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ADVANCE ADMINISTRATIVE DECISIONS

ADDRESS

by

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The so-called presumption that every man knows every law has, of course, no place in the realm of legal or factual truth. That catch-phrase presumption is but a short-hand way of saying this: Mr. John Q. Citizen does some act in 1936. Later, in 1939, he is prosecuted for doing that act as in violation of law. It is, ordinarily, no defense that he did not know or suspect, when he acted in 1936, that a court, in 1939, would hold that his 1936 conduct was unlawful.

Citizens, that is, must daily act at the peril of being prosecuted for actions they thought entirely innocent. And that is, indeed, a serious potential peril, especially in most large cities. For it is a trite observation that on the statute-books of most states and in the code ordinances of most large cities are vast multitudes of penal laws, some of which are loosely or ambiguously worded, some of which are seemingly outmoded, and of many of which the average person has no knowledge. The consequence is that, every week, thousands of citizens are doing acts, ignorant of the fact that they may later be convicted for those acts, if the state prosecuting attorney chooses to prosecute them. Because of the large number of those statutes and ordinances, and the large number of violators, the prosecuting attorney cannot possibly prosecute all violators. He cannot reasonably be expected to do so. And laws do not execute themselves, except to the extent that well-known laws either embody or create standards of behavior with which the bulk of the community habitually and almost unconsciously complies. The state prosecuting attorney therefore must - he cannot do otherwise - select a few of the many laws to enforce and a few of the many violators to prosecute. He has therefore a vast discretion. We do not, usually, call it discretion; but it is that, none-the-less. And that discretion, be it noted, is and must be utterly uncontrolled by anyone except the prosecutor himself. There are no objective standards to determine his choice. In saying that I am criticizing no one. The existence of that discretion, and its necessarily unregulated character is, in the main, inherent in the nature of our governmental system.

It is undeniable, then, that when a citizen, Smith, acts - especially if he dwells in a large city - he often takes the risk that a prosecuting attorney will later use his discretion to charge Smith with, and prosecute him for, the infraction of a law of which Smith was ignorant. That is one of life's hazards. There are many other hazards in the adventure of living. We cannot do away with all of them. But we should reduce their number as far as practicable.

In part we could circumscribe the risks of future prosecution by overhauling our state statute books, repealing foolish or out-moded penal laws and clarifying others. But we cannot ask the impossible. Although many men have dreamed of a legal world devoid of uncertainty, no society has ever been able to find a way of clarifying and codifying all of its laws so that they will be mathematically precise, leaving no room for varying interpretations. With respect to many statutes judicial construction is unavoidable and essential; and, until the courts have interpreted such a statute with absolute finality, the citizen must be in doubt as to precisely what the statute forbids. Moreover, there are some types of statute where exact definition would be undesirable, where the case-by-case method of determining the meaning of the statute is called for. That is peculiarly true of statutes dealing with fraud, and the like. For, as one court put it, "Fraud is kaleidoscopic, infinite. Fraud being infinite and taking on protean forms at will, were courts to cramp themselves by defining it with a hard-and-fast definition, their jurisdiction would be cunningly circumvented at once by new schemes beyond the definition. Messieurs, the fraud-feasors, would like nothing half so well as for courts to say they would go thus far and no further, in its pursuit. Accordingly, set definitions of fraud are of set purpose left general and flexible. . ."* It has been said that "if there were a technical definition of fraud, and everything must come within the scope of its words before the law could deal with it as fraud, the very definition would give to the crafty just what they wanted, for it would tell precisely how to avoid the grasp of the law."** The common law, it has been commented, not only fails to define fraud, but asserts as a principle that there shall be no definition, for, owing to the multiform character of fraud, and the great variety of attendant circumstances, no definition which is all inclusive can be framed, but each case must be determined on its particular facts.

It follows, then, that merely by overhauling or revising statutes, we cannot procure such definiteness as to the meaning of all of them that all citizens will always know without doubt which of their acts will be held to be unlawful and subject to prosecution.

But there are ways of limiting, somewhat, the area in which citizens must act at their peril of future prosecutions. And to-night I want, briefly, to discuss one example of one of such means to that end.

I refer you to the provisions of the Public Utility Holding Company Act of 1935. That statute does not simply say: "This or that conduct is unlawful and those who engage in that conduct are subject to fine or imprisonment." No, as to much of the conduct that it makes unlawful, it sets up machinery so that, in advance of action, the citizen can know definitely whether he will or will not be doing something unlawful. It enables him to avoid acting at his peril of future prosecution.

Let me illustrate: It is one of the purposes of the Holding Company Act to prevent the improvident issuance of securities by utility holding companies under circumstances which Congress deemed injurious to investors and consumers. Now Congress might merely have said that certain kinds of security issues shall be unlawful. In that event, if the citizens who constitute the officers of

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* / *Stonemets* v. *Head*, 248 Mo. 243, 263.

**/ *Winter* v. *Bandel*, 30 Ark. 362, 373, quoting with approval 2 Parsons on Contracts, 768.

such a company, wanted to issue securities, they would have to take their chances. They might, in perfect good faith, believe that the stocks and bonds they sold in 1938 were not of the prohibited character, and yet, several years later, in 1941, be indicted and prosecuted for and convicted of having done a serious legal wrong.

But Congress, in the Holding Company Act, did not use that traditional method of dealing with citizens. Instead it set up this device: The company is required, before selling certain kinds of securities, to file with SEC a declaration setting forth in detail the relevant facts concerning the proposed issue of stocks or bonds. The Commission is required to enter an order either permitting the declaration to become effective as filed or amended, or refusing to allow it to become effective. The statute sets forth, with considerable particularity, the standards which must govern the Commission in making its order. And any order permitting the securities to be issued may contain such terms and conditions as the Commission finds necessary to assure compliance with the standards contained in the statute.

Before the Commission reaches its decision, it holds a public hearing. At that hearing, there may appear and be heard, any interested State, State Commission, or municipality, representatives of interested consumers or security holders, and other persons whose participation is in the public interest or for the protection of investors or consumers. In actual practice, the Commission's staff collects and puts in the record much pertinent data, and interrogates the witnesses of the company and others. More than that, before the hearing, the staff confers, often for days, with the officers, lawyers, accountants and engineers of the company, both ascertaining relevant facts and advising the company's representatives and others as to what data should be presented.

If the Commission enters an order granting permission to issue the securities, any person aggrieved by the order may obtain a review in the Court of Appeals for the District of Columbia or the Circuit Court of Appeals in the circuit where such person resides. If there is no such review, or if the Commission's order, when reviewed, is sustained by the Court, then - what? Then, if the conditions contained in the Commission's order are complied with, the issuance of the securities is lawful under the Holding Company Act. The directors and officers know, before they act, just where they stand. They need not proceed in ignorance of the law. They can not later be prosecuted for violation of the provisions of the Act, provided they acted in accordance with the terms and conditions of the order.

I have cited but one instance out of many. There are many other kinds of conduct as to which, under the Holding Company Act, citizens can, in similar manner, receive advance absolution.

The authorization in the Utility Holding Company Act of that administrative contrivance is not wholly novel; the use of some such method has an earlier history. But I think it fair to say that it has not heretofore been employed in a field so conspicuously in the public mind as is the utility industry today. The security issues of that industry now are of unusual importance; the advance administrative orders of the Commission are therefore reported, and commented on, weekly in the press.

You will note that that absolution is not given by SEC on any hop-skip-and-a-jump basis or through any secret Star-Chamber proceedings. The green-light is not flashed after a mere superficial scrutiny of the facts. The citizen or his lawyer does not simply drop in at some government lawyer's office, chat with him for a few hours in the absence of the public, ask, "Sam, can we do this?", and receive an oral or written permission which will serve as a defense against a future prosecution. No such unscrutinized slap-dash exemptions are granted. Instead, there is a public hearing; all legitimately interested persons can appear and present evidence or arguments for or against the proposed action; a record of the evidence is carefully made and considered; and judicial review is open. Thus not only are the company's representatives heard, but the public interest is amply protected and, since the commission's order, permitting the proposed conduct, is carefully worded and conditioned, it does not create a vague exemption from the pains and penalties of the statute, but an exemption only within the charted confines of the Commission's decision.*

That technique, of course, resembles the declaratory judgment. Such declaratory judicial judgments are immensely useful. But they are inapplicable, both legally and practically, to the kind of problem which I have been discussing. On the practical side, the courts have neither the time nor the equipment for coping with the detailed technical facts relating to such matters.

Moreover, at least so far as most federal courts are involved, there can be no legally valid judicial determination of many such questions, because they do not give rise to a case or controversy, and the federal courts** cannot constitutionally, in such instances, be given the power to render decisions. Happily, the Supreme Court the other day did away with the obscuring "negative order" doctrine; but, in doing so, it reaffirmed the doctrine that administrative agencies may pass on matters which the federal courts, because of the inhibitions of the Constitution, may not consider. It is only when an administrative body has acted in violation of the law or the Constitution that, in respect of many matters, a justiciable controversy exists which may be decided by the federal courts.

The declaratory judgment statute is therefore not adequate for meeting many complicated situations. The device embodied in the Holding Company Act is thus a distinct step forward, a valuable improvement. We might call it the method of "advance administrative decision."

Such advance administrative absolutions or decisions can importantly and desirably restrict the discretion of the prosecutor. They exempt from the statute, and thus remove from his discretion to prosecute, those citizens who have applied for and received favorable advance decisions of the Commission.

Those administrative absolutions have this obvious virtue: They prevent, instead of punishing, conduct which the legislature deems undesirable. Surely, wherever possible, prevention is, to use an Irish bull, the best cure.

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* I am not here referring to those provisions of the statute pursuant to which the Commission may give certain companies wholesale exemption from the prohibitions of the statute.

** There must be excepted, in part, the courts of the District of Columbia.

Punishment, after the deed is done, is far less effective. It can seldom, if ever, undo the injury to those who have been hurt by the unlawful conduct. And, too, the fear of possible punishment often paralyzes socially useful business enterprise, for the cautious citizen, advised by a careful lawyer, will be unwilling to embark on a journey which may end in jail.

In the exercise of its powers to give advance absolution, we on SEC try to approach business problems with informed understanding of business needs and ways. While, to be sure, when we consider a case after a hearing and argument, we act quasi-judicially, we and our staff, before a hearing, try to assist the companies and their lawyers, accountants and engineers, so that the facts presented will lead to decisions which are both in accordance with the statute and business-like. In those preliminary discussions, we employ the informal method of the round-table conference. We do not stand on false dignity. We recognize that, although we have official titles, we are still human beings and do not know it all. We do not wear frock-coats, and we do not think frockcoatedly. (We and those with whom we confer think out loud and in the vernacular; we and they put our feet on the table and unbutton our vests.) We want to understand and be understood. Ours is a practical problem, a problem to be worked out, under the requirements of the statute, with business men. We seek decisions which will carry out the law and yet be workable. We think that that is the best means of bringing about cooperation between government and business.

Mr. Justice Holmes said, in words often quoted but never to be forgotten, "The *life* of the law has not been logic; it has been experience." That is peculiarly true of the law as it is carried out by administrative agencies: The *life* of administration is not logic, it is experience. Both for the courts and for administrative bodies, logic is an indispensable instrument; without it, government officers, judicial or administrative, will act arbitrarily; like circumstances should yield like decisions. But logic applied to the bare bones of a statute will produce awkward, unrealistic, impractical, strait-jacketting results. Experience with, and resulting knowledge of, the businesses which come before us, is essential. We must, and we can, so to speak, live with the statute and with those businesses. And an administrative agency is in a peculiarly advantageous position to obtain that kind of detailed, day to day experience. The courts have recognized that fact and, increasingly, are welcoming the use of such agencies, subject always to proper judicial review, as important adjuncts to the work of the judiciary. As Judge Augustus N. Hand said last November, speaking for the Second Circuit Court of Appeals, in sustaining an interpretation placed upon the Public Utility Holding Company Act by SEC*: "One of the principal reasons for the creation of such a bureau is to secure the benefit of special knowledge acquired through continuous operation in a difficult and complicated field. Its interpretation of the Act should control unless plainly erroneous. In no other way can the objects of the act be attained without constant and disconcerting friction."

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* *Securities and Exchange Commission* v. *Associated Gas and Electric Company*, 99 Fed. (2d) 795 (C C A 2d, 1938).

While I am on that theme, perhaps you will forgive a slight detour from my main thesis: Logical reasoning, I've said, is important to equal justice; by the use of logic, capricious or arbitrary decisions are precluded; when the legal and factual premises are alike, the conclusions must be the same; like circumstances should lead to like decisions. Ordinarily what is decided in one year as to the Jones Company, should be the basis for a decision the next year in the case of the Smith Company, if the facts concerning the two companies are substantially the same. But such logical application of the rationale of former decisions is not invariably proper. Experience with the operations, in actual practice, of the past decisions of SEC sometimes teaches us that, in making those past decisions, we erred. Study sometimes demonstrates that we made a mistake in our last year's order concerning company A. In that event, we should not, because of veneration of our own error or a mechanical application of logic, perpetuate our earlier mistake, but should, and we do, decide, somewhat differently the case of Company B - on the basis of our intervening educative experience. The courts find it necessary to act on such a principle, and, on occasions, depart from their own precedents (as the United States Supreme Court recently, in the *Tompkins* case, repudiated its own almost century-old doctrine of *Swift* v. *Tyson*, and, in the *Rochester Telephone* case, its own negative-order doctrine of many years standing). An administrative agency, like SEC, must do likewise; it must not hamstring business activities by wooden and inflexible adherence to its own precedents when experience shows them to be erroneous. Indeed, it is an important aspect of the work of the administrative agency that it is better able than the courts to observe the practical operations of its own prior orders and more quick to perceive such practical mistakes. To be sure, departures from its previous rulings must be undertaken by such an agency most cautiously, but such departures are, on occasions, clearly indicated as the just and sensible course.

To revert to my main theme: In the useful employment of administrative experience, I submit that the device of the advance administrative decisions, authorized in the Utility Holding Company Act, presents a significant and promising experiment.

Here is no universal panacea. I more than suspect that you join with me in being skeptical of panaceas. Our modern industrial civilization is too complex to lend itself to simple cure-alls and doctrinaire solutions. Patient, painstaking methods, of varying kinds, need to be applied in the solution of our numerous problems, and in particular to the many varieties of problems in the field of the relations between business and government. We must be wary of the men with over-simplified answers to complicated questions. It would be pleasant if there were some one simple way of answering all of them. But lawyers, perhaps, know better than most men the folly of glibness and the danger of listening to the one-idea man. Our experience as advisers to business has sobered us. We are not attracted by the mere fact of novelty.

But sometimes we lawyers are rebuffed by mere novelty, too much inclined to regard mere newness as if it were a vice. I am happy to observe that such is not the prevailing attitude in this Association. The recent address, on the subject of administrative agencies, by one of your distinguished members, the

Chairman of your Administrative Law Committee, Mr. John Foster Dulles, published in the current number of the American Bar Association Journal, is ample evidence of that fact; it discloses an open-minded statesman-like approach to the novel problems in the field of administration, a repudiation of the panic-stricken approach to the much needed development of new administrative agencies.

Encouraged by that attitude, but with recognition of the necessity of being modest, circumspect and cautiously experimental in the application of novel ideas, I venture to suggest that, within proper limits, the device of advance administrative absolution, authorized in the Utility Holding Company Act, might perhaps be profitably extended to other areas of activity. There are some kinds of conduct to which it probably cannot be extended: Business men would be reluctant to submit to public scrutiny, and examination at a public hearing, some kinds of proposed business activity. In some cases, the need for prompt action would make impossible a method necessarily involving considerable delay. And there are other reasons, from the point of view of sound government administration, for not employing the device of advance administrative decisions to certain other types of contemplated activities. But the bar and the government might well cooperate in carefully canvassing the possibilities of applying that method, by means of trial and error, to some spheres of business where, today, business enterprise is needlessly hampered, with resultant injury to our economy, by fears of future prosecution.

As I have suggested in another context, business is not a simple, static thing, and all businesses are not approximately alike. Business is a dynamic, pulsating, and ever-variable quantity with a multitude of differentiated aspects. Indeed there is no such thing as "Business" or "Industry": there are many and different businesses and industries. Attempts merely to define their limits, to describe their character, or to measure their size are themselves separate so-called social sciences. The task of prescribing, virtually at a single stroke, completed regulation for such a variety of institutions staggers the mind of an ordinary mortal. In its efforts to regulate certain of the conduct of "business" and "industry", it is unwise that, to a greater extent than is necessary, government should simply play the role of "the cop on the corner" who makes arrests if statutory commands and inhibitions are violated. Businesses and industries consist of men and the conduct of men in their dealings with property and with other men. Businesses and industries are, therefore, living things, and, if they are to live, they must be governed by a living law. It is the function of administrative agencies to help keep the law alive and equal to the problems of those businesses and industries which are under regulation. Let me close with some striking pertinent words uttered last year by our former Chairman, now Mr. Justice Douglas of the United States Supreme Court:

"For the Congress to endeavor to provide definite and precise formulae to govern many of the complex and intricate activities of business and finance would be as difficult as to endeavor to state what is a reasonable

rate of speed for an automobile under any and all conditions. . . . Various and diverse interests can seldom be neatly balanced against the standard of the common good by means of a precise and inflexible formula. If such an attempt were made, the Congress would be faced with the choice of a strait-jacket of out-right prohibition on the one hand, or a do-nothing policy on the other hand. Both of these are un-American in their philosophy. It is the American tradition to insist on keeping to an irreducible minimum regimentation in any form, particularly a 'thou shalt not' regimentation. It is likewise the American tradition that our government be a responsive as well as a responsible agency - ready, willing and able to assume a position of leadership at those points where self-help would lead to chaos. For these reasons the Congress has merely isolated, not solved, many important problems. Their solution has been delegated to administrative agencies such as the SEC. . . . The virtue of the administrative process is its ability to deal with technical, debatable, undefinable, or imponderable matters in a discretionary manner. It provides a realistic and sound alternative to hard and inflexible rules which proceed on the false assumption that right or wrong, black or white, constitute the only choice. . . . In all of this there is no spectre of unbridled discretion, no element of dictatorship. Congress in all of these situations specifies the standards which are to be applied. . . . And the action of these agencies is subject to review by the courts."

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