

ADDRESS
of
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Chairmen of the Investment Bankers
Regional Code Committees

Investment Bankers Code Committee
1010 Vermont Avenue • Washington, D. C.

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GENTLEMEN:

I think anything in the nature of a formal speech would be rather inappropriate, because this gathering springs from a common purpose. It is very easy to find the single, simple common denominator. The recent oil case proves, it seems to me, your complete courage in coming down here in the face of the seemingly admitted fact that the New Deal has passed its flood tide of that uncritical devotion which characterized its inception. I think it is fortunate that a statute which many of us are interested in should come before the Court for decision very early or very late. When a statute is immediately reviewed by the Supreme Court, or say shortly after its passage, the same forces which begot the legislation affect the Court. Though it is inelegantly phrased, there is much truth from constitutional history in the statement that the Supreme Court follows the election returns; and if Court review comes quite late, then a given statute has a fair, a very good, chance of being sustained constitutionally because if it has worked it will be constitutional. If it has not worked it will most likely have been repealed. When you move into the field of constitutional law you are normally dealing with vague generalities. There is no such thing as the logic of the Constitution; it is a combination of statesmanship, or lack of it, of a little history and a lot of experience, and the life of it is, as Mr. Justice Holmes says, administration. So that even if the New Deal should be found for some reason alien to our constitutional history, I make the point here most emphatically that your life should still go on because you have come into being through forces which represent idealism. I am not deceiving myself about the limitations on that principle. The I. B. C. and the S. E. C. are products of an experience; they represent the translated wishes of people who have some feeling that the abuses of a system can be corrected by the intelligent use of political power. Next June if Congress should say "nay" or if before that the Supreme Court should, place in terms of the commerce clause, a delegation of powers, or other legal dogmas an insuperable hurdle to the act under which you operate, —I think there is every reason to hope that you will continue as an organization: one that has possibly no legal status but one nevertheless that represents all that made the medieval Guilds magnificent and one which shall be the protectors of professional and business idealism.

I feel the logic of your existence very strongly. I have a regret that the National Recovery Act was not drawn on a little different basis. I think all the critics would be answered had we just permitted associations like your Code Authority, to organize without requiring membership, without making it compulsory, but seemingly creating a governmental administrative board to whom your Code Authority could go in

case you found some of your conferees acting unfairly. In such a case the commission would apply well accepted standards of fair competition, and without any Blue Eagle or other ballyhoo, it would secure a court order enjoining that kind of unfair business. In such a case one would conform strictly to the traditions of our law and at the same time we would have permitted this self-government which after all is the ultimate aim of all of us who are here.

But unfortunately I think most of the New Deal legislation is going to be viewed by the Court, so to speak, in the middle, and that doesn't augur very well for the constitutional validity in the books. However, on that score I think that whatever happens to what critics may choose to call alphabetical monstrosities, I am passionately convinced that the S. E. C. will live and will have a permanent and I hope a very salutary effect on the business practices of generations to come. I have no doubt but that twenty-five years from today the average law school will have a course devoted exclusively to the administrative legal work of the Securities and Exchange Commission. I have no doubt that the Commission will have achieved a place in the public law of this country which will make the protests of the critics before the Senate committee rather humorous reading.

Speaking of the purely technical side for a moment, Congress, if you recall the history, was confronted with the problem of regulating exchanges and at the same time regulating the other important form of the security business, over the counter. It was wisely thought by the committee that to make the listing requirements strict and to leave the over-the-counter market unsupervised would place great temptation in the minds of the large corporations; so that they would be more or less lured into the over-the-counter market and the organized exchanges would as a practical matter pass out of existence. That was the great fear. But when they came to phrasing the regulations of over-the-counter dealings they began to appreciate how tremendous the problem was, how near a seamless web they sought to tear, and Section 15 came into being representing compromises on many fronts. I think the real difficulties were left to the S. E. C. whose opportunities for study and practical experience were apparent. We have a great worry because we realize all too keenly that we might easily skate on rather thin constitutional ice. The fact of interstate commerce must be found in all our regulations. Nevertheless we are required (and we are very hopeful about it) to take steps to see that the sanction of the law, to some extent at least, is applied to the over-the-counter market. Here is where we need you, and I might add here is where you need us, and I say that advisedly, in terms of cold cash if you will, because no other agency can so quickly and so effectively restore the confidence of the buying public as the Securities and Exchange Commission.

One of the important legal difficulties is found in the definition under your Code of 'investment banker.' I don't think it at all follows that every investment banker as defined by your Code is subject to regulation under Section 15. You will recall that in Section 15 regulation is limited to 'brokers and dealers who make a market', 'making or creating a market for both the purchase and sale of any security', 'brokers and dealers enabling another to make or create such a market, and brokers

and dealers using any facility of such a market'. Now whether or not investment bankers necessarily fall within one of those classifications is a fundamental question and one that has as yet not been solved.

The problem I mention is comparatively minor in the light of the broader aspects of the law. The regulation of those brokers and dealers whom we can regulate, seems to me, will be a very effective method of controlling what are regarded by all of us as the social evils in this form of enterprise. I think the Commission is prepared—and I don't think I am violating any requirements of good taste—to have some form of registration of dealers and brokers. Registration is a term that seemed to appeal to the Investment Bankers Committee when they first appeared before our Commission. I think it is a quarrel about a substance that is very shadowy; I think registration is a licensing system, and I think the requirements should and will be very simple, very easily passed by an applicant who has had experience; but licensing will give us an effective method of controlling the outlaw in your business. If after a hearing possibly with the aid of your Code Authority a man's registration or licensè is taken away, thereafter it is much easier to secure a prohibition against evil acts by that man. In such case the sole question to be reviewed by a court would be whether or not he had a license, not the elaborate problem of transactions in interstate commerce and the difficult question whether or not he disclosed or failed to disclose essential facts which were necessary to make his other statements not misleading. So the Commission unanimously endorses and feels the absolute essential nature of this requirement, to wit, that there be some form of registration. But you have no reason to fear that in this regulation there is going to be a policy of extermination or any such paternalism that will make you feel the brooding omnipresence of Washington. Far from it. I think the Commission very wisely is aware of the limitations of effective legal action. I think we all appreciate very strongly the terrible lesson of prohibition, that there are many things which the law cannot do. One of the things it can't do, it seems to me, is to police every security transaction in this country. Even if it were physically and financially possible to so police, the evils that would result, I think, would be far worse than the cure. Then indeed you would have bureaucracy and red tape and all the things that make us throw our hands up in horror at the great centralizing processes in our government that seem to be taking place.

That is where my phrase 'we need you' comes into play. We need you because between us we know the outlaws. I dare say that there isn't a single one of you who could not effectively, far more effectively than could a court of law, catalogue those who are and those who are not within the letter and spirit of the law that regulates your business practices. I think that imposes on you, if this community of interest is to be preserved, the obligation of letting us know where the outlaw is (that possibly would be enough), or some indication of the type of business, whether it be bucket shop or sell and switch or high pressure salesmanship. I think it is all to your self-interest. After all, the history of the great nineteen twenties and the problems that made necessary your Code is the history of the evils of competition. I understand and sympathize with men of honor who see their business taken away by some practice

that is just a little over the line. And so the line is moved and that practice becomes sanctified by common usage and gradually the standards are lowered. As a result you come to a point where a sudden shock like a depression plus a revival of spirit like the NRA brings you back into a sane light of common sense and wisdom.

On behalf of the Commission, particularly on behalf of the complaints section, I ask you to help us all you can. Our task of policing is impossible of execution without the assistance of your group, and I assume that there is every reason for your cooperating. I have had an examination of the law and there is no actual risk from your personal viewpoint in calling our attention to any violations of laws. The civil law of slander, of libel, of malicious prosecution, protects you in such case because you have an interest to serve, and in the absence of actual malice there is no risk of liability in any such proceeding.

In addition to that, our files on complaint letters are confidential. They are not to be made public records. I am sure that as a practical matter, we can work it out so that should a complaint be received, the source of the complaint will never be a matter of record; in fact it will find its grave in the silence of the S. E. C.'s files.

The difficulty in the enforcement section is so pronounced that I can't too strongly urge the need of your assistance. We have recently had some interesting experiences in our attempt to enforce the penal sections of the law through injunction. We are, as you know, permitted to appear in our own name in an equity suit in the Federal Court in order to secure an injunction against violations of law. Unfortunately, to the professional outlaw in the business, injunctions are worth about ten cents a dozen. The respondents just change their name and move to another locus. But the only limitation, apart from criminal prosecution under which they suffer, is that if they have a rug with initials in it, they are restricted in their choice of a name to a name that has the same initials. Otherwise, the expensive rug must be sacrificed.

Our main recourse must be in the publicity feature of our activities. When an injunction against Abracadabra Gold Mines sponsored by XYZ reaches the pages of the newspapers, that does have a very helpful effect for the untold thousands who are still on the sucker list and who might be lured into buying through the arts of these gentlemen who work over the telephone in the boiler shop.

We have recently received what appears to be a setback in a decision by Judge Chestnut in the United States Court at Baltimore. It was complicated by other factors so that we decided as a matter of wise judgment, a review by higher courts ought not to be sought. As the matter now stands we have been enjoined from using evidence on the theory that it was obtained in violation of the Fourth Amendment. The Commission is faced with a difficult problem in such cases because speed is essential in dealing with particular forms of financial racketeering. If you start to give operators all the niceties of constitutional protection, they will have a bonfire behind them, and the books—well, they are just there in the form of ashes. We are trying to combine a procedure reasonably swift and at the same time one which gives more than passing deference to the Fourth Amendment to the Constitution of the United States. I confess that although I taught in a law school and was on the bench in

Massachusetts for three years, I am tempted to be less of a constitutionalist than I was, because I realize the practical necessities of trying to have efficiency in the government in its attempt to control this great problem of interstate fraud.

Another technical matter that seems to me has some concern for you gentlemen is this. There has been an alarming tendency of late in the direction of private financing, which it seems to me would have serious implications for you gentlemen in the investment banking business. It has also great evils from the point of view of the average small investor; the investor who became an investor as the result of the tremendous drive during the Liberty Loan campaigns and who now sees the great companies, such as Standard Oil and Swift & Company, selling their bonds only to insurance companies and other institutions. The small fellow who has held a refunded obligation must pick a bond or a stock from a list of decidedly inferior types of securities. This development has been brought about largely, but not directly by the Securities Act. I use causation in a strictly philosophical sense—I may say occasioned by the Securities Act, but more properly this situation has been caused by the reaction of the large issuers to what they conceive to be the dangers of the Securities Act, dangers that I submit in all honesty are grossly exaggerated.

The Commission feels very keenly that this direction is unhealthy. Since the Federal Trade Commission days we have been stating a rule that an offering to not more than twenty-five persons is not a public offering. Looking back, we can say that this probably was unwise. First of all, it should be noted, it was not made as an interpretation of the Commission, it was an opinion of counsel, an opinion letter of Mr. Baldwin Bane originally, and later we took up the torch. The only effect of the opinion was to prevent a conviction for violation of the law criminally. These opinion letters, so far as I understand the laws of evidence, would not be admissible in any suit either as between the Commission and a particular defendant or in a civil suit seeking rescission or seeking damages under the act. But it did serve a practical function in that it assuaged the fears of directors who thought in terms of avoiding, not evading, the act.

A second danger was that a public offering is a rather new concept to our law and began with the adoption of the Securities Act. In England it is an old conception, a century old, and there, they have developed the thought, and I think quite accurately, that there may be a public offering to only one person. In the preliminary negotiations, in the preliminary conversations trying to find these twenty-five insurance companies which will take a large issue, I am quite sure that one could very easily find evidence from which a trier of facts would be warranted in saying this is a public offering. In such case all the safeguards of registration would be swept aside. Consequently, these so-called private offerings are very risky enterprises, because should the Court find that they were public offerings, then of course there has been a sale of a security without the use of a prospectus and if the mails or facilities of interstate commerce are used there would be rather severe sanctions in the way of liability, at least from a civil point of view. In a rising market of course there isn't much to fear at present, but should we have an

abrupt decline I think many lawyers in New York might have cause to regret the so-called clearance they gave their clients in these private offerings.

In order to make it more difficult for that type of financing to be followed, the Commission has labored very diligently for some months, with the aid of the most expert accounting and legal criticisms available, and has produced a form which has been widely acclaimed. The new form was unanimously agreed upon by the leading accountants and lawyers familiar with registration problems as carrying with it a minimum of liability and designed to furnish a form of questionnaire which could be answered expeditiously and with comparatively little expense. That has been the first act.

We have compromised in so far as we possibly could under the act to furnish the investor protection and at the same time avoid any undue burden on the issuer, the officers, the directors, or on the underwriter.

Now we propose to point out to people who seek to make private offerings the great dangers inherent in the very undertaking. We are suspicious that many of these so-called private offerings are accompanied by an understanding that if the X insurance company should decide that it would swap a large issue in its portfolio, the issuer thereupon will register under the act. The transaction between the issuer and the insurance company does not violate the law, although it may be a step which would make the insurance company, in case of distribution, an underwriter as the term is used in the Securities Act of 1933.

Those things we are doing with an eye to helping the orthodox method of financing in this country, with a view to giving once again the same old healthy direction to public participation. I expect from a management point of view this present process is rather discouraging. It will not take the insurance companies very long to learn the tricks of financial control, and I have a very strong feeling that a management would much prefer to have its securities widely held than to have concentration in the hands of an insurance company or a bank, with the consequent supervision that might be most cantankerous and more embarrassing.

That indicates, I think, the sympathetic attitude of the Commission.

In addition to that we have a division in the General Counsel's office which offers our best judgment to all who come and seek it. With Mr. Wilbur I have arranged to expedite the answers to any questions that may be sent in, in order that both acts in their relation to your business, may be explained. Fundamentally the process of administration down here is one of education. These two statutes brought into our law a very important new group of conceptions difficult to understand, difficult to translate into ordinary terms. It is our job to simplify where we can, so that the educational process of elevating corporate standards will go on to the end that the principle in business that right is might, will prevail.

I know the act represents the wishes of Congress; it is a congressional mandate that disclosure is required. To you gentlemen I submit, disclosure cannot be a process your association can obstruct. By your very title you are allies of the Commission. In this community undertaking,

I feel that the Commission has much to offer your group, and I am positive that your group has much to offer the Commission.

I will be very glad to answer any questions that any of you may present. (Applause.)

CHAIRMAN WILBUR: Before the question stage, I am going to ask Mr. Griswold, Chairman of the Code Committee, to make a few remarks.

MR. GRISWOLD: Judge Burns, it is neither my duty nor my habit, I think my friends will agree, to say flattering or too pleasant things; I think the man who receives a public compliment is not particularly pleased and the man who pays it feels a little cheap, but I cannot refrain from saying that I think that what we have heard is not only one of the best addresses that I have heard on this subject, but I think it is one of the best addresses that I have heard for many years on any subject. (Applause.)

I don't mean to infer from that that we can immediately agree with everything that you have said—we may differ. I speak not for those present, but only for myself. Yet I can say that you have thrown a clear, an interesting and convincing light on some of the questions that have been bothering me personally and I know have been bothering others.

There is one subject, if you will permit me to say so, on which I would like you to throw additional light. I happened to be reading, coming over from Baltimore, Sir William Osler's "A Way of Life". I commend it to all of you, particularly those who are getting, let me say, "older". He advises us to live in the day, to forget "dead yesterdays" and "unborn tomorrows", a philosophy that even if we agree with, we could not all live within. Even after rereading the book a half dozen times, I cannot adjust myself to the habit of forgetting the "unborn tomorrow".

To apply this statement to the subject under consideration, one of the possibilities that gives me great concern is the future of a licensing system. While such a system today may produce a control of the evils of our business in a manner which may set virtue on so high a plane that we, who would, could continue to live always on this higher plane—I might not even be fearful today of the future entrusted to a man who framed the licensing system when he has expounded it in the terms in which you have expounded it—the thing that I am most fearful of is that not only generations but administrations pass away and the men who frame and administer the laws pass away with them. The licensing system is fraught, not with the dangers of today, but possibly with the dangers of tomorrow. That which is intended to seek a control for the prevention and punishment of evils often extends with change of administration into control for less worthy motives and in new directions stimulated often by impulses, shall we say political, or shall we say even for purposes of political advertisement.

Government control of a business begins often with a good motive. A little later that control is exercised under the impulse of motives not quite so worthy. Therefore you will forgive me for turning away from today and looking into the future. I would like to ask you if you would

not with the same clarity of view and the same honesty of expression tell us how you feel about the future of a licensing system.

JUDGE BURNS: In the first place that is a fear that has characterized most American business from the inception of our nation. You recall it was stated when the Interstate Commerce Commission first came into effect, I think in 1887, that this would convert our system of railroads into streaks of rust; it was felt when the first banking legislation was promulgated that here we had what our forefathers fought against, the social state with the power to choke a business that essentially is competitive. I think that attitude has been more prevalent lately than ever; that there has been the fear that no matter how well disposed a present governmental body may be it will be succeeded by other gentlemen who may possess different methods, who may have different ends, who may be hostile to our system. We might theoretically get a man who will pretend in order to achieve political greatness and in his heart he might wish to scrap this great system. I think that is a real and not uncommon fear. On the other hand, it must be remembered that none of the fears were actually realized. Most countries on the Continent have had for hundreds of years a system of licensing which has given a professionalizing tendency to the business. I just read recently—Mr. Fayne called my attention to it—the new decrees that affect the securities business in Belgium. I know for a fact that in France and Italy the licensing system for brokers has proceeded for quite a long time. In fact, in France I understand you have to be licensed to be a broker but any one can be a banker.

That I mention merely to show that there is no necessary connection between the system of licensing and the evils in the business which are feared might result from political stupidity or chicanery.

I have a second and more practical answer, it seems to me, that the law can be so drafted that the scope of state control is exceedingly limited. By that I mean that, if you permit a system of licensing, you should have a provision whereby the license cannot be withdrawn except after notice and hearing and a review by a court of the administrative proceedings, in order that there may be insured fairness, that all the constitutional safeguards have been observed. I think that is a practical matter which can be worked out. I think I would urge as many safeguards as possible. While I don't go quite the same distance as many of you in fears about the unborn tomorrow, nevertheless I realize it is a fear that must not be ignored.

MR. GRISWOLD: But what of the future development from a simple licensing system into a conditional licensing system.

Let me illustrate—Under a treaty with Canada, wild-fowl regulations in the U. S. are entrusted to our Department of Agriculture and by that Department to the Biological Survey. They have had difficult problems—some handled wisely. But this year someone suggested a licensing system, granting permits to owners of property to feed or "bait" wild-fowl. It was stated by representatives of the Government that it was quite unnecessary to have a public hearing on the subject—the matter was a very simple one—the Department had in mind protection of wild-

fowl in certain mid-western states and thus no one else need fear a simple licensing system.

I should say by way of justification that a license to feed or "bait" raised some important questions in relation to land values and employment of labor. It affected large areas, in some instances practically conservation areas, shot over very little, with hundreds of thousands of wild-fowl fed each year at the owner's expense.

Without a hearing, the Department put into effect not a *simple* licensing system, but a *conditional* licensing system. The conditions were that those who accepted licenses were not only subject to regulation that did not apply to other sportsmen, but owners were required to sign an agreement in writing to obey every wild-fowl regulation of the Department at the end of an open season, and to send in a report under oath at the close of a season mentioning *every* duck (naming his or her species) killed at *every* blind (naming it), by *every* gunner (naming him or her) on *every* day of the season, and you could not get a license without the promise of such a colorful statement.

I consider this new idea a new venture in legislation. I commend it to States granting licenses to automobile owners. Before issuing licenses, require the licensee to promise to obey each and every traffic regulation and require him to send in a statement (supplied by the State in form for a daily report) declaring each and every day what traffic regulation the licensee was guilty of violating on that particular day.

Indeed the principle might be extended further and require the owner to state how many drinks he took every day, naming the hour and place, all of the answers to be under oath. All of this of course should be, as in the case of federal licensing cited above, accompanied by a substantial fine and a provision for penitentiary reflection over a period not to exceed six months.

I have given you perhaps what may seem to be a frivolous illustration. It at best illustrates how the minds of those entrusted with authority by the Government sometimes function. I should not be fearful of the kind of licensing of which you speak, nor from what I have heard to have it administered by yourself—it is not "today" that I fear, but the "un-born tomorrow".

JUDGE BURNS: I think the answer is you must have some degree of faith in government. After all, if we had that type of mentality on the Supreme Court I have no doubt that the process of social disintegration would be a speedy one. I think on the whole you get a much more honest, a much more detached, a much more efficient administration in certain departments of the Federal Government than you do in the state departments, it is less susceptible to political influence. All I say is that you have a problem which can't be translated into mathematical formulae, it is a question of the evils on the one hand and the risks of interference on the other. It is a compromise as to what you will give up of your own liberty in order to achieve a common good. If the thing doesn't work well, remember you always have the opportunity to change it.

MR. GRISWOLD: Do you think the government ever retreats from a position that it has taken?

MR. BURNS: There are two positions from which the government never retreats. One is taxes and the other is new departments. (Laughter.) They are sometimes killed in action but they never retreat. (Laughter.)

I believe that this Commission now (and I can't help but give it a little ballyhoo), which is wise in the practical way of life, is idealistic and has common sense, which is, after all, the best definition of wisdom. I think that they will so set their stamp on the regulations which they issue that it will be really a beacon light no matter who comes to succeed them. I really feel this deeply. I think large judicial experience has indicated that it takes centuries sometimes to overcome the good influence of a strong judge. I think we are quasi-judicial in our operations right now.

QUESTION FROM FLOOR: Judge Burns, I have been one of the severe critics of the Securities and Exchange Commission, having been through three registrations and I certainly want to add a word to what Mr. Griswold has said about your presentation of facts. The trouble with most of us who are actually going through these registrations is that we have some crusading youngsters, I think, rather than your own views put into practical application. The question I want to ask you, however, is this. In Ohio we have quite an active securities commission, we have examiners and attorneys and scouts throughout the state that are policing us all the time. I understand that the Securities Commission is going to have districts. I am thinking of what the investment banker in Ohio is going to be up against with both the federal and the state scouts scattered around. Is there going to be one effort to coordinate those or get rid of one or the other?

JUDGE BURNS: May I say first of all that Congress has seen to it recently that we won't have much of a squadron. We are setting up eight regional offices. The one that would cover Ohio would be located in Chicago. It is purposely made a very small organization; the average number of employees will be less than eight except in New York and Chicago. Chicago will have about twenty, I should think, New York about forty-five. These offices will have plenty to do other than scouting, because they will act as the focal point for Commission action in interpretative regulations and in court proceedings; the directors will also be instructed that their principal duty is one of coordination with the other agencies involved in the prevention of security frauds, that is with the local securities commission, Better Business Bureaus, district attorneys and the post office inspectors assigned to that district.

I can reassure you that there will be no danger of a horde of federal agents making life miserable for you with investigations that are really not worthwhile. As a matter of fact, there shall be, I am positive, no system whereby accountant investigators will go to each security house in the district. That is a fear that you can brush aside as completely unjustifiable. The practice of wholesale sleuthing will be non-existent. God and the Supreme Court alone know who are the brokers and dealers who make a market because that phrase is for our purposes conveniently vague. I think that is a phobia that you will look back upon and laugh at.

QUESTION FROM FLOOR: Last week I found the First National Bank of St. Louis very much up in the air because of a communication they had received from the S. E. C. in connection with the work of one of the Bondholders' Protective Committees, and the information requested is going to involve a perfectly tremendous amount of labor to answer. They were told they were to have the questionnaires back by the first of February, and I would say it probably is a physical impossibility to do it. In my own bank, for instance, it would require practically the attention of the entire department for an extensive period. Of course, I am only a layman and consequently carry the usual layman's erroneous ideas, but it has been my understanding that the operation of the Bondholders' Protective Committees in so far as they apply to municipal securities didn't have to register and I presumed didn't come under the jurisdiction of the S. E. C. There is every desire on the part of the First National Bank of St. Louis and the Boatmen's National Bank too, to do anything and everything that the S. E. C. wants them to do, but we are wondering what it is all about.

JUDGE BURNS: There were two questions involved in your presentation. The first is your query about the questionnaire, which is really a reasonable one, because you are right, municipals are excluded from the Securities Act of 1933. However, Section 19, in the Securities and Exchange Act of 1934, puts upon the Commission the duty of making an investigation of all protective committees and reporting to Congress. So this investigation is pursuant to a specific charge by Congress that we proceed to investigate the whole problem involved in reorganization. Congress required us to do it.

There is, however, a second problem, and that is you think the questionnaire is burdensome and likely to be expensive to answer, that particularly in the case of municipals the problems are quite different and the questionnaire ought not to be so inclusive. That seems to me to be a very reasonable point of view, and I would like to state that the questionnaire is from the protective committee investigation department of our Commission, presided over by Professor William Douglas of Yale, an extremely competent man, but a very fair man. I think this questionnaire was sent out in good faith because of a feeling that this was the kind of questionnaire that would best reach the answers to the problems that were bothering the Commission representatives. We have had numerous statements along the same general lines, that it is really quite burdensome. I would be glad to have in writing your objections. I think the Commission will consider together with Professor Douglas whether something couldn't be done to postpone the day of reply and also to permit such answers as the following: "We do not know this answer and do not now give it because the expense involved is quite disproportionate." I say that merely as a curbstone opinion but I will be glad to hear from you.

FROM FLOOR: The whole fraternity is up in the air on this. I had one case where it was figured it would take three months of a corps of lawyers just to answer the questions. In one case that I know of they are required to report on every transaction by each member of the com-

mittee, including their affiliates, which would probably make it almost impossible to do.

FROM FLOOR: The questionnaire states that any affiliated interest embraces any concern in which a committee member is a stockholder, which would make it quite burdensome on a committeeman who happened to own stock in a number of banks.

JUDGE BURNS: That questionnaire does not have the imprimatur of the Commission—not that I mean to imply that the Commission will disown it, but I do say that it has been just one of the departmental activities that the Commission is required to engage in, and I will be glad to hear from you on your reasonable objections to the method and any suggestions as to how it can be brought into conformity with practicality.

FROM FLOOR: We might at least file our returns with that sort of an answer.

JUDGE BURNS: I suggest that you write in asking if that answer may not be given.

FROM FLOOR: If we send the questionnaire back with those answers, if they want further answers they can shoot it back to us.

JUDGE BURNS: I think you might even try that.

FROM FLOOR: The date is February 1 and you can get an extension to February 15.

JUDGE BURNS: I prefer to have you write. Address a letter to me stating that there are limitations on the practical method of answering this, the time element involved, the expense, and also that you would like to know if there couldn't be some method of avoiding burdensome and expensive questions.

QUESTION FROM FLOOR: I was also going to ask about committees that have been dissolved, their reorganization completed, they have no assets, the committee members personally will not wish to incur any expense in preparing this information. What obligation is there upon them to go to the work of preparing all this?

JUDGE BURNS: Mr. Fayne calls my attention to the fact that you should keep in mind that this is merely for purposes of reporting to Congress and is not to be a basis of any regulation by the Commission.

QUESTION FROM FLOOR: In speaking of these committees now out of existence, would it not be sufficient to advise your Commission that the files were such-and-such a place and we will give you complete access to them, but why should somebody without compensation and no further interest in it go to the work and expense of preparing these lengthy replies?

JUDGE BURNS: I would write that last paragraph right in the letter.

QUESTION FROM FLOOR: I should like to ask a question with regard to bondholders' protective committees in industrial reorganization. I happen unfortunately to be on a couple of those that went through the 77-B section of the Bankruptcy Act and went into court with a reorganization plan. Does that come under the jurisdiction of the request for these questionnaires? There seems to be some doubt as to whether they are under the Securities Commission or not.

JUDGE BURNS: I really don't know. My impression is that the language of Congress was so broad as to bring 77-B proceedings within the purview of it. However, whether or not the protective committee department of the Securities and Exchange Commission has actually intended to have the questionnaire go to organizations under 77-B I don't know. I will be glad to let you know if you will call me late this afternoon.

FROM FLOOR: If you have your plan of reorganization all ready and are ready to go through with it and it is approved by a federal judge, then you don't come under the regulation, I take it, but if you simply form a committee and then do your reorganizing later you come under the Commission's order.

JUDGE BURNS: There are two problems, and I am afraid I assumed you had in mind the first, whereas I now believe you had in mind the second. I assumed that you were asking whether or not in this protective committee study the questionnaire to be sent out would apply to existing 77-B reorganization, but I now see that you meant to ask whether or not proceedings under Section 77-B require registration under the Securities Act of 1933. In other words, if a private group should get together and proceed in the federal court under the equity receivership practice and solicit deposit of bonds for C. D.'s, they would be issuing securities and would be required to file under the Commission's form they would be issuers of certificates of deposit. Where Congress has taken over the corporate reorganization by permitting the federal courts to supervise all steps in the reorganization, query whether impliedly or expressly it ousted the Securities and Exchange Commission from its jurisdiction over certain types of securities in that reorganization. We have written an opinion letter stating that any solicitation by any group in strictly 77-B proceedings which seeks to have the security holder sign what in substance is a power of attorney to have the committee represent him, if it is limited to the proceeding in Section 77-B is outside the Securities Act. If you will come to see me I will be glad to give you a copy of that opinion. It is an extremely difficult question of statutory construction because of the history of the passage of Section 77-B and the use by the court of the word "confirmed", making it appear that the exemption was not to apply until the court actually had confirmed the plan.

My feeling is that Congress has really attempted to control one particular situation, namely, the need of corporations taking quick, speedy, and inexpensive reorganization. I think that that expressly or impliedly meant that the Securities and Exchange Commission's jurisdiction should be considered as ancillary to the jurisdiction of the court, but that in so far as the jurisdiction of the 77-B proceedings were invoked, either by

the act of the corporation or by a creditor or by security holders, that from that time on the Securities and Exchange Commission provisions for registration did not apply to the solicitation of approvals of or acceptance to the plan.

FROM FLOOR: A good many people in the district I represent are worried concerning regulations for the over-the-counter market. The fear is based on the fact that the Commission has been regulating the exchanges and that their knowledge of that is quite great, but that they have no knowledge of the size of the over-the-counter market. I would like to go back to my constituency and say that the Commission is thoroughly familiar with the size and the ramifications of that market.

JUDGE BURNS: I think you can say that; at least the Commission is aware of the problems involved, and I think that awareness is at least 60 per cent of the problem.

QUESTION FROM FLOOR: Have they made any study of the size of it?

JUDGE BURNS: Yes, there has been a study. I can also add this to any message that you might take back, that the Commission is limited rather strictly by the commerce requirement clause; in regulating an exchange it is easy to say an exchange is itself a facility for interstate commerce, but in the over-the-counter market there is a serious difficulty in most cases as to whether or not you have sufficient evidence of interstate commerce, so there are legal limitations. Secondly, the Commission will not put out any regulations affecting the over-the-counter market until all interested parties have had an opportunity to examine and object. In all our proceedings we have tried as far as we could to follow the judicial process of giving notice and an opportunity to be heard and making our decision rest on the evidence that has been submitted.

CHAIRMAN WILBUR: Judge Burns, I want to assure you of our desire to cooperate in the fullest possible manner and our belief that we can do a job, and I further want to express our warm, and I emphasize the word "warm", appreciation of your coming here with all that you have to do. We thank you very much. (Applause.)