

"THE FUNCTION OF THE GENERAL COUNSEL'S  
OFFICE AND ITS RELATION TO THE OTHER  
DIVISIONS OF THE COMMISSION'S STAFF."

ADDRESS

of

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One of the jobs that the General Counsel of this Commission has to spend quite a bit of time on is talking to applicants for legal positions in the General Counsel's office. Usually this consists of a conversation in which I am interviewing the applicant - asking him where he was born, what law school or law office he comes from, and why he thinks he would get any fun out of working his head off in a government agency - and this particular one, at that. But sometimes the applicant turns the tables on me, and quite sensibly, says to me: "Well, I've always understood that the SEC's legal staff is about the best one in Washington, and that you can get a lot of valuable experience working for the Commission; but beyond that I don't know a great deal about your work. Tell me, just what is the work of the General Counsel's office?" At that point I say to him something like this: "Well, we do a lot of things. We tell the Commission, and the other divisions of the staff, just what they can and can't do under the various acts that the Commission administers; we draft the Commission's opinions; we handle the Commission's litigation; we answer complaints and follow them up; we develop enforcement cases and supervise the enforcement activities of the regional offices; we control the preparation of cases for criminal reference to the Department of Justice; we correspond with every Tom, Dick and Harry who wants to know how to comply with the law, or who thinks it would be a good idea to raise a little money by selling stock and wonders whether the SEC can help him. In short, we act as legal advisers to the Commission, and to the world; and when the world sues the Commission, or the Commission sues the world, we act as the Commission's attorneys in court."

Now, although the description of our work that I have just quoted is pretty conversational in character, and is not intended as a precise definition of our functions, it really does give about as good a general picture of our work as can be given in a few words. With most of the divisions of the Commission, the description is a good deal easier. The other divisions can point to a particular Act, or a particular provision of an Act, and say: "That is what our work revolves around. That Act, or that section, requires companies to file some specific documents, or to get the Commission's approval before they can take some specific steps, or to revise their plans or their structure in accordance with some specific statutory provisions. Our job [I am still talking of the other divisions of the Commission] is to make a particular Act, or a particular section of an Act, effective, by supervising its administration, by understanding its policy and implementing it with rules and regulations designed to make that policy effective."

These other divisions - the Registration Division, the Public Utilities Division, and so forth - are what you can describe generally as "administrative" divisions, not in the sense that Mr. Brassor's division is called *the* Administrative Division, but in the sense that their function is to *administer* provisions of law as practical, business-minded experts. Sometimes the division heads are lawyers, and they all have some lawyers on their staff. But the function of those lawyers is essentially administrative; they contribute their legal training and knowledge to the administration of the policies of the law, just as an officer of a corporation who happened to be a lawyer might contribute his legal learning to the formulation and development of **business policies**.

That isn't primarily the job of the General Counsel's office. Of course, we are all on the staff of an administrative agency - an agency that exists primarily for the purpose of developing and enforcing a governmental policy

of regulation over finance and securities generally. In a broad sense everybody on the staff is supposed to be contributing his bit to the formulation and development of Commission policy. But as a matter of internal organization - as a matter of contrast of functions - the distinction is what I have indicated: we are not part of the Commission's administrative arm; we are its counsel, its attorneys, its lawyers in the same sense that the big New York law office with which I used to be associated was counsel to the Chase National Bank. Our most important functions are very simple to state: we advise the Commission, and we defend the Commission.

Now, I don't want to give you the impression that everything is neatly and logically arranged, with no overlapping of edges or confusions of jurisdiction. Some things we do that might, according to the pattern I have suggested, be equally appropriately handled by some other division. Some we don't do that I, in my humble opinion, think we ought to do, either because I am proud enough of the office to think we could handle them better, or because what seems to me a sound and fair administrative structure demands that they be handled by our office. We are full of historical accidents, as is only natural in a Commission which has been working in new fields, and which has had its jurisdiction constantly increased. And apart from that, since we are the only major division of the Commission which is not labelled as the administrator of some particular act or provision, we get every little unexpected odd job that comes in that doesn't seem to fit squarely into some neatly labelled pigeonhole. If you don't know what to do with something send it to the General Counsel.

I don't propose to take you at all into the intricacies of exactly how we do our work. It would take pretty long to do that, and, besides, the best people to hear from about that are the people who really do it; instead of people like me whose job is simply to sit around and make unpleasant remarks when other people don't do things the way I like them. You will hear two of the real workmen, Mr. O'Brien and Mr. Kline, at the next two talks of this series. The only thing I want to do is give you a general picture of what kind of things it is that we do, and how, as a group of lawyers, we fit into the structure of the complicated mechanism which has grown up on the corner of 18th Street and Pennsylvania Avenue.

I suppose the best way I can describe the specific jobs that the General Counsel's office tries to do is to treat them historically, and show how they came into existence. I can't do that with all of them; this office has been here a lot longer than I have, and there are a good many things about it that I don't understand yet. But at least I can give you the high spots.

I first came here, as one of the attorneys, in the fall of 1935. That was only a bit more than a year after the Commission was started -- as a Commission, but it was more than two years after the Commission's work had started. The Securities Act, which is in a very real sense the corner stone of all our work, had been handled by the Federal Trade Commission for a year, and then handed over -- with a good part of the Federal Trade Commission's staff -- to the new Securities and Exchange Commission; the Securities Exchange Act had been in effect for over a year; and the Public Utility Holding Company Act had just been passed, and nobody knew just how it was going to work.

I still find it difficult to get over the sense of being the newest and most ignorant attorney in the office. I had read the Securities Act once-- out loud to my wife on a beach on Cape Cod. I had tried both the Exchange Act

and the Holding Company Act, but they both seemed so complicated that I hadn't got much beyond the recitals at the beginning. Everyone around seemed to know what they were looking for and how to find it; and every time I asked a question, somebody would pop up with a new section of the Acts or a new division of the staff, that I had never heard of. I had been working in what was generally supposed to be the largest private law office in the world -- it was about the same size as the General Counsel's office is now -- but that seemed to me a simple, uncomplicated organization compared with the enormous department store that I seemed to have gotten myself into. It was at least three months before I even saw a face that I recognized as one that I had ever seen before; and six before I could recognize a problem as having some resemblance to anything in my experience.

And yet at that time, three years ago, the work of our office was a good deal less complicated than it is now. It is true that there were some mushrooms growing up -- some things that looked peculiar and rather exciting, but so specialized that we all tried to stay away from them. The general work of the office fell into two categories: conveniently called enforcement, and interpretation. And both categories were concerned primarily with the Securities Act. The other two acts were still dangerous experiments, which called for imaginative exploration, but not much for straight legal analysis.

I suppose that enforcement of the fraud provisions of the Securities Act will always remain about the same. There will always be about the same number of enthusiastic suckers ready to invest their life's savings in the newest get-rich-quick scheme, and the same number of equally enthusiastic salesmen who think they have found a way to steal some money and keep out of the way of the cops. So what we call "enforcement" in the office is probably the simplest and easiest of our jobs to understand -- although it isn't necessarily the simplest and easiest to do. It is the job of outthinking the crook who is perfectly sure he has found a way to outthink us.

Most enforcement problems start with complaints from the public -- which is why we have a Complaint Section. Everyone who has put some money into a scheme that didn't pan out wonders whether we can't help him, and writes us to find out. Usually we can't; we have absolutely no money to pay for the college education of a girl whose grandpa sold his farm back in 1912 to buy some Golden Muskrat oil stock. But we have to write her, and explain why we can't help her; and reading her letter, and writing to her sympathetically and helplessly, is probably the most heartbreaking job in the whole Commission.

But every now and then a complaint letter really develops something. We may learn of a recent crook, who has been tactless enough to pick on an articulate victim -- one with too little sense to throw him out the door, but enough to remember what he looked like. Our Securities Violations Section, which keeps up a voluminous interchange of information with the state prosecutors and Securities Commissions, the Better Business Bureaus, the F.B.I., the Department of Justice and the Post Office Inspectors throughout the country, may find us a record of the crook, and we may really be able to do something about him. And even if we have no Rogue's Gallery history on him, we may get enough from the complaint to start a thoroughgoing and successful investigation, either through our own attorneys or through the regional offices. Most of the actual investigations are naturally handled by the regional offices, but they report to us at regular intervals, and we keep a very careful watch over the course of the investigations, and help decide whether to close them up because they have turned out to be blind leads, or

on the other hand to develop them into injunction proceedings, or into criminal cases to be referred to the Department of Justice for prosecution. And if they do turn into court cases, we supervise the pleadings and the court strategy, and give whatever help is needed in actually conducting the case.

So much for "enforcement". It is a routine, in a sense, as all law practice is; but the inexhaustible fertility of the security crook always keeps it fresh. Every case is a new one; and every time we crack down on one racket a new and more ingenious one turns up. There is no danger of our running out of cases.

The other half of our work, as I knew it when I came with the Commission, was known as "interpretation". That is a pretty vague word -- a lot vaguer than "enforcement". But it meant something very definite in our work. At that time, far more than now, the legal analysis of the words of the Securities Act was incomplete. Every day -- and several time a day -- a letter would come in describing some new proposed plan which involved a careful study of the Act to decide just how its words should apply to an unexpected factual situation. I started doing "interpretative" work when it was no longer a pioneer project; the outlines had been formed pretty clearly in the two years before. But even though the outlines had been formed, the picture as a whole still needed a great deal of filling in. There was scarcely a day when we didn't have a letter that posed a problem that had to be discussed with a dozen people -- not for the purpose of finding the precedents, but for the purpose of making them. The Securities Act is, in my judgment, the most carefully integrated, the most accurately drafted piece of legislation that ever came out of a deliberative assembly. There may be places where its effects, from an economic or financial point of view, may be unduly restrictive or otherwise unsound; but as a piece of legislative drafting it is a perfect marvel. Every word in it has its place, and its relation to every other word. And this fact -- its perfection of craftsmanship -- provided an intellectual excitement to the job of "interpretation" -- the job of telling the inquiring lawyer or financier or industrialist just how the Act affected his plans. It was, and is, a *difficult* act, in the sense that you have to work with it and live with it quite a while to know what it really means; and for that reason it needed a lot of "interpreting". It took just about four years for us to get over the feeling that every letter that came in was probably going to present some new type of situation we had never seen quite in that shape before, and to generalize our experience to the point where we could be pretty sure of the broad principles applying to every situation.

With our increasing experience, and with the country's increasing experience, with the Securities Act, the volume of interpretative mail, outside of the pure routine, naturally began to go down. Of course, there have always been interpretative problems under the other two Acts as well; but they have never taken up a great deal of our time, since they apply directly to such smaller groups of people, and, generally speaking, to organized and informed groups, whose members don't so often feel the urge to write in and ask the General Counsel about it. Our free legal aid service has always dealt mostly with the Securities Act.

As the importance of interpretative correspondence declined, you might think that the volume of our work did too. But that wasn't the case. As I indicated, although we were primarily concerned with enforcement and interpretation, there were several other plants growing up in the corners, and beginning to get large enough to attract our attention.

One of these was the confidential treatment cases, under Section 24 of the Securities Exchange Act. That section permits every company applying for registration under the Exchange Act to request confidential treatment by the Commission of any information contained in its application. Requests for confidential treatment began to pour in, and for some reason it became our job to prepare and handle the hearings on these requests, and help the Commission to dispose of them. That was quite a job, partly because of the volume of cases all calling for action at the same time, and partly because we had to invent the general principles on which the cases were to be decided - we had nothing in the way of precedents to go on. But by now most of those cases are out of the way, so far as Commission action is concerned, and we are waiting for a chance to get some court decisions which will tell us whether we have been going in the right direction.

Another of the innocent little strangers that has grown into a very important element in our work is the proxy rules. We had drafted them, in their original form, before there was a Division of Forms and Regulations. They went into effect in the fall of 1935, and for the first couple of years were of very little significance. As rules they were simple; they called for little in the way of enforcement; and we regarded them primarily as sources of information regarding corporate practices. We treated them as a phase of interpretative work, and just filed away most of the material that came in.

But the more we saw of the rules, the more we came to recognize that here was one of the most important focal points of attack on corporate chicanery. Perhaps we have been too much inclined to see bears under the bed; but there is no doubt at all that corporate management that has been a little unscrupulous likes to get stockholder approval of what it has done, as a protection against future damage suits. And so gradually we began to scrutinize proxy material a little more carefully, and to ask embarrassing questions whenever we noticed anything at all out of the ordinary. We have tightened up the rules, and tightened up the inspection. We have made corporations conscious of the fact that rubber stamp approval by stockholders is no longer the simple thing it used to be to get - at least for listed companies. Now, if they want to bind the stockholders to what they have done, they have to tell them exactly what it is first.

Instead of the one man inspection that we used to provide under the old rules, we have developed quite a staff to cover the proxy material. We have at the present time three lawyers working full time on them, and three accountants. We need more of each. We have made it a real job of inspection. And the reason it is part of our job goes back to the primary functions of the General Counsel's office that I spoke of at first: the functions of *advising* the Commission and *defending* the Commission.

Certainly our examination of proxy material is *administrative* in character. But unlike most of the other administrative jobs, this one has no administrative sanction. With a registration statement under the Securities Act, if the Commission thinks there is something wrong with it, it can hold a hearing, take testimony, and impose the administrative sanction of a stop order. With a manipulation of securities, the Commission can impose the administrative sanction of expulsion from an exchange. But with the proxy rules, all the Commission can do is go to court and ask the judge to stop or punish the violation. And since it is the General Counsel's office that has to go to court on the Commission's behalf - the General Counsel that has to take the responsibility for winning the Commission's cases - or as many

of them as possible, it is obvious that the General Counsel is vitally concerned with the nature of the decision that is made as to whether the proxy material complies with the rules or not. From a functional point of view our inspection of proxy material more closely resembles a fraud investigation looking to injunction proceedings than it does an administrative examination.

I don't propose to go in equal detail into all the various pieces of work we do. Some of them hardly need to be mentioned. For example, like every law office we have to keep some lawyers available to look up law and prepare memoranda on every kind of legal question. We are often called on to help in, or take the burden of, drafting new statutes, or amendments to old ones, or in drafting rules. We provide liaison consultants to the Public Utilities Division, the Trading & Exchange Division, the Reorganization Division, and the Oil & Gas Unit. We supervise not only the enforcement activities of the regional offices, but all their interpretative mail and correspondence as well. We handle appeals from Commission orders - we are getting a few of those now, after four years of relative peace - and this involves preparation of records, brief writing, and actual argument of cases. And perhaps most important of all, we handle the drafting of the Commission's opinions in the various types of administrative proceedings that come up under all three Acts. This is the only thing left that I want to describe in any detail.

When I first came with the Commission, there wasn't any such thing as an Opinion Section. Opinions were generally drafted for the Commissioners by staff men, and redrafted by the individual Commissioners, or their legal secretaries, if they were lucky enough to have them. It was a pretty haphazard process.

I think it was early in 1937 that we began to realize consciously that fairness and efficiency both required that Commissioners as busy as ours needed the full time assistance of a group of competent, disinterested, impartial lawyers to assist them in handling the increasing volume of opinion writing which fell on their shoulders. I certainly do not intend any unfavorable comment on the competence or fair-mindedness of the lawyers in the administrative divisions of the Commission. But the fact remains that a lawyer who has recommended the bringing of a case - a stop order case, say, or a delisting case under the Exchange Act, who has prepared the case for trial, tried it, lived with it and slept with it for months, is just not the proper person to help the Commission in its quasi-judicial function of deciding the case. Our Commissioners have to rely on the staff to a tremendous extent to digest and analyze the record for them, to formulate proposed findings and proposed methods of expression of their conclusions. Sound disposition of the cases absolutely demands that this help shall be secured from some lawyer, even from some division, other than the one responsible for the preparation and trial of the case. The trial attorney may know the record better than anyone else; but he also knows what he was trying to put into the record, and fairminded as he may be, he is as a human matter incompetent to judge whether or not he succeeded. A review of the record by an impartial attorney who has nothing at stake except his own reputation for writing sound opinions, fully keyed to the record, and able to stand up under attack, may involve duplication of effort, but it is a necessary and desirable duplication.

And this function of assisting the Commission in its quasi-judicial capacity belongs peculiarly to the General Counsel's office as I visualize it - the office whose jobs are to advise the Commission and to defend the Commission.

If an order of the Commission is appealed or attacked collaterally, it is the General Counsel who has to stand up and defend it. If the order is resisted, it is the General Counsel who has to go out and try to enforce it in the courts. This being so, logical organization requires that the General Counsel's office, which has had nothing to do with the trial of the case, should be the division of the staff to be consulted by the Commission in the preparation of the opinion and the order. Our office should, as it does, have some say in shaping Commission opinions which we are going to have to defend.

Of course it is true that we do participate in a few types of administrative proceedings before the Commission - broker-dealer revocation proceedings, confidential treatment proceedings, exemption proceedings under the Holding Company Act, and an occasional proceeding of great importance like the Transamerica proceeding. Some of these are historical accidents, like other phases of our jurisdiction; some of them are survivals from the period when we were less acutely aware of the need for formalizing our organization in the interests of fair play. Even in those cases we make sure that the opinion stage of the proceeding is handled by lawyers who have no connection with the trial of the case. But in the bulk of administrative proceedings we play no part in the trial itself. We are called in to consult with the Commission often enough at intermediate stages, to advise it as to the disposition of interlocutory motions. We work with the Commission on the final disposition of the case, and the preparation of the opinion and order. And when the opinion and order are out, we try to uphold them in the courts. Personally, I like to think that this conscious organization of the staff in the interests of efficiency and fair play has something to do with the record of success we have had so far in upholding the Commission's work in the courts.