ADDRESS

of

CHESTER T. LANE

General Counsel, Securities and Exchange Commission

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To what extent can there be formulated rules with respect to what constitutes a fair administrative hearing, which are generally applicable to different administrative tribunals and to different kinds of administrative action?

I must tell you at the outset that I do not propose to, indeed I cannot, answer this question entirely responsively. For me to try to set the limit beyond which fairness cannot go, to try to define the wide variety of administrative tribunals and administrative proceedings to which any given set of rules of fairness must be applicable, would be to assume a breadth of experience and a certainty of knowledge to which I have no claim. To me, administration, and administrative law, are very broad terms, used to cover one general present-day aspect of the continuing socio-legal system which we have inherited and under which we are now living. I cannot follow the popular use of these words to convey condemnation of a supposedly new type of bureaucracy, a New Deal oddity invented in political desperation to gloss over governmental ineptitude by concentrating public attention on the evils of big business. Administrative action is not, as many critics would have it, a servant girl recently hired from the neighboring employment agency, of uncertain antecedents and doubtful utility in the household, to be praised or criticized, educated or restrained to the end that she may be made worth her wages, and finally to be discharged without a character if she does not live up to her references.

It is too little understood that administrative law, even though the development of its techniques may be but another phase of the servant problem, is no newcomer in our midst. Administrative law is an honorable and legitimate product of the permanent relationship between organized society and the individual, with an ancestry in the direct line going back many decades. We are all familiar with the process by which over centuries the demands of an expanding society induced the conscience of the chancellor to implement the rigid forms of the common law by the more flexible and humanistic procedures and doctrines of equity. By a process of development in many ways parallel, our modern administrative law is a product of the conflict between the conventions of judicial procedure and the needs of an ever-increasingly complex industrial society. I have no thought of tracing the history of this conflict - that is for the legal historians; but I do assert that a realistic view of the problems of administrative law today requires an understanding that those problems are not autochthonous nor even of recent birth. The conflict from which they arose has been going on for nearly a century, and almost every issue now discussed was raised long before 1938.

This point may be well illustrated by examining the course of affairs which led, in the heat and frayed emotions of the summer of 1914, to the creation of the Federal Trade Commission. On January 24, 1914, just after President Wilson had proposed his legislative program, there appeared in the columns of the New York Times this dispatch (page 11, column 1):

> "C. Stuart Patterson, banker and director of the Pennsylvania Railroad, and ex-attorney general William Hensel .... united tonight in condemning the Wilson anti-trust legislation in addresses before the Terrapin Club.

> "'A revolution is going on,' said Mr. Patterson, 'and it will go still further ... This vexatious interference with business is dangerous to the whole people. It affrights capital and halts investment; and in turn, it hurts labor. When this interfering legislation is enacted, the man of wealth is able to look after himself, but the man who depends upon his weekly wage is the one who suffers. So this becomes class legislation.
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> "'You cannot in justice create adversity for one class and prosperity for another. Every class must be treated alike.
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> "'...Sober sense will call a halt on the interference of little Politics with Big Business, and there will be a demand for legislation that will put all men on a common equality.
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> "'If it is proper to legislate good wages for the shop girl, it is also iniquitous to impose a starvation income upon railroads. And if it is wrong for business interests to form combinations to regulate prices and protect their business, then it is equally unlawful for labor to combine to dictate to capital.'"

Not unexpectedly the National Association of Clothiers, the Chamber of Commerce, the Merchants' Association of New York, and the editorial columns of the various newspapers joined the chorus of protest.

Criticism of the President's legislative program was finally centered against the proposal to entrust the Federal Trade Commission with functions of investigation and decision. The Commission, it was said, might be satisfactory if it did no more than make recommendations to Congress, if, like the old and useless Bureau of Corporations, its functions were limited to "appeals to reason and publicity". One bitter opponent of the Federal Trade Commission declared that the proposed administrative body's "efficiency is that of a monarchy...and has no place whatever in a democracy" (New York Times, 8-17-14; p. 12). And Representative Montague stated at the hearings before the Committee on Interstate and Foreign Commerce (p. 80):

> "Your bill proceeds on the theory...that the division of this government into three branches...should be practically abolished... and the rights of the individual should not be considered...Does not your bill...go back 400 or 500 years to the old days of tyranny?"

The parallel is obvious. The newspapers told of the bitter fight between Government and "big business". Business demanded a cessation of governmental interference that it might have a "breathing spell". President Wilson accused business of creating a "psychological depression" to defeat his legislative aims. But the Federal Trade Commission was created and there is little suggestion today that it be abolished.

In thus recalling historical parallels I am far from suggesting futility in the discussion of problems of administrative law. For even though no problem be a new one, there can be no doubt that the expansion of administrative functions in recent years has given new importance to the role of the administrator which demands the most careful reexamination even of old problems which appear to have been solved. We have passed many years from the days when the Interstate Commerce Commission, narrow as its powers were, stood

and practices of securities markets, and the management of gas and electric utility holding companies. Each of these statutes confers power upon the Commission to promulgate rules and regulations of general applicability and legal effect, prescribing in every instance appropriate standards for the guidance of the Commission. This rule making power in itself raises questions for discussion, among the more interesting of which is whether hearings, on notice to interested groups of the community, are necessary or appropriate to the exercise of this essentially legislative function. I propose, however, to limit my inquiry to the order making power. For under each of the statutes the Commission may, after notice and hearing, issue final orders, which adjudicate the rights and liabilities of individuals and companies with the force and effect of law, and which are reviewable by the appellate courts in much the same manner as final judgments of courts of first instance. It is the fairness of hearings in proceedings culminating in such quasi-judicial orders that I assume forms the principal subject matter of this discussion.

As I said, the work of the Securities and Exchange Commission involves a wide variety of types of proceedings culminating in final quasi-judicial orders. From a procedural point of view, however, there has been developed within the Commission a rather clear line of demarcation between two broad classes of proceedings: one, actions of a prosecutory nature instituted by the Commission itself with a view to the suspension of some privilege, either pending compliance with law or as a penalty for its infraction, and the other, actions begun by formal application of private parties to secure from the Commission the grant of some privilege or relief from some statutory prohibition. These classifications are not water-tight, but I propose to accept them for purposes of discussion. For purposes of convenient distinction I will call the former adversary proceedings, and the latter administrative proceedings.

Typical of adversary proceedings are stop order proceedings under the Securities Act to suspend the effectiveness of a registration statement, and proceedings under the Securities Exchange Act to suspend the registration of a security listed on a national securities exchange. Typical of administrative proceedings are applications under the Securities Exchange Act for the extension of unlisted trading privileges on national securities exchanges, and applications under the Public Utility Holding Company Act for exemption from the restrictions imposed by the statute upon the applicant as a holding company or as a subsidiary company, or for authority to issue or acquire securities or utility assets. It may be helpful to consider in detail one example of each class: the stop order proceeding under the Securities Act, and the application for authority to issue securities -- the declaration -- under the Public Utility Holding Company Act.

Briefly stated, the purpose of the Securities Act is to protect the investor against fraudulent or unethical practices in the sale of securities. This protection is in part achieved by means of injunctions and criminal sanctions against fraud in the sale of securities, through the mails or in interstate commerce. These sanctions are enforced only by the courts on application and proper showing by the Commission or, in the case of criminal proceedings, by the Attorney General. But the Act also contains prophylactic provisions -- provisions designed to protect the investing public from misrepresentation or concealment by requiring full disclosure of all fact bearing materially upon the value of securities sold through the mails or any other instrumentalities of interstate commerce. To achieve this end, Section 5(a) of the Act provides, with certain exceptions, that no security may be offered, sold, or delivered

after sale, through the mails or in interstate commerce, unless there is in effect as to such security a "registration statement" describing the security and the issuer in appropriate detail. Under Section 8(a) a registration statement, in the absence of amendment by the issuer or action by the Commission postponing the effective date, becomes effective automatically upon the twentieth day after its filing with the Commission.

Although the Commission has no authority under the Act to approve or disapprove of securities, or in any way to pass upon their merits, the role of the Commission in connection with registration statements is not a passive one. Unless the Commission were empowered to examine into the truth and completeness of a registration statement, and to require the correction of false or inadequate data, the purposes of the Act would fall far short of achievement. Section 8(d) of the Act therefore confers upon the Commission the duty of suspending the effectiveness of any registration statement which, after notice and hearing, is found to contain material misstatements or omissions. Specifically, that section provides as follows:

> If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after opportunity for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, issue a stop order suspending the effectiveness of the registration statement. When such statement has been amended in accordance with such stop order the Commission shall so declare and thereupon the stop order shall cease to be effective.

It will be seen that to some extent the statute itself prescribes procedural details to be followed in the institution and conduct of stop order proceedings. The statutory requirements, however, are of the broadest, and have necessarily, and I believe appropriately, been implemented by general Rules of Practice, applicable to all proceedings alike. These Rules of Practice embody, at least in part, the Commission's own self-imposed standards of judicial self-limitation.

The proceeding for a stop order is begun after examination of the registration statement by an examining group in the Registration Division of the Commission. If the Registration Division concludes that the statement is materially false or misleading, authorization for a hearing under Section 8(d) is sought from the Commission. Thereupon, if the Commission agrees that the registration statement does not appear to comply with the statutory standards of disclosure, confirmed telegraphic notice of opportunity for hearing within fifteen days is sent to the registrant together with a "Statement of Matters to be Considered" in the nature of a detailed bill of particulars. The Rules of Practice specifically provide that:

> "Such notice shall state the time and place of hearing and shall include a statement of the items in the registration statement by number or name which appear to be incomplete or inaccurate in any material respect, or to include any untrue statement of a material fact, or to omit a statement of any material fact required to be stated therein or necessary to make the statement therein not misleading. Such notice shall be given either by personal service or by confirmed telegraphic notice a reasonable time in advance of the hearing. The personal notice or the

confirmation of telegraphic notice shall be accompanied by a short and simple statement of the matters and items specified to be considered and determined." (Rule III(b)).

In the proceeding the Commission is represented by an attorney from the staff of the Registration Division, which in judicial analogy may be regarded as the plaintiff. The hearing is public in character and held before a trial examiner designated by the Commission; all testimony is stenographically reported and made part of the record; copies of the transcript are made available to all parties to the proceeding. Trial examiners as a matter of internal organization are not subordinated to any official other than the Commission itself, and the Registration Division has no voice in the selection of a trial examiner for any particular case. At the conclusion of the hearing each party (which term, as I am using it, includes the Registration Division) may then file with the trial examiner "a statement in writing in terse outline setting forth such party's request for specific findings, which may be accompanied by a brief in support thereof" (Rule IX(e), Rules of Practice). Both the requested findings and the supporting briefs are also served upon all parties. Ten days after the receipt of the transcript of testimony the trial examiner is required by the Commission's Rules of Practice to file with the Secretary of the Commission an advisory report containing his findings of fact, copies of which are immediately transmitted to each party. Within five days after receipt of the report exceptions may be taken to the findings proposed by the trial examiner, to his failure to make findings, or to the omission or exclusion of evidence. Briefs may be filed in support of such exceptions, and, upon written request of any party, oral argument may be had before the Commission. Thereafter the entire record, including a transcript of the oral argument before the Commission, if such argument was requested, is transmitted to the Commission's General Counsel, whose office is as a matter of internal organization entirely separate and distinct from the Registration Division, for consideration and the preparation of an appropriate opinion containing the necessary findings in support of a stop order, or dismissing the proceeding. The actual drafting is done by attorneys in the Opinion Section of the General Counsel's Office, under the guidance of an Assistant General Counsel and a Supervising Attorney. The draftsmen are under strict instructions not to confer with the trial examiner or with trial counsel in the Registration Division. In the initial stages the draftsmen, as like as not, have only the most general intimation of the Commission's tentative viewpoint or approach to the case. The first draft of the opinion is thus prepared on the basis of the record itself, without conference with any party to the proceeding, and without pressure or suggestion from any source outside of the Commission and the General Counsel's office. Copies of the draft opinion are circulated among the members of the Commission for individual consideration, and later the opinion is called for joint discussion among the draftsmen and the Commissioners in Commission meeting. By that time each Commissioner is familiar with the record, has read the proposed opinion, has reached some decision in his own mind, and is prepared to discuss the issues and offer suggestions as to the form and content of the opinion. I admit frankly that in most cases the opinion is not acceptable in its first draft and must be rewritten in accordance with the matured conclusions of the Commission. Occasionally a completely new opinion, or even alterative opinions, must be prepared. If a Commissioner dissents from the determination of the majority, he will himself ordinarily write a dissenting opinion containing the reasons for his dissent.