Public Law 85-791

AN ACT

August 28, 1958
[H. R. 6788]

To authorize the abbreviation of the record on the review or enforcement of orders of administrative agencies by the courts of appeals and the review or enforcement of such orders on the original papers and to make uniform the law relating to the record on review or enforcement of such orders, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the analysis of chapter 133 of title 28 of the United States Code, immediately preceding section 2101 of such title, is amended by inserting at the end thereof the following additional item:

Administrative agencies.
Record on review and enforcement of orders.

"2112. Record on review and enforcement of agency orders."

"SEC. 2. Chapter 133 of title 28 of the United States Code is amended by inserting at the end of such chapter immediately following section 2111 an additional section, as follows:

"§ 2112. Record on review and enforcement of agency orders

"(a) The several courts of appeals shall have power to adopt, with the approval of the Judicial Conference of the United States, rules, which so far as practicable shall be uniform in all such courts prescribing the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers, to the extent that the applicable statute does not specifically prescribe such time or manner of filing or contents of the record. Such rules may authorize the agency, board, commission, or officer to file in the court a certified list of the materials comprising the record and retain and hold for the court all such materials and transmit the same or any part thereof to the court, when and as required by it, at any time prior to the final determination of the proceeding, and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court. The record in such proceedings shall be certified and filed in or held for and transmitted to the court of appeals by the agency, board, commission, or officer concerned within the time and in the manner prescribed by such rules. If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals.

Rules for filing.

"(b) The record to be filed in the court of appeals in such a proceeding shall consist of the order sought to be reviewed or enforced, the findings or report under which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned, or such portions thereof (1) as the said rules of the court of appeals may require to be included therein, or (2) as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court in any such proceeding may consistently with the rules of such court

dence shall be received by the court, but the court may order additional evidence to be taken before the Board, and the Board may, after hearing such additional evidence, modify its findings of fact and conclusions and file such additional or modified findings and conclusions with the court, and the Board shall file with the court the additional record."

Agriculture.
7 USC 1599.

SEC. 24. (a) Subsection (c) of section 409 of the Federal Seed Act (53 Stat. 1287), is amended to read as follows:

"(c) Until the record in such hearing has been filed in a court of appeals as provided in section 410, the Secretary of Agriculture at any time, upon such notice and in such manner as he deems proper, but only after reasonable opportunity to the person to be heard, may amend or set aside the report or order, in whole or in part."

7 USC 1600.

(b) The second, third and fourth paragraphs of section 410 of the Federal Seed Act (53 Stat. 1288), are amended to read as follows:

"The clerk of the court shall immediately cause a copy of the petition to be delivered to the Secretary, and the Secretary shall thereupon file in the court the record in such proceedings, as provided in section 2112 of title 28, United States Code. If before such record is filed, the Secretary amends or sets aside his report or order, in whole or in part, the petitioner may amend the petition within such time as the court may determine, on notice to the Secretary.

"At any time after such petition is filed the court, on application of the Secretary, may issue a temporary injunction restraining, to the extent it deems proper, the person and his officers, directors, agents, and employees from violating any of the provisions of the order pending the final determination of the appeal.

"The evidence so taken or admitted and filed as aforesaid as a part of the record, shall be considered by the court as the evidence in the case. The proceedings in such cases in the court of appeals shall be made a preferred cause and shall be expedited in every way."

7 USC 1601.

(c) The first and second sentences of section 411 of the Federal Seed Act (53 Stat. 1288), are amended to read as follows:

"SEC. 411. If any person against whom an order is issued under section 409 fails to obey the order, the Secretary of Agriculture, or the United States, by its Attorney General, may apply to the court of appeals of the United States, within the circuit where the person against whom the order was issued resides or has his principal place of business, for the enforcement of the order, and shall file the record in such proceedings, as provided in section 2112 of title 28, United States Code. Upon such filing of the application the court shall cause notice thereof to be served upon the person against whom the order was issued."

SEC.
15 USC 80a-42.

SEC. 25. The second and third sentences of subsection (a) of section 43 of the Investment Company Act of 1940, as amended (54 Stat. 844), are amended to read as follows: "A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission or any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, or set aside such order, in whole or in part."

SEC.
15 USC 80b-13.

SEC. 26. The second and third sentences of subsection (a) of section 213 of the Investment Advisers Act of 1940, as amended (54 Stat. 855), are amended to read as follows: "A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, or any officer thereof designated by the Com-

mission for that purpose, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, or set aside such order, in whole or in part."

Public Health.

SEC. 27. (a) Paragraph (1) of subsection (b) of section 632 of the Act of July 1, 1944, as added by the Hospital Survey and Construction Act (60 Stat. 1048), is amended to read as follows:

42 USC 291j.

"(b) (1) If the Surgeon General refuses to approve any application under section 625 or section 654, the State Agency through which the application was submitted, or if any State is dissatisfied with the Surgeon General's action under subsection (a) of this section, such State may appeal to the United States court of Appeals for the circuit in which such State is located by filing with such court a notice of appeal. The jurisdiction of the court shall attach upon the filing of such notice. A copy of the notice of appeal shall be forthwith transmitted by the clerk of the court to the Surgeon General, or any officer designated by him for that purpose. The Surgeon General shall thereupon file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28, United States Code."

(b) The first sentence of paragraph (2) of subsection (b) of section 632 of the Act of July 1, 1944, as added by the Hospital Survey and Construction Act (60 Stat. 1048), is amended to read as follows:

42 USC 291j.

"(2) The findings of fact by the Surgeon General, unless substantially contrary to the weight of the evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Surgeon General to take further evidence, and the Surgeon General may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings."

Agriculture.
7 USC 1115.

SEC. 28. The fourth sentence of subsection (c) of section 205 of the Sugar Act of 1948 (61 Stat. 927), is amended to read as follows: "Within thirty days after the filing of said appeal the Secretary shall file with the court the record upon which the decision complained of was entered, as provided in section 2112 of title 28, United States Code, and a list of all interested persons to whom he has mailed or otherwise delivered a copy of said notice of appeal."

50 USC 793.

SEC. 29. The second and third sentences of subsection (a) of section 14 of the Internal Security Act of 1950 (64 Stat. 1001, are amended to read as follows: "A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the Board shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction of the proceeding and shall have power to affirm or set aside the order of the Board; but the court may in its discretion and upon its own motion transfer any action so commenced to the United States Court of Appeals for the circuit wherein the petitioner resides."

Subversive activities.
50 USC 820.

SEC. 30. (a) Subsection (e) of section 110 of the Internal Security Act of 1950 (64 Stat. 1028), is amended to read as follows:

"(e) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it."

50 USC 821.

(b) The third and fifth sentences of subsection (c) of section 111 of the Internal Security Act of 1950 (64 Stat. 1028), are amended to read as follows: "The Board shall thereupon file in the court the record of the proceedings before the Board with respect to the matter con-

85TH CONGRESS *1st Session* | HOUSE OF REPRESENTATIVES | REPORT No. 842

AUTHORIZING ABBREVIATED RECORDS IN REVIEWING ADMINISTRATIVE AGENCY PROCEEDINGS

JULY 23, 1957 – Ordered to be printed

Mr. WILLIS, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H. R. 6788]

The Committee on the Judiciary, to whom was referred the bill (H.R. 6788) to authorize the abbreviation of the record on the review or enforcement of orders of administrative agencies by the courts of appeals and the review or enforcement of such orders on the original papers and to make uniform the law relating to the record on review or enforcement of such orders, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

The amendments are as follows:

No. 1. Page 2, line 8, strike out "rules" and insert "rules, which so far as practicable shall be uniform in all such courts".

Page 2, line 12, strike out "in which" and insert "to the extent that".

No. 2 Page 2, line 20, after "proceeding", change the period to a comma and add:

> and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court.

No. 3. Page 2, line 21, after "for", add "and transmitted to".

No. 4. Page 3, line 2, after "which", strike out "in its judgment that proceedings may be carried on with the greatest convenience to all the parties involved" and insert "a proceeding with respect to such order was first instituted".

No. 5. Page 3, line 6, after "filed.", add –

> For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals.

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petition shall be forthwith transmitted by the clerk of the court to the Commissioner, or any officer designated by him for that purpose. Upon the filing of the petition the court shall have jurisdiction to affirm or set aside the action of the Commissioner in whole or in part."

No. 39. Page 20, line 4, strike the figure "(1)" and insert the letter "(l)".

No. 40. Page 22, line 12, strike "a" immediately before "part".

No. 41. Page 26, line 23, insert a period immediately after "Code".

EXPLANATION OF AMENDMENTS

Amendment No. 1. – Several of the Federal agencies and the American Bar Association propose that the bill be amended to require the adoption of *uniform* rules. While uniformity is highly desirable, there will be special conditions in particular circuits which will not obtain generally. This amendment seeks substantial uniformity by requiring the approval of the Judicial Conference to rules promulgated by the various courts of appeals while at the same time permitting individual courts to make special provisions required by peculiar local conditions.

The latter part of this amendment makes it clear that the rules to be adopted by the courts of appeals may cover the matters of time of filing, manner of filing, and contents of the record *to the full extent* that such matters or any of them are not specifically covered by applicable statutes.

Amendment No. 2. – Subsection (a) of new section 2112 has been expanded in accordance with suggestions made at the hearing on May 17, 1956, to provide that the rules of court may authorize the agency concerned, to file a certified list of the materials comprising the record and retain the actual papers in its physical custody to be transmitted to the court only when and if required by the court in its consideration of the case. This procedure has been recently tried in several of the courts and found feasible. In carrying out this provision the instant amendment was inserted to provide that the filing of a certified list of materials will be deemed full compliance with any provision of law requiring the filing of the record.

Amendment No. 3. – This amendment was made in the interest of precision to implement the provisions of amendment No. 2.

Amendment Nos. 4 and 5. – The bill, as introduced, provided that if proceedings have been instituted in two or more courts with respect to the same order, the agency would be required to file the record in that court which in its judgment would be most convenient to the parties, and the other courts were then to transfer their proceedings to it. This was intended to provide statutory authority for the procedure developed by the courts in this situation. See *Columbia Oil and Gas Co.* v. *Securities and Exchange Commission* (3rd Cir. 1943, 134 F. 2d 265); *L. J. Marquis & Co.* v. *Securities & Exch. Com.* (2 Cir. 1943, 134 F. 2d 335); *L.J. Marquis & Co.* v. *Securities & Exchange Com.* (3 Cir. 1943, 134 F. 2d-822). This provision would have provided a general rule applicable to all agency review cases. The use of the phrase "in its judgment" was intended to make clear that the choice of forum in such a case was in the discretion of the agency and was not to be reviewable except for clear abuse of discretion. How-

ever, the American Bar Association and several of the agencies found fault with the provision and recommended that the court of appeals – and not a Federal agency – in which the first proceeding was instituted, should have exclusive jurisdiction of all proceedings involving the same order with authority to transfer all the proceedings to another court of appeals if that would best serve the convenience of the parties. The committee has adopted this suggestion, and the instant amendments carry out this recommendation.

Amendment No. 6. – It was suggested that additional portions of the record ought to be ordered filed when the court thinks it "proper." It need not be shown to be "necessary" before the court may do so. Accordingly, this amendment was adopted to carry out the suggestion.

Amendment No. 7. – Following the introduction of the bill, it developed that as a result of recent rule changes, no court of appeals now requires the entire record to be printed. This limitation rendered the provision affected by this amendment unnecessary.

Amendment No. 8. – The American Bar Association suggested that the petitioner for review and the respondent in enforcement proceedings should have the option to require the entire proceeding to be filed in the court. Since subsection (b) of new section 2112 includes a provision giving the agencies the right, at their option, to file the entire record in the courts, it was deemed proper that petitioners and respondents, at their option, should also have the same right, and this amendment so provides.

Amendment No. 9. – This amendment makes a technical change in the bill.

Amendment No. 10. – This amendment was adopted to make clear that the bill is not intended to apply to the review of decisions of the Tax Court, which is not an administrative agency, or to the review of agency orders which are by law reviewable by the district courts and not, in the first instance, by the several courts of appeals.

Amendments Nos. 11 and 12. – These amendments remove any possible ambiguity as to the right of the Federal Trade Commission to modify or revoke an order under review prior to the filing of the record. At the same time, the amendments do not interfere with the basic scheme of the bill to make clear in all cases that jurisdiction attaches in the court of appeals for the purpose of making interlocutory and procedural orders from the time of the filing of the petition for review.

Amendments Nos. 13, 14, 15, 16, and 17. – These are clarifying amendments, and were suggested by the Department of Agriculture.

Amendment No. 18. – This amendment was adopted at the suggestion of the Securities and Exchange Commission to make clear that that Commission has concurrent jurisdiction with the court of appeals to modify, amend, or revoke its own order between the time the petition for review is filed and the time the record if filed. This permits the Commission to carry out the provisions of the Securities and Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Investment Company Act of 1940 and the Investment Advisers Act of 1940. It was pointed out at the hearing that, in these cases, there is no advantage to be gained by conferring exclusive jurisdiction on the court of appeals before the record is filed in that court. In fact, in some instances, such a procedure might have the effect of depriving a party of the right of a rehearing before the Com-

MEMORANDUM OF SECURITIES AND EXCHANGE COMMISSION ON H.R. 6788, 85TH CONGRESS, 1ST SESSION, A BILL TO AUTHORIZE THE ABBREVIATION OF THE RECORD ON THE REVIEW OR ENFORCEMENT OF ORDERS OF ADMINISTRATIVE AGENCIES BY THE COURTS OF APPEALS, ETC.

This Commission would be affected by sections 2, 9, 10, 15, 25, 26, and 33 of H. R. 6788, and these comments are limited to those sections.

We are in accord with the general objectives of the bill. We believe, however, that the bill should be amended to that the exclusive jurisdiction of a court of appeals will not attach to a particular proceeding until the filing of the record with the court by the Commission. In this respect the bill would not affect proceedings for review of actions of this Commission under the Securities Act of 1933, where the time the exclusive jurisdiction of the reviewing court attaches is not specified. It would affect review of Commission actions under the other laws the Commission administers. The Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Investment Company Act of 1940 and the Investment Advisers Act of 1940 presently provide that the court of appeals with whom a petition for review is filed shall have exclusive jurisdiction upon the filing of the transcript of the record by the Commission. This generally occurs some days after the filing of the petition. Sections 10, 15, 25, and 26 of the bill would amend the court review provisions of those statutes to provide that upon the filing of a petition for review the court of appeals would have exclusive jurisdiction to affirm, modify, or set aside the Commission's order in whole or in part. We believe that the word "record" should be substituted for the word "petition" in the last sentence of the proposed amendment contained in each of those sections, so that there would be no acceleration of the date of the exclusive jurisdiction of the court of appeals.

We are aware of no advantage to be gained by conferring exclusive jurisdiction on the court of appeals before the record is filed in that court, and we believe that in some instances this (1) might have the effect of depriving a party of the right to a rehearing before the Commission; (2) might be construed to deny the Commission the power to stay its own orders after the filing of a petition for review; and (3) may be inconsistent with the provisions of section 2 of the bill, which would authorize the Commission where a petition has been filed in more than one court of appeals to file the record in that court where the Commission believes the proceedings might be carried on with the greatest convenience to all the parties. These possibilities arise from the fact that the proceedings before the Commission often involve various persons entitled to seek review.

(1) Rule XII (e) of the Commission's Rules of Practice (17 C. F. R. sec. 201.12 (e)) permits the filing of a petition for rehearing within 5 days after entry of the order complained of. Under the bill in its present form if one of the parties to the proceeding should file a petition for review before another party files a petition for rehearing, the Commission may lack jurisdiction to entertain the petition for rehearing for the reason that exclusive jurisdiction to modify or set aside the Commission's order in whole or in part would be vested in the court of appeals. This would deprive the Commission of the power to modify its order in light of objections or changed circumstances called

to its attention by a petition for rehearing or otherwise. Modification of an order, of course, may sometimes eliminate the basis for further litigation. Moreover, since proceedings before the Commission frequently involve more than one issue, the Commission may be deprived of power to modify its own order with respect to an issue which is not involved in the petition for review.

(2) Applications to the Commission for stays pending appellate court review are frequently made after the issuance of Commission orders. The Commission's familiarity with the case at this stage gives it a peculiar advantage in passing upon such applications. Where such applications are presented to an appellate court, the court generally has the benefit of the Commission's prior determination on the question of a stay. This may no longer be true if the proposed amendment is construed to deprive the Commission of jurisdiction in the matter once a petition for review has been filed.

(3) The Federal securities statutes commonly permit court review proceedings to be instituted in either the Court of Appeals for the District of Columbia Circuit or in the court of appeals for the circuit in which the allegedly aggrieved person resides or has his principal place of business. (See e.g., sec. 24 (a) of the Public Utility Holding Company Act of 1935, 15 U. S. C., sec. 79x (a)). The proposed change may create a problem of construction with regard to the respective jurisdictions of the various courts of appeals where several petitions for review of a single Commission order are filed by various parties in different courts. Section 2 of the bill would amend title 28 of the United States Code by adding section 2112 (a), which would authorize the Commission to file the record in that court where the proceedings could be carried on with the greatest convenience to all the parties and would require the other courts to transfer the proceedings therein to the particular court in which the record was filed. This appears inconsistent with the language of the bill which would give the first court "exclusive jurisdiction" on the filing of the petition.

DEPARTMENT OF AGRICULTURE
Washington, D.C., June 5, 1957.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR CONGRESSMAN CELLER: This is in reply to your letter of May 16, requesting the views of this Department with respect to H. R. 6788, 85th Congress, 1st session. We recommend the enactment of the bill provided that it is amended as herein suggested.

The main purpose of the bill is to authorize administrative agencies to abbreviate the administrative records to be reviewed in courts of appeals. We believe, on the basis of our experience, that generally it is more practicable to certify to the court the entire administrative record in a case. Unless a substantial portion of the administrative record can be omitted, e.g., a large block of pages in sequence from the transcript of the evidence, an attempt to abbreviate the record is wasteful of effort and productive only of relatively inconsequential results. Also in some cases the relevancy of substantial parts of the record cannot be known until the appellant's brief has been filed on appeal, setting forth the appellant's points or questions