

**THE INTERSTATE COMMERCE COMMISSION,
1912-1937****ROBERT L. CALHOUN***

MR. CALHOUN: Thank you very much, Bob. The problem I have with my particular period, which covers from 1912 to the Commission's 50th anniversary in 1937, is there's an awful lot to cover.

I have about two hours worth of material in front of me. I'm not going to read it all, I promise you. But it shows you the diversity, the complexity and richness of one of the most complicated periods in American history. It happens to end the same year I was born. As the Commission is celebrating its 100th anniversary, I'm celebrating my 50th.

What you're going to be hearing about this period, which spans Woodrow Wilson's first term to well into the beginning of Franklin Roosevelt's second term, is going to be from a number of different perspectives. I would like to outline a few of these so you'll see where some of the remarks come from.

They come first and foremost in my having worked for the Commission, both for Charlie Webb and then later as Legislative Counsel to the Commission, which I think were some of the best years I had in my life as a lawyer. Being a public servant in this agency, the people were wonderful to work with as individuals — dedicated, hard-working and very smart.

One of the things inherited when I was legislative counsel here was an enormous collection of documents. These are the archives of the Commission's legislation. Documents are the footprints of history. They give you a feel insofar as written words can do for what people thought

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about, what they talked about, what their aspirations were and what they hoped would happen.

And that is particularly true of this period. What you will see in handwritten notes from the Committee on Legislation and the chairman of the Commission on various documents are not just the grave bureaucratic mass of paper, the one associated with government, but men who were very interested in their country, in their transportation system, and their role in making the two mesh one with the other.

One of the most difficult periods in American history was during the 1930's, in the Great Depression. And that's what we're going to be talking about to a large extent in this particular period; the influence of very dynamic, very radical, very dangerous times in the economy and the history of this country. And there was great fear that the institutions, both economic and political, would get changed in a very fundamental way.

For a person of my age and my generation, I only listened to my parents talk about the Depression, about communism, about radicalism, and about hungry people and strikes. And you go back and read it; it is a marvel and it should be to the institution of this country, to which this institution played a very large role in that we all came through it.

I'm also influenced, I am forced to tell you, by the fact I also have a degree in economics. I don't have a Ph.D., like Dr. Miller, but I do have a Masters on the subject and it is in transportation economics.

I studied under Kant Healy, who was kind of a heretic about this agency. I also studied under Dr. Miller. As you heard him mention, I was his first boss, so if you want to blame me for hiring him, fine.

Jim Miller and I used to argue a lot about this agency, and I do agree with part of what he said. And that is that railroads were a lot more competitive when this agency was founded than conventional wisdom would tell you.

I do not agree with what I consider a revisionist review of history, that the Interstate Commerce Act constitutes a conspiracy against competition, or a conspiracy between the railroads and the Commission to do in the public interest. At least not during the period George Chandler talked about. That came later, in the period I'm going to talk about.

Because, if anything, Commissioner Aitchison referred to the period George Chandler talked about as the period of enforced competition. No fooling, anti-trust laws applied to mergers, rate bureaus, and so forth. And the most the Commission could do was to shave off the rough edges.

But, by and large, it was everybody for themselves. By 1912, and more importantly during the First World War, as a result of the general increased cases that George alluded to, the railroad industry in this country was in pretty bad shape in terms of earnings, too many railroads, too

much track, and service falling apart. We had to take over the railroads through the United States Railway Administration in 1917 and 1921. That forced a new way of thinking about regulation and about transportation. In particular, it suggested that competition in and of itself was not a good thing. It was not something to be suppressed, but it was not something to be valued above all of their objectives.

Now, here I will also have to take issue with one of Dr. Miller's good friends, Tom Moore, who teaches at Stanford, and Gabriel Cocoa, whom many people quote. I regard both of them as revisionists also, in the sense that they would like to tell you that railroads basically were always monopolous, and all the Commission did was fortify it.

That also happened in this period. But it happened for a reason. In 1920, we had a choice in this country to continue things the way they were, which nobody wanted to do because it didn't work. The federal control period showed that the railroad industry was an industry, one railroad company — with a lot of parts — but still one company.

We made a choice. We could nationalize the system. A lot of people thought that was rather a terrific idea. Commissioner Eastman thought it was a good idea.

A lot of other people had said, well, what you ought to do is let the railroads run themselves. You just get out of the business and you have a kind of economic socialism, if you want to call it that, or industrial syllogism, modeled after the Italian and Spanish form of government at the time, where the industry policed itself.

The act of 1920 and the other acts that you'll hear talked about, in a sense, are a compromise between those competing views, of private cartelization on the one hand, and public monopoly or nationalization on the other. They contemplate private management, private ownership, private operation, with the understanding that the Commission is going to do more than just process complaints. It's also going to regulate this industry. To quote from the Supreme Court decision of the time, "Maintain a railroad system adequate for the people of the United States by placing the railroads under the Faustian guardianship and control of the Commission."

Now, the 1920 Act stated its central premise was to do that, but we didn't get rid of what George Chandler has talked about. And that was laws dealing with discrimination and reasonable rates, and so forth, which were like pro-shipper as distinct from pro-carrier. What was supposed to happen was this: we were supposed to get an era of stable rates, a prosperous railroad system, good service to shippers, predictable results, instead of ad hoc litigation either by the Justice Department under the anti-trust laws (this was the era of Keough, by the way, for those of you who followed that particular subject) or ad hoc complaint litigation. The Com-

mission was going to become in effect, a planner and a regulator, not just a court.

Jim Landis, who wrote a book called *The Administrative Process* in 1938, described what he saw the Commission had been transformed into. He said:

These men, the members of the Commission, as they now view their duties, are no longer content to base the justification of their stewardship upon achievements that merely assure reasonable rates and the absence of discrimination. Instead, the ills of the industry have become their bailiwick. The policies they must formulate must now be directed toward broad and imaginative ends, conceived in terms of management rather than policy.

This is one of the most rich periods in legislative activity that you can imagine in transportation. So what are they trying to do? You're going to make rates nationally so everybody can make a living, defined as five and a quarter percent on the fair value of the railroad's property, whatever fair value was.

The railroad made too much money, it was going to get recaptured under the Recapture Clause and put in a bank for the benefits of railroads that didn't make enough. This was the cross-subsidization that Dr. Miller was talking of — one aspect of it. Some railroads could not cut it, like the New England railroads, so a policy was established to apportion divisions between carriers on the basis of revenue need.

This is a way of taking money out of one pocket and putting it in the other in order to begin to have a railroad system, as distinct from, individual carriers. That was the concept.

You also had the situation of mergers and control of entry and exit that Dr. Miller talked about. Entry was the thing they were more concerned about. Too much railroad building in this country resulted in a lot of railroad bankruptcies and the excessive competition that people sought to control. As it turned out, the railroad industry was going the other way. Most of the Commission after 1920 was abandoning railroads rather than building new ones, although you're looking at a person whose trying to get a railroad built. It's taken me five years to gum through this place to get it done, but it can happen.

But all of this was to ensure that shippers paid no more than they needed to pay, and that railroads did not waste the money received on things they did not need to do, the need being defined by the law and by the Interstate Commerce Commission.

You cannot help but read the decisions of those periods to know the people individually, the members of the Commission, who spent a lot of time personally thinking about these issues. I have seen decisions in draft form in this period where you'll see the Commissioner's handwritten notes. This is the day of no xeroxing. So, secretaries were madly typing

50 carbon copies of every decision to circulate it for voting. So you'll get the benefit of the individual comments off of those carbon copies.

Now it's instructive to know one thing that this act didn't do. Remember, George Chandler talked about the Rate Bureau cases. There was no Rate Bureau language in the 1920 Act. The Commission and the Justice Department seemed to have entered into some sort of a treaty of peace not to kick sleeping dogs. Rate Bureaus didn't go away, even though they were supposed to be illegal under the anti-trust laws.

The Commission occasionally would talk about them in the reports, but there's a tendency of "don't rattle cages" about that subject. Everybody kind of went along with the game until 1938, when Thurmond Arnold decided: Well, we can't have things like the National Recovery Act and legalized cartels and suspending the anti-trust laws. Let's make them mean something.

The first anti-trust case that he brought was against the Rate Bureau. It's known as the Lincoln case in transportation history, which eventually led to the Bullwinkle Act in 1948.

Now, by and large, I am forced to say — at the risk of also being a party-pooper — a lot of this stuff didn't work. It didn't work for two or three reasons.

First of all, it asked too much of a legal system. Any of us who are lawyers know it's a lot easier to tell people "don't do that" rather than "we'd like you to do this, and like you to do this, and like you to do this," and a person will say "I don't want to do that."

The Commission's master merger planning process is a classic example of trying to roll a stone uphill with your nose. Congress gave the Commission the task of replanning the whole railroad network in this country and do a few systems, but they did not give them the resources to compel it to happen, either legal or financial. The railroads said, "It's not in our interest to do it," and didn't do it. That exercise in master planning, which was probably more ideologically insensible in the first place, finally had to be repealed.

The practical problems of determining excess earnings for a railroad were just unwieldy and unmanageable. In addition, starting in about 1929-1930, railroads weren't earning excess earnings in any case. There were no excess earnings to share in the industry as a whole, so that process went down the tube.

That goes to the second reason why the stuff didn't work: you can't regulate something without eventually trying to regulate everything. One thing government has never succeeded in doing was regulating the weather. The agricultural sector in the United States economy went through endless misery, as it continues to do, during this entire period.

The Commission was plagued with equally endless misery from Congressmen, and from non other than Warren Harding, who was supposed to have come to the Commission personally to intercede on behalf of farm and agricultural people to reduce rates of the railroads. Keep in mind, this is at the time the Commission is under a mandate to increase rates to ensure adequate earnings. The Commission's caught in a crack. No matter what it does, it's going to get yelled at. If the railroads don't prosper, they're going to get yelled at; if the farmers don't prosper, they're going to get yelled at. A totally impossible situation for the Commission. No matter what you do, you're going to be wrong. That is not unique to this period, but it has been a problem with regulation all of its life.

More importantly, when you are trying to restructure an industry, the focus was on financial aspects. It was thought that the big bad bankers, like J.P. Morgan and Bernard Baruche, were really the problem of the underlying structure of the railroads. Just restructure the bonds and the stock and stop putting out watered stock, and what have you, that would cure most of the problems.

It didn't. A lot of railroads went into bankruptcy, a lot of them two or three times.

But neither the Commission nor the Congress was willing to face up to what had to be faced in the 1970's. If you want to restructure the railroads, you've got to be mean about it. You've got to be a dictator, this is what we're going to do, this is what we're going to pay for and this is what it's going to look like.

And to a large extent, that's what Conrail was all about. They tried to learn from the experience of the 1930's that you must do it comprehensively, or don't do it at all and come up with that particular process.

One cannot talk about this period without noting briefly two other things. One is competition by other modes and the other is the Motor Carrier Act. I want to talk about something that's more interesting than anything else, and that's Joe Eastman and Franklin Roosevelt.

You've already heard some talk about the Motor Carrier Act, so I won't go into what that law is all about. I think most of you are familiar with it anyway. What's more interesting is the choice the Congress had and rejected until 1980.

The Motor Carrier Act of 1935, as I think most people know, was the product of the Coordinator of Transportation's basic bill. But there was a different approach, which nowadays would be called a fitness only approach: Show me that you're honest. Show me you've got insurance. Show me that you're safe. Promise not to discriminate, publish your rates, and you're in business. It's that simple.

It is always dangerous in history to reflect on what might have been,

but it's interesting to speculate that if there had been that Motor Carrier Act passed, rather than the one that passed, wouldn't the whole world have been a lot different? It would have been a different motor carrier industry. It would have been a different Commission. It would have been a different railroad industry, because the railroad industry would have had to pull up its socks and restructure, and the Commission would have had the time to focus on it.

It was always my view when I was here, and is my view now, that the worst thing that happened to the Interstate Commerce Commission was the passage of the Motor Carrier Act. Administratively, it inundated this place with paper and became, instead of an agency that should be thinking about transportation policy, an army of clerks processing paper. The Commission in more polite terms, will tell you that it is ruining the institution, that you cannot cope with all this paper and applications. . . .

Now, just to go on to the last item, which is more political science, somebody mentioned as a politician, these are some things I came across when I was legislative counsel here and have been looking at ever since.

We talk about this agency as an independent agency and so it is in the functional sense. It's never been quite clear what it is in the legal sense. There is no place in the Constitution for independent agency—either you're a court or you're president or you're congress. There's no fourth thing in there. But we kind of fake around it and say, well, it's a little of all three. And that's always caused a problem.

Now, George Chandler talked about the courts. In the period I'm talking about, the Commission got along with the courts pretty well, largely because there are a number of Justices in the Supreme Court who had had a hand in the Commission's work — Taft, Hughes, Brandeis — or basically understood the railroad business, such as Sutherland, who is a railroad lawyer by background. The O'Fallon case, which destroyed the Recapture Clause and made a mockery out of the valuation process, is probably the only exception to that.

The next panel is going to talk about administrative law, so I'm not going to go into the cases here, just simply enough to point out that probably the major cases that deal with administrative law in this agency were decided in the period I'm dealing with.

Same thing's true with the Congress. Congress got along with the Commission as well as anybody can ever get along with a Congress. You had a couple of rough spots. Remember, Agency Commissioner Hess was kicked out of the agency. They wouldn't give him another term, because they didn't like his vote on a particular case. You'll find when Hodge-Smith resolutions passed, there is some internal correspondence

of the Commission saying that "Congress is meddling in our business, and they don't know anything about it."

By the time you get down to the end of this period, the Commission's legislative committee, Swann, Atchison, McHaffey, apparently got along pretty well with people like Senator Wheeler, Clarence Lee, Sam Rayburn, who were really kind of the architects of the major legislation of this era. And they apparently spent Saturday mornings with him talking about Commission's legislation. It's always been my suspicion that the reason they got along so well was they had a common enemy, and that was Franklin Roosevelt.

Franklin Roosevelt had a lot of problems with this agency, and particularly with Joe Sveesman. The problem was they were two very stubborn people. They each had their own views on what their role in life was. They apparently got along fairly well most of the time, but they also had their share of quarrels. It was primarily whether the President had a right to meddle with this agency. Now, it didn't start with Roosevelt, it actually started with Woodrow Wilson, which is somewhat ironic, because Wilson, as the Professor of Princeton University, had written an essay called *On Administration*, which is also celebrating its 100th anniversary next month. And the central premise in Wilson's essay was that once Congress passes the laws, once the President signs them, you appoint neutral administrators to carry them out. The law is what the law is, and politicians know nothing about laws once they've done their piece of the work. And he summarized it in this fashion: although politics sets the task for administration, it should not be suffered to manipulate its office.

When Woodrow Wilson became President, he changed his mind. Woodrow Wilson sent some mail over here saying: I would rather try to influence the Supreme Court than the Interstate Commerce Commission. On the other hand, I think the bankers and the railroads have made a good point, they need a rate increase.

Now, these were publicly sent to Commissioner Daniels, who had been a colleague of his at Princeton. The Commission paid no attention to that. So then Wilson went public, went up to the Congress, State of the Union Address, and said: the Commission has got to understand the railroads need a rate increase.

The Commission said, "We don't care. We brand this as right, and you're wrong." And turned it down. And Wilson tried to pack the Commission by adding some members down here to get people to go his way.

The next person was Warren Harding. You know, I haven't been able to document this story, but there's this wonderful tale that Warren Harding was supposed to have come to the Commission at a conference while they were discussing a rate case. He was told to leave, that it was improper for the President of the United States to try to influence the Com-

mission, and he hadn't been invited: "You'd better leave." And Herbert Hoover did the same thing — was told the same thing. I mean, he was meddling.

The 1930's had so much legislation, it was necessary for the President to bring some order in all of this, to get some clearance. So they sent around what is the ancestor of the Budget Bureau circular that says: If you're going to submit legislation to Congress, it's got to go to OMB first. And at the bottom it says, "This legislation is consistent with the President's program."

By and large, the Commission told them, "We're an independent agency. You have no business telling us what to do. You control our budget and our appointments, and that was all."

Well, for a while, it was kind of touch and go, and then the Commission lucked out. The Supreme Court decided the case of *Humphrey's Executive vs. United States*, which said just that.

And, finally, the President apparently called Joe Eastman over to the White House, and then wrote him a letter, which I have in front of me if you want to actually see the copy of it. But I'll just read you one sentence out of it:

In the case of the independent Commissions, all that is requested is proposed legislation be taken up with the Executive Branch of the government. That is a simple request in the interest of orderly conduct of the government and in no way seeks to destroy the independence of the Commission.

I've never been able to find the answer to this letter, but I suspect it was: "Thank you, Mr. President, but drop dead."

Basically, the Commission eventually raised a compromise, which I inherited as legislative counsel, and that is, you give them to OMB five minutes after you give them to the Congress. I think that's still a practice here.

Not to be put down, they tried it another time in 1937. And this time the Commission just simply said: "you don't have a legal authority. *Humphery's Executive* says we're not accountable to you. Most we'll do is we'll send it to you after we send it to the Congress.

Now, the last piece, though, was the Roosevelt Administration. They never gave up. Bureaucracy is tenacious, if nothing else.

We're also celebrating the 50th anniversary this year of something known as the Brownlo Commission, which was otherwise known as the President's Commission on Administrative Management. The Brownlo Commission, among other things, created what is now the Executive Office of the President at the White House. It also recommended the placing of the ICC in the Department of Commerce as a Bureau within the Department of Commerce. And characterized this agency and its counterparts, like the SEC and the FEC, as being a headless fourth branch of the gov-

ernment. The Commission's comments on that were quite unmerciful and quite unforgiving and they are found in the last volume of Mr. Sharkon's book, if you have the opportunity to read them.

Finishing up, the Commission and Franklin Roosevelt made up here in this very room. At the 50th anniversary celebration, Franklin Roosevelt wrote a nice letter to the Commission and said:

The Interstate Commerce Commission is fortunate that interpretations of our charter of liberties — meaning the Constitution — have allowed it to function during the past half century through recognition of the fact that an obviously national need can be met only through obviously national action.

Thank you.

MR. MINOR: Thank you, Bob. Bob's reference to the voluminous records and reports of the Commission reminded me that on that same occasion that I spoke of earlier, Mr. Justice Frankfurter opined that the Commission obviously worked harder than the Supreme Court because we had generated more volumes of reports than the Supreme Court had in half the time.

Our next speaker is a graduate of Goucher College, with a major in Mathematics, was elected there to Phi Beta Kappa. She took graduate work in Math at Johns Hopkins, resulting in a Master of Arts degree in '31, and a Ph.D. two years later.

She taught at the University of Richmond and got another master's degree in Economics at the University of Oregon and was an instructor there for a period of two years, before joining the Interstate Commerce Commission.

She worked at the Commission part-time at first, and later assumed a full-time position beginning a long and distinguished career in government work, 30 years in Transportation Economics.

She practiced her skills not only at the Commission but at the Office of Defense Transportation until, in 1953, Post Master General Arthur Summerfield asked her to come over and try to make some sense out of the transportation economics at the Post Office. She held at that time the highest position of any woman in the Department— and in the entire history of the Department.

Probably her most significant contribution was heading a staff of 30 persons who worked on trying to organize the transportation of mail throughout the country. And her work in that area and the work of her colleagues was so successful — we were chatting a moment out in back before the panel began — that, in one year, she calculated that \$50 million was saved the American user of postal services.

She has been recognized by prestigious awards by nongovernment groups, Federal Woman's Award in 1961, which was the first year the

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award was made; and in 1970, the National Civil Service League gave her its Career Service Award.

It's not surprising that Dr. Beatrice Aitchison has had such a distinguished career. As most of you know, I think, her father, Clyde Aitchison, was a member of the Interstate Commerce Commission from 1917 to 1952, a period of 35 years, a record which probably will stand for all time. Certainly no one has approached it.

It's a great privilege for me to present to you Dr. Beatrice Aitchison.