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ADMINISTRATIVE FLEXIBILITY OR INDUSTRIAL PARALYSIS ?

ADDRESS

of

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before the

GEORGETOWN LAW ALUMNI CLUB

Washington, D. C.

Wednesday, November 9, 1938 - 12:30 P.M.

A man may be wise in his generation and yet, in some matters, make serious mistakes. Even genius sometimes falters. Our greatest - such as Hamilton, Jefferson, Lincoln, Mr. Justice Holmes - even they, surely, were not always right. One can, then, say (and I most emphatically do say) that Dean Roscoe Pound has, in times past, greatly enriched American legal thinking, and yet one can, without inconsistency, criticize his current efforts to denigrate and to render impotent the work of existing Commissions and other administrative agencies.

In July of this year Dean Pound launched a sharp attack on all such bodies, in a report prepared and presented by him as Chairman of the Administrative Law Committee of the American Bar Association. There he made a blanket denunciation of virtually all their activities as involving what he colorfully called "administrative absolutism." When challenged, he fell back the other day (in a speech to the Investment Bankers Association) on a retort that those who disagreed with him did so on the false charge that he is a "reactionary." Now I happen to be one of those who disagree with Dean Pound's present views on the subject of the administrative process -- but not on that ground. I differ from him primarily because he is grossly mistaken as to the facts on which he purports to rely.

He errs basically in picturing Commissions as hostile to the Courts. That is a mischievous factual error. The SEC, for instance, I can say from first-hand knowledge, has no such hostility. It does not regard the administrative process as opposed to the judicial. As Judge Hucheson has often pointed out, the judicial process, even in its more orthodox traditional aspects, is, not infrequently, at bottom, administrative. And the work of any Commission, when acting quasi-judicially, is not at all antithetical to, but is ancillary to, and an adjunct of, even the strictly judicial function of the courts.

Dean Pound, in many of his writings, has been fond of referring to Coke's courageous stand against King James' effort to put the King above all legal restraints. But there is another chapter in Coke's career that is by no means admirable -- his stubborn resistance to the growth of equity, his stupid efforts to choke off (or, one might say, to Coke off) the beneficent flexibility which the Chancellor was introducing into a then over-rigid legal system, a flexibility necessary to adapt that legal system to the new needs of a then growing and changing civilization. Surely Coke's famous fight against Chancellor Ellesmere was a notable piece of folly. Courts of equity, all of us now agree, were not and are not the enemy of the law courts but their complement. Dean Pound, in his recent mood, is imitating the mistakes while lauding the virtues of Coke. For Dean Pound mistakenly neglects the fact that Commissions, when acting quasi-judicially, are the patient servants of the judiciary, not their adversaries. It is as unwise for Dean Pound, in our day, to try to foment strife between the two -- by the use of strife-provoking words like "administrative absolutism" to describe, most inaccurately, the patient efforts of Commissions -- as it was for Coke, several centuries ago, to make war on the Chancellor.

There are always, of course, some men who are greedy for absolute power and who, when it is possible, abuse, by indirection, the limited powers assigned to them. Such men are found in every walk of life, not only in government but in business -- and (it is sometimes whispered) even in law school faculties. There were such men in our own government service long before the advent of the New Deal. Doubtless there are some such men in office in Washington today. I am happy, however, to say that, during several years of participation in government, I have encountered the veriest few of such men. Most of them held minor posts and none of those whom I knew are still here.

To pick them out as typifying the administrative process is fragrantly to falsify the facts - fully as much as it would be to typify the judiciary by reference to the fortunately very few tyrannical or arbitrary or stupid or corrupt men who have, at times, come to sit on the bench.

And, with complete conviction, I can say of my colleagues on the SEC that they are men mindful at all times of the legal limitations on their powers; scrupulous in respecting those limitations; untiring in their efforts to preserve the rights of citizens to full, fair hearings; and, above all, entirely aware of the inestimable value of our judicial system and the importance of the legal profession. Accordingly, SEC has had relatively few of its orders contested in the courts, and, when appeals have been taken, it has but seldom been reversed.

I do not mean that SEC is perfect. Being human, it errs, of course. And it has always been and is now glad to consider carefully and to act upon suggestions for wise changes in its procedure. Within very recent months it has made several such changes proposed by patient, well-informed and competent critics.

But it does not feel obliged to ignore intemperate, reckless charges to the effect that it is unfair or despotic-minded. I think I can warrantably say that most of the lawyers who have practiced before it will join me in repudiating such comments. (I add, parenthetically, that my pride in the well-earned reputation of SEC for fairness is not egotistic, for that reputation is essentially the fruit of the past acts of my predecessor and fellow Commissioners which occurred before I joined the Commission, less than a year ago.)

Some lawyers conceive of life as virtually nothing but litigation, - "just one damn law suit after another." Such lawyers are no boon to their clients or to society. For while most of us are not pacifists and therefore do not entirely agree with Ben Franklin's aphorism that a bad peace is *always* better than a good war, there is much of truth in that observation which lawyers should take to heart: To prevent, by means of sensible adjustments, the court-room battles we call litigation, is often the duty of our profession. In that spirit, it is the duty of Commissions, such as SEC, in the exercise of their quasi-legislative functions - in the careful working out, into detailed rules, of standards constitutionally laid down and purposes validly declared by Congress - to avoid those abrupt or excessive injections of new obligations, into previously established business habits, which are likely to provoke unnecessary litigation.

You remember that doctor who, when in doubt as to the nature of his patients' ailments, threw his patients into fits, because, he explained, he was "hell on fits." Some such motive may be operative in the case of those doctors of the law who drafted and approved the bill attached to the report of Dean Pound's Committee. Sections 1 and 2 of that bill (for reasons that I shall presently explain) would not only create situations so difficult for thousands of citizens as inevitably to provoke constant litigation, but would force the judiciary to become an active participant in all the quasi-legislative work of administrative agencies.

The report of Dean Pound's Committee states that the Chairman of that Committee (i.e. Dean Pound) and two other members had appeared before the Senate Judiciary Committee and that they have supported that bill; and the report goes on to discuss Sections 1 and 2 in the bill at length and to commend them. It happens, however, that a few days ago, I sent to Dean Pound a draft of the present paper, asking for his comments. To my surprise, he advised me yesterday that the report of his Committee, as published by the American Bar Association, is in error in that respect, that neither he nor his Committee, had ever passed on or supported that bill, but that it had been prepared by a subcommittee of the Board of Governors of the Association, had been approved by that Board, and, by its order, had been attached to the report of Dean Pound's Committee. On that basis, Dean Pound has no responsibility for that bill.

Before I discuss that bill, I want to make this clear: I have never been one of those who scorn, as "impractical", men who are given to "theories." Mr. Justice Holmes and Chief Justice Taft each served a term or so as a law school professor before his appointment to the United States Supreme Court; and their "theories" have played a significant and valuable part in the development of our legal system. Wise theories have been the chief practical instruments of civilization. The word "theorist," when used as a verbal brick-bat, can, then, properly mean only that he, against whom the word is hurled, has theories which have neither been tested in practice nor, by the cautious use of a trained imagination, carefully projected and tested in thought.

In that latter sense - of the espousal of a theory unimaginatively conceived without adequate reflection as to the practical consequences of its application to reality - in that sense I earnestly suggest that those who sponsored that bill have shown themselves to be impractical theorists. For one of the most dangerous, unwise and impractical theories ever solemnly advanced by presumably serious men is that embodied in the first two sections of that bill.

Section 1 amazingly provides that, *within one year* from date - or within one year from the date of enactment of any new statute conferring new powers - each Commission, (or other executive or administrative agency) shall, "for the purpose of filling in the details of the statute," after notice of hearing, issue general regulations and rules "to implement" every statute under which such agency operates that affects "the rights of persons or property." And Section 2 provides for a direct review, on petition, by the Court of Appeals for this District, of any such regulation or rule,* to determine whether it is valid, -- such review seemingly to be allowed to any person, even in the complete absence of any specific case or controversy affecting that specific person's specific rights.

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* Section 6 makes Section 2 inapplicable to certain agencies.

I invite you to consider the disastrous effects on the business community of such a statute. Plainly it would mean that each Commission would be obliged, within a year, to put into effect its maximum discretionary rule-making powers. The SEC, for instance, would have to comb through the several statutes empowering it to act, and would have to assert, promptly, every last bit of its discretionary powers over the stock exchange, over investment bankers, and concerning the utility holding companies and their operating subsidiaries. Consternation would inevitably result.

If, of its own volition, and without the compulsion of the proposed law, the SEC were thus suddenly to slap on those industries its maximum of permitted rules, the American Bar Association would - *and justifiably* - cry out to high heaven. The comments can be conjectured: "arbitrary"; "bureaucratic impracticability"; "unimaginative autocracy"; "stupid inflexibility"; "ridiculous disregard of the niceties of business practices"; "reckless haste"; "unwillingness to make haste slowly"; "centralized rigidity and inflexibility"; "officialdom rejecting the wise and sensible processes of conference and proper study"; "drunk with power".

Fortunately, no such reckless conduct has ever been required. *The SEC, made up of human beings, does not always tread angelically, but it does not rush in after the manner of fools.* In dealing with the stock exchanges, months - indeed years, - have been spent in careful study and consultation with officials and members of the Exchanges in formulating and revising the rules and regulations thus far promulgated. And even today, the maximum powers affecting the exchanges have not been employed; in all likelihood they never will be.

If the proposed statute had heretofore been in effect, it would have meant that SEC would have been obliged to adopt regulations, good or bad, wise or unwise, despite the absence of adequate data on which to base regulations, and without proper opportunity for consultation with the industry to be regulated.

For the stock exchanges, SEC would promptly have been required to adopt rules governing price stabilization in new security offerings. Yet that is a problem which the best financial minds have been exploring for four years; and they are still unprepared to recommend appropriate regulations. Proxies, about which there was little data, would have become the subject of regulations without the benefit of the study that the SEC has been able to give the matter.

The entire policy of allowing stock exchanges to adopt many of their own rules, under residual government supervision, would have been rendered impossible. The Commission would have had to issue a host of regulations, swamping the exchanges with rules on listing, delisting, hours of trading, methods of getting business, settlements, payments, deliveries, tickers, short sales, stopped sales, commission rates, interest rates, puts, calls, straddles and options.

It would have had to make rules on financial responsibility, separation of capital, financial statements, accounts, books of record -- and it would have had to grind them out of a mill, without careful preparation, without sufficient consultation, without enough experience.

Nowhere would such a course have proved as disastrous as in the field of over-the-counter dealings in securities. Here the SEC would have had to enact rules and regulations of the most detailed variety to govern an unorganized segment of the securities business which includes over 7,000 firms of many varied sizes and characteristics, scattered all over the nation. We would have had to adopt such rules even though we did not, until recently, have so much as a simple census of over-the-counter firms, nor even elementary knowledge of the nature of such firms.

The number and variety of regulations which would have been heaped on the financial community is so great that it is difficult to visualize the fantastic confusion which would have resulted.

Under the Public Utility Holding Company Act, SEC would have been compelled to lay down regulations, calling for simplification and integration of holding company systems by rule instead of by the reasonable, business-like, evolutionary policy in effect now. The Commission would have to enact, among other things, rules of intercompany loans, dividend payments, security transactions, sales of assets, proxies, service contracts, sales contracts, construction contracts, standard reports, accounts, and records. Such a blanket enactment would have a deadening effect on an industry which is changing as rapidly as the utility industry. It would ignore the vital fact that in any program of regulation, every item must be coordinated with and fitted to every other item and must be kept in harmony with the shifts and developments in the industry.

It would result in overlapping and duplication of rules. Moreover, it would offer to industry a diet of regulation which industry would be unable to digest. Business and business men, like any of us, can absorb just so many rules at a time. Administrative agencies are aware of that. Indeed, we realize as well as business that regulation by government, if it is to be successful, must NOT be poured upon business. It must be carefully and slowly and experimentally adapted to business practices until it easily becomes part of them. On that basis, SEC has not only studied carefully before making its rules, but has changed its rules to fit conditions, modifying those rules which encountered unforeseen conditions or which caused unforeseen, unintended and undesirable consequences.

The proposed statute is based on a conception of the nature of law, government and business impossible to apply to the world of today. It conceives of law as a precise and virtually inflexible system of mandates and prohibitions; government, meanwhile, is regarded as simply the cop on the corner who sees to it that the thou-shalts and the thou-shalt-nots are not violated. Business is regarded as a simple static affair, all businesses being looked upon as approximately alike.

But twentieth-century reality is far different. Business is a dynamic, pulsating, and ever-variable quantity with a multitude of differentiated aspects. Indeed there is no such thing as "Business" or "Industry": there are many and different businesses and industries. Attempts merely to define their limits, to describe their character, or to measure their size are themselves separate so-called social sciences. The task of prescribing, virtually at a single stroke, completed regulation for such a variety of institutions staggers the mind of an ordinary mortal. Businesses and industries are but men and their conduct, and their relations to property and to other men. They are, therefore, living things, and, if they are to live, they must be governed by a living law. It is the obligation of administrative agencies to help keep the law alive and equal to the problems of those businesses and industries which are under regulation . The proposed statute would paralyze not only the regulatory agencies, but businesses and industries as well.

Measured against the problems at hand, the proposed statute appears so illogical, so unsound, that one wonders whether perhaps its purpose may not possibly have been to paralyze administrative government - with the intent of thus destroying it.

It is because SEC, before taking action which might be ill-advised or might too suddenly disrupt old established business practices, has had many patient day-by-day round table conferences with the officers of the stock exchange - it is, I say, because of that horse-sense, practical-minded (but not soft-headed) approach to the common problems of that industry and the Commission, that Mr. Martin, President of the New York Stock Exchange, said in a speech two weeks ago:

"The Securities and Exchange Commission is cooperating helpfully, sympathetically and, in my judgment, wisely with the New York Stock Exchange in its effort to provide the kind of market-place which the national economy requires. We have a two-way cooperation that is sensible and effective in arriving at an understanding of our problems. The Commission's representatives are sitting down with us around the table, and, in a give-and-take spirit and in an atmosphere of complete harmony, we have been able to remove the irritations which once handicapped us. . . There are some who find any supervision of business by government repugnant. Frankly, we have no patience with that attitude. Such a viewpoint is unreal and is not likely to attract any substantial following among practical men and women. . . The Securities and Exchange Commission has, most reasonably and fairly, left to us the management of our own affairs in our own sphere to the extent that we can demonstrate our own competence, retaining for itself the residual role of supervision. That, to us, is an entirely healthful and agreeable condition."

And, on the same day, Chairman Douglas said, in memorable words:

"For the Congress to endeavor to provide definite and precise formulae to govern many of the complex and intricate activities of business and finance would be as difficult as to endeavor to state what is a reasonable rate of speed for an automobile under any and all conditions . . . Various and diverse interests can seldom be neatly balanced against the standard of the common good by means of a precise and inflexible formula. If such an attempt were made, the Congress would be faced with the choice of a straight-jacket of outright prohibition on the one hand, or a do-nothing policy on the other hand. Both of these are un-American in their philosophy. It is the American tradition to insist on keeping to an irreducible minimum regimentation in any form, particularly a 'thou shalt not' regimentation. It is likewise the American tradition that our government be a responsive as well as a responsible agency -- ready, willing and able to assume a position of leadership at those points where self-help would lead to chaos. For these reasons the Congress has merely isolated, not solved, many important problems. Their solution has been delegated to administrative agencies such as the SEC . . . The virtue of the administrative process is its ability to deal with technical, debatable, undefinable, or imponderable matters in a discretionary manner. It provides a realistic and sound alternative to hard and inflexible rules which proceed on the false assumption that right or wrong, black or white, constitute the only choice. But beyond that it permits of action not only case by case but by rules. A rule can be expanded, contracted or repealed in light of changed conditions or new experience. A formula fixed by legislative act tends to become more difficult to dislodge. Furthermore, the power to make rules means the power to deal with emergency situations -- directly and with dispatch; in terms of minutes or hours rather than months or years. In a dynamic, fast-moving economic system responsible government must have a reserve of such powers if it is to save capitalism from its own complexities. . . In all of this there is no spectre of unbridled discretion; no elements of dictatorship. Congress in all of these situations specifies the standards which are to be applied. The administrative agency has no powers but the powers granted in the statute. Its rule-making power is circumscribed by the law itself. And the action of these agencies is subject to review by the courts."

It is true that Section 1 of the proposed bill allows limited amendment of rules. But the wording and purpose of that section would clearly permit of no amendments, after the first year, expanding the scope of any rule.* That must be the meaning of the bill; for, otherwise, Section 1 would serve no purpose since it would add nothing whatever to existing law. Thus the bill would say to every Commission: "You will lose all discretionary rule-making powers not exerted by you within the first year." Accordingly, no Commission could, under such a statute, properly afford not to exercise, inside the

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* Except, perhaps, when a court held, after the year, that a particular rule was invalid; in that event, seemingly, there could be a "revision downward."

first twelve months, its maximum potential discretionary authority to issue rules and regulations; for if it did not do so, it might discover, after the first year, that, by abandonment of powers, it had crippled itself seriously in the discharge of functions assigned to it by Congress.

The Supreme Court has often recognized that the legitimate reason for the delegation of discretionary rule-making to administrative agencies is the inability of Congress adequately to study the detailed means of accomplishing its valid statutory purposes. But why did the sponsors of the bill decide that 365 days are just sufficient for the adequate study of all the divers subjects of such legislation? What magic hath a twelve-month? Why not six or eighteen or twenty-four or thirty-six months? Will those lawyers who drafted that bill undertake to study comprehensively any topic under the sun, affecting any group of men whatsoever, within fifty-two weeks from any given date?

The proposed statute is, then, I repeat, theoretical in the bad sense of that term. In an effort to avoid fancied but non-existent unfairnesses to citizens it would unleash the most exaggerated kind of unfairness to our citizens.

It would produce a lifeless, frozen, industrial world. Commissions, like SEC, are striving to keep industry vital, in step with the needs of a modern changing world. They offer you flexible administration and a creative industrial process. The sponsors of that bill offer you unimaginative governmental rigidity and, as a result -- industrial paralysis.

Since Section 1 of that bill is so patently unwise, I think we may assume that it will never become law. There is no need, therefore, at this time, to discuss at length the equal impracticability of the companion Section 2, which would deluge the Court of Appeals with direct appeals from quasi-legislative rules of Commissions, regardless of the existence at the time of any actual specific controversy, -- a proposal which flies in the face of well considered judicial practices, and one which impatiently ignores the fact that, as the law now stands, a party to any real case or controversy has the right to attack any such rule both before the Commissions which issued it and on appeal to the Courts. It is indeed a surprise that those who condemn, as revolutionary, established administrative processes, should be the sponsors of the innovation of vesting vast new legislative powers in the judiciary.*

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* I am, of course, not here discussing the interstitial "law-making" inherently involved in the judicial process.

Section 2 provides that the Court of Appeals for the District of Columbia shall have exclusive jurisdiction "upon petition . . . to determine whether any rule" issued by any administrative agency "is in accordance with the Constitution and the statute under which it is issued." It expressly provides "that upon the filing of *any* petition" the court shall have jurisdiction. It concludes with a provision that nothing contained in that Section "shall prevent the determination of the legality of any rule which may be involved in *any suit* in any court of the United States." It thus appears that the jurisdiction under Section 2 is to attach upon the filing of "any petition" and regardless of whether the determination of the legality of any rule is involved "in any suit." The report of the Committee indicates that the Committee is not sure whether the hearing before the Court of Appeals under Section 2 would be "administrative" (i.e., quasi legislative) or a proceeding terminating in a declaratory judgment. That it would not be the latter seems clear: (a) Obviously, if the intention had been to provide for a declaratory judgment, then Section 2 would have contained the precise language found in the Declaratory Judgment Act -- which begins with the significant words *"In cases of actual controversy."* (b) Moreover, if Section 2 contemplated a declaratory judgment, then it would be superfluous, since the subject is, already, fully covered by the existing Declaratory Judgment Act.

I yield to no man in emphasizing the indispensability of an effective judiciary. But let us beware of greatly enlarging the powers of the courts beyond their appropriate judicial confines. Americans will warrantably resent any tendency on the part of lawyers to substitute a "lawyercracy" for democracy, to turn our entire government into a government of lawyers, or a government solely by the judiciary. Our judges, from Chief Justice Marshall to and including Chief Justice Hughes, have wisely rejected the beginnings of any such plan.

I am glad to note that, when, last July, the proposed bill was presented to the House of Delegates of the American Bar Association, the bill was recommitted to the Administrative Law Committee for further study, and that it was decided that no bill on the subject should be submitted to Congress, without first being approved not only by the Board of Governors but also by the House of Delegates. *A new committee and a new Board of Governors are now in office and it is to be hoped that they and the House of Delegates will, at a minimum, eliminate Sections 1 and 2 of the bill.*

In Dean Pound's lengthy report to the Bar Association, much is said which is designed to create the impression that most of those who are favorably disposed to administrative agencies are vigorously opposed to any adequate judicial review of the orders of such agencies when acting quasi-judicially. That, again, is a mis-statement of the facts. No person holding a responsible administrative post in Washington today has ever taken such a position. Opinions can differ, and they have differed, as to how closely judicial review should approach a complete redetermination by the courts of the facts considered by administrative agencies. Many wise and conservative men think it most undesirable that the courts should be required to do over again any considerable part of the laborious fact-finding work of administrative bodies. Accordingly, it is absurd to denounce a reluctance to go that far as a perverse, radical or dangerous yearning for "administrative absolutism."

It is significant that, within the last few weeks, the Bar of the City of New York adopted a report (made by a committee including such eminent and conservative lawyers as Arthur Ballantine, Bruce Bromley, William Chadbourne, Grenville Clark, Alfred A. Cook, Frank L. Polk, and former Solicitor General Thomas D. Thacher) recommending against the adoption of an amendment to the New York Constitution which would impose on the courts the duty of making a general review both of the law and the facts of all decisions made by administrative agencies exercising quasi-judicial powers*. A dissenting report, signed by a very few members of the Committee of the New York Association, argued that such an amendment "was essential to the preservation of free government." But the majority report adopted by the Association stated "that the constantly increasing intricacy of our social and economic life makes inevitable a constantly increasing reliance upon such administrative agencies with expert knowledge in particular fields."**

And that conservative journal, The New York Times, commenting editorially on that proposed amendment, said that it "would handicap the operation of the administrative and regulatory agencies which are increasingly necessary in government and would add no needed safeguard to the existing rights of individuals, firms, and corporations. A court which is compelled to make an independent investigation of the statements of fact submitted by an administrative agency is in danger of superseding such an agency - a role for which it is not fitted."

On Monday of this week the Federal Court of Appeals for the Second Circuit, said, in sustaining an order of the SEC: "One of the principal reasons for the creation of such a bureau is to secure the benefit of special knowledge acquired through continuous operation in a difficult and complicated field. Its interpretation of the Act should control unless plainly erroneous. In no other way can objects of the Act be attained without constant and disconcerting friction."

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* The proposed amendment provides for "a judicial review... upon both the law and the facts" of any decision, order, or other determination made by any administrative agency, and that the court may direct a reconsideration by the administrative agency if it finds any order of such agency "to be contrary to the evidence, or not supported by the facts."

This resembles Section 4 of the bill attached to the report of Dean Pound's Committee.

**The report briefly referred to other alleged defects in the administrative process; lack of time and space prevents discussion thereof in this paper.

Commissioner Aitchison, of the ICC, last month made some sagacious comments on the plans of those who desire to "transfer the final word in the details of the administrative process to some court." He said that implicit in such plans "are two unsound premises. First, if the evils alleged against the administrative process as now administered can be corrected within the scope of the process itself, there will be no reason for transferring new functions to the judiciary -- especially as almost in the same breath the critics tell us that the judiciary is overburdened ... . And second, a change in the system of judicial review of administrative orders *after* they are made will leave untouched the overwhelming mass of such determinations which never could be taken to any court for review, and will only by indirection tend to prove the effectiveness of the administrative process." His basic point is sound, of course. The best way to improve the administrative process - including that very sizeable part of it that can never get into court, no matter what is done - is from within. There are, fortunately, indications that many members of the bar are coming to recognize that fact, and are ready to restrict themselves to suggesting improvements to be made by the administrators themselves rather than through hasty, ill-conceived legislation.

Now, so far as I can discover, Dean Pound has not, from practice before any Commission, any first hand knowledge of how Commissions act. His denigration of the administrative process might, therefore, seem to be based on mere hearsay or pre-conceived biases. However, it ought never be forgotten that he *has* detailed inside information of how one particular federal Commission functioned. For he was, some seven years ago, himself a Commissioner: He was appointed by President Hoover to the so-called Wickersham Commission which was directed to hear evidence and make recommendations to Congress as to whether the prohibition amendment and the prohibition law should be repealed or modified. That Commission, you will recall, made a most singular final report in 1931. I call it singular because, while it was signed by Dean Pound and nine other of the eleven Commissioners and contained very specific conclusions as to future legislative action, each of the Commissioners appended a supplemental memorandum of his own, and in several of those supplemental memos there was flat disagreement with the specific conclusions set forth in the joint report. That report, as a result of that unexampled procedure, was most confusing to the public.

There was a far more important defect in that report, a defect revealed in the separate supplemental memo of Judge Kenyon, one of the Commissioners: The Wickersham Commission had held its hearings "in secret", and based its final report "in part on secret evidence" not made available to the public. Judge Kenyon stated that that method of secrecy was, from his viewpoint, "unfortunate". Commissioner Roscoe Pound, however, did not join in Judge Kenyon's apology, and in no way indicated that he felt that such secrecy was in any way undesirable or smacked of "administrative absolutism."

Here we may find the clue to Dean Pound's distemper when, today, he contemplates Commissions: Having in mind the operations of the Wickersham Commission in which he participated, in 1930-1931, he perhaps believes that all Commissions now operate in the same undemocratic fashion. Happily, that is not true. No American Commission, other than the Wickersham Commission, when called upon to hold hearings and to advise Congress, has ever ventured to make a report to Congress, based upon unpublished testimony kept secret from the public.

It is of considerable interest - in the light of what the Wickersham Commission did in 1931 - that Dean Pound, in his report to the Bar Association, in 1938, referred to an unfortunate tendency of Commissions "to decide . . . on evidence not produced" and added, that "a common form in which this tendency is manifested is *to act on secret reports* of inspectors and examiners". And Dean Pound's 1938 report also commented adversely on the manner in which the Securities and Exchange Commission acted when exercising a function similar to that of the Wickersham Commission - that of holding hearings and making reports to Congress relating to future legislation. For he there quoted with approval a comment reflecting on the fairness of those reports, prepared in 1935-1937 under the personal supervision of Chairman Douglas. But, contrast those S.E.C. hearings with those of the Wickersham Commission: At those SEC hearings, which were public, every witness was represented by counsel who was given the chance to interrogate his client; also, if any testimony was given which any other person considered to be unfair to him, he was permitted to appear and testify and be represented by counsel. All the testimony taken at those hearings was made public, and such testimony was carefully summarized, with extensive quotations, in the reports of SEC to Congress. There was nothing remotely resembling the secrecy which characterized the hearings of the Wickersham Commission.*

In closing, I suggest that, in appraising the work of existing Commissions, regard be given, not to the mere colorful phrases of clever men and their artful condemnatory emotion-stirring words, but to the actual facts as to the conscientious, painstaking and responsible manner in which such administrative agencies are now performing their daily tasks.

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* There is, therefore, no justification whatsoever for Dean Pound to refer to such hearings by SEC, and like hearings of other administrative agencies, in the following language: "The reports are not findings growing out of the facts objectively ascertained, with a guarantee of objectivity in that both sides were presented by representatives of each, but reports supported by gathering and marshalling all that can be said on one side, with at best a perfunctory concession to appearances by a public hearing not infrequently carefully staged with an eye to the predetermined result."

Such a comment comes with poor grace from a member of the Wickersham Commission.