THE DEVELOPMENT OF THE DOCTRINE OF PRIMARY JURISDICTION

VICTOR G. ROSENBLUM

MR. ROSENBLUM: Thank you so much, Betty Jo. It is a great privilege to be a participant in this Centennial celebration for the Interstate Commerce Commission.

In all of the remarks of the panelists after the keynote address by Mr. Miller, we have heard references to the creativity, the initiative, the efficacy, and the fairness of the contributions made by the Interstate Commerce Commission.

I have to confess a bit of surprise that the keynote address was an invitation to a wake rather than a celebration of a hundred years of achievements which might still have some contributions to be made in the future.

Instead, we were told that the Interstate Commerce Commission has no redeeming public benefit, that we can expect no more of it, that it should be allowed to die with dignity, and that we should gather here at some unnamed time in the future for a fantastic wake.

Somehow it seems to me that it might not have been inappropriate for the issue of the role of a representative of the White House to have been dealt with in ways in which that issue was dealt with in the past of the ICC. It was suggested on these occasions that the White House did not have a key role to play in the determination of the role or the future of the agency, but that any determination concerning an independent regulatory commission was to be made by legislation. Beyond that, both the Legislature and the Executive had to butt out.

If one looks at the remarkable exhibit next door that has assembled documents of the past history of the Interstate Commerce Commission,

one finds included in those superb materials remarks that were made by the Honorable Joseph Bartlett Eastman in 1944 on the occasion of his 25th anniversary as a Commissioner of this distinguished agency. The entire remarks published under the heading of the "12-Point Primer" that he proposed are worthy of reading, but let me summarize some of the points made by Mr. Eastman in that vital document.

He said:

> "With a country as big and complex as it is, administrative tribunals like the Interstate Commerce Commission are a necessity. To be successful, they must be masters of their own souls and known to be such. Political domination will ruin such a tribunal. "Good men," he said, "can produce better results with a poor law than poor men produce with a good law."

And finally, he noted: "Zealots, evangelists, and crusaders have their value before an administrative tribunal but not on it."

Those observations are well worth noting, even in our own time, for much of the talk that is directed toward issues of deregulation has, I would suggest, some implicit inaccuracy, if not deceptiveness in it.

I am not an opponent of deregulation as such, but much of what has passed for deregulation within our society in recent years has not been true deregulation so much as it has been the triumph of one form of regulation over another.

It was noted by our colleagues that this morning the spring meeting of the Antitrust Section of the American Bar Association is taking place in another part of town, and that is a vital and thriving meeting. I suggest to you that part of what has been called deregulation in the last few years has represented more of a substitution of an antitrust approach to regulation for the approach of regulation by administrative agencies. Yet the governmental hand in regulation by antitrust is as present — or perhaps at times even more present, though perhaps less subject to public accountability — than it is when the authority is exercised by a regulatory entity.

Judge Brown referred quite carefully and thoroughly to some of the examples — and Joseph Eastman, in his prime, and Gary Edles, this morning, referred to even more — examples of the creativity of the contributions made to administrative law by the Interstate Commerce Commission.

To my mind, one of the most salient of the contributions made by the ICC was made within the realm of this vital doctrine of primary jurisdiction, a doctrine which at times had led the Supreme Court of the United States to say to the Antitrust Division, "Keep your hands out of this until the regulatory agency has utilized its expertise and experience in suggesting the ways in which this matter ought to be resolved."

One of the great primary jurisdiction cases was the Western Pacific

case, decided in 1956, with a decision by Mr. Justice Harlan in which he went to great pains to delineate the doctrine and the central role to be played by the Interstate Commerce Commission in its application to the matter of the construction of a tariff.

The Supreme Court was at its best there in a most instructive and constructive opinion on the part of Mr. Justice Harlan regarding the roles of an administrative agency.

Why should there be the assumption that getting rid of the Interstate Commerce Commission, as indeed we have gotten rid of the Civil Aeronautics Board, produces a deregulated society?

Now, you and I are still doing a good deal of traveling on airlines, I take it, and notwithstanding the demise of the Civil Aeronautics Board, I for one find that as an individual flier I am more subject to regulations after the demise of the CAB than I was when it was an active force.

I know that when I fly today I can barely find out in advance what it is going to cost me. The advertised rates are the rates which are usually unavailable unless one gets the ticket more than 30 days in advance and places his marriage in jeopardy by spending every Saturday night away from home.

In the olden days, under regulation, one could buy a ticket that was good on any airline on any day and all of the prices were posted.

I think that before we accept the blandishments of the notion that deregulation really means that we are deregulated, we ought to have empirical data about the consequences of so-called deregulation for the ordinary human being and not simply for a few favored entrepreneurs who are the beneficiaries of the term.

Furthermore, as I have suggested to you, there are serious questions about whether leaving things to the antitrusters will invariably put us in a better position than having us subject to regulation by administrative agencies.

My recent experiences, and perhaps some of yours, with regard to telephone systems are not all that encouraging in that regard. When I pick up my telephone today, I find that I have poorer service at generally higher cost than was the case when Ma Bell was subject fully to the Federal Communications Commission's regulations. The breakup, which was a breakup that was ordered through the application of antitrust law, may or may not in the long run turn out to have been a wise action.

But it seems to me that it was at least questionable whether the FCC should, as it did in that case, simply withdraw and say, "Oh, we don't really know whether we have authority on this matter or not, so we will step out for now. It was dysfunctional to bypass the regulatory agency and to leave the matter of the construction of the abundance of telecom-

munications issues that had to be dealt with to an able, but burdened, single judge, who then had to go through nearly a million pages of material in deciding what the outcome of that case should be.

I would urge that we review carefully, as the panelists before me have done, what the history and contributions of this distinguished agency have been. I believe that they have been contributions not merely to the teaching of administrative law, but to our society overall. The ICC contributed to finding ways that can be less formal, more efficient, and can still be fair in achieving results that meet the criteria and the standards of the concept of the public interest.

When my late colleague, Nat Nathanson, and his colleague, Lou Jaffe, wrote their distinguished book on administrative law, they noted especially the significance of the Interstate Commerce Commission. In the course of their fourth edition, which was written in 1976, they stated that "the development of administrative agencies in the United States was attributed to the ways in which the market failed to maximize production or to deliver adequate supplies to those needing them and, indeed, as well was due to the violent traumas of bankruptcy and ruin for many industries. Congress acted in response to the proposition that neither the market mechanism or business administration could adequately protect the social organization. It is customary and appropriate," said Nathanson and Jaffe — and in this respect they were echoing other casebook writers as well — "It is customary and appropriate to date the present era of administrative regulation from the creation of the ICC in 1887. The Interstate Commerce Commission broke new ground in the federal establishment through its large armory of powers, through its capacity to exercise vetos on entrance, exit, expansion, consolidation, and merger, through its fixing of rates, its promulgation of rules of service and safety, and its adjudication of alleged rate violations, and its capacity to award or deny reparations to shippers."

I am not offering an ode to the concept of regulation for regulation's sake. I am rather suggesting that a history of a hundred years of regulation by an agency concerned with protecting this elusive but vital thing called the public interest should not be quickly dismissed without full analysis of what the consequences will be.

The substitution of an antitrust motif for a regulatory agency motif is at best something which is vastly in need of study.

My antitrust professor at Columbia, Professor Milton Handler, in recent years chose to examine the relationship between administrative regulation and antitrust regulation, and interestingly enough, Professor Handler, in articles, including one in the Yale Law Journal, made the observation that overall there were things to be said for administrative regulation's methodology that were superior to those of antitrust.

When is there opportunity for public participation? When is there opportunity to know in advance what a policy is going to be under the rubric of antitrust?

Within the realm of administrative regulation, we have developed the capacity to achieve what the framers of our Constitutional system were talking about when they said that "in establishing a government to be administered by men over men the great difficulty lies in this: you must first enable the government to control the governed and in the next place oblige it to control itself."

Within the framework of a hundred years of the traditions of the Interstate Commerce Commission, we have seen key occasions on which this blend has been dramatically demonstrated, the blend of the capacity to regulate, to enable the government to control the governed, and at the same time out of its sense of fairness and out of its regard for Constitutional and statutory principle to oblige the government to control itself.

This is a rare blend. I think we should nurture it rather than prematurely erect funeral pyres and tombstones to it.

Thank you very much.

MR. CLEARY: I wish to thank you all. Being very faithful, I am sure you feel that the last moments have been very worthwhile, and I think the comments of Professor Rosenblum and the other members of this panel have given us a lot to think about.

I hope you can think quickly and we can get a large group back here at 2:00 o'clock, when we have some good events for this afternoon.

Thank you very much.

(Whereupon, the ICC Centennial Celebration was recessed for lunch, to reconvene at 2:00 p.m., this same day.)