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The Other Hobbs Act: An Old Leviathan in the Modern Administrative State

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THE OTHER HOBBS ACT: AN OLD LEVIATHAN IN THE MODERN ADMINISTRATIVE STATE

Jason N. Sigalos[*]

The Hobbs Administrative Orders Review Act is a little-known statute, one that is often mistaken for a federal criminal statute with a similar name. The lesser-known Hobbs Act requires aggrieved parties to challenge certain agency orders in a federal court of appeals within sixty days of the order's promulgation. However, if no party does so, are later parties bound by a potentially unlawful agency order in subsequent enforcement actions? The U.S. Supreme Court recently dodged this question in PDR Network, LLC v. Carlton & Harris Chiropractic, Inc. *That case concerned a suit between two private parties under the Telephone Consumer Protection Act, which the Federal Communications Commission interpreted as prohibiting faxes that advertise free goods. The district court held that it was not bound by the agency's determination, but the Fourth Circuit held that the FCC's interpretation was binding on the district court under the Hobbs Act. Justice Breyer's opinion of the Court remanded the case for the Fourth Circuit to consider two predicate questions. In contrast, Justice Kavanaugh would have allowed parties in enforcement actions to challenge the agency's interpretation in district court.*

Both opinions neglected the extensive, but largely unearthed, legislative history germane to the disputed question. This history reveals that the drafters did not intend the Hobbs Act's provisions to apply to subsequent

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private enforcement actions; rather, they may have intended these provisions to only apply to judicial review of agency orders made through formal proceedings. The disconnect between the drafters' assumptions and modern realities of the administrative state illustrate the challenges the Court faced when applying an archaic administrative statute. And, perhaps surprisingly, the legislative history provides support for both Justices' views.

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I. INTRODUCTION

Imagine that a federal agency promulgates an order at odds with its underlying statute. Congress has required aggrieved parties to challenge the agency order in a federal court of appeals within sixty days. No party does so. Are later parties nonetheless bound to the unlawful rule in later enforcement actions in district courts? The U.S. Supreme Court recently dodged this thorny question,[1] but the issue is likely to reappear at One First Street.[2]

In the October 2018 Term, the U.S. Supreme Court considered a seemingly straightforward case concerning two federal statutes, the Telephone Consumer Protection Act of 1991 (the TCPA)[3] and the Administrative Orders Review Act (the Hobbs Act).[4] The petitioner, PDR Network (PDR), produces the *Physicians' Desk Reference* (the *Reference*), and, in 2013, it advertised "a new e-book version of the *Reference*" by faxing healthcare providers.[5] PDR provides the *Reference* for free.[6] The respondent, Carlton & Harris Chiropractic (Carlton), sued PDR after receiving this faxed advertisement "claiming that PDR's fax violated" the TCPA.[7]

Carlton's claim relied on a 2006 Federal Communication Commission (FCC) Order[8] that interpreted the TCPA as prohibiting

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[1] *See* PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2053 (2019) (vacating and remanding the judgment of the court of appeals).

[2] Christopher Walker, *Opinion Analysis: Court Dodges Question (for Now) Whether the Hobbs Act Is Ordinary or Extraordinary Administrative Law*, SCOTUSBLOG (June 21, 2019, 12:54 PM), https://www.scotusblog.com/2019/06/opinion-analysis-court-dodges-question-for-now-whether-the-hobbs-act-is-ordinary-or-extraordinary-administrative-law/ ("[I]t will likely only be a matter of time before the court confronts this question again.").

[3] *See* 47 U.S.C. § 227 (2012) (codifying the TCPA).

[4] *PDR Network*, 139 S. Ct. at 2053. The Hobbs Act, also known as the Administrative Orders Review Act, is codified at 28 U.S.C. § 2342 (2018), and should not be confused with the criminal Hobbs Act, which prohibits "robbery or extortion" that "obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 1951(a) (2018).

[5] *PDR Network*, 139 S. Ct. at 2054.

[6] Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC, 883 F.3d 459, 462 (4th Cir. 2018), *vacated*, 139 S. Ct. 2051 (2019).

[7] *PDR Network*, 139 S. Ct. at 2054.

[8] *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25,967, 25,973 (May 3, 2006) (to be codified at 47 C.F.R. pt. 64) [hereinafter the 2006 Order] ("The Commission concludes that facsimile messages that promote goods or services even at no cost . . . are unsolicited advertisements under the TCPA's definition."). The 2006 Order was passed through notice and comment rulemaking. *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 70 Fed. Reg. 75,102, 75,102–03 (proposed Dec. 19, 2005) (to be codified at 47 C.F.R. pt. 64) (describing this "Proposed rule" as a "*Notice of Proposed*

faxes that advertise even free goods and services.[9] The district court dismissed Carlton's suit and found that the TCPA—in contrast to the 2006 Order—only prohibits faxing unsolicited commercial advertisements.[10] However, the Fourth Circuit vacated the district court's decision, holding that "the Hobbs Act requires a district court to apply FCC interpretations of the TCPA."[11]

The relevant portion of the Hobbs Act states that "[t]he court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the [FCC] made reviewable by section 402(a) of title 47."[12] Because neither party directly challenged the 2006 Order in a circuit court within the required sixty-day window, the Order appeared immune to challenge even though it may have improperly interpreted its underlying statute, the TCPA.[13] The U.S. Supreme Court granted PDR's petition for writ of certiorari to decide

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Rulemaking (*NPRM*)" and seeking comments by January 18, 2006); *see also* 21 FCC Rcd. 3787, 3791 ("On December 9, 2005, the Commission released a Notice of Proposed Rulemaking proposing modifications to the Commission's rules on unsolicited facsimile advertisements . . . .").

[9] *PDR Network*, 139 S. Ct. at 2053 ("In 2006, the FCC issued an Order stating that the term 'unsolicited advertisement' . . . includes certain faxes that 'promote goods or services even at no cost,' including 'free magazine subscriptions' and 'catalogs.'" (citing 21 FCC Rcd. 3787, 3814)).

[10] Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC, No. 3:15-14887, 2016 WL 5799301, at *5 (S.D. W. Va. Sept. 30, 2016) ("The TCPA unambiguously requires a fax to be commercial in nature to be considered an advertisement. PDR's fax neither offers anything for sale, nor does PDR plausibly benefit commercially from the free distribution of the Physicians' Desk Reference. Accordingly, PDR's fax is not commercial in nature and therefore not an advertisement . . . ."), *vacated and remanded*, 883 F.3d 459 (4th Cir. 2018).

[11] *Carlton*, 883 F.3d at 466.

[12] 28 U.S.C. § 2342(1) (2018). The FCC orders interpreting the TCPA are included under § 402(a) of the Communications Act because these orders do not fall under an exception to Hobbs Act review in § 402(b). *See* 47 U.S.C. § 402(a) (2012) ("Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by . . . chapter 158 of title 28."); *see also id.* § 402(b)(1)–(10) (listing orders appealable directly to the D.C. Circuit Court). The Fourth Circuit stated this without explanation. *See Carlton*, 883 F.3d at 464 n.1 ("47 U.S.C. § 402(a) sets forth the procedure to 'enjoin, set aside, annul, or suspend any order of the Commission under' the Communications Act, which includes the [TCPA].").

[13] *See* 28 U.S.C. § 2344 (2018) ("Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies."); *see also* Christopher Walker, *Argument Preview: The Hobbs Act as Ordinary or Extraordinary Administrative Law*, SCOTUSBLOG (Mar. 18, 2019, 10:34 AM), https://www.scotusblog.com/2019/03/argument-preview-the-hobbs-act-as-ordinary-or-extraordinary-administrative-law/ ("Carlton & Harris Chiropractic argues that the Hobbs Act makes no exception for challenging the FCC's 2006 order outside of the 60-day period . . . . Instead, a district court in a subsequent enforcement proceeding must apply the agency's statutory interpretation, even if it conflicts with the statute itself.").

"[w]hether the Hobbs Act required the district court . . . to accept the FCC's legal interpretation of the [TCPA]."[14]

Unfortunately, Justice Breyer's brief opinion of the Court left those desirous of clear answers wanting. Justice Breyer decided "the extent to which the [2006] Order binds the lower courts may depend on the resolution of two preliminary" questions: (1)"what is the legal nature of the 2006 FCC Order?" and (2) "did PDR have a 'prior' and 'adequate' opportunity to seek judicial review of the [2006] Order?"[15] The Court remanded the case for the Fourth Circuit to ponder these "preliminary issues."[16]

Justice Kavanaugh, concurring in the judgment, answered the question presented. He would have vacated the Fourth Circuit's judgment because "the Hobbs Act does not bar a defendant in an enforcement action from arguing that the agency's interpretation of the statute is wrong."[17] Justice Kavanaugh cited a "general rule" that defendants in enforcement actions may argue that an agency's statutory interpretation is incorrect, unless Congress "expressly" barred these defendants from making this argument.[18] The Hobbs Act does not expressly bar this defense in a private enforcement action, so the district court correctly allowed PDR to challenge the 2006 Order's interpretation of the TCPA.[19]

Two arguments featured heavily in Justice Kavanaugh's opinion. First, the Administrative Procedure Act (APA) "creates a basic presumption of judicial review [for] one 'suffering legal wrong because of agency action.'"[20] Without this presumption, defendants' inability to argue against agency interpretations of enabling statutes in enforcement actions would raise serious due process concerns.[21] Second, the Hobbs Act's text—in contrast with the text

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[14] PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 478 (2018).

[15] PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2055 (2019) (citing 5 U.S.C. § 703 (2018)).

[16] *Id.* at 2056.

[17] *Id.* at 2058 (Kavanaugh, J., concurring).

[18] *Id.*

[19] *Id.* ("The Hobbs Act does not expressly preclude judicial review of an agency's statutory interpretation in an enforcement action. . . . PDR may argue to the District Court that the FCC's interpretation of the TCPA is wrong.").

[20] Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 370 (2018) (alteration in original) (first quoting Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967); and then quoting 5 U.S.C. § 702 (2018)).

[21] *PDR Network*, 139 S. Ct. at 2062 (Kavanaugh, J., concurring) ("Barring defendants in as-applied enforcement actions from raising arguments about the . . . agency rules enforced against them raises significant questions under the Due Process Clause. . . . We can avoid

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of the Clean Water Act; the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); and the Clean Air Act—does not specifically prevent district courts from reviewing agency interpretations in enforcement actions.[22] What is notably—yet, unsurprisingly—missing from Justice Kavanaugh's concurrence is any discussion of the Hobbs Act's legislative history.[23] This Note attempts to fill that gap.

The Hobbs Act's history is messy; many actors shape its development. Despite this complexity, the statute's architects relied on clear assumptions that bolster the persuasiveness of *both* Justice Kavanaugh's and Justice Breyer's opinions in *PDR Network*. The legislative history shows the statute's designers, while cognizant of the APA and the burgeoning administrative state, never contemplated the Hobbs Act applying in the context of a private enforcement action.[24] Nor did they imagine the Hobbs Act applying to mere interpretive rules.[25] Yet, this support for both Justices' positions remained buried in the tomes of legislative history that this Note uncovers. Ultimately, and more broadly, the Hobbs Act reveals the assumptions of a "lost world" of administrative law that may be unmoored from modern litigation.[26]

Part II will outline the Hobbs Act's exciting history, detailing its development from the minds of Article III judges to the desk of President Harry Truman, who signed the Act on December 29, 1950.[27] Our tour through this history is not for the faint hearted, but the journey promises significant reward.

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some of those due process concerns by adhering to a default rule of permitting judicial review of agency legal interpretations in enforcement actions.").

[22] *Id.* Justice Kavanaugh also distinguished the Hobbs Act from the Emergency Price Control Act of 1942, which the Court interpreted as barring judicial review of a pricing order in a criminal proceeding. *Id.* at 2064–65 (citing Yakus v. United States, 321 U.S. 414 (1944)).

[23] *Id.* at 2057–66. His choice to not address the legislative history is unsurprising because he has previously criticized over-reliance on legislative history in statutory interpretation. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (advocating for a world where "legislative history would be largely limited to helping answer the question of whether the literal reading of the statute produces an absurdity").

[24] *See infra* Sections II.B–D. *Cf.* J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1146–53 (2012) (discussing the modern administrative state's reliance on private rights of action).

[25] *See infra* Section III.B.2.

[26] *See* Daniel A. Farber & Anne J. O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1137 (2014) (arguing that "administrative law, as developed by the courts and in governing statutes, has not meaningfully confronted the contemporary realities of the administrative state").

[27] *PDR Network*, 139 S. Ct. at 2059 (Kavanaugh, J., concurring).

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Part III will apply the lessons from the legislative history to both Justice Breyer's and Justice Kavanaugh's opinions in *PDR Network*, illuminating how the Act's writers would have bolstered each opinion. Part III will argue that the Act's framers *never intended* to apply the Hobbs Act to judicial review of an administrative order in the context of a private dispute. Justice Breyer's "preliminary issues" and Justice Kavanaugh's appeal to first principles are byproducts of struggling to fit a square peg (a modern private right of action) into a round hole (the Hobbs Act's framework).[28] Part IV will briefly outline a possible way forward based on the legislative history.

II. THE HISTORY OF THE HOBBS ACT

The Hobbs Act's origins lie with a request by Chief Justice Harlan Fiske Stone for the Judicial Conference of the United States to study and amend the procedure for reviewing administrative agency orders under the Urgent Deficiency Act (UDA) of 1913.[29] Part II of this Note will outline the UDA's procedures before turning to the Judicial Conference's recommendations. This Part will then discuss how the Eightieth and Eighty-First Congresses evaluated and packaged the Judicial Conference's proposal.[30]

A. THE URGENT DEFICIENCY ACT OF 1913

The UDA required that three-judge district courts, composed of at least one circuit court judge, review Interstate Commerce Commission (ICC) orders.[31] The Court was required to hear appeals from the decisions of these three-judge courts.[32] Three other

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[28] *Id.* at 2056.

[29] H.R. REP. NO. 81-2122, at 2 (1950) (discussing the Act's legislative history).

[30] The Act was originally three bills, which, over the course of eight years and six name-changes, eventually consolidated into one bill. Two tables in the appendices at the end of this Note identify the important characters and lay out the differences between the bills. *See infra* Parts V–VI.

[31] *See Providing for the Review of Orders of Certain Agencies, and Incorporating into the Judicial Code Certain Statutes Relating to Three-Judge District Courts: Hearing on H.R. 1468, H.R. 1470, and H.R. 2271 Before Subcomm. No. 3 and Subcomm. No. 4 of the H. Comm. on the Judiciary*, 80th Cong. 9–10 (1947) [hereinafter *Hobbs Act Committee 1947 Hearings*] (statement of Hon. Albert B. Maris, circuit judge, Third Circuit) (outlining the UDA review procedure).

[32] *Id.* at 27 (statement of Hon. Orie L. Phillips, senior circuit judge, Tenth Circuit) (stating that under the UDA, "appeal could be had, as of right, to the Supreme Court").

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statutes, in addition to the UDA, also required three-judge courts to convene and hear cases.[33] According to Harry Plotkin, assistant general counsel of the FCC, "not many administrative agencies" existed in 1913 when the UDA established this procedure; in fact, the ICC was the "only important" agency.[34] ICC orders were previously reviewed by the Commerce Court, established by the Mann-Elkins Act of 1910, but Congress eliminated this Court in 1913.[35]

Instead of amending the Judicial Code, Congress abolished the Commerce Court with "a rider in an appropriation act," now known as the UDA.[36] However, the UDA only repealed some Commerce Court provisions and procedures, while leaving others in place "by inference," creating "great confusion" over how these statutory three-judge courts should review ICC orders.[37] While the UDA was one of four statutes that provided for three-judge courts, these statutes prescribed different procedures.[38]

B. THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES (1942–1946)

In the early 1940s, the Judicial Conference decided to remedy "this confused statutory situation" by creating a uniform procedure for convening three-judge district courts.[39] Chief Justice Stone had an ulterior motive, apart from clarifying the three-judge court procedure, when requesting reform of the UDA process.[40] Under the UDA, the Court was "compelled . . . to review many cases where the

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[33] These other three statutes were "the Expediting Act" (for certain antitrust cases), "section 266 of the Judicial Code" (for suits to stop enforcement of allegedly unconstitutional state statutes), and "the act of August 24, 1937" (for suits to stop enforcement of allegedly unconstitutional federal statutes). *Id.* at 9 (statement of Hon. Maris).

[34] *Id.* at 73 (statement of Harry M. Plotkin, Assistant General Counsel, FCC).

[35] *Id.* at 13 (statement of Clyde B. Aitchison, Chairman, ICC) (discussing the history of judicial review of ICC orders).

[36] *Id.* at 10 (statement of Hon. Maris).

[37] *Id.*

[38] *Id.* at 9 ("[T]he provisions of those statutes with respect to the convening of the court and the procedure of the court are somewhat different.").

[39] *Id.* at 6.

[40] *Id.* at 27 (statement of Hon. Phillips) (stating that Chief Justice Stone believed appeal "as of right" to the Supreme Court under the UDA procedure created an unnecessary "burden" on the Court).

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questions involved were of minor importance"; Chief Justice Stone wanted to "relieve" the Court of this "burden."[41]

In 1942, the Judicial Conference created a committee to respond to Chief Justice Stone's concern.[42] The committee's primary goal was to modify compulsory Supreme Court review of three-judge court decisions to certiorari review.[43] While making this one alteration would have been simple, the committee did not "stop there."[44] Rather, it recommended two other changes to the UDA appellate procedure.

First, the committee recommended transferring jurisdiction for review of ICC orders from the three-judge courts to the circuit courts of appeal.[45] Because the proposal eliminated litigants' right to Supreme Court review, the committee "felt that" an appellate court, rather than a "three-judge district court," should review the agency order.[46] The committee argued that litigants "should have an appeal as of right in *some* appellate court" to preserve the judicial system's "traditional" process.[47]

Second, the committee proposed modifying how the courts of appeal review the agency order. Under the UDA, the three-judge district courts held a de novo trial where the agency would submit

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[41] *Id.*

[42] H.R. REP. NO. 81-2122, at 2 (1950). The Judicial Conference committee was chaired by Chief Judge Orie Phillips, and it included ICC Commissioner Aitchison as well as other circuit and district court judges. *See Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 27 (statement of Hon. Phillips) (discussing the committee's composition). This committee was then consolidated in 1943 with another committee which was studying three-judge court procedure. *See* H.R. REP. NO. 81-2122, at 2 (1950) (outlining the consolidated committee's formation and membership).

[43] *See Providing for the Review of Orders of Certain Agencies, and Incorporating into the Judicial Code Certain Statutes Relating to Three-Judge District Courts: Hearing on H.R. 2915 and H.R. 2916 Before Subcomm. No. 2 of the H. Comm. on the Judiciary*, 81st Cong. 111 (1949) [hereinafter *Hobbs Act Committee 1949 Hearings*] (statement of Hon. Phillips) (stating that the committee's goal was "primarily to lessen the burden of the Supreme Court").

[44] *Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 27 (statement of Hon. Phillips). For more curious readers, the Congressional record contains a more granular description of the Judicial Conference committee's internal process. *See id.* at 79 (letter from Henry P. Chandler, Director of the Administrative Office of the U.S. Courts, to the Speaker of the House of Representatives (Jan. 23, 1947) [hereinafter letter from Mr. Chandler]) (describing the formation and changes to the original committee, as well as descriptions of its members).

[45] *Id.* at 27 (statement of Hon. Phillips) (stating that the committee's proposal "adopted the pattern generally of review in circuit courts of appeals").

[46] *Hobbs Act Committee 1949 Hearings*, *supra* note 43, at 112 (statement of Hon. Phillips).

[47] *Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 27 (statement of Hon. Phillips) (emphasis added). Judge Phillips explained that review by the circuit courts was "the pattern generally of review . . . under the Bituminous Coal Act and the National Labor Relations Act." *Id.*

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its record as testimony, but the court could evaluate additional evidence that did not appear before the agency.[48] Under the committee's proposal, the circuit court would review the agency's order "on the record made before the administrative agency."[49] The circuit court could remand the case to the agency to take additional evidence if necessary.[50]

The committee's first proposal only addressed review of ICC orders.[51] However, a wrinkle emerged because not every ICC order was made on the record after a hearing.[52] Judge Phillips's committee concluded that orders not made on a record could "only be reviewed adequately upon a trial de novo."[53] In these cases, three-judge courts would continue to review these orders using UDA procedures because circuit courts were "not well equipped to conduct such trials."[54] Therefore, Judge Phillips's first proposal only covered ICC orders "made after a hearing."[55]

The committee then consulted the Maritime Commission, the Department of Agriculture, and the Federal Communications Commission (FCC) regarding how courts should review these

[48] *See To Provide for the Review of Certain Orders: Hearing on H.R. 5487 Before Subcomm. of the S. Comm. on the Judiciary*, 81st Cong. 25 (1950) [hereinafter *Hobbs Act 1950 Senate Subcommittee Hearing*] (statement of Leland L. Tolman, Chief, Business Administration, Administrative Office, U.S. Courts, appearing for the Judicial Conference) (explaining the three-judge courts' review process).

[49] *Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 27 (statement of Hon. Phillips).

[50] *See Hobbs Act 1950 Senate Subcommittee Hearing*, *supra* note 48, at 25 (statement of Mr. Tolman) ("If additional evidence [was] needed for the decision, the case [could] be sent back to the agency for the taking of additional testimony and the making of new findings or a change of its order.").

[51] *Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 28 (statement of Hon. Phillips) (discussing the first "draft bill").

[52] *Id.* at 87 (1945 Report of Committee on Review of Orders of the ICC and Certain Other Administrative Orders, by Hon. Phillips) (outlining the types of ICC orders not made on a record).

[53] *Id.* As examples of orders not made on a record, Judge Phillips cited "[c]ertain orders in emergency matters . . . made without any hearing" and "legislative or purely administrative" orders that "are made upon informal hearings in no sense adversary in character." *Id.*

[54] *Id.* "[T]hree-judge courts are not well adapted for conducting hearings" because "[t]he necessity of holding conferences whenever questions arise in the course of the proceedings . . . very much slows the trial." *Id.* at 82 (letter from Mr. Chandler). Instead, "[t]he proposed review upon the record by a court of appeals would secure the collaboration of three judges at the stage where it is useful, namely in the decision, without consuming their time unnecessarily in the preceding phases of the case." *Id.*

[55] *Id.* at 28 (statement of Hon. Phillips). This left "perhaps 5 percent" of ICC orders to remain under UDA review. *Id.* This estimate was based on a report from the ICC Commissioner, which found that "something less than 5 percent of the suits brought against the [ICC] involved orders" not made on a record. *Id.* at 81 (letter from Mr. Chandler).

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agencies' orders.[56] The Maritime Commission requested inclusion in the ICC bill; in contrast, the FCC and the Secretary of Agriculture believed the courts of appeal could adequately review their orders, regardless of whether they were made without a hearing, so the committee sorted these agencies' orders into a second proposal.[57]

This second bill provided three mechanisms to compensate for a lack of a hearing. First, the circuit court could remand the case to the agency to conduct a hearing if one was required.[58] Second, if a hearing was unnecessary, and only questions of law were presented, the circuit court could settle those purely legal questions.[59] Third, if issues of fact existed, and the agency had not held a hearing, the circuit court could transfer the case to a district court to hold a trial de novo.[60]

Judge Phillips believed appellate courts should only review orders made on a record after a hearing; he reported to the Judicial Conference that "the orders made reviewable under this act should be *limited* to those which can be *heard on the record* made before the Secretary or the Commissions."[61] While the second proposed bill allowed circuit court review of FCC and Secretary of Agriculture orders made without a hearing, built-in devices enabled the circuit courts to create a record if one was needed.[62] After three years of

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[56] *Id.* at 28 (statement of Hon. Phillips) (explaining "we called in the other bodies, because they though [sic] we might like to get a pattern first.").

[57] *Id.*

[58] *Id.* ("[I]f the order was made up without a hearing, and, in fact, the hearing was required by law, the Court should remand the case and direct a hearing.").

[59] *Id.* ("[I]f a hearing is not required by law and it is made to appear by the pleadings and affidavits . . . that no genuine issue of material fact is involved and only questions of law are presented . . . then the Court may review the law questions . . . .").

[60] *Id.* ("[I]f it appears that there were genuine issues of fact and no hearing was had, then the Court transfers the case to the United States district court for a trial . . . .").

[61] *Id.* at 87 (1945 Report of Committee on Review of Orders of the ICC and Certain Other Administrative Orders, by Hon. Phillips) (emphasis added). Judge Phillips's report to the Judicial Conference in 1945 emphasized that "revisions" may be necessary to "carry out [the] basic concept" that review "will be restricted to orders made after full hearing before the administrative body and which can be reviewed upon the record made in the proceeding before that body." *Id.* Judge Phillips assured the Attorney General that the "ICC bill does not cover cases where an order was entered without hearing or other proceeding by the Commission"—this was "the purpose of the limited" jurisdiction. *Id.* at 99 (letter from Hon. Phillips, to Att'y Gen. Tom Clark (Feb. 9, 1948)). Judge Phillips's congressional testimony in 1947 echoed this interpretation of the proposed bills: "Broadly speaking, the bills provide for a review on the record made before the administrative agency." *Id.* at 27 (statement of Hon. Phillips).

[62] *See supra* notes 58–60 and accompanying text.

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work, the Judicial Conference approved Judge Phillips's proposal and recommended it to Congress.[63]

C. THE EIGHTIETH CONGRESS (1947)

The Judicial Conference sent its proposal to Congress in 1946.[64] The proposal originally encompassed three separate bills: H.R. 2271, H.R. 1468, and H.R. 1470.[65] H.R. 2271 reformed the process for convening a three-judge district court.[66] In contrast, the other two bills transferred jurisdiction over review of certain ICC and Maritime Commission orders (H.R. 1468), as well as certain FCC and Secretary of Agriculture orders (H.R. 1470), from three-judge district courts to the circuit courts of appeal.[67]

Two subcommittees of the House of Representatives Committee on the Judiciary held hearings on these proposals on March 7, March 17, and March 24, 1947.[68] These hearings focused on H.R. 1468's impact on the ICC, but this legislative history is still relevant for two reasons.[69] First, H.R. 1468 and H.R. 1470 both use similar

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[63] *Id.* at 79 (letter from Mr. Chandler) ("The study culminated at the annual meeting in 1946, when [they] were submitted to the conference, and the conference approved . . . and recommended to the Congress for enactment . . . .").

[64] H.R. REP. NO. 81-2122, at 3 (1950). When Judge Phillips appeared for the Congressional hearing on his proposals, he emphasized his committee's hard work. *Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 27 (statement of Hon. Phillips) ("We held a great many meetings. We spent 4 years on this work. . . . We sent out many tentative drafts to the circuit and district judges and to practitioners before the administrative bodies. We got all the advice and help we could . . . .").

[65] *Hobbs Act Committee 1947 Hearings*, *supra* note 31, at III.

[66] *Id.* at 18 (statement of Mr. Chandler, Director, Administrative Office of the U.S. Courts) (discussing H.R. 2271's procedural reforms).

[67] *Id.* at 17–18 (stating that these bills would make review of ICC and other administrative agency orders "be upon the record by the appropriate court of appeals"). However, Mr. Chandler noted "there will still be some proceedings which . . . will go to three-judge courts." *Id.* at 18.

[68] *Id.* at III–IV.

[69] *Id.* (showing a significant amount of testimony came from the ICC and practitioners as compared with the other affected agencies). The subcommittee members may have focused discussion on the ICC because it was the "first independent regulatory agency." Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America's Infrastructure*, 95 MARQ. L. REV. 1151, 1152 (2012). This Note will, in contrast to the hearings, focus on the FCC for two reasons. First, *PDR Network* concerned review of an FCC order. Second, the ICC is defunct, whereas the FCC still exists. *See id.* at 1185 ("The ICC Termination Act . . . sunset the [ICC] itself, deregulated and amended certain of the agency's functions, and transferred jurisdiction . . . to the newly created Surface Transportation Board (STB) and the [Department of Transportation]." (footnotes omitted)).

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language.[70] Second, the drafters intended the bills to perform the same function—reform judicial review of agency orders—but for different agencies.[71]

At the time of the hearings, the FCC had jurisdiction over two areas: (1) issuing licenses to radio stations and (2) regulating communications common carriers.[72] The FCC's licensing jurisdiction came from the Federal Radio Commission, whereas the FCC "inherited" its "jurisdiction over the common carriers" from the ICC.[73] Before Congress created the FCC in 1934, Federal Radio Communication orders were appealed to the D.C. Circuit Court, which was the same as the appeals process for other agency orders.[74] When the FCC absorbed jurisdiction over common carriers, the agency also inherited the UDA review procedure as "a second method of appeal."[75]

Because the FCC inherited jurisdiction from two different agencies, FCC orders were reviewed in two separate procedures, depending on their content. The D.C. Circuit reviewed FCC orders that granted or denied licenses, whereas three-judge district courts reviewed FCC orders that regulated common carriers, revoked radio station licenses, and promulgated other rules.[76]

Harry Plotkin, the then-assistant general counsel of the FCC, emphasized that H.R. 1470 would have less "practical problems" for the FCC than H.R. 1468 would have for the ICC, because the circuit courts already reviewed "the great bulk of" FCC orders.[77] Mr. Plotkin attributed the difference to the ICC's status as the first

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[70] While similar, the bills were not identical. H.R. 1468 gave jurisdiction to the circuit courts "to enjoin, set aside, or suspend . . . final orders of" the ICC and Maritime Commission. *Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 21. H.R. 1470, however, gave jurisdiction to the circuit courts "to enjoin, set aside, suspend . . . or *to determine the validity of*" final agency orders of the FCC and Secretary of Agriculture. *Id.* at 24 (emphasis added). This difference, while unexplained in the Congressional record, may have important ramifications for how the Court interprets the Hobbs Act. *See* Brief of Professor Aditya Bamzai as Amicus Curiae in Support of Petitioners at 24–33, PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051 (2019) (No. 17-1705) (discussing the meaning of "determine the validity of").

[71] *Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 27 (statement of Hon. Phillips) ("[T]he bills provide for a review on the record made before the administrative agency.").

[72] *Id.* at 71 (statement of Harry M. Plotkin, assistant general counsel, FCC).

[73] *Id.*

[74] *Id.* Mr. Plotkin specifically pointed to the review process for the National Labor Relations Board (NLRB) and Federal Power Commission. *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* at 73. Mr. Plotkin estimated that "about 90 percent of [FCC] cases go to the court of appeals," and "[o]nly about 10 percent . . . end up in three-judge district courts." *Id.* at 72.

administrative agency.[78] When Congress passed the UDA in 1913, the ICC was the only large administrative agency in existence.[79] However, as more agencies emerged and "problems became more complex," the agencies themselves "held hearings," so de novo trials were unnecessary.[80] Rather, reviewing courts, including the three-judge courts and the circuit courts, would "try these matters on the basis of the record developed before the administrative agency."[81] Because courts began reviewing agency orders on the record, the UDA procedure "was no longer extended to other agencies, except accidentally, as in [the FCC's] case," which inherited the UDA procedure from the ICC.[82]

Henry Chandler, Director of the Administrative Office of the U.S. Courts,[83] was similarly in favor of H.R. 1468 and H.R. 1470.[84] Mr. Chandler argued that circuit court review on the record was "the more modern method" because this was "the pattern established for review of orders of the Federal Trade Commission . . . the Securities and Exchange Commission, the Bituminous Coal Commission, and the National Labor Relations Board."[85]

According to Mr. Chandler, the modern method was preferable to the UDA procedure for three reasons.[86] First, on-the-record review would prevent needless duplication of efforts because the circuit court, unlike the three-judge court, would not hold a de novo

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[78] Dempsey, *supra* note 69, at 1151–52 ("In 1887, the U.S. government established the first independent regulatory agency, the Interstate Commerce Commission . . . .").

[79] *Hobbs Act Committee 1947 Hearings, supra* note 31, at 73 (statement of Harry M. Plotkin, assistant general counsel, FCC) ("[W]hen the [UDA] procedure was established in 1913 . . . there were not many administrative agencies in existence. . . . [T]he ICC was the only important one, as I recall, in existence at that time . . . .").

[80] *Id.*

[81] *Id.* at 74. These reviewing courts merely "read[] the record to find out if the expert body ha[d] substantial evidence before it upon which to base its decision." *Id.*

[82] *Id.* Mr. Plotkin believed "the procedure suggested in [H.R.] 1468 and 1470 [was] eminently fair" if Congress wanted to modernize the UDA review system. *Id.*

[83] "In 1939, Congress provided the federal judiciary with its own administrative agency, which . . . was to collect information on caseloads, prepare the judiciary's annual budget request, disburse appropriated funds, and provide other administrative assistance to the courts." ADMIN. OFF. U.S. CTS., https://www.fjc.gov/history/timeline/administrative-office-u.s.-courts (last visited Mar. 18, 2020).

[84] *Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 81 (letter from Mr. Chandler) ("The proposed method of review by the circuit courts of appeals has important advantages in simplicity and expedition over the present method.").

[85] *Id.*

[86] *Id.* (stating that the modern method was "generally considered to be the best method for the review of orders of administrative agencies").

trial.[87] Second, "three-judge courts [were] not well adapted for conducting hearings" to take evidence.[88] Third, U.S. Supreme Court review via writ of certiorari, rather than appeal by right, would ease the Court's burdensome caseload and allow the justices to focus on more important cases.[89]

However, Mr. Chandler acknowledged that "some types of orders" were "not susceptible to review by circuit courts of appeals on the record."[90] These orders were "legislative or administrative in nature which are made upon informal hearings in no sense adversary in character," and they could not "be reviewed adequately in the courts except upon a trial de novo with full opportunity to all parties to introduce evidence."[91]

While these exceptional orders existed, less than five percent of ICC orders were made without a formal hearing.[92] Mr. Chandler noted that it was less likely for non-ICC agency orders to be made without the creation of an adequate record.[93] Like Judge Phillips's statements to the Judicial Conference,[94] Mr. Chandler assured Congress that H.R. 1468 and H.R. 1470 were carefully drafted to only cover agency orders that produced a record.[95] Despite this testimony, the Eightieth Congress did not pass H.R. 1468 and H.R. 1470 for reasons the record did not disclose.[96]

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[87] *See id.* ("First, the submission of the cases upon the records made before the administrative agencies will avoid the making of two records, one before the agency and one before the court, and going over the same ground twice."). Mr. Chandler noted that "the recent [APA]" ensured that records "before the agencies will be made in such a way that all questions for the determination of the courts on review . . . will be preserved and the rights of the parties will be fully protected." *Id.*

[88] *Id.* at 82 ("The necessity of holding conferences whenever questions arise in the course of the proceedings . . . very much slows the trial. In addition the procedure takes the time of three judges whereas one would be sufficient.").

[89] *Id.* (stating that discretionary review "will save the members of [the Supreme] Court from wasting their energies on cases which are not important enough to call their attention").

[90] *Id.* at 81.

[91] *Id.*

[92] *See id.* (noting that "less than 5 percent" of ICC orders were "of this kind").

[93] *See id.* ("There appears to be even less likelihood of the entry of orders by the other administrative agencies which may not be readily reviewed by the circuit courts of appeals upon the record.").

[94] *See supra* text accompanying notes 53–53.

[95] *See Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 81 (letter from Mr. Chandler) ("[C]are has been taken in drafting the bills to include in the method of review by the circuit courts . . . only the types of orders in which an adequate record for that purpose is made before the agencies. Review of the exceptional orders of the other type will remain . . . in the district courts by trial de novo.").

[96] While the legislative history does not provide an on-point explanation, the record highlights a fierce debate between the Office of the Attorney General and several agencies

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D. THE EIGHTY-FIRST CONGRESS (1949–1950)

Congressman Sam Hobbs reintroduced Judge Phillips's proposal in the House of Representatives on February 21, 1949 as H.R. 2915 (covering the FCC and Secretary of Agriculture) and H.R. 2916 (covering the ICC and Maritime Commission).[97] On March 10, 1949, Representative Hobbs warmly welcomed Judge Phillips back to testify on the two bills after noting that Judge Phillips had "testified for 8 years on these bills."[98]

Judge Phillips recited largely the same testimony as he had two years earlier.[99] Specifically, he reemphasized that circuit court review would be on the agency's record, "not upon an original hearing of witnesses and other evidence."[100] While the circuit courts—unlike the three-judge district courts—could not take evidence, they could remand cases back to the agency to add evidence to the record if needed.[101]

While Judge Phillips's statements remained largely the same, FCC representatives proposed a material change to limit H.R. 2915's application only to orders issued pursuant to the FCC's common carrier jurisdiction.[102] While the FCC previously approved

over whether the agency or the United States should be the principal or intervening party in litigation challenging the orders. *See Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 65–68 (statement of Harold I. Baynton, Special Assistant to the Att'y Gen.) (arguing for the United States to be the principal party); *see also id.* at 74–76 (statement of Harry M. Plotkin, assistant general counsel, FCC) (arguing for the agency to be the principal party). A slightly clearer hypothesis emerged in Mr. Tolman's testimony to the Senate in 1950. When asked why the Hobbs Act took eight years to get from the Judicial Conference to the Senate, Mr. Tolman told the Senate subcommittee that "it was partly the difficulty of working out exactly the details with the agencies." *Hobbs Act 1950 Senate Subcommittee Hearing*, *supra* note 48, at 12 (statement of Mr. Tolman). He pointed to the ICC and "practitioners before the" ICC as parties lobbying against the bill because they "did not like to change the three-judge District Court procedure." *Id.*

[97] *See* H.R. 2915, 81st Cong. (1949); H.R. 2916, 81st Cong. (1949).

[98] *Hobbs Act Committee 1949 Hearings*, *supra* note 43, at 111.

[99] *See id.* at 111–21 (statement of Hon. Phillips) (reiterating similar arguments in favor of H.R. 2915 and 2916 that he made for H.R. 1468 and 1470).

[100] *Id.* at 113 (noting that "review in the court of appeals will be upon the record made before the Commission").

[101] *See id.* (highlighting "a provision in each bill that if for any reason any evidence that should have been introduced before the administrative agency was not introduced . . . the court may remand it for the taking of that evidence and additional findings"). Judge Phillips remarked that this procedure "preserved" the "rights of [the] parties." *Id.*

[102] The then-FCC chairman, Wayne Coy, called attention to the FCC's bifurcated jurisdiction between radio station licensing, which "was provided under section 402(b) of the Communications Act," and the FCC's "inherited jurisdiction over common carriers" from the

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H.R. 1470,[103] the agency suggested amending H.R. 2915 to "limit" its application "to the urgent deficiency type of case" (its common carrier regulations under § 402(a) of the 1934 Communications Act).[104] FCC representatives argued this change was necessary to avoid "disturbing" the "mutually satisfactory procedure now followed in connection with cases under section 402 (b)."[105]

Although H.R. 2915 and H.R. 2916 failed to pass, the story of the Eighty-First Congress does not end there. Judge Phillips's proposal reemerged on May 23, 1950 in the House of Representatives as H.R. 5487.[106] This bill contained a noticeable change from its forerunners: it covered the FCC, the Secretary of Agriculture, and the Federal Maritime Board (the U.S. Maritime Commission's successor).[107] The ICC was noticeably absent.[108] A second, less-noticeable change in H.R. 5487 was its narrower scope regarding FCC orders; the bill only covered, as requested by the FCC, orders made under § 402(a) of the Communications Act.[109]

ICC, which "was incorporated into the Communications Act of 1934 as section 402(a)." *Hobbs Act Committee 1949 Hearings*, *supra* note 43, at 140 (letter from Wayne Coy, FCC Chairman, to Elmer Staats, Assistant Director, Legislative Reference, Bureau of the Budget, Washington D.C.). Chairman Coy stated that "90 percent of the appeals from orders . . . [were] reviewed by the [D.C.] Circuit under section 402(b)," whereas "[t]he remaining 10 percent" of FCC orders were reviewed according to UDA procedure. *Id.*

[103] *Id.* (expressing the FCC's original support for H.R. 1470, which, "as originally drafted, would have established a uniform review procedure for all Commission cases").

[104] *Id.* at 151 (statement of Rosel H. Hyde, Commissioner, FCC) (stating that the FCC had suggested amending H.R. 2915 to limit its scope). Like Chairman Coy, Commissioner Hyde noted that appeals from the agency's radio-station licensing orders—under § 402(b)—already go to the D.C. Circuit; therefore, H.R. 2915 need only apply to the FCC's common carrier regulations—under § 402(a)—which were reviewed under the UDA. *See id.* (noting that the bill's "purpose . . . was to eliminate the urgency deficiency type of" review).

[105] *Id.* at 144 (letter from Paul A. Walker, Acting FCC Chairman, to Hon. Emanuel Celler, Chairman, House Committee on the Judiciary (Mar. 30, 1949)). Like Commissioner Hyde, Acting-Chairman Walker argued that H.R. 2915 "should be restricted to improving the procedure relating to cases falling under the [UDA]." *Id.*

[106] *See* H.R. REP. NO. 81-2122, at 1 (1950) (stating the date when Congressman Hobbs submitted this report to accompany H.R. 5487).

[107] *See* H.R. 5487, 81st Cong. (1950) (stating which agencies and orders were covered).

[108] Leland Tolman, a staff member of the Administrative Office of the U.S. Courts, explained to a Senate subcommittee that the ICC was not included in this bill because "there were certain orders of the [ICC] that the Judicial Conference Committee felt should not be included . . . . So two separate bills were drawn." *Hobbs Act 1950 Senate Subcommittee Hearing*, *supra* note 48, at 13 (statement of Mr. Tolman). However, the bill concerning the ICC was "still pending in the House." *Id.* This may be explained by Mr. Tolman's earlier discussion of ICC opposition to Judge Phillips's proposal. *See id.* at 12; *see also supra* note 96.

[109] *See* H.R. 5487, 81st Cong. (1950) (stating that circuit courts' jurisdiction was over FCC orders "made reviewable in accordance with . . . section 402 (a)").

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Despite these changes, Senate testimony on behalf of H.R. 5487 continued to echo Judge Phillips's understanding that the bill shifted review to the circuit courts of appeal for orders made after a hearing.[110] This testimony reiterated the outline and core purpose of Judge Phillips's proposal.[111] Each agency representative,[112] when asked by the senators, stated that the covered orders were not "entered ex parte in the agency."[113] Richard Solomon, the acting assistant general counsel for the FCC, told the subcommittee that "[o]n all common carrier orders . . . there must be a full opportunity for hearing given to the common carrier."[114] He also noted that "orders involving rule making" had "to be in accordance with the Administrative Procedures [sic] Act," so the FCC "issue[s] a notice of rule making and [the affected parties] can get a hearing if there is a request for it and reasonable cause."[115]

On December 11, 1950, Senator Harley Kilgore, the chairman of the subcommittee that heard testimony on H.R. 5487, issued a report recommending passage of the bill.[116] After briefly explaining the proposal's history, the report notes widespread support for the bill.[117] The report also reflects Judge Phillips's understanding that "[r]eview by the circuit court of appeals is limited to the record made

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[110] *See Hobbs Act 1950 Senate Subcommittee Hearing*, *supra* note 48, at 27–29 (showing representatives from the FCC, the Department of Agriculture, and the Federal Maritime Board affirming that the covered orders were "required to be based on the record of the hearing" (statement of Charles W. Bucy, Associate Solicitor, U.S. Department of Agriculture)).

[111] H.R. 5487 replaced the UDA procedure (de novo trial by a three-judge district court) with circuit court review on the agency's record, but "[i]f additional evidence [was] needed for the decision, the case [could] be sent back to the agency for the taking of additional testimony and the making of new findings or a change of its order." *Id.* at 25 (statement of Mr. Tolman). Mr. Tolman noted that when district courts took additional evidence, this process "very often . . . was used and abused." *Id.*

[112] Rosel H. Hyde and Richard A. Solomon represented the FCC, Paul D. Page represented the Federal Maritime Board, and Charles W. Bucy represented the Department of Agriculture. *See id.* at 2, 6, 7, 10.

[113] *Id.* at 27.

[114] *Id.* at 28 (statement of Mr. Solomon).

[115] *Id.* at 28–29. Mr. Solomon previously emphasized that "[t]he only things excepted from the bill are the various types of orders of the [FCC] which . . . go directly to the" D.C. Circuit. *Id.* at 15. Mr. Tolman also clarified that while the D.C. Circuit would continue to review certain FCC orders, "the procedure [would] be very much the same"; H.R. 5487 merely "carr[ied] the method of review, which has found to be successful and worked well, into all administrative agencies." *Id.* at 13, 25 (statement of Mr. Tolman).

[116] *See* S. REP. NO. 81-2618, at 1 (1950) (stating that the Judiciary Committee "recommend[s] that the bill . . . do pass").

[117] *Id.* at 3 ("It is approved by the judiciary, by the agencies concerned, by the Attorney General, and by practitioners and others interested.").

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before the agencies with certain exceptions."[118] The report explains the importance of on-the-record review in its conclusion: "[T]he submission of the cases upon the records made before the administrative agencies will avoid the making of two records, one before the agency and one before the court, and thus going over the same ground twice."[119] The report addresses concerns about the record's adequacy by noting that "[u]nder the [APA] of June 1, 1946, the record before the agencies will be made in such a way that all questions for the determination of the courts on review, and the facts bearing upon them, will be presented."[120] Judge Phillips's proposal finally became law on December 29, 1950 as the Administrative Orders Review Act.[121]

III. SQUARING THE MODERN ADMINISTRATIVE STATE WITH THE HOBBS ACT

The Hobbs Act's architects, likely, wrote and passed the bill assuming that the circuit courts of appeal would only review orders made on a record and after a hearing.[122] Judge Phillips, as well as representatives of the affected agencies, explicitly stated and repeatedly referred to this assumption.[123] However, this assumption has become a legal fiction of our protean administrative state.[124] According to Dan Farber and Anne O'Connell, "there is an increasing mismatch between the suppositions of modern administrative law and the realities of modern regulation."[125] These assumptions built into administrative law are a "lost world" because "the actual workings of the administrative state have increasingly diverged from the assumptions animating the APA."[126]

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[118] *Id.* at 4. These exceptions, which were explained by Judge Phillips and Mr. Tolman to the House and Senate subcommittees respectively, include procedures for the circuit courts to remand the cases to the agency or district court if more evidence were needed. *See id.* (outlining procedures for the taking of additional evidence).

[119] *Id.*

[120] *Id.*

[121] *See* Pub. L. No. 81-901, 64 Stat. 1129 (1950) (codified as amended at 28 U.S.C. §§ 2341–2351 (2018)).

[122] *See supra* note 61 and accompanying text.

[123] *See supra* notes 61, 94, 110 and accompanying text.

[124] *See* Farber & O'Connell, *supra* note 26, at 1140 (arguing that "administrative law seems more and more to be based on legal fictions").

[125] *Id.*

[126] *Id.*

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One of these assumptions is "that agency decisions . . . are based on evidence . . . and that we can identify the particular evidence before the agency (also known as 'the record')."[127] This assumption underlies what Thomas Merrill calls the appellate review model.[128] This model borrows from the "relationship between appeals courts and trial courts in civil litigation."[129] There, the appeals court "decides the case based exclusively on the evidentiary record generated by the trial court," and if "additional evidence is critical to a proper decision, it will remand to the trial court."[130]

If the appellate review model sounds familiar, rest assured that it should. Merrill's description precisely mirrors Mr. Chandler's explanation of "the more modern method" of judicial review, where the circuit courts review agency orders on the record.[131] In 1947, this "modern method" was the "established" review procedure for FTC, SEC, and NLRB orders.[132] The Hobbs Act merely expanded this model to other agency's orders—including the FCC's—which were previously reviewed by three-judge district courts.[133]

The assumption of on-the-record review aligned with the appellate review model, which "emerged during a time when agencies primarily engaged in adjudication and only rarely ventured into rulemaking."[134] This assumption influenced the drafting of the APA, as "[m]uch of" its procedural rules are "devoted to the process by which parties put information before agencies."[135] However, while "the APA focuses on formal rulemaking and

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[127] *Id.* at 1142.

[128] *See generally* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011) (discussing the origins of this judicial review model). Merrill's article, which does not discuss the UDA, three-judge statutory courts, or the Hobbs Act, is supplemented by this Note's discussion of the evolution of judicial review of agency orders.

[129] *Id.* at 940.

[130] *Id.*

[131] *Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 81 (letter from Mr. Chandler).

[132] *Id.*

[133] *See* Pub. L. No. 81-901, 64 Stat. 1129 (1950) (codified as amended at 28 U.S.C. §§ 2341–2351 (2018)) (covering certain orders of the FCC, Federal Maritime Board, and Secretary of Agriculture).

[134] Merrill, *supra* note 128, at 1001. According to Farber and O'Connell, "the prevalence of adjudication fostered the rise of the 'appellate review model' in administrative law, where courts review agency action on the agency's record even in nonadjudicatory cases." Farber & O'Connell, *supra* note 26, at 1143.

[135] Farber & O'Connell, *supra* note 26, at 1153.

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adjudication," use of these procedures "declined precipitously after the Court's decision in *Florida East Coast Railway*."[136]

The Hobbs Act's drafters did not foresee the precipitous decline of formal rulemaking and adjudication. As Part II showed, the Act's architects likely wrote the bill assuming that the circuit courts would only review orders made on a record developed after an agency hearing.[137] This language, which is used throughout the Hobbs Act's legislative history, echoes the APA's triggering language for formal rulemaking and adjudication—"on the record after opportunity for an agency hearing."[138] According to the Attorney General's Manual on the Administrative Procedure Act, "the formal procedural requirements of the [APA] are invoked only where agency action 'on the record after opportunity for an agency hearing' is required."[139] In contrast, if a statute directed a hearing, without specifying "on the record," Congress "intended to avoid the application of formal procedural requirements" and instead "intended only to provide an opportunity for the expression of views."[140]

Unlike the formal hearings and records that Judge Phillips likely envisioned when crafting the Hobbs Act, informal rulemakings could "take a variety of forms," including "informal hearings (with or without a stenographic transcript)" or "submission of written views."[141] The rise of informal rulemaking created "considerable confusion" over how courts should review agency action given the

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[136] *Id.* at 1160. In *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973), the Court held that in order to "trigger the necessity of an oral evidentiary hearing," as required by formal rulemaking, a statute must use "language that unequivocally connotes an oral evidentiary hearing." 1 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 5.2 (6th ed. 2019).

[137] *See supra* note 61 and accompanying text.

[138] 5 U.S.C. § 553(c) (2018) (triggering formal rulemaking); *id.* § 554(a) (triggering formal adjudication).

[139] U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 41 (1947) [hereinafter AG's Manual]. These formal provisions are outlined in the original sections 7 and 8 of the APA. *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237, 241–42 (1946).

[140] AG's Manual, *supra* note 139, at 35. The U.S. Supreme Court eventually adopted this view. *See* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 234 (1973) (stating that "'after hearing' was not the equivalent of a requirement that a rule be made 'on the record after opportunity for an agency hearing' as the latter term is used in § 553 (c) of the [APA]"); *see also* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1307 (1975) ("The [*Florida East Coast*] opinion seems to say that 'hearing' provisions in regulatory statutes, which had long been regarded as requiring trial-type hearings, have been modified by the [APA] so that nothing more than notice and written comment is required . . . .").

[141] AG's Manual, *supra* note 139, at 31.

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lack of a record on review.[142] In response, courts had to "redefin[e] traditional terms such as 'hearing' and 'record' as they apply to informal rulemaking."[143] As the Second Circuit noted, "[a] practice developed in the early years of the APA of not making a formal contemporaneous record, but rather, when challenged, to put together a historical record of what had been available for agency consideration at the time the regulation was promulgated."[144] This meant that the "record" meant "whatever the agency produces on review."[145]

Arguably, the greatest loss in the shift from formal to informal rulemaking has been the lack of a "focused and defined record."[146] While agencies have developed notice-and-comment procedures for some[147] informal rulemakings, "these procedures have not fully succeeded in creating an alternative structure for administrative action" because the record "has been largely overlooked."[148] Regardless of how one views informal rulemaking's capacity to generate a reliable record, it is certain that "[t]he old notion[] . . . that the right to a formal hearing must accompany any significant agency action ha[s] for all practical purposes been abandoned."[149]

To borrow from Farber and O'Connell's parlance, the assumption that animated the Hobbs Act—of orders produced on the record

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[142] Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 185 (1974).

[143] *Id.* For the term "hearing," the U.S. Supreme Court has held "that informal rulemaking—which by definition is not 'on the record' in an evidentiary sense—may in at least some situations satisfy the statutory requirements of a 'hearing.'" *Id.* at 195. The "record" has been distinguished from "on the record" which "refer[s] to the requirement for trial-type proceedings." *Id.* at 204.

[144] United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 249 n.13 (2d Cir. 1977).

[145] *Id.* (quoting Verkuil, *supra* note 142, at 204). However, this idea that a record could be created after-the-fact contradicted Supreme Court instruction that "in informal rulemaking, 'the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.'" *Id.* at 249 (quoting Camp v. Pitts, 411 U.S. 138, 142 (1973)).

[146] William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 61 (1975) ("There is at present in informal rulemaking no parallel requirement that the record certified to the court be the fruit of special procedures designed to produce it.").

[147] Many informal rulemakings do not even "occur through traditional notice-and-comment procedures." Anne J. O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 902 n.33 (2008) (citing a U.S. Government Accountability Office study which "estimated that approximately half of the final regulatory actions listed in the Federal Register during 1997 were completed without prior notice and comment").

[148] Pedersen, *supra* note 146, at 88.

[149] *Id.*

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after a formal hearing—belongs to a "lost world" of administrative law.[150] The question now shifts to how courts should respond to the "mismatch between" the assumptions and realities of administrative law.[151]

Part III addresses an example of this mismatch found in *PDR Network*. The case concerned two private parties, in a private enforcement action, debating the applicability of an FCC order, which was promulgated over a decade earlier via notice and comment rulemaking.[152] How would the Hobbs Act's drafters have contemplated applying the Act to this situation? The answer: they likely would not have applied the Act.[153] After discussing the reasoning behind this answer, Part III will then address the implications for Justice Breyer's and Justice Kavanaugh's opinions in *PDR Network*.

A. SQUARE PEG AND ROUND HOLE: APPLYING THE HOBBS ACT IN *PDR NETWORK*

The underlying dispute in *PDR Network* was whether PDR violated the TCPA by faxing Carlton an advertisement for a free, new version of the *Reference*.[154] Carlton's complaint hinged on a 2006 FCC Order, interpreting the phrase "unsolicited advertisement" in the TCPA as prohibiting promotional faxes, even ones for free goods and services.[155] The district court first held it was not bound by the FCC's broader interpretation of the TCPA, and then found the TCPA only banned commercial faxes, excluding PDR's faxed advertisement for a free *Reference*.[156]

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[150] Farber & O'Connell, *supra* note 26, at 1163 (noting that "agencies rarely engage in formal proceedings").

[151] *Id.* at 1140.

[152] *See* PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2053–54 (2019) (discussing the background factual dispute).

[153] *See* H.R. REP. NO. 80-1619, at 4 (1948) (discussing H.R. 1468's inapplicability to private suits under the Interstate Commerce Act).

[154] 139 S. Ct. at 2054.

[155] *Id.* at 2053.

[156] *See* Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC, No. 3:15-14887, 2016 WL 5799301, at *3 (S.D. W. Va. Sept. 30, 2016) ("The Hobbs Act does not require a federal court to adopt an FCC interpretation of the TCPA."), *vacated and remanded*, 883 F.3d 459 (4th Cir. 2018).

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The Fourth Circuit vacated the district court's decision.[157] The Fourth Circuit held that, because the Hobbs Act gives the court of appeals "exclusive jurisdiction"[158] to review certain FCC orders—including the 2006 Order[159]—the district court had to apply the FCC's interpretation of the TCPA.[160] Therefore, the district court should have found in Carlton's favor, because, under the 2006 Order's interpretation, PDR violated the TCPA.[161]

The Hobbs Act's architects did not foresee applying the Act to this fact pattern. *PDR Network* involved a dispute between two private parties over whether a 2006 FCC Order[162] appropriately interpreted the TCPA, but "neither party had challenged the [2006] Order's validity" when it was passed.[163] Justice Kavanaugh acknowledges that "[t]he point of the Hobbs Act is to force parties who want to challenge agency orders . . . to do so promptly and to do so in a court of appeals," but this statement raises the question of whether the Hobbs Act was intended to apply in this situation.[164] As this Note's discussion of the legislative history shows, the answer—for two reasons—is no.

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[157] *See* Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC, 883 F.3d 459, 469 (4th Cir. 2018), *vacated and remanded*, 139 S. Ct. 2051 (2019).

[158] 28 U.S.C. § 2342 (2018).

[159] *See supra* note 12.

[160] *See Carlton*, 883 F.3d at 469 ("The Hobbs Act requires a district court to follow FCC interpretations of the TCPA . . . .").

[161] *See PDR Network*, 139 S. Ct. at 2054–55 (describing the Fourth Circuit's recommended holding).

[162] The FCC issued the 2006 Order via notice and comment—not formal—rulemaking. *See supra* note 8 (discussing the issuance of the 2006 Order). Still, this notice and comment rulemaking did produce a record. *See* 21 FCC Rcd. 3787–3834 (showing the FCC's record).

[163] *PDR Network*, 139 S. Ct. at 2054. Because neither party challenged the 2006 Order when it was initially promulgated, neither the district nor circuit court could have entertained a challenge to it because the Hobbs Act only provides a sixty-day window within which aggrieved parties may challenge an agency order. *See* 28 U.S.C. § 2344 (2018) ("Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies."). PDR, the initial defendant, was sued for an action it took in 2013, well outside the sixty-day window. *See PDR Network*, 139 S. Ct. at 2054. However, Justice Kavanaugh's concurrence disputes whether this provision precludes parties from "argu[ing] against the agency's legal interpretation in subsequent enforcement proceedings." *Id.* at 2059–60 (Kavanaugh, J., concurring). He believes that statutes, like the Hobbs Act, which "are silent about review in subsequent enforcement actions," do not override "the proper default rule" of "allow[ing] review by the district court of whether the agency interpretation is correct." *Id.* at 2060.

[164] *PDR Network*, 139 S. Ct. at 2059 (Kavanaugh, J., concurring).

1. The Hobbs Act Was Intended to Apply Only to Agency Orders Made on the Record, After a Hearing Before the Agency—Not to Informal Rulemakings.

In 1945, Judge Phillips recommended to the Judicial Conference that "the orders made reviewable under this act should be *limited to* those which can be *heard on the record* made before the Secretary or the Commissions."[165] He emphasized that judicial review should "be restricted to orders made after *full hearing* before the administrative body and which can be *reviewed upon the record* made in the proceeding before that body."[166]

Recall that this language inextricably resembles the APA's trigger for formal rulemaking.[167] In formal rulemaking, the APA requires "extensive trial-like mechanisms, with an agency reaching a decision 'on the record after opportunity for a hearing.'"[168] Before the 1970s, the Supreme Court had implied that a hearing "contemplate[d] an opportunity to present evidence orally and to cross-examine opposing witnesses"; however, after *Florida East Coast*, the term "hearing," by itself, could "refer to a written exchange of views" rather than a trial-like process.[169] Accordingly, the language of "on the record after hearing," or similarly equivalent language, became necessary "[t]o trigger the necessity of an oral evidentiary hearing."[170]

While the Hobbs Act's drafters did not specifically refer to formal rulemaking to designate which orders the Act covered, the legislative history implies this intended scope. Judge Phillips recommended that the Act only cover orders made after a full hearing before the agency and which could be reviewed on the

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[165] *Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 87 (1945 Report of Committee on Review of Orders of the ICC and Certain Other Administrative Orders, by Hon. Phillips) (emphasis added).

[166] *Id.* (emphasis added). Four years later, Judge Phillips again noted that review would be on the record when testifying to the House subcommittee. *See Hobbs Act Committee 1949 Hearings*, *supra* note 43, at 111–21 (statement of Hon. Phillips) (reiterating his vision of on-the-record review). He told the subcommittee that, under his proposal, circuit court review "is on the record below and not upon an original hearing of witnesses and other evidence." *Id.* at 113.

[167] *See* 5 U.S.C. § 553(c) (2018) ("When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply . . . .").

[168] O'Connell, *supra* note 147, at 900–01 (alterations omitted) (quoting 5 U.S.C. § 553(c) (2018)).

[169] HICKMAN & PIERCE, *supra* note 136, § 5.2.

[170] *Id.*

record.[171] Additionally, when writing to the Judicial Conference, he noted that the Act would not apply to orders that were "made without any hearing" or that were "made upon informal hearings in no sense adversary in character."[172]

Even if the legislative history does not reveal a conscious delineation of the Hobbs Act's scope based on the APA's distinction between formal and informal rulemaking, the Act's drafters explicitly referenced the APA's procedural requirements as necessary protections for parties' due process rights.[173] It appears from these references to the APA that the Act's drafters had these procedures in mind when envisioning how the agency would create the record for review.

This envisioned scope for the Hobbs Act seems to only cover orders made through formal rulemaking—excluding the 2006 Order at issue in *PDR Network*, which the FCC issued via notice and comment rulemaking.[174] While this informal rulemaking produced a record, this "hearing" was—in Judge Phillips's parlance—"in no sense adversary in character."[175]

2. The Hobbs Act Was Explicitly Not Intended to Apply in Cases Involving Private Enforcement Actions.

The House Report accompanying H.R. 1468 stated that the bill provided for "review of [ICC] and Maritime Commission orders made after hearings and preparation of the record by the circuit court of appeals; the remainder of cases wherein no record is made, by the old three-judge district courts."[176] Mr. Leland Tolman, a staff

[171] *See supra* note 166 and accompanying text.
[172] *Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 87 (1945 Report of Committee on Review of Orders of the ICC and Certain Other Administrative Orders, by Hon. Phillips).
[173] *See Hobbs Act 1950 Senate Subcommittee Hearing*, *supra* note 48, at 28–29 (statement of Mr. Solomon, Acting Assistant General Counsel, FCC) ("On all common carrier orders of course there must be a full opportunity for hearing given to the common carrier [involved]. Some orders involving rule making do come within the bill but the rule making of course would have to be in accordance with the [APA] . . . ."); *see also* S. REP. NO. 81-2618, at 4 (1950) ("Under the [APA], the record before the agencies will be made in such a way that . . . the rights of the parties will be fully protected.").
[174] *See supra* note 8 (explaining that the 2006 Order was issued through notice and comment rulemaking).
[175] *Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 87 (1945 Report of Committee on Review of Orders of the ICC and Certain Other Administrative Orders, by Hon. Phillips).
[176] H.R. REP. NO. 80-1619, at 3 (1948). While this section discusses H.R. 1468, which did not apply to the FCC, the Judicial Conference concurrently wrote and considered the proposals for the ICC, Maritime Commission, FCC, and Secretary of Agriculture. *Id.* at 2 (stating that the Judicial Conference committee's "final result was three bills—H. R. 1468,

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member of the Administrative Office of the U.S. Courts, also wrote a "detailed and specific memorandum of the coverage of H.R. 1468," which appeared in the House Report of 1948.[177] In this memo, Mr. Tolman stated:

> H.R. 1468 does not apply to any proceeding brought by the United States or the Commission to enforce an order of the Commission . . . . These will continue to fall within district court jurisdiction as at present. *Nor does it relate to actions between private parties to enforce various liabilities created by the Interstate Commerce Act*, nor to criminal proceedings under the act, nor to suits for forfeitures or penalties.
>
> The theory of the bill is that it *will not be used in proceedings where a record or hearing has not been made* before the Commission, since the circuit courts of appeals are not equipped to make such records.[178]

This clarification of H.R. 1468's intended scope suggests that the Act's drafters did not intend the jurisdictional reforms to apply to private enforcement actions because such proceedings lacked a record made by the agency.[179]

B. IMPLICATIONS FOR JUSTICE BREYER'S AND JUSTICE KAVANAUGH'S *PDR NETWORK* OPINIONS

The Hobbs Act's legislative history teases out the internal friction within Justice Breyer's and Justice Kavanaugh's *PDR Network* opinions. Both justices struggled to apply the Hobbs Act to a case that the statute's architects likely did not intend the Act to cover. Justice Breyer resolved this dilemma by remanding the case

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H. R. 1470, and H. R. 2271"). Therefore, the legislative history for H.R. 1468, a progenitor bill, likely bears instructive value for how courts should interpret the Hobbs Act.

[177] *Id.* at 3–7. Mr. Tolman is a familiar figure in this Note; he advocated for H.R. 5487 to the Senate subcommittee on August 8, 1950, five months before the bill became law. *See Hobbs Act 1950 Senate Subcommittee Hearing*, *supra* note 48, at 23 (statement of Mr. Tolman) (discussing the widespread approval of H.R. 5487).

[178] H.R. REP. NO. 80-1619, at 4 (1948) (emphasis added).

[179] *See id.* The memo noted that the proposal did not apply to public—as well as private—enforcement actions. *See id.* While these quotes are in the context of private and public enforcement actions authorized by the Interstate Commerce Act, the logic behind H.R. 1468's limited coverage equally applies to private rights of actions created by laws such as the TCPA.

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for the lower court to consider two preliminary questions.[180] In contrast, Justice Kavanaugh found that the district court could decide that the agency's interpretation of a statute was incorrect because such a holding would not "determine the validity" of the agency's order in violation of the Hobbs Act.[181] The legislative history—oddly—supports both approaches. This section will first address the support for Justice Kavanaugh's opinion before discussing the strange coherence of Justice Breyer's opinion.

1. Justice Kavanaugh's Opinion.

Justice Kavanaugh marshals several legal and policy arguments to support his interpretation of "determine the validity."[182] Primarily, he notes that "elementary principles of administrative law establish that the proper default rule is to allow review by the district court of whether the agency interpretation is correct."[183] Statutes that "expressly preclude judicial review in subsequent enforcement actions," such as the Clean Water Act and CERCLA, do so explicitly.[184] In contrast, the Hobbs Act is "silent on the question [of] whether a party may argue against the agency's legal interpretation in subsequent enforcement proceedings."[185]

For Justice Kavanaugh, this question is not low stakes.[186] Parties in enforcement actions "may not even have existed" when the agency issued its order, so courts cannot fairly expect every potential party to "predict the future" and challenge the order before the order adversely affects them.[187] This "unfairness raises a serious constitutional issue" because "[b]arring defendants in as-applied enforcement actions from raising arguments about the reach and

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[180] *See* PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2055 (2019).

[181] *Id.* at 2064 (Kavanaugh, J., concurring).

[182] *Id.* at 2063.

[183] *Id.* at 2060. Justice Kavanaugh points to APA § 703 to support this "default rule." *Id.* at 2061; *see also* 5 U.S.C. § 703 (2018) ("Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."). For Justice Kavanaugh, the Hobbs Act's sixty-day window to challenge an agency order is not "the 'exclusive opportunity' for judicial review" because the Act does not explicitly say so. *PDR Network*, 139 S. Ct. at 2061.

[184] *Id.* at 2059.

[185] *Id.* at 2059–60.

[186] *Id.* at 2061 ("It would be wholly impractical—and a huge waste of resources—to expect and require every potentially affected party to bring pre-enforcement Hobbs Act challenges against every agency order that might possibly affect them in the future.").

[187] *Id.* at 2062.

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authority of agency rules enforced against them raises significant questions under the Due Process Clause."[188] To avoid falling short of due process requirements, Justice Kavanaugh urged "adher[ence] to a default rule" of allowing judicial review in subsequent enforcement actions.[189]

The legislative history bolsters Justice Kavanaugh's opinion in two ways. First, the Hobbs Act was not intended to divest district courts of jurisdiction over certain types of orders and enforcement actions.[190] Mr. Chandler assured the Speaker of the House that "care has been taken in drafting the bills to include . . . *only* the types of orders in which an adequate record . . . is made before the agencies."[191] Additionally, Mr. Tolman clarified that private and public enforcement proceedings would "continue to fall within district court jurisdiction."[192]

While Justice Kavanaugh relied on comparisons to other bills, such as CERCLA, to show that "the Hobbs Act does not expressly preclude review in enforcement actions,"[193] the legislative history provides *direct*, rather than *indirect*, evidence to support his thesis. The Act's drafters likely intended district courts to retain jurisdiction over judicial enforcement actions.[194] As applied to *PDR Network*, the Hobbs Act's authors likely would have left jurisdiction over Carlton's private enforcement action with the district court. This narrower interpretation of the Hobbs Act would restrict the circuit court's jurisdiction to direct review over formal adjudications and rulemakings.

Second, the legislative history shows the drafters were concerned with affected parties' rights; this bolsters Justice Kavanaugh's argument that district court review of an agency interpretation is necessary to preserve due process. Judge Phillips told the House subcommittee that "the rights of parties . . . are preserved" because

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[188] *Id.*

[189] *Id.*

[190] *See* H.R. REP. NO. 80-1619, at 4 (1948). ("The theory of the bill is that it will not be used in proceedings where a record or hearing has not been made before the Commission . . . .").

[191] *Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 81 (letter from Mr. Chandler) (emphasis added).

[192] H.R. REP. NO. 80-1619, at 4 (1948).

[193] *PDR Network*, 139 S. Ct. at 2062 (Kavanaugh, J., concurring).

[194] *See* H.R. REP. NO. 80-1619, at 4 (1948) ("H.R. 1468 does not apply to any proceeding brought by the United States or the Commission to enforce an order of the Commission . . . . These will continue to fall within district court jurisdiction as at present. Nor does it relate to actions between private parties . . . .").

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even though judicial review is "not upon an original hearing of witnesses and other evidence," it is a hearing "on the record below."[195] The Senate Report on H.R. 5487 also noted that "[u]nder the [APA], the record before the agencies will be made in such a way that all questions for the determination of the courts on review . . . will be presented and the *rights of the parties will be fully protected*."[196]

The drafters assumed that litigants and affected parties would have a hearing before the agency and that the circuit court would review the agency's decision on the record of that hearing.[197] The Hobbs Act's architects were cognizant of the APA[198] and crafted the Act's procedures assuming that the APA would ensure an adequate record was made before the agency and that private parties' rights would be protected.[199] These statements strongly suggest the Hobbs Act's drafters would have sympathized with Justice Kavanaugh's due process concerns.[200] Even though Judge Phillips and the House subcommittee did not cast their concern with "the rights of the parties" in the language of due process, they did verbalize a desire for these parties' rights to be "fully protected."[201] These statements echo Justice Kavanaugh's concern with "unfairness" to defendants in enforcement actions.[202]

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[195] *Hobbs Act Committee 1949 Hearings*, *supra* note 43, at 113 (statement of Hon. Phillips).

[196] S. REP. NO. 81-2618, at 4 (1950) (emphasis added).

[197] *See Hobbs Act Committee 1949 Hearings*, *supra* note 43, at 113 (statement of Hon. Phillips) ("The review in the court of appeals will be upon the record made before the [Federal Communications] Commission.").

[198] When Judge Phillips first referenced the APA, he correctly named the law, but he qualified his statement by adding "I believe that is the correct title." *Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 29 (statement of Hon. Phillips). Still, he assured the House subcommittee that the Judicial Conference had "checked [H.R. 1468 and 1470] with the [APA] and believe they are in no wise in conflict with that act." *Id.* at 30. Judge Phillips later told the House subcommittee in 1949 that "the last thing that [he] did was to ask the Solicitor General's office and the solicitors for these various agencies to check carefully [the Hobbs Act] with the [APA] to see if there was any conflict or overlap or anything that interfered or affected that situation." *Hobbs Act Committee 1949 Hearings*, *supra* note 43, at 113 (statement of Hon. Phillips). He assured the House subcommittee that "there was no place that these acts impinged upon the [APA], or in any wise conflicted with it." *Id.*

[199] *See Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 81 (letter from Mr. Chandler) (stating that under the APA "the record before the agencies will be made in such a way that all questions for the determination of the courts on review, and the facts bearing upon them will be preserved and the rights of the parties will be fully protected").

[200] *See* PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2062 (2019) (Kavanaugh, J., concurring) (arguing that precluding judicial review "raises significant questions under the Due Process Clause").

[201] S. REP. NO. 81-2618, at 4 (1950).

[202] *PDR Network*, 139 S. Ct. at 2062.

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One figure in the legislative history was particularly concerned with unfairness to litigants: Charles Cotterill.[203] Mr. Cotterill was a practitioner before the ICC, and, according to his testimony, he represented clients whose interests "aggregate[d] about $350,000,000 to $400,000,000 annual revenue."[204] He pleaded with the House subcommittee that private litigants' right to appeal should be to the Supreme Court, not "the inferior courts," which lack a "concentrated appreciation of the controlling elements."[205] He articulated what would later become Justice Kavanaugh's concern regarding due process.[206] Like Justice Kavanaugh, Mr. Cotterill appealed to the APA's provisions allowing review of agency orders as a defense in enforcement proceedings.[207] He warned that the Hobbs Act's "exclusive" provision for judicial review by the court of appeals would be "the death knell . . . before the ink is hardly dry" to the APA.[208] As Aditya Bamzai noted, "[n]o action appears to have been taken in light of [Mr. Cotterill's] remarks, though there are scattered comments in the record suggesting concern about the proposed legislation's consistency with the [APA]."[209] Despite the subcommittee's unresponsiveness to Mr. Cotterrill's concerns, his argument is prescient in light of Justice Kavanaugh's concurrence in *PDR Network*.

While the Hobbs Act's framers did not adopt Mr. Cotterrill's views, their concern for the rights of private litigants validates Justice Kavanaugh's focus on unfairness to private litigants in enforcement actions. Recall the concern evidenced by questions and statements during the hearings on the Hobbs Act in the Congressional subcommittees.[210] The Act's architects likely would

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[203] *See* Brief of Professor Aditya Bamzai, *supra* note 70, at 26–28 (quoting and discussing Mr. Cotterill's argument).

[204] *Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 41 (statement of Charles E. Cotterill, Esq., New York City).

[205] *Id.* at 42, 43.

[206] *See id.* at 45 ("[I]t was inherently wrong in our country that [people] could be indicted criminally for the violation of an administrative order and then not be permitted to defend [themselves] on the ground that the order itself was invalid because [it was] beyond the authority of the agency to make it.").

[207] *See id.* at 46 (stating that under the APA "the validity of an administrative order may be challenged by way of defense in a criminal proceeding brought to enforce such an order").

[208] *Id.* "It is the death knell to the opportunity of a defendant to say, 'Well, if I did violate the order . . . the order itself was not a valid order.' You are taking . . . that right of defense . . . ." *Id.*

[209] Brief of Professor Aditya Bamzai, *supra* note 70, at 28.

[210] *See Hobbs Act 1950 Senate Subcommittee Hearing*, *supra* note 48, at 26 (statement of Mr. Tolman) ("One of the primary questions that arose in the House . . . was raised by

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have disapproved of the Act applying to a private enforcement action because the parties would not have had an opportunity to present evidence and testimony at a hearing before the agency; in such cases, there would be no record for the circuit courts to exclusively review.

The Hobbs Act's drafters emphasized the preservation of, and role for, the APA within their proposal to ensure that an adequate record was made before the agency, and to protect litigants' rights. Justice Kavanaugh's concurrence arrives at a similar conclusion, although it lacks the texture that only legislative history can provide.

2. Justice Breyer's Opinion.

Writing for the majority, Justice Breyer "found it difficult to answer [the] question" presented in *PDR Network*.[211] He remanded the case to the Fourth Circuit to answer "two preliminary sets of questions."[212] "*First*, what is the legal nature of the 2006 FCC Order . . . is it the equivalent of a legislative rule, which is issued by an agency pursuant to statutory authority and has the force and effect of law?"[213] Or is the 2006 Order an "interpretive rule, which simply advis[es] the public of the agency's construction of the statutes and rules which it administers and lacks the force and effect of law?"[214] "*Second* . . . did PDR have a 'prior' and 'adequate' opportunity to seek judicial review of the Order?"[215] While Justice Breyer's decision in *PDR Network* is puzzling to some,[216] after reading the legislative history, one may be compelled to view his decision as the only logical solution.

Justice Breyer's first question reflects a central distinction Judge Phillips drew regarding which orders the Hobbs Act would cover. Judge Phillips stated that "certain types of orders . . . could not be reviewed in the circuit courts of appeals on the record before the

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Congressman Walter, who was one of the authors of the [APA]. He was very anxious that we should be careful not to make any changes in the [APA]. So we had a special examination made . . . ."); *see also id.* at 18 (statement of Mr. Solomon, Acting Assistant General Counsel, FCC) (assuring a Senator that the Hobbs Act does not repeal or affect any APA provisions).

[211] PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2053 (2019).

[212] *Id.* at 2053, 2055.

[213] *Id.* at 2055 (internal quotations omitted).

[214] *Id.* (alteration in original) (internal quotations omitted).

[215] *Id.* (quoting 5 U.S.C. § 703 (2018)).

[216] *See, e.g.*, Walker, *supra* note 2 ("The Supreme Court's decision to dodge the question presented and remand is curious.").

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Commission," such as "orders in emergency matters [that] are made without any hearing."[217] Additionally, the Hobbs Act would not cover "[o]ther orders, *legislative or purely administrative in character*, [which] are made upon informal hearings in no sense adversary in character."[218] Henry Chandler reiterated the same distinction.[219] While Judge Phillips and Justice Breyer use the term "legislative" order in conceptually distinct ways,[220] both delineate what the Hobbs Act covers by identifying "the legal nature" of the agency order on review.[221]

The legislative history also speaks to Justice Breyer's second question. The Act's assumption that orders would be based on a hearing that generates a record explicitly answers Justice Breyer's question in the affirmative.[222] Judge Phillips explained that the Hobbs Act's built-in mechanisms allow the circuit court to remand the case for the agency to conduct a hearing or take more evidence if necessary.[223] He emphasized that these mechanisms, in addition to the APA, guaranteed that a hearing would occur to protect litigants' rights when necessary.[224] While nothing in Justice Breyer's opinion even hints at the legislative history, his questions reflect key concerns and assumptions of the Hobbs Act's drafters.

IV. CONCLUSION

The Hobbs Act's legislative history illustrates that the statute's designers likely thought the Act would only apply to a narrow range of agency orders—those which were made on the record, after a hearing before the agency. These drafters believed the Hobbs Act

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[217] *Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 87 (1945 Report of Committee on Review of Orders of the ICC and Certain Other Administrative Orders, by Hon. Phillips).

[218] *Id.* (emphasis added).

[219] *See id.* at 81 (letter from Mr. Chandler) ("[O]ther orders legislative or administrative in nature which are made upon informal hearings in no sense adversary in character . . . cannot be reviewed adequately in the courts except upon a trial de novo with full opportunity to all parties to introduce evidence . . . .").

[220] For discussion of the modern definitions of legislative and nonlegislative rulemaking, see O'Connell, *supra* note 147, at 900–05.

[221] PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2055 (2019).

[222] *See supra* note 166 and accompanying text.

[223] *See supra* notes 58–60 and accompanying text. For purely legal questions, remand would not be necessary. *See Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 28 (statement of Hon. Phillips) ("[If] no genuine issue of material fact is involved and only questions of law are presented . . . then the Court may review the law questions . . . .").

[224] *See supra* notes 198–99 and accompanying text.

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was consistent with, and relied upon, the APA's provisions to guarantee the agency produced an adequate record.[225] Additionally, they believed the APA played a vital role in protecting the rights of affected parties before the agencies. Recall that, at the time, Judge Phillips's proposal represented the modern method of review.[226]

Today, the Hobbs Act belongs to a lost world of administrative law. In the lost world, affected parties challenge agency orders in a hearing before the agency, which creates a record that a circuit court can review. Thomas Merrill calls this "the appellate review model," and he notes that it "emerged during a time when agencies primarily engaged in adjudication and only rarely ventured into rulemaking."[227] But now, "the pattern is close to the reverse, as many of the characteristic modern agencies, like the EPA, the FCC, and FERC, do most of their business through rulemaking and rarely engage in adjudication."[228] As Farber and O'Connell noted, friction occurs when legal fiction confronts reality.[229] Moreover, the modern administrative state often relies on private rights of action to enforce regulations.[230]

One Hobbs Act drafter expressly said the Act would not change the review procedure for "actions between private parties to enforce various liabilities."[231] While Justice Kavanaugh devised a clever interpretive solution to avoid applying the Hobbs Act to the private action in *PDR Network*, his holding narrowly allows defendants in subsequent enforcement actions to "argue against the agency's *legal interpretation*."[232] A decision based on the legislative history would more broadly apply to all agency orders contested in subsequent enforcement actions—not just legal interpretations. Justice Breyer's approach could also be fine-tuned by legislative history. While Judge Phillips would agree that the legal nature of the challenged order is relevant to whether the Hobbs Act applies, Judge Phillips likely would not need to reach this question in *PDR*

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[225] *See supra* notes 198–99 and accompanying text.

[226] *Hobbs Act Committee 1947 Hearings*, *supra* note 31, at 81 (letter from Mr. Chandler).

[227] Merrill, *supra* note 128, at 1001.

[228] *Id.*

[229] *See* Farber & O'Connell, *supra* note 26, at 1140 ("The mismatch (or legal fictions), in turn, has consequences for the legitimacy and efficacy of the federal bureaucracy.").

[230] *See* Glover, *supra* note 24, at 1146–53 (discussing the administrative state's reliance on private rights of action).

[231] H.R. REP. NO. 80-1619, at 4 (1948).

[232] PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2059 (2019) (Kavanaugh, J., concurring) (emphasis added).

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Network to decide that the Hobbs Act is inapplicable to a private right of action.

While both Justice Breyer and Justice Kavanaugh arrive at legally acceptable conclusions, the legislative history provides a more direct path to the right answer. Paying closer attention to this history could aid the federal judiciary by obviating difficult questions that emerge when old leviathans confront modern legal realities.

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V. APPENDIX A: DESIGNERS OF THE HOBBS ACT

Who	Title
Clyde B. Aitchison	Chairman, Interstate Commerce Commission (ICC)
Charles W. Bucy	Associate Solicitor, U.S. Department of Agriculture
Henry P. Chandler	Director of the Administrative Office of the U.S. Courts
Tom C. Clark	U.S. Attorney General
Charles Cotterill	Private Lawyer
Wayne Coy	Chairman, Federal Communications Commission (FCC)
Sam Hobbs	Congressman, Member, House Committee on the Judiciary
Rosel H. Hyde	Member, FCC
Harley M. Kilgore	Senator, Member, Senate Committee on the Judiciary
Albert B. Maris	Circuit Judge, Third Circuit
Earl C. Michener	Congressman, Chairman, House Committee on the Judiciary
Paul D. Page, Jr.	Solicitor, U.S. Maritime Commission (Maritime Administration and Federal Maritime Board)
Orie L. Phillips	Circuit Judge, Tenth Circuit
Harry M. Plotkin	Assistant General Counsel, FCC
Richard A. Solomon	Acting Assistant General Counsel, FCC
Leland L. Tolman	Chief, Business Administration, Administrative Office, U.S. Courts
Paul A. Walker	Acting Chairman, FCC

VI. APPENDIX B: EVOLUTION OF THE HOBBS ACT

H.R. Number	A.K.A.	To Whom Bill Applied	Bill's Function / Unique Language
80 H.R. 2271	Uniform Process Bill	N/A	Made uniform the process for review by statutory three-judge district courts
80 H.R. 1468	First ICC Bill	ICC; U.S. Maritime Commission	To provide for the review of certain orders of the ICC and the U.S. Maritime Commission and giving the U.S. courts of appeals jurisdiction on review to enjoin, set aside, or suspend such orders.
80 H.R. 1470	First FCC Bill	FCC; Secretary of Agriculture	To provide for the review of FCC orders under the Communications Act of 1934, as amended, and of certain orders of the Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and the Perishable Agricultural Commodities Act, 1930.
81 H.R. 2915	Second FCC Bill	FCC; Secretary of Agriculture	Same as 80 H.R. 1470.
81 H.R. 2916	Second ICC Bill	ICC; U.S. Maritime Commission	Same as 80 H.R. 1468.
81 H.R. 5487	Hobbs Act	FCC; Secretary of Agriculture; U.S. Maritime Commission / the Federal Maritime Board	To provide for the review of FCC orders under the Communications Act of 1934, as amended, and of certain orders of the Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and the Perishable Agricultural Commodities Act, 1930, as amended, and of orders of the U.S. Maritime Commission or the Federal Maritime Board under the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended.