ADDRESS

OF

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before the

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It gives me great pleasure to be here, and to have an opportunity to talk to what I suppose may be called, in a representative sense, the Chicago Bar. To me, Chicago is still pretty much of a mystery. I know where it is, about how big it is, and something of what it stands for; but I should confess frankly that I have very little sense of what it is. I have been in it, and through it, before. I have even talked publicly here before, but only to groups meeting in Chicago but drawn, like me, from other parts of the country purely for the meeting. This is the first time I have been able to come to Chicago as itself, because it is Chicago rather than because it is a convention ground or a railroad junction. And coming here to Chicago, as itself, for the first time, I feel presumptuous to be standing up before you and doing the talking. My proper place, the place I should like to take, is that of the observer, the listener, the student. I have far more to learn from you than you have from me.

But although personally I feel decidedly embarrassed at being called upon to stand up in front of you and talk didactically as if I knew something, I recognize that as a symbol I represent something that is pretty important to a good many of you. Whther I can tell you anything you are interested in hearing, or that you don't know already, is rather beside the point - what is the point in my being here, as I see it, is that I am a typical official of a large modern government agency, centralized in Washington but spreading its operations out into every state and every city in the land. Probably very few of you would call yourselves exclusive, or even expert, practitioners before the SEC or any other agency of the government; but equally few of you, I should guess, can go through a month of practice without running across the trail of some government agency at some point in the month. And while the SEC in not quite as ubiquitous as the tax gatherer, it is, at least in the business and financial community, something like the "brooding omnipresence in the sky" that Mr. Justice Holmes talked of. Whether we should or shouldn't be, whether we like it or not, those of us that have elected to work with a modern governmental agency like the SEC have become consequential and interesting beyond our intrinsic merits; it has become important for the practising lawyer to know what we look like, and how our mental processes work. That gives me the only real excuse I have for being here this evening, and for talking as if I thought you were interested in hearing me.

And further, that gives me the key to the only thing that I can appropriately talk about to you tonight. If I am the guest of your gracious hospitality because I am representative of something that interests you, the only thing I can do to repay your hospitality is to talk freely and honestly about the thing that I am representing - the kind of modern government agency of which the SEC is typical. And more particularly, the only way I can appropriately talk about it is to talk about the problems which it raises - or which I suppose it raises - in the mind of the general practising attorney, who doesn't consider himself a specialist in SEC, or Federal Trade Commission, or Labor Relations Board cases, but who finds himself constantly confronted, in the course of a busy practice, with the necessity of advising his clients just where and how these various agencies and many others may impinge upon their lives and businesses. I have to approach my problem with the knowledge that the general practising attorney - and in all frankness, I think I must say, the general practising attorney in Chicago particularly - approaches us with a suspicion and mistrust which are as much of a reflection on him as on us, and which handicap him in his job of advising and protecting his clients just as much as they do us in our job of enforcing the law and advancing its policies. These reflexes of mistrust and suspicion are, I really believe, far

more prevalent among attorneys whose contacts with official government agencies are sporadic, incidental only to their general practice, than they are among the experts who practise day after day before administrative bodies, and who actually know what is going on. If I am right in this, it must follow that a great deal of the difficulty is due to unfamiliarity and ignorance a prejudice against novelties in operative law merely because they are inconsistent with inherited traditions or customs. To put it succinctly, the practising lawyer often enough casually damns the commission because it doesn't behave the same way as a court, entirely forgetful that if it did there would have been no reason for its creation. And we have gone too far now to be able to reject the administrative process as an integral part of our governmental machinery; the one thing I will say dogmatically is that the administrative process is here to stay, and that those of us who are thoughtful and practical-minded will talk not about whether it should be here, but about how to make it work better.

Perhaps the first and most important thing to recognize is the stupidity of the assumption so often publicized, that the problems raised by administrative law and by governmental commissions are fundamentally new, that they are born out of a new and outrageous type of twentieth century despotism, and fed purely on greed for political power with which to strangle democratic institutions and individual enterprise. Nothing is solved by oratory about the good old days of freedom and certainty, when individual action went untrammeled, and legal rights were clear and certain, and laid out in neat and well-marked pathways. A conscientious use of historical perspective is not only enlightening, it is even comforting to those who are afraid for the future of democratic government.

A typical example of the sort of thing I am thinking of is to be found in a book entitled "Government by Commissions", by an Englishman named J. Toulmin Smith, which was recently reviewed in the Yale Law Journal by Professor David F. Cavers of the Duke University School of Law. What Mr. Smith has written in this book, says Professor Cavers, strikingly resembles the utterances of those who deplore current trends in this country, and a few quotations will illustrate his point. In his preface, Mr. Smith finds that "the fast-encroaching and all-grasping system of Centralization" is not only a menace to Great Britain, but an explanation of unrest and revolution in continental Europe. Later in the book Mr. Smith has this to say:

> "Where uncertainty prevails as to permanence of property or security of person there can be no inducement, there is every check to improvement and industry and effort. To supply the want of the hour will be all that any man will do. If the political quack and experimenter is dangerous to the permanence of national union, the legislative quack and experimenter is fatal to individual prosperity . . ."(p.106)

> "What is wanted is the unfettering of all individual effort; the taking off of those trammels that bind down skill and enterprise and all self-depending energies, and are daily binding them down harder; the release from the oppressive and presumptuous dictation of Commissions - those chosen instruments of the arbitrary and degrading system of Centralization." (p.316)

If you have not read this book or Professor Cavers' review of it, you will naturally suppose that it deals with the problems of today. But as a matter of fact, it was published just 90 years ago, in 1849. One of the innovations most roundly condemned by its author was the regulation of hours for child labor, providing for a maximum of 10 hours work a day for "non-adult operatives". When Mr. Smith was bemoaning the future of individual enterprise, in 1849, the greatest period of industrial expansion and prosperity in all history was just getting under way.

I have quoted from Mr. Smith in order to show the need for historical perspective, without at all meaning to suggest that all criticism of the administrative process is disproved by history. Criticism there is, and must be, if we are to continue to function as a democracy. All development in governmental technique is the result of a process of trial and error, and the recognition and correction of the errors is due in large part to the helpful effect of intelligent and informed criticism.

What I want to do is to talk in the light of criticism of the administrative functions of which I am a part, and to make an effort to analyze and understand that criticism insofar as it emanates from the ordinary practicing lawyer. I want to disregard the broadly critical sweep of Mr. Smith, and his modern counterpart, Ex-Governor Slaton of Georgia, who told the American Bar Association that he was "opposed to practically all bureaus, and all administrative agencies, as distinguished from courts". 1/ I want to disregard the warped and malevolent abuse that drips from the mischievous columns of certain types of newspapers. I want to disregard such well-meaning but thoughtless efforts at control as the recent bill introduced at the request of the American Bar Association in the Senate as S.915 - the so-called Administrative Law Bill. I tried analyzing this bill a month or so ago, before another group meeting in Chicago, and rather unsympathetically pointed out that instead of really protecting the individual, it would merely complicate and constipate the processes of administrative justice and fair play to such an extent that they would in all probability break down altogether. I characterized the bill, in a phrase which struck the imagination of the headline writers, as an attempt to regulate the works of a wristwatch by using a mattock.

But though I think that as a solution of any problem, the American Bar Association's Administrative Law Bill is hardly worth serious attention, as a symptom of a critical attitude on the part of practising lawyers it is decidedly important. Inept as it is, it evidences something I do not want to disregard, the genuine and often anguished doubts of the practising lawyer who in all good faith finds himself confronted and troubled by the growing pervasiveness and complexity of the modern administrative process, and who without wanting to junk the social and economic gains which the administrative process has been able to bring about, wonders genuinely how to maintain a fair and equitable balance between the demands of modern organized society and the traditional rights and freedoms of the individual. If it is true that the practising lawyer is worried at our direction, it is time for us at least to take stock of his worries, and try to find out what they are all about. If they are based upon hearsay and rumor, unbased on real knowledge of the workings of the administrative process (remember, I am talking of the practitioner who like most lawyers is not an expert in administrative

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1/ 25 A.B.A. Journal 94.

law), we need to meet them not by denunciation but by explanation. Many of the current criticisms of administrative bodies fall into that class, I know. But I know too that much of the criticism is not based merely on ignorance. Administrative agencies, though not new, have grown immensely in importance and pervasiveness in the last few years, and, being run by fallible human beings, they have fallen into many traps, failed often not only in their objectives but in their attempts to find fair-minded and efficient modes of operation. Criticism of such failures is well justified and we can meet it only by trying to understand it and do something about it. At least in the Commission that I work with, we are acutely conscious of the need for critical self-analysis, and for constant readjustment of our techniques and procedures to bring them closer to high standards of fair play and efficiency. If we fail, it is not from lack of will.

One of the outstanding difficulties encountered in formulating intelligent criticism of the modern administrative process, and one which I think was fatally disregarded in the American Bar Association's bill, is the tremendous diversity of the problem. This is a diversity which has to be recognized, unless we are to assume, as I think few intelligent people would do today, that the problem can be solved by abolishing regulatory bodies, or any substantial number of them, altogether. Granted there may be too many, and they have sprung up haphazardly from time to time, as the need arose, without consistency as to form or coordination as to function. But they all have their work cut out for them. As to their number, I have heard it said that there are 130 agencies and commissions of the federal government, and I have no doubt that that is so if you count all the committees and so on that form integral parts of the various executive departments. For example, Frederick Blachly, of Brookings Institute, made a thorough report to the Senate last year showing that the Department of Agriculture has within it more than thirty separate committees and boards dealing with appeals on the grading of commodities, from tea and potatoes to "broom-corn" and "cherries stored in sulphurdioxide brine". Many of the 130 are doubtless so specialized in their functions that not one practising lawyer in a thousand will ever come into contact with them. For my purposes tonight they are important only as illustrating the impossibility of subjecting the administrative process to rigid and inflexible standards of conduct. What can the doings of the California Debris Commission have in common with a proceeding to reorganize a holding company system under Section 11 of the Public Utility Holding Company Act? Personally, I haven't the faintest idea, but I am not willing to follow the American Bar Association's bill in assuming that their problems are the same.

Dean Wigmore has recently narrowed the problem down a little by publishing a list of about 40 principal federal administrative offices that hold hearings, adopt regulations and make rulings or decisions affecting the interests of the individual citizen. This list contains all such bodies that the average lawyer has ever heard of, and some that he hasn't; and, incidentally, I was struck by the fact that of the 40, only 14 were conceived after 1932, while 22 of them made their appearance more than 15 years ago. Of course some of these, such as the Civil Service Commission, the Post Office, Patent Office, Court of Customs and Interstate Commerce Commission, go back 50 years and more. It is with this heterogeneous assortment of bodies, or some score of them, that the contemporary business man and his lawyer have to cope from time to time.

Now let me take some of the commonest and most heart-felt criticisms that are currently made against administrative agencies, and evaluate them, so far as I can, in the light of my own limited knowledge of their workings. Obviously, since I am engaged in a pretty time-consuming job with just one agency, the Securities and Exchange Commission, I will have to limit my specific analyses to the operations of that Commission.

The most natural complaint, and the one that is heard perhaps most often, is that there has grown up such a mass of rules, regulations and forms that a business man doesn't know where he stands, and isn't likely to find out without expert assistance. I sympathize with this complaint, but it seems to go more to the complexity of civilization itself than to any maliciousness, or even ineptness, on the part of administrative officials. The same complaint can certainly be made with respect to the vast number of court decisions that are being published every year, and to the statute books that fatten and are fed, not altogether on the whimsical notions of our legislators, but on the insistent and largely legitimate demands of their constituents. When I was here last December at a meeting of the Association of American Law Schools, one speaker came out in favor of simpler and fewer regulatory acts and for a sufficient clarity and certainty in such legislation so that business might be carried on without the burden of uncertainty and fear. No one can take exception to that as an ideal, but I wonder if it isn't self-contradictory. You can have simple legislation, if you wipe the slate clean aud adopt something on the order of the Napoleonic Code. But what certainty would it add, or what fears would it remove, when you come to the field of modern commerce? The administration of such a code would require a freer hand on the part of the executive and judiciary than this country has ever known, and it would tend more toward a government of men than of laws. That sort of uncertainty is precisely what we are trying to avoid by the use of general rules and regulations, made and published in advance, in such form as to leave an absolute minimum for interpretation. You can't do away with the need for interpretation, or at least we haven't been able to, but the more specific your rule is, the less you will have to argue about what it means. It also follows, unfortunately, that specification breeds a quantity of detail, and you have to strike the best balance you can. This goes to the root of the reason for administrative regulation - no legislature is in any position to achieve such a balance in the more complex fields of law-making.

As a matter of fact, this whole question poses a dilemma of the most serious character. While many practising lawyers are protesting the volume of rules and regulations, the degree of expert specification imposed upon them, the American Bar Association bestrides the other horn by calling for more and more rules in the interests of certainty. You will perhaps remember that the draft of the Administrative Law Bill which preceded the one finally adopted empowered and directed every administrative authority forthwith to implement every statute "affecting the rights of persons or property" by adopting "rules, regulations and declarations of policy" for the purpose of "filling in the details of the statute". And the organized stock exchanges of the country, pained by the difficulty of determining whether a market manipulation will be regarded as within the simply phrased prohibitions of the Securities Exchange Act, seek to invest our Commission with the power and duty of defining market manipulations, and to exclude from the prohibitions of law all manipulations, however vicious aud fraudulent they may be, for which the Commission has not been able to think up a definition in advance.

Granted the soundness of the desire for certainty, the desire runs head on into the countervailing desire for simplicity of which I spoke at first.

As I said, a balance must be struck. Some kinds of statutory provisions need detailed and elaborate amplification by rule and regulation. Exsentially regulatory provisions, such as the registration requirements of the Securities Act and Securities Exchange Act, or the margin restrictions of the Exchange Act, by their very nature need exhaustive implementation by rules. If government wishes to require the filing of specific information in the public record, or to limit the amounts of margin in exchange transactions, it must obviously devise specific rules by which to determine the information to be filed, or by which to compute the amounts of margin permitted in different types of transactions. Restrictive rules of this character deal with what in law schoo we called *malum prohibitum*, with subject matters where the guiding principle lies in a technically devised social policy, rather than in any generally accepted moral sense. They can be sharply contrasted with such statutory prohibitions as those of Section 17 of the Securities Act or Section 9(a)(2) of the Exchange Act, which prohibit fraud in the sale of securities and manipulation of securities markets. These prohibitions, in the nature of *malum in se*, do find their standards of reference in a generally accepted moral sense, implemented by countless judicial decisions which in large part take the place of administrative rules. And in between you can find every variety of statutory restriction and command, each calling for a greater or less degree of implementation by rule according to the nature of the problem with which it deals. If we are considering the need for adoption of rules, at least we must consider it in the light of the particular statutory policy to be implemented. A general instruction to an administrator to adopt every rule he can think of is just as bad as one prohibiting him from adopting rules at all.

And passing from the need for rules to the methods of framing them, a conscientious understanding of individual problems, or at least classes of problems, seems to me equally essential. Granted that rules should not be secretly drafted in a back room, and sprung on an unsuspecting and bewildered world without warning, consultation or advice, like Mr. Hitler's pleasant little surprises. But the way to remedy possible abuses in rule drafting is not, as the American Bar Association would have it, to impose a blanket requirement of public hearings. In one field - say the field of rate fixing or price codes - public hearings may be eminently desirable; in another - say the field of security market regulation - they may be a waste of time. The modern administrator is supposed to be an expert. If he isn't in fact, throw him away and get another; but whether he is or not, you can't profitably lay out for him the precise ways in which he is to get the information necessary to enable him to perform as an expert. We in the SEC use every device we can find to give us the framework for intelligent rule-making. We consult with lawyers and laymen; we send out questionnaires (and often enough get roundly criticized for our inquisitiveness); we prepare drafts and submit them for criticism to everyone who may be likely to have a genuine contribution to make, and particularly to organized professional and business associations interested in the problems we are dealing with. Often enough our projected rules, after being submitted to the fiery test of informed scrutiny, are radically revised, deferred, or even abandoned altogether. We make mistakes, without question, but we know, as well as you can, that rules that are arbitrarily and ignorantly conceived cannot last long, and that in the long run their failure will hurt us, and our work, immeasurably.

At least so far as the SEC is concerned, I don't think the practicing lawyer can reasonably worry that the rule-making power is exercised improvidently.

While we are on the subject of rule-making, however, there is at least one thing that we can all agree on, and that is, that if there are to be rules, everyone ought to get a chance to know what they are. In the field of rule-making, as in every other aspect of administrative action, publicity is a vitally important factor, both for the protection of the public affected and for the purpose of keeping any governmental agency in line with democratic principles. Publicity is sound insurance against the type of administrative absolutism that seems to be haunting the imaginations of our more conservative patriots. By "publicity" I do not mean propaganda. I mean disclosure of what is being done by government agents and officials - the public dissemination of rules, decisions and executive actions. On this theory the SEC has not been content merely to meet the requirements of the Federal Register Act. It has a large duplicating unit which produces thousands of copies of releases every week, and a service section which keeps up-to-date lists of individuals, companies and law firms who want to be kept on the mailing list for various types of releases. Anyone wishing his name to be placed on any of the mailing lists need only tell us so, and he will receive the classification of releases he wants without charge. To illustrate: if the Commission adopts a new rule affecting trading in securities, it issues a release setting out the new rule weeks or months in advance of its effective date; it publishes the rule in the Federal Register; it sends out copies of the release - 6,900 to registered brokers and dealers throughout the country, 2,400 to the people on "list 4" (people who have requested announcements of rules and interpretations under the Exchange Act), 1,200 to a general list of people who request copies of all releases, and 600 to the public press. This number, totaling 11,100, is exclusive of the releases distributed to members of the Commission's staff and also does not take in the many copies that are sent to people in answer to specific inquiries. In the same way decisions and orders of the Commission are broadcast by release and through newspapers, as well as news relating to indictments, convictions and acquittals in cases of security violation charges. These are also sent to each State Securities Commission. Of course some subjects, such as rules and announcements under the Public Utility Holding Company Act, do not call for so many copies because they deal with subjects in which fewer people are interested, but the press gets them in any event, and so do the Public Service Commissions of each State. Frankly, I think the only drawback to this system, so far as the practicing lawyer is concerned, is that it is difficult to keep up with all the announcements that go out. Even that drawback we try to minimize by putting out compilations of releases for convenient reference; but even without the compilations I think the system is a complete answer to the criticism I have heard, that a mysterious Star Chamber atmosphere pervades the administrative agency.

And when it comes to the field of interpretation, as distinguished from announcement - when you take those provisions of statute which do cover a wide territory and have not been implemented by specific rules or published definitions - again we try to meet the problems of the practicing lawyer by running what might almost be called a free legal aid service. Many of you gentlemen are probably familiar with the way we try to answer, by letter or personal conference, every kind of interpretative inquiry that comes in on any problem within the Commission's jurisdiction. Sometimes we can't give you the answer, or the kind of answer, you want; and sometimes perhaps we slip up, lose a letter, forget to answer it, or make a mistake. There are many

questions that we cannot answer offhand, and there are some on which we may not be able to express an opinion, either because the answer isn't within our jurisdiction to determine (as, for example, cases involving only civil liability under the securities statutes) or because they involve future actions the implications of which can't adequately be analysed in advance. But we have tried to keep the latchstring always out, and to avoid the criticism that led the American Bar Association to propose that all possible interpretations be promulgated publicly as quickly as possible. Our Utilities and Registration divisions are often called on to put in hours of work assisting practicing lawyers in meeting problems in the preparation of forms and applications, and they do it willingly. We have even announced this willingness publicly and repeatedly; for instance, in putting out the new proxy rules, which seem to be whitening the hair of so many lawyers and corporation executives, we specifically invited any one preparing proxy literature to meet the rules to send it in to us ahead of time for preliminary inspection, so that we could *both* avoid the embarrassment of fighting over its propriety after it had gone out. But this is a system that can't be handled one-sidedly; it naturally calls for a cooperative attitude on the part of the practicing lawyer. In the absence of that, we all suffer in varying degrees - perhaps the lawyer's client most of all.

So much for the vagueness of statutes and the complexity of rules. Another problem arises out of practice and procedure before administrative bodies. Rules of practice and procedure are, of course, peculiarly the lawyer's province. In going over Dean Wigmore's list, I found that with possibly 6 exceptions, each of the 40 or more agencies and boards had its own adjective rules, and it is fairly safe to assume that no two sets of them are alike. It does not surprise me to hear complaints on this subject, -- I even think something ought to be done about. A movement is on foot among several of the commissions to see how far the new Federal rules can be adopted or adapted for use in their respective types of proceedings, and we are among them. It seems like a step in the right direction, though it is still too soon to say how it will work out.

Rules of evidence probably raise the hardest questions from the point of view of uniformity. Complaints have often been publicized that the traditional rules were not being followed in quasi-judicial proceedings before administrative bodies. Yet I doubt whether the bar would be entirely satisfied to see a strict adherence to jury-trial rules of evidence, or even the more flexible rules ordinarily applied by a court without a jury. The more specialized and technical the field you deal with, the harder it is to see the relevance or materiality of individual factors until the whole picture is fitted together, and I believe this is as true for one side as it is for the other. A good many years ago the Interstate Commerce Commission, in its 22nd Report to Congress, said:

> "It is perhaps not too much to say that not a single case arising before the Commission could be properly decided if the complainant, the railroad, or the Commission were bound by the rules of Evidence applying to the introduction of testimony in courts." 1/

If you have ever witnessed an acrimonious battle before an administrative tribunal, I think you will agree with me that fights over the rules of

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1/ 22nd Annual Rep. I.C.C., p. 10.

evidence stem from no more than the practicing lawyer's desire to use one more of the traditional weapons in his legal armory to win his case from a substantive point of view. Objections to evidence are often enough merely reflex actions, performed as a matter of course and without particular thought; and if they are not that, they usually arise from a substantive disagreement as to the legal ingredients of the case that is being built up. Surely, outside the heat of the trial, we can agree that the only really important question of evidence presented to a competent trier of fact is whether the line of questioning is so far beyond the scope of the inquiry that it is a waste of everybody's time to pursue it further. If it is not clearly out of bounds, let it in, whatever its form, and let the trier of fact evaluate it when he has the whole picture before him.

More important than complaints against rules of procedure is the attack often made upon the basic integrity of proceedings before administrative agencies. This complaint was recently given somewhat hyperbolical form by a prominent member of the legal profession, who stated that counsel for an administrative body, pursuant to the complex duties attached to his office, "drafts rules and regulations for his commission, directs an investigation, files a complaint in the language of an outraged plaintiff, presents evidence to the commission to support the complaint, writes the opinion of the commission sustaining the complaint of his outraged plaintiff in judicial language adapted to the pertinent decisions of the court of last resort, and in event of appeal, moves heaven and earth to prevent a review of the facts . . .*

So far as the SEC is concerned, this complexity of functions is scrupulously avoided, and I understand that the same is true of the other agencies in which the judge-prosecutor function is combined. Actually, no one man or group of men combines these duties. We have a large organization divided into divisions and sections each with its own field of activity. One group of subordinates handles the investigation and prosecution of a particular case, without personal contact with or guidance from men who are going to decide it. In most of our administrative cases, such as stop-order or delisting proceedings, the Commission's trial counsel are not even under the jurisdiction of the General Counsel, but are drawn from the administrative division of the staff through which the case arose. The opinion section of the General Counsel's office, on the other hand, which drafts the Commission's opinions, is composed of men who have been entirely away from the heat of controversy, who have their own self-respect to maintain, and who are under strict instructions not to confer with trial counsel or with the trial examiner.

The first draft of the opinion is thus prepared strictly from the record itself, without pressure or suggestion. Copies are circulated among the Commission members for their individual consideration, and the draft opinion is later discussed jointly among the Commissioners and draftsmen in a Commission meeting. By that time each Commissioner is familiar with the case and is prepared to offer suggestions as to the form and content of the opinion. The matured conclusions of the Commission are thus formulated without contact with trial counsel, except for oral argument formally conducted before them with all parties represented. I submit that this procedure is judicial in

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* Arthur T. Vanderbilt, 23 A.B.A. Journal 871, 873.

every sense of the word, and raises no more serious questions than are present where, in a criminal case, the judge is on good terms with the district attorney. True, commissioners are responsible for getting things done, for effectuating legislative policies, as well as for judging individual cases, but they are perfectly well aware that the surest way to defeat their own ends would be to neglect justice and fair play in individual cases. Their decisions are publicized widely and more promptly than those of most courts, and commissioners are as sensitive to the opinion of the bar and the public as any jurist can well afford to be.

The particular complaint that I just quoted to you on the judge-prosecutor combination ends with the statement that in case of appeal, counsel for an administrative commission "moves heaven and earth to prevent a review of the facts." I suppose the implication intended is that, having made findings of fact that are not justified by the evidence, counsel then does everything he can to keep the appellate court from finding the true facts. This implication seems to me not only unfounded - it is irrelevant to the question raised by the judge-prosecutor combination. If an over-zealous commission counsel in a particular case has been responsible for findings which are not based on substantial evidence, he has no special magic with which to prevent a review of them by the appellate court. If a case is up for review on the merits, it is a well-recognized duty of the appellate court to consider exceptions to the findings of fact, in the light of the record presented, and I don't think there is any way to prevent it.

The real basis of this complaint must lie in criticism of a commission's General Counsel for trying to convince an appellate court that his commission's findings of fact are sound and ought not to be disturbed. I take it that this is a perfectly proper position for any advocate to take on appeal, and certainly there is nothing improper in having the General Counsel defend his commission's decision on appeal. That is one of his principal duties, and it is this duty that makes it so logical and proper for the General Counsel to have a hand in preparing the commission's decisions in the first place. The very knowledge that he may have to defend the commission's findings and conclusions in court provides in itself an incentive to him to use his best efforts to see that they are prepared with due regard to the bounds of propriety, as laid down by the courts. It seems to me that this particular combination of responsibilities in the General Counsel is not only important from the standpoint of efficiency but also as a sobering influence on commission action, tending to protect the private litigant against any predilections that the commission may have towards usurping power or making arbitrary findings or conclusions.

In connection with the fact-finding power of quasi-judicial agencies the question is always present as to how far an appellate court should be allowed to go in disturbing or upsetting the findings. I suppose that as a practical matter this question must be decided in each case by the courts themselves, because no precise standard can be fixed by statute to meet all the innumerable situations that are bound to arise. We do know that findings, to be sustained, must be based on substantial evidence; but is it possible to provide an ironclad test for determining what, in any given set of circumstances, is "substantial" evidence? Findings are often inferential in character, representing a conclusion to be drawn from a multitude of related facts. Men may differ as to the proper conclusion to be drawn from a correlation of undisputed facts, and for this reason the personal experience of the finder of facts may play an important part in what his conclusion, or inference, will be.

For example, take a proceeding involving proof of a manipulation of stock prices on a securities exchange. Suppose that the respondent is shown to have engaged in a series of transactions, and to have made certain statements, on the basis of which the Securities and Exchange Commission finds as a fact that the respondent did those acts and made those statements for a certain prohibited purpose. In most cases, naturally, the finding as to the purpose of the respondent is a conclusion based on circumstantial evidence, unless, as seldom happens, the respondent has admitted his intent outright. A person without experience in stock market practices, and unfamiliar with the many technical terms employed by the trade, is relatively incompetent to decide such an issue of ultimate fact. He would certainly be unlikely to draw from the evidence the same inferences as would a person who had made a special study of the subject.

It may then be asked, why put such decisions in the hands of a Commission largely constituted of lawyers rather than in the hands of judges on the bench? The answer is very simple, and is based on two factors. One is that the Commission has a staff of experts who are not necessarily lawyers - experts drawn from securities markets, accounting practice, public utilities. If you, as lawyers, doubt the relevancy of testimony in some of our manipulation cases, show it to an experienced trader and he can tell you, if he will, how it applies to one form of operation or another. No court has such facilities available to it for the purpose of acquiring specialized knowledge. The other factor is that even lawyers, exposed sufficiently to technical matters in a few special fields, can themselves become experts to a degree. Expertness is largely a question of concentration and specialization, and the judges passing on matters of general jurisdiction have little if any opportunity to indulge in specialization.

All this has been said before, and I don't want to labor the point. I simply point out in general the arguments against increasing, by statute or otherwise, the duty of appellate courts to remake the findings on technical subjects. And anyhow, the proof of the pudding is in the eating; as the Solicitor General of the United States recently said:

> "There is no way in which you can actually determine the work that these tribunals are doing, as to its quality, except to take the fate that it meets in actual cases in Court. We know that these administrative agencies are daily deciding thousands of cases. * * * The result, Gentlemen, of cases that reach the Supreme Court shows that the record of administrative tribunals on review is slightly better than the record of lower courts on review. We must admit that the decisions of the Supreme Court of the United States are our ultimate test. The administrative tribunals were affirmed in 64 per cent of their cases, and the Courts were affirmed in 54 per cent. That was a ten-year test, because I didn't want to be subject to the charge that it was simply a New Deal study. Those figures, Gentlemen, are all contained in the report of the Solicitor General for the past year." 1/

I can add to that, without being personally prideful, that since the creation of the SEC its record of affirmances in the Federal Courts has been

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1/ Address before American Bar Association House of Delegates, January, 1939; reported in February issue, A.B.A. Journal, p. 96.

better than an average of 64 per cent, and its experience in the Courts as a party litigant has to date been outstandingly successful. I repeat that I am not attempting to take personal credit for this; my own participation in the Commission's litigation is too recent to have had much effect on the record. But I think it is no exaggeration to say that our Commission's batting average is somewhere around .900.*

Now, gentlemen, where does all this lead us? From a good deal that I have said, you may get the idea that my primary purpose this evening has been to defend the SEC, or at least advertise it. In a sense, that is probably so; it is natural that in talking about administrative law problems I should try to give you a favorable impression of the particular agency that I am connected with. And, of course, as I said at the beginning, it is difficult for me to illustrate any point I want to make except by reference to the SEC, because that is the only agency of the government that I have any real familiarity with.

But as a matter of fact, my principal purpose has not been to talk about the SEC as such. I am interested, and I think most of you are interested, in the whole problem of the relationship of the citizen, the lawyer, and the business man to the complex set of governmental bureaus which we call administrative agencies. This problem is not new, as I have said, but in the last twenty years or so, administrative agencies have grown in number and pervasiveness, and the problem has grown in importance and in difficulty. The problem is one which we all have got to approach with coolness, with careful thought, and above all, with cooperation.

And apart from the attitudes with which we approach the problem, I think that if we are going to get anywhere at all with it, we have got to remember that it isn't a simple problem to be met by inflexible rules or atandardized codes of conduct. Some rules may help, if they are drawn with sympathetic and sensitive awareness of the legal, practical and human factors with which they are dealing. But judges, district attorneys, administrators, all alike, fill their places in society with distinction only if they are able, and, more than able, fair-minded. Back of all the argument about the administrative process, just as with the judicial process, you have men. If they are trying to do a decent and constructive job, if they are invested with a sense of justice aud fair play, if they are imbued with what Veblen called the "instinct of workmanship", you will have an assurance of informed and balanced judgment far stronger than any system of rules and functional safeguards. The "ultimate protection", as Mr. Justice Frankfurter has said, "is to be found in ourselves, our zeal for liberty, our respect for one another and for the common good."

* See Fourth Annual Report of the Commission, pp. 46-58; 82-87; Appendix VI.

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