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"COMMISSION ENFORCEMENT POLICIES: WHERE WE STAND"

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"COMMISSION ENFORCEMENT POLICIES: WHERE WE STAND"

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NOTWITHSTANDING ITS EFFORTS IN MANY AREAS, SUCH AS MARKET REGULATION, REGULATION OF INVESTMENT COMPANIES, AND OTHER ACTIVITIES, A LARGE PART OF THE COMMISSION'S WORK IS, AS IT HAS BEEN FROM ITS BEGINNING, THE ENFORCEMENT OF THE FEDERAL SECURITIES LAWS. AT THE PRESENT TIME APPROXIMATLY 36% OF OUR BUDGET IS EXPENDED ON THESE ACTIVITIES AND CORRELATIVELY THE SAME PROPORTION OF OUR PEOPLE ARE ENGAGED DIRECTLY IN ENFORCEMENT MATTERS; THE BUDGET PREPARED FOR THE NEXT FISCAL YEAR INDICATES THIS PORTION WILL INCREASE TO 41%. THUS, NOT INAPTLY, THE COMMISSION CAN RIGHTLY BE CHARACTERIZED AS A LAW ENFORCEMENT AGENCY. AS SUCH WE DO ALL THE THINGS THAT CONVENTIONALLY LAW ENFORCEMENT AGENCIES DO: WE INVESTIGATE SUSPECTED VIOLATIONS OF THE LAW THAT WE ARE SWORN TO UPHOLD, WE TAKE TESTIMONY FROM WITNESSES, WE SUBPOENA DOCUMENTS, WE TRY TO FIT TOGETHER INTRICATE PIECES OF OFTEN TERRIBLY BEWILDERING PUZZLES TO FIND IF THERE HAS BEEN A VIOLATION,

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WE BRING LAWSUITS IN OUR OWN NAME, AND WHEN IT APPEARS TO US THAT A COURSE OF CONDUCT HAS RISEN TO A LEVEL OF CRIMINALITY, WE REFER THE MATTER TO THE JUSTICE DEPARTMENT FOR CRIMINAL PROCEEDINGS.

AS A LAW ENFORCEMENT AGENCY QUITE OBVIOUSLY WE ARE SUBJECT TO ALL THE RESTRAINTS ON OUR CONDUCT THAT OTHER SUCH AGENCIES ARE. AMERICAN CITIZENS HAVE RIGHTS WHICH MUST BE RESPECTED BY EVERYONE WHO IS CONCERNED WITH THE ENFORCEMENT OF THE LAW, NOT JUST THE LOCAL POLICE DEPARTMENTS OR THE FBI OR THE OTHER AGENCIES THAT PERHAPS WE THINK OF AS MORE CHARACTERISTICALLY LAW ENFORCEMENT AGENCIES. NOT ONLY ARE THEIR RIGHTS TO BE PROTECTED, BUT THEY ARE ALSO ENTITLED TO FAIRNESS IN THE MANNER IN WHICH THEY ARE TREATED. OFTEN THE TEMPTATION, WHEN THE EVIDENCE IS OVERWHELMING THAT A SERIOUS AND TRAGIC FRAUD HAS BEEN COMMITTED AGAINST INNOCENT INVESTORS, IS TO SHORT CUT MATTERS, PREJUDGE THE SUSPECTED CULPRITS AND SET ABOUT "PROTECTING THE PUBLIC INTEREST" IN A PRECIPITATE AND EXPEDITIOUS MANNER. THIS TEMPTATION IS INDEED ALLURING. OFTEN OUR STAFF MEMORANDA RECOMMENDING ACTION MAKE IT CLEAR THAT VERY EARLY IN THE INVESTIGATION IT BECAME APPARENT WHO THE PRINCIPAL WRONGDOERS WERE, THAT THEIR CONDUCT WAS PROBABLY WRONG AND INDEFENSIBLE. IT IS AT

THOSE TIMES IN MY ESTIMATION THAT WE HAVE THE OPPORTUNITY TO GIVE CONSIDERABLY MORE THAN LIP SERVICE TO THE IDEALS AND PRINCIPLES WHICH CHARACTERIZE OUR TREATMENT OF FELLOW CITIZENS. IT IS EASY TO TREAT WITH RESPECT, WITH DIGNITY, WITH FULL ACCORDANCE OF CONSTITUTIONAL RIGHTS, THE TECHNICAL VIOLATOR, THE GOOD CITIZEN WHO HAS PERHAPS STUMBLED INTO A WEB NOT OF HIS OWN MAKING. IT IS WHEN WE CONFRONT THE TOUGH, OFTEN SEEMINGLY DEPRAVED, AVARICIOUS, REPETITIVE MALEFACTOR THAT OUR PATIENCE BECOMES SORELY TRIED AND OUR RESPECT FOR AMERICAN TRADITIONS MOST SEVERLY TESTED.

WHILE I BELIEVE WE CAN AND DO MAKE EVERY REASONABLE EFFORT TO BE FAIR, IT IS NOT SURPRISING THAT THE COMMISSION, LIKE OTHER LAW ENFORCEMENT AGENCIES, IS NOT INFREQUENTLY ACCUSED OF TRESPASSING UPON RIGHTS. A COMMON TECHNIQUE EMPLOYED BY COUNSEL FOR A POTENTIAL RESPONDENT OR ONE WHO HAS ALREADY BEEN NAMED, IS TO TRY THE PROSECUTOR AND NOT THE CASE. WE UNDERSTAND THIS AND WHILE THAT COURSE IS SOMETIMES IRRITATING, NONETHELESS WE RECOGNIZE IT FOR WHAT IT IS - A TRIAL LAWYER'S TACTIC - AND TAKE SATISFACTION THAT WISE JUDGES ARE RARELY, IF EVER, MISLED BY THE TACTIC. IT ENTAILS FREQUENT CHARGES THAT THE STAFF HAS BEEN OVERLY ZEALOUS, THAT PROCEDURAL NICETIES HAVE BEEN IGNORED BY THE COMMISSION AND ITS STAFF OR THAT THERE IS AN ELEMENT OF UNFAIRNESS IN OUR ESTABLISHED PROCESSES.

SUCH CHARGES ARE STANDARD EXPERIENCE FOR LAW ENFORCEMENT AGENCIES. I DO NOT SUGGEST THAT THERE IS NEVER MERIT IN COMPLAINTS AGAINST US AND OTHERS IN GOVERNMENT. BUT OFTEN THE OTHER SIDE OF THE LEDGER RECEIVES SCANT ATTENTION, AND WHEN IT IS ASSERTED, IT IS OFTEN DISMISSED BY THE SUGGESTION THAT THE DEFENSE ONLY REFLECTS A CLOSED, POLICE-STATE KIND OF MIND.

SEVERAL YEARS AGO CHAIRMAN CASEY WISELY APPOINTED TWO FORMER CHAIRMEN OF THE COMMISSION AND A THIRD LAWYER, NOT PREVIOUSLY ASSOCIATED WITH THE COMMISSION, WHO WAS NAMED CHAIRMAN OF THE GROUP, TO ADVISE THE COMMISSION CONCERNING ITS ENFORCEMENT POLICIES AND SUGGEST CHANGES. THIS BODY TRUE TO ITS CHARGE MADE A NUMBER OF SUGGESTIONS FOR CHANGE IN THE COMMISSION'S ENFORCEMENT POLICIES AND PRACTICES - FORTY-THREE, IN FACT.

WHEN I JOINED THE COMMISSION IN AUGUST 1973 I HAD IN MY MIND AS A PROJECT WHILE AT THE COMMISSION SECURING THE FULLEST IMPLEMENTATION OF THE WELLS COMMITTEE RECOMMENDATIONS. WHEN THEY WERE SUBMITTED TO THE COMMISSION IN JUNE 1972, I FELT THEY HAD CONSIDERABLE MERIT, THOUGH MANY OF THEM INVOLVED AREAS IN WHICH I HAD HAD NO DIRECT EXPERIENCE. NOT LONG AFTER ARRIVAL ON THE SCENE AT 500 NORTH CAPITOL STREET I REVIEWED THEM AND LAID THEM ALONGSIDE THE COMMISSION'S AND THE STAFF'S PRACTICES.

SINCE THEN I HAVE DONE THAT SEVERAL OTHER TIMES. FURTHER, I HAVE DISCUSSED THEM WITH MEMBERS OF THE STAFF. AT THE MOMENT, WHILE SURELY THEY HAVE NOT BEEN AS FULLY IMPLEMENTED AS SOME OF US WOULD LIKE, I CAN EXPRESS CONSIDERABLE SATISFACTION WITH THE EXTENT TO WHICH SOME HAVE BEEN DEVELOPED IN COMMISSION PRACTICE. A STATISTICAL SUMMARY OF THE NUMBER OF "YES'S" AND "NO'S" AND "PARTIALS" WOULD IN MY ESTIMATION BE MISLEADING, SINCE ALL OF THE RECOMMENDATIONS ARE NOT OF EQUAL WEIGHT OR IMPORTANCE. BUT I CAN SAY IN GENERAL MUCH PROGRESS HAS BEEN MADE IN GIVING HEED TO THESE SUGGESTIONS. ONE OF THE IMPORTANT PROPOSALS WAS THE ONE THAT URGED THE ADOPTION OF A POLICY BY THE COMMISSION THAT RESPONDENTS BE GIVEN THE OPPORTUNITY TO MAKE WRITTEN SUBMISSIONS TO THE COMMISSION BEFORE PROCEEDINGS ARE INSTITUTED. PRIOR TO THE WELLS COMMITTEE REPORT THERE HAD BEEN AN INFORMAL PRACTICE UNDER WHICH SUCH SUBMISSIONS WERE OFTEN RECEIVED BY THE COMMISSION. IN RESPONSE TO THIS SUGGESTION THE COMMISSION PUBLISHED SECURITIES ACT RELEASE NO. 5310 WHICH MADE THESE POINTS:

1. WHILE THE COMMISSION AGREED WITH THE OBJECTIVE IT CONCLUDED IT WOULD NOT BE IN THE PUBLIC INTEREST TO ADOPT FORMAL RULES SINCE THE ADOPTION OF FORMAL REQUIREMENTS MIGHT SERIOUSLY LIMIT THE SCOPE AND TIMELINESS OF COMMISSION ACTIONS. THE COMMISSION'R RELEASE NOTED THAT THE ADOPTION OF FORMALIZED PROCEDURES MIGHT "INAPPRIATELY INJECT INTO ACTIONS IT BRINGS

ISSUES, IRRELEVANT TO THE MERITS OF SUCH PROCEEDINGS, WITH RESPECT TO WHETHER OR NOT THE DEFENDANT OR RESPONDENT HAD BEEN AFFORDED AN OPPORTUNITY TO BE HEARD PRIOR TO THE INSTITUTION OF PROCEEDINGS AGAINST HIM AND THE NATURE AND EXTENT OF SUCH OPPORTUNITIES".

2. IT ADVISED COUNSEL TO CONSULT WITH THE STAFF MEMBERS CONDUCTING THE INVESTIGATION WHO WERE GIVEN DISCRETION TO ADVISE PROSPECTIVE DEFENDANTS OR RESPONDENTS OF THE GENERAL NATURE OF THE INVESTIGATION AND THE VIOLATIONS INDICATED AS THEY PERTAINED TO THE PERSON MAKING THE INQUIRY.

3. WHERE A FACTUAL DISAGREEMENT EXISTED BETWEEN THE STAFF AND THE PROSPECTIVE RESPONDENT OR DEFENDANT THE ONLY ORDERLY WAY TO RESOLVE SUCH CONFLICT WAS THROUGH LITIGATION. THEREFORE THE RELEASE STRESSED THE COMMISSION'S BELIEF THAT SUBMISSIONS WILL NORMALLY PROVE TO BE MOST HELPFUL WHEN THEY DISCUSS QUESTIONS OF POLICY AND LAW.

NOTWITHSTANDING THE SUGGESTION THAT SUBMISSIONS SHOULD NOT ADDRESS THEMSELVES TO CONTESTED QUESTIONS OF FACT, IT SEEMS TO ME THAT THE BULK OF SUCH SUBMISSIONS - AT LEAST JUDGED IN PHYSICAL TERMS - CONTINUE TO BE CONCERNED WITH FACTUAL DISPUTES. "THE STAFF THINKS THIS IS SO, BUT IT ISN'T; THIS IS..." QUITE OBVIOUSLY BEFORE A PROCEEDING HAS BEEN AUTHORIZED IT IS IMPOSSIBLE FOR THE

COMMISSION TO DECIDE THESE FACTUAL CONFLICTS; TO DO SO WOULD RESULT IN TWO TRIALS, ONE IN DECIDING WHETHER A SUFFICIENT BASIS EXISTS TO AUTHORIZE AN ACTION, THE SECOND AT THE APPROPRIATE AND TRADITIONAL TIME. THAT WOULD BE SILLY.

AS A PERSONAL ASIDE, I THINK MOST SUBMISSIONS LOSE MUCH OF THEIR OPPORTUNITY FOR PERSUASION BY BEING TOO LENGTHY. THIS FAULT COULD BE CONSIDERABLY REDUCED IF THEY DID NOT INCLUDE EXTENSIVE ARGUMENTS OVER THE FACTS. BEYOND THAT, THERE COULD STILL BE ROOM FOR REDUCING THE SIZE OF SUBMISSIONS. I RECALL THAT A DISTINGUISHED COURT OF APPEALS JUDGE URGED THAT IN MAKING AN ORAL ARGUMENT COUNSEL SHOULD GO FOR THE JUGULAR VEIN AND NOT BELABOR EVERY ISSUE. I WOULD SUGGEST THAT A SIMILAR COURSE PURSUED IN THE PREPARATION OF SUBMISSIONS MIGHT WELL YIELD BETTER RESULTS FOR COUNSEL MAKING THEM.

SOME WELLS COMMITTEE PROPOSALS ARE NOT CAPABLE OF IMPLEMENTATION BY COMMISSION ACTION ALONE; FOR INSTANCE, IT WAS SUGGESTED THAT IN SOME CRIMINAL SECURITIES CASES A STAFF ATTORNEY BE APPOINTED AS SPECIAL ASSISTANT TO THE U.S. ATTORNEY, AN APPROACH THAT APPARENTLY HOLDS LITTLE APPEAL TO THE RELEVANT OFFICIALS OF THE JUSTICE DEPARTMENT. AGAIN, SOME OF THE SUGGESTIONS WOULD INVOLVE LEGISLATIVE ACTION. SOME OF THOSE PROPOSALS, SUCH AS THE ONE SUGGESTING AUTHORITY TO IMPOSE CIVIL FINES ON RESPONDENTS IN BROKER-DEALER PROCEEDINGS, HAVE BEEN VERY RECENTLY RECONSIDERED

BY THE COMMISSION, BUT FOR A VARIETY OF VERY GOOD REASONS, THAT DISCUSSION HAS BEEN DEFERRED TO A LATER TIME.

IN OTHER INSTANCES, MY EXPERIENCE AT THE COMMISSION INDICATES THAT SOME SUGGESTIONS SIMPLY ARE NOT SUSCEPTIBLE OF REASONABLE IMPLEMENTATION, SUCH AS THE PROPOSAL THAT A DRAFT OF THE PROPOSED ORDER FOR PROCEEDINGS OR COMPLAINT BE SUBMITTED TO THE ADVERSE PARTY OR HIS ATTORNEY AT THE TIME HE IS ADVISED OF THE STAFF'S INTENTION TO SUBMIT A RECOMMENDATION TO THE COMMISSION. I NOTE, FOR EXAMPLE, THAT THE FEDERAL TRADE COMMISSION RECENTLY ABANDONED ITS LONG-STANDING PRACTICE OF SHOWING PROPOSED DEFENDANTS A COPY OF THE PROPOSED COMPLAINT PRIOR TO COMMENCING AN ACTION, PRIMARILY, AS I UNDERSTAND IT, BECAUSE THE PROCESS HAD BEEN ABUSED AND USED AS AN OCCASION FOR DILATORY TACTICS.

STILL OTHER PROPOSALS OF THE WELLS COMMITTEE, HOWEVER, DESERVE CONTINUING STUDY AND IMPLEMENTATION. FOR INSTANCE, I THINK ONCE THE COMMISSION STAFF HAS CLOSED AN INVESTIGATIVE FILE WITHOUT RECOMMENDING AN ACTION, THE SUBJECTS OF THE INVESTIGATION SHOULD BE INFORMED. IT IS SUGGESTED THAT THIS MAY PREVENT THE COMMISSION FROM BRINGING ACTION IF SUBSEQUENT INFORMATION DEMANDS FURTHER INVESTIGATION. I THINK THAT POSSIBILITY CAN BE EASILY DEALT WITH THROUGH APPROPRIATE LANGUAGE IN THE COMMUNIQUE BEARING THE GLADFUL TIDINGS. I SPEAK FROM SOME EXPERIENCE IN

THIS. IN EARLY 1973 WHILE I WAS STILL IN PRIVATE PRACTICE A MATTER A CLIENT HAD BEEN INVOLVED IN WAS THE SUBJECT OF AN INFORMAL INQUIRY BY THE STAFF. DAYS WERE SPENT IN PREPARING FOR A CONFERENCE WITH THE STAFF, A FULL DAY WAS SPENT AT THE COMMISSION BY SOME EIGHT OR TEN PEOPLE, INCLUDING INDEPENDENT ACCOUNTANTS, MANAGEMENT, AND ATTORNEYS. TO THIS DAY NO ONE HAS EVER BEEN INFORMED THAT THE MATTER IS NO LONGER ACTIVE! RECENTLY, THE STAFF HAS INFORMALLY FOLLOWED THE PRACTICE OF ADVISING THE SUBJECT OF AN INVESTIGATION, UPON REQUEST, THAT THE INQUIRY HAS BEEN CONCLUDED. I FOR ONE WOULD LIKE TO SEE NOTIFICATION OF THE CONCLUSION OF AN INVESTIGATION GIVEN ROUTINELY TO THOSE WHO HAD REASON TO THINK THEY WERE TARGETS.

THE WELLS COMMITTEE URGED STRONGLY THAT THE COMMISSION BE MORE FLEXIBLE IN DEVELOPING REMEDIES LESS DRACONIAN THAN THOSE CUSTOMARILY USED. WE HAVE DONE THIS IN MANY INSTANCES. FREQUENTLY A STAFF RECOMMENDATION WITH RESPECT TO FORMAL PROCEEDINGS AGAINST A VIOLATOR WILL, BECAUSE OF CIRCUMSTANCES SURROUNDING THE SITUATION, RESULT IN SOMETHING LESS THAN A FULL-FLEDGED FRAUD PROCEEDING. IN THAT CONNECTION, THE COMMISSION HAS DEVELOPED, MOSTLY THROUGH SETTLEMENTS, UNIQUE AND, I THINK, HIGHLY IMAGINATIVE REMEDIAL APPROACHES. MANY OF YOU, I AM SURE, KNOW OF SETTLEMENTS WHICH HAVE ENTAILED INDEPENDENT ADDITIONS

TO BOARDS OF DIRECTORS, THE APPOINTMENT OF SPECIAL COUNSEL, THE FORMATION OF PEER REVIEW PANELS FOR ACCOUNTING FIRMS, AND THE LIKE. THESE SEEM TO ME TO BE EXCELLENT RESPONSES TO THE PROBLEMS WE CONFRONT; THEY LOOK NOT BACKWARD BUT FORWARD TO MEANS OF CLEANING UP BAD SITUATIONS AND PREVENTING THEIR RECURRENCE.

THE SUGGESTION HAS BEEN MADE THAT PERHAPS IN SOME, IF NOT IN ALL, CASES, WHEN REQUESTED BY COUNSEL THE SUBMISSION PROCESS SHOULD BE SUPPLEMENTED BY ORAL ARGUMENT. I THINK ON A COST-BENEFIT ANALYSIS THAT SIMPLY WOULD NOT BE EXPEDIENT. IF SUCH A PROCEDURE WERE IMPLEMENTED THE COMMISSION WOULD HAVE PRECIOUS LITTLE TIME TO DO ANYTHING OTHER THAN READ SUBMISSIONS AND LISTEN TO THE ARGUMENTS OF COUNSEL FOR PROPOSED RESPONDENTS AND I WOULD DOUBT THAT SUCH ORAL PRESENTATIONS WOULD ADD SIGNIFICANTLY TO THE UNDERSTANDING WHICH CAN BE DERIVED BY THE COMMISSION FROM A WELL-PREPARED SUBMISSION.

OFTEN CHARGES ARE MADE THAT OUR STAFF PEOPLE HAVE BEEN UNFAIR OR OPPRESSIVE OR OVERBEARING IN THEIR CONDUCT DURING INVESTIGATIONS - AND I WOULD IMAGINE THERE MAY BE CASES WHERE THAT IS TRUE. WHENEVER THERE IS SUCH A COMPLAINT, THE GENERAL COUNSEL'S OFFICE INVESTIGATES AND REPORTS TO THE COMMISSION.

MOST OFTEN, QUITE FRANKLY, THESE INVESTIGATIONS INVOLVE EXPENDITURES OF TIME FAR BEYOND THE MERITS OF THE COMPLAINT. IT MAY SEEM PAROCHIAL TO SAY THIS, BUT WITH VERY FEW EXCEPTIONS THESE CHARGES ARE BASELESS. IN ONE INSTANCE THE CHARGE WAS MADE THAT IN TAKING TESTIMONY A STAFF MEMBER HAD BEEN UNFAIR AND INSULTING. I CALLED FOR THE TRANSCRIPT OF THE TESTIMONY. WHAT IS DISCLOSED WAS NOTHING MORE THAN THE CLOSE QUESTIONING OF A WITNESS SUSPECTED - WITH SOME GOOD REASON - OF AN INTEREST IN CONCEALING FACTS. IT WAS THE SORT OF INTENSIVE QUESTIONING I WOULD HAVE CONSIDERED THE DUTY OF THE TRIAL LAWYERS IN MY OLD LAW FIRM.

OUR CRITICS ARE NOT JUST WOUNDED LAWYERS AND ACCOUNTANTS AND BUSINESSMEN - AND LAW SCHOOL DEANS. THESE HAVE RECENTLY BEEN JOINED BY THE DEPUTY CONTROLLER OF THE CURRENCY WHO HAS CHIDED US FOR OUR "OVERT" MODE OF ENFORCEMENT AND CONTRASTED IT WITH THE MORE BENEFICIENT "COVERT" MODE OF PROCEDURE FOLLOWED BY HIS AGENCY. I DOUBT SERIOUSLY WHETHER HIS CHARGES CONCERNING THE FAULTS OF OUR APPROACH CAN WITHSTAND CAREFUL SCRUTINY, AND YET HE HAS HIS SUPPORTERS IN THE SECURITIES INDUSTRY. AS THE CHAIRMAN OF THE COMMISSION HAS POINTED OUT RECENTLY, IT MIGHT BE NICE TO PROTECT THE EXISTING CORPORATION, BUT WHO IS TO PROTECT THE PROSPECTIVE INVESTOR WHO MAY PUT HIS MONEY AT RISK IN A CORPORATION WHICH HAS, WITH THE CONNIVANCE OF THE REGULATORY AGENCY, MASKED ITS AWAKENESS AND ITS DEBILITY? SURELY A GOVERNMENT LIKE OURS MUST HAVE CONCERN WITH HIM.

PERHAPS AT NO TIME IN ITS DISTINGUISHED 40+ YEARS OF HISTORY HAS THE TRADITIONAL ENFORCEMENT ROLE OF THE COMMISSION BEEN AS CRITICISED AS IT IS NOW OR CHARGES AS SERIOUS AND NUMEROUS MADE AGAINST IT AND ITS ENFORCEMENT PERSONNEL. THESE COME AT US FROM ALL SIDES AND IT WOULD SEEM ALMOST AS IF ONE BRED ANOTHER, ANOTHER BRED TWO, TWO ATTACKS BRED FOUR AND SO ON. FORTUNE MAGAZINE PUBLISHED TWO ARTICLES AT THE END OF LAST YEAR CRITICISING BOTH THE REGULATORY AND THE ENFORCEMENT ACTIVITIES OF THE COMMISSION. IT IS UNFORTUNATE THAT THIS DISTINGUISHED PUBLICATION DID NOT SEE FIT TO INFORM ITS READERS THAT THE AUTHOR OF THE ARTICLES HAD ONLY RECENTLY RETURNED TO JOURNALISM AFTER A STINT AS AN EXECUTIVE OF A SECURITIES FIRM THAT WAS INVOLVED IN LITIGATION WITH THE COMMISSION. IT WOULD SEEM THAT PERHAPS THE PRINCIPLES OF FULL DISCLOSURE MIGHT BE STRENGTHENED SOMEWHAT IN THE PUBLISHING FIELD. THE EDITOR OF FORTUNE, WHEN THIS RATHER VITAL OMISSION WAS CALLED TO HIS ATTENTION, EXPRESSED IN ANOTHER FORUM -- NOT IN HIS OWN MAGAZINE -- HIS REGRET AT THE OMISSION AND SUGGESTED THAT PERHAPS IT WOULD HAVE BEEN WELL TO INFORM HIS READERS OF THIS POSSIBLE SOURCE OF BIAS.

MUCH OF THIS SPATE OF CRITICISM APPEARS TO HAVE ORIGINATED WITH THE REMARKS OF THE DEAN OF AN EASTERN LAW SCHOOL WHO SPOKE

CRITICALLY OF THE COMMISSION A YEAR AGO JANUARY IN SAN DIEGO. HIS REMARKS ARE REPRODUCED IN A RECENT ISSUE OF THE OHIO STATE LAW JOURNAL. NOT INSIGNIFICANTLY HE ADMITS HIS OWN IGNORANCE OF THE SUBJECT ON WHICH HE SPEAKS BY COMMENCING HIS ARTICLE WITH THESE WORDS:

> "SINCE I AM A STRONGER TO THIS GROUP, AND, INDEED, TO THIS AREA OF THE LAW...."

THIS DEAN'S CRITICISM REFLECTS AN ENORMOUS VOLUME OF HEARSAY, MUCH OF WHICH HAS ITS ORIGINS WITH PEOPLE WHO OR WHOSE CLIENTS HAVE BEEN STUNG AT ONE TIME OR ANOTHER BY COMMISSION ENFORCEMENT PROCEEDINGS. AS ONE INSTANCE OF HIS DEPARTURE FROM FAIRNESS, HE ASSERTS THAT COMMISSION ADMINISTRATIVE PROCEDURES MAY RESULT IN EX PARTE COMMUNICATIONS BETWEEN THE STAFF AND ADMINISTRATIVE LAW JUDGES. OUR JUDICIAL SYSTEM MAY AND OCASIONALLY HAS BEEN SUBJECT TO THAT ABUSE; THAT MAY HAPPEN IN ANY ADMINISTRATIVE AGENCY LIKE THE COMMISSION WHICH HAS, AS A CONSEQUENCE OF CONGRESS' DETERMINATION. MULTIPLE RESPONSIBILITIES. THE QUESTION IS NOT WHETHER THIS MAY HAPPEN; THE QUESTION IS, HAS IT HAPPENED? IN MY EXPERIENCE AT THE COMMISSION THERE IS NO PRINCIPLE MORE HONORED BY EVERYONE INVOLVED THAN THE SEPARATION OF FUNCTIONS PRINCIPLE. IF ANYTHING, WE HAVE A FETISH ABOUT IT. TO SUGGEST BY INNUENDO THAT SUCH MAY NOT BE SO IS NOT ONLY TO FAULT UNFAIRLY THE COMMISSION, BUT THE JUDGMENT OF CONGRESS WHICH VESTED THE FUNCTIONS THEY HAVE IN ADMINISTRATIVE AGENCIES IN GENERAL.

THESE CRITICISMS TROUBLE ME FOR MANY REASONS. FOR ONE THING IF THEY ARE SUBSTANTIALLY TRUE, THEN I, WHO THROUGHOUT MY LIFE HAVE ALWAYS THOUGHT I WAS ON THE SIDE OF THE ANGELS WHERE MATTERS OF CIVIL RIGHTS AND FAIRNESS WERE INVOLVED, AM ASSOCIATED WITH AN ORGANIZATION THAT APPARENTLY SHARES NONE OF MY PHILOSOPHICAL DISPOSITIONS OR NOTIONS OF CIVILIZED COMITY. ANOTHER SOURCE OF CONCERN TO ME IS THAT, IF THESE CHARGES ARE TRUE, THEN MY SIGHT IS DIM AND ALL THESE ABUSES HAVE BEEN SUCCESSFULLY SCREENED FROM MY SIGHTLESS EYES. I HAVE YET TO FIND THE NEST IN WHICH ALL THIS EVIL IS NURTURED.

THESE FEARS I CAN OVERCOME. I AM CONFIDENT THAT I AM NOT ASSOCIATED WITH AN ORGANIZATION INDIFFERENT TO PEOPLES' RIGHTS OR FUNDAMENTAL CONCEPTS OF FAIRNESS. WHILE IT MAY BE TRUE, AS I'M SURE IT MAY BE IN ANY AGENCY WITH A FUNCTION SIMILAR TO THE COMMISSION'S, THAT THERE MAY BE ISOLATED INSTANCES OF OFFICIAL ARROGANCE, IMMATURE AND UNREASONABLE WIELDING OF POWER, REACHING FOR SHORTCUTS IN THE HEAT OF BATTLE, I AM PERSUADED THAT THESE ARE NOT INHERENT IN THE PHILOSOPHY OF THE AGENCY OR ITS PEOPLE, BUT ARE RATHER THE FRUITS - AND ONLY OCCASIONAL ONES, IF AT ALL - OF YOUTHFUL INEXPERIENCE, TOO GREAT A DEDICATION, OCCASIONAL LAPSES OF PROCEDURES DESIGNED TO AVOID SUCH OCCURRENCES, LAPSES WHICH, I MIGHT ADD, ARE NOT INFREQUENTLY THE CONSEQUENCES OF GOADING AND OTHER TACTICS BY MORE SOPHISTICATED OPPOSING COUNSEL WHO THINK THEY SEE OPPORTUNITIES TO GAIN ADVANTAGE FOR CLIENTS.

THERE IS SOMETHING ELSE THOUGH THAT WORRIES ME A GREAT DEAL MORE AND THAT IS THE CONCERN THAT THESE ATTACKS, REPEATED OFTEN ENOUGH, MAY UNDERMINE THE 40-YEAR PROCESS WHICH HAS ESTABLISHED THE COMMISSION AS ONE OF THE OUTSTANDING REGULATORY UNITS IN THE GOVERNMENT. MUCH OF THE ABILITY OF THE COMMISSION TO PROTECT INVESTORS IN THIS COUNTRY HAS BEEN THE CONSEQUENCE OF WIDESPREAD CONFIDENCE THAT IT ACTED WITH INTEGRITY AND COMPETENCE, THAT IT ATTRACTED TO ITS RANKS OUTSTANDING PEOPLE. AS THIS REPUTATION GREW IT BECAME EASIER TO IMBUE PEOPLE WITH THE ENTHUSIASM AND THE ZEST NECESSARY TO CARRY OUT THESE DEMANDING TASKS. I AM WORRIED THAT THIS ABILITY TO ATTRACT, TO INSPIRE, TO MOTIVATE MAY BE A CASUALTY OF THESE CHARGES.

I WOULD NOT FOR A MOMENT SUGGEST THAT THE COMMISSION SHOULD BE IMMUNIZED FROM FAIR CRITICISM AND AS A MATTER OF FACT I FIND IT FREQUENTLY HELPFUL IN ASSESSING OUR PERFORMANCE WHEN A CRITIC TAKES AIM AT US AND AT OUR WORK AND I WOULD NOT SUGGEST THAT THESE CRITICS FOREGO AN EXPRESSION OF THEIR HONEST JUDGMENTS. I WOULD HOWEVER HOPE THAT THOSE WHO FURNISH WRITERS INFORMATION DO IT ACCURATELY, THAT THEY LET THEIR BIASES HANG OUT, THAT THEY BE DISCRIMINATING IN SEPARATING THEIR OWN HOSTILITIES BORNE OF PARTICULAR EVENTS FROM BALANCED JUDGMENTS. I WOULD URGE READERS OF ARTICLES ABOUT THE COMMISSION TO APPROACH THEM WITH A CRITICAL EYE - A PERCEPTIVE SKEPTICISM - AND ASK THEMSELVES WHETHER THEY ARE SEEING A FEW ISOLATED SAPLINGS OR A REAL FOREST.

I THINK IT IS IMPORTANT THAT THE COMMISSION SEEK TO PUT THESE CRITICISMS IN PERSPECTIVE. MORE IMPORTANT I THINK IT IS ESSENTIAL, TODAY MORE THAN PERHAPS EVER IN THE PAST, THAT THE COMMISSION EXAMINE ITS OWN PROCEDURES AND DETERMINE WHEREIN THE CRITICISMS MAY HAVE JUSTIFICATION. AS I HAVE INDICATED TO YOU I FOR ONE HAVE DONE THIS BY PERIODICALLY RETURNING TO THE WELLS COMMITTEE REPORT, BY URGING UPON THE COMMISSION AND ITS STAFF FURTHER IMPLEMENTATION WHERE IT SEEMS APPROPRIATE AND BY STRENGTHENING THOSE PROCEDURES THAT HAVE BEEN DESIGNED TO ASSURE FAIRNESS IN OUR ACTIVITIES.

IN THIS TIME OF EMPHASIS - WITH GOOD REASON - UPON THE AVOIDANCE OF UNDUE AND UNFAIR GOVERNMENT INTRUSION INTO THE AFFAIRS OF OUR CITIZENS, THE COMMISSION MUST AUGMENT ITS DETERMINATION TO GIVE NO ONE LEGITIMATE CAUSE FOR COMPLAINT ABOUT OUR PEOPLE, OUR POLICIES, OUR FAIRNESS, OUR DEDICATION TO PROPER PROCEDURE. THERE IS NOTHING AS DESTRUCTIVE OF CONFIDENCE IN GOVERNMENT AS THE OPPRESSIVE OR UNFAIR USE OF GOVERNMENT POWER. THERE IS NO SUCH THING AS A PERMISSIBLE SHORT-CUTTING OF FAIRNESS OR DECENCY IN THE NAME OF THE "PUBLIC INTEREST" OR THE "PROTECTION OF INVESTORS." THE COMMISSION BY RETAINING FINAL JUDGMENT OVER THE FILING OF EVERY COMPLAINT, THE COMMENCEMENT OF EVERY INVESTIGATION, THE MAKING OF EVERY SETTLEMENT, HAS RETAINED THE FINAL RESPONSIBILITY FOR THE CONDUCT OF ITS AFFAIRS. MY EXPERIENCE SUGGESTS THAT, WITH ONLY THE RARE EXPECTIONS, IT HAS BORNE THAT RESPONSIBILITY WELL AND IN ACCORD WITH WHAT EVERY CITIZEN EXPECTS OF HIS GOVERNMENT.