Senate omnibus regulatory reform bill, S. 1080, we prefer the language of H.R. 3084. However, the differences are relatively minor, and we are sure they can be easily worked out.

Mr. Chairman and Members of the Committee:

I am Loren A. Smith, Chairman of the Administrative Conference of the United States. I am accompanied by Stephen L. Babcock, Executive Director of the Conference, and by Richard K. Berg, our General Counsel.

It is always a pleasure to appear before this subcommittee. It is a particular pleasure to testify in favor of H.R. 3084, a proposal which enjoys universal, indeed, near unanimous, support. H.R. 3084 would eliminate or, at least, vastly simplify the so-called race to the courthouse which frequently occurs in connection with review of certain agency actions in the courts of appeals.

The race to the courthouse problem comes about this way: Many statutes provide for direct review of certain agency orders in the United States courts of appeals. Such review is usually provided for agency actions made "on the record after opportunity for a hearing," but direct court of appeals review is also frequently available, especially under the more recently enacted statutes, for rules of general applicability adopted under the informal procedures of section 553 of the APA.<sup>1</sup> The statutes that provide for court of appeals review ordinarily contain a venue provision specifying in which circuit or circuits the proceeding may be brought, but these provisions generally provide a broad choice of forum for the party bringing the proceeding. For example, the Administrative Orders Review Act, 28 U.S.C. § 2341-2350, which governs review of orders of six major regulatory agencies, provides that a review proceeding may be brought in the judicial circuit where the petitioner resides or has its principal office or in the District of Columbia.

Since many agency actions, particularly rulemaking actions, affect multiple parties and interests and since many lawyers believe that one court of appeals is likely to

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<sup>1/</sup> See, generally, Administrative Conference Recommendation 75-3, 1 CFR § 305.75-3, The Choice of Forum for Judicial Review of Administrative Action.

be more favorable than another to their clients' position in a review proceeding, the choice of reviewing court has assumed a considerable importance. A statute, 28 U.S.C. § 2112(a), provides that when petitions for appellate review of an agency order are filed in two or more courts of appeals, the record of the agency proceeding is to be filed by the agency in the court in which the first petition was filed, and that court then has jurisdiction of the proceeding to the exclusion of the others. In cases governed by section 2112(a), this has led to races among parties to be first to file. Because of lawyers' ingenuity, assisted by modern communications technology, these races are now sometimes decided by seconds or fractions of seconds. I attach as an appendix to my testimony an account published in The Wall Street Journal of one such race involving the Federal Energy Regulatory Commission.

Of course, it must be emphasized that the court of first filing is not necessarily the court which will eventually hear the case on its merits. Section 2112(a) permits a transfer of the case to another court of appeals "for the convenience of the parties in the interest of justice." But since these cases are ordinarily decided on the basis of the administrative record and do not involve witnesses or lengthy judicial hearings, it is usually just as convenient to hear a case in one circuit as in another. That is why the race to be the first to file has taken on the importance that it has.

The race to the courthouse is expensive to the parties. The estimated cost to clients in one such race run several years ago was \$65,000. The race also imposes costs on the judicial system—for judges, and even the agencies, must devote their time and attention to resolving such races. In these days of modern communications technology deciding the winner is not easy. In one recent case the Third Circuit observed that "unlike race tracks, however, courts are not equipped with photo-electric timers, and we decline to speculate which nose would show as first in a photo finish." United Steelworkers v. Marshall, 592 F.2d 693, 695 (3d Cir. 1979). In the famous Tenneco Oil Co. case, the Fifth Circuit, faced with apparent simultaneous filings in its own and in the

District of Columbia Circuits, referred the matter back to the Federal Energy Regulatory Commission for findings as to who filed first. FERC referred the matter to its ALJ, who held three days of hearings in which the parties reenacted the race. On the basis of three trial runs the ALJ made findings which were adopted by the Commission, but rejected by the Fifth Circuit as incomplete. The matter was referred back to the ALJ, who responded with a chart relating the events to the hundredth of a second. This time the court accepted the result.<sup>2</sup>

The Tenneco case is not typical, of course, but it demonstrates the ridiculous waste of resources which can occur when significant consequences, at least consequences deemed significant by the parties, are made to hinge on trifling events. Furthermore, the race to the courthouse presents an unedifying spectacle to the public and tends to discredit both the administrative and the judicial processes.

In 1980 the Administrative Conference adopted its Recommendation 80-5, which calls for replacing the race to the courthouse with a system of random selection administered by the Administrative Office of the U.S. Courts. This recommendation, which I attach, was based on a very fine report to the Conference by its consultant, Professor Thomas McGarity, which the Committee may wish to include in the record of this hearing. The system of random selection which we propose would be employed to determine in which court to file the administrative record whenever review proceedings have been initiated in two or more circuits with respect to the same agency order within ten days of the issuance of the order. The designated court would then proceed with the case in the same manner as it would under present law if it were determined to be the court of first filing. The right to transfer the case to another circuit for the convenience of the parties or in the interest of justice would be preserved as it now exists.

As I have said, this proposal has broad support. It is endorsed by the American Bar

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2/ See McGarity, Multi-party Forum Shopping for Appellate Review of Administrative Action, 129 U. Pa. L. Rev. 302, 320-22 (1980).

Association, as well as by the Conference, and, indeed, I know of no public opposition. (Perhaps some lawyers who feel that they are able to win more races than they lose might prefer the present system.) It is so eminently fair and sensible that there is no reason not to enact it promptly.

As you know, our proposal has been included in the omnibus regulatory reform legislation being considered in both Houses of Congress. A provision almost identical to H.R. 3084 was contained in last year's omnibus bill, H.R. 746, reported out of the Committee on the Judiciary, while a generally similar provision was in S. 1080, the bill passed by the Senate in the 97th Congress. So there is substantial support in Congress for the proposal. However, the future of the omnibus legislation is uncertain, and there seems to be no good reason to delay enactment of this simple and non-controversial reform to await resolution of the complex problems posed by the omnibus bills. That is why we welcome the introduction of H.R. 3084 and urge its speedy approval.

Let me address briefly the differences—and they are minor—between H.R. 3084 and the race to the courthouse provision in S. 1080. S. 1080 provides for random selection whenever there are two or more filings within a five-day period, rather than the ten-day period provided in H.R. 3084. We much prefer ten days because it would give a more realistic opportunity to parties outside of Washington to learn of the agency's decision. Given the delay in the publication and circulation of the Federal Register, five days may not be enough. Second, the Senate bill's five-day period does not run from the date of the agency order, as does the ten-day period in the House bill. So far as we know, the race to the courthouse has presented a problem only where it occurs immediately after the agency order issues, and we would prefer to fashion the remedy to the illness. As is very well stated in last year's Judiciary Committee report, "The main interest that a 'floating' time period seems likely to further is that of someone who neglects to file forthwith, but decided to do so (for purposes of forum avoidance, or

whatever) upon learning that another party has filed. There is no public interest in furthering such forum shopping." H. Rept. No. 97-435, p. 83.

Obviously, these and other textual differences between the two bills are minor and can be easily worked out. I and my staff stand ready to assist in this endeavor.

I know that on the broad horizon of regulatory issues, the race to the courthouse is a minor eyesore. There are far more important problems to be solved, but they seem resistant to solutions. Here at least is something, undramatic, perhaps, but solid and practical, which can be done. You know the saying of Confucius, "A journey of a thousand miles begins with a single step." However long the journey to regulatory reform may be, this bill is a step we should take now.

Thank you for the opportunity to testify today.

**Appendices to Testimony  
on H.R. 3084**

**A. Wall Street Journal Article, "Of All the Big Races, The Lawyers' Derby Is Most Appealing," Monday, May 9, 1983**

**B. Recommendation 80-5, Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action (Adopted December 11, 1980).**

## APPENDIX A.

## Of All the Big Races, The Lawyers' Derby Is Most Appealing

In a Sense, but Judges Assail  
Hectic Efforts to Reverse  
Agencies in 'Right' Courts

By STEPHEN WERNIEL

Staff Reporter of THE WALL STREET JOURNAL  
WASHINGTON—The lawyers are in the starting gate . . . and they're off.

You won't find this race listed with odds-makers in Las Vegas or Atlantic City. This race is to the courthouse. It is run by lawyers using walkie-talkies, open telephone lines, hand signals and split-second timing to be the first to appeal a decision by a federal regulatory agency to one of 12 federal appeals courts around the country.

The winner, under the law, gets the appeal heard in the court where he files. Many lawyers believe that getting to the right court can improve their chances of getting an agency overruled. Because regulatory decisions often satisfy none of the parties involved, those on all sides of a case frequently end up racing one another.

Judges aren't big fans of such contests, which they describe as unseemly, costly and unnecessary. "The most obvious fault of the sport is the image it conveys of the legal profession and the judicial system," says Judge Abner Mikva of the federal appeals court here. Many lawyers say they agree.

### Every Two Seconds

Having said that, many lawyers continue to race. One race was won by lawyers who filed appeals every two seconds around the time that an order was expected to be released. Another was lost because a walkie-talkie's message failed to penetrate concrete building walls. One racer hung around an agency so long waiting for an order that the agency's staff invited him to their Christmas party.

The races can be tests of stamina, skill and ingenuity. Consider, for instance, a recent race at the Federal Energy Regulatory Commission, or FERC.

For a week, about a dozen people from two competing law firms have been camped out at FERC's public-documents room here. They are watching the daily postings for a decision allocating cheap hydroelectric power from the Niagara River in upstate New York. One firm represents municipal utilities. The other represents the state power authority and a single utility.

On the fifth business day, a few moments before the 3 p.m. posting, both teams nervously edge up to the barricade that keeps them several feet from the bulletin board. Suddenly, there it is. Some 53 orders will be posted this afternoon, but the ruling on Municipal Electric Utilities Association vs. Power Authority of the State of New York is first.

As soon as she sees opinion 151A, Genevieve Morelli shouts "file" into a walkie-talkie she has been holding for days. Miss Morelli is a lawyer for Duncan, Weinberg & Miller, which represents the municipal utilities. Her command is barked to a legal assistant down the hall, where a pay telephone has been kept open daily to the federal appeals court here in Washington.

### The Final Leg

The command crackles so clearly over the walkie-talkie that it is heard by Yolanda O'Bryant, a secretary with the firm, at another pay phone a mile away in the clerk's office at the appeals court. She signals to a friend, who files the appeal.

At the same instant that the FERC notice is posted, Michael Krusee, a legal assistant in the Washington office of the Rochester, N.Y., firm of Nixon, Hargrave, Devans & Doyle, also yells "file" into his walkie-talkie. His message must get to the federal appeals court in New York City, 200 miles away. That is where his firm's client, Rochester Gas & Electric Corp., and the power authority, represented by New York lawyer Barry Fischer, want the appeal filed. One obstacle: There is no phone available to them in the clerk's office at the New York court.

In a strategy devised by Mr. Fischer, Mr. Krusee's walkie-talkie is linked to one held by Susan Macy, a legal assistant stationed across the hall at the Post Liquor store. Mr. Fischer paid the store manager to install a telephone jack in an alcove. Rather than rely on a pay phone, the team brought its own phone, plugged it in each day and kept the line to New York open at a cost, Mr. Fischer estimates, of \$600 a day.

Miss Macy relays the order to another legal assistant at a telephone on the 16th floor of the Municipal Building in Manhattan. This assistant instantly passes the order on by walkie-talkie to Karen Kimmel, a lawyer waiting across the street in the appeals-court clerk's office. The race is over within seconds after it began.

The result: "We're dead," says Cathy Lichtenberg, the lawyer who organized the appeal for the municipal utilities. Mr. Fischer agrees.

The outcome remains uncertain. The appeals court in Washington uses a time-stamp

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# Of All Races, the Lawyers' Derby Is Undoubtedly the Most Appealing

*Continued From First Page*

clock that denotes only hours and minutes. The appeal there was stamped 3 p.m. The clock in the New York court marks the seconds as well. That appeal was stamped 3 p.m. and 20 seconds.

A three-judge panel of the New York court is scheduled to hear arguments tomorrow on which court should keep the case. Such ties are occurring with increasing frequency, causing the courts both concern and exasperation.

"Unlike race tracks," the appeals court in Philadelphia complained in one case, "courts are not equipped with photoelectric timers, and we decline the invitation to speculate which nose would show first in a photo finish."

The appeals court here recently warned of "difficulties" when "faced with zealous representatives employing modern technology." The warning came in a FERC case involving the city of Gallup, N.M., which sought to appeal to the court here, and Public Service Co. of New Mexico, which sought to appeal to the appeals court in Denver, a favorite with energy producers.

The utility won the race by less than a second after finding a copy of FERC's order in a box on a guard's desk moments before the order was posted. But FERC protested that both sides had appealed its order before its 3 p.m. release time. The agency ordered that both sides file new appeals. In the second race, the utility won again, this time by nine full minutes. As these things go, that's approximately a millennium. Gallup suspects hanky-panky.

Although the utility twice got to the Denver court before Gallup got to the court right here in Washington, the dispute initially went to the Washington court anyway because Gallup had filed petitions there days before the first race was run. Eventually the court dismissed those petitions, saying that Gallup had "jumped the gun." At the same time, the court rejected FERC's argument that the first race shouldn't count because the filings came before 3 p.m. The agency's assertion that a clerk had checked the document-room clock before posting the order was undercut when, the court noted, "it came to light that the clock had been taken down that day to facilitate painting."

Complaining that once again its members were being asked to act "as finish-line judges," the court ruled that the Denver court had jurisdiction and that that court should decide if the first-race filings were "too early." That's where things now stand.

## Judge Holds Stopwatch

The appeals court in New Orleans once ordered FERC to decide who won a race. To do so, an agency law judge with a stopwatch in hand conducted three days of hearings, including a reenactment of the race.

Judge Mikva contends that a lawyer "cannot place sufficient reliance" on reputations of different courts "to justify putting his client and the judicial system to the expense of a race." And while expenses are difficult to measure, they can add up.

Thomas McGarity, a University of Texas law professor who has studied court races, in an article described one that cost \$65,000. But he added that the image problems caused by such races "may be somewhat overblown" because they "rarely claim much, if any, media attention outside of the specialized legal press."

The American Bar Association, the quasi-governmental U.S. Administrative Conference and others have endorsed legislation that would give parties 10 days to appeal wherever they want. Then a lottery would be held to decide which court would hear the case. The plan passed the Senate last year but died in the House.

Meanwhile, the races go on because many lawyers insist that it really may make a difference which court hears a case. In the race to appeal the FERC hydroelectric ruling in either New York or Washington, "the parties affected are all in New York; it's a New York state problem," argues Mr. Fischer, the power authority's lawyer. The utilities' Mrs. Lichtenberg counters that the court in Washington "understands FERC."

## The Formaldehyde Case

Many of the races lead to major appeals-court decisions. When the Consumer Product Safety Commission last year banned home insulation with formaldehyde, the Formaldehyde Institute successfully raced to file the appeal in the federal appeals court in New Orleans. A Ralph Nader group had wanted the appeal heard in Washington, D.C. The New Orleans court recently overturned the ban.

The Amalgamated Clothing and Textile Workers Union recently succeeded in getting to the Washington court first with its appeal of Occupational Safety and Health Administration standards for worker exposure to cotton dust. The union beat out the American Textile Manufacturers Institute, which raced to appeal the case in Richmond, Va.

"It's absolutely clear that it doesn't make any sense to go through this," says Alan Morrison, the director of the Nader-affiliated Public Citizen Litigation Group. But, he adds, "any lawyer who is worth his or her salt has to try to gain any advantage they can gain for their clients."

There is always room for refinements, though. Washington lawyer Sherman Poland says that years ago he concluded during a dry run that you shouldn't yell "File!" into a walkie-talkie in a crowded regulatory agency room. "People might think you were saying 'Fire,'" Mr. Poland says. So, in the real race, he says, "They shouted 'Stamp it' instead."

## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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OFFICE OF  
 THE CHAIRMAN

## RECOMMENDATION 80-5

**ELIMINATING OR SIMPLIFYING THE "RACE TO THE COURTHOUSE"  
 IN APPEALS FROM AGENCY ACTION**

(Adopted December 11, 1980)

Many agency actions subject to direct review in the courts of appeals involve more than one private party that may legitimately consider itself aggrieved by the agency action. In most such cases, a single court of appeals is not specified by statute as the reviewing court, and venue may lie in more than one such court. Many lawyers believe that one court of appeals is likely to be more receptive than another to their clients' arguments in an agency review proceeding. The choice of the reviewing court has therefore assumed large importance in the review of some actions of some agencies.

A statute, 28 U.S.C. §2112(a), provides that, when petitions for appellate review of the same order are filed in two or more courts of appeals, the record of the agency proceeding is to be filed by the agency in the court in which the first petition was filed, and that court then has jurisdiction of the review proceeding to the exclusion of others. This provision has become less and less useful as the choice of forum has become more significant in lawyer's minds, and races to the courthouse have proliferated and methods of conducting the races have become more refined. Races are now sometimes decided by seconds or fractions of seconds, if they can fairly be said to have been decided at all. (There is no single finish line to cross or tape to break; time stamping machines in clerks' offices are not synchronized.) Moreover, races will be even harder to judge as agencies adopt regulations, designed to make the races fairer and more civilized, specifying the date and time at which agency orders are deemed to have been issued.

The spectacle of the race to the courthouse is an unedifying one that tends to discredit the administrative and judicial processes and subject them to warranted ridicule. It will require Congressional action to bring the final curtain down on the spectacle. Our first and principal recommendation is addressed to Congress. It calls for simple random selection of the reviewing court when a race ends in a dead heat or near dead heat. Pending Congressional action, there are actions that the agencies and the courts themselves can take to ameliorate the present sorry situation, and we also make recommendations addressed to the agencies and to the Judiciary for such interim actions.

PART A. RECOMMENDATION TO CONGRESS

Congress should amend 28 U.S.C. §2112(a) to provide that, if petitions to review the same agency order have been filed in two or more courts of appeals within ten days after the order was issued, the agency is to notify an appropriate official body, such as the Administrative Office of the United States Courts, of that fact; that the appropriate official body, on the eleventh day after the issuance of the order, is to choose from

among the circuits in which petitions have been filed according to a scheme of random selection and notify the agency of that choice; and that the agency is then to file the record of the proceeding in the court so chosen, which will take jurisdiction and conduct the review proceeding, subject to the existing power, which would not be changed, to transfer the case to any other court of appeals for the convenience of the parties in the interest of justice.

The amended Section 2112(a) should provide further that a court of appeals in which a petition for review has been filed that has jurisdiction to entertain the petition may, in a case of pressing need, issue a stay of the agency order during the period in which no court has been chosen to take jurisdiction of the proceeding, the stay to remain in effect for no more than 15 days, unless extended by the chosen court or a transferee court, and subject to revocation or modification by the chosen court or a transferee court; and that, if the court in which the record is filed determines that it lacks jurisdiction or venue is improperly laid but that jurisdiction and venue may be proper in another circuit, the court is to notify the official body administering the system of random selection of that fact, and that body then will choose from among the remaining courts in which petitions have been filed according to the same scheme of random selection.

#### PART B. RECOMMENDATION TO THE AGENCIES

In the absence of legislation, those agencies whose actions have resulted or are likely to result in races to the courthouse should specify in advance a time at which their orders are to be deemed issued or their actions are otherwise ripe for judicial review. Such agencies should do this by generic regulation if possible and, if that is not possible, by specifying times of issuance or ripeness case by case.

#### PART C. RECOMMENDATION TO THE JUDICIARY

In the absence of further legislation, the Supreme Court should promulgate a rule under which, if petitions to review the same agency order are filed in two or more courts of appeals simultaneously (for example, within one minute of one another), the Administrative Office of the United States Courts is to be informed of that fact, and the Administrative Office is then to choose one court, according to a scheme of random selection, from among the circuits in which such simultaneous petitions are pending, which court shall then determine where the record is to be filed pursuant to 28 U.S.C. §2112(a).

Mr. HALL. The gentleman from Ohio, Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman, and thank you, Mr. Smith.

I'd like to ask whether you have an amendment to propose to the bill that would cause such a matter to be listed on the WTOP listing of events on the Hill? [Laughter.]

Mr. SMITH. Well, the only amendment may be that the media should be more concerned with some of the real issues that make the system work.

Mr. KINDNESS. I thought maybe there might be something we could do to jazz it up. [Laughter.]

Mr. BERG. There may be first amendment problems. [Laughter.]

Mr. KINDNESS. I'd like to ask whether you have any response to the proposal that instead of the Administrative Office of the U.S. Courts doing the random selection and the administrative function that is involved in these situations in the "race to the courthouse" matters, the multidistrict litigation panel perform that function.

Any particular thoughts on that?

Mr. SMITH. I think we've discussed that matter somewhat, and I think the important point is that the courts are satisfied with the perception of this random drawing is done well and fairly. I think from our point of view, that would be a perfectly acceptable change.

I think the only thing that's important is obviously the judiciary should be comfortable with whatever system is used for the random selection.

Mr. KINDNESS. Thank you.

I yield back, Mr. Chairman.

Mr. HALL. The gentleman from Virginia, Mr. Boucher.

Mr. BOUCHER. Thank you, Mr. Chairman.

Mr. Smith, I just have one question by way of information purely. Do you have any notion of about how many instances each year an agency order is appealed by two or more parties to different U.S. courts of appeal?

Mr. SMITH. I don't have any specific figures on that. Let me see if any of my staff do. I would guess it would be a fairly significant number.

Mr. BERG. I don't have figures. It's reasonably frequent.

Mr. BABCOCK. It's been estimated at 1 to 200 times a year.

Mr. SMITH. I guess the estimate is 1 to 200 times a year.

Mr. BOUCHER. That many?

Mr. BABCOCK. A lot of NLRB orders, Mr. Congressman, are appealed by both labor and management.

Mr. BOUCHER. Do you think that one possible result of enactment of this bill might be that we would still have multiple filings in the various courts of appeal in an effort to prevail in the random drawing, but just less of a race to get there? Apparently you've got 10 days under this measure within which to do it, so we might not actually reduce the number of instances where there are multiple filings in the U.S. courts; we would just be, in effect, reducing the race to do it first.

Mr. SMITH. I think that would be the case. In fact, I would hope that would be the case. I don't think we want, in this bill, the committee wants to restrict the substantive rights of individuals or

change the procedural system as it exists except this little aspect of that procedural system, this little bit of craziness with the walkie-talkies and presumably that would go.

Mr. BOUCHER. Thank you, Mr. Smith.

Thank you, Mr. Chairman. I yield back.

Mr. HALL. Thank you very much, Mr. Smith. We appreciate your testimony. We'll certainly give it every consideration.

Mr. SMITH. Thank you very much, Mr. Chairman. I would add, if I may, one final note. This committee, of course, is also our parent committee, our authorizing and oversight committee, and the conference this week has come out with two documents which I present here to the clerk for you: Our "Guide to Federal Rulemaking," which I believe is a unique publication in the system of A to Z annotated guide to all the legal aspects of Federal rulemaking and is a project that the Conference staff has worked on over this last year; and our annual report.

Mr. HALL. You can just leave that. It will be made a part of the files of this committee.

Mr. SMITH. Thank you very much, Mr. Chairman.

Mr. HALL. Thank you very much.

We will next hear from Mr. Leland Beck, Counsel, Legislative Affairs, Administrative Office of the United States.

Mr. Beck, you may proceed.

#### **TESTIMONY OF LELAND E. BECK, COUNSEL, LEGISLATIVE AFFAIRS OFFICE, ADMINISTRATIVE OFFICE OF THE U.S. COURTS**

Mr. BECK. Thank you, Mr. Chairman.

I have filed a written statement with the committee. I would ask it be made a part of the hearing record.

Mr. HALL. Without objection, so ordered.

Mr. BECK. Mr. Chairman, the Judicial Conference of the United States, the policymaking body for the third branch of Government, is composed of the chief justice and the chief judges of each of the courts of appeal, along with the district judge representing each of the circuits.

The composition of the conference is important, I believe, because we are talking about a policymaking body on behalf of the third branch that includes all of the chief judges of the very circuits involved in this race.

The Judicial Conference, meeting 2 weeks ago, took up the question of resolving the problem of the race to the courthouse under section 2112 and determined to agree and to support the idea of random selection amongst the courts of appeal in which simultaneous petitions have been filed.

The courts of appeal get involved in this process very late in time. The actual decision of an administrative agency, the order being appealed from, the so-called starting gun, is the beginning of a very short timespan in which we see what I can fairly characterize as an unseemly race.

The courts of appeal, in taking in the filings, are then positioned with the problem of which received the petition first. This determination, I am sorry to say, may at some point in the future, if lawyers catchup with modern technology, require the various clerks'

offices to install synchronized timeclocks that record in nanoseconds—and if I remember correctly, a nanosecond amounts to one-billionth of 1 second.

The problem of the race to the courthouse is caused by lawyers' perceptions that certain courts of appeal will react more favorably to their pleadings or that other courts of appeal will react less favorably. This, I should assert, is merely a perception. I cannot say that there is any study that has ever shown that one court of appeals does, in fact, treat agency determinations in a way different from other courts of appeal.

The Judicial Conference, in supporting legislation now embodied in H.R. 3084, has one specific concern, and that is that the Administrative Office of the U.S. Courts, as the management unit for the implementation of Judicial Conference policy, not be vested with judicial powers.

The initial choice of a court of appeals for the purposes of venue is, in fact, such a judicial power, even if it is handled in a completely ministerial manner, such as random selection.

Accordingly, the Judicial Conference reviewed available judicial panels to make that determination and issue the appropriate orders. The Judicial Conference determined that the most appropriate organ for that function would be the Judicial Panel on Multi-District Litigation.

Now, the Judicial Panel on Multi-District Litigation consolidates pretrial proceedings in district courts, but this particular process, while not perfectly analogous to the race to the courthouse, is sufficiently similar that we believe the JDMDL would be the appropriate body to vest that power in.

I would suggest that in vesting power in the Judicial Panel on Multi-District Litigation, we can substantially simplify the process. Let me just touch upon one particular question.

The process of notification to the courts of appeal after a race has been run will require that each court of appeals enter a transfer order to the designated court for the purpose of venue. If this power were to be vested in the Judicial Panel on Multi-District Litigation, I would suggest that we could simplify the process greatly. Since we have a panel with judicial power, we might vest in that panel the power to make the transfer order and thereby issue an order to the agency, all of the petitioners, and to the courts of appeal themselves, transferring the case. This, I believe, would simplify the process.

Mr. Chairman, I must say we agree with the administrative conference on the major points of this legislation and we support its enactment and insofar as details are concerned, I can assure you that we stand ready to assist the committee.

I thank you.

[The statement of Mr. Beck follows:]

Prepared Statement  
of  
Leland E. Beck  
Counsel, Legislative Affairs Office  
Administrative Office of the United States Courts  
on behalf of  
The Judicial Conference of the United States  
before the  
Subcommittee on Administrative Law and Governmental Relations  
Committee on the Judiciary  
United States House of Representatives  
on  
"The Race to the Courthouse"  
H.R. 3084  
October 5, 1983

Mr. Chairman, and Members of the Subcommittee, I appear today to present the views of the Judicial Conference of the United States on H.R. 3084, a bill to provide for selection of a specific court of appeals to determine multiple appeals from the same agency order. The Judicial Conference, composed of the Chief Justice of the United States, the Chief Judges of the Courts of Appeals and a district judge from each of the regional circuits, is the policy making body for the Judicial Branch of government.

The Judicial Conference supports enactment of the concepts in H.R. 3084 providing for the random selection of a court of appeals from those courts of appeals in which petitions for review of an agency order are filed for the purpose of determination of initial venue over all petitions to review the same order. The Judicial Conference believes that the random selection function should be performed by a pre-existing judicial body, the Judicial Panel on Multi-District Litigation, and not the management office for the judicial system, the Administrative Office of the United States Courts.

Since 1958, 28 U.S.C. § 2112(a) has provided that, when an agency issues an order appealable to the courts of appeals, the first court of appeals in which a petition for

review is filed will be the court of appeals that has venue to hear the appeal. Over the past quarter of a century, this provision has led to increasingly expensive "races to the courthouse" and problematic preliminary litigation to determine which petitioner filed first. We have now seen enough of these races to be sure that this system of determining the proper venue of a petition for review does not work. Some of the more expensive and elaborate races illustrate the lengths to which litigants will go in order to acquire venue in a forum perceived to be inclined toward their views of the law or to avoid a forum that they perceive to be disinclined to their views. In some instances, elaborate chains of communication have been established to file a petition in a court of appeals that is perceived to be a favorable forum as quickly as possible after an appealable order has been filed by the administrative agency, including "dummy" chains to mislead the opposition. In other cases, counsel have filed multiple petitions for review in rapid succession, beginning immediately prior to the previously announced time for the filing of the decision by the administrative agency, so that one of the petitions will have been filed within a very short time after the filing of the order subject to review, thereby increasing the probability that he or she will be successful in obtaining the forum of choice. Each of these approaches to the race is costly to the litigants; the first is costly in terms of retaining on-site personnel at both the agency and the courthouse of choice and such items as open phone lines; the second is costly in terms of the payment of a separate filing fee for each of the petitions filed. Neither approach to the race is guaranteed to be successful, and each creates a separate issue for litigation: who won the race.

In addition, there is substantial doubt that the assumption that underlies the race is accurate. The assumption is that the courts of appeals treat the procedural and substantive decisions of administrative agencies with greater or lesser deference when administering a standard of review. The reality of this assumption, however, has little to do with whether a race will be run. Quite to the contrary, counsel's perception, and the client's financial capacity, will determine whether and to what extent, there will be a race to the courthouse to file for review of an agency order.

In December, 1980, after a careful study of the process and effects of multiple filings in the courts of appeals to acquire a "favorable" forum,<sup>1</sup> the Administrative Conference of the United States recommended that 28 U.S.C. § 2112(a) be amended to provide that: if petitions to review the same order of an administrative agency are filed in two or more courts of appeals within ten days after the order is issued, the agency is to notify an appropriate official body of that fact; that the official body, on the eleventh day after the issuance of the order, is to choose from among the circuits in which petitions have been filed according to a scheme of random selection and notify the agency of that choice; and that the agency is then to file the record of the proceeding in the court so chosen. The court of appeals would take jurisdiction over the matter and conduct a review proceeding, subject to the existing power to transfer the case to any other court of appeals for the convenience of the parties in the interest of justice.<sup>2</sup>

The Administrative Conference proposal was embodied in legislation during the 97th Conference and was reviewed by the Judicial Conference in September, 1981, and September, 1982,<sup>3</sup> along with broader venue changes. The Judicial Conference has been of the view that questions of venue are properly the domain of the Congress to decide, but has been receptive to the notion of random selection to eliminate the "race to the courthouse". In September of this year, the Judicial Conference again considered the issue of random selection of a court of appeals from among the relevant circuits in order to determine initial venue for the appeal. In a refinement of policy recommendations the

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1. T. McGarity, Multi-Party Forum Shopping for Appellate Review of Administrative Action (Administrative Conference of the United States, 1980). A revised version of this report appears under the same title at 129 U.Pa.L.Rev. 302 (1980).

2. Administrative Conference of the United States, Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action, Recommendation 80-5, December 11, 1980.

3. Report of the Proceedings of the Judicial Conference of the United States, September 24 and 25, 1981, p. 80 - 81; Report of the Proceedings of the Judicial Conference of the United States, September 22 and 23, 1982, p. 89.

Judicial Conference endorsed the concept of random selection, but with a specific caveat.

The Administrative Conference proposal, and the provisions of H.R. 3084, would vest the process of random selection in the Administrative Office of the United States Courts. The Administrative Office, as the management unit that implements Conference policies, does not possess judicial powers. The Judicial Conference recommends that Administrative Office not be vested with such powers. Accordingly, the Judicial Conference sought a judicial body for the performance of this function, and it believes that the process of random selection should be placed in the Judicial Panel on Multi-District Litigation. The Judicial Panel on Multi-District Litigation, in existence since 1968, is authorized to consolidate pretrial proceedings of cases filed in multiple district courts.<sup>4</sup> While the analogy between consolidation of pretrial proceedings in civil litigation in the district courts and a determination of initial venue in the courts of appeals is not perfect, the differences, for the purposes of this bill, are not of great moment. This additional duty would not represent a major increase in the duties of the Judicial Panel on Multi-District Litigation; it would increase the efficiency of the venue determination process.

H.R. 3084 and the Administrative Conference proposal would place the random selection process in the hands of the Administrative Office and would require only that the Administrative Office notify the administrative agency of the determination of the court of appeals selected for the filing of the record. No provision is made in the bill or proposal for notification of all the appellants in the proceedings. Furthermore, it remains for the agency to notify the courts of appeals of the consolidation and request an order of transfer of the respective cases to the specified court of appeals; the courts of appeals would then enter the appropriate transfer order. This entire process can be

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4. 28 U.S.C. §1407 (1976).

simplified by vesting the function of selection in the Judicial Panel on Multi-District Litigation.

Under a substitute proposal that you may wish to consider, the petitioners could file petitions for review in the courts of appeals of their choice within the ten day period designated by the bill under Federal Rule of Appellate Procedure 15(a). The clerk of each of the courts of appeals where a petition for review has been filed in a timely manner would notify the administrative agency of the filing of the petition for review in accordance with Rule 15(c), by service under Rule 3(d) or as otherwise provided by statute. An alternative to having the clerk of the court of appeals serve the administrative agency would be to require the petitioner to serve the agency in the same manner as defendants are served in civil cases filed in the district courts in accordance with Federal Rule of Civil Procedure 4(d)(4). The administrative agency would, as proposed in H.R. 3084, be required to file a notice with the Judicial Panel on Multi-District Litigation specifying the courts of appeals that have served it with petitions for review. The clerk of the Judicial Panel on Multi-District Litigation would make the random selection, certify the court of appeals selected by affidavit and enter an order consolidating the petitions for review in the court of appeals so selected, causing the administrative agency, the petitioners and the courts of appeals where the petitions were filed to be served with the order. This process remains entirely ministerial, but clarifies the filing and service requirements, and more closely comports with existing judicial procedures established in the Federal Rules of Appellate Procedure.

Random selection of the court of appeals for the purposes of initial venue will put an end to races to the courthouse, but, ultimately, questions of proper venue will remain. By providing a simplified process in accord with existing rules, such as I have suggested, the potential for threshold litigation, other than forum non conveniens types of motions, can be all but eliminated.

There are several provisions of H.R. 3084 that are of concern. First, the requirement of notice to the administrative agency within ten days has been changed in the revision that I have suggested to a ten day filing requirement in the courts of appeals. This change utilizes an existing filing process and a disinterested determination of timeliness. While the use of service by the clerk of the court of appeals to notify the agency of the filing slows the process, the alternative suggestion of utilizing concurrent service by the petitioner loses the initial determination that the petition for review was timely filed in the court of appeals.

Second, the requirement suggested by the bill that the determination be made "as soon as practicable", or on a specified day, does not add to the real timeliness in the determination of the court of appeals of initial venue, but does add specific burdens to the process. I should note that the hortatory "as soon as practicable" language is reminiscent of the plethora of civil priorities specified in statutes for certain classes of cases in district courts and courts of appeals; their efficacy has long been questioned and their repeal, we hope, is imminent. Specification of a day certain on which the determination will be made simply interrupts the normal administration of the determiner in order to fulfill a ministerial statutory duty. There is no real savings in requiring that one case be drawn each day merely because it is the proper day, when a group of cases can be drawn once a week with greater efficiency.

Third, the bill does not fully recognize that the notices contemplated will not be served instantly. Several days may be required to provide service and transmission of all the relevant documents.

I hope these suggestions will be of assistance to the Subcommittee in developing this legislation further. If we can be further assistance in this endeavor, we would be pleased to do so.

Mr. HALL. Thank you very much.

Do you suggest that the judicial panel on multidistrict litigation handle the random selection process established by H.R. 3084? Do you foresee any problem with this district court panel issuing an order regarding a determination of venue among the circuit courts?

Mr. BECK. Mr. Chairman, I don't see a problem there because of the nature of the order itself. This is not a final venue determination, even though in the past, counsel have generally conceded initial venue will be final venue.

We are talking about a ministerial process for the determination of initial venue. I don't think it matters greatly what the character of the judicial panel is that issues that order. I would suggest that the Judicial Panel on Multi-District Litigation, while currently composed of district court judges, is authorized to also be composed and include court of appeals judges.

The process that I envision for handling of this random selection would actually involve no judicial time whatever, but merely the utilization of an existing panel and an existing clerk's office in particular to make this ministerial selection and to issue the paperwork.

Mr. HALL. Have you heard of any persons who are opposed to this bill?

Mr. BECK. Mr. Chairman, that is one of the graces of this hearing and this legislation. I have heard of no opposition to it whatever.

Mr. HALL. Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman.

I'm sitting here suddenly realizing what I believe to be a practical problem with the bill. I'd like to ask your thoughts on this.

It's a matter of how communications will occur that identify the fact that there is a filing in more than one circuit.

Mr. BECK. Yes.

Mr. KINDNESS. To what point those communications should be directed—the parties who are interested in the order are the ones most likely to know there is multidistrict filing here—I mean, filing in more than one circuit. The courts don't necessarily know it on a timely basis.

How would you perceive the communications occurring under the suggestion of the multidistrict panel administering this?

Mr. BECK. When an agency issues an order appealable to the various circuit courts of appeal, the bill provides for a 10-day period in which filing of the petition can be had. The filing in the clerk's office implicitly includes a determination that the filing was timely. At the same time, there are two different mechanisms for notification of the agency.

Federal Rule of Appellate Procedure 15(c), I believe, requires that the clerk's office notify the agency from whose order the appeal is being taken. At the same time, the petitioner is required to serve the agency, and in most cases the United States, with that appeal.

Mr. KINDNESS. Excuse me, at this point, we could very well be beyond the 10 days, right?

Mr. BECK. Because of the differences in time and space, between here and, say, the ninth circuit, in San Francisco, yes, we can, indeed, experience a difference in time between the two facts occur-

ring. You can file in a timely manner in the ninth circuit, the courthouse in San Francisco, until 8 o'clock Eastern Standard Time, because it is only 5 o'clock their time. You could not simultaneously file that with the agency because their office would have been closed.

The question of timeliness as it appears in the bill right now requires that both the court and the agency be notified in a timely manner. I don't see any problem with that. It is ultimately the agency that will certify to either the Administrative Office, the Judicial Panel on Multi-District Litigation, or whomever, that multiple appeals have been filed.

The question at this point is merely how do we determine what is timely? The bill requires two independent determinations of timeliness: one by the courts of appeal in which the petition is filed and one by the agency itself.

Beyond that point, with the agency notified, I would see them filing a motion for consolidation, if I might call it that, in the Judicial Panel on Multi-District litigation. That motion would, of course, designate the courts of appeal in which the petitions have been filed.

The clerk's office would draw, by means of random selection, which of those courts of appeal would have initial venue. The clerk would at that point file an affidavit of the drawing and issue, under the judge's signature, an order transferring the case, and all of the petitions to that particular case, in the designated circuit.

At that point, the order would need to be issued to a variety of different people: the agency, in order that they might file the record; the various petitioners, in order that they might know where the record is going; and of course, the courts of appeal so that they can transfer the docket papers from that court, in accordance with the Judicial Panel's order, to the court of initial venue.

There are several small time gaps involved here. For example, as we've already discussed, the one based upon the fact that we have courts of appeal on the west coast and here on the east coast. There is also going to be a piece of time involved in the agency preparing its notification and transmitting that just across town. The Judicial Panel on Multi-District Litigation maintains its clerk's office up on Vermont Avenue. That will take a small amount of time.

At the point that that paperwork arrives at the Judicial Panel, I would foresee either an immediate selection or simply a collection of a number of cases over a very short period of time so that a selection can be made within a normal administrative routine, say, for example, once a week.

Paperwork, of course, does not appear magically from one place to another. When we can figure out how to do that, I think that we will solve many of the problems of judicial procedure, but we haven't done that yet.

Mr. KINDNESS. The way the bill is written at present, though, it states that:

If within 10 days after issuance of the order, the agency receives written notice that proceedings have been instituted in two or more courts of appeal, then the agency shall promptly, after the expiration of that 10-day period, so inform the Administrative Office.

You're proposing that we switch that around so that if within 10 days the filings have occurred in the courts of appeal, then action proceeds from that point; is that correct?

Mr. BECK. Yes; I am. The courts of appeal make a determination of timeliness each and every time an appeal is filed, each and every time paperwork comes in. The agencies, of course, do this within the administrative process. But when an appeal is filed, they become litigants—

Mr. KINDNESS. Excuse me, let me just see if I'm getting this correctly now. The appeal has been filed in two circuits, let's say, and let's make the assumption that the appellants are, for some reason, not aware of one another—

Mr. BECK. Correct.

Mr. KINDNESS [continuing]. And the service of process upon the agency occurs—that may occur within a period of time in excess of 10 days, I suppose.

Mr. BECK. Yes; it might.

Mr. KINDNESS. Then let's assume that. Then the agency must institute action in order to advise the multidistrict panel that there is a multiplicity of appeals. That could occur within a period of time, as the bill is written, or as you're suggesting, does not have a limit on it, so I would assume that it's implicit in your recommendation that there be some sort of timeframe established for these subsequent steps of communication. Is that a fair appraisal?

Mr. BECK. No; Congressman, I would not recommend including specific timeframes for steps beyond the filing period. Let me clarify one particular point. The filing with the court of appeals and the filing with the agency may not be simultaneous, simply because of the differences of time.

I see no problem with requiring that both of those filings take place within 10 days. I think that that would actually be a preferable situation.

The next stage, the filing of notification with whatever official body that will make the initial venue determination, is something that should occur quite quickly. It is probably in everyone's interest that that be done as quickly as possible.

Mr. KINDNESS. Except the agency, and they're the one to do it. [Laughter.]

Mr. BECK. Considering that the agency at that point becomes the respondent, the agency may not be very interested in having it filed as quickly as possible.

Mr. KINDNESS. But that's the point at which there probably should be a—

Mr. BECK. I would think that would be an appropriate point—

Mr. KINDNESS [continuing]. Time of some sort?

Mr. BECK. Yes, yes; I think that would be an appropriate point for an additional required timeframe.

Mr. KINDNESS. Thank you.

Mr. HALL. Mr. Boucher.

Mr. BOUCHER. I have no questions. Thank you, Mr. Chairman.

Mr. HALL. How is this handled at the present time?

Mr. BECK. In terms of the current—

Mr. HALL. Yes.

Mr. BECK [continuing.] 2112?

Mr. HALL. Yes.

Mr. BECK. As I understand it, the agencies are the repository, if I might use that term, for the only consolidated notices of the petition being filed. The initial determination of venue is often handled very informally in conference between circuit court judges. Where there is a real race to the courthouse, the fifth circuit, for example, will remand that matter as a factual question to the administrative agency for a determination and then deal with that on appeal.

Mr. HALL. Do you think that if you have a filing in two circuits and within the 10-day period, and of course, the law, as proposed, states that the agency must promptly identify, and that's what you and Mr. Kindness, I think, were talking about a moment ago that might need some brushing up.

What do you think would be an appropriate timespan for the agency to notify the multiple panel?

Mr. BECK. Mr. Chairman, I would not propose to speak for that aspect of the administrative process since ultimately we will not become involved until after it expires. The 10 days to file in the various circuit courts I think is a reasonable time. I think another 10 days for the appropriate service of process on the agencies—hopefully that will be concurrent and within the first 10 days—and for the agencies to make the notification would be more than reasonable.

Mr. HALL. All right. Thank you very much.

Mr. BECK. Thank you, Mr. Chairman.

Mr. HALL. We appreciate that.

Does counsel have any questions they want to ask?

Ms. POTTS. No; thank you.

Mr. HALL. All right.

Thank you very much, sir.

[Whereupon, at 10:20 a.m., the subcommittee proceeded to the consideration of other business.]

ADDITIONAL MATERIAL

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1983/84

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October 3, 1983

Honorable Sam Hall  
Chairman, Subcommittee on Administrative  
Law and Governmental Relations  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

Over the past two years representatives of the American Bar Association have testified before your Subcommittee and in the Senate in support of pending regulatory reform legislation. One aspect of that legislation, about which I write now, is a proposal to correct the wasteful and unseemly "race to the courthouse" frequently undertaken by parties seeking Court of Appeals review of regulatory action.

As outlined in the attached recommendation approved by a voice vote of the Association's House of Delegates in February of this year, and in the accompanying background report, the ABA recommends the establishment of a random selection method of choosing the appropriate reviewing court in those cases where judicial review has been sought in more than one circuit court. Our recommendation fully supports the provision contained in your bill, H.R. 3084, which I understand is the subject of hearings by your Subcommittee on October 5.

I am pleased to reiterate the official support of the American Bar Association for prompt enactment of this legislation and request that you include this letter and its attachments in the printed record of your hearings on H.R. 3084.

Sincerely yours,  
*Martin F. Richman*  
Martin F. Richman  
Chairman, Section of  
Administrative Law

cc: Subcommittee Members

SECTION OF ADMINISTRATIVE LAW

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AMERICAN BAR ASSOCIATION  
SECTION OF ADMINISTRATIVE LAW  
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association recommends to federal agencies and the Congress the following actions regarding the timing and venue of judicial proceedings to review federal agency actions:

1. Federal agencies should specify, by general rule, the time and date as of which their actions become final for purposes of judicial review. With respect to substantive rules, such time and date should normally be no less than 30 days before the effective date of the rule.

2. Congress should enact legislation providing: Where statutory review provisions render federal agency action reviewable in more than one court of appeals, all petitions filed through the fifth business day after the day an agency action becomes reviewable shall be deemed to have been filed simultaneously. During such period, any proper court in which a petition for review or appeal is filed has authority to stay, pending review, any such action that is to become effective within such period. Promptly upon the expiration of such period, if filings have been made in more than one judicial circuit, venue will be determined among them on the basis of random selection. The venue so determined will remain subject to any statutory provisions for transfer for the convenience of the parties in the interest of justice.

REPORT

The situation that gives rise to the foregoing recommendation of the Administrative Law Section is popularly known as the "race-to-the-courthouse." It is described in the preamble to a similar recommendation of the Administrative Conference of the United States:

"Many [federal] agency actions subject to direct review in the courts of appeals involve more than one private party that may legitimately consider itself aggrieved by the agency action. In most cases, a single court of appeals is not specified by statute as the reviewing court, and venue may lie in more than one such court. Many lawyers believe that one court of appeals is likely to be more receptive than another to their clients' arguments in an agency review proceeding. The choice of the reviewing court has therefore assumed large importance in the review of some actions of some agencies.

"A statute, 28 U.S.C. § 2112(a), provides that, when petitions for appellate review of the same order are filed in two or more courts of appeals, the record of the agency proceeding is to be filed by the agency in the court in which the first petition was filed, and that court then has jurisdiction of the review proceeding to the exclusion of others. This provision has become less and less useful as the choice of forum has become more significant in lawyers' minds, and races to the courthouse have proliferated and methods of conducting the races have become more refined. Races are now sometimes decided by seconds or fractions of seconds, if they can fairly be said to have been decided at all. (There is no single finish line to cross or tape to break; time stamping machines in clerks' offices are not synchronized.) Moreover, races will be even harder to judge as agencies adopt regulations, designed to make the races fairer and more civilized, specifying the date and time at which agency orders are deemed to have been issued.

"The spectacle of the race to the courthouse is an unedifying one that tends to discredit the administrative and judicial processes and subject them to warranted ridicule." 1980 A.C.U.S. 25.

A fuller description and analysis of the problem can be found in the consultant's report underlying the Administrative Conference recommendation, McGarity, Multi-Party Forum Shopping for Appellate Review of Administrative Action, 129 U. Pa. L. Rev. 302 (1980); and in Fels, Beyond the Stopwatch: Determining Appellate Venue on Review of FERC Orders, 1 Energy L.J. 35 (1980); Ross & Goldman, Racing to the Court; An "Unseemly" Way to Challenge Agency Orders, Nat'l L.J., March 3, 1980, at 27 col. 1.

Through its Judicial Review Committee the Administrative Law Section studied the problem of the race-to-the-courthouse. The reasons for the recommendation resulting from its study follow:

Paragraph 1 of the Recommendation endorses a practice already adopted by the Environmental Protection Agency and other agencies, approved by the courts, and generally applauded by practitioners. This practice eliminates the uncertainty regarding when the starting gun for the race goes off -- an uncertainty that has in the past caused the most disciplined racers to make multiple filings at the various stages at which the agency action might conceivably become reviewable. General adoption of the practice would not end the race; to the contrary, it would make racing easier and the finishes closer. But it would make the race fairer.

Paragraph 2 of the Recommendation does seek to end the race -- or at least to slow it to a brisk but dignified walk. The first and perhaps the closest, question is whether that objective is worth pursuing. Most of those who have looked into the question believe that the human-chain, open-phone-line races and the subsequent proceedings to determine who was fractions of a second ahead of whom are wasteful of private and judicial resources, and are a sufficiently common spectacle to bring the legal process into public disrepute, if not ridicule. Many lawyers resent the felt necessity to engage in such tactics in order to protect their clients' interests. As suggested above, the situation is likely to get worse as more and more agencies adopt the practice of specifying by general rule the precise appealable moment of their actions.

The approach taken by the Recommendation is to retain some incentive for prompt filing, in that the first-in-time rule would continue to defeat filings made after a prescribed deadline, but to make it unnecessary to scramble to attain the favored clerk's office first by providing that all filings made within five business days after an agency

order is issued or rule is final would be treated as on a par in timeliness.

In addition to preserving some advantage for the relatively prompt filer, the narrowness of the "window" is designed to solve the problem of stays pending review. A lengthy free-filing period (e.g., 30 days) would make it necessary to specify a court that could issue stays during that time. If the determination what court is to have the stay power is left to be governed by the first-to-file rule, the whole object of the exercise has been defeated, since the ability to obtain a stay is often important enough in itself to render a highly sophisticated race worthwhile. And most would think that assigning stay authority over all matters to a single court (e.g., the Temporary Emergency Court of Appeals) is an unacceptable concentration of power. The difficulty with both of these solutions could be minimized by requiring the court that ultimately is awarded venue to reexamine the stay de novo -- but in many cases that would be enormously wasteful of judicial and lawyerly resources. The solution adopted by the Recommendation is to permit any proper court to issue a stay during the brief "window" period in the thought that it is highly unlikely that the (at most) few days' delay pending the selection of the proper court would often be important enough to induce litigants to present, or judges to entertain, stay motions during that period except in most extraordinary circumstances.

Finally, there is the question of how to select among the circuits in which "window" filings are made. The Recommendation adopts the simple device of random selection. Professor McGarity, explaining the Administrative Conference's choice of the same method of random selection, wrote that such "[a]n automatic mechanism would avoid costly courthouse races, eliminate the need for costly threshold discretionary transfer litigation, and satisfy most conceptions of fairness. No party would have any particular advantage, because the choice would be utterly impartial . . . "[A]n automatic mechanism would preserve judicial comity, because the mechanism would avoid any possibility that two courts would be required to decide the same question in the same case." Id. at 372.

One last point should be noted: the statutory provisions for transfer of venue (as currently in effect or as subsequently amended) would apply to the venue selected through this new process.

The Association's Special Committee on Coordination of Federal Judicial Improvements has endorsed the recommendation. As indicated above, the Administrative Conference of the United States has proposed a random selection device as a means of curbing or eliminating the courthouse race. 1 C.F.R. § 305.80-5. And the Judicial Conference of the United States has endorsed that idea. Furthermore, a provision consistent with our recommendation has been a relatively non-controversial part of both House and Senate versions of regulatory reform legislation in the 97th Congress.

William H. Allen  
Chairman

February, 1983

General Information Form  
To Be Appended to Reports with Recommendations

No. 102A  
(leave blank)

Submitting Entity Administrative Law Section

Submitted By William H. Allen, Chairman

1. Summary of Recommendation(s).

The recommendation would call upon federal agencies and Congress to act to curb the problem of the race to the courthouse, which occurs when parties to an agency proceeding seek the advantage of what they perceive as a favorable forum by being the first to file in a court of appeals a petition for review of agency action. The principal recommendation is to provide that all petitions filed within a specified period (five days) be treated as simultaneously filed and that the court of appeals that has initial jurisdiction of the review proceeding then be chosen by lottery or some other form of random selection.

2. Approval by Submitting Entity.

The substance of the recommendation was adopted by the Council as a statement of Section policy on October 11, 1980, and the recommendation was readopted by the Council for submission to the House in August 1982.

3. Background. (Previous submission to the House or relevant Association position.)

4. Need for Action at This Meeting.

The fate of regulatory reform legislation in the 97th Congress is not known at this writing. If enacted, such legislation would almost certainly include a race-to-the-courthouse provision much like what is recommended. If the 97th Congress adjourns without acting on regulatory reform, it would be desirable that the ABA be in a position to join others in urging race-to-the-courthouse legislation early in the 98th Congress.

5. Status of Legislation. (If applicable)

Covered in answer to No. 4.

6. Financial Information. (Estimate of funds required, if any.)

None.

7. Conflict of Interest. (If applicable)

None.

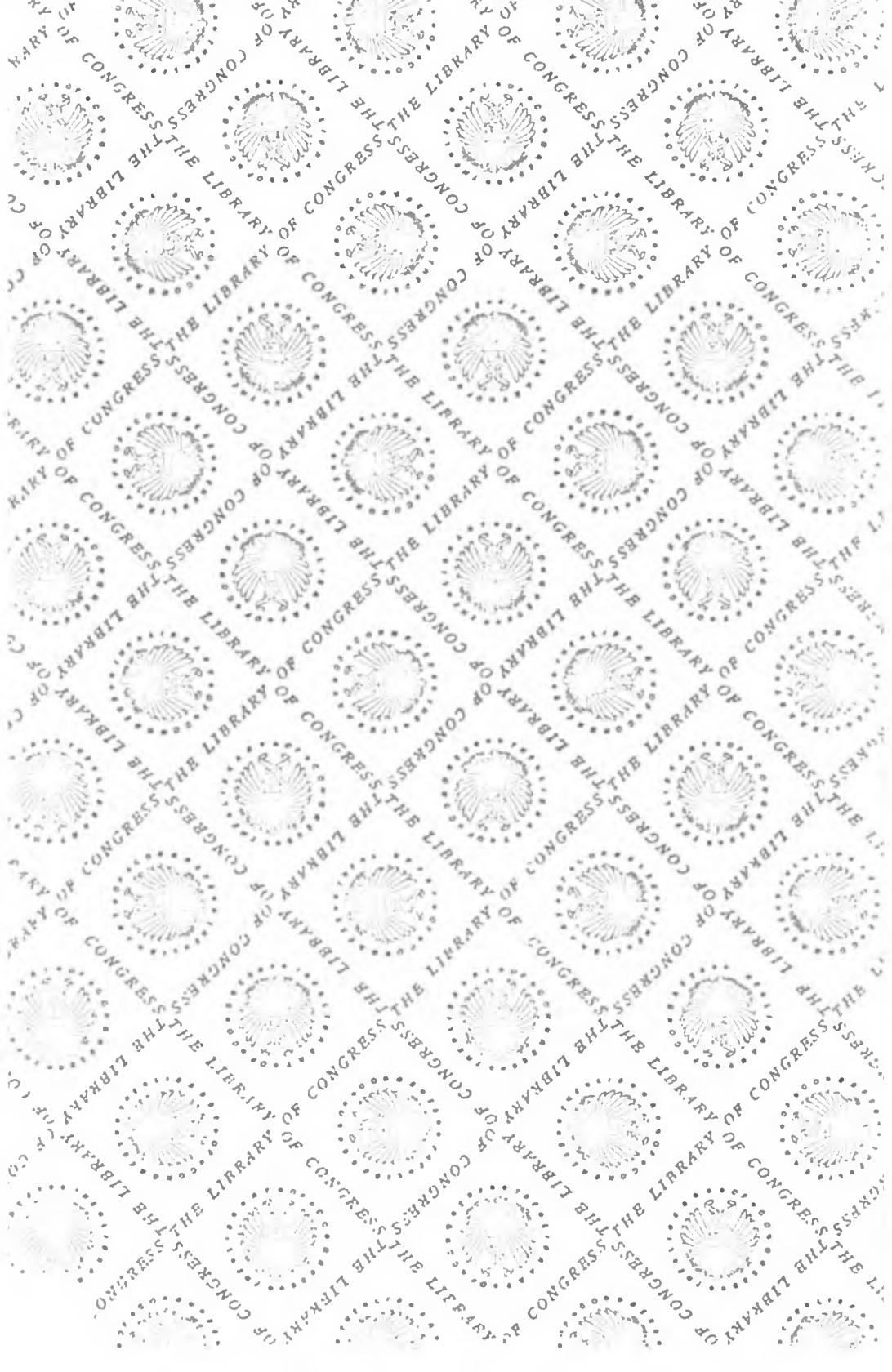
8. Referrals.

As noted in the report, the Special Committee on Coordination of Federal Judicial Improvements has endorsed the recommendation. The report has been referred to all Sections and Committees and the Coordinating Group on Regulatory Reform.



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