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The Impact of Judicial Review on the Federal Communications Commission*

FREDRICK W. FORD**

In recent years the administrative process, particularly as reflected in the workings of the major federal independent regulatory agencies, has been the subject of searching reappraisals in many quarters. The House of Representatives has established a Special Subcommittee on Legislative Oversight to inquire into the manner in which the principal regulatory agencies have been executing their statutory mandates. Senate and House committees have been considering legislation which if enacted would bring about large scale revisions in procedure. The Judicial Conference of the United States has recommended the formation of a Conference on Administrative Procedure to give closer study on a continuing basis to the administrative process. And some legal scholars and political scientists have called for a substantial overhaul of the entire system. The administrative process has periodically been subjected to such scrutiny and has benefited by it. Over the long run, however, the most permanent and effective source of control has, I think, been provided by those courts whose functions have included the review of agency actions.

Broadly speaking, judicial review is limited, in theory at least, to confining agency actions within the delegated statutory authority and to providing a check against arbitrary and capricious action. Its effectiveness has occasionally been criticized because of these limitations and others imposed by requirements of a jurisdictional nature, such as standing, ripeness for review and so forth. Nevertheless as the Chairman of a major federal regulatory agency I can assure you that the courts exercise a meaningful and continuous influence on our deliberations. I would like today to give you, in necessarily sketchy terms, but with reference to a number of specific instances, some idea of the review which the courts exercise over our agency, the Federal Communications Commission. I became a member of the Commission in 1957 and most of the cases I

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** Chairman, Federal Communications Commission.
mention have been handed down either since that time or sufficiently close to that date for me to experience their impact on our processes.

I should perhaps point out at the outset that the Commission's area of interest from a regulatory standpoint includes broadcasting, common carriers engaged in interstate and foreign communication by wire or radio, and the many safety and special radio services (marine, industrial, aviation, amateurs and so forth). The greatest number of our actions which become the subject of judicial review, however, concern either licensing or rule making in the broadcast field, and my remarks will be directed to these matters.

The basic delegation of authority which the Communications Act bestows on us is the rather broad mandate to act in "the public interest, convenience and necessity." One writer has described such a statutory standard as saying, in effect: "Here is the problem. Deal with it." It is really not that broad a delegation, however, since we are required to consider matters of "citizenship, character, and financial, technical and other qualifications"; we may not grant the application of an alien, a foreign corporation or foreign government; we are directed to make "a fair, efficient and equitable distribution of radio service" among the various states and communities of the nation; and international agreements limit the use we can make of certain radio frequencies.

From a functional standpoint the Commission's major responsibilities in the realm of licensing fall into four categories: the renewal of broadcast licenses transfers in the ownership or control of broadcast stations; the construction and operation of new radio and television stations, and major modifications in these stations, such as increases in power and antenna heights, change in station locations, etc.

We have broad rule making powers as well. Section 4(i) of the Communications Act empowers the Commission to "make such rules and regulations . . . not inconsistent with this Act as may be necessary in the executions of its functions," and Section 303

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2 1 DAVIS, ADMINISTRATIVE LAW 87 (1958).
enumerates a wide variety of situations over which we are authorized to exercise jurisdiction.

Under Section 402 of the Communications Act review of a Commission decision or order may be sought by any person "who is aggrieved or whose interests are adversely affected" thereby. This section, incorporated into the Act in 1952, reflected significant changes in the review provisions which had governed the relationship between the Commission and the courts during most of the agency's lifetime. Subsection (a) provides that, with certain exceptions (set forth in subsection (b)), proceedings to enjoin, set aside, amend or suspend orders of the Commission are to be brought under the Judicial Review Act of 1950. This Act did away with the provision that three-judge district courts review Commission actions and substituted review by the various United States Courts of Appeals.

Subsection (b) of Section 402 provides that actions seeking review of decisions and orders involving the exercise of our radio licensing functions must be brought in the United States Court of Appeals for the District of Columbia Circuit. The remaining subsections set forth the procedures governing 402(b) appeals and prescribe the nature and extent of appellate jurisdiction. For example, the court may grant motions for stay (402(c)); the scope of review set forth in the Administrative Procedure Act is made applicable (402(g)); and upon a reversal of its decision, the Commission, in giving effect to the court's judgment, must do so on the existing record unless otherwise ordered (402(h)). This latter provision overrules an earlier Supreme Court decision that had sustained the Commission's power to give consideration on remand to circumstances occurring subsequent to the original proceeding.

The impact of judicial review on the functions I enumerated above has varied. With respect to transfers of ownership and renewals, Commission action has almost invariably resulted in grants of the applications in question so that the occasion for appellate review has been minimal. The cases which have arisen have usually concerned the rights of third persons to protect the grants and have them designated for evidentiary hearing. The readiness of the court to find that standing exists and to require a hearing

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where on the basis of the pleadings the Commission has found no substantial unresolved public interest question, has been the most striking feature of review in this area. For example, in the *Camden Radio* case, an existing licensee was held a person "aggrieved," with standing to protest the transfer of an outstanding authorization even though no injury arising from the transfer was shown. Its status as a prospective competitor of the assignee was deemed sufficient. In another case a business concern competing with RCA in the manufacture and sale of appliances and electronic equipment was deemed to have standing to protest renewal of the license of a station owned by the National Broadcasting Company, an RCA subsidiary. In the court's judgment the operation of the station by NBC secured competitive advertising advantages for RCA sufficient to confer standing on a competitor as a person aggrieved by renewal of the license.\(^{11}\)

In *Federal Broadcasting System, Inc. v. FCC*\(^{12}\) the court held that the statutory language requiring a protest to "specify with particularity the facts, matters and things relied on," had been satisfied "merely" so long as some fact or situation was articulated which "would tend to show" that a grant was improperly made. The Commission was accordingly required to hold an evidentiary hearing on a station's renewal of license although on the basis of the pleadings before it, it was satisfied that no substantial public interest question was present. Primarily then, reversal of Commission action in these areas has rested on a procedural rather than a substantive basis. I can recall no instance since I have been a member of the Commission where a decision involving as assignment of license or a renewal has been upset when reviewed on the merits.

Applications for new stations and for major modifications in existing facilities present more difficult problems. Rights of existing stations and other applicants are more frequently involved, and the cases become more complex and hard-fought. In addition to the standards of character, citizenship, and financial and technical soundness, these cases often involve questions as to which of several applicants or frequency assignments will better serve the public interest. On all of these matters the Commission has considerable

\(^{10}\) *Camden Radio, Inc. v. FCC*, 220 F.2d 191 (D.C. Cir. 1954).


\(^{12}\) 225 F.2d 560 (D.C. Cir. 1955).
latitude stemming from its status as an expert body in the field and from its statutory position as the agency entrusted by the Congress with the responsibility for regulating the broadcast industry. Yet, a look at the decisions reviewing our proceedings shows that it has not been at all uncommon for the court to reverse where the result reached has seemed to it unsatisfactory.

On the matter of character it has been held that misrepresentation of the Commission can result in disqualification as a licensee. However, in a much litigated case involving a television station in Spartansburg, South Carolina, the Commission determined after a full evidentiary hearing that there had been no misrepresentation on the part of a licensee. The court of appeals reversed, holding that our own standard of what constituted misrepresentation to a regulatory body had been too mild. On the basis of the same evidence which had been considered by the Commission, the court found that "calculated, deliberate" misrepresentation had occurred. Reviewing the evidence again, the Commission found no "wilful" intent to deceive, and again the court remanded the case. Thus we had a situation in which the regulatory body concerned twice satisfied itself that data submitted to it did not preclude an applicant from receiving a grant; however, the court of appeals reversed the Commission in both instances. The case, which began in 1954, is still before us.

In order to receive a license an applicant, among other things, must be found to possess certain financial qualifications, and the court has been generally willing to accept the determinations of the Commission in this area. A recent case to the contrary offers, in my view, a rather striking example of the very broad review function which a court will on occasion exercise. Normally, under our procedures, an applicant's financial capabilities are questioned in a hearing only if a preliminary examination of data submitted in the application raises a substantial doubt as to his qualification. In this particular case, a contest between two applicants for a television channel in Biloxi, Mississippi, no financial question seemed apparent, and our order setting forth the issues on which the hearing

14 Hall v. FCC, 237 F.2d 567 (D.C. Cir. 1956); Hall v. FCC, 257 F.2d 626 (D.C. Cir. 1958).
15 E.g. Deep South Broadcasting Co. v. FCC, 278 F.2d 264 (D.C. Cir. 1960); Columbia Empire Telecasters, Inc. v. FCC, 228 F.2d 459 (D.C. Cir. 1955).
was to be held, simply referred to the fact that the applicants were found to have been "legally, technically and financially qualified." A decision favoring one of the applicants was eventually rendered and the loser sought review. The validity of the Commission's finding as to financial qualifications was not, however, raised in the appeal. Nonetheless, in remanding the case the court found that "the Commission plainly erred in holding Radio Associates financially qualified" and the case was remanded. Thus, in a decision which had rather far-reaching consequences on our internal procedures, the court was deciding an issue which was never seriously raised before the Commission and which had been neither briefed nor argued by any party to the court proceeding.

The task of providing the "fair, equitable and efficient" radio service called for under Section 307(b) of the Communications Act encompasses consideration of such matters as existing services, interference between stations, outlets for local self-expression and so forth. This concept is so fundamental to the task of assigning broadcast licenses that it is the subject of adjudication in a great number of FCC proceedings. Aside from the procedural rights involved the subject matter of these cases is clearly one calling for the type of "expertise" which the Commission was established to bring to bear on the licensing of broadcast stations. Generally speaking, this is reflected in the frequency with which the Commission has been sustained by the Courts when review is sought. By and large the Commission's determinations as to what constitutes a "community" for allocations purposes, the need for a new service vis-a-vis a service that would be lost through interference, and the needs of one community over another for a broadcast service have generally been upheld. Three somewhat related appeals' court decisions setting aside Commission actions represent an important exception in this area and show that even here the courts actively scrutinize the bases for Commission actions in individual cases. The first of these, Allentown Broadcasting Co. v. F.C.C. presented the following question: In choosing between competing applicants who would provide broadcast stations to different communities, should the

17 E.g. Jackson Broadcasting & Television Corp. v. FCC, 280 F.2d 676 (D.C. Cir. 1960); Red River Valley Broadcasting Co. v. FCC, 272 F.2d 562 (D.C. Cir. 1959); Interstate Broadcasting Co. v. FCC, 265 F.2d 598 (D.C. Cir. 1959); Albertson v. FCC, 243 F.2d 209 (D.C. Cir. 1957).
18 222 F.2d 781 (D.C. Cir. 1954).
Commission give primary consideration to the comparative qualifications of the applicants or to the needs of the respective communities for the service proposed? The court of appeals, in reversing a Commission decision, held in effect that the needs of the different communities could be considered only after the abilities of the competing applicants to meet those needs had been found to be equal. Here, however, the Supreme Court reversed this judgment and upheld the Commission's contention that a fair, efficient and equitable distribution of radio service required that paramount consideration be given to the needs of the communities involved rather than the qualifications of individual applicants.\(^1\)

The type of evidence which may be adduced to determine the need for one service over another, however, has presented a considerable problem and one on which the Commission and the court have not always seen eye to eye. For example, when a Commission examiner and later the Commission itself held that evidence as to the actual programs proposed by an applicant and those which were already being broadcast over existing stations was irrelevant to the issue of need for a new service the court remanded the case, holding that a comparative appraisal as between an existing service and that which a new replacing signal would provide was what "the public interest command[s]."\(^2\)

In a recent case the court found that the Commission's decision granting an applicant for Plainview, Texas, and denying one for Slaton, a smaller nearby community, was unsupported by substantial evidence, even though the record showed that the favored community was nearly three times the size of the other; that the grant would provide a first competitive service to the community; that Slaton was in the metropolitan area of a larger city and received service from six stations in that city; and that the Slaton proposal would cause interference to an existing station. The court held that there was insufficient evidence to assume the needs of the community were being met by the big city stations, and that evidence of the programming of those stations was the only way to make this determination.\(^3\)

In recent years perhaps our most significant licensing activity in the broadcast field has concerned competing applications for

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20 Democrat Printing Co. v. FCC, 202 F.2d 298 (D.C. Cir. 1952).
television channels. When, as was often the case, more than one applicant sought to use the same channel assignment the Commission was required by law to conduct a full sale evidentiary hearing to determine which of the competing applicants was the better qualified. From 1952, when the so-called "freeze" was lifted on television applications, to the present, nearly sixty final decisions have been rendered by the Commission in this area. While the number of Commission decisions represent barely 10% of the total number of commercial television stations which have gone on the air since 1952—most of the others being issued without hearing because only one applicant sought the channel—it nonetheless constitutes a substantial portion of the adjudicatory workload of the Commission during this period because of the tremendous length of the records, the hearing time consumed, and the many procedural steps required by statute and relevant court decisions. With so much at stake on the outcome, our decisions were frequently appealed—nearly half of them having been judicially reviewed.

The attitude of the courts in reviewing this kind of case was expressed in the following terms by Judge Prettyman, presently Judge of the Court of Appeals for the District of Columbia Circuit, in a decision involving an appeal by a losing applicant for a channel in Tampa, Florida:

"The controversy is in an area into which the courts are seldom justified in intruding. The selection of an awardee from among several qualified applicants is basically a matter of judgment, often difficult and delicate, entrusted by the Congress to the administrative agency. The decisive factors in comparable selections may well vary; sometimes one applicant is superior to another in one respect, whereas in another case one applicant may be superior to its rivals in another feature. And it is also true that the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes... All such matters are for the Congress and the executive and their agencies. They are political, in the high sense of that abused term. They are not for the judiciary."22

That this approach to the exercise of its review function did not represent the opinion of all nine members of the court of appeals is at once apparent from the dissenting statement in the same case.

Moreover, the meticulous treatment accorded the issues presented by other cases of this type\textsuperscript{23} makes it apparent that judicial review was far from perfunctory, notwithstanding the very wide area of Commission discretion which was acknowledged in the above-quoted language. Nonetheless, even where the court has seemed to disagree with the result reached, our decisions have, with few exceptions, been upheld on matters of substance.

In contrast, where the court was of the view that procedural error has occurred or that the state of the record before it was not satisfactory, it has been quick to remand. For example, when it appeared to the court that an applicant has not "clearly waived" any objection to having a Commissioner who had not heard oral argument participate in the decision, the case was remanded for further proceedings.\textsuperscript{24} Another case was remanded because the Commission had failed to rule with sufficient particularity on exceptions which had been filed by one of the parties.\textsuperscript{25}

In addition, the court has insisted that events occurring after the closing the record and even after a decision has been rendered should be taken into consideration if they are substantial in nature. The death of an important figure in one of the applicants,\textsuperscript{26} a post-decision change in a grantee's programming and physical plant,\textsuperscript{27} and issuance of a stock option which if exercised would change the make-up of a successful applicant\textsuperscript{28} have all been the cause of cases being remanded for further consideration, even though the events occurred after the record had been closed and a decision rendered, and even where the Commission, in the interest of administrative finality and the expeditious conduct of its affairs, had declined to exercise its discretion to reopen the proceeding and submit the applicants to a reappraisal.

Thus far this discussion of the court's review function over the Commission has been concerned with review exercised within the framework of Section 402 of the Communications Act. In several of the cases just mentioned, the events in question occurred while

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\textsuperscript{23} James A. Noe & Co. v. FCC, 260 F.2d 739 (D.C. Cir. 1958); Sunbeam Television Corp. v. FCC, 243 F.2d 26 (D.C. Cir. 1957); Sacramento Broadcasters, Inc. v. FCC, 236 F.2d 689 (D.C. Cir. 1956); McClatchy Broadcasting Co. v. FCC, 239 F.2d 15 (D.C. Cir. 1956).
\textsuperscript{24} WIBC, Inc. v. FCC, 259 F.2d 941 (D.C. Cir. 1958).
\textsuperscript{25} Radio Station KFH Co. v. FCC, 247 F.2d 570 (D.C. Cir. 1957).
\end{footnotesize}
the Commission retained jurisdiction, even though a final decision had been rendered, and the court's action reversing the Commission's refusal to reopen the record rested on what was considered an abuse of discretion. However, in one of the cases, Fleming v. F.C.C., a somewhat different situation obtained. Here the death of a partner in a losing applicant occurred while an appeal was pending but long after our own proceeding had been terminated. All parties urged that the appeal be disposed of on the existing record. The court, however, remanded the case with instructions to weigh the effect of the death on the earlier decision so that the court would "have the benefit of [the Commission's] determination before deciding whether to reverse or affirm." The applicable review section of the Communications Act, unlike some other statutes governing administrative agencies, confers no authority on the courts to remand a case except where it has reversed a Commission decision, and here of course the court did not reverse because it had not reached the merits. In the absence of specific statutory authority, however, the court relied on "the general equity powers which a court exercises in reviewing administrative action." These principles the court held, "extend to cases where, even without fault of the agency, the state of the record may preclude a 'just result'."29

Thus, in asserting a broad equity power the court was stating a basis for appellate review above and beyond the specific terms of the Communications Act. Subsequently, it was to exercise this power in a series of cases where the questions involved greatly exceeded in general importance those of the Fleming case. I refer to those proceedings involving contests for television channels where an investigation by the House of Representatives Subcommittee on Legislative Oversight disclosed that improprieties might have occurred, particularly as to the manner in which certain applicants sought to influence the outcome by means outside the recognized processes of adjudication.30 Here, either at the request of the Commission,31 or on the court's own motion,32 or on remand from

29 225 F.2d at 526.
31 WKAT, Inc. v. FCC, 258 F.2d 418 (D.C. Cir. 1958).
32 Massachusetts Bay Telecaster's, Inc. v. FCC, 261 F.2d 55 (D.C. Cir. 1958).
the Supreme Court, the court of appeals remanded a series of cases for further proceedings on matters which had been brought to light long after the record was closed and after the cases had left the Commission; but where it was clear that further deliberation was required if a just result was to be assured. These actions as well as some others I have mentioned bear out, I think, the thrust of Justice Harlan's often quoted observation of many years ago in his opinion in *Monongahela Bridge Co. v. United States*:

"Suffice it to say, that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property."  

Thus far my remarks have been directed to appeals from Commission decisions in licensing or adjudicatory situations. A word should perhaps be said about review of our rule making or quasi-legislative functions, which involve the formulation of regulations governing interstate communications by wire and radio. The exercise of these functions does not provoke the volume of litigation that our adjudicatory actions do, but since these petitions for review frequently challenge the validity of rules affecting an entire industry their importance is obvious. As I indicated at the outset, pursuant to section 402(a) of the Communications Act, petitions for review are governed by the Judicial Review Act of 1950, and the United States as well as the Commission becomes a party to the proceeding.

The judgments called for in rule making perhaps lie even more completely in the realm of agency expertise than do those associated with adjudication. So long as the rule lies within our delegated authority and a rational basis for its adoption is given, our judgment has seldom been disturbed. In recent years perhaps the most notable sequence of broadcast cases demonstrating this had concerned the allocation of television channels to various communities. The power of the Commission to adopt a nationwide plan of television channel assignments by rule rather than by case to case adjudicatory methods was affirmed in 1953. Since that time a number of *ad hoc* changes

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33 WORZ, Inc. v. FCC, 268 F.2d 889 (D.C. Cir. 1958).
34 216 U.S. 177 at 195 (1910).
in the basic allocation plan have also been brought about by rule making and these have been almost universally sustained by the courts. However, effecting individual changes in an overall assignment plan through rule making rather than through adjudication has given rise to procedural difficulties which led to the remand of two cases and has brought about a revision of our own procedures in cases of this type.

Section 4 of the Administrative Procedure Act allows for considerable flexibility in the conduct of rule making proceedings. Ordinarily there must be notice and opportunity for the expression of views by interested parties, but even these may be dispensed with under certain circumstances. Proceedings which have as their objective a change in the channel assignments to individual communities, although wholly prospective and therefore rule making in nature, are, nevertheless, more particular than general in their applicability. In some respects, they might be regarded as having overtones of licensing because, although no license is ever awarded as a result of these rule making proceedings, they frequently constitute a preliminary step looking towards a later modification of an existing license or making available a new channel the use of which might be hotly contested. Because of the unusual nature of these proceedings it was argued by some that more than the basic A.P.A. considerations of notice and opportunity to be heard were required.

In WIRL Television Co. v. United States the court rejected the contention that such a proceeding required an evidentiary-type record with sworn testimony, cross-examination and so forth. A similar contention had been rejected in the earlier Logansport case. But when testimony before the House of Representatives Subcommittee on Legislative Oversight indicated that a participant in a rule making proceeding involving channels in Springfield, Illinois, and St. Louis, Missouri, had held off the record discussions on the merits of the pending proposal with various members of the Commission, the court of appeals vacated our judgment and remanded the case. Notwithstanding that the case involved a quasi-legislative rather than a quasi-judicial function of the Commission, the court held that the essential character of the proceeding included the "reso-

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37 253 F.2d 863 (D.C. Cir. 1958).
38 Logansport Broadcasting Corp. v. United States, 210 F.2d 24 (D.C. Cir. 1954).
lution of conflicting private claims to a valuable privilege" and that "basic fairness" precluded any discussion of the matter on an ex parte basis.\textsuperscript{39}

Largely as a result of this case the Commission has taken steps to alter its procedures in a manner which would continue to allow the free and unfettered communication of ideas characteristic of the legislative process where rules of general applicability are concerned, but which would require in appropriate rule making cases that comments directed to a given proposal be made on the record.

I began these remarks today by indicating that the judiciary constituted an influential and potent force in the operation of an administrative agency. While I have attempted to suggest some of the wide variety of situations in which the courts may upset an agency's determinations, I think that an appreciation of the effect of these decisions can be gained only when it is realized that they are not isolated rulings in individual cases but that they become the law, having the same force as our enabling statute itself. When the court held in the \textit{Federal} case\textsuperscript{40} that allegations which the Commission had found too general were adequate to meet the statutory standard, this meant not only that \textit{Federal} forced a business competitor's application to go through a hearing, but that subsequently many other hearings on other applications were required on the basis of allegations that would otherwise have been rejected by the Commission as insufficient to raise any substantial public interest question. Similarly, when it was held in the \textit{Camden Radio} case\textsuperscript{41} that an existing station had standing as "a person aggrieved" to protest the assignment of an outstanding permit without showing that any injury would flow from the assignment, it meant that subsequent transfer applications could be protested and subjected to delay by parties with no direct or substantial interest therein. As a result of the \textit{Biloxi} case\textsuperscript{42} our internal screening process covering the financial qualification of applicants was comprehensively revamped. The court's decision in

\textsuperscript{39} Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959). Subsequently, and on remand from the Supreme Court, the \textit{WIRL} case, note 37 \textit{supra}, was also remanded, though apparently only because that from a geographic and engineering standpoint its outcome could be considered related to \textit{Sangamon}.

\textsuperscript{40} Federal Broadcasting System, Inc. v. FCC, 225 F.2d 560 (D.C. Cir. 1955).

\textsuperscript{41} Camden Radio, Inc. v. FCC, 220 F.2d 191 (D.C. Cir. 1954).

\textsuperscript{42} WLOX Broadcasting Co. v. FCC, 260 F.2d 712 (D.C. Cir. 1958).
the KFH case43 resulted in a completely revised format and more painstaking draftsmanship in every Commission decision handed down since that time. The Slaton-Plainview decision44 made necessary a new look at the type of evidence which would be allowed in other proceedings involving standard broadcast applications. These are just a few examples of the far-reaching effects which have flown from some decisions which I have cited here today. Thus, even though the number of Commission cases appealed is not great from a relative standpoint, the influence of the court is nonetheless a pervasive one.

Each year we submit an annual report to the Congress which, among other things, contains a statistical tabulation of the cases which have been affirmed or reversed during the previous fiscal year. In 1957 the Commission was affirmed in twelve cases and reversed in thirteen. The 1958 and 1959 totals were identical; we were affirmed in twenty-one cases and reversed in twelve. For the fiscal year which ended June 30, 1960, our record is sixteen affirmances with but a single reversal. Attaching much significance to so limited a sampling is in all likelihood rather rash and unwarranted. It may be overly optimistic, but I would like to attribute our recent score of successes in some measure to the development of a greater mutual understanding between the Commission and the courts.

Whether there should be judicial review of agency action is hardly an open question at this time. There is in fact much to be said for Professor Jaffe's proposition that the availability of review by an independent judiciary, offering as it does a guarantee of legality, "is the very condition which makes possible, which makes so acceptable, the wide freedom of the administrative system, and give it its remarkable vitality and flexibility."45 At the same time, if the administrative system is to continue as an effective instrument for the regulation of so many facets of our society, there must, I believe, be a greater appreciation of Justice Frankfurter's view that procedures familiar to the courts for the protection of private rights are not the only permissible ones and that it is "essential to the vitality of the administrative process that the procedural powers given to these agencies not be confined within the conventional modes by

43 Radio Station KFH v. FCC, 247 F.2d 57 (D.C. Cir. 1957).
which business is done in courts.” And finally, I think there must be meaningful recognition of the concept enunciated by the Supreme Court in the WOKO case and others that in ascertaining where lies the public interest “it is the Commission, not the Courts, which must be satisfied . . .”

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