THE EXPANSION OF ICC ADMINISTRATIVE LAW ACTIVITIES

JOSEPH AUERBACH

MR. AUERBACH: Thank you very much, Betty Jo.

You are going to see as I go through my remarks, that I have had occasion to plow some of the same fields that George Chandler did this morning, but from a different perspective. His has been history and mine is to try to winnow out the administrative law significance of this.

I would like to start by referring you to a book that many may have read, it won a Pulitizer prize last year, called "Prophets of Regulation," by Thomas McCraw.

In it he says this:

"From our own perspective, a century later, the greatest significance of the 1887 Act to Regulate Interstate Commerce lies in its creation of the prototypical federal regulatory agency."

The ICC served, of course, over the next half century from its creation, as a model of how the American system could effectively carry out its unique system of federal regulation, administratively, rather than judicially.

Public policy, even in an essentially populist era, with rudimentary local communication, demanded this. The genesis of the public policy lay in the significance of railroad transportation to the fastest growing nation in world history. The railroad dominated this country's economy and society in the 19th century. The domination existed from every standpoint, capitalization, employment, community impact or entrepreneurial opportunity. There was no force, industrial or religious which matched the societal impact of the railroad after the first third of the 19th century. Before the Civil War, there were already mature rail networks in the East — the

New York Central, the Pennsylvania, the Baltimore & Ohio, the Erie. These actually crisscrossed in this Middle Atlantic area, and by that time, had also opened up the West. After that war, in only the five years between 1868 and 1873, some 30,000 miles of new track were laid.

A little history. The first railroad regulatory commission was in Rhode Island in 1839, and it was followed by New Hampshire and Connecticut, but these acted essentially solely in working out in intermediary fashion joint schedules and rates. In 1869, Massachusetts produced a disclosure statute which provide a true regulatory, investigatory and thus, finally, a true regulatory foundation.

In 1871 and later, as you've heard from George Chandler, Illinois, Wisconsin, Minnesota and Iowa passed what we call the Granger laws. These were designed to regulate railroad rates within their borders. These were upheld by the Supreme Court in 1877 on the concept that the states were dealing with an industry affecting a public interest.

Then came the movement from state to federal regulation. It was recognized that state lines bore no rational or necessary economic relationship to actual rail operation or the impact of the rail operation on a state's economy.

In 1886, however, in the *Wabash v. Illinois* case, the Supreme Court ruled the states could only regulate commerce within their own state. That's 1886. The consequence one year later is that we have federal regulations so triggered by the Act to Regulate Interstate Commerce.

Conceptually, the birth of this administrative law was a troubled one. I would say more of a Caesarean section than a natural birth. The Commission has only one parent, and at that time, a very cautious one — Congress. There were many foster aunts and uncles in the industry, and while they urged the promulgation of a statute, they considered the concept a considerable nuisance.

But importantly, and most importantly, there was an older, stronger, competitive cousin, the Judiciary. This Act was then viewed as something that was either being carved out of the Judiciary or was in some way in conflict with it.

Nevertheless, the infant was born and it became, very shortly, a creature that showed sagacity and quick growth.

It is extraordinary to note that by the time this infant was 55 days old, administrative law had taken on a meaning. Now, you couldn't have predicted it, even one year before. And that led me to look at a book that was written that same year, 1887. Many of you know Edward Bellamy's "Looking Backward."

The reason I looked at it was to see whether Bellamy had any concept of what was going on in this area. It is a book in which the principal

character finds himself — after sleeping in a Rip Van Winkle fashion — awake in 1987. Bellamy is predicting how we would look in 1987. He finds that 100 years later there are new societal relationships, womens' rights, federal preeminence, piped music and something he calls "credit cards." Now, Bellamy's predictions which are so extraordinary and so interesting, however, fail in one respect: He never realized what was happening to our judicial system through the emergence of administrative law.

I think a fair conclusion is that Bellamy would be very much surprised by what happened in this area, though, clearly not surprised by what happened in these other areas to which he had reference.

The Commission's administrative law activities have occurred in two principal areas. There are the ICC's own rules and practices, which we can catalog as procedural. Then there are the effects of judicial and legislative acts which have had a substantive consequence in administrative agency functioning. Let me call those the regulatory standards.

I start with the procedural standards.

The 1887 Act contained a term, "full hearing." In those rules of practice which were issued just 55 days after the Act was passed, the Commission, chaired by that noted judge and scholar, to whom George earlier referred, his great-great-grandfather, Thomas Cooley, interpreted this term in their rules as requiring a full oral trial type hearing. This established, procedurally, the kind of due process that was consistent with our common law heritage. But this insistence upon a traditional hearing did not mean that they would ape judicial practice in how the hearing was going to be conducted.

There was very early recognition in the rules — as early as 1887 — that there were to be significant differences in the formalities to be observed by each of the two systems. As early as 1892, the ICC reported, "This endeavor to adjust differences between carriers and shippers without formality, delay or expense has been attended with very satisfactory results."

The Commission instituted during that period the use of prehearing conferences which were designed to induce and encourage settlements informally.

By 1901, the great majority of complaints before the ICC were disposed of by conferences with shippers and carriers or by correspondence. The concept of paper proceedings as an administrative substitute for even the informal oral hearing had become a reality in less than a decade.

The oral hearing also took on a unique form with respect to evidentiary rules. In its 1908 annual report, the Commission stressed, "it is per-

haps not too much to say that not a single case arising before the Commission could be properly decided if the complainant, the railroad and the Commission were bound by the rules of evidence applying to the introduction of testimony in courts. "

This conclusion was honored by an unwillingness at the Commission and at its subsequent numerous regulatory agency progeny, which we became familiar with in the 1930s, to exclude any evidence which appeared pertinent, no matter its character or source. Clearly, hearsay rules were not to be observed, and all evidence was to be approached essentially from the standpoint of its weight.

This, of course, was a natural consequence of an expert applying experience and sophistication to facts and opinion rather than barring information because the trial body — including the jury — could not subjectively fairly appraise its significance.

The '87 Act did not prescribe rules governing agency practice. The Commission, therefore, began its existence, not only free of procedural judicial accretions of the past but designedly left free by Congress to adopt rules of practice deemed responsive to the exigencies of its mission.

From the beginning, the Commission fashioned its rules to achieve a simplicity in practice which set a model for future administrative agencies, and to some degree, as I think Judge Brown's comments today would indicate, for the courts themselves.

The Commission waived requirements of strict adherence to technical rules of pleading so long as complaints were reasonably clear. It discouraged motions to dismiss. It allowed liberal use of supplemental and amended complaints. It freely granted petitions for intervention.

As the Commission declared in its first annual report, "It has been deemed exceedingly desirable that proceedings before the Commission should be made as informal as should be consistent with order and regularity and that dilatory action of every nature should be discouraged."

In numerous decisions during its early years, the Commission made clear that it "was not a judicial tribunal, restricted by technical rules".

Congress had authorized the Commission in the 1887 Act to conduct its proceedings in such manner as would best "conduce to the proper dispatch of business and to the ends of justice. "

Early on, the Commission interpreted this mandate very liberally. It adopted rules designed to provide maximum flexibility and efficiency and to make the Commission accessible to the public. In its 1908 annual report, the Commission made an extraordinarily important observation from an administrative law standpoint. "The ordinary court determines only the

rights of the parties before it, but every decision of the Commission involves the rights of parties who are not present before it."

In advancing this proposition, the Commission declared three years later that it was not within belief that Congress intended to convert this Commission into a tribunal which should merely determine, as between two sides, the preponderance of evidence and base its decisions upon technical and somewhat archaic rules. However, the ICC encountered substantive difficulties during this period.

In a series of definitive decisions in the late 1890s, the Supreme Court severely limited the scope of the Commission's authority under the 1887 statute. It specifically held the Commission lacked the power to fix rates and to enforce the long and short-haul provisions of that statute. By 1897, Mr. Justice Holmes commented that the Court's rulings had gone "far to make that Commission a useless body for all practical purposes and to defeat many of the important objects designed to be accomplished by Congress." *ICC v. Alabama Midland.*

In its annual report for 1897, the Commission similarly stated that although it would continue to conduct investigations and "perhaps correct in a halting fashion some forms of discrimination, by virtue of this judicial decision, it has ceased to be a body for the regulation of interstate carriers. The people should no longer look to this Commission for protection which it is powerless to extend."

At the urging of shippers and the Commission itself, however, Congress took steps in 1906 to reestablish the ICC as a strong regulatory agency. It then enacted the Hepburn Act, to which George also referred.

From an administrative law standpoint, the Hepburn Act was of immense significance. It made the Commission's rate orders presumptively correct and immediately enforceable, though subject to being set aside by court injunction. But the burden of proof in rate proceedings was shifted from the Commission to the railroads. This legislation, along with other subsequent enactments expanding their jurisdiction and power, had several important and lasting administrative law effects. The Commission, as a consequence, established the use of hearing officers and developed hearing bureaus. These had become necessary in part because of the increase in the volume of the Commission's caseload.

The Hepburn Act had authorized employment of special examiners to administer oaths, examine witnesses and receive evidence. This was a step forward in administrative law. And early in 1917, or about ten years later, the Commission inaugurated the significant practice of having the hearing examiner prepare a proposed report in the more important cases. This afforded parties an opportunity to file exceptions and bring forth their best analysis of the record and the law as seen by the hearing officer.

That, in turn, protected both the Commission and the public by narrowing issues and disputes.

Jurisdictional issues had surfaced as early as 1907 in *Texas & Pacific Railway v. Abilene Cotton Oil*. The Court held there that the judiciary had no power to determine the reasonableness of rates in the first instance. This established the doctrine of primary jurisdiction of the administrative agency, which was to have a significant bearing on the development of administrative law.

Following enactment of the Hepburn Act, the Court also narrowed voluntarily the scope of judicial interference, restricting review to the consideration of purely legal and constitutional issues.

This new approach was first articulated in 1910 in *ICC v. Illinois Central*. Recognizing the benefits of Commission regulation, the Supreme Court held that courts must confine their review to questions of power and right and not to matters which could be left to the administrative discretion of the Commission.

As the Court made clear, a reviewing court should not usurp administrative functions by setting aside a lawful administrative power because of its doubts as to whether that power had been wisely exercised. Rather than asking itself whether it would have entered the same order, the Court was required to recognize that the power to make the order and not the mere expediency or wisdom of having made it is the judicial question.

Discretion of the courts was stated with even more precision in 1912 in *ICC v. Union Pacific*. The Court said here, the findings of the Commission were to have ascribed to them the strength due to judgments of a tribunal appointed by law and informed by experience. The courts, therefore, were not to substitute their judgment for that of the Commission on questions of fact.

Here lay a fundamental tenet of administrative law: The clear enunciation of the principle of the respective and distinct functions of court and agency. If the courts were permitted to adopt a factual judgmental review, the advances of administrative law would be lost. The Commission would become, as there stated, a mere instrument for the purpose of taking testimony to be submitted to the courts for the ultimate action.

The principles of administrative law which I have noted, and indeed, many others which were fathered by the ICC were ultimately embodied in the Administrative Procedure Act. Judge Brown has referred today to that statute.

In the view of some commentators, the APA virtually codified the scope of ICC practices and procedures. As one practitioner noted two years after passage of the APA, "everyone interested is still searching in vain for some profound effect that the APA has had on practice before the

Commission." It may be fairly said that the ICC's rules were virtually a working model.

In conclusion, it's fair to say that notwithstanding the vicissitudes of history and relationship between the administrative agency and the courts, the ICC has left a lasting imprint on the development of administrative law in the United States and that the principles which it authored, literally, from the promulgation of its rules of practice in 1887, together with the issues which it raised over the next half-century were far broader in their significance than the confines of transportation regulation.

MS. CHRISTIAN: Thank you, Joe, and I think that if anyone had any doubt as to the influence of the ICC on the development of administrative law in general, you have certainly put them to rest.

Our next speaker is a man who had an enormous influence from within the Commission on the development of administrative law during the last decade. Gary Edles received his Bachelor's Degree from the City University of New York and his LLB from NYU, also holds a Master of Law and a Doctor of Judicial Science from George Washington Law School.

He is the co-author of a book entitled "Federal Regulatory Process, Agency Practice and Procedures."

After serving briefly with the Civil Aeronautics Board, Gary came to the ICC in 1980 as Director of the Commission's Office of Proceedings and served as Director of that office during the period when the move toward deregulation was just beginning to move into full flower.

He is now an Administrative Appeals Judge at the Nuclear Regulatory Commission, and I have great pleasure in presenting to you the Honorable Gary Edles.