EARLY ADMINISTRATIVE LAW DEVELOPMENT

JOHN R. BROWN

JUDGE BROWN: Thank you very much, Betty Jo, and ladies and gentlemen.

Since this happened to me at the hands of Page Keaton, a revered dean of the University of Texas Law School, and many of you will know him, and I know Betty Jo has very fond memories of him, I'll say this introduction. These proceedings remind me of the man who went to a bullfight, and outside of the arena there was this man dressed in a very elaborate embroidered bolero jacket and a little tricornered hat. The man said, "You are the toreador?" "No." "Are you the picador?" "No." "Are you the matador?" "Well, if you're not the picador, the toreador or the matador, what are you?" He said, "I'm the man who opens the gate and lets the bull come in."

One other thing. This man on judgment day crawled out of his grave, looked at the epitaph and said, after reading it, "Either somebody is an awful liar or I'm in the wrong hole."

I was called on first today because either by the act of the printer in putting my name up first on the left-hand side, Betty Jo's decision, or because I don't know very much about this subject. I just simply have the power to rule on it.

I'm going to count on, and I'm going to leave as much time as we possibly can for, these distinguished gentlemen who are well-informed.

I think we shall be very grateful, and you people who have made your professional livings in the practice of or being on or working with the Interstate Commerce Commision, should be very grateful for this great institution and the wisdom of Congress in establishing it, because I can say that it is really the daddy, I think, of administrative law. I have to leave to my

colleagues, and especially the professor, to tell me to what extent the Commission's actions themselves have been innovative in administrative matters.

But administrative law, as it is today, has largely developed as a result of appeals from the actions of the ICC, and the actions of judges and courts, particularly the Supreme Court on that subject. We know that that has been a very fruitful source of the development of administrative law.

Indeed, there is another very great fact — that there is a continual opposition on the part of the bar to administrative agencies. I must confess that I shared this view when I went on the bench. I had the idea that all administrative agencies were simply tools of the government and, thus, very biased in their outlook. It wasn't long until I could see that the country could not survive without them and, contrary to my bar like impressions, that they are not a biased, partial group of government enforcers. They were there to do a very good job.

Now, as Betty Jo told you, I had the experience of appearing before a division of the Commission in one of these formidable hearing rooms next door. All I recall about it is that they said, "Mr. Brown, you're out of time."

I got into ICC work because I was primarily a maritime lawyer, and at a relatively late date in the regulation of transport matters, they enacted Part III on water carriers. Well, I soon sensed that one of the problems about the administration of Part III on the part of the Commission was that they were uninformed on maritime matters. So I got in a case once in which we got permission from steamship carriers on the Great Lakes to take over their case before the Commission on the carriage of automobiles on the decks of empty vessels or barges. There is a little provision in the Interstate Commerce Act, I think it was Section 303 or something like that, it said nothing in this Act shall prevent a carrier from augmenting or adding to its fleet or its facilities as may be necessary to meet the needs of its shippers.

Well, it seemed to me that one of the things the Commission needed to know about was the practice in the steamship trade of chartering, that's leasing vessels. So I had a friend who was a vice president of a major steamship company, also a lawyer by training and education, and we were having a hearing before a hearing examiner. Unfortunately, the night before there had been a big snow in Washington, and as we came into the hearing room, I noticed this fellow had spats on. I did not know what the impression of the examiner would be to a man wearing spats. I had prepared a great number of photostatic copies of not only charter parties but ocean bills of lading, which showed that in the steamship business, a line carrier, whose fleet was not adequate to meet the needs of the shippers, could lease a vessel, and put it on berth for carriage.

I had this fine expert on the stand with his spats on, very evident, and

I asked him, what does a steamship company, engaged in a liner service, do when they need more bottoms. My opponent objected on the grounds that it interfered with the discretion of the Commission. It was asking a question which was for the decision of the Commission and was, therefore, inadmissable. To which the examiner responded that this is the kind of information we have been needing all these years. He proceeded to hear him at length, and I did get a favorable decision.

It was appealed to the District Court, a three-judge court in Ohio. I appeared there before Justice Potter Stewart, then a judge on the Sixth Circuit, Judge Jones of the District Bench from Detroit, and one other judge. I had reserved one minute of my time to argue. I told the court that I hoped this was my last argument to any court, because I'm on my way to Washington for hearings on my appointment as a United States Circuit Judge for the Fifth Circuit, to which Justice Stewart says, "I wish you well." And he needed to, because I had some problems.

I repeat again, we're all fortunate that the ICC came into being and has been so productive in meaningful decisions on the development of administrative law. The studying that I have done in preparing for this sent me back to some very ancient cases, one of which was *Interstate Commerce Commission v. Louisville & Nashville Railroad Company* in 1912. While it may be an ancient case, it is by no means a dead case. Those of you who are skilled in this field will recall that in Justice Rehnquist, then Justice, not Chief Justice, Rehnquist's opinion in the *Florida-East Coast Railroad* case, his primary problem was to deal with this old case. Justice Douglas and Justice Stewart dissented on the grounds that this was, in effect, indifference to the *Louisville and Nashville Railroad* case by the Supreme Court.

The interesting thing about it is that — I don't need to review for you what the facts were — in the opinion the Court lists 11 cited cases, all of which, at that time in 1912, were cases that originated in or around or out of actions of the Interstate Commerce Commission. The Court in that case decided some very, very important standards that still are very much alive. They said, for example, "This is a question of reasonable or unreasonable rates. The more liberal the practice in admitting testimony the more imperative the obligation is to preserve the essential rules of evidence by which rights are asserted or defending. In such cases, the Commissioners cannot act upon their own information as would jurors in primitive days."

Then they said, "All parties must be fully apprised of the evidence that is submitted or to be considered and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal." In no other ways can a party maintain its rights or make its defenses. In no other way can it test the sufficiency of the

facts to support the findings, for otherwise, even though it appeared that the order was without evidence, the manifest deficiency would always be explained on the theory that the Commission had before an extraneous unknown, but presumptively sufficient information to support the finding.

You see, in contemporary administrative law, a continuation of those principles of a hearing, ordinarily the receipt of evidence subject to cross-examination and testing with an awareness on the part of the parties as to the controlling principles and rules to be followed. What is remarkable, I think, about that was that this was the product of a time when people were violently opposed to this process of administrative agencies, administrative tribunals, and that attitude has not subsided. Indeed, it strives very much. I received within in the last couple of months a copy of the *Administrative Law Review* with a full treatment of the latest proposal of the ABA section on administrative law written by Professor Levin.

Interestingly enough, there was a comment made earlier about President Roosevelt's activities in transportation matters, and the remarkable thing was that in about 1940, he himself was very much supportive of an approach that was very critical of administrative law, as it was then practiced. But even since the enactment of the Administrative Practice Act in 1946-1947, there's been continued criticism of the administrative law system.

Indeed, in contemporary literature, Judge Smith, formerly the Chairman of the Administrative Conference of the United States, wrote an article in, I think in the *Duke Law Journal,* called "Judicialization of Administrative Law," and that's excited a lot of responses which, if they haven't contributed anything else, have contributed some flowery language. Judge Carl McGowan, for example, in the *Duke Law Journal,* wrote a reply to judicialization criticizing that approach. Professor Cass of Boston University, wrote an article critical of Judge Smith's judicialization article, called it "Looking With One Eye Closed." Then there was "Administrative Discretion: The Gloomy World of Judge Smith," by Professor Levin and "Twilight or Just an Overcast Afternoon?" by Mr. William Allen, a very active practitioner and a former chairman of the ABA Section on Administrative Law.

Judge Smith's approach was that we've got this thing so refined today that things have become judicialized, and I think there's a good deal of basis for that criticism. Whether it's quite as hopeless as he made it out is very doubtful. But I would say that in this rich experience, in which the ICC has been such a principal factor, we have made a lot of progress in administrative law, making it more reliable, and I guess, more consistent with our ingrained notions of judicial fairness and accuracy.

I've read a good deal of Professor Davis' treatises, and I certainly agree with him in several respects, that administrative law has become so

verbalized that it obscures what we are trying to get at. There are all sorts of statutory standards and judge-made standards; substantial evidence, clearly erroneous, clear error, and arbitrary and capricious. What do they mean? Professor Davis is very strong in this view that we ought to just stick to those words and do not let judges try to explain it. I have to agree that when we get through with our explanation, it is not any better than the words that we started to try to explain.

My principal activity as a judge was the 12 years I was Chief Judge of the Fifth Circuit. That is before the practice or review of ICC orders by a three-judge district court was repealed and the present system initiated, where you take a direct appeal to the Court of Appeals. In those 12 years, I had to designate, I think, over 576 three-judge courts. A good one-third of those were ICC appeals. I think real progress was made when the Congress eliminated that superfluous act, since it was essentially a review, as a matter of law, whether the Commission's design should be sustained, whether the evidence was substantial and all those sort of things. I think the new system is working very, very well, and I must say I think the tendency of judges to intrude on the work of the Commission and the work of administrative agencies is a temptation that is very hard to overcome, and too often, it results in intrusion.

My own experience as a judge started really on three-judge cases. I looked upon the Administrative Procedures Act ("APA") as a great savior in a couple of early cases right after I went on the bench. I wrote some rather extended opinions in which I criticized the practice of the ICC in those days of suspending some order for good cause shown. I said that under the APA that wasn't adequate enough. They had to, at least, outline briefly what the good cause happened to be. Here more recently, we've had some very important decisions in the Fifth Circuit, one of which sustained in part and reversed in part the decision of the ICC on deregulation of the trucking industry, in which the court said that the Commission's orders on household goods and bulk carriers was not acceptable.

There was another effort where the ICC, as an outgrowth of deregulation, and I think the Staggers Act, imposed this new standard of geographical competition and commodity competition. The panel first held that that was not acceptable. I dissented rather vigorously, persuaded the court en banc to take it and the en banc court sustained my view and upheld the Commission.

I think the message now is that certainly we cannot survive in this complex industrialized technological society without substantial assistance of agency regulation and determination. While judges do verbalize too much, we think we have finally gotten a fairly workable set of principles that assure, at least nominally, some fundamental fairness to the proceedings.

Professor Davis makes an interesting sort of an insistence that if courts only imposed on themselves the kind of exactitude they impose on administrative agencies, our decisions would be much better. He has written quite an article at the University of Minnesota on how the Supreme Court could well utilize this sort of technique, but he points out that the real difficulty with the court system is that, in these matters, we do not have the factual basis for a sound decision nor do we have the facilities to get it without violating all of the cherished notions and traditions of absolute independence. Which leads me to make this general remark. You know, we exist by virtue of Article III, and the benefits to the federal judges is that they cannot reduce our income. Unfortunately, it does not guarantee an increase either.

As I said, we are the product of Article III. I have long had a great deal of doubt about whether Article III and the case or controversy, which is part of our ingrained view that it's got to be a live controversy and only the parties to that controversy can control it, produces good results. So often, in my experience as a judge, the people who are advocating a position are incompetent to begin with. They do not understand the problem. They have not done adequate research, and they do not advance the most telling arguments. So that too often, law is made by people who are both inept, maybe ignorant and ill equipped to carry it on. That's one of the great advantages, I think, of administrative proceedings. It does allow the agency to marshall all of this evidence, collect a lot of evidence, and then a court gets to review it using one standard or another.

I want to acknowledge my indebtedness, both to Congress for having the wisdom, at a time when it must have been very, very radical to create the Interstate Commerce Commission and its continuing insistence of giving it adequate powers to meet changing conditions.

I've very happy to have been here and to have been invited to be here.

Thank you so much.

MS. CHRISTIAN: Thank you very much, Judge Brown. You yourself have made enormous contributions to the development of administrative law, and I think we are very fortunate to have had you with us today and to be on this program.

Our second speaker is someone that will be familiar to a great many of the people in this audience, since he has been practicing before the ICC for over 30 years.

Joseph Auerbach received both his bachelor's and his L.L.B. degrees from Harvard, served briefly as an attorney with the Securities and Exchange Commission and in the United States Foreign Service, and, in 1952, joined the law firm of Sullivan & Worcester in Boston, where he

began his career as a transportation lawyer actively practicing before the ICC.

For those of us who were here in the 1960's, I think that Joe Auerbach became almost synonymous with railroads and reorganization, since he was involved with both the Penn Central and the New Haven. This was the era in which I myself first had the chance to become well acquainted with him, and in my mind, he will always be closely identified with the successful reorganization of those two roads.

Mr. Auerbach is now of counsel to his firm, and he is, in addition, teaching as a professor of business administration at the Harvard Business School, is one of our outstanding ICC practitioners, and it gives me great pleasure to present Joe Auerbach.