From Litigator to Commissioner— Some Thoughts on Judicial Review*

BETTY JO CHRISTIAN**

I feel as if I am being somewhat selfish in the topic I have chosen for today's meeting—selfish because it is a subject that has been of tremendous interest to me personally since the beginning of my own career. For fifteen years, I spent the bulk of my time representing the Interstate Commerce Commission in the Federal courts—defending its decisions against whatever challenge might be brought by a dissatisfied party. At first, my interest focused simply upon the result in my own specific cases—whether I won or lost, and whether my carefully constructed arguments were accepted or rejected by the court. But gradually, over a period of time, I became even more interested in the pattern which I began to perceive of the complex interrelationship between the courts and the Commission, and the way in which the Commission's actions were influenced and affected by the decisions being handed down by the courts. From this, it was only one more step to begin to form some judgments as to the value of this interaction—whether particular types of effects which I began to recognize were actually beneficial or detrimental to the proper functioning of the agency, as intended by Congress. And now, as a result of my appointment as a Commissioner, I have had the unusual opportunity of viewing this whole interrelationship from a second vantage point—that of the decision-maker whose deci-

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** Commissioner, Interstate Commerce Commission. B.A., University of Texas, 1957; LL.B., University of Texas School of Law, 1960.

sions are being reviewed. So today, I would like to share with you some of the thoughts that I have developed over a period of years, in the hope that the subject will be equally interesting to other lawyers also involved, in a different role, in ICC litigation.

Those of us who work for the Commission, in whatever role, invariably seem to begin any discussion of the judicial review process with a proud recitation of the statistics—the fact that, over a period of years, the Commission has been sustained in more than eighty percent of its cases in the lower appellate courts and over ninety percent in the Supreme Court. Indeed, sometimes I suspect that we do this in hopes of discouraging you from seeking review, on the theory that your statistical chance of success really isn't very large! But what do these statistics actually mean? Do they mean that the Commission is "right" over eighty percent of the time and "wrong" less than twenty percent of the time? Or that the Commission's lawyers write the best brief or deliver the best argument over eighty percent of the time? When I was supervising the Commission's litigation branch, I would have liked to believe that it was the latter, and now that I am a Commissioner I would like to believe it is the former—but I long ago accepted the fact that this simplistic (and very pleasant!) analysis is largely irrelevant.

Factual Disputes

The first thing that becomes obvious to even the most casual observer of the review process is that there is one particular type of case in which the courts will almost invariably uphold whatever decision the agency has reached—and that is the case which involves nothing more than a factual dispute. The concept of "substantial evidence" as the standard for reviewing such decisions is now firmly embedded, and the few deviations from that standard which still occur are—when the agency or intervenor in support decides to appeal—promptly corrected by the Supreme Court.[1] And I am forced to admit that this type of factual case makes up a large part of that nice eighty percent that I mentioned earlier!

But apart from raising the Commission's batting average, do these essentially factual cases have any importance in the overall interplay between court and agency? I believe they do, for they represent a reaffirmation of something that, to me, is one of the most important strictures upon the administrative agency—that we must base our adjudicative decisions upon the evidence presented to us in the case we are deciding. We tend to take this for granted now, but in the early days of the regulatory agencies' existence, the way in which the agencies were to approach decision-making was far from a settled question. At that time, an agency was a rather odd animal—neither court nor legislature—nor fitting comfortably into any of the three categories of government which originally made up the American

1. *See, e.g.*, Ralston Purina Co. v. Louisville & N.R.R., 426 U.S. 476 (1976); Consolo v. Federal Mar. Comm'n, 383 U.S. 607 (1966).

system. Could agencies, like legislatures, base their decisions upon whatever facts happened to be within their personal knowledge? Or were they required, like courts, to decide a case upon the basis of the facts put into the record by the parties? The determination of this issue, and the resulting dichotomy between the rulemaking and adjudicative functions of the agency, was fundamental to the entire administrative and regulatory system—and its creation was largely the work of the early courts who reviewed agency decisions. Thus, to the extent that the development of the "substantial evidence" concept has had the effect of insuring that agencies base their decisions in adjudicatory cases upon the evidence of record, the court-agency interplay has been an enormously beneficial one. Indeed, without it, I suspect that the administrative agency would have become a far different system than the one we know today. And we owe a great debt of gratitude to some of those long ago judges—men such as Mr. Justice Lamar[2] and Mr. Justice White[3]—who were instrumental in bringing it into being.

ADMINISTRATIVE PROCEDURES

If the courts have, as I believe, played a large role in defining the factual boundaries within which an agency's adjudicative decisions must be made, they have played an equally large role in determining the procedures by which the proceedings must be conducted and the decision made. In this area, however, I am not convinced that the results of the court-agency interplay have been entirely beneficial. Rather, after watching the review process for a number of years, I am inclined to believe that the results in the procedural area have been a mixture of benefit and detriment to the administrative process.

There is no doubt that the courts have performed an enormously useful service in demanding that whatever procedures are employed must satisfy the basic requirements of fair play and due process for all interested parties. Thus the courts have quite properly insisted that the most meticulous attention be paid to the adequacy of notice published in the *Federal Register*,[4] since this is often the only means of assuring that potentially interested persons are informed of the existence of a proceeding in time to protect their interests. The courts have performed a distinct service by requiring that parties to an agency proceeding be afforded a full and fair opportunity to make their case, since a decision on the record can be meaningful only if that record is complete from the standpoint of all parties.[5] And the courts have quite rightly demanded that the decisions rendered by the agencies

2. *See, e.g.*, ICC v. Louisville & N.R.R., 227 U.S. 88 (1913); ICC v. Union Pac. R.R., 222 U.S. 541 (1912).
3. Louisville & N.R.R. v. Behlmer, 175 U.S. 648 (1900).
4. *See, e.g.*, S.C. Loveland Co. v. United States, 534 F.2d 958 (D.C. Cir. 1976).
5. *See, e.g.*, ICC v. Louisville & N.R.R., 227 U.S. 88 (1913); North Am. Van Lines, Inc. v. United States, 412 F. Supp. 728 (N.D. Ind. 1976).

contain findings which are sufficient to inform the parties of the essential reasons for the agency's decision on every important issue.[6]

I am convinced, however, that some of the other procedural requirements imposed by courts upon the agencies have not been beneficial, but instead have in the long run resulted in a real detriment to the administrative process. In large part, these rulings seem to me to be a result of what I can only describe as an "over-judicializing" of the administrative process—that is, a tendency to regard the way that the courts approach a problem in a judicial context as the only appropriate way to handle the problem.

For example, all of us are familiar with the tendency, in typical administrative proceedings, to present virtually all evidence in the form of testimony of individual witnesses, making very little use of other possible methods for developing factual data. Yet, in my opinion, many issues decided by the agencies could be developed far better in other ways, such as through economic data, traffic statistics, and expert views. Why has this witness-by-witness approach developed? Why didn't the agencies, from their very inception, develop different methods of establishing the facts needed for their determinations? I am convinced that at least one reason was the tendency of the courts, in some of the early cases reviewing agency actions, to insist that a trial-type procedure, with testimony adduced by individual witnesses, was required as a matter of law.[7] I personally am convinced that these cases would no longer be followed by modern courts.[8] Nevertheless, I believe that their effects are still being felt in the way that agencies have developed their procedures over the years.

Occasionally courts have appeared to force upon agencies their own ideas of what procedure an agency should follow, although the parties to the case have not raised the point or have even conceded that the agency's decision was proper. For example, I can recall one case in which a court set aside an ICC decision denying a late-filed petition for intervention despite the fact that the concerned party expressly conceded that the denial of intervention was within the Commission's discretion.[9] In another case that I recall, a court remanded a modified procedure case with instructions to hold an oral hearing, although the plaintiff had never contested the use of modified procedure and, in fact, didn't even want an oral hearing since he knew that his witnesses were unwilling to attend an oral hearing.[10] In the latter case the court evidently felt that the record would have been improved by cross-examination, whether the parties to the case wanted to or not.

6. *See, e.g.*, Bowman Transp. Inc. v. Arkansas - Best Freight Sys., Inc., 419 U.S. 281 (1974); SEC v. Chenery Corp., 318 U.S. 80 (1942).
7. *See, e.g.*, Philadelphia Co. v. SEC, 175 F.2d 808 (D.C. Cir. 1948), *dismissed as moot* 337 U.S. 901 (1948); L.B. Wilson, Inc. v. FCC, 170 F.2d 793 (D.C. Cir. 1948).
8. *See, e.g.*, Permian Basin Area Rate Cases, 390 U.S. 747 (1968).
9. National Bus Traffic Ass'n v. United States, 212 F. Supp. 659 (N.D. Ill. 1962).
10. Lahmann Int'l Corp. v. United States, No. C-1-74-456 (D. Ohio, filed Nov. 3, 1975).

PROBLEMS OF "OVER-JUDICIALIZING"

Yet, in my opinion, this "over-judicializing" is a disservice to the administrative process. The simple fact is that an administrative agency is not a court, and is not supposed to be a court. If the agencies had been nothing more than another branch of the judiciary, their purpose could have been served just as well by the creation of another set of federal courts. The main reason for the creation of the agencies as separate entities was that they were expected to perform a function different from either the courts or the legislatures—to act in a manner which may be either quasi-judicial or quasi-legislative, but essentially distinct and more flexible than either. When the agencies are forced into a mold which too closely resembles the trial of a court proceeding, the result may well be to deprive the public of many of the benefits that the administrative process is designed, and in fact is able, to produce.

The effects of this are, I believe, widespread. For example, one of the agency problems most frequently discussed today is regulatory lag—a problem whose very existence is ironic, since one of the purposes behind the creation of the agencies was to eliminate the delay inherent in the judicial system.[11] Needless to say, there are many contributing causes to the problem of regulatory lag, and I certainly do not intend to single out the courts as the principal villain. Nevertheless, I believe it is inescapably true that at least one of the causes for the amount of time often consumed in completing an administrative proceeding is the procedural requirements mandated by the courts—requirements which may not be either necessary or appropriate for resolution of the particular issue involved. Where the result of the courts' procedural decisions is to discourage agencies from quickly implementing innovative procedures specially designed to resolve pressing issues with fairness to all parties, then I believe the administrative process is badly served. And where the courts' decisions operate to mandate specific considerations and thus inhibit the agencies from making full use of the expertise that they in fact possess—and are supposed to possess—then I believe that the court-agency interplay results in a detriment to the administrative process.

POLICY

The final area that I want to discuss, in which the courts and the agencies interact with each other, is in the realm of policy. At first blush, this may seem to be a contradiction in terms, for it has become almost a truism to say that the courts do not interfere with the agencies' actions on matters of policy. But is this entirely true? I am convinced that it is not, in several respects.

To begin with, the courts can and do play an extremely important role in making certain that the agencies in fact carry out the policy determinations

11. W. GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS, 14 (1941).

of Congress. This occurs most frequently in the context of interpreting and applying a new statutory provision. In the case of the Interstate Commerce Commission, examples that readily come to mind are the Supreme Court's decisions in such cases as *ICC v. J-T Transport*,[12] involving the Commission's implementation of the statutory provisions governing contract carrier applications, and *ICC v. New York, New Haven & Hartford Railroad*,[13] involving the Commission's interpretation of the then-new "rule of ratemaking" embodied in the Act. Although technically the courts may do no more than issue a legal interpretation of the language of a statute, the result can be—and in the two cases I haved cited was—a dramatic shift in policy which the court in effect compels the agency to make.

No one can deny the propriety—and indeed the necessity—for judicial interpretation of the statutes which embody the policy determinations of Congress. But there comes a point at which the policy actually enacted by Congress ceases to be clear, and the courts are still called upon to determine whether what the agency has done is in accord with a fuzzy and unclear congressional policy. In these areas, the interrelationship between the courts and the agencies can have even more profound effects upon the policies pursued by the agencies, well beyond mere questions of statutory interpretations.

Perhaps the most telling example of this latter type of policy review in recent years occurred in connection with cases arising under the National Environmental Policy Act of 1969. When that statute was first enacted, most agencies, including the Interstate Commerce Commission, assumed that the broad language of the statute left them with considerable leeway in how the Act's requirements should be meshed with their pre-existing responsibilities. But in the early court cases arising under that Act it soon became apparent that the courts were taking it upon themselves to determine the precise procedural methods by which the policies reflected in the Act must be implemented by the agencies. The result was a far-reaching change in agency procedures and methodologies, with such things as "threshold assessments" and "impact statements" assuming an integral role in the agency process. And although some of the more extreme procedural requirements imposed by the lower court decisions have now fallen by the wayside as a result of the Supreme Court's decision in the *SCRAP* litigation,[14] the result of the entire complex of environmental cases has been a significant change in the manner in which agencies must pursue policy questions which involve environmental issues.

Another recent example of this type of judicial influence upon policy-making is in connection with the role of the economic regulatory agencies

12. ICC v. J-T Transp. Co., 368 U.S. 81 (1961).
13. ICC v. New York, N.H. & H.R.R., 372 U.S. 744 (1963).
14. Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289 (1976).

with regard to the national goal of ending racial discrimination and promoting equal opportunity. The question of whether the "public interest" standard embodied in economic regulatory statutes such as the Interstate Commerce Act and the Natural Gas Act encompasses such matters as promoting minority ownership or employment was certainly not clear from the face of the statutes or the underlying legislative history. Yet recent Supreme Court and district court cases[15] have decided these questions, as matters of statutory interpretation, thereby exerting a dramatic effect upon the policies pursued by the agencies in this area.

This type of court-agency interplay in the policy area is one that is, to me, the most disturbing in terms of its potential effects upon the administrative process. Regardless of whether I may agree or disagree with the result in a particular case, it disturbs me to see the ultimate decision in what is essentially a policy matter made, not by the Congress or the agency created by Congress, but by the judicial branch of the government. Theoretically, of course, the decision can always be reversed by Congress through a new statutory amendment, but this avenue is often more theoretical than real, given the practical problems inherent in attempting to secure the enactment of legislation. And unless and until such a reversal is accomplished, the agency is compelled to implement the policy as laid down by the reviewing court, even if the agency itself does not believe that this policy is appropriate or in accord with its specific mandate from Congress.

I hope that you are not all waiting for me to suddenly announce a neat formula that will solve all the problems—because I must confess that I have not found one. The interrelationship between the courts and the agencies is one that has had tremendous benefits in some areas, but I believe it has had disadvantages in other areas. I hope that in these brief remarks I have at least caused some of you to begin to think about the problem, and perhaps to view the judicial review process as something more than just an exercise in "Did I win or lose the case?"

15. NAACP v. Federal Power Comm'n., 425 U.S. 662 (1976); O-J Transp. Co. v. United States, 536 F.2d 126 (6th Cir. 1975), *cert. denied*, 97 S. Ct. 386 (1976). *See also* Equal Employment in Surface Transportation, 353 I.C.C. 425 (1977).