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SAN FRANCISCO, CALIFORNIA
JANUARY 26, 1979

"EMERGING ISSUES CONCERNING
ADMINISTRATIVE PROCEDURES"

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1.

I AM VERY PLEASED TO HAVE THIS OPPORTUNITY TO SPEAK TO A GROUP OF LAWYERS, BECAUSE SO MUCH OF MY LIFE HAS BEEN DEVOTED TO THE LAW. I AM LOOKING FORWARD TO THE QUESTIONS WHICH YOU MAY HAVE FOR ME. BUT FIRST I WANT TO RAISE WITH YOU CERTAIN QUESTIONS REGARDING THE DEVELOPMENT OF THE LAW BY INDEPENDENT REGULATORY AGENCIES. I THINK THESE QUESTIONS ARE SIGNIFICANT TO LAWYERS GENERALLY AND SECURITIES LAWYERS IN PARTICULAR. MUCH OF THE COUNTRY'S LAW TODAY IS MADE BY ADMINISTRATIVE AGENCIES, AND AS A LAWYER AND A COMMISSIONER I BELIEVE THAT PUBLIC RESPECT FOR ADMINISTRATIVE JUSTICE IS VERY IMPORTANT. HOWEVER, NEW ADMINISTRATIVE PROCEDURES WHICH ARE BEING EITHER EXTERNALLY IMPOSED ON AGENCIES OR INTERNALLY ADOPTED RAISE SERIOUS ISSUES ABOUT THE QUALITY OF ADMINISTRATIVE JUSTICE.

AS A COMMISSIONER OF THE SEC, I AM AN IMPORTANT PART OF THE ADMINISTRATIVE PROCESS OF AN INDEPENDENT FEDERAL REGULATORY AGENCY. I AM OFTEN REQUIRED TO MAKE DECISIONS WHICH DETERMINE NOT ONLY THE SUBSTANCE OF THE COMMISSION'S REGULATIONS, BUT ALSO THE PROCEDURES BY WHICH THOSE REGULATIONS ARE FORMULATED, IMPLEMENTED AND ENFORCED. PERHAPS IT IS MY BACKGROUND AS A LAWYER WHICH GIVES ME THE CONVICTION THAT FAIR PROCEDURES ARE CRITICAL BOTH TO DEMOCRATIC DECISION MAKING AND THE PROTECTION OF INDIVIDUAL LIBERTIES.

2.

FROM MY PARTICULAR PRESENT PERSPECTIVE I SEE TWO CONTRADICTIONARY TRENDS DEVELOPING IN THE ADMINISTRATIVE LAW PROCESS. BOTH TRENDS CAUSE ME CONCERN. FIRST, A VARIETY OF NEW PROCEDURES ARE BEING IMPOSED ON REGULATORS AND REGULATORY COMMISSIONS BY LEGISLATION AND COURT DECISIONS. SECOND, A GENERAL IMPATIENCE WITH THE COMPLEXITIES OF DECISION MAKING, COUPLED WITH A DISTRUST OF THE ADVERSARY SYSTEM, ARE LEADING TO THE ADOPTION OF REGULATORY PROCEDURES WHICH SHORT CIRCUIT TRADITIONAL LEGAL REQUIREMENTS.

THE NEW PROCEDURAL RESTRAINTS ON REGULATORS ARE A PRODUCT OF A WIDESPREAD PUBLIC DISTRUST OF GOVERNMENT AND PUBLIC OFFICIALS. AMONG THE PROCEDURES I HAVE IN MIND ARE THOSE IMPOSED BY THE GOVERNMENT IN SUNSHINE 1/ AND FREEDOM OF INFORMATION ACTS, 2/ WHICH ARE INTENDED TO EXPOSE THE WORKINGS OF GOVERNMENT TO PUBLIC VIEW; THE FINANCIAL DISCLOSURE AND CONFLICT OF INTEREST PROVISIONS OF THE ETHICS IN GOVERNMENT ACT 3/; THE RESTRICTIONS AGAINST EX PARTE COMMUNICATIONS DURING RULEMAKING INDICATED BY THE DECISION OF THE D.C. CIRCUIT COURT OF APPEALS IN THE HOME BOX OFFICE CASE; 4/ AND THE INHIBITIONS BECAUSE OF BIAS SUGGESTED BY THE DISQUALIFICATION OF MICHAEL PERTSCHUCK IN THE RECENT FTC PROCEEDING INVOLVING CHILDREN'S TELEVISION. 5/

1/ 5 U.S.C. SECTION 552B.

2/ 5 U.S.C. SECTION 552.

3/ PUBLIC LAW 95-521 (OCTOBER 26, 1978), 28 U.S.C.

SECTION 301 ET SEQ.

4/ 567 F.2D 9 (D.C. CIR. 1977)

5/ CIV. ACTION No. 78-1421 (D.D.C. NOVEMBER 3, 1978).

3.

THE PROCEDURAL LIMITATIONS ON GOVERNMENT OFFICIALS CONTAINED IN ALL OF THE FOREGOING LAW ARE BASED ON SOUND PUBLIC POLICIES WITH WHICH IT IS HARD TO QUARREL. OF COURSE, THE PUBLIC HAS A RIGHT TO KNOW WHAT ITS GOVERNMENT IS DOING. AND EVERYONE FAVORS PUBLIC OFFICIALS WHO ARE ETHICAL AND OPEN-MINDED AND MAKE DECISIONS BASED ON A PUBLIC RECORD. BUT JUST AS THERE ARE MANY DIRECT AND INDIRECT COSTS OF GOVERNMENT REGULATION OF BUSINESS, THERE ARE MANY COSTLY BURDENS WHICH ACCOMPANY THE BENEFITS OF REGULATION OF THE REGULATORS.

THE COUNTRY'S RESPONSE TO OVERREGULATION SEEMS TO BE TO SHACKLE THE GOVERNMENT WITH THE SAME KIND OF REGULATORY APPARATUS WHICH HAS BEEN IMPOSED UPON THE BUSINESS COMMUNITY. WHILE THERE MAY BE A KIND OF ROUGH JUSTICE IN THIS DEVELOPMENT, IT MAY WELL LEAD TO WORSE INSTEAD OF BETTER GOVERNMENT.

LET ME GIVE YOU SOME OF THE ADVERSE IMPACTS ON THE SEC OF THE SUNSHINE, FREEDOM OF INFORMATION AND ETHICS ACTS, AND THE HOME BOX OFFICE AND PERTSCHUCK OPINIONS.

CONGRESS INTENDED THE SUNSHINE ACT TO GIVE THE PUBLIC ACCESS TO THE DECISION MAKING PROCESS OF THE FEDERAL GOVERNMENT. THE ACT ENDEAVORS TO ACCOMPLISH THIS PURPOSE BY DIRECTING THAT EVERY PORTION OF EVERY MEETING OF AN AGENCY SHALL BE OPEN TO PUBLIC OBSERVATION, UNLESS AN EXEMPTION EXISTS FOR CLOSING THE MEETING. FOR OBVIOUS AND SOUND POLICY REASONS, ONE EXEMPTION IS PROVIDED FOR THE CLOSING OF MEETINGS BY THE SEC WHERE RECOMMENDATIONS FOR

ENFORCEMENT ACTION ARE DISCUSSED. ON THE OTHER HAND, MEETINGS WHERE RULEMAKING PROPOSALS ARE DISCUSSED ARE GENERALLY OPEN.

SINCE THE COMMISSION HAS DELIBERATED MANY RULEMAKING AND MANY ENFORCEMENT MATTERS SINCE I BECAME A COMMISSIONER, I HAVE HAD CONSIDERABLE FIRST HAND EXPERIENCE OBSERVING THE DIFFERENCES BETWEEN OPEN AND CLOSED MEETINGS. IN MY OPINION EACH HAS ITS ADVANTAGES AND DISADVANTAGES.

THE CLOSED MEETINGS, AS MIGHT BE EXPECTED, ARE MORE INFORMAL AND THERE IS FREER AND LESS INHIBITED DEBATE BETWEEN THE STAFF AND THE COMMISSION AND AMONG THE COMMISSIONERS. ALTHOUGH SHARP DIFFERENCES OF VIEW ARE EXPRESSED, OFTEN HEATEDLY, THE ATMOSPHERE IS NEVERTHELESS MORE COLLEGIAL THAN AT THE OPEN MEETINGS. ON THE OTHER HAND, THE GREATER FORMALITY OF OPEN MEETINGS MEANS THAT BOTH THE COMMISSIONERS AND THE STAFF ARE FREQUENTLY BETTER PREPARED, AND THE MEETINGS ARE RELATIVELY SHORTER IN RELATION TO THE AMOUNT OF BUSINESS CONDUCTED.

WHETHER THE MEETINGS ARE OPEN OR CLOSED, COMPLIANCE BY THE SEC WITH THE NOTICE PROVISIONS OF THE SUNSHINE ACT IS EXPENSIVE AND TIME CONSUMING. FURTHER, THE CALENDAR PROCEDURES WHICH THE SUNSHINE ACT HAS IMPOSED UPON THE COMMISSION EXTENDS THE TIME BETWEEN THE FORMULATION OF A STAFF RECOMMENDATION AND ITS CONSIDERATION BY THE COMMISSION. IN ADDITION, A CHILL HAS BEEN PUT ON INFORMAL DISCUSSION AMONG COMMISSIONERS ABOUT BUSINESS MATTERS. THUS, THE EFFICIENCY OF THE COMMISSION HAS BEEN DECREASED.

I HAVE DESCRIBED THESE INCIDENTAL EFFECTS OF THE SUNSHINE ACT ONLY BECAUSE THEY ARE INCIDENTAL. THEY WERE NEITHER CONTEMPLATED NOR INTENDED BY THE LEGISLATION. THEY ARE THE COSTS AND BURDENS OF A REGULATORY STATUTE. MY PERSONAL VIEW IS THAT OPEN MEETINGS DO MAKE THE GOVERNMENT MORE ACCESSIBLE AND MORE ACCOUNTABLE TO THE PUBLIC AND THEREFORE THE BENEFITS TO THE PUBLIC OF THE SUNSHINE ACT OUTWEIGH THE COSTS. BUT BOTH THE COSTS AND BENEFITS ARE VERY DIFFICULT TO MEASURE, BECAUSE THEY HAVE SOCIAL AND POLITICAL AS WELL AS ECONOMIC COMPONENTS. HOWEVER, THE COSTS, AS WELL AS THE BENEFITS, SHOULD BE UNDERSTOOD AND APPRECIATED. ALTHOUGH IT IS IMPORTANT FOR THE PUBLIC TO UNDERSTAND THE WORKINGS OF THE GOVERNMENT, IT IS ALSO IMPORTANT FOR THE GOVERNMENT TO WORK EFFICIENTLY AND WELL.

THE FREEDOM OF INFORMATION ACT WAS PASSED FOR A LAUDATORY PURPOSE SIMILAR TO THAT OF THE SUNSHINE ACT --TO MAKE INFORMATION ABOUT GOVERNMENT AVAILABLE TO THE PUBLIC. THE DRAFTERS OF THIS STATUTE RECOGNIZED, HOWEVER, IMPORTANT RIGHTS OF INDIVIDUAL PRIVACY, AND THE NECESSITY TO PROTECT CERTAIN FILES WHERE CONFIDENTIALITY IS IMPORTANT FOR THE PROPER FUNCTIONING OF THE GOVERNMENT.

IT SHOULD BE NOTED THAT CONGRESS NOT ONLY BALANCED THE PUBLIC'S GENERAL RIGHT TO KNOW AGAINST AN INDIVIDUAL'S RIGHT TO PRIVACY IN THE FREEDOM OF INFORMATION ACT, BUT ALSO PROTECTED PRIVACY IN THE PRIVACY ACT 6/ WHICH PREVENTS THE

6/ 5 U.S.C. SECTION 522A.

6.

GOVERNMENT FROM PUBLICLY RELEASING CERTAIN FILES. THESE STATUTES ARE TO A CERTAIN EXTENT CONTRADICTORY. FURTHER, THE AVAILABILITY OF INFORMATION IN THE GOVERNMENT'S FILES IS FREQUENTLY UTILIZED FOR PURPOSES NOT INTENDED BY THE STATUTE, ALTHOUGH NOT NECESSARILY PROHIBITED. FOR EXAMPLE, THE FREEDOM OF INFORMATION ACT IS USED AS A DISCOVERY DEVICE IN LITIGATION AND TO OBTAIN BUSINESS INFORMATION ABOUT COMPETITORS. THE RESULT HAS BEEN EXTENSIVE LITIGATION.

AN UNFORTUNATE EFFECT ON THE SEC OF THE FREEDOM OF INFORMATION ACT IS AN INORDINATE CONSUMPTION OF STAFF AND COMMISSION TIME. IN THE COMMISSION'S FIRST FISCAL QUARTER FOR THE YEAR COMMENCING OCTOBER 1, 1978, IN EXCESS OF 7,000 HOURS OF STAFF TIME - THE EQUIVALENT OF 14 PERSONS WORKING FULL TIME - WAS DEVOTED TO PROCESSING FOIA REQUESTS. NEARLY 1,000 HOURS OF THIS TIME WAS SPENT BY STAFF MEMBERS IN THE OFFICE OF THE GENERAL COUNSEL, AND MUCH OF THE TIME OVERALL WAS ATTORNEYS TIME - WHICH AS YOU AND YOUR CLIENTS KNOW IS EXPENSIVE.

THE ETHICS IN GOVERNMENT ACT WHICH WAS PASSED IN THIS PAST SESSION OF CONGRESS REQUIRES COMMISSIONERS AND SENIOR STAFF OFFICIALS PUBLICLY TO DISCLOSE THEIR FINANCIAL AFFAIRS AND IMPOSES STRINGENT POST GOVERNMENT EMPLOYMENT RESTRICTIONS ON COMMISSIONERS AND THE HIGHEST LEVEL POLICY MAKING STAFF OFFICIALS. PARTICULARLY ONEROUS IS A BLANKET PROHIBITION UPON FORMER OFFICIALS FROM APPEARING OR REPRESENTING CLIENTS BEFORE THE COMMISSION FOR ONE YEAR.

7.

THE COMMISSION VIGOROUSLY BUT UNSUCCESSFULLY OPPOSED THIS LEGISLATION. I AM PERSONALLY VERY CONCERNED THAT IT WILL PRECIPITATE MANY HIGH LEVEL STAFF DEPARTURES BEFORE IT BECOMES FULLY EFFECTIVE ON JULY 1, 1979. FURTHER, I BELIEVE THAT OVER TIME THIS LEGISLATION WILL ADVERSELY CHANGE THE COMPOSITION OF THE COMMISSION'S STAFF. ALTHOUGH THE ACT WAS INTENDED TO SAFEGUARD AGAINST CONFLICT OF INTEREST AND ABUSES OF PUBLIC TRUST BY GOVERNMENT OFFICIALS, I BELIEVE THAT IT IS UNLIKELY TO ACCOMPLISH THIS PURPOSE AND IS LIKELY TO RESULT IN A PERMANENT CIVIL SERVICE COMPARABLE TO THAT OF CERTAIN FOREIGN COUNTRIES. TO MY MIND, SUCH A CLASS OF GOVERNMENT EMPLOYEES IS INCOMPATIBLE WITH PARTICIPATORY DEMOCRACY AND IS LIKELY TO LEAD TO A LESS COMPETENT BUREAUCRACY THAN PRESENTLY EXISTS IN GOVERNMENT.

DESPITE THE ADVERSE SIDE EFFECTS OF THE LEGISLATION WHICH ATTEMPTS TO REGULATE THE REGULATORY AGENCIES, SUCH LEGISLATION SEEMS TO HAVE INCREASING APPEAL. SUNSET LEGISLATION WAS PASSED LAST YEAR BY THE SENATE. // TWO KEY SENATORS ON THE SENATE GOVERNMENTAL AFFAIRS COMMITTEE HAVE RECOMMENDED THE INTRODUCTION OF LEGISLATION WHICH WOULD REQUIRE AGENCIES TO ASSESS THE COSTS OF ANY NEW REGULATION AND ISSUE AN ECONOMIC IMPACT STATEMENT BEFORE PROMULGATING NEW RULES. 8/ I BELIEVE THIS TYPE OF LEGISLATION IS AN

// S.2 PASSED ON OCTOBER 11, 1978.
8/ WALL ST. JOURNAL, JANUARY 12, 1979, P. 12.

8.

INDICATION OF WIDESPREAD CITIZEN DISAFFECTION WITH GOVERNMENT AND CONGRESSIONAL FRUSTRATION IN ATTEMPTING TO EXERCISE OVERSIGHT OF THE INDEPENDENT REGULATORY AGENCIES. HOWEVER, SUCH LAWS DO NOT ATTACK THE ROOT CAUSES OF OVERREGULATION OR INAPPROPRIATE REGULATION, BUT RATHER ADD ANOTHER LAYER OF REGULATION ON TOP OF AN ALREADY OVERLOADED REGULATORY APPARATUS.

THE COURTS ALSO SEEM TO BE SUSPICIOUS OF REGULATORS AND READY TO VOICE SUCH SUSPICIONS BY ARTICULATING ADDITIONAL REGULATORY PROCEDURES. IN HOME BOX OFFICE V. FCC ^{9/} THE D.C. CIRCUIT COURT OVERTURNED CERTAIN CABLE TV PROGRAMMING RULES ADOPTED BY THE FEDERAL COMMUNICATIONS COMMISSION, IN PART BECAUSE OF EX PARTE CONTACTS BY INTERESTED PERSONS WITH FCC COMMISSIONERS AND EMPLOYEES BEFORE AND BETWEEN THE TIME THE COMMENT PERIOD CLOSED AND THE TIME WHEN THE RULES WERE ADOPTED. THE COURT WAS TROUBLED ABOUT THE APPARENT UNFAIRNESS OF THE PROCEEDING AND HELD THESE CONTACTS WERE IMPROPER BECAUSE SUCH CONDUCT PREVENTED PUBLIC SCRUTINY OF THE EX PARTE COMMENTS AND PRECLUDED AN ADEQUATE RECORD FOR COURT REVIEW. ^{10/}

9/ NOTE 4 SUPRA.

10/ HOWEVER, IT SHOULD BE NOTED THAT IN A SUBSEQUENT CASE, ACTION FOR CHILDREN'S TELEVISION V. FCC, 564 F.2D 458 (D.C. CIR. 1977), ANOTHER PANEL OF THE D.C. CIRCUIT LIMITED THE RESTRICTION ON EX PARTE CONTACTS TO RULEMAKING PROCEEDINGS INVOLVING AN ALLOCATION OF A VALUABLE PRIVILEGE AMONG COMPETING USERS, SUCH AS THE LICENSING OF A T.V. STATION.

IN ASSOCIATION OF NATIONAL ADVERTISERS, INC. v. F.T.C., 11/ D.C. DISTRICT COURT JUDGE GESELL DISQUALIFIED THE CHAIRMAN OF THE FEDERAL TRADE COMMISSION FROM PARTICIPATING IN A MAJOR TRADE REGULATION RULEMAKING PROCEEDING ON THE GROUND THAT THE CHAIRMAN, IN HIS PUBLIC STATEMENTS AND CORRESPONDENCE HAD PREJUDGED FACTUAL ISSUES IN DISPUTE. I POINT OUT TO YOU THAT JUDGE GESELL PREDICATED HIS DECISION ON THE UNIQUE CHARACTERISTICS OF THIS RULEMAKING -- THAT THE PROCEDURES, INCLUDING A LIMITED RIGHT TO CROSS-EXAMINATION, WERE SIMILAR TO THOSE IN AN ON-THE-RECORD ADJUDICATION, AND THAT THE DISPUTED ISSUES INVOLVED WHAT HE CALLED ADJUDICATIVE ISSUES OF FACT. FURTHER, THE CASE IS NOW ON APPEAL. I HOPE THIS DECISION WILL NOT PRESAGE AN ERA OF REGULATORY COMMISSIONERS WHO ARE SO OPEN MINDED THAT THEIR HEADS ARE EMPTY OF EXPERTISE AND PHILOSOPHICAL CONVICTIONS.

INDEED, BOTH OF THESE COURT DECISIONS UNDERCUT AN IMPORTANT JUSTIFICATION FOR INDEPENDENT REGULATORY COMMISSIONS, NAMELY, AGENCY EXPERTISE. THEY PUT A CHILL ON THE WILLINGNESS AND ABILITY OF COMMISSIONERS TO DISCUSS PROPOSED AGENCY ACTION AND TO ASCERTAIN NECESSARY INFORMATION ABOUT THE POSSIBLE IMPACT OF REGULATORY INITIATIVES. THEY SEEM TO BE PREDICATED ON A BASIC MISTRUST OF THE REGULATORY RULEMAKING PROCESS, AND AN EFFORT TO MAKE THAT PROCESS MORE CREDIBLE BY REGULATING IT.

ALTHOUGH REGULATORY AGENCIES SEEM TO BE INCREASINGLY TIED UP BY NEW PROCEDURAL REQUIREMENTS AND COMPLEXITIES, ESPECIALLY IN THE RULEMAKING AREA, THERE SEEMS TO BE A COUNTERVAILING TREND TOWARD SHORT CIRCUITING SOME EXISTING

PROCEDURES. ON THIS SUBJECT I WILL SPEAK ONLY ABOUT WHAT IS HAPPENING AT THE SEC BECAUSE I AM NOT FAMILIAR ENOUGH WITH THE PROCEDURES OF OTHER AGENCIES TO COMMENT UPON THEM.

IN GENERAL THERE IS A TREND TOWARD THE NEGOTIATED SETTLEMENT OF BOTH INJUNCTIVE ACTIONS AND ADMINISTRATIVE PROCEEDINGS INSTITUTED BY THE COMMISSION. MANY OF THESE SETTLEMENTS FEATURE NOVEL FORMS OF RELIEF. THE REASONS FOR THIS TREND ARE COMPLEX, BUT I BELIEVE SOME OF THE IMPETUS IS A REACTION TO THE INCREASING DIFFICULTY, BY REGULATORS AND THE REGULATED, OF COPING WITH THE VOLUME OF CASES, PARTICULARLY WHEN THE COMMISSION IS HAMPERED BY THE NEW REGULATORY PROCEDURES APPLICABLE TO COMMISSION MEETINGS WHICH I HAVE JUST ENUMERATED. IT IS LIKELY THAT THE TREND TOWARD NEGOTIATED SETTLEMENTS WILL BE ACCELERATED BY THE CASE OF PARKLANE HOSIERY Co. v. SHORE ^{12/} RECENTLY DECIDED BY THE SUPREME COURT. THERE HAS ALWAYS BEEN A STRONG PUBLIC POLICY IN FAVOR OF THE SETTLEMENT OF LITIGATION, AND THE COMMISSION'S SETTLEMENTS CAN BE DEFENDED AS EFFICIENT AND CREATIVE.

NEVERTHELESS, THE DEVELOPMENT OF REGULATORY POLICY BY NEGOTIATED CASE BY CASE SETTLEMENTS HAS SOME INHERENT PROBLEMS. BOTH THE RULEMAKING AND THE ADJUDICATORY FUNCTIONS OF THE AGENCY TEND TO BECOME SUBSUMED BY ENFORCEMENT CASES.

^{12/} CIV. ACTION No. 77-1305 (JANUARY 9, 1979).

THIS HAS ADVERSE CONSEQUENCES IN TERMS OF THE ORDERLY DEVELOPMENT OF ADMINISTRATIVE LAW, BOTH ADJECTIVE AND PROCEDURAL.

WHEN THE VAST MAJORITY OF CASES ARE SETTLED, THE AGENCY QUICKLY BUILDS UP NUMEROUS UNCONTESTED PRECEDENTS JUSTIFYING A NOVEL THEORY OR PROCEDURE. ATTACKING THE LEGAL VALIDITY OF THAT NEW "LAW" (AND I PUT "LAW" IN QUOTES) THEN BECOMES VERY DIFFICULT, ALTHOUGH A PERSISTENT CITIZEN SOMETIMES CAN SUCCEED IN SO DOING, AS ILLUSTRATED BY THE SLOAN CASE. 13/

LET ME GIVE YOU A FEW EXAMPLES. WHEN OVER 400 COMPANIES HAVE CONFESSED TO MAKING QUESTIONABLE PAYMENTS AND AMENDED THEIR SEC FILINGS "VOLUNTARILY," IT IS DIFFICULT FOR A COMPANY TO LITIGATE THE MATERIALITY OF SUCH DISCLOSURES. THE EXTENT TO WHICH THE COMMISSION CAN OBTAIN RELIEF BEYOND THE ENTRY OF AN INJUNCTION IN CIVIL CASES IS BEING DECIDED MORE BY CONSENT SETTLEMENTS THAN COURT DECISIONS. THE VALIDITY OF RULE 2(E), ALTHOUGH HIGHLY QUESTIONABLE, IS DIFFICULT TO RAISE AFTER THE COMMISSION HAS BROUGHT OVER A HUNDRED CASES. THE APPROPRIATE LEGAL PARAMETERS OF PUBLICATION UNDER SECTION 21(A) OF THE EXCHANGE ACT, INCREASINGLY BEING UTILIZED TO SETTLE ENFORCEMENT ACTIONS, IS SIMILARLY TROUBLESOME.

13/ 436 U.S. 103 (1978).

LIKE PLEA BARGAINING, CIVIL CONSENT DECREES AVOID THE ADVERSARY PROCESS. THERE ARE FEWER CLEAR WINS OR LOSSES. MORE CASES ARE DISPOSED OF AND LESS MONEY IS SPENT IN THE DISPOSITION, BUT THE LAW BECOMES CHEAPENED IN THE PROCESS. IT IS EASY FOR ME TO UNDERSTAND WHY SETTLEMENTS ARE SO APPEALING TO BOTH PRIVATE AND GOVERNMENT ATTORNEYS, BUT I NEVERTHELESS FIND THE TREND TOWARD NEGOTIATED SETTLEMENTS DISTURBING.

I THINK MY DISCOMFORT IS AT LEAST THREE-FOLD. FIRST, I BELIEVE THAT THE ADVERSARY SYSTEM, FOR ALL ITS FAULTS, IS A PREFERRED WAY TO ASCERTAIN FACTS AND DEVELOP THE LAW. OUR SOCIETY MAY NO LONGER BE ABLE TO AFFORD THE LUXURY OF THE ADVERSARY SYSTEM IN CERTAIN AREAS -- FOR EXAMPLE AUTOMOBILE NEGLIGENCE CASES. NEVERTHELESS, A GOVERNMENT PROSECUTOR SHOULD BE TESTED AND HELD ACCOUNTABLE TO THE PUBLIC BY THE ADVERSARY SYSTEM ON A REGULAR BASIS.

SECOND, I AM DISTRESSED BY THE EXACERBATION OF THE FAILURE OF ADMINISTRATIVE AGENCIES TO BE SUBJECT TO THE DOCTRINE OF SEPARATION OF POWERS CAUSED BY THE FREQUENT USE OF CONSENT DECREES. WE ALL LEARNED IN LAW SCHOOL THAT THE COMBINATION OF PROSECUTORIAL, RULEMAKING AND ADJUDICATORY FUNCTIONS IN AN ADMINISTRATIVE AGENCY IS AN INHERENT PROBLEM. IN AMOS TREAT & Co. v. SEC 14/ THE D.C. CIRCUIT COURT

14/ 306 F.2D 260 (D.C. CIR. 1962).

ATTEMPTED TO IMPOSE AN ADMITTEDLY ATTENUATED SEPARATION OF FUNCTIONS ON ADMINISTRATIVE PROCEEDINGS. IN RESPONSE TO THIS DECISION, THE COMMISSION PRECLUDED THE PROSECUTORIAL STAFF FROM PARTICIPATING IN OPINION WRITING. THIS SEPARATION IS BY-PASSED HOWEVER IN SETTLED SEC ADJUDICATIONS. I WOULD NOTE THAT THE HOME BOX OFFICE AND PERTSCHUCK DISQUALIFICATION CASES I DESCRIBED BEFORE CAN ALSO BE CRITICIZED FOR THEIR CONFUSION OF ADJUDICATORY AND RULEMAKING PROCEEDINGS.

HOWEVER, WHEN REGULATORY AGENCIES CONFUSE INTERNAL DISTINCTIONS BETWEEN PROSECUTORIAL, RULEMAKING AND ADJUDICATORY PROCEEDINGS, THE COURTS ARE ENCOURAGED TO RESPOND BY TREATING ALL REGULATORY DECISION MAKING AS SUBJECT TO THE FORMALITIES OF FULL BLOWN ON-THE-RECORD HEARINGS.

ONE COMMENTATOR HAS THEORIZED THAT CONTINUING PUBLIC SKEPTICISM ABOUT THE ADMINISTRATIVE PROCESS IS DUE TO THE AMERICAN REVERENCE FOR THE DOCTRINE OF THE SEPARATION OF POWERS AND THE FAILURE OF THE ADMINISTRATIVE PROCESS TO OBEY THE DOCTRINE. ^{15/} I MUST CONFESS THAT THE POLITICAL EVENTS OF THE PAST DECADE HAVE GIVE ME A GREATER RESPECT FOR THE DOCTRINE OF SEPARATION OF POWERS THAN I HAD IN LAW SCHOOL. AND THAT RESPECT HAS MADE ME SENSITIVE TO THE NEED OF AGENCIES TO COMPENSATE BY INTERNAL PROCEDURES FOR THEIR COMBINATION OF POWERS.

^{15/} FREEDMAN, "CRISIS AND LEGITIMACY IN THE ADMINISTRATIVE PROCESS," 27 STANFORD L.REV. 1041 (1975).

I AM CONCERNED ABOUT WHETHER REGULATORY POLICY SHOULD BE MADE ON A CASE BY CASE BASIS, WHEN ALMOST ALL CASES ARE SETTLED. A PRIVATE LAWYER REPRESENTING A CLIENT NEGOTIATES A SETTLEMENT TO GIVE THE CLIENT THE GREATEST PROTECTION AGAINST LIABILITY FOR THE LEAST COST. THE GOVERNMENT ATTORNEY IS LIKEWISE PROPERLY CONCERNED WITH THE RESULT IN A PARTICULAR CASE. THE CAREFUL CONCERN FOR THE DEVELOPMENT OF DISCLOSURE OR OTHER REGULATORY POLICY, IN WHICH THE PUBLIC IS PERMITTED INPUT, WHICH OCCURS IN RULEMAKING OR EVEN MORE INFORMAL INTERPRETATIVE PROCEEDINGS, IS ABSENT.

FINALLY, I THINK WE HAVE TOO MUCH LAW IN THIS COUNTRY, INCLUDING TOO MUCH LITIGATION. IT IS A KIND OF SOCIAL POLLUTION, INFECTING THE BODY POLITIC. ALTHOUGH THE IMPETUS TOWARD THE SETTLEMENT OF CASES IS IN SOME WAYS AN INDICATION OF A GENERAL REJECTION OF LITIGATION, THE LAW IS NOT THEREBY VINDICATED. RATHER IT IS DIMINISHED. IF EVERYONE, INCLUDING THE POWERFUL AND THE RESPECTABLE, IS VIOLATING THE LAW, BUT DOES NOT SUFFER SERIOUS CONSEQUENCES AS A RESULT, THE LAW CEASES TO HAVE STRONG BEHAVIORAL SUASION.

YOU MAY THINK I AM CONTRADICTING MYSELF NOW. IF I AM OPPOSED TO UNNECESSARY LITIGATION, HOW CAN I BE SO CONCERNED ABOUT THE SETTLEMENT OF LITIGATION? I ADMIT MY THINKING ON THIS SUBJECT IS BOTH TENTATIVE AND IN SOME WAYS AMBIVALENT. HOWEVER, I SUSPECT THAT THE EASY SETTLEMENT OF HARD CASES LEADS TO AN EVER EXPANDING INCREASE IN THE NUMBER OF

QUESTIONABLE REGULATORY PRECEDENTS. THIS CAN ONLY BREED PUBLIC CYNICISM ABOUT THE PROCESS OF GOVERNMENT.

YOU MAY THINK THIS IS A CURIOUS TIRADE ON MY PART. AFTER ALL, I AM ONE OF THE 5 COMMISSIONERS WHO AUTHORIZES ALL THOSE CASES AND ALL THOSE SETTLEMENTS. AND ALTHOUGH I DO ON OCCASION DISSENT ON PARTICULAR MATTERS, I MUST TAKE RESPONSIBILITY FOR THESE DEVELOPMENTS ALONG WITH THE REST OF THE COMMISSION, AND THE STAFF, AND FOR THAT MATTER THE PRIVATE BAR. UNFORTUNATELY, I PERCEIVE THE PROBLEMS OF REGULATION BY CONSENT DECREES MORE READILY THAN I PERCEIVE ALTERNATIVES OR SOLUTIONS.

THE PRESSURES ON A REGULATORY AGENCY HAVE TRADITIONALLY BEEN IN THE DIRECTION OF BRINGING MORE AND MORE CASES. CONGRESS AND THE PUBLIC APPARENTLY BELIEVE THAT THE EFFECTIVENESS OF AN AGENCY IS DEMONSTRATED BY ITS FEARLESSNESS IN BRINGING CASES AGAINST THE INDUSTRY IT REGULATES. FURTHER, CONGRESS HAS GREATLY INCREASED THE SCOPE OF THE SEC'S POWER SO THAT THE COMMISSION NOW HAS CONSIDERABLE REGULATORY AUTHORITY OVER ALL PUBLIC COMPANIES. REGULATORS RARELY RECEIVE MEDALS FOR EXERCISING RESTRAINT AND REFUSING TO PROSECUTE CASES OR PROMULGATE NEW REGULATIONS. RATHER, THE PRESS AND THE PUBLIC TEND TO REVIEW SUCH RESTRAINT AS AN INDICATION THAT AN AGENCY HAS BECOME THE CAPTIVE OF A REGULATED INDUSTRY.

I AM SETTING FORTH THIS GENERAL PROBLEM THIS AFTERNOON FOR THIS PARTICULAR AUDIENCE BECAUSE I BELIEVE THE BAR IS AN EAGER PARTY TO THE SETTLEMENT PROCESS. I UNDERSTAND THAT PRIVATE AS WELL AS GOVERNMENT LAWYERS WHO SETTLE CASES BELIEVE THEY ARE DOING SO IN THE BEST INTERESTS OF THEIR CLIENTS. BUT I ALSO UNDERSTAND THAT SETTLING CASES IS MORE PROFITABLE FOR A PRACTITIONER THAN LITIGATING THEM. REALISTICALLY, LAWYERS BENEFIT FROM AN INCREASE IN THE AMOUNT AND COMPLEXITY OF OUR REGULATIONS, AND LITIGATION CONCERNING THEM. LAWYERS MUST THEREFORE ACKNOWLEDGE RESPONSIBILITY FOR THE OVER ABUNDANCE OF LAW TO WHICH ALL OF US ARE SUBJECT. I DO NOT BELIEVE THE PRIVILEGED AND PIVOTAL POSITION OF THE BAR WILL BE INDEFINITELY TOLERATED BY A PUBLIC WHICH IS DISTRUSTFUL OF BUSINESS AND GOVERNMENT AND WEARY OF PAYING THE COST OF REGULATION.

ANOTHER REASON I HAVE VOICED MY CONCERNS ABOUT THESE ISSUES IN ADMINISTRATIVE PROCEDURES TO A BAR ASSOCIATION AUDIENCE IS THAT TO THE EXTENT THE PROBLEMS OF OVERREGULATION HAVE EMERGED IN THE FORM OF NEW ADMINISTRATIVE PROCEDURES, THE BAR IS THE CONCERNED GROUP MOST CAPABLE OF DOING SOMETHING ABOUT THE PROBLEMS. COURT CASES LIKE HOME BOX OFFICE ARISE BECAUSE LAWYERS BRING THEM. REGULATION BY SETTLEMENT OCCURS BECAUSE LAWYERS MAKE SETTLEMENT OVERTURES. A PART OF OUR ADVERSARY PROCESS IS THE PURSUIT OF RESULT ORIENTED LEGAL PRACTISES FOR PARTICULAR CLIENTS.

YET, AS CITIZENS AND AS PROFESSIONALS WE OWE SOME ALLEGIANCE TO THE DEVELOPMENT OF THE LAW FOR THE PUBLIC GOOD. I WAS VERY HEARTENED TO LEARN RECENTLY THAT THE AMERICAN BAR ASSOCIATION'S SUBCOMMITTEE ON SEC PRACTICE AND ENFORCEMENT MATTERS WILL INITIATE A REVIEW OF THE COMMISSION'S RULES OF PRACTICE AND WAYS TO STRENGTHEN THE SAFEGUARDS ACCORDED INDIVIDUAL RESPONDENTS. THIS REVIEW WILL CONCERN THE EXTENT AND DEPTH OF COMMISSION SUPERVISION OF INVESTIGATIONS AND ENFORCEMENT MATTERS, AN EVALUATION OF THE INDEPENDENT STATUS OF LAW JUDGES AND THEIR CONTROL OF LITIGATION, THE ROLE OF COMMISSION MEMBERS AND OPINIONS AND REVIEW IN THE OPINION WRITING PROCESS, AND DISCIPLINARY MATTERS. THIS IS AN AMBITIOUS PROJECT IN WHICH THE SEC'S GENERAL COUNSEL PLANS TO PARTICIPATE. THIS IS THE KIND OF PROBLEM AREA WHERE A COOPERATIVE REVIEW BY THE COMMISSION'S STAFF AND THE PRIVATE BAR COULD BE VERY USEFUL. I HOPE THAT SOME OF THE ISSUES WHICH I HAVE TOUCHED UPON TODAY WILL BE REFLECTED UPON ALSO. THERE IS A GREAT NEED FOR CLOSER SCRUTINY OF ADMINISTRATIVE PROCEDURES BY GOVERNMENT AND PRIVATE ATTORNEYS, WITH THE TWO FOLD OBJECTIVE OF AFFORDING GREATER PROTECTION FOR INDIVIDUALS FROM POTENTIAL GOVERNMENT ABUSE AND ALSO AFFORDING THE GOVERNMENT VEHICLES FOR CONDUCTING ITS BUSINESS EXPEDITIOUSLY AND EFFECTIVELY.