SOME PRACTICAL ASPECTS OF THE RELATIONSHIP BETWEEN THE SECURITIES AND EXCHANGE COMMISSION AS AN AGENCY OF THE EXECUTIVE BRANCH OF THE FEDERAL GOVERNMENT AND THE JUDICIAL BRANCH

Address of

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Mr. Chairman, Commissioner Armstrong, fellow members of the Association of the Bar and guests:

I

PRELIMINARY REMARKS

To say that I feel deeply honored to be here tonight would be trite but it happens to be the truth. I cannot think of a more tempting occasion for mischief than to be billed on this program following the distinguished Commissioner Armstrong -- who is not only my client but really my boss -- and to be introduced by the distinguished Chairman of this Committee -- who was one of my most illustrious predecessors in office. Such an opportunity is indeed a rare one, and I am sorely tempted to take full advantage of it but for the fact that I am deeply aware of my own shortcomings and, incidentally, I am aware of the function of rebuttal if I should dare overstep the mark.

Moreover, the fact of the matter is that I am just a country lawyer from Connecticut at heart and even after a little more than a year in Washington I am fully conscious that not all of the hayseed is even yet out of my hair. Some indication of the volume of SEC practice carried on by the little firm in Connecticut from which I came to Washington may be gleaned from the remark my secretary in

Connecticut made after I had dictated to her a letter accepting the appointment as General Counsel of the SEC. She said: "Mr. Timbers, I don't wish to be curious but could you tell me what the Securities and Exchange Commission is; I know that it has something to do with security in the exchange of war prisoners but beyond that I am in the dark." Frankly, I knew very little more than that about the SEC when I first arrived in Washington -- but, brother, you sure learn fast.

II

BASIC RELATIONSHIP BETWEEN SEC AND THE FEDERAL JUDICIARY

This relationship, as all of you are aware, is basically the relationship between one agency of the executive branch of the government and the judicial branch of the government. Implicit in that relationship under our constitutional form of government is the doctrine of separation of powers, coupled with what we were taught in political science as certain checks and balances. So much for the theoretical relationship between this Commission and the judiciary.

As a practical matter, the relationship between the SEC and the courts is substantially the same as the relationship between any litigant and the courts. Counsel for the Commission, when appearing before the courts, appears not only as attorney for the Commission as a client but also appears as an officer of the court, and I have discovered that the judges, and quite properly so, rarely pass over the opportunity to emphasize government counsel's role as an officer of the court.

Beyond this, however, the relationship of the SEC to the courts -- and the same holds true for any regulatory agency of the federal government -- is a somewhat extraordinary relationship. It is extraordinary because for its very existence and particularly for the scope of its jurisdiction, the Commission necessarily must look to the courts. We administer six federal statutes[1/] and we have a prescribed statutory role under Chapter X of the Bankruptcy Act.[2/] It is impossible, however, to ascertain the full thrust of the Commission's statutory responsibilities by merely looking at the four corners of these statutes. Twenty years of decisional law, much of it hammered out on the hard anvil of bitterly contested litigation, has been necessary in order to add flesh and blood to the bony statutory structure. Indeed, that process still continues and, in my opinion, necessarily must continue in order to preserve the vitality of our Commission. After serving as General Counsel to the Commission for a little more than a year, I have become more and more impressed with the cogency of the words Judge Learned Hand wrote to me when I first took office:

> "The SEC is still young enough not to have suffered the sclerosis that has invaded such commissions as the . . . . and the . . . .; and I am sure you will help to hold off that disease that in the end, if unchecked, will destroy the value of such organs of our government."

1/ Securities Act of 1933, 48 Stat. 74, 15 U.S.C. § 77; Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. § 78; Public Utility Holding Company Act of 1935, 49 Stat. 838, 15 U.S.C. § 79; Trust Indenture Act of 1939, 53 Stat. 1149, 15 U.S.C. § 77aaa; Investment Company Act of 1940, 54 Stat. 789, 15 U.S.C. § 80a; Investment Advisers Act of 1940, 54 Stat. 847, 15 U.S.C. § 80b.

2/ 52 Stat. 883, 15 U.S.C. § 501.

A quick glance at the SEC's record in the United States Supreme Court during the twenty years of the Commission's existence may serve to illustrate what I refer to as this continued process of maintaining the vitality of the Commission. During these years thirty-four cases in which the Commission has been either a party or amicus curiae have come before the Supreme Court for decision on the merits.[3/] In only

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3/ Jones v. SEC, 298 U.S. 1 (1936); Landis v. North American Co., 299 U.S. 248 (1936); Electric Bond & Share Co. v. SEC, 303 U.S. 419 (1938); Case v. Los Angeles Lumber Products Co., 308 U.S. 106 (1939); SEC v. U.S. Realty & Improvement Co. 310 U.S. 434 (1940); A. C. Frost & Co. v. Coeur D'Alene Mines Corp., 312 U.S. 38 (1941); Consolidated Rock Products Co. v. DuBois, 312 U.S. 510 (1941); Marine Harbor Properties Inc. v. Manufacturers Trust Co., 317 U.S. 78 (1942); SEC v. Chenery Corp., 318 U.S. 80 (1943); Fidelity Assurance Ass'n v. Sims, 318 U.S. 608 (1943); SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943); Brown v. Gerdes, 321 U.S. 178 (1944); Prudence Realization Corp. v. Ferris, 323 U.S. 650 (1945); Otis & Co. v. SEC, 323 U.S. 624 (1945); Young v. Higbee, 324 U.S. 204 (1945); Price v. Gurney, 324 U.S. 100 (1945); Pacific Gas & Electric Co. v. SEC, 324 U.S. 826 (1945); American Power & Light Co. v. SEC (SEC v. Okin), 325 U.S. 385 (1945); North American Co. v. SEC, 327 U.S. 686 (1946); SEC v. W. J. Howey Co., 328 U.S. 293 (1946); American Power & Light Co. v. SEC (Electric Power & Light Corp. v. SEC), 329 U.S. 90 (1946); Vanston Bondholders Protective Committee v. Green, 329 U.S. 156 (1946); Penfield Co. of California v. SEC, 330 U.S. 585 (1947); SEC v. Chenery Corp. (SEC v. Federal Water and Gas Corp.), 332 U.S. 194 (1947); Engineers Public Service Co. v. SEC, 332 U.S. 788 (1947); Leiman v. Guttman, 336 U.S. 1 (1949); Manufacturers Trust Co. v. Becker, 338 U.S. 304 (1949); SEC v. Central-Illinois Securities Corp., 338 U.S. 96 (1949); Mosser v. Darrow, 341 U.S. 267 (1951); Niagara Hudson Power Corp. v. Leventritt (SEC v. Leventritt), 340 U.S. 336 (1951); SEC v. Ralston Purina Co., 346 U.S. 119 (1953); Wilko v. Swan, 346 U.S. 427 (1953); General Protective Committee v. SEC, 346 U.S. 521 (1954); Bentsen v. Blackwell, 347 U.S. 925 (1954).

three cases has the ultimate judgment gone against the Commission or the position it espoused.[4/] Our record in the lower courts has been almost as good. I cite this record not for its box score result but as an indication of the skill with which your government's business in this important area has been handled by the Commission's excellent staff, and particularly by such able men as your Chairman this evening, who through the years have so dedicated themselves to the high responsibility of their office as to bring about such a commendable record. This, I think, explains in no small measure the vital place this comparatively small agency of the federal government has assumed in the economic life of the nation. Incidentally, considering that the Commission is a small one -- with approximately 750 employees -- it is interesting to note that the SEC has contributed its fair share to the personnel of the federal judiciary, including a Justice of the Supreme Court and a Judge of the Court of Appeals for the Second Circuit.

III

AMICUS CURIAE ROLE OF THE COMMISSION

Aside from the Commission's normal role as a party plaintiff or party defendant in the usual case in which the Commission appears in court, one of its most difficult and, in my opinion, most important

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4/ Jones v. SEC, 298 U.S. 1 (1936); American Power & Light Co. v. SEC, (SEC v. Okin), 325 U.S. 385 (1945); Vanston Bondholders Protective Committee v. Green, 329 U.S. 156 (1946).

functions is in the role of amicus curiae. This is by no means a new concept nor one peculiar to this Commission. It dates back to the days of the Roman law and has been instrumental in the development of Anglo-Saxon law for more than three centuries.[5/] Henry Clay appeared before

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5/ Apparently the practice of assisting a court at the latter's request was already known to the Roman law, where the judex sought the assistance of a consiliarius in the solution of difficult questions of law. The practice of making suggestions to a court on some point of law by a person not a party to the action was early established in the common law; reference to it is made in the Yearbooks during the reign of Edward III (1327-77), Henry IV (1399-1413), and Henry VI (1422-61). In the Prince's Case, 8 Co. Reps. 1, 77 Eng. Rep. 480, 516 (1606), amici curiae, who in that case were also parties, were chided by the court for deceiving it in citing an old statute without disclosing a pertinent clause thereof. Apparently one of the principal functions of amici at that time was to bring to the attention of the court old statutes and decisions of which there was little or no record. Apparently any bystander, whether or not requested to do so, could advise the court of legal error. In The Protector v. Geering, 145 Eng. Rep. 394 (1656), amici moved to quash an inquisition for outlawry. "It is for the honor of a court of justice to avoid error in their judgments . . . Errors are like felons and traitors, any person may discover them . . ." In Horton v. Ruesby, 90 Eng. Rep. 326 (1687), it was held that the Statute of Frauds did not void a conveyance even though execution was not had thereon until after the death of the conveyor. "Sir G. Treby (ut amicus Curiae) said that he was present at the making of the said statute, and that was the intention of the Parliament." Query whether today a former Congressman could so testify as amicus with respect to a statute enacted while he was sitting.

/The foregoing and other cases are summarized in II Viner's Abridgment, 2d ed. 1791, and the entire subject is well discussed in Beckwith and Sobernheim, Amicus Curiae--Minister of Justice, 17 Fordham L. Rev. 38 (1948)./

the United States Supreme Court as amicus curiae in 1821.[6/]

Basic Conflict Between Two Fundamental Concepts of Government

The difficulty in determining the extent to which a Commission such as ours should participate as amicus curiae in private litigation stems basically from a conflict between two fundamental concepts of government: (a) a belief that the expert knowledge developed by a Commission such as the SEC over a period of years should be made available to the courts as an aid to their formulation of the decisional law construing the statutes administered by this Commission as well as the regulations promulgated under those statutes by the Commission; and

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6/ In this interesting early Supreme Court case involving the participation of an amicus, Green v. Biddle, 8 Wheat. (21 U.S.) 1, 17 (1821-3), claimants to land in Kentucky under patents granted by Virginia prior to the establishment of Kentucky as a separate state in 1792 argued that laws passed by Kentucky in 1797 and 1812, granting certain rights to Kentucky tenants in possession against persons who successfully established paramount title, were an unconstitutional impairment of a compact made in 1789 between Virginia and the proposed state of Kentucky, under which compact the rights to land of claimants under prior Virginia patents were to be governed by the law of Virginia. In March, 1821, Justice Story held for the Court that the Kentucky statutes were unconstitutional as an impairment of the prior compact. Thereupon on March 12,1821, Henry Clay as amicus curiae moved the Court for reargument and stay of mandate, inasmuch as the tenant in the case had not put in an appearance and the Court's adjudication involved the rights and claims of numerous occupants of land in Kentucky. The motion was granted. Thereafter in 1822, Clay and others argued to the Court in favor of the Kentucky enactments, but in its final opinion delivered in 1823, the majority of the Court adhered to the view expressed earlier by Justice Story.

(b) a belief that taxpayers' money should not be used by a governmental agency such as ours to load the dice in favor of one side or the other in private litigation where the parties are represented by competent counsel fully able to aid the court in the normal judicial process. The present Commission has given careful thought to this problem which involves, as I am sure you will recognize, elements of basic philosphy of government.

Practical Facts of Life Confronting SEC

In formulating an intelligent and workable policy for amicus curiae participation, the Commission is confronted with certain practical facts of life:

(1) A litigant naturally wants the Commission to participate on his side of any case in which the securities laws are involved because the Commission's record in litigation is an exceptionally good one. The pressure by litigants to get the Commission into a case often is a very strong pressure and frequently is implemented by pressure from Congressmen and Senators on behalf of their constituents.

(2) The courts frequently request the Commission specifically to participate as amicus curiae and it is most difficult, I assure you, for a government lawyer to advise his client not to honor such a judicial request. At the last term, the Court of Appeals for the Second Circuit on two

occasions criticized the Commission for failure to participate as amicus curiae:

(a) In Blau v. Mission Corp.[7], Circuit Judges Clark, Frank and Hincks stated:

> "In previous decisions involving the interpretation of this remedial statute we have been aided by detailed expositions of relevant factors by the Securities and Exchange Commission as amicus curiae, and we regret the lack of their aid in this case. Accordingly, we proceed with due caution in venturing upon uncharted seas."

(b) In Roberts v. Eaton,[8] Circuit Judges Clark, Medina and Harlan stated:

> "The Securities and Exchange Commission, as we are informed and to our regret, see Blau v. Mission Corp., supra, has declined an invitation to express its views as amicus curiae."
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> * * *
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> "Thus left to our own resources we are not inclined at this juncture to attempt enunciation of a black-letter rubric."

In many other cases the courts, including the Second Circuit, have commented favorably upon the aid rendered by the SEC in its role as amicus curiae.

(3) Budget limitations alone, however, necessarily make it impossible for our Commission with its present staff to

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7/ 212 F. 2d 77 (C. A. 2, 1954), cert. denied, 347 U. S. 1016 (1954).

8/ 212 F. 2d 82 (C. A. 2, 1954), cert. denied, 75 S. Ct. 44 (Oct. 14, 1954).

participate in all cases involving construction of statutes administered by the Commission or rules and regulations promulgated by the Commission under such statutes. Accordingly, the Commission necessarily must select with care those cases in which it is to participate as amicus curiae.

Views of Federal Judges

During the past year I have endeavored to obtain first hand the views of various federal judges upon the subject of SEC amicus curiae participation. Their views may be summarized as follows:

(1) The SEC should participate where the issue is extremely technical and where the Commission's superior expert knowledge should be made available to the judicial branch of the government.

(2) The SEC should participate where it is important that the court should be apprised of the Commission's administrative experience with respect to the statutory provision or rule under consideration.

(3) The SEC should participate where a novel question of statutory construction or rule interpretation is involved -- to the end that an appropriate judicial precedent may be obtained which will be important in the future administration of a statute or rule.

Accordingly, these are the principal considerations taken into account by the Commission in determining whether to participate as amicus curiae in a given case.

Procedure to be Followed by Bar

The following procedure is recommended to members of the bar who desire to obtain participation by the SEC as amicus curiae in a given case:

(1) Informal request for the staff view on a particular question before the case gets into litigation.

(2) After commencement of suit, informal conference with the staff regarding its position on the particular question involved.

(3) Formal written request addressed to the Commission to participate as amicus curiae in a particular case. Such application should be accompanied by pleadings or printed record and briefs.

(4) After review by the staff, a recommendation either for or against amicus curiae participation is presented by General Counsel's Office to the full Commission which makes the ultimate determination.

(5) In the event a case is submitted to the court without SEC amicus curiae participation, a request addressed by the court to the Commission to file a brief will be given careful consideration by the Commission.

Wilko v. Swan

The case of Wilko v. Swan,[9/] decided at the last term of the Supreme Court, may serve to illustrate the circumstances under which the Commission (a) on the one hand will participate as amicus curiae, and (b) on the other hand will not so participate. That case involved the validity of a pre-litigation stipulation (contained in a margin agreement) to arbitrate any dispute between the purchaser of securities and the brokerage house from which they were purchased. Suit was brought in the District Court for the Southern District of New York to recover the purchase price of securities which the plaintiff claimed were sold to him under fraudulent representations. From an order denying the brokerage firm's motion to stay proceedings until the matter could be submitted to arbitration, the brokerage house appealed to the Court of Appeals for the Second Circuit. Believing that an important question involving the effectiveness of the civil liability provisions of the securities laws was involved, the Commission filed a brief in the Second Circuit as amicus curiae supporting the plaintiff's position. The Second Circuit, by a divided court, rejected the Commission's position and reversed the case, thus sustaining the validity of the arbitration agreement. The Commission petitioned for certiorari and it was granted. In the Supreme Court the Commission assumed the laboring oar on behalf of the petitioner and secured a reversal of the Second Circuit in an

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9/ 346 U. S. 427 (1953).

opinion which struck down the arbitration agreement. Upon remand to the District Court, the case in due course proceeded to trial upon disputed issues of fact. At that stage plaintiff's counsel urged the Commission to participate as amicus curiae on behalf of the plaintiff in the District Court. This the Commission declined to do. The disputed issues of fact were tried to a jury which returned a verdict on the special questions submitted, deciding those issues in favor of the defendant in some respects and disagreeing on some issues. Upon examination of the briefs submitted by both parties in connection with the plaintiff's motion to set aside the verdict, the Commission found that certain statements contained therein were not in accord with well established principles of law. Whereupon the Commission addressed a letter to the court briefly pointing out what it believed to be erroneous statements of law contained in the briefs and offering to file a brief as amicus curiae if called upon to do so by the court. There the matter stands at the present time so far as I know; no request has been received by the Commission from the court to file a brief as amicus curiae and I therefore assume that the court is satisfied that it can correctly decide the case without further aid from the Commission.

IV

FUNCTIONS OF THE COMMISSION UNDER CHAPTER X OF THE BANKRUPTCY ACT

The function of the Commission in a reorganization under Chapter X of the Bankruptcy Act presents an interesting illustration of the

relationship between the SEC as an agency of the executive branch of the government and the judiciary. Aside from the mandatory functions of the Commission under Chapter X, there is a large area in which the Commission's participation under Chapter X is discretionary. In this discretionary area the problems which confront the Commission in determining whether to participate are not unlike the problems confronting the Commission in determining whether to participate as amicus curiae in private litigation.

SEC's Role In Bringing About Chapter X

Before discussing the nature of the Commission's functions under Chapter X, I should like to mention the part played by the Commission in the last major amendment of the Bankruptcy Act in 1938. Under Section 211 of the Securities Exchange Act of 1934, Congress directed the Securities and Exchange Commission to make a study and investigation of the activities of protective and reorganization committees and to report the results of its study and its recommendations. The Protective Committee Study of the Commission did make an intensive inquiry into committee practices in the entire field of reorganization, including bankruptcy reorganizations, and reported to Congress in eight printed volumes. This report concluded that in reorganizations many abuses existed contrary to the interest of public investors. Generally those abuses involved conflicts of interest; exorbitant costs; control of reorganizations by those who should not have had control; lack of information for public investors, parties in interest and the courts;

undue pressures upon the courts and security holders; and lack of adequate procedures and facilities for assuring fair and feasible plans. Chapter X was enacted to meet these abuses in the reorganization field.

Pointing out that the traditional jurisdiction of the federal courts over corporate reorganization had been developed under Section 77B of the Bankruptcy Act into a generally appropriate and acceptable form of proceeding, the Commission recommended that the supervision of reorganizations by the courts should not be replaced by that of an administrative agency. Rather, the Commission recommended that the powers of the courts be broadened and their decisions made more effective by requiring the appointment of an independent trustee and by affording the courts the assistance of an administrative body, expert in financial and business affairs. In addition to these recommendations, the Commission advocated other changes which, among other matters, involved giving creditors and stockholders greater rights to participate in reorganization proceedings and assuring their receipt of adequate information upon which they could base their participation in a reorganization or their vote on a plan of reorganization.

The Commission, during 1937 and 1938, together with members of the National Bankruptcy Conference, assisted in drafting a new section on reorganization in the proposals to amend the Bankruptcy Act. The Congressional Committee Reports, in addition to reporting on other aspects of the proposed bill, pointed out the defects in Section 77B, concluded that it required a complete revision, and indicated that the defects had been dealt with and corrected in Chapter X.

Scope of SEC's Functions Under Chapter X

In substance, the Commission's basic recommendations were adopted by Congress. An independent trustee is required to be appointed in all Chapter X cases involving debts of $250,000 or more (Sec. 156). His counsel is likewise required to be independent (Sec. 151). The Chapter X trustee is given the duty to investigate the affairs of the debtor, as directed by the judge, and to report the results to the judge, including any fraud, misconduct, mismanagement or irregularities (Sec. 167). A report on the financial condition of the debtor must be prepared by the trustee and transmitted to creditors and stockholders, who may then submit to the trustee suggestions for a plan (Sec. 167). The trustee has the primary responsibility for preparing a plan (Sec. 169). When this is filed, a hearing is held, on notice to all creditors and stockholders, and any objections, amendments and other proposals are heard (Sec. 169).

Where the debtor's liabilities are more than $3,000,000, the judge must refer the plan or plans he regards worthy of consideration to the Commission for an advisory report; where the liabilities are less than $3,000,000, he may do so (Sec. 172). The judge fixes the time within which the Commission's report is to be filed, or its notification that it will not file a report (Sec. 173). Thereafter the judge approves the plan or plans determined by him to be fair and equitable, and feasible. The approved plan or plans are then submitted to creditors and stockholders for their vote (Sec. 174). At the same time, they are given the judge's opinion and the Commission's report, if any, together with such

other material authorized by the judge (Sec. 175). After the vote is taken, the judge confirms the plan if he is satisfied that the plan is fair and equitable, and feasible; acceptances by the required majorities of creditors and stockholders are in good faith; all payments for fees and expenses are disclosed and have been or will be approved by him; and the appointment of the new management is equitable, in the interests of creditors and stockholders and consistent with public policy (Sec. 221).

Section 208 of Chapter X provides that the Securities and Exchange Commission shall, if requested by the judge, and may, upon its own motion if approved by the judge, file its appearance in a Chapter X proceeding. It is thereupon deemed to be a party in interest with a right to be heard on all matters arising in such proceeding but has no independent right to appeal. According to the Congressional Committee Report, the Commission's intervention is in the interest of adequate representation of the public interest and for the purpose of regularizing its assistance to the courts. (Sen. Report 1916, 75th Cong., 3rd Sess. April 20, 1938). Implementing its advisory function under Chapter X, Section 265a and other sections provide for the transmission of notices of important hearings and of important documents in all Chapter X proceedings to the Commission.

Appraisal of SEC's Functions Under Chapter X

As a general matter, the Commission has deemed it appropriate to seek to participate only in proceedings in which a substantial public

investor interest is involved. Where special features indicated its desirability, the Commission has become a party to smaller cases. Through its nationwide activity and continuous experience in bankruptcy reorganization the Commission has been able to encourage uniform and appropriate application of the principles and policies of Chapter X. The Commission has often been called upon by judges, referees, trustees and parties for advice and suggestions, even in cases in which it has not participated. In the latter cases, where important questions of general interest in Chapter X have arisen, the Commission on occasion has filed a brief with the district or appellate court as amicus curiae.

In the period since the enactment of Chapter X the Commission has been a party to more than 300 Chapter X proceedings involving stated assets of more than $3,000,000,000 and stated liabilities of more than $2,000,000,000. In recent years, due to the fortunate position of American industry in general, the Commission's Chapter X activities have been reduced to a minimum and we at the Commission hope that this trend will continue. Be that as it may, during this current fiscal period the Commission has had only two occasions when it has determined it necessary to file its appearance in new Chapter X proceedings.

Since its participation in Chapter X proceedings in 1938, the Commission has issued 32 advisory reports and 24 supplemental advisory reports. While these formal advisory reports represent only a small portion of the work of the Commission in Chapter X proceedings, nevertheless, the advisory reports occupy a prominent position in the reorganization field. Generally speaking, an advisory report is

prepared only in a case involving a large public investor interest and in which significant problems exist. In many cases, even though the corporation is of significant size and importance, because of the exigencies of time or for other reasons Commission counsel makes detailed oral presentation of the Commission's views and the reasons therefor. Similarly, in the smaller cases, the Commission's views are given orally by counsel.

The weight given to the Commission's recommendations in Chapter X proceedings is illustrated by the following quotation from an opinion by the United States Court of Appeals for the Second Circuit in a recent case:[10/]

> "Naturally careful consideration is due the conclusion of the able district judge who has had this lengthy reorganization so long under his control. At the same time we cannot overlook the fact that the governmental agency charged with substantial responsibility in the premises, the Securities and Exchange Commission, has made an extensive investigation resulting in a detailed and helpful report with a reasoned conclusion which the trial judge has rather summarily rejected. If the considered findings of this agency, with so much better facilities for investigation than those possessed by either this or the trial court, are to have any force beyond their initial impact below, then we think that they will largely offset the usual presumption accorded a decision of first instance. Otherwise much of the statutory purpose in creating an expert body for the consideration of technical problems will be set at naught. Compare 6 Collier on Bankruptcy, Par. 7.30, 14th Ed. 1947. We have elsewhere stressed the importance of due regard for Commission findings, Finn v. Childs Co., 2 Cir., 181 F. 2d 431, 438; and we are clear that here, too, we must give weight to the detailed evaluation of the facts made by this reliable and experienced public agency and the conclusion reached, even though this was not accepted by the trial judge."

10/ Conway v. Silesian American Corporation, 186 F. 2d 201 (1950).

In addition, a Congressional Committee which recently examined various functions of the Commission had occasion to request the views of the judiciary upon the Commission's activities in Chapter X cases. The Committee reported: 11/

> "The judges' replies reveal a uniform belief that the Commission has been very helpful to the courts in reorganization cases. The personnel representing the Commission was found to be well informed, capable, and highly skilled. Many of the judges were impressed by and valued the Commission's comprehensive advisory reports and recommendations. The Commission was reported to be diligent in its function of protecting the rights of the various security holders, and beneficial to all parties concerned. Accordingly, the subcommittee commends the Commission for the effective and able manner with which it has carried out its duties and responsibilities under Chapter X of the Bankruptcy Act."

Current Reexamination of SEC's Functions Under Chapter X -- In Conjunction With The Judicial Conference

Within the past year the Commission has found it necessary, largely because of budget considerations, to reexamine its functions under Chapter X of the Bankruptcy Act, particularly in those areas in which its participation is discretionary. In view of the obvious impact upon the workload of the federal courts of any curtailment of the activities of the Commission in Chapter X proceedings, whether by legislation or by administrative determination, we decided to invite the views of the federal judiciary as an aid to the Commission's reexamination of its functions in Chapter X proceedings.

Accordingly, at the meeting of the Judicial Conference held in Washington last September, representatives of the Commission appeared

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11/ H. Rep. No. 2508, 82nd Cong., 1952, p. 134.

and recommended that the Judicial Conference circulate to each federal judge in the country a questionnaire seeking specific comments upon the functions of the Commission in Chapter X proceedings. We emphasized that what we want are frank, critical comments by the federal judiciary upon the functions of the Commission in Chapter X proceedings, with special emphasis upon those functions which, in the view of the federal judiciary, the Commission appropriately could curtail without unduly increasing the burden of the federal courts and without prejudicing the public interest. I might say that Chief Justice Warren was particularly cordial to the idea of submitting the proposed questionnaire to the federal judiciary and he was most helpful in arranging for the appearance of representatives of the Commission before the Judicial Conference.

After the matter was presented by Chairman Demmler and following some questions and discussion by members of the Judicial Conference, the Conference, upon motion made by Chief Judge Magruder of the Court of Appeals for the First Circuit, seconded by Chief Judge Stephens of the Court of Appeals for the District of Columbia Circuit and unanimously carried by the Judicial Conference, authorized the Director of the Administrative Office of the United States Courts to circulate the proposed questionnaire to all federal judges. I understand that this questionnaire is being sent to the federal judges, together with copies of the report of the Judicial Conference, and that we may expect to receive responses to the questionnaire within the next few weeks. Such responses as are received will be tabulated, analyzed and the results

will be submitted in the form of a report to the Bankruptcy Committee of the Judicial Conference. Our Commission then intends to consult with the Bankruptcy Committee for the purpose of determining what administrative action, if any, the Commission may appropriately take, as well as what legislative measures possibly may be proposed, to adjust the functions of the Commission under Chapter X in the light of sixteen years of practical experience, particularly as viewed by the federal judiciary.

This effort on the part of the Commission to reexamine its functions under Chapter X of the Bankruptcy Act is, I think, a striking illustration of effective cooperation between the Commission as an agency of the executive branch of the Government and the federal judiciary.

V

MAJOR LITIGATION IN WHICH THE COMMISSION IS PRESENTLY INVOLVED

Finally, I should like to comment very briefly upon several interesting cases now pending in the federal courts in which the Commission is involved.

Reimbursement of a Parent Company by a Subsidiary for Expenses Incurred in the Reorganization of the Subsidiary Under Section 11(e) of the Holding Company Act.

Within the past year a number of cases have been decided by several of the United States Courts of Appeals which have pretty well settled the question of whether a registered parent holding company is

entitled to reimbursement from its registered subsidiary holding company for expenses incurred by the parent in the reorganization of the subsidiary under Section 11(e) of the Holding Company Act. The Court of Appeals for the Third Circuit in The United Corp. v. SEC (Public Service Corporation of New Jersey),[12] and the Court of Appeals for the Eighth Circuit in Standard Gas & Electric Co. v. SEC,[13] have upheld the Commission's refusal to allow such reimbursement. The Supreme Court denied certiorari in each of these cases.[14]

Substantially the same question is now pending before the Court of Appeals for the First Circuit in Koppers Co. v. SEC[15] which was argued on October 5, 1954 but has not yet been decided. The same question is involved in The United Corp. v. SEC (Niagara Hudson Power Corp.)[16] which has been assigned for argument in the Court of Appeals for the Second Circuit on December 17, 1954.

SEC v. Drexel & Co.[17]

The Supreme Court has granted the Commission's petition for certiorari in this case which will be argued in the Supreme Court in

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12/ 211 F. 2d 231 (C. A. 3, 1954).

13/ 212 F. 2d 407 (C. A. 8, 1954).

14/ Oct. 14, 1954, 23 U. S. L. Week 3095.

15/ Appeal from 120 F. Supp. 460 (D. Mass. 1953).

16/ Appeal from 114 F. Supp. 683 (N.D. N.Y. 1953).

17/ 210 F. 2d 585 (C. A. 2, 1954), cert. granted Oct. 14, 1954, 23 U.S. L. Week 3092, No. 153, Supreme Court, Oct. Term 1954.

February 1955. Here the Court of Appeals for the Second Circuit reversed the Commission and held that it had no jurisdiction to pass upon a fee paid by Electric Bond and Share, a registered parent holding company, to Drexel & Co., its financial adviser, for services rendered in the reorganization of Electric Power & Light Corp., a subsidiary of Electric Bond & Share, under Section 11(e) of the Holding Company Act. The decision by the Second Circuit, in the view of the Commission, represents a direct challenge to the jurisdiction of the Commission in an important area of its functions under the Holding Company Act. For this reason we sought and obtained from the Supreme Court a writ of certiorari, and we hope to obtain in the Supreme Court a reversal of the Second Circuit on this question.

U. S. v. T. M. Parker Inc.[18/]

This case involves the first effort by the United States to extradite Canadian citizens under the 1952 amendment to the Canadian-United States Extradition Treaty. The amendment to the Treaty represented the culmination of many years of efforts on the part of the Commission to plug a loophole in the enforcement of the United States securities laws.

Shortly after the enactment of the Securities Act of 1933 and the Securities Exchange Act of 1934 and the creation of the Securities

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18/ E. D. Mich., Criminal Nos. 34274-34277.

and Exchange Commission in 1934, there was an exodus of fringe securities operators from this country to Canada. From Canada they were able to peddle, with the aid of the telephone and the mails, securities from Canada into the United States in total disregard of the American securities laws and the regulations of our Commission. For years our Commission has been powerless to correct this situation for the reason that extradition from Canada of persons indicted for violation of the American securities laws was impossible. Extradition was impossible because the Canadian courts held that violations of the mail fraud and other anti-fraud provisions of the United States laws were not covered by the treaty. After many years of patient negotiations between representatives of the United States Department of Justice, the United States Department of State and our Commission, on the one hand, and the appropriate Canadian officials on the other hand, agreement was reached with Canada to amend the treaty to cover these offenses. Accordingly, an amendment to the Canadian-United States Extradition Treaty was ratified in 1952, the Canadian mail fraud statute previously having been broadened by appropriate amendment. With this machinery established, we waited for an appropriate test case which was not long in appearing on the horizon in the form of U. S. v. T. M. Parker Inc.

During a six-week period in the late spring and early summer of 1953 a "boiler room" operation from Montreal resulted in the defrauding of a large number of American investors residing in some forty of our states of a total of over $300,000. Many of these investors never received even so much as a scrap of paper in return for the money they

sent to Montreal. Others paid 10 or 15 times more per share than the price at which the stock could have been purchased. The fraud in short was a most aggravated, vicious form of crime.

Following a thorough investigation by our Commission, the case was presented to a grand jury in the United States District Court for the Eastern District of Michigan. Indictments were returned in April 1954 against nine American and four Canadian defendants. The American defendants were promptly apprehended and arraigned. All pleaded not guilty and were released on bail awaiting trial.

None of the Canadian defendants, however, appeared in Detroit, relying upon what for years has constituted virtually an immunity from prosecution under the United States securities laws. Accordingly, extradition proceedings were instituted and an extraordinarily competent firm of Montreal attorneys was engaged to represent the United States Government in the extradition proceedings in Canada.

After the extradition papers inched their way through the appropriate channels in this country and in Canada, they at last arrived in the Superior Court for the District of Montreal late in October of this year. Warrants were issued for the arrest of the two Canadian defendants we were able to locate. They were apprehended and have been held, without bail, in the Bordeaux Jail in Montreal while the extradition hearing has taken place.

The extradition hearing commenced on November 3 before Chief Justice Scott of the Superior Court for the District of Montreal and will be concluded tomorrow, running for just about one month. This

extradition hearing, although obstensibly a "preliminary inquiry" within the meaning of the Canadian law, actually took the form of a full dress trial of the Canadian defendants on the merits. Some forty witnesses were called by the prosecution and numerous affidavits of defrauded American investors were introduced. One of the defendants took the witness stand on his own behalf.

At the conclusion of the evidence, Chief Justice Scott announced that he was satisfied that an overwhelming case of fraud had been established by the prosecution, on the basis of which he concluded that prima facie violations of the United States securities laws and mail fraud statute had been established, as well as violations of the Canadian counterpart of the United States statutes. The only question remaining, according to Chief Justice Scott, was one of law, namely, whether the crimes charged were within the extradition treaty and the Canadian Extradition Act. We are now awaiting the court's decision.

If extradition is granted in this case it will go a long way toward enabling our Commission to enforce the United States securities laws against those who peddle securities across our borders and in violation of our laws.

VI

CONCLUSION

I trust that this discussion of some of the problems which confront our Commission, particularly in its relation to the courts,

has been of interest to you. If it has served only to indicate something of the scope and magnitude of the problems with which our Commission has to deal vis-a-vis the courts, I shall be very happy. I assure you that I have enjoyed enormously being with you tonight and I am deeply grateful to you for your considerate patience.

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