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THE MOBILITY OF THE ADMINISTRATIVE PROCESS

ADDRESS

of

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before the

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When I was asked by your Association to address you at this Convention, I was particularly impressed with its theme -- "Making Democracy Work". It seemed to me that a more important general theme could not have been fixed upon at this time and I must congratulate the Association on its selection.

You have asked me to talk today about administrative law, administrative practice and administrative procedure, with particular reference to the way these operate at the Securities and Exchange Commission. Administrative law, as it has come to be known, deals primarily with the procedures and methods by which the Administrative agencies of government operate in bringing about compliance with the laws they administer.

To a body of practicing lawyers such as this, it is unnecessary to detail the growth of the administrative agency as a governmental unit. It is also probably a fundamental well known to all of you that administrative law is essentially a body of law which has been developed as the result of the attempts of legislative bodies to create more effective means of dealing expeditiously with the increased and more intricate problems arising from the complexities of modern life.

The administrative agency inherently possesses the basic mobility necessary to keep the processes of government abreast of the requirements of our economic life. I would be more than foolish if I were to contend that a perfect system has been developed or that in the best of these agencies there have not been rough spots -- spots not always too easily smoothed. But somehow throughout the history of administrative operation, the kinks have been pretty well ironed out.

I have spoken of the fundamental procedural aspects of what we know as administrative law. There is a tendency to lose sight of the fact that administrative law relates to the manner in which business is to be done by and before an administrative agency just as court room procedure relates to

the manner in which business shall be done by and before the courts. It constitutes the methods and procedures by which the agency shall be guided in the enforcement of substantive law -- whether statutory or common law -- relating to its particular field of administration; and it assures all parties the opportunity to present their case fully before the agency so that justice under a law or set of laws may be fairly and expeditiously dispensed. And furthermore, we should not forget that this procedure preserves the right of orderly appeal to the established courts. Thus, for instance, the laws administered by the Securities and Exchange Commission provide for appeals from actions of the Commission to the Circuit Courts of Appeals and the United States Supreme Court just as provision is made for a similar course of appeal from the decisions of the United States District Courts.

A knowledge and understanding of procedure is, of course, one of the basic tools of the lawyer. His knowledge of substantive law is of little use to him unless he knows how to put it to the use of a client. But I recall that a law student, at least in most of our law schools, is not over-burdened with courses on procedure. Most of his time is spent in learning substantive law. Law teachers have come to the conclusion apparently that the young lawyer can pick up the procedures in his own jurisdiction quickly and with ease after entering upon practice. Experience seems to indicate that the teachers are for the most part right because there is nothing very mysterious or esoteric about court room procedure.

By the same token, there is nothing very mysterious or esoteric about administrative procedure. There is not even anything very new about it. Members of the bar have been practicing successfully before the Interstate Commerce Commission since 1887, and before an increasing number of administrative agencies since that time. After all, the Constitution of the United States is only 152 years old, and this so-called infant, administrative law, is already more than a third as old.

Administrative procedure, like court procedure, is merely the vehicle for the application of principles of substantive law to a particular controversy. It is of course important, but of greater importance are the substantive principles by which an administrative agency should be guided in reaching a decision. Failure to appreciate this is actually detrimental to the administrative process because much valuable time can be consumed in consideration of procedural details which should be devoted to study of the substantive law necessary to a correct determination of the pending matter. The lawyer who enjoys the greatest success at the administrative bar and whose client's rights receive the greatest protection, is the one who recognizes that the principle function of administrative procedure is to assure his client a fair hearing, and who therefore devotes the major portion of his time to a thorough mastery of the substantive law.

A Commission such as ours must see that its procedures are both simple and fair. They must be readily understood and cast in a basic pattern familiar to the practicing lawyer. Likewise its substantive rules and regulations must be direct, easily comprehended and within the limits of authority contained in law and the Constitution.

The Securities and Exchange Commission, like other administrative agencies, has codified its administrative procedure in a manual known as its Rules of Practice. These rules have been based, within the scope permitted by our specific statutes, on the experience of other administrative agencies and the courts plus a certain amount of trial and error. The rules are by no means frozen. They are changed and improved whenever it is demonstrated that such alterations are feasible. Like the rules of any game, they are based on the fundamental desire to achieve fair play for those who are affected by our statutes. My experience has led me to the conviction that administrative agencies are bodies of earnest, conscientious

public servants, with their roots deep in the sacred traditions of legal principle and practice. They are close students of the history and development of administrative law, and as such profoundly aware that it is simply basic common law modified in the manner of its application for specialized fields of human endeavor. They are eager to make it operate as it should and they take real and sincerely justified pride in its success.

Our Commission has, in the adoption of substantive rules and regulations called for under the laws we administer, always studiously endeavored to insure their fairness and adaptability to the accustomed practices of the persons and businesses affected by them. To this end we have followed the policy of going through a careful process of conference and discussion with lawyers in private practice and the most competent of representatives of business on contemplated rules and regulations long prior to their issuance. I think it might be worth while at this point to give you a play-by-play account of the procedure.

We have on our staff corps of experts drawn from men experienced in the fields of activity over which the Commission has regulatory jurisdiction. These men are constantly studying the conduct of business in their particular field as it may be affected by the law. It is on the basis of their knowledge and studies that tentative rules under the statutes are drafted. These are then discussed with the full Commission. After the Commission's criticisms and suggestions have been incorporated, the rules - designated as tentative and for purposes of discussion only - are sent to business groups, trade associations and individuals representative of the persons most interested in the subject matter covered by the rules. Written comments are invited and personal discussions with members of the staff are arranged when requested. The staff then outlines for the Commission the principal criticisms made, and expresses its views on them. The process

up to this point may or may not be repeated many times. After final redraft satisfactory to the Commission the rules are adopted, to become effective at some future date - in the case of the more important rules, usually thirty to ninety days after their adoption. This last precaution gives all interested persons an opportunity to study the rules and to arrange for any necessary changes in their methods of doing business resulting from them. Under circumstances where there is sufficiently widespread interest among the public and persons engaged in the business concerning the subject matter of the rules, the Commission has, prior to their adoption, held what have come to be described as "public conferences". These conferences are conducted informally in our public hearing rooms, with the full Commission present and all views are heard, both those of the Commission's staff and of any other persons wishing to address themselves to the subject.

You will note that in this procedure we have relied almost exclusively on specialists. First, there is the technical knowledge of our own men employed for their special knowledge and training in the particular field. Then there are the legal experts of our staff who have for long years devoted themselves exclusively to these specialized problems. And finally there are the technicians, both operating and legal, from the segment of business most affected by the proposed regulation. Only by the employment of all the specialized technical knowledge available both inside and outside of the Commission is it possible to promulgate these regulations expeditiously and at the same time practicably. True, we might draft and adopt rules over night, but the chances are that no matter how legally proper they may be, their operation would be jeopardized by complications unforeseen in the rush of precipitate action.

Today and clearly in the world of tomorrow, we do not have time for stumbling trial and error. The administration of laws can and must move swiftly and surely so that American business shall not be harassed by

unreasonable delay and doubt in the task before it. To move swiftly and surely today requires the fullest application of technical knowledge and the fullest cooperation of technicians both in and out of government. It also requires full employment of the inherent elasticity of the administrative process to meet the many new problems which inevitably arise in a changing world. The world trend is clearly towards specialization in our economic life. This trend is ever apparent in our life today, and it is a safe prediction that it will continue in the future with ever-increasing intensity. The rapid multiplication of the achievements of science render such a course a certainty.

The increase in business specialization will result in an increase in special laws, which in turn will call for specialized administration of laws. This administration will call for speed and efficiency in its discharge. We stand now in a mechanized world that swirls by and engulfs those who are not geared to keep abreast of it. Business must move with speed in order to accomplish its task -- and now and in the future we must see to it that government is conducted in such a manner that business can move swiftly and with the least possible interference -- always bearing in mind that the general public must be assured protection from exploitation. And with this in view I see no greater assurance of success than through careful and intelligent development of the administrative process. We must preserve its basic mobility to meet the exigencies of the future.

A significant example of this mobility is at hand in the relatively brief experience of our own Commission. In 1933 when the Congress passed the Securities Act it provided for a minimum period of twenty days during which a registration statement covering securities to be offered to the public should be on file with the Commission before it could become effective and the securities offered. It was a wise provision to embody in a law

whereby the Congress embarked on a totally new field of Federal regulation. Its purpose, as you all know, was to give adequate opportunity for examination and the detection of errors, omissions, or outright frauds in the statement. After a very few years of experience the Commission has developed the efficiency of its operation in this regard to the point where it was able to suggest that the Congress increase the flexibility of this provision so as to permit us to shorten the twenty-day period to whatever point seemed proper in the public interest and in accordance with certain other specified standards. Furthermore, our staff has developed a technique for consultation in advance of filing so that many errors and omissions may be avoided in the statement as originally filed, thus preserving precious time for business which would otherwise be taken up with corrections and amplifications during the period after filing. Since these changes were made, well-prepared programs of finance have been able to proceed almost without statutory interruption, completing the examination process in as short a time as four or five days.

The special adaptability of the administrative system to the handling of emergency situations is also well illustrated from our experience. Recently when the Government of Great Britain was liquidating American securities taken over from its nationals in order to finance its war effort, the question was raised as to whether the British Government would occupy the position of an underwriter under the provisions of the Securities Act of 1933 and in consequence be subject to the liabilities of the Act. Under the circumstances a Commission rule was necessary in order to make certain that such a contention, no matter how tenuous, could not successfully be made. Speed was of the essence -- a buyer was at hand for a large block of securities and the money was woefully needed for the prosecution of the war. The Commission being of the opinion that the interpretation was correct, the rule was adopted almost within twenty-four hours.

Although rules of general application require, as I have previously pointed out, careful and thorough preparation, the machinery of mobile administration is capable of being geared up for the individual case which demands immediate solution.

We are, in fact, constantly attempting to adjust and speed up our procedures. The degree to which we are successful in perfecting our administrative law and procedure and adapting the whole process to the demands of the future rests very largely with the bar -- the bar throughout the whole country. The familiar saying that a court is no stronger than the bar practicing before it is equally applicable to administrative agencies. The challenge is one to the whole bar -- and I say the whole bar because I do not wish to be understood to restrict myself to the so-called "financial bar" of the presently dominant financial centers of this country.

I believe that one of the reasons why administrative procedure has become such a lively subject among lawyers is that, to a certain extent, a concentration of administrative practice has been permitted to grow up within the profession. I say "permitted" advisedly, because I think that the bar in general has, either because of lassitude or more plausibly because of normal human hesitancy to approach something new, been too willing to believe that administrative procedure is so complicated that it should be left to so-called experts. And in using that phrase I do not mean to deny that there are some experts in the field of Federal securities laws. Nor would I assert that there are never occasions on which the assistance of some expert is necessary. But I do believe that in the large run of matters, the lawyer in general practice can without too much difficulty equip himself to serve his securities clients ably and well.

My feeling is that it is not the laws themselves which frighten most lawyers away so much as it is the feeling that the procedures are complicated. The truth of the matter is that upon close examination neither proves to be very complicated. Doubtless, any competent member of the California bar

could protect the rights of their clients in most matters before our Commission today with every bit as much effectiveness as the most expensive eastern lawyer.

And I want to talk just a little bit about that here today. California is a proud State, and well it should be. California is a rich State, not only in natural wealth and industrial wealth, but in human values. Of course, my appraisal of the State may be influenced by the fact that it is my birthplace. I know of frequent instances where a lawyer from the East has been called to California to help register an issue of securities of a California corporation. I seriously question the necessity of such a move. I recognize that the eastern lawyer may be able competently to represent his client, but I refuse to believe that the lawyers of California are not equipped to serve their clients as well.

The Securities and Exchange Commission has always been a staunch believer in what we call regional finance. It has seemed to us that too many local industries go to New York for their money when they could get it just as well, if not better, at home, and probably with less expense. We believe that California money ought to be available to California industry and, conversely, that California industry should be accessible to California capital. We see a distinct advantage to our economic stability in strong financial communities, with healthy investment banking firms and healthy stock exchanges, in the regional capitals of the country. To help accomplish this we have established regional registration centres in two of these regional financial capitals, in San Francisco and in Cleveland and they seem to be working very well. But it is obvious to us that one of the principal obstacles to the achievement of this goal lies in the various communities

themselves. The leading regional financiers and industrialists and, yes, even the leading regional lawyers often seem to have their eyes on the largest financial centers. What is the reason for this? We all know that operating a business, raising capital, protecting a client at the bar, require mainly honest, hard work and that there are no shortcuts to a successful prosecution of these basic objectives whether it be in California or in New York.

Here again, the bar can be a truly decisive force in this struggle to win autonomy for the various great regions of the country. Members of the California bar cannot afford to assume that they are not equipped to practice before such agencies as the Securities and Exchange Commission in the interest of California clients. Should they do so, their influence and their power in this struggle for antonomy may well be lost.

I do not mean to imply that proficiency in the field of Federal securities laws can be attained without concentration and hard work, but it is not necessary for a California lawyer to shut himself up behind closed doors for weeks to try to figure out the precise procedural steps he should take in handling a matter before the Securities and Exchange Commission. It takes no super-human effort to achieve a sufficient understanding of these laws to enable a lawyer competently and expertly to advise his clients regarding them. One of the reasons why we have offices in San Francisco and Los Angeles is for the very purpose of assisting members of the bar to understand our laws and our procedures. Those offices are equipped to assist members of the bar

as well as members of the public in interpreting our laws and applying them to specific situations and to acquaint them with procedural steps necessary to be taken in such matters. We have no interest in being mysterious. We conceive it to be a large part of our task to assist persons in complying with our laws, and that includes assisting lawyers who are in turn trying to help their clients to this end. For instance, a large portion of our work relates to matters in which steps are being taken by a corporation, a securities dealer or an investment adviser to conform with the requirements of the law and the rules and regulations thereunder. This work is done largely across the table. From the Californian's standpoint it seems unnecessary that it should be done across the country. For that reason, we have done our part by moving a table to the West Coast.

At times like these, it is of course important that the normal relations between business and government should run as smoothly as possible so that energies can be directed more extensively to the great national effort we are making. We want to help your clients all we can so that their efforts to comply with our laws shall proceed smoothly and swiftly. And we know that we need your help in such a program. We Americans need all the strength we can muster if we are to retain our prestige and preserve our future as a free nation against the frightful international storms which are now raging. For our part, wherever we can be helpful in smoothing the path to compliance with our laws for your clients, we shall be helpful. Wherever we can find new ways of being more helpful, we shall employ them. I do not mean that we shall relax our efforts to drive out the crooks or bring the wilful violators to compliance. But I do mean that we want you to come in and seek our help, even more than you have done in the past, wherever you have a real problem. I feel sure we can expect the same cooperation from you.

We in America have a great responsibility -- that of insuring the existence of democracy, or, as you have put it, "Making Democracy Work". The fulfillment of the task which this responsibility entails calls for vision, not retrospect, except as we look back to profit by our experience.

We must not forget that democracy is as much a form of government as it is a way of life. If democracy is to survive, the democratic form of government must be given the flexibility and mobility necessary to keep abreast of the swiftest changes. Periods of war have always brought unusually rapid technological advancement with its aftermath of social and economic problems. Democratic Government must meet the challenge of these changes. Fortunately, our government is at present well implemented for this purpose. Fortunately, the experimental days of administrative law are behind us. Upon a foundation of broad experience we have developed a new dynamic device for instrumenting the will of Congress in the increasing fields of specialized endeavor. Administrative law has reached maturity and it has taken its place in the first ranks of the tools of democratic public will.