

## Getting Started: Organization, Procedure and Initial Business of the ICC in 1887

Leonard S. Goodman\*

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The Act to Regulate Commerce was signed by President Cleveland on February 4, 1887, making the provisions on appointment and organization effective on that date; the remaining sections of the Act became effective 60 days later on April 5, 1887.<sup>1</sup> President Cleveland required nearly this entire 60-day period to complete his five appointments, which were announced on March 22, 1887.

This paper will explore how these five appointees organized themselves for business, the procedures they developed, and the initial business they conducted in the first few months. This period long preceded the day the Supreme Court would characterize the Commission as “a

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\* Special Projects Counsel (1973-74) and Associate General Counsel (1960-73) to the Interstate Commerce Commission, Mr. Goodman is currently in private practice as a legal consultant in utility and transportation matters.

1. Act to Regulate Commerce, ch. 104, § 24, 24 Stat. 379, 387 (1887).

tribunal appointed by law and informed by experience."<sup>2</sup> There had been no prior experience with Federal regulation under the Commerce Clause of a national business by an administrative commission. The country waited to see how it would conduct itself.

The earliest Commission has been accused of holding a "modest conception" of its mandate and a "hopeless bias" against the railroads.<sup>3</sup> At the same time, another student of the railroad industry claims that the early commissioners were only the first in a long line who systematically betrayed the spirit of the new legislation under "strong pro-railroad predilections."<sup>4</sup> Neither assessment fairly reflects the record that the new commission made for itself in its earliest period of formation. Far from perfect, it nonetheless laid the seeds for the later administration of the statute in the public interest.

### 1. ORGANIZATION

Snow was falling and the Washington streets were wet when the five lawyers from different sections of the country met on March 31, 1887, to take their oaths of office. They had made an informal call on the President, and they were convened in the offices of the Secretary of the Interior with whom the new statute required them to confer.<sup>5</sup> They had each been appointed for different terms of office. All pomp was missing from the ceremony as a notary administered the oaths.

By far the best known of the new commissioners was Thomas McIntyre Cooley, a constitutional scholar and former Chief Justice of the Michigan Supreme Court. The others, less well-known nationally, had governmental backgrounds and even some regulatory experience at the State level. The terms of office, total periods of service, and relevant

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2. *Assigned Car Cases*, 274 U.S. 564, 580 (1927).

3. A. MARTIN, *ENTERPRISE DENIED: ORIGINS OF THE DECLINE OF AMERICAN RAILROADS, 1897-1917*, 173-74 (1971).

4. G. KOLKO, *RAILROADS AND REGULATION, 1877-1916*, 48 (1965).

5. The Secretary was obligated to furnish the Commission with offices and supplies, and was empowered to approve the hiring of personnel, the amounts of employee compensation, and the payment of expenses. 24 Stat. 386 (1887). The commissioners did not consider themselves a bureau of the Department of the Interior, although they agreed to be shown with the Department in the "Blue Book" of government offices. See *Diaries and Personal Memoranda Books of Thomas M. Cooley, 1824-1898*, Univ. of Mich., Mich. Historical Collections (hereinafter cited as *COOLEY DIARY*), Oct. 15, 19, 1887. There is no evidence that the Secretary exercised any direct or indirect control; he soon advised Congress that the new commission should be "authorized to report directly to the President; to appoint its own officers and employees; and to draw upon the Treasury for the payment of the salaries of its subordinates as well as for all expenses incurred under the act." Report to Congress of the Secretary of the Interior, 1887, at 57. These statutory changes formally occurred with the amendments of March 2, 1889, 25 Stat. 855 (1888).

backgrounds of the first commissioners are set forth in the following table.<sup>6</sup>

#### SUMMARY PROFILES OF THE ORIGINAL ICC COMMISSIONERS

<u>Name</u>	<u>Term of First Appointment</u>	<u>Total Service (incl.reappt.)</u>	<u>Relevant Background</u>
Thomas M. Cooley	6 yrs.	Mar.31,'87-Jan.12,'92	Ch.J.,Mich.S.Ct. Prof.of law Constit.scholar
William R. Morrison	5	" -Dec.31,'97	State legislator Congressman
Augustus Schoonmaker	4	" -Dec.31,'90	Judge,legislator, Atty-gen.,State Civil Svc.Commissioner
Aldace F. Walker	3	" -Mar.31,'89	Rail lawyer, legislator who helped create Vt.R.Comn.
Walter L. Bragg	2	" -Aug.21,'91	Chairman of the Ala.R.Comn.

A contemporary picture of the five new commissioners appears on the page opposite.<sup>7</sup> Full beards were the Victorian style; and these were conservative, practical men of that period.

Cooley was serving as the receiver of the Wabash Railroad when he received his appointment; he had been involved in many other railroad affairs, and had written and spoken widely on railroad matters. The Culom Committee paid particular attention to his views during the hearings on the new railroad act. His colleagues unanimously elected him chairman of the new commission immediately following their swearing in on March 31, 1887.<sup>8</sup>

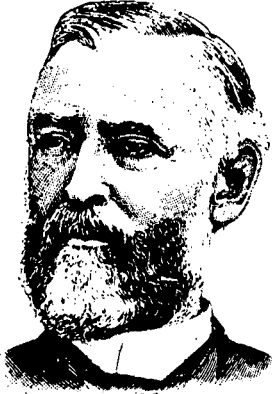
President Cleveland had granted the longest term of office (a full six-year term) to Chairman Cooley at his request.<sup>9</sup> It is said that Cooley had

6. See Miller, *The Interstate Commerce Commissioners: The First Fifty Years: 1887-1937*, 5 GEO. WASH. L. REV. 580-700 (Mar. 1937); 4 I.L. SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION*, 12-41 (1937); The appointments were made and the oaths taken during a Senate recess. The appointments were submitted for confirmation on Jan. 4, 1888, and confirmation was given on Jan. 16, 1888.

7. Courtesy of RAILWAY AGE. The picture first appeared in RAILWAY AGE on Apr. 1, 1887, vol. 12, p. 217, (hereinafter cited as RAILWAY AGE). It later appeared and is reprinted here from LIGHT ON THE LAW: A REFERENCE BOOK ON "THE ACT TO REGULATE COMMERCE," (Railway Age Publ. Co., 1887).

8. First I.C.C. Minute Book, Record Group 134, National Archives, Washington, D.C. (hereinafter cited as MINUTE BOOK), Mar. 31, 1887, at 3. Cooley noted in his diary, "By common consent I was made Chairman of the Commission." COOLEY DIARY, *supra* note 5, Mar. 31, 1887.

9. Cooley wrote in his diary, that he answered President Cleveland's tender of an appointment on March 11, 1887, the same day it was received, "by telegraph that I should defer to his



HON. AUGUSTUS SCHOONMAKER,  
OF NEW YORK.



HON. WILLIAM R. MORRISON,  
OF ILLINOIS.



HON. THOMAS M. COOLEY,  
OF MICHIGAN.



HON. WALTER L. BRAGG,  
OF ALABAMA.



HON. ALDACE F. WALKER,  
OF VERMONT.

THE INTER-STATE COMMERCE COMMISSION

been reluctant to accept the appointment.<sup>10</sup> True, he later expressed some recriminations and doubts, as he became overworked and very ill during his term of office;<sup>11</sup> but his requesting a long term of appointment does suggest an initial eagerness and commitment to the task, which his acceptance of the chairmanship and his leadership thereafter only confirm.

In fact, the record of this early period in the Commission's history largely reflects the energy and thought of Chairman Cooley. The Commission often deferred to his judgment in this early period; and even when he despaired in later years that the Commission was taking a too narrow view of its jurisdiction, in all honesty he could write in his diary of 1889,

However the fact might be as to our differing views of the law, I must admit that I had been allowed to shape the action and policy of the Commission in the past. . . .<sup>12</sup>

The Secretary of the Interior assigned rooms to the new commissioners in the Hooe Iron Building at 1330 F Street, N.W., in Washington, which was then occupied by the Geological Survey. The commissioners occupied these quarters for only two weeks. On April 15, 1887,<sup>13</sup> they located their headquarters across the street on the fifth floor of the newly constructed Sun Building at 1315 F Street (now 1317 F Street). This new eight-story, marble-fronted, structure had been built by the Baltimore

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judgment, but should not think a short term desirable. I also later in the day wrote to the same effect."

10. See Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 863, 885, note 100 (1962); see also Jones & Alan, *Thomas M. Cooley and the Interstate Commerce Commission: Continuity and Change in the Doctrine of Equal Rights*, 81 POL. SCI. Q. 602, 612 (1966). The confusion may have arisen over the letter from Cooley to his wife, which these sources rely on, in which Cooley had earlier responded to the rumors of his appointment by stating, "I don't think there is anything in it for me to feel elated," perhaps referring then only to the prematureness of any such feeling, rather than to his lack of eagerness for the position.

11. Cooley wrote in his diary for September 19, 1889, that when he returned to Washington from the West, he wanted to determine whether, as he suspected, Commissioner Bragg, who had assumed "a general charge of our affairs," had been "acting in some respects foolishly" and had departed from "our general policy." He determined either to assume "control hereafter or to leave the Commission." In this mood, he found the "opportunity for a full & free talk with Col. Morrison" at the next hearings in Indianapolis, when he told Commissioner Morrison, "that as he knew very well I never wanted the office of Commissioner & my family had never wanted me to take it . . . I ought to resign provided I could assign to the public satisfactory reasons for doing so." Morrison assured him that he was needed on the Commission: "If I left, he said, the Commission might as well dissolve." Morrison then apparently spoke to Bragg, who "was soon mellow, & almost oppressively anxious to do anything he thought I was likely to want done." Cooley was clearly overworked and his health was failing. Less than a month later, he left Washington for home in Michigan "in a condition of partial paralysis" and returned only in December. COOLEY DIARY, *supra* note 5, Nov. 1, 1889, and Christmas, 1889.

12. COOLEY DIARY, *id.* Nov. 1, 1889.

13. 1 Interstate Commerce Reports (hereinafter cited as I.C.R.) 18 (1887).

Sun;<sup>14</sup> and was the tallest privately owned office building at that time in the city. Even today it retains much of the splendid wrought iron, polished brass railings and other interior adornments of its past, although the imposing spire has long since been removed. The Commission expanded onto the sixth floor of the Sun Building the following year. It continued in this building, adding additional floors as well as supplementary space elsewhere, until 1917.<sup>15</sup> An exterior view of the Sun Building, when construction was completed in 1887, is shown on the opposite page.<sup>16</sup>

The Commission filled the statutory position of Secretary on April 19, 1887, by appointing Edward A. Moseley of Massachusetts, whom they also designated their Special Disbursing Agent.<sup>17</sup> A few days earlier the Commission had hired five clerks (at \$100 per month each) and a messenger (at \$60 per month).<sup>18</sup> The circumstances surrounding the Secretary's appointment and the hiring of the clerks may explain some of the problems the Commission was to experience with the workload.

The Commission's first Secretary would serve as the chief administrative officer of the new agency, managing the flow of the hundreds of pieces of correspondence<sup>19</sup> that the agency soon would receive. However, there was nothing in Moseley's background that would have justified his appointment as office manager of the new agency. He had been a sitting member of the Massachusetts legislature at the time of his appointment, and that State's candidate for an I.C.C. commissioner. The President apparently decided that he would like to have Moseley ap-

14. New York Times, Apr. 6, 1887, at 5. col. 3.

15. See Address of George M. Crosland, Ass't Dir., I.C.C. Bur. of Traffic, at Exercises Commemorating the Fifty Years' Service of the Interstate Commerce Commission, Departmental Auditorium, Apr. 1, 1937, (hereinafter cited as CROSLAND), at 7.

In 1914, the Interstate Building was constructed for the Commission's use adjoining the Sun Building, as the Commission's need for space increased. CROSLAND, *id.*; and caption to a photograph of the building in Misc. Historical Materials, Record Group 134, National Archives, Washington, D.C., Carton No. 3.

16. Courtesy of Glassie, Pewett, Dudley, Beebe & Shanks, Sun Building, 1317 F Street, N.W., Washington, D.C. 20004.

17. MINUTE BOOK, *supra* note 8, at 21-22. His temporary bond was set at \$2,000 and his permanent bond at \$5,000. The Commission then advised the Secretary of the Interior regarding the appointment and the amount of the bond. *Id.* at 22; Cooley to Secty. Lamar, Apr. 19, 1887, Letter Book No. 1 of the I.C.C., Apr. 1, 1887-May 17, 1887, Record Group 134, National Archives, Washington, D.C. (hereinafter cited as LETTER BOOK) at 214-15.

18. MINUTE BOOK, *supra* note 8, at 10, 14. When the commissioners reached Washington and had been sworn in, they found that, "Applications for appointment under the Commission are very numerous." COOLEY DIARY, *supra* note 5, Mar. 31, 1887.

19. The reference to "over 1,000 complaints, grievances, and questions . . . within a few months" in KOLKO, *supra* note 4, at 49, is safe enough. See Files of the I.C.C. Operating Division, 1887-1906, Record Group 134, National Archives, Washington, D.C. (formerly stored at the G.S.A. Warehouse in Springfield, VA). See also the concise and interesting monograph entitled, A. & O. HOOGENBOOM, A HISTORY OF THE ICC: FROM PANACEA TO PALLIATIVE, at 21 (1976).



THE SUN BUILDING  
FOLLOWING COMPLETION OF CONSTRUCTION IN 1887

pointed Secretary; and acting on that advice, the Commission chose him for the position.

Although the new Secretary was later to win some distinction for his efforts on behalf of railroad labor by championing federal statutes like the Safety Appliance Acts,<sup>20</sup> he had, as his biographer notes,<sup>21</sup> "no special experience and no natural aptitude" for administration, such as "the work of establishing the routine of his office"—and "he knew nothing of law and judicial forms." All this was to change in the next few years, but his initial incompetence led to extreme awkwardness in his early relations with the demanding Chairman Cooley, greatly complicated the earliest efforts to organize the Commission's work, and imposed additional burdens on the commissioners, particularly the Chairman.

For example, when the commissioners left Washington to hold hearings in the South in the latter part of April, 1887, Chairman Cooley left a "Memorandum for Secretary during absence of Commission," specifying that the Secretary was to,

1. Enter applications and complaints in their respective Dockets;
2. Answer letters of inquiry from answers previously given; if no prior answer was available, simply acknowledge the letter;
3. Send complaints to defending railroads for answer;
4. Acknowledge receipt of section 4 applications with a notice of the Commission's absence from the city.<sup>22</sup>

In other words, virtually nothing new could go forward during the Commission's absence from Washington. As late as September, 1887, Cooley was writing in his diary:

I have today been very busy with correspondence. Our Secretary is so stupid a fool he keeps me anxious about matters in the office constantly. Wednesday [Sept. 7, 1887] in a letter he inclosed [a] copy of a petition which he said he had docketed, finding it all proper. This was a liberty on his part, and looking at the copy I saw it was one I should not have docketed. I immediately telegraphed him to do nothing in that case till he got a letter from me, and then wrote him that there were other matters involved in docketing a case besides those of form.<sup>23</sup>

On October 8, Cooley described the encounter he had had with Moseley back in April, adding that ever since then Moseley "has been afraid of

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20. See 27 Stat. 531 (1893), 29 Stat. 85 (1896), 32 Stat. 943 (1903), 36 Stat. 298 (1910).

21. J. MORGAN, *THE LIFE WORK OF EDWARD A. MOSELEY IN THE SERVICE OF HUMANITY*, at 31 (1913). Morgan maintains, and he quotes from correspondence to show, that a close and warm friendship eventually formed between Moseley and Chairman Cooley. *Id.* at 32-36.

22. *MINUTE BOOK*, *supra* note 8, at 28. Although the Memorandum refers to "Dockets" for applications and complaints, the first reference to a specific docket number in the minutes occurs in June of 1887. *Id.* at 66.

23. *COOLEY DIARY*, *supra* note 8, Sept. 10, 1887. In the same vein, he wrote on October 8, "Our Secretary is a great trial to me."



me” and “accomplishes his ends as far as possible without coming to me.”

Similar problems were inevitable with the first group of clerks employed by the Commission. The patronage reflected in the Moseley appointment was not an isolated case. All appointment and employment of personnel was treated as a matter of patronage, so that each commissioner was allowed to appoint one of the first five clerks.<sup>24</sup>

Yet, the volume of new work was daunting. Besides the flood of correspondence, the railroad industry in 1887 filed about 110,000 books, papers, and documents showing rates, fares, and charges, as well as copies of contracts or other arrangements for transportation.<sup>25</sup> Although the Commission’s First Annual Report claims that the tariffs had been indexed and “put . . . in order for reference,” a later assessment suggests that the papers were initially dumped on the floor of a vacant room and were not completely filed for three years.<sup>26</sup>

The Commission’s staff during its first year was quite small. There were no employees to offset the political appointees. The Commission’s Second Annual Report (for the fiscal year ending June 30, 1888) shows only eight clerks and two messengers on the payroll for twelve months, or a total of ten employees as of July 1, 1887. For the first two weeks in

24. CROSLAND, *supra* note 15, at 8-9. Chairman Cooley diplomatically characterized the Commission’s hiring “on personal knowledge of fitness.” Cooley to English, Apr. 16, 1887, LETTER BOOK, *supra* note 17, at 135. The Commission’s auditor complained to Chairman Cooley in August that three of his four clerks “seem willing enough but they are imbued with Washington ways which I find so very slow compared to the business like methods to be found in most railroad offices.” McCain to Cooley, Aug. 17, 1887, First Letter Book, I.C.C. Dept of Statistics, August, 1887 to March, 1888, Record Group 134, National Archives, Washington, D.C., at 35. Crosland adds that hiring on the basis of patronage generally continued until the creation of the civil service in 1896.

25. I.C.C. First Annual Report, 1887, at 24, *reprinted in* Report to Congress of the Secretary of the Interior for 1887, at 1094. CROSLAND, *supra* note 15, at 8, maintains that the majority of the new tariffs were filed in early April, 1887. However, Moseley was still acknowledging the receipt of tariffs from a major carrier like the Northern Pacific at the end of April. See Moseley to Hannaford, Apr. 30, 1887, LETTER BOOK, *supra* note 17, at 366; and other tariffs arrived from other carriers in May. See Hubbard to Cooley, May 10, 1887, *id.* at 411-13. The Commission initially required all carriers participating in joint tariffs to file separate tariffs. See Walker to Germond, Superint’g., N.Eng.Transf.Co., Apr. 4, 1887, *id.* at 30: “The fact that these documents are likely to be filed by the other corporations with which you are associated would not of itself relieve you from the obligations imposed by the Act. The foregoing are our general views, of first impression. . . .”

26. CROSLAND, *supra* note 15, at 8. Two of the original clerks were still alive when Crosland delivered his address.

The Commission created a separate Bureau of Statistics to monitor the tariffs and to provide statistical analyses in July, 1887, 1 I.C.R. 354-55 (1887), which in October soon undertook to collect data on potential cases of discrimination in violation of Section 4 of the act. See 1 I.C.R. 601 (1887). The Commission separated statistics from tariffs in the summer of 1888. CROSLAND, *supra* note 15, at 8.

April, 1887, the Commission had but one messenger and one clerk; the next four clerks joined the staff in the third week.<sup>27</sup>

There was insufficient appropriation for a much larger staff in the first year. The first appropriation of \$100,000 was for the fiscal year ending June 30, 1888, but was made available from February 4, 1887. The total expenditures for fiscal years ending June 30, 1887 and June 30, 1888 were \$113,000; thus, the Commission expended about \$13,000 in the three-month period of March 31 to June 30, 1887. Since the commissioners were each paid \$7,500 per year, and the Secretary received \$3,500 per year, the Commission paid out on the average only about \$900 per month in the first three months for all other expenses, including employees' salaries, travel, and office space, supplies and furnishings:

Total expenditures—3 mos.		\$13,000
Commissioners' salaries		
(5 x \$7,500 x 3/12)	\$9,375	
Secretary's salary		
(\$3,500 x 3/12)	875	
Sub-total		10,250
Balance for All Other Exp.		\$ 2,750

On the other hand, a small staff in the beginning was consistent with the overall manner in which the Commission took up its tasks, and the manner in which they envisioned the new commission would continue to function. They expected a mixture of formal and informal, but always personal involvement in the work of the agency, which is most closely analogized to the functioning of a new court.

## 2. CASE-BY-CASE APPROACH

Judge Cooley foretold that the new commission would proceed on a case-by-case basis even before the commissioners took their oaths of office. He "unofficially expressed his opinion" to a New York Times reporter on March 30, 1887,

that it would be impossible to interpret the law until cases making such interpretation necessary should come up in practice, and he thought it would be best for the commission to take up in order the questions as they should arise and determine what interpretation should be given to the provisions applicable to each case.<sup>28</sup>

Similarly, soon after being sworn, he answered a letter relating to the Commission's jurisdiction in the following manner:

Its functions, except in the special cases in which it is empowered to sus-

27. MINUTE BOOK, *supra* note 8, at 14. Crosland suggests that the Commission must have employed a temporary typist, since the first typewritten letter appears as early as April 18, 1887. CROSLAND, *supra* note 15, at 7. The first typewritten pages of the letter books appear on May 14, 1887.

28. New York Times, Mar. 31, 1887, at 5, col. 4.

pend the operation of the law, correspond to those of a Court, and it only speaks authoritatively when complaints are made that the law is violated.<sup>29</sup>

Since three of the five original commissioners had held judicial positions at the State level at some time in their lives, and a fourth had been counsel to a number of railroads,<sup>30</sup> it might have seemed inevitable just from their backgrounds and training that the initial Commission would have opted for a case-by-case approach to railroad regulation. Section 17 of the Act also required the Commission to adopt rules of practice that “[conformed], nearly as may be, to those in use in the courts of the United States.”<sup>31</sup> But, besides the statute and personal backgrounds that emphasized the settlement of legal disputes case-by-case, there were sound reasons for an initial case-by-case approach.

The report of the Cullom Committee in 1886, which fathered the Act to Regulate Commerce, had likened the new commission to a court that would enforce the rules prescribed by Congress prohibiting unjust practices. A commission could adjust differences between shipper and carrier and collect and publish accurate information concerning the affairs of the railroads.<sup>32</sup> This portion of the report ended with the following significant reference to the words of Judge Cooley:

The committee believe with Judge Cooley that this final solution is “likely to be found in treating the railroad interest as constituting in a certain sense a section by itself of the political community and then combining in its management the State, representing the popular will and general interests, with some definite, recognized authority on the part of those immediately concerned, much as State and local authority are now combined for the government of municipalities. Something of the sort would neither be unphilosophical nor out of accord with the general spirit of our institutions.”<sup>33</sup>

Here, attention must be given to the words, “with some definite, recognized authority on the part of those immediately concerned.” The only such authority to reach unjust practices affecting individual shippers throughout the nation at that time was judicial authority.

The unjust practices affecting shippers had to be found and documented. A forum had to be in place for complaints to be heard and decided. Any part of the entire “vast extent of our country” provided a potential setting for the Commission’s supervision and correction of rail-

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29. Cooley to Bishop Knickerbocker, Apr. 18, 1887, LETTER BOOK, *supra* note 17, at 157, 1 I.C.R. 21 (1887).

30. Chairman Cooley and Commissioner Schoonmaker had been State court judges; Commissioner Morrison had served as the clerk of a county court; and Commissioner Walker’s firm had a large railroad practice. See Miller, *supra* note 6, at 592-600.

31. Sec. 17, 24 Stat. 386 (1887).

32. See *Report of the Senate Select Committee on Interstate Commerce*, 49th Cong., 1st Sess. 213-15 (1886).

33. *Id.* at 215, Appendix at 12.

road rates. In these circumstances, it necessarily would have to await cases brought to its attention to give it a practical basis for action.<sup>34</sup>

Under the new statute, the Commission was an alternative forum to a court for any shipper who believed he was charged unreasonable or discriminatory rates. A person seeking damages was required to elect whether to proceed in court or before the Commission;<sup>35</sup> and its orders then were not self-enforcing, but only enforceable in court.<sup>36</sup>

At the same time that the statute created the commission as an alternative to the courts to hear and determine complaints, it gave the new agency superintending powers over the railroads that no court, except perhaps as receiver in bankruptcy, possessed. The Commission was authorized "to inquire into the management of the business of all common carriers subject to the provisions of this Act." The Commission was both required "to keep itself informed" and authorized to obtain "full and complete information" from the carriers. It need not await the filing of complaints before it could proceed, since it was also granted "full authority and power at any time to institute an inquiry, on its own motion . . . as to any matter or thing concerning which a complaint [was] authorized to be made . . . or concerning which any question [might] arise under any of the provisions of the Act, or relating to the enforcement of any of the provisions of this Act."<sup>37</sup> It was then empowered to make any order as if it had been appealed to by complaint or petition (except an order for the payment of money).<sup>38</sup> However, these were powers that no group of five men without precedent or regulatory experience could begin to assert.

Chairman Cooley's experience did extend to a recognition of a difference between the administrative process and the judicial process as a matter of constitutional law. He had written the following on constitutional principles:

Different principles are applicable in different cases, and require different forms and proceedings; in some they must be judicial; in others the govern-

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34. See Chairman Cooley's detailed description of the large task confronting the Commission, and his attempt to educate a merchant on the legal and practical necessity for a certain minimum informational content of a complaint, *reprinted at* 1 I.C.R. 408-10 (1887).

35. See § 9, 24 Stat. 382 (1887).

36. See § 16, 24 Stat. 385-86 (1887). If a railroad refused to file rates, the Commission could only apply under the 1887 statute to a Federal court for a writ to compel the filing or for an injunction to prevent them from receiving or transporting the affected traffic. Sec. 6, 24 Stat. 381 (1887). Violations of the act were misdemeanors punishable by fine in any district court. Sec. 8, 24 Stat. 382 (1887); there was also the possibility of imprisonment of railroad officials for acts of discrimination. Sec. 10, 24 Stat. 382 (1887).

37. Sec. 12, 24 Stat. 383 (1887).

38. Sec. 13, 24 Stat. 384 (1887). For discussion of the Illinois statute of 1873, which created the precedent for a strong commission that would represent the shipper in court, see MILLER, RAILROADS AND THE GRANGER LAWS, at 93-96, 197 (1971).

ment may interfere directly, and *ex parte*. . . .<sup>39</sup>

Or, as he had stated more succinctly on another occasion, "Administrative process of the customary sort is as much due process of law as judicial process."<sup>40</sup> Chairman Cooley would have been the first to insist, however, and with justification, that general doctrines of constitutional administrative process do not automatically translate themselves into practical rules of conduct for a national railroad industry without prior regulatory experience; the case-by-case approach to regulation could bring that experience.

The Act to Regulate Commerce was an enactment in which Congress, as Judge Friendly much later so aptly said, simply told the agency to do its best without any listing of its powers or even scanty directions on how to exercise them.<sup>41</sup> A case-by-case approach was called for where the agency entered *terra incognita* and "did not know enough to draft a useful rule." The agency in such cases must wait until its "consideration of a problem has progressed to the point at which a specific legal standard has crystallized." The particular case in the meantime would afford a stimulus for action that otherwise might be long delayed.<sup>42</sup>

A significant benefit accruing to the Commission from its Chairman's judicial bent was the highly cultivated ethical sensibility that he imparted to his colleagues and imbued in his office. Cooley's resistance to profiting from his office was tested quite early and more than once. He turned down a payment of \$100,000—a very large sum in that period—for the use of his name in an investment scheme for one year. Then in October of 1887 he was offered the presidency of a major railroad. He initially responded, 1) he would only leave "honorably and without any just imputation because of my abandonment of the public service;" and 2) he must be assured he was "wanted on strictly business principles" and not "to give respectability to schemes I do not approve."<sup>43</sup> He declined the ap-

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39. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA*, at 277 (4th ed. 1931).

40. Opinion by Cooley, then Associate Justice, for the court in *Weimer v. Bunbury*, 30 Mich. 201, 214 (1874).

41. The "Great Divide" between the giving of instructions by Congress and simply telling the agency to do its best came in the Transportation Act of 1920, ch. 91 § 400, 41 Stat. 456, 474 (1920). See FRIENDLY, *BENCHMARKS*, at 96 (1967) (hereinafter cited as *BENCHMARKS*).

42. *Id.* at 146, referring specifically to Securities and Exchange Commission and Federal Trade Commission matters, but applicable more generally.

Even a rather severe critic of the Commission's performance after 1910 agrees that "the great problem" of the first decades of the Commission was the fairness of rates vis-a-vis one shipper and another or one location and another. See *ENTERPRISE DENIED*, *supra* note 3, at 175.

43. COOLEY DIARY, *supra* note 5, Oct. 5-6, 1887. The Chairman returned free passes that were sent him by the railroads with a simple thank you, but "the Commission never makes use of them." Cooley to Waite, May 14, 1887, *LETTER BOOK*, *supra* note 17, at 462, 463.

pointment on October 17, stating in his diary, "that I could not now honorably and with justice to my associates give up my present position."

### 3. DAILY ROUTINE

The cold and wet weather continued on April 1, 1887, when the commissioners met promptly at 10 a.m. for their first public session. They resolved on motion of one of their members that their "official hours," or "hours of meeting," each day should be from 10 a.m. to 1 p.m. and from 3 p.m. to 5 p.m.; and they "sat" during those hours this first day.<sup>44</sup> Counsel for four railroads presented applications for relief from Section 4 of the new statute;<sup>45</sup> and the Commission ordered it to be placed on file.

The next day, April 2, 1887, was Saturday, but the commissioners again met at 10 a.m. One of the first items of business was that the Commission ordered that it would issue no orders at the request of railroads or shippers in the absence of a verified petition:

That application made for the official action of the Commission shall be made by petition, which shall set forth the facts on which they are founded and be verified by the oath of the applicant or of some authorized agent or attorney.<sup>46</sup>

"The Commission sat all day and heard applications under the long and short haul clause" of Section 4.<sup>47</sup> Applications were received from three railroads for relief from the requirements of Section 4. A representative of the Atlanta Board of Commerce appeared to support the railroads' applications. In the afternoon, the Commission entertained a formal request from the major southern railroads for temporary suspension of the long and short haul clause of Section 4;<sup>48</sup> and representatives of their association were heard on the joint application.<sup>49</sup> The case-by-case approach on the second day of the Commission's existence as a collegial body had spawned a broadly based proceeding of a type that we today might associate with rulemaking.

Much of April 4 was spent in examining the qualifications of the several applicants for the position of Secretary.<sup>50</sup> April 5 was "the first day on which we have power under the law to make orders and we made some," temporarily relieving the territory embraced in the petition of the

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44. COOLEY DIARY, *supra* note 5, Apr. 1, 1887; MINUTE BOOK, *supra* note 8, at 4.

45. The "long and short haul clause" of Sec. 4, 24 Stat. 380 (1887), provided that no greater charge should be made for the shorter than for the longer distance between two points, unless the Commission authorized a departure from the general rule.

46. MINUTE BOOK, *supra* note 8, at 5-6, 1 I.C.R. 15 (1887).

47. COOLEY DIARY, *supra* note 5, Apr. 2, 1887.

48. MINUTE BOOK, *supra* note 8, at 5.

49. Argument of Milton H. Smith on behalf of the Southern Railway and Steamship Assn., reprinted in LIGHT ON THE LAW, *supra* note 7, at 191-207.

50. COOLEY DIARY, *supra* note 5, Apr. 4, 1887.

members of the southern railroads' association from the requirements of Section 4.<sup>51</sup> The 90 day order, released on April 6, established a schedule of hearings for later in April and early May at four different Southern cities (Atlanta, Mobile, New Orleans, and Memphis), and invited interested persons to appear or to submit written statements.<sup>52</sup> Much of April 6 and 7 was spent reviewing applications for employment before the commissioners dispersed for the Easter holiday.<sup>53</sup>

The Commission's Minutes now begin to reflect a pattern in the Commission's sessions or sittings. The Minutes report that each day at 10 a.m. the "Commission met pursuant to rule," that the Commission then went into "Recess," and that thereafter it "reassembled pursuant to rule." At the end of the day, as the Minutes state, the Commission "adjourned for the day."<sup>54</sup>

The phrase "General Session" first appears in the Minutes only in mid-May after the Commission had held its hearings in the South and had returned to occupy its new headquarters in the Sun Building. On May 17 the Commission ordered that it would adhere to the following daily order of business while in Washington:

1. A private session at 10 a.m. for reception and disposition of new business;
2. A public session at 11 a.m. for hearings assigned and the consideration of any other matters that may be presented; and
3. A private session at 3 p.m. for disposition of unfinished business and for conference.<sup>55</sup>

The revisions of May 17 reflect several new developments in Commission practice. Prior to that date, all sessions were public; the commis-

51. *Id.* Apr. 5, 1887.

52. 1 I.C.R. 15 (1887), *reprinted in* LIGHT ON THE LAW, *supra* note 7, at 208-10. On April 23, 1887, the Commission suspended the Fourth Section for 75 days at the request of the transcontinental railroads. 1 I.C.R. 27 (1887), *reprinted in part in* LIGHT ON THE LAW, *supra* note 7, at 214-15.

The Commission issued its final decision on the southern railroads' petition on June 15. Judge Friendly characterized this "beautiful" decision as a "model for administrators." His discussion of the decision, the subsequent history of the administration of Section 4, and the resulting interplay with Congress, are available in his Holmes Lectures, and will not be repeated. See *Federal Administrative Agencies*, *supra* note 10, at 883-90. For other parts of these thoughtful lectures, see Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards*, 75 HARV. L. REV. 1055 and 1263 (1962); portions also appear in BENCHMARKS, *supra* note 41.

53. COOLEY DIARY, *supra* note 5, Apr. 6-7, 1887. "The importunities of office seekers are continuous & desparate." *Id.* Apr. 6, 1887.

54. See also Cooley to Parsons, Apr. 7, 1887, LETTER BOOK, *supra* note 17, at 63: "The commission has now adjourned for 8 days." Moseley to Rev. Wheeler, May 10, 1887, *id.* at 410: "The Commission is not now in session, but convenes again May 16th, and the submission of any papers cannot be made until that date."

55. MINUTE BOOK, *supra* note 8, at 46.

sioners now saw the need for time for reflection, consultation, and the assignment of work among themselves. In a "public session," the doors of the Commission remained open each day for any interested person to request relief orally or to place his views in the files. Applications for Commission orders, as we noted earlier, had to be presented by verified petition, or, as the Chairman explained, "Petitions for action by the Commission require to be verified as for judicial action."<sup>56</sup> The Commission was serving much like a low level court.

Prior to May 17, the Commission's Minutes do not at all reflect the major work of that period relating to the disposition of the large amount of correspondence received each day. Much of this had been handled by the Chairman; but there was now clearly too much for one person. After May 17 the Minutes show that incoming letters are being assigned and recorded for disposition by named commissioners.

The commissioners held fast to a belief that each piece of correspondence, except for routine acknowledgment of the receipt of letters or the repetition of a prior response, called for their personal involvement. The commissioners looked upon each letter that requested an interpretation or an opinion as in itself a potential case for decision. As late as 1889, the Commission reported to Congress that the commissioners still:

personally examine all complaints received, hear the trial of all controversies, conduct investigations, prepare all reports made, decisions rendered, and orders and circulars issued, allow subpoenas *duces tecum*, carry on the correspondence relating to the action and duties of carriers and the rights of shippers, and various other things.<sup>57</sup>

Such a vast, self-imposed mandate necessarily required some self-imposed limitations. The next section discusses the rules of practice and procedure and the limitations that the Commission developed to convert the avalanche of correspondence into substantive rulings.

#### 4. PRACTICE AND PROCEDURE

Lawyers practicing in the Federal courts of the 1880's were governed by the numerous equity rules prescribed by the Supreme Court and the "practice, pleadings, and forms and modes of proceeding" in actions at law in the State in which each Federal court was sitting.<sup>58</sup> Federal equity practice assumed that the lawyer was familiar with the traditional

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56. Cooley to Wilson, Apr. 4, 1887, LETTER BOOK, *supra* note 17, at 17.

57. I.C.C. Third Annual Report at 3 (1889). This report was the first to be submitted by the Commission directly to Congress and not through the Secretary of the Interior.

58. The Equity Rules in effect in 1887 had been in effect since 1842, *see* 42 U.S. (1 How.) xli (1843), and would not be revised until 1912. *See* Rules of Practice for the Courts of Equity of the U.S., 226 U.S. 627. The practice in actions at law was governed by the Conformity Act of 1872, ch. 255, 17 Stat. 196 (1872).



chancery practice in the States; the Federal rules modified or clarified, rather than rewrote the traditional practice. Federal practice in the Victorian period, therefore, maintained the separation of law and equity and the role of the many forms of writs and pleadings associated with the two sides of the court.

The Act to Regulate Commerce freed the new commission from the technicalities of common law practice and procedure. The statute described a wholly new and simplified "complaint" practice. It authorized the Commission to accept a complaint filed against a railroad in the form of a simple "petition, which shall briefly state the facts." It was then the Commission's duty to forward "a statement of the charges thus made" to the defending railroad(s) and to call upon the railroad(s) "to satisfy the complaint or to answer the same in writing within a reasonable time." If the complaint were not satisfied, or there was any reasonable ground for investigation, the Commission was required "[to investigate the matters] complained of."<sup>59</sup>

Similarly, the statute laid down new rules for the courts to follow when enforcing a Commission order. The enforcing court was required to proceed "as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises."<sup>60</sup>

Chairman Cooley at once undertook to channel the flow of correspondence into the statutory stream of complaint and satisfaction or complaint and answer authorized by the statute. He treated each piece of shipper correspondence as an "informal complaint," if it raised matters within the jurisdiction of the Commission and set forth sufficient facts to raise an issue for decision. It might be returned for verification, but if it failed in one of the more essential respects, he treated the letter as a potential complaint to be shaped and guided, or discouraged (if clearly outside the Commission's jurisdiction) to further the broad purposes of the new statute.<sup>61</sup>

The Chairman treated the letters and telegrams from carriers more formally, when they sought a formal Commission order. Here, as we

59. Sec. 13, 24 Stat. 384 (1877).

60. Sec. 16, 24 Stat. 385 (1877). The Commission's findings were "prima facie evidence of the matters therein stated" in the enforcing court.

61. Chairman Cooley wrote in his diary on August 12, 1887, "I have sent off a great batch of letters today in answer to inquiries & complaints in railroad matters." On August 15, he sent a rather lengthy letter describing the "powers and procedure of the Commission" in which he used "letter" and "complaint" virtually interchangeably, or brought them together in the phrase "complaining letters." He notes that the Commission ideally needs and requires that "complaints be verified in proof of genuineness and good faith, and that they recite sufficient of the facts to make out an apparent case of injustice;" upon filing, such a document then becomes a "formal complaint." 1 I.C.R. 408, 409 (1887).

noted earlier, he insisted that the carriers file verified petitions. He continually encouraged the carriers in doubtful cases to assume that they were subject to the requirements of the new statute.

The Commission adopted its first Rules of Practice on May 25, 1887, or 55 days after its organization.<sup>62</sup> These rules governed the procedure to be followed on the filing of formal petitions and complaints seeking formal Commission action. Petitions seeking relief from Section 4 had to be verified. Complaints also had to be filed in verified form and "briefly state the facts which are claimed to constitute a violation of the Act." The rules then essentially followed the path prescribed by the statute, namely, that the Commission would cause a copy of the complaint to be served upon each common carrier complained against, such carrier would have to file a verified answer within 20 days (or less if the Commission ordered a shorter period for answer), and, if the complaint remained unsatisfied, the Commission would hold a hearing. However, as the Commission stated in its Second Annual Report, "The great majority of complaints . . . have been laid before the Commission informally,"<sup>63</sup> that is, outside the hearing process and only in an exchange of correspondence with the Commission's serving essentially as a mediator.<sup>64</sup>

The correspondence was substantial in the early months and physically exhausted the commissioners, particularly the Chairman. His diary contains numerous references to "busy days" or "hard day's work on Commission business."<sup>65</sup> On August 17, 1887, he wrote, "I have had two very busy days this week, the correspondence of the Commission, all of which is sent me now, occupying my time to the extent of human endurance. . . . The work of the Commission grows to threatening magnitude."

Chairman Cooley's goal in every case was to obtain a plain statement of the facts from complaining shippers, and through persuasion, seek to obtain redress from the railroads. In his writings of 1883, Cooley had defined the role of a railroad commissioner as a "friendly umpire between the public on the one hand and the railroads on the other."<sup>66</sup>

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62. MINUTE BOOK, *supra* note 8, at 56-60, I.C.C. First Annual Report, 1887, App. D, reprinted in 1 I.C.R. 841 (1887). The commissioners had corresponded with the railroad commissions of New York and Massachusetts. See Walker to Ry.Comrs.of N.Y., Apr. 4, 1887, LETTER BOOK, *supra* note 17, at 20; Cooley to Clerk of Bd.of Ry.Comrs.of Mass., Apr. 15, 1887, *id.* at 118.

63. I.C.C. Second Annual Report, 2 I.C.R. 249, 253 (1888).

64. Cooley had written in 1874 long prior to the creation of the Commission that there was no need for "a judicial order after hearing for every action of government that touches the right of individual citizens." *Weimer v. Bunbury*, *supra* note 40, 30 Mlch. 201, 215 (1874).

65. See, e.g., COOLEY DIARY, *supra* note 5, Apr. 4, 1887; Apr. 6, 1887; May 9, 1887 (covering Apr. 13-24); Aug. 17, 1887; and Sept. 10, 1887.

66. Quoted in Jones & Alan, *supra* note 10, at 610.

His guiding principle was "equality of rights, privileges, and capacities."<sup>67</sup> Consequently, he could report in the First Annual Report, that complaints against carriers were "made as informal as should be consistent with order and regularity" and essentially in the form of a verified petition that set forth the facts:

In no case has the Commission declined to given attention to a complaint because of its being informal or imperfectly presented; but when not in shape for its action, if the facts indicated a probable grievance, it has opened correspondence with the carrier with a view to redress. In the majority of cases the correspondence has resulted in satisfactory arrangement.

The Chairman concluded, that, even when hearings were held:

It is a pleasure to note that in this informal mode of procedure the parties have in general most heartily co-operated, and that they have been very liberal in agreeing upon the facts when it is practicable to do so, thereby materially shortening the hearings and making them assume more the form of amicable contentions.<sup>68</sup>

By the beginning of December, 1887, the Commission had docketed only 103 formal complaints.<sup>69</sup>

The Commission, as noted above, did not dismiss complaints for reasons of improper form or incompleteness, but rather wrote to complainants requesting them to correct deficiencies or to supply further information.<sup>70</sup> On the other hand, dismissal was the proper course, when the complaint both "failed to state clearly any facts upon which we can intelligently [sic] act, or to present a case within our jurisdiction;"<sup>71</sup> or if a railroad's petition did not set forth sufficient facts "for the purposes of an intelligent judgment upon the situation."<sup>72</sup>

So far we have not discussed very many limitations on the official disposition of informal correspondence. It reviewed all correspondence and forwarded informal complaints that made a prima facie case of unfairness to the railroads. One limitation that it did follow was that it would not itself decide the lawfulness of a particular rate in the form of a hypothetical case contained in informal correspondence. Chairman Cooley explained:

It is not the province of the Commission to express opinions generally as to what railroad companies may or may not do, or to be advisers for them in matters of statutory construction. The Commission deals only with practical questions, & undertakes to settle only actual controversies. Opinions upon

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67. See, e.g., T. COOLEY, CONSTITUTIONAL LIMITATIONS, 393 (1883).

68. I.C.C. First Annual Report, 1887, at 26, 27-28, reprinted in Report of the Secretary of the Interior, 1887, at 1096, 1097-98.

69. *Id.* at 112, reprinted in Report of the Secretary of the Interior, 1887, at 1182.

70. See Cooley to Fusz, Apr. 19, 1887, LETTER BOOK, *supra* note 17, at 197. The same rule applied to railroads. See Cooley to Anderson, Apr. 16, 1887, *id.* at 143-44, if the petition is unverified, "it would be necessary to return it for that important formality."

71. Walker letter of Apr. 18, 1887, *id.* at 172.

72. Cooley to Anderson, *supra* note 71.

abstract questions would be without authority, & for that reason if for no other should not be officially given. But it is always possible, also, that they may never become practical questions, or if they do, that they will assume such shape and be attended by such circumstances as to make previous views inapplicable and misleading.<sup>73</sup>

The Commission, therefore, consistently refused to decide issues relating to the lawfulness of particular rates that "the railroad companies shall or shall not make to any class or organization of persons" in advance of the carriers' having filed such rates; it would entertain only "actual controversies when the rates actually made are suffered by the parties."<sup>74</sup>

Commissioner Schoonmaker took a somewhat different tack on hypothetical questions, but with the same result. He advised a school president, who had requested information regarding the reduced rates allowable to students:

The responsibility should be taken in the first instance by the Railroad Companies and then if complaint be made this Commission can pass upon it but it can not give opinions that are truly abstract.<sup>75</sup>

The commissioners also avoided expressing informal opinions, if they believed that the question might later arise in a more formal setting and they might then be asked for a formal opinion.<sup>76</sup> Some questions "[c]ould not properly be answered by the Commission on *ex parte* presentation. They are questions which might become the subject of lawsuits."<sup>77</sup>

The Commission strictly applied the rule calling for formal petitions for relief from Section 4 of the Act.<sup>78</sup> The petition for such relief was expected to contain "the material facts connected with your application, and the precise relief or decision desired, verified by your affidavit."<sup>79</sup> Chairman Cooley continually insisted that an application "should be presented

73. Cooley to DeLever, Apr. 1, 1887, LETTER BOOK, *supra* note 17, at 5-6; *see also* Cooley to Aglar, Apr. 4, 1887, *id.* at 19; Cooley to Hall, Apr. 4, 1887, *id.* at 28; Cooley to Smith, Apr. 14, 1887, *id.* at 70; Cooley to Todd, Apr. 14, 1887, *id.* at 75; Cooley to Harte, Apr. 14, 1887, *id.* at 91, "legal question . . . might become the subject of a suit or of a formal proceeding;" Cooley to Kercheral, Apr. 14, 1887, *id.* at 102, "would be binding on no one."

74. Cooley to Henderson, Apr. 14, 1887, *id.* at 77, 1 I.C.R. 18 (1887); Cooley to Fulton, Apr. 10, 1887, *id.* at 139; *and see* Cooley to Belknap, Apr. 15, 1887, *id.* at 134, "The railroad companies should determine their policy for themselves."

75. Schoonmaker to Mollison, Apr. 7, 1887, *id.* at 60.

76. Schoonmaker to Patrick, Apr. 6, 1887, *id.* at 51, "The Commission cannot express opinions in advance upon questions that may come before it for determination."

77. Cooley to McDonald, Apr. 14, 1887, *id.* at 71.

78. Special rule adopted April 2 and Rule No. 2 adopted May 25.

79. Walker to Sargent, Grand Master, Bro. of Locom. Firemen, Apr. 6, 1887, LETTER BOOK, *supra* note 17, at 49.

by verified petition,"<sup>80</sup> even when Leland Stanford, president of the Southern Pacific, urgently requested such an order.<sup>81</sup> Cooley repeated that the Commission "still hold that if . . . you call for authoritative action, a case must be formally presented by petition and then investigated by them."<sup>82</sup> Cooley added in responding to another railroad's request, "This has been required in all Cases, and seems to be essential to the orderly and proper conduct of the business of the Commission."<sup>83</sup>

Of course, if the railroads were to be heard on their applications for relief from Section 4, the shipper also would be given an opportunity to be heard. The commissioners often volunteered to notify shippers should the railroads they were using apply for Section 4 relief.<sup>84</sup> And, if unusually high rates were brought to their attention in their consideration of the application for temporary relief, they would bring such matters to the attention of the affected railroad for correction. For example, the wool growers argued that the rates on wool from local stations in Oregon and elsewhere were much higher than from major shipping points like Portland; Chairman Cooley wrote the affected railroad, that the Commission members,

suggest the propriety of your at once endeavoring to come to an understanding with the wool growers in respect to this business, or arranging for a hearing upon the subject before the Commission at an early day, and before the expiration of the seventy-five days names in the temporary order. . . .<sup>85</sup>

The Commission insured the widest possible notice to shippers of its proceedings involving Section 4 by ordering the railroads, 1) to publish notice of the petition in two newspapers of general circulation before filing the petition with the Commission, and 2) after filing, to post copies of orders granting temporary relief, which also established hearing schedules, with the tariffs at all stations.<sup>86</sup> The posting requirement was an innovative use of an implied power to condition an order granting temporary relief from Section 4 ("it is a condition of this order"); and it reflected an intent to notify the entire shipping community using the line and to encourage the widest possible participation in its proceedings, a matter it further encouraged by scheduling several of its hearings outside Washington.

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80. Cooley to Winter, Apr. 1, 1887, *id.* at 8; and see Schoonmaker to Spring, Apr. 15, 1887, *id.* at 130.

81. See exchange of telegrams and correspondence, Apr. 4-7, 1887, 1 I.C.R. 16-17 (1887), reprinted in *RAILWAY AGE*, *supra* note 7, Apr. 15, 1887, at 267.

82. Cooley to Stanford, Apr. 7, 1887, *LETTER BOOK*, *supra* note 17, at 55, 1 I.C.R. 17 (1887).

83. Cooley to Anderson, Apr. 5, 1887, *LETTER BOOK*, *supra* note 17, at 36.

84. Cooley to Fulton, Apr. 1, 1887, *id.* at 1; Cooley to Hall, Apr. 7, 1887, *id.* at 56.

85. Cooley to C.H.Prescott, Gen'l Mgr., Oregon, Ry. & Navig. Co., *id.* at 62-63.

86. See, e.g., *Re Southern Ry. & S.S. Ass'n.*, 1 I.C.R. 15, 16 (1887); *Re Transcontinental Roads*, 1 I.C.R. 27, 28 (1887); *Re Atchison, T. & S.F.R.R.Co.*, 1 I.C.R. 58, 60 (1887).

Temporary orders were used solely for "provisional action only, and to give all parties concerned an opportunity for as early a hearing as may be practicable."<sup>87</sup> Moseley assured one shipper at the direction of the Commission,

that temporary orders . . . are not to be considered as indicating the result which the Commission may arrive at from more serious deliberations.<sup>88</sup>

A temporary order in the meantime would "prevent derangement of business" of the railroad, while the hearings occurred.<sup>89</sup>

The Commission issued very narrowly drawn temporary Section 4 orders. They applied only to the railroads making applications for them, and then only to the specific traffic described in the individual applications rather than to all the applicants' traffic.<sup>90</sup> And temporary relief was not automatically given simply for the asking; Commissioner Walker explained to one railroad:

[Y]ou do not show in your petitions, or prove by evidence, any pressing exigency or imperative urgency for a temporary order, such as has been shown in the not very numerous cases in which such orders have been made. They have been withheld in other instances upon that ground.<sup>91</sup>

The Commission's evidentiary rules, like its rules of practice and procedure, departed from the judicial norm of the day. Chairman Cooley wrote that the Commission at its hearings outside Washington "will not care to take proofs in any formal way." The Commission accepted opinion evidence from railroad officials, "but the Commission ought to be able to see from the petition itself that it is so," whether or not the opinion be well-founded.<sup>92</sup>

## 5. ASPECTS OF JURISDICTION

Acting like a court, but without judicial precedent, the Commission thought it best to avoid too early a construction of its own role in the scheme of things. It described its jurisdiction whenever an issue was formally presented, but it would not go out of its way to answer hypothetical

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87. Cooley to S. Bernheimer & Sons, Apr. 6, 1887, LETTER BOOK, *supra* note 17, at 42; see also Cooley to Proctor & Gamble, Apr. 14, 1887, *id.* at 72; Moseley to Donohue, May 19, 1887, *id.* at 77.

88. Moseley to Fell, May 19, 1887, *id.* at 90.

89. Cooley to Firth, Apr. 6, 1887, *id.* at 46.

90. Rule No. 2 of the I.C.C. Rules of Practice, 1 I.C.R. 841 (1887); Bragg to Knapp, Apr. 7, 1887, LETTER BOOK, *supra* note 17, at 67; Cooley to Axtell, Apr. 16, 1887, *id.* at 145-46.

91. Walker to Clarke, Apr. 23, 1887, *id.* at 255-56. See also Cooley to Anderson, *supra* note 71; Cooley to Axtell, *supra* note 91; Walker to Aiken, Apr. 18, 1887, LETTER BOOK, *supra* note 17, at 149. In the last letter, Walker helpfully added that, "It would seem from your statements," that the Section 4 order on behalf of the Southern Railway and Steamship Association "applies to all your inter-state business."

92. Cooley to Johnson, Apr. 14, 1887, *id.* at 79; see also Cooley to Anderson, *supra* note 71 and Cooley to Axtell, *supra* note 91.

inquiries. On the other hand, on numerous occasions, the Commission's Letter Book reflects a conscious effort to define jurisdiction, particularly vis-a-vis the court system, and to provide guidance to the public regarding these questions.

Chairman Cooley led the way on this hesitant approach to jurisdictional questions, but he did not act alone. He first consulted his colleagues. For example, on the first day of conducting public business, the Chairman advised one correspondent that he had laid his inquiry "before the members of the Commission," and that they had decided that no opinion could be expressed, since the "questions which are presented by it seem to be questions rather for the Courts than for the Commission."<sup>93</sup>

The commissioners typically advised an interstate railroad, when it inquired whether it was subject to the Commission's jurisdiction, that the Commission would "assume" the carrier was subject to the new act and that it should file appropriate rates. These were tentative views subject to later revision.<sup>94</sup> Thus, the Commission advised the independent express companies to file rates until a hearing could be held on the jurisdictional question of whether such companies were subject to the new Act.<sup>95</sup> After hearing, the Commission held that the independent express companies were not subject to its jurisdiction.<sup>96</sup>

The Commission drew a jurisdictional line, as we noted earlier, be-

93. Cooley to McDonald Bros., Apr. 1, 1887, LETTER BOOK, *supra* note 17, at 3.

94. See Walker to Falkenbach, Apr. 7, 1887, *id.* at 59; Cooley to Achevy, Apr. 14, 1887, *id.* at 100. The commissioners might advise, that "[t]he foregoing are our general views, of the first impression, upon the questions presented in your letter. The matter will be more formally considered if you should see fit to present a verified petition." Walker to Germond, *supra* note 25.

On the other hand, there was no general policy, that "informal opinions were to be given to railroads, but not to shippers," as Kolko alleges, *supra* note 4 at 53. Kolko cites but one exchange of correspondence to support this charge, and even this one is miscited. Briefly, the president of a midwestern railroad had written the Chairman to explain that he had recently established new through rates between Chicago and Minneapolis-St. Paul on an independent and lower basis than his competitors (thereby avoiding any need for rebates), when the others had nearly doubled the former rates and presumably would continue to give rebates. Cooley wrote a simple note of encouragement, while at the same time condemning rebates:

Dear Sir—Yours of July 27th is before me. If you have carefully looked over the ground & made safe calculations, you are no doubt right in the course you have decided upon. It is greatly to be regretted, I think, that the roads could not come to a common understanding what rates they could afford to accept, & then fix such rates & abide by them. The mischief of rate wars & secret arrangements does not end when they are stopped, but continues indefinitely. Very resp'y yours. T.M. Cooley, Chairman.

Cooley to Stickney, Aug. 10, 1887, File No. 1119, Files of the I.C.C. Operating Division, *supra* note 19.

95. Cooley to Chany, Apr. 4, 1887, LETTER BOOK, *supra* note 17, at 25, "until such hearing is applied for, the Commission will assume that the law does apply to such companies;" Schoonmaker to Smith, Apr. 5, 1887, *id.* at 37, "until a hearing upon the question it will be assumed that the law applies to Express Companies."

96. Re Express Companies, 1 I.C.R. 677 (1887). The Hepburn Act, ch. 3591, 34 Stat. 584 (1906), amended the Act to Regulate Commerce to include express companies within the carri-

tween deciding cases and dictating specific rates that the railroads must charge in advance of publication. It would not assume any jurisdiction to authorize discounts or other concessions in freight rates to individuals, when freight agents requested it to authorize such concessions;<sup>97</sup> and it would not decide whether particular persons or classes of persons were entitled to free or reduced rate transportation under Section 22 of the Act. Here the Commission thought it best to have such questions decided initially by the railroads and to await any complaints resulting from particular decisions. At the same time, it assured correspondents that no penalties would be assessed against a railroad that made such decisions for itself: "Penalties are for wilfull or reckless disregard of law; not for errors of judgment."<sup>98</sup>

The Commission departed from its hands-off role under Section 22 in some cases. For example, it typically responded to inquiries about religious ministers and teachers that railroads had a "right" to grant reduced rates and special privileges to such persons.<sup>99</sup> Commissioner Schoonmaker rather weakly explained that this advice was given, since in his view such persons "cannot conveniently be represented before this Commission."<sup>100</sup>

In one case, the Commission greatly narrowed the scope of Section 22 so as to preserve a broad jurisdiction over rail passenger fares. Section 22 then provided "that nothing in this Act shall apply to the issuance of mileage, excursion, or commutation passenger tickets." A railroad argued that the section, therefore, excluded all such tickets from the discrimination provisions of the statute, and thus allowed it to grant special rates or privileges to any class of persons, such as traveling salesmen ("commercial travelers"). Commissioner Morrison writing for the Commission, after "he had changed his mind 17 times about it,"<sup>101</sup> dictated an opinion one Sunday to a stenographer, that the exclusion applied only

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ers made subject to the Act. *See also* American Express Co. v. United States, 212 U.S. 522 (1909).

97. *E.g.*, Cooley to Finley, May 16, 1887, LETTER BOOK, *supra* note 17, at 471.

98. Cooley to Harrison, Apr. 18, 1887, *id.* at 163; *see also* Cooley to Bedell, Apr. 17, 1887, *id.* at 93; Schoonmaker to Wheeler, Apr. 23, 1887, *id.* at 281.

99. Cooley to Bishop Knickerbocker, Apr. 18, 1887, *id.* at 157, 1 I.C.R. 21 (1887); *see also* RAILWAY AGE, *supra* note 7, Apr. 22, 1887, at 282-83; Cooley to Bishop Gillespie, Apr. 19, 1887, LETTER BOOK, *supra* note 17, at 190.

100. Schoonmaker to Rev. Hasselquirs, Apr. 23, 1887, *id.* at 285-86. Schoonmaker even expanded the definition of "minister" in response to another inquiry: "There is no doubt of the right of the Railroad Companies to grant special rates to Ministers of religion and in deciding in good faith that Missionaries are ministers of religion. . . ." Schoonmaker to DeGruff, Apr. 16, 1887, *id.* at 169-70; *see also* Schoonmaker to Wheeler, *supra* note 99, at 280-81.

101. COOLEY DIARY, *supra* note 5, July 19, 1887. Morrison wrote the opinion after Cooley had encouraged him to sit down and write; Cooley then pronounced the opinion "a very good one."



to the "issuance" of such tickets but not otherwise. He thereby avoided the carrier's construction of the section, which in effect would have exempted from the reasonableness and discrimination sections "all that relates to passengers."<sup>102</sup>

The Commission also typically construed the statute informally at the request of other government officials. For example, the Commission advised the Michigan Commissioner of Railroads that the carriers may grant free passes to State railroad commissioners.<sup>103</sup> It also advised the Secretary of the Interior whether government contractors qualified for reduced rates under Section 22 in "deference to a department of the government."<sup>104</sup>

The letter from General Black, Commissioner of Pensions, placed the Commission in a quandary. He asked whether the railroads could legally continue to afford half fares to disabled volunteer soldiers traveling from one national home to another. The letter raised an issue clearly outside Section 22, but it originated from a government official. Chairman Cooley responded that the construction of the statute was a "judicial act, involved in the decision of some controverted question," which required the filing of a complaint. However, he added, "If the fair meaning of the second section" of the Act was that the giving of a half-rate is "the allowance of special rate . . . for certain persons, not common to all . . . then such allowance would be unjust discrimination, otherwise not."<sup>105</sup> We can assume that the General understood the import of the Chairman's message.

The commissioners advised its correspondents when it clearly had

102. *Larrison v. Chicago & Grand Trunk Ry.Co.*, 1 I.C.R. 369, 370 (1887). Commissioner Walker filed another opinion the same day reiterating that traveling salesmen were not entitled to any lesser rates than other passengers. *Assoc. Wholesale Grocers of St.Louis v. Missouri Pac.Ry.Co.*, 1 I.C.R. 393 (1887).

It is true that the Commission was perhaps less "sensitive" in this early period to passenger fares than to freight rates as the Hoogenbooms' assert. See HOOGENBOOM, A HISTORY OF THE ICC, *supra* note 19, at 24. There were no large sums of money involved, when passenger problems were treated case-by-case, and passenger fares would interfere with the case-by-case learning process involving the commerce of the country. It is ironic that a company-wide solution to unreasonable passenger fares (resulting in the creation of a Riders' Fund on the company's books) should come years later in the courts, not in any agency; relate to local, not interstate, transportation; and be approved while private ownership of public surface transportation steadily declined throughout the country. See *Bebchick v. Public Utilities Commission*, 318 F.2d 187, 203-204 (D.C. Cir. 1963), *cert. denied*, 373 U.S. 913.

103. *Bragg to Rich*, Apr. 14, 1887, LETTER BOOK, *supra* note 17, at 92; *but see* Cooley to Kercheral, Mayor of Nashville, Apr. 14, 1887, *id.* at 102, refusing an informal opinion.

104. Cooley to Muldrow, Acting Sect'y of the Interior, Apr. 18, 1887, *id.* at 151-53, 1 I.C.R. 23 (1887). See also RAILWAY AGE, *supra* note 7, Apr. 22, 1887, at 283; Schoonmaker to Baird, U.S. Comm'r. of Fish & Fisheries, Apr. 19, 1887, LETTER BOOK, *supra* note 17, at 208-12, 1 I.C.R. 23 (1887).

105. *Re Inmates of National Homes*, 1 I.C.R. 75 (1887), see RAILWAY AGE, *supra* note 7, May 27, 1887, at 371.

no jurisdiction; one party even asked the Commission whether a particular State had the power to tax the railroad.<sup>106</sup> More often, the Commission would respond to general jurisdictional inquiries, that it would not "answer questions of construction under the Inter-State Commerce Law except when they are so presented that its decision would be authoritative."<sup>107</sup> Or, they might add, the "question you raise is a suitable one to submit to counsel, but we do not deem it proper for us to express an opinion upon it."<sup>108</sup>

#### CONCLUSION

Under Chairman Cooley's guidance, the Commission in the beginning period of its life under the Act to Regulate Commerce firmly established simplified procedures and an informal complaint practice. A century later those traditions still form a basic characteristic of the Commission's procedure and practice, and a standard for other agencies and the courts as well.

The long and short haul clause of Section 4 was itself worthy of full-time effort in this period; but the Commission also began a program of reviewing the rates charged to individual shippers or classes of shippers, and marking out the bounds of the exemptions from the Act. It deftly used the threat of a hearing as much as the hearing process itself to bring about needed changes in railroad rates and to reduce the large scale discriminations that characterized the rate structure.

The first commissioners were politically astute, principled, and best of all unafraid to administer the new Act in the public interest. Their strong self-image can be illustrated: in the fall of 1887 the Chicago Tribune, as Cooley recorded in his diary, had been saying "ugly things about the Commission and calling its members weak and wanting in proper independence." When the Railway Editor called on him, Cooley asked "what

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106. Cooley to Littlefield, Apr. 16, 1887, LETTER BOOK, *supra* note 17, at 135. See also Cooley to Crawford & Dallas, Apr. 6, 1887, *id.* at 43, no jurisdiction over canal companies; Bragg to Seag, Apr. 6, 1887, *id.* at 48, no jurisdiction over a boat line in Rome, GA; Cooley to Greenleaf, Apr. 14, 1887, *id.* at 99; Cooley to Anderson, Apr. 15, 1887, *id.* at 124, no jurisdiction in "looking up lost freight or collecting damages therefor."

107. Cooley to Blaisdell, Apr. 14, 1887, *id.* at 98; see also Cooley to Winter, Apr. 2, 1887, *id.* at 12, "controversies . . . which present practical questions upon which it has authority to pass definitively;" Cooley to Johnston, Apr. 2, 1887, *id.* at 13, "actual controversy for authoritative decision." Chairman Cooley advised one correspondent that the Commission had no general power to prescribe freight classifications, adding the hopeful note that "it might perhaps deal with cases of manifest injustice when formal complaint was made." Cooley to Hunter, May 14, 1887, *id.* at 455.

108. Cooley to Ferguson, Apr. 6, 1887, *id.* at 47; see also Schoonmaker to Spring, Apr. 6, 1887, *id.* at 50; Cooley to Moyer, Apr. 14, 1887, *id.* at 82; Cooley to Waterbury, Apr. 14, 1887, *id.* at 86; Cooley to Pratt, Apr. 14, 1887, *id.* at 88; Cooley to Potter & Marsden, Apr. 15, 1887, *id.* at 112.

he meant by that kind of talk" because that editor "knew perfectly well the Commission was fearless."<sup>109</sup>

This is not to say that the Chairman did not hope for greater accomplishment. As Chairman Cooley settled into his new office, he expanded his vision of what the Commission might accomplish. He had written several years earlier, that:

Different principles are applicable in different cases, and require different forms and proceedings; in some they must be judicial; in others the government may interfere directly, and *ex parte*. . . .<sup>110</sup>

Unhappily, he grew overworked and progressively weaker, and could not serve out his full term; as he grew more weary, he also grew more disenchanted with the Commission limiting its role to the decision of cases and failing to act more directly. He derisively characterized the Commission in a momentary pique as a "police court" in his diary, not that it was exercising excessive police power,<sup>111</sup> but because it was continuously in session to hear controversies—often minor ones at that—from whatever parties crossed its threshold. It was neglecting more important work, which Cooley considered "the gradual education of the public in the matter of railway transportation" and "the quiet work we can perform in the improvement of the law and the unification of a railway system." Thus, he wrote in 1889:

The effect of overwork was aggravated by a consciousness that the view taken of our duty under the law by my associates was different from mine: their view I must take the liberty of characterizing as narrow; as a police court view; a view which makes our principal duty the hearing of complaints, while I thought the passing upon complaints of far less importance than the gradual education of the public in the matter of railway transportation, the quiet work we can perform in the improvement of the law and the unification of a railway system.<sup>112</sup>

Such education would lead to more sophisticated complaints, and hence to more effective regulation.<sup>113</sup> Chairman Cooley had moved in the direction of a more active Commission during the Burlington strike of 1888; but the Commission was reluctant to move with him.<sup>114</sup>

I believe Cooley underestimated what he and his colleagues had ac-

109. COOLEY DIARY, *supra* note 5, Sept. 22, 1887. The Editor took refuge in the claim, that as a newspaperman he had to make his paper "interesting."

110. *Supra* note 39.

111. Prof. Jones, an otherwise acute student of Cooley and his historical period, misinterprets Cooley's terse remark in his diary. Jones errs, when he juxtaposes Cooley's suggestion for "less coercive power" by the Commission and his characterization of the Commission as a "police court," which are independent thoughts and in different documents. See *Cooley and the Interstate Commerce Commission*, *supra* note 10, at 615.

112. COOLEY DIARY, *supra* note 5, Sept. 19, 1889.

113. See, e.g., *supra* note 34.

114. See *Cooley and the Interstate Commerce Commission*, *supra* note 10, at 616 *et seq.*

completed. I have mentioned a few of these accomplishments. More important than those, however, is a legacy of integrity from this early period that each Commission since then, and indeed each of the other independent agencies that were spun from its image, has drawn sustenance. Noted earlier was Judge Friendly's references to the clarity and probity of the principles laid down in the earliest Section 4 decisions. Beyond that lies a vision of public service, conservative in the best sense, that pervaded their work when they came to Washington. The philosophy underlying their approach to national office was best summed up by Chairman Cooley in an address he entitled, "The Lawyer's Duty to the State." He spoke words then that now seem so timely:

The State, as a political organism is for the time, in a measure, committed to our charge for conservation, and if need be, renovation. The State is not for us to live upon, prey upon, grow wealthy and great upon, but it is to be passed along tenderly and lovingly, and the better for the handling.<sup>115</sup>

Then, dismissing those who would look back to all that was once "pure and good," he concluded that "the golden age should always be in the future, because in the order of Providence we are put here to make the future better than the past."

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115. Proceedings of the Fourth Annual Meeting of the Bar Assn. of Tenn., Nashville, 1886, at 91, quoted in Jones, Alan, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 JOURNAL OF AM. HIST. 751, 771 (1967).