ADDRESS

of

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A great deal is being said and written these days about administrative agencies, their growth and pervasiveness, their expanding influence, and the need for cutting their claws. Much of the current comment is ostensibly concerned with procedure, fair hearings, rules of evidence, the judge-prosecutor combination, and extension of the right of judicial review. I recognize the sincerity of a large portion of the comment, and the paramount importance of the questions involved. But I think it is clear that much of it is, in reality, only one phase of the attack on the objectives of modern social legislation.

For example, an employer who wants to be left to deal individually with his employees on his own basis may hesitate to attack the objectives of the Wagner Act, or the Labor Board as a social mechanism, while he feels quite safely in the fashion if he indulges in a general and indiscriminate attack on the Board's procedure or membership. A securities trader who wishes to work out his own salvation through a little manipulation may well hesitate to attack openly the objectives of the Securities Exchange Act, whereas he can work up a righteous wrath about bureaucracy, "administrative absolutism", or a government of men instead of laws. He is on particularly safe ground when he tries to prove that the SEC's principal objective is to discourage legitimate stabilizing or profit-taking operations and to kill the liquidity of markets. He can persuade economists who ought to know better to write letters to the Times proving, by a miraculously illogical formula, that the slump in 1938 was really more severe than the crash of 1929 -- due, of course, to the Commission's policies.

On the other hand, there is no doubt that much honest fear and confusion exists. Administrative agencies are far from new, but their rapid increase in importance during the last few years has naturally resulted in a sharpening and accenting of the problems and maladjustments which only time can straighten out. We all need to catch up with our jobs.

Articulate criticism recognizes these difficulties clearly and seeks to cope with them, fairly confident that by the process of self-education we can achieve a balance which will save us our gains in effective government administration.

Awareness of these maladjustments is not confined to the general public -- it is shared by many of those within the government, as is illustrated by the fact that the Attorney General has recently, at the request of the President, appointed a most distinguished committee to make a thorough study of the whole problem.

Current criticism and the resultant self-analysis have put government to some extent on the defensive, and have led to a series of speeches, articles and books dealing with the administrative process, justifying its strong points and confessing or excusing its weaknesses. I have indulged in this myself a number of times recently, largely drawing my illustrations from the SEC -- because that is the only agency I can speak for. I have taken as my focal point of attack the inept attempt at regulation of government embodied in the so-called Administrative Law Bill, which in some unexplained way secured the imprimatur of the American Bar Association. Tonight I am going to talk about administrative problems again, but this time with a slightly different twist. Instead of trying, as I did recently, to analyze and discuss the views that the lawyer in private practice has of the SEC, I propose to give you some of the views that the SEC has of the practicing lawyer.

As a matter of fact, the idea was not mine. Shortly after your committee so kindly extended an invitation to me to come here and talk to you, I happened to be having a conversation with one of your highly respected members, and asked him what he thought would be a good subject for my talk. We canvassed several possibilities, and then he had an inspiration. "Why not tell them", he said, "what the SEC thinks of lawyers?"

At first this seemed to me rather a presumptuous thing to try to do. In spite of a lot of gossip to the contrary, we in Washington do think of ourselves as public servants, retained to do as good a job as we can within a strictly limited ambit of authority. As such, we feel ourselves pretty free to comment officially on the conduct and habits of those who come before us in our official capacities. We have no hesitation in issuing public opinions condemning stock manipulators or filers of false registration statements. We can and do make charges of law violation -- of unethical conduct -- within our administrative province with a freedom which is not permitted to the public or its lawyers. But when we get outside the field of our official jurisdiction the situation is different. As public servants we must in large part surrender the citizen's inalienable right to say what he likes about the people he disagrees with. The principle that it is proper, and even noble, for the citizen to tell the government where it gets off doesn't work the other way round.

So, as I said, it seemed to me presumptuous at first to undertake to say what the SEC thinks of lawyers. But as I considered the question further, I began to appreciate that in any realistic analysis of the problems of administrative law and procedure the job is being only half done if you confine your analysis to the habits and practices of the administrators. Of course, administrative justice, decency, and fair play depend in large part on the consciences of the administrators, on the soundness of the rules and restraints under which they operate -- whether these rules and restraints are self-imposed or formulated by statute. But after all, administrative agencies are not fair or unfair, efficient or inefficient, in a vacuum. The SEC's work is done in a variety of ways, but they all involve participation not only by the Commission and its staff, but by the members of the public, or their representatives, that are affected by the Commission's activities. If you are considering the right and proper way to run a conference, you have to look at the attitude and demeanor of all the conferring parties. If you are considering the fairness, dignity and efficiency of a public hearing on charges against a member of the public you can properly inquire into the behavior of the Commission, its trial examiner, and its staff; but you must also inquire into the conduct of the respondent and his counsel. If bullyragging of witnesses, or suppression of evidence, by Commission counsel, impairs the dignity of the hearing, the same is true of similar conduct on the part of counsel for the respondent. Each has its own serious effect upon the efficiency with which the Commission performs its function of finding the facts and administering the law -- and therefore its serious effect upon the efficiency of the whole administrative process. Neither one side nor the other can avoid its own responsibility by pointing with scorn at the derelictions of the other.

So it is in this sense, as part of the current discussions of administrative law, that I feel justified in talking about what the SEC thinks of lawyers - or at least in giving you some idea of what people in an administrative position like mine think are the proper responsibilities of a lawyer engaged in practice before a Commission like ours. In nothing I say am I

forgetting that the lawyer's paramount responsibility is to represent his client faithfully and efficiently, and to procure for him the best results which integrity, diligence and ability can bring about. But granted that, there are ways and ways of representing a client's interests successfully; and in many senses the best lawyer is the one who knows best how to adapt his techniques to the changing needs of a variety of formal and informal proceedings - who enjoys the most sensitive awareness to the fundamental differences between situations superficially similar, and shows the greatest ability to adjust himself to these differences. A lawyer may be the best jury lawyer in the world, but if he employs his jury tactics at a corporate mortgage closing, or even on a judge in an equity sitting, he is probably not doing the best possible job for his client.

Here, then, is the question which I really think is worth discussing about the relation of the bar to administrative agencies like the SEC: how far has the bar as a whole succeeded in adjusting its habits of thought and its habits of practice to the relatively novel and peculiar needs of practice before administrative agencies? The question can perhaps be subdivided into three phases: first, the need that the practising lawyer, skilled in techniques learned in common-law schools, court rooms and business conferences, shall recognize that those techniques may need radical readjustment to enable him to secure the best results for his client in a hearing or conference at the SEC; second, the need that the practising lawyer, assuming to practice in a specialized field, shall recognize that the knowledge of the law which has heretofore served him in his general practice may be insufficient to equip him to represent and defend his client most adequately before the SEC; and third, the need that the practising lawyer, much as he or his clients may dislike the objectives of some or all modern social legislation, shall sink his or his client's personal antipathies, shall recognize that he has got to live with the Commission, and shall understand that if his client's interests are to be best served he had better work with than against the Commission. To summarize, I am concerned sith three aspects of the practising lawyer: his techniques, his equipment, and his attitude. How far do these need readjustment if the administrative process is to be perfected?

First let us take techniques. Professor Edmund Morgan, discussing the function of trial courts, says in substance (and I hope I shall not misquote him) that the courts are not so much for the purpose of administering absolute justice between litigants; if they were, they would be cumbersome machines for the purpose, for apparently the best way to disqualify a trier of the facts, whether juror or judge, is to show he has some first-hand knowledge of the facts. Instead of investigating facts, both court and jury are supposed to start in a vacuum and allow themselves to be worked out of it by carefully prepared and skilfully questioned witnesses, and then decide who has presented the better case. In this respect, says Morgan, we might as well recognize that our courts are established mainly to *dispose of* disputes, one way or another, in a peaceable manner. Disputes have to be settled peaceably, and I am not criticising the judicial system. For most purposes, it is the best that our civilization has been able to work out. Undoubtedly it has advanced a long way from trial by battle, fire, or water, though it is still possibly a bit too close to compurgation, especially when court and jury have to weigh the opinion testimony of "expert" witnesses. However, the mechanism of our courts, whether in civil or criminal trials, is not pointed towards disposing of cases correctly on the basis of facts *as they actually exist*. Primarily, the guarantees of the system are directed to provision for a fair hearing, and to a correct decision on the basis of the case *as presented by the litigants*.

This fact puts an enormous premium on the abilities of trial counsel in presenting his client's case. It is often a rudimentary element of his technique that not too much of his evidence or theory shall be disclosed to the other side in advance of its presentation, that strategy verging on dramatics shall be employed, and that weak points in both facts and law shall be consigned to oblivion to the extent that the canons of ethics and the obtuseness of an opponent will permit. By calling attention to this I am not assuming to criticize the practitioner, to stigmatize accepted standards of trial practice, or to suggest that general practitioners should conduct private litigation in any different way. For all I know, this technique is appropriate and even essential to the best representation of a client's interests in a court of law. What I am driving at is that in practicing before administrative agencies, different considerations are brought into the picture and a different technique is necessary if we are to make any progress.

Now, administrative agencies naturally have a variety of functions, and I am going to stick to illustrations involving the functions of the SEC, not only because that is the one I am familiar with, but also because the statutes it administers place upon it the duty of serving a pretty representative variety of functions. Some are administrative, some legislative and some judicial in character, but they all involve the interests of the public. The Commission is not set up exclusively as an additional tribunal to settle disputes between two or more litigants on the basis of what the parties and their counsel want to bring out. If it were, there would hardly be any excuse for its establishment. It must act on the basis of actual facts, to a large extent, and, if necessary, go beyond the representations made to it and find out for itself what those facts really are. Therefore, I think it is fair to say that whatever dealings a lawyer has with the Commission, he must, for logical and practical reasons, in some degree drop the habits and prejudices that go to make up his usual trial counsel technique.

This is less true in purely adversary proceedings than in the ordinary regulatory or investigation proceeding. For example, if you represent a client whom we are proposing to expel or suspend from a national securities exchange, or whose broker-dealer registration is up for revocation, you will naturally adopt a different technique from the one you would use if you were trying to get the Commission's approval of an acquisition of public utility securities under the Holding Company Act. Public hearings in both cases might look the same, because you have a trial examiner, witness chair, court reporter and counsel table in the room, but the essential nature of the cases is so divergent that you would hardly expect the same tactics to be appropriate in each.

In the case of an application to acquire utility securities, and in many similar cases, the primary object is not to resolve disputed facts or points of law, but to put into the record the considerable amount of information which the Commission needs in order to form a correct and practical opinion of the transaction and to see that statutory standards are met. In such a proceeding the Commission's function is quasi-judicial in about the same sense that a bankruptcy or surrogate's court exercises a judicial function when it authorizes a receiver or administrator to enter into a contract. Whether an adverse party is represented or not, the proceeding is much more than an adversary proceeding. The Commission's attorney is neither prosecutor nor antagonist; he is more nearly a quasi-judicial assistant to the Commission.

Under the terms of the statute, the Commission has to balance the ambitions of the applicant company with the interest of investors and consumers; both the Commission and the company have fiduciary duties to the public; and from all points of view the best atmosphere is necessarily one of inquiry and disclosure rather than of strategy.

The same principles, I think, ought to be applied to stop-order or de-listing proceedings where a question is raised as to misleading statements or omissions in a registration statement. We all know how difficult it is to make a statement of fact that is subject to only one interpretation. We also know something of the art of conveying impressions that are wholly erroneous without making a single statement of fact that can be branded as an outright falsehood. If the Commission has to deal with such situations on strictly legal principles, much of the benefit of our truth-in-securities legislation will be lost, and I venture to say that no member of this Association favors that kind of result. Now, if a client has gone so far as to get himself subjected to such a proceeding, in spite of all the opportunities the Commission offers before it starts anything, the least helpful technique may be to try to work up a plausible case and go to bat on it. Without meaning to suggest that counsel ought to crumble before the slightest desires of the Commission's staff, I do suggest that the best interests of the client would be most often served by open and frank inquiry rather than by trial-room maneuvres. Objections to question after question on the ground that they are "incompetent, irrelevant and immaterial" are, after all, largely a matter of habit. Where they are made solely to impress the client or the newspapers, I would not feel it my province to criticise them; but there is every indication that many attorneys actually believe that these reiterations constitute sound legal procedure. Yet it seems to me a commonplace of the law that exclusionary rules of evidence have little application to administrative proceedings. In the words of Dean Wigmore:

> ". . . the jury-trial rules are intended for a constantly changing tribunal of fact composed of inexperienced jurymen dealing with hundreds of types of cases. When the tribunal is composed of *experienced professional men*, habitually inquiring day after day into the *same limited class of facts* (as happens with most administrative boards), an expert weighing of evidence can generally be counted upon. The cautions represented by the exclusionary jury-rules can and will be applied by such a tribunal in weighing the evidence, without actual exclusion of it. . ." 1/

It may happen, of course, that a question opens up a whole line of inquiry which is so irrelevant to the proceeding that to pursue it would simply waste the time of everyone concerned; a question may also open up a line of inquiry which would stimulate publicity harmful out of all proportion to the probative value of any evidence elicited; but these are unusual situations. Ordinarily, no SEC attorney is going to attempt to introduce evidence unless he honestly believes it to be admissible and helpful. He has nothing to gain by confusing the issues and, in fact, if the record in the proceeding is confused or full of irrelevancies, his own record within the Commission will suffer.

1/ 1 Wigmore, Evidence (2d ed.) sec. 4b.

A reluctance to exclude evidence, however, does not mean that the rules of evidence, insofar as they represent the accumulated experience of the years as to probative values, are utterly disregarded. As Wigmore says, a tribunal trained in the common law tradition will apply these rules when it weighs the evidence. It is interesting to note that the Interstate Commerce Commission, which even the American Bar Association seems to regard as above reproach, said in one of its earlier reports to Congress 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/

Like insistence upon jury-trial rules of evidence, legalistic disputation is mainly useful only as a smoke-screen and chiefly serves to enlarge the record. I think there is no disputing the fact that many of our records of hearings are unnecessarily long, but examination of them does not reveal that the excess is due to the admission of improper evidence. It is one of the duties of my staff to study and summarize these records, and I have it on good authority that about ninety percent of the excess space is taken up by the bickerings of trial counsel on unsubstantial evidentiary and procedural matters. Our trial examiners often do not feel in a position to cut off an advocate who insists on making speeches, since they want to avoid being charged with suppressing wisdom and truth. Similarly, they don't want to exclude evidence that may prove to be of value, so that in the normal case your record contains not only the disputed evidence but also the objections, objections to objections, and arguments on each. I put it to you whether or not counsel need a more realistic technique than that, if only in the interest of economy.

So much for trial room technique. It is the most obvious form of technique involved in dealing with administrative agencies, and the easiest to draw examples from. But it shouldn't be forgotten that the question of technique is just as important in informal proceedings - private investigations under oath but without a presiding officer, or round-table conferences looking to an interpretative opinion or the settlement of a dispute. Here no less than in the court room the practitioner may need to shed inappropriate habits of thought or behavior, to adjust himself to a recognition of the fact that the relations between the Commission and his clients are very different from the relations between two clients whose attorneys are negotiating for a contract. A technique of securing advantages which may be perfectly ethical in business between private parties may be absolutely out of place - or at least absolutely futile - in business between the citizen and a regulatory agency of his government. And by recognizing and acting on this distinction the practitioner can play perhaps his most important role in the advancement of the administrative process.

My second point was equipment. Perhaps I should not bring up the subject of equipment before this distinguished gathering, because it must be conceded that the members of the New York City Bar with whom we come in contact know their business as thoroughly as any attorneys to be found anywhere else in the country. With that concession I will proceed with general remarks that can be taken personally if you choose, or can be tossed aside as intended for consumption by less enlightened practitioners.

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

A lawyer's equipment in the specialized fields in which we work is of prime importance whether in the trial room or around the conference table. You have heard the Commission's staff described as "experts". If you believe that word connotes undue distinction and ability, call us "specialists", which is a word that I understand is consistent with the humility so much desired of those employed in public service. At any rate, our staff is composed not only of lawyers, but also of specialists imported from the stock markets, accounting practice, the public utility and securities analysis fields. Many of the staff lawyers themselves become exposed to the technical terms and customary practices pertaining to those fields, to such an extent that they qualify as specialists. Now, these people are all willing and ready to confer upon the problems brought to them by perplexed business men and lawyers, and in fact they conduct what amounts to a free legal aid service. At the present time their preference, in many cases, is to have personal contact with the client rather than - or at least as well as - the lawyer. And this is not because they have any idea of taking advantage of the client, either. It is because it so often happens that the lawyer has too little familiarity with the subject matter involved - too little understanding of the trade in which his client is engaged, or an insufficient grasp of accounting theory and practice. Legal talent alone will not serve, and little cooperation can be reached on purely legalistic grounds. This is all axiomatic, and I am sure that it is well known when it comes to dealing with older agencies like the Patent Office and the Interstate Commerce Commission. Patent lawyers know they cannot disregard chemistry and physics, and a practitioner about to confer with the I.C.C. is not likely to ignore his education in railroading. But it is astonishing how many lawyers come to us without preparation, or without at least bringing an expert assistant, and expect to solve problems dealing with market operations, selling campaigns, accounting theory and even engineering. If such expeditions result in misunderstandings instead of solutions, the fault is hardly all on the Commission's side.

What I have said does not by any means lead to the conclusion that lawyers should keep away from SEC conferences. Lawyers are needed, not only to help solve legal questions, but also to organize and present non-legal questions. The need for educating lawyers in business matters is certainly one thing I have in mind, but more important yet are the advantages that will follow if the bar will give due weight to non-legal traditions and practices, and not try to convert every problem into a legal problem.

Finally, in discussing what the SEC thinks of lawyers, we come to what I have called the question of attitude. This question interveins problems of technique and problems of equipment, but it goes beyond them too.

In suggesting the importance of a lawyer's attitude towards the Commission and its job, I am not suggesting that you thank us or the Congress for giving you more work to do. I understand that you feel undercompensated for the work you get out of the securities laws and the Holding Company Act. I realize above all that you feel tired and gray at the mere thought of getting out a proxy statement. I once flippantly chided one of your eminent members for an apparent ungratefulness for the additional legal business the Securities Act brought to him, and received the morose answer: "Yes, the same way plague brings work to doctors."

Maybe the analogy is a good one. I don't feel in a position to resent it. At least it illustrates my point: if a doctor, much as he detested plague, concentrated his attention on the evil spirit that had brought it on the community, he wouldn't be serving his plague-stricken patients very well. What they need is to have him forget his irritation, and get down to the job of first finding out what to do for them, and then doing it.

So with the lawyer. The lawyer who went into court for his client with an abiding mistrust of the judge, or dislike for the system of courts - preferring the old-fashioned duelling ground as a method for settling disputes - and who let his attitude color his presentation of the case, would be doing his client a serious disservice. And so would a lawyer who knew all about trial technique, and was thoroughly familiar with the intricacies of his client's case, but who for some reason disliked the doctrines upon which his client's case rested so much that he refused to try to understand them. The best representation of a client's case demands not only efficient techniques, and adequate equipment, but also an open-minded and sympathetic approach to the client's problems. And translating the argument back to the field of administrative law, the lawyer's best representation of his client demands that he assume, at least for the purposes of his case, that the people he is dealing with in such a Commission as the SEC are honest, disinterested, and trying their best to do a good job. And even more, it demands that he consider the statutes and regulations they are trying to administer with an open-minded approach, and so far as possible with a clear conception of the objectives of those statutes and regulations, and the reasons for their existence. It is not necessary to think they are perfect, or that they coincide with your own social or economic philosophy. But it is necessary to have a reasonable amount of intellectual curiosity about them, and to put yourself in a position to explain the underlying principles to your client.

It is easy to multiply examples on this point, but let me stick to one - the anti-manipulation provisions of the Securities Exchange Act. Of course, manipulation of security prices, being but a general classification of fraud in a peculiarly fertile field, is as varied and manifold in its character as the number and imaginations of potential manipulators will permit. The manipulator seeking to evade the spirit of the law without falling afoul of its letter will naturally complain that he has difficulty telling whether he has successfully avoided penalty for his activities, but his complaints will not evoke much sympathy.

In this discussion, I am not concerned with him, but with the honest trader, who ought to be able to secure dependable advice from his attorney as to whether or not a proposed transaction would violate the law. Among such traders, fear and uncertainty exist where there should be neither, so far as the SEC is concerned; and these emotions are stimulated by counsel who furnish the trader with blanket advice to do nothing, for fear of some unknown pitfall or taboo. Section 9 (a) (2), the anti-manipulation section of the Securities Exchange Act, is not difficult to understand in its relation to the normal honest trading transaction if it is read against a background of experience and information on the different types of market operations, both innocent and otherwise, that constitute the paraphernalia of the experienced market trader.

Nor can the lawyer's refusal to advise his client be justified by his inability to get an advance absolution from the Commission. We are stopped, not by an inability to explain what the law means, but by the impossibility of expressing an opinion on the legality of a trading operation without knowing all of the relevant facts. As to a market operation that has not taken place, we have necessarily no factual basis for an opinion, and the best we can do is talk about hypothetical situations and hedge our opinions accordingly. But the trader himself is in possession of the facts because he makes them. He knows the purpose he has in mind when he embarks on a market operation, he knows the speed with which he buys or sells, and can observe immediately the effect of his buying or selling. With proper advice from a lawyer who is willing to understand the objectives of Section 9 (a) (2) and its historical background, and to study the precedents of its enforcement, he should be able to see as he goes along just what to do in order not to violate the law. If any of you feel that giving such educational advice is not practical, call on our trading specialists and you may find out some things that you never thought of before. Conversely, you may be able to contribute to our education in the process.

This suggestion, that in one particular field it is equally possible for us to educate you and you to educate us, brings me to a pretty good note on which to end my discussion of the question which I flippantly called: "What the SEC thinks of lawyers". The answer, succinctly, is that the lawyers in the SEC think of themselves as lawyers, trying to do the best job they can for their client; and they like to deal with lawyers on the outside who are trying to do the same thing for *their* clients. Each of us can criticize and disagree with the other's techniques, equipment and general attitude. Such disagreements are natural, and perhaps, even, healthy. But whether or not we disagree on these things, we have got to remember that we are both experimenting with a rather new and quite vigorous phase of the law; that whether or not we like it we have both got to live with it; and above all, that we are both part of it, and equally important to it, and might just as well work together to turn it into a really efficient instrument of the public service.

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