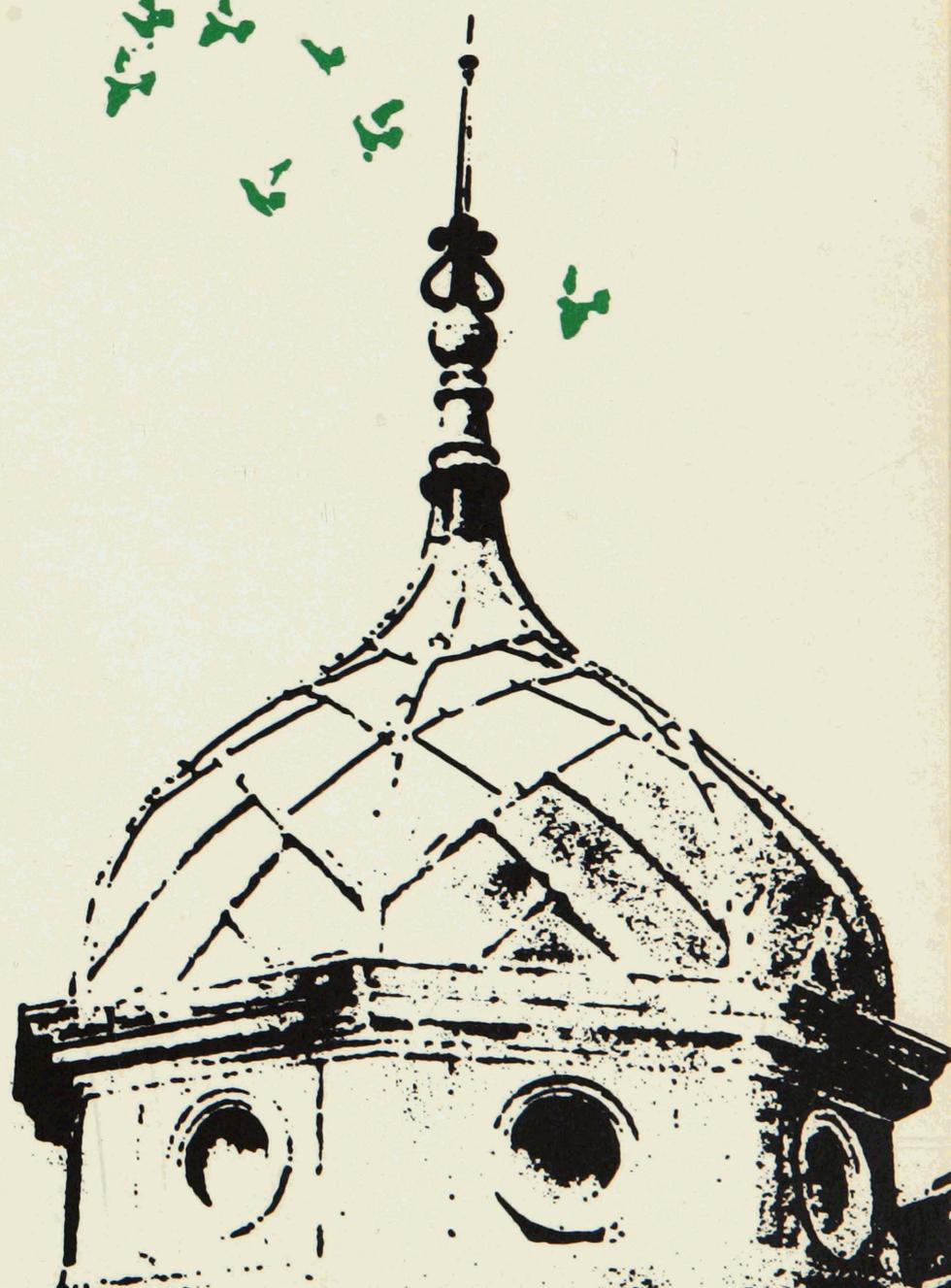


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**Prof. Conard Named
To AALS Presidency**

"We're pleased and proud to have you be president, Al." This remark by Prof. Paul G. Kauper summed up the Law School faculty's feelings about the recent designation of Prof. Alfred F. Conard to the presidency of the Association of American Law Schools.

Prof. Conard will have until next December to ready himself for his responsibilities, but he is already quite familiar with the functions of the Association. As a member of its executive committee in 1964-65, he played an active part in furthering its founding purpose of coordinating efforts to improve legal education and teaching methods. And he acted as chairman of the Association's Committee on Research in 1968-69.

In recent annual meetings of the faculties and deans of the 120 fully-accredited member law schools there has been an interest in expanding the role of the AALS in determining how the law must be developed to meet the needs of a changing society. The theme of the 1969 meeting in San Francisco, at which Conard was chosen, was "Social Research and the Law," and he hopes to encourage law schools to pursue empirical research on how laws actually work in controlling human behavior.

Conard believes the most immediate problem facing American law schools today is a "crisis of confidence." A "surge of distrust has led many law students to doubt the value of what they are asked to learn, and the validity of our measures of whether they are learning it," he commented. "This attitude poses a formidable obstacle to the processes of learning and teaching.

If the attitude of these students stays with them when they become tomorrow's lawyers and judges, it will greatly impair the political and financial support on which the viability of the modern law school depends. Consequently our foremost task is to retain or to regain—as the case may be—the confidence of our most immediate constituency. This certainly calls for a rigorous re-examination of the ends and means of legal education today."

Conard thinks a more fundamental problem of law schools today is related to his concern for the need for more scientific knowledge on how laws work. "We need to know more about the interaction between human behavior and the legal system," he said. "We have a formidable body of knowledge about prohibitions and penalties, for example, but we know very little about whether, when, and how much these legal commands deter criminal behavior. Society is in desperate need of new knowledge about such subjects and it is the clear responsibility of the law schools to institute research. In a society so complex—so highly complicated by human artifices—as today's, society cannot trust its fate to laws which are based only on the habits of past centuries or on the intuitions of political leaders."

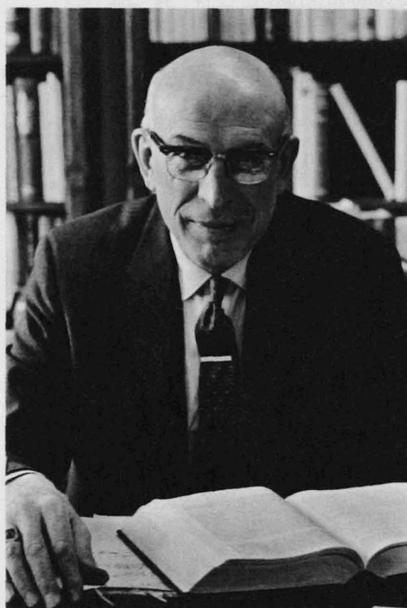
Two other U-M Law School professors have held the AALS presidency during their tenure in Ann Arbor, although two other former professors deserve mention. Henry M. Bates was AALS president in 1912-13. And Edson R. Sunderland served as the organization's head in 1930. Henry Wade Rogers, the Law School's first full-time law professor and dean from 1883 to 1890, became association president several years after leaving Michigan, and John P. Dawson, a former secretary-treasurer of the Association, would have ascended the official staircase had he not accepted a call to administer American economic aid to Greece in 1947.

Conard is a native of Grinnell, Iowa, and came to the Law School in 1954 from the University of Illinois Law Faculty. He earned his LL.B. at the University of Pennsylvania in 1936 and LL.M. and J.S.D. degrees from Columbia University in 1939 and 1942. During World War II he served as an attorney in the Office of Price Administration and the Office of Alien Property Custodian. His particular interests are business organization, comparative law, and the economic and quantitative analysis of legal processes. The literary products of these activities include a casebook on business organization, now undergoing its third revision,

the *American Journal of Comparative Law*, of which he is editor in chief, and his recent important book, *Automobile Accident Costs and Payments*.

In addition, Professor Conard is chief editor for the volume on business and private organization of the *International Encyclopedia of Comparative Law*, a council member of the American Bar Association's Section of Corporation, Banking, and Business Law, an executive committee member of the Council on Law-Related Studies, and a trustee of the Law and Society Association.

Prof. Paul Kauper Honored By Heidelberg University



Paul G. Kauper, who holds a distinguished professorship at the U-M Law School as the Henry M. Butzel professor of law, and who is an internationally recognized authority on constitutional law, has been awarded an honorary doctor of laws degree by the Heidelberg University in West Germany.

In conferring the degree of "Doctor iuris honoris causa," Heidelberg University took special note of Prof. Kauper's contributions as "a spiritual bridge across the Atlantic." The citation reads:

"In conferring this honor the University recognizes one of the most distinguished American constitutional lawyers. Professor Kauper has maintained close personal and scholarly ties with Heidelberg. He has repeatedly spent time here doing research, and at home he has given assistance in an outstanding manner to a number of

Heidelberg jurists who have visited the University of Michigan.

"Professor Kauper's lively promotion of scholarly contacts between Germany and the United States accords with his concept of constitutional law. He is a champion of comparative studies in the area of constitutional law and at the same time an outstanding student of European constitutional systems, whose lectures on American constitutional law are constantly enriched and illustrated with European legal ideas. His publications have been helpful in spreading the knowledge of German law in the United States as well as the knowledge of American law in Germany.

"The University of Heidelberg, by conferring the title of *Doctor iuris honoris causa* on Paul G. Kauper, expresses its recognition of a spiritual bridge across the Atlantic and at the same time honors a broadly cultivated and industrious teacher and scholar."

Prof. Kauper has long maintained close personal and scholarly ties with German and other European jurists. Among his more formal activities in Europe were his participation as an American representative at a colloquium in Warsaw on the subject of "The Concept of Legality in the Socialist State," a guest professorship on several occasions at the Max Plank Institute for Foreign Public Law and International Law at Heidelberg and his participation in a colloquium at Heidelberg on the subject of judicial review.

Numerous other honors have been conferred on Prof. Kauper over the years. Honorary degrees have been awarded him by American colleges and universities.

Honors from U-M have included the appointment to the Henry M. Butzel professorship in 1965 and the Distinguished Faculty Achievement award in 1959 for his "brilliance in scholarship, mastery of the art of teaching, and generosity in public service." In 1951 he was awarded the American Bar Association's Ross Essay Prize on the subject of "The First Ten Amendments." Recently he served as president of the National Order of the Coif.

He is author of *Cases and Material on Constitutional Liberty, Frontiers of Constitutional Liberty, Civil Liberties and the Constitution*, and *Religion and the Constitution*. In addition, he has written many, many law review articles.

Kauper has given much of his time in service to the city of Ann Arbor and religious groups. He served on the Ann Arbor Charter Revision Commission, on the City Planning Commis-

sion, and on an Ann Arbor Board of Education committee to study racial imbalance in the public schools. He was a member of the Board of College Education of the American Lutheran Church and the Commission on Church-State Relations, operating under the auspices of the Lutheran Church in America.

Four New Professors To Join Law School

The Law School has announced four new faculty appointments for the coming academic year. Three associate professors to join the Michigan faculty are: Vincent Blasi of Stanford University School of Law; Robert A. Burt of Chicago University Law School; and Harry P. Edwards of the law firm of Seyfarth, Shaw, Fairweather and Geraldson of Chicago. James A. Martin, currently a law clerk to Judge Harold Leventhal of the U.S. Court of Appeals for the District of Columbia Circuit, will become an assistant professor here. Edwards was graduated from the Michigan Law School in 1965, and Martin in 1969.

Automobile Product Liability Advocacy Institute Topic

Consumer advocate Ralph Nader and trial attorney Alfred S. Julien highlighted the 21st annual Advocacy Institute program in Hill Auditorium in March.

Nader was at home with this year's topic, "Automobile Product Liability." He reiterated arguments against built-in automobile dangers from his book, *Unsafe At Any Speed*, and pointed out new developments in design and failure law.

Julien's devastating cross-examination of an "accident reconstruction expert" spearheaded the Institute's trial demonstrations. The demonstrations—a key feature of each year's program—are a teaching technique originated at the Institute, in which noted attorneys examine and cross-examine witnesses under simulated courtroom conditions.

The Advocacy Institute is sponsored by the Institute of Continuing Legal Education (ICLE) at the University, a joint venture of the U-M Law School, the Wayne State University Law School, and the State Bar of Michigan.

U-M law professors Joseph R. Julin and Peter O. Steiner were among this year's Advocacy Institute faculty. Prof.

John W. Reed, ICLE director, served as moderator for all sessions.

Environmental Law Society Has "Active, Flexible" Program

Environmental law societies have been sprouting up at law schools all over the country since last fall but, judging from recent reports by representatives of more than two dozen schools, the University of Michigan Law School's Environmental Law Society has been one of the most active in the country.

Many of its efforts climaxed during the March 10-14 environmental teach-in sponsored in Ann Arbor by ENACT (ENvironmental ACTION for Survival), a broadly based group of community and university citizens concerned about our deteriorating surroundings. On the first day of the teach-in, over 600 people (including national press and television) heard a Society-sponsored symposium of three prominent environmental litigators and David Dominick, Commissioner of the Federal Water Pollution Control Administration. Moderated by Prof. Arthur R. Miller, DDT foe Victor Yannacone, Sierra Club legal action committee chairman Donald Harris, and Scenic Hudson Preservation Committee lawyer David Sive, along with Dominick, each defined his viewpoint and experience, then answered questions before conducting smaller group discussions.

Also during the March teach-in the Michigan Society published the first draft of an environmental law handbook, an effort coordinated with the assistance of Prof. William Pierce, which summarizes Michigan and federal air and water pollution laws as well as providing bibliographic references. Roger Conner, first-year law student who is one of the group's moving forces, presented testimony on the need to enhance citizen standing and eliminate the sovereign immunity doctrine to the U.S. House Subcommittee on Conservation and Natural Resources which visited Ann Arbor March 13 to hold hearings on student views of the environmental crisis.

Michigan's Environmental Law Society grew informally by sponsoring talks at the Law School on population growth, hard pesticides, and local examples of environmental damage, and by undertaking several special projects initiated by its members. Hunter Watson, a second-year student, arranged a meeting with Consumers Power Company at the Law School to learn about that company's program

of leasing land along the Au Sable River in Wexford County, Michigan. Jeff Raney, another law student, invited Don Nelson, a recent Law School graduate now with the National Air Pollution Control Administration, to give a seminar in air pollution law sponsored by the Department of Health, Education, and Welfare.

Several students are assisting attorneys in Muskegon and Midland, Michigan, with research and writing on pending cases of water pollution and alleged unconstitutional taking of riparian lands. Others have been active in providing information to legislators in Lansing about Michigan House Bill 3055, drafted by Prof. Joseph L. Sax of the Law School, to permit citizens to contribute to the development of an environmental common law in Michigan. (See related article in this issue.)

The students in the Environmental Law Society plan to maintain an equally active and flexible program next year.

New Book by Prof. Jackson On World Trade and GATT



"Anyone who reads GATT is likely to have his sanity impaired." So said an American Senator in 1951 before a Congressional hearing. It was in part to relieve this exasperated feeling about the General Agreement on Tariffs and Trade that Prof. John H. Jackson of the Law School wrote *World Trade and the Law of GATT*, recently published by Bobbs-Merrill. It is a legal analysis which Jackson hopes will assist the government official, private attorney, or legal scholar to learn about GATT or to determine precisely what legal commitments exist between certain member nations at any particular time.

GATT is an international treaty

among 76 nations designed to govern the permissible activities of the member governments in regulating international trade. It is the principal institution controlling international trade of non-Communist nations. It has been the sponsor of six major tariff and trade negotiating rounds since World War II (the most recent and most fruitful of which was the Kennedy Round from 1962-67), and has been instrumental in dismantling import quotas and in lowering tariffs on most manufactured products among Western industrial nations and Japan. As a result it is possible for the American consumer, for example, to purchase a much wider variety of foreign products at more reasonable prices—German wines or cameras, Japanese autos or motorcycles, British bicycles or scotch—than he would otherwise be able to do.

Although the United States was one of the 22 governments which signed as original "contracting parties" to GATT in 1947, GATT has never been fully accepted by the U.S. Congress. It is an "executive agreement" in American law, accepted by the President under authority of the Reciprocal Trade Agreements Acts enacted by Congress. Congress has traditionally manifested some hostility towards GATT, perhaps partly because Members of Congress have as constituents industries which seek protection from competing foreign products—sheet glass, steel, textiles, chemicals and dyes, pianos, and bicycles, for example. Nevertheless the United States has continued to participate in GATT, since it is a stabilizing force in world trade, and because it is considered an essential institution for assisting the U. S. in gaining entry into foreign markets for U.S. exports.

GATT began, Jackson writes, "as only one wheel of a larger machine, the ill-fated International Trade Organization, and, when that larger machine fell apart before leaving the assembly line, this wheel became a unicycle on which burdens of the larger machine were heaped. The unicycle, for reasons not quite fully understood, has continued to roll through two decades since it was put together. To be sure, it takes careful balance to keep it rolling and ad hoc repairs and tinkering have brought it to a point where the bailing wire and scrap metal which hold it together form an almost incomprehensible maze of machinery. Yet there is little doubt that the unicycle has contributed to man's purposes [of bringing] some order into the chaos of international trade."

Prof. Jackson's principal research technique in writing this book was direct observation and participation, as well as systematic analysis of hundreds of volumes of primary documents. He was assisted in this endeavor by an invitation of Mr. Eric Wyndham-White (Director General of GATT until 1968) to attend and observe GATT meetings, and act as consultant to the GATT secretariat on legal matters. Jackson spent eight months in residence in Geneva in this work during the Kennedy Round, and followed it with continued close observation of GATT work from the U.S. This also gave Prof. Jackson the opportunity to get to know delegates to GATT and benefit from their experience.

The documentation problem was more formidable. Fortunately a number of the documents were made available to the public (after a decision by the 76-nation governing body of GATT) so use of these documents was liberalized somewhat. But the overwhelming bulk of documents generated during the creation of GATT (about 27,000 pages resulting from four major conferences between 1946-48) and by GATT work during two decades (another like amount) challenged one of Jackson's principal research aims—to rely as much as possible on original resources rather than secondary work. The documents are virtually unindexed; there is no "West digest" system for GATT. To conquer this material Jackson employed several Law School students as research assistants and developed computer processing methods for indexing the documents.

These research methods, his own new analysis of the material he gathered, and his observation, participation, and discussions, have resulted in a comprehensive work of 800 pages of text, and another 150 pages of tightly organized appendices, to produce the most original and thorough work on this unique and important international institution yet published.

The treatise—a *legal* analysis, he stresses, not an economic one, (although "the *relationship* of . . . economic issues to the legal issues . . ." has been noted throughout)—is divided into four parts: 1) the "Constitutional Law" of GATT; 2) the substantive obligations of GATT; 3) the exceptions to these obligations; and 4) some over-all reflections and conclusions.

"The central feature of GATT," Jackson explains, "is the commitment to limit tariffs that a nation can apply to imports of specific goods, and the

generalization of these commitments to all GATT parties through the Most-Favored Nation clause." Thus each member nation promises not to impose higher customs duties than those listed in its schedule of maximum tariffs which it adopts (after negotiation) for its trade. Each member also may not give preferential trade treatment to any GATT or non-GATT nation.

Beyond this, however, the GATT treaty contains a series of obligations about government policy towards international trade. Under the "national treatment" clause, a member nation must treat imported goods from GATT nations the same as its own domestically produced goods of the same kind, when it comes to internal taxation (e.g., a sales tax) or regulation. Quota restrictions on imports are prohibited, with some exceptions, and GATT countries are required to publish all their international trade regulations, including their tariffs and permitted quotas. Anti-dumping duties are regulated in detail, and certain types of subsidies on exports are prohibited. These are examples of obligations designed to promote three other central functions of GATT: 1) to protect the value of tariff concessions against "nullification" by various nontariff import barriers; 2) to establish a "code of trade conduct" to channel protectionist devices away from certain types of barriers; and 3) to institute consultation procedures and joint action to carry out the basic purposes of GATT of promoting trade and welfare in the world.

Among these consultation and joint action procedures is one of the few means of sanctioning a member who violates a binding GATT obligation. A clause of these provisions enables the members of GATT to authorize "retaliatory" actions (in the form of special trade barriers) against an offending nation's exports. However, this provision is not very effective. Only once, for example, has GATT allowed one country to suspend its tariff concessions against another country under this clause. But in this case the quota on wheat imports from the United States which was imposed by The Netherlands (in response to U.S. dairy import restrictions) did not disturb the U.S. significantly because of the greater economic size and power of the U.S.

There are a series of exceptions to GATT obligations, once described by Senator Taft as "such that a lawyer could drive a four horse team through any obligation that anybody has." These exceptions, however, have been

both necessary to the continued survival of GATT as an institution, and have been used to promote positive thrusts of policy such as helping the underdeveloped nations to pursue development policies.

The most important type of exception to GATT obligations is the waiver power. Under this power two-thirds of GATT members can grant an application for a waiver from any GATT obligation. Examples of waivers obtained by the U.S. include one which granted special preferences between Canada and this country on trade in auto parts, and one which granted permission to impose import quotas on dairy products and certain grains to preserve U.S. domestic farm price support programs under the Agricultural Adjustment Act.

Some exceptions are "automatic" and require no prior vote. One such exception is the escape clause, which permits a member nation to suspend any GATT obligation which under unforeseen circumstances causes any product to be imported into that nation in such quantities as to threaten domestic producers of a competitive product. Another automatic exception applies to nations who are members of—or who just set up a scheduled plan to become—a bona fide customs union or free trade area, such as the E.E.C. or LAFTA; in spite of the Most-Favored Nation nondiscrimination clause, such nations can impose tariffs on goods imported from GATT member nations even though they do not impose them on the same goods imported from others in the free trade area.

A third automatic exception, invoked more frequently in the 1950's than recently, qualifies GATT's general prohibition against quotas. "Any contracting party," reads Article XII, "in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported to the extent necessary to forestall the imminent threat of, or to stop, a serious decline in monetary reserves. . . ."

Although the possibility of industrial nations granting trade preferences, in the form of lower tariffs, for example, to developing countries has been discussed a great deal in recent years, developing member nations of GATT have not yet agreed on a plan to submit for consideration by the entire membership. But developing countries may also automatically deviate from GATT obligations by imposing import quotas or raising their tariffs, "in order to implement pro-

grammes and policies of economic development designed to raise the general standard of living of their people . . ." under certain specified criteria.

Although these automatic exceptions could be readily abused, GATT nations in fact resort to them only when necessary. This is in part because the members do not wish to undermine the stability of the organization by exploiting these safety valves and in part because any nation which raises tariffs on another country's exports under one of the exceptions is subject to reciprocal action against its own exports by the same country.

Jackson sees the question of treatment of less-developed countries under international trade rules as one of the most basic concerns facing GATT, along with balance of payments problems. In his conclusion, however, he points out several other problems, involving the language of the GATT treaty and GATT as an institution, which need attention in the future.

Because the structure of international trade and economic relations have changed considerably in the last twenty years, some of the language of GATT is outdated, either because it no longer covers difficulties that were originally compromised or because it cannot be applied in new circumstances. Furthermore, the language contains loopholes which are difficult to close but which permit the use of novel nontariff protectionist devices which constitute serious barriers to free trade. One example is the import deposit scheme under which a member government, to protect domestic industry, requires any importer of a competing foreign product to deposit cash with the government up to the value of the imported goods for a period of months.

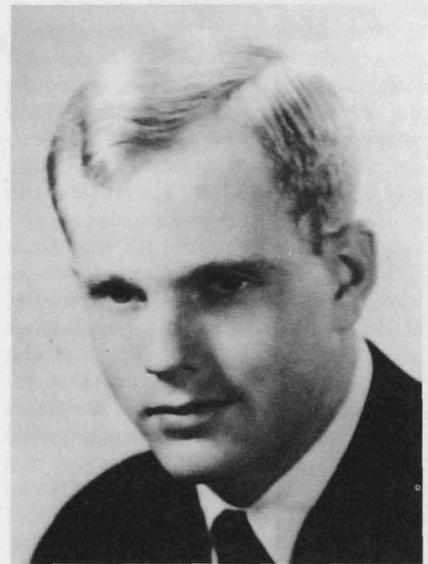
One of GATT's institutional problems is that the amending process is extremely cumbersome. Some provisions require unanimity, long since unrealistic, but even those amendments needing only a two-thirds acceptance are difficult to obtain. Another problem is that several "grandfather clauses" exempting particular practices of the original members from the obligations of GATT are unfair, now that there are so many newer members who find it difficult to achieve such privileges through the process of obtaining waivers.

In sum, Jackson says, "GATT has been a more effective instrument than we had a right to expect when it began, but there are real clouds on the horizon. Its provisions on balance of

payments are not adequate, since it allows only for quotas and not for tariff surcharges. There needs to be more help for developing countries. It needs major reforms before there is a severe monetary crisis or a depression spreading from country to country. But unfortunately with the climate of world opinion as it is, it is hard to foresee any basic reforms in the near future."

When the time for such reforms comes, Jackson's book will clearly be the instrumental tool for guidance. In the meantime, as he puts it, the book should assist those who have transactions in international trade and those who are working daily to keep the institution from crumbling under the onslaught of political and protectionist forces. Hopefully it will assist those persons to preserve their sanity!

Law Students Organize Legislative Aid Bureau



Peter D. Schellie

Scores of University of Michigan law students have organized themselves as the Legislative Aid Bureau and are volunteering their service to any community in need of legislative assistance—in drafting new ordinances, revising old ones, or in researching the issues and questions related to law-making. Peter D. Schellie, LAB chairman, explained his organization:

"The LAB serves as a research tool for various legislative bodies at the city, county, and state levels. It offers to these legislative bodies the services

of a large number of law students who devote a significant amount of time to work on various legislative projects. These students utilize the vast resources of the U-M Law Library, one of the finest collections of legal research materials in the nation, to prepare effective, imaginative legislation.

"At present many municipalities simply are unable to devote extensive study to each legislative enactment due to budgetary problems as well as the myriad of daily problems which require immediate attention. While the LAB is expected to aid smaller communities which have literally no legal staff, it will also work with larger cities since the staffs in those areas are often so overwhelmed with day-to-day affairs that they have no opportunity to work in the area of legislation preparation. In addition, research materials readily available to students at the Law School are not as accessible to many legislative bodies or their staffs.

"Willing students who are familiar with legal research feel that the overall quality of legislation can be improved and the objective of any one specific piece of legislation can be more effectively carried out through in-depth study of the area covered by the legislation. The LAB has already worked with several cities in the Ann Arbor area and has prepared one piece of proposed legislation for the Michigan State Legislature. In the very near future, the entire southwestern area of Michigan, and within a short time the whole of the State of Michigan will be served. The Bureau would then expand its services to the midwest, and eventually to the entire nation. Such an ambitious undertaking would be carried out by the gathering of research data and experience in a large number of legislative areas, and then using these pieces of legislation as starting points for future inquiries in that area. As the Bureau develops, it could offer to a large number of governmental units a wide variety of pieces of legislation, all of which would of course be adapted to the individual government unit requesting the ordinance or bill. The subject areas to be covered by the Bureau would be virtually unlimited and the number of governments served would be limited only by the manpower available.

"Political, ideological, and personal factors are not relevant in the selection of legislative projects. At present, ordinances in the areas of CATV, gun control, consumer protection, and environmental areas are being re-

searched. It should also be noted that the legislation being prepared by LAB is not written as 'model' legislation, but as proposals which, while being in the most sound form and language and utilizing the most up-to-date methods, are politically acceptable so as to allow passage at the present time.

"While dealing with governmental units which are of course political in nature, the Bureau is anxious to avoid any connotations of partisanship. Services are available to legislative bodies as a whole and not to any particular segment of those bodies. The role of LAB is strictly limited to the researching and drafting of legislation upon request of the legislative body. Further, its role does not extend to suggesting the enactment of any particular piece of legislation nor does it extend to any manner of 'lobbying' as regards the proposed legislation after it has been submitted. The LAB is, of course, willing to answer questions regarding the legislation, but it would not initiate any action to affect the ordinance or bill.

"The financing of the Bureau is still unresolved. All student activity would be on a non-compensatory basis, and thus the major cost of personnel is avoided. Certain administrative costs are, however, inherent in any such organization, and since this service is provided to governmental units without asking for compensation, the Bureau will suggest the possibility of a donation from the unit receiving the assistance. This will in no way, however, be mandatory, nor will it flavor further relations with that body. LAB is hopeful of finding an individual, foundation, or corporation which is sufficiently interested in the future development and growth of the legal system at the local and state level to make a grant to support this project, so that even the voluntary contribution method may be eliminated."

Prof. William J. Pierce is acting as the LAB's faculty advisor.

Prof. Douglas Kahn Writes "Basic Corporate Taxation"

In his recent book, *Basic Corporate Taxation*, Professor Douglas Kahn departs from the traditional approach. Instead of following the life cycle of a corporation from creation to liquidation, the book begins with a consideration of tax consequences attending the withdrawal of funds from a corporation, i.e., dividends, redemption,



and liquidations. It then examines the formation of corporations in the context of the several alternative forms of reflecting proprietary interest in the enterprise.

"The choice of corporate forms—the representation of capital contributions as common or preferred stock or debt—is dictated primarily by the tax consequences of withdrawing funds from the corporation and by business and estate planning considerations," Prof. Kahn explains, "and it is useful to have these matters in view when examining incorporation problems." Since the corporate structure may be modified subsequent to incorporation, the book examines the tax and planning considerations relevant to such modifications and to corporate acquisitions.

Kahn's book, published by the Institute of Continuing Legal Education, is designed both for students needing a concise treatment of corporate taxation and for practitioners wanting an overview of the system. "I didn't attempt to write an exhaustive treatise," Kahn points out. "The book spells out the basics and points out where more subtle problems may lie and where the reader can obtain more detailed information on specific areas."

Kahn has used numerous hypothetical cases to illustrate operation of the tax laws and the intertwining of various problems so that the lawyer may be apprised of the interrelationships of problems he otherwise would see only in isolation. "Moreover, because abstract discussion of tax principles is sometimes difficult to comprehend, the use of hypothetical examples

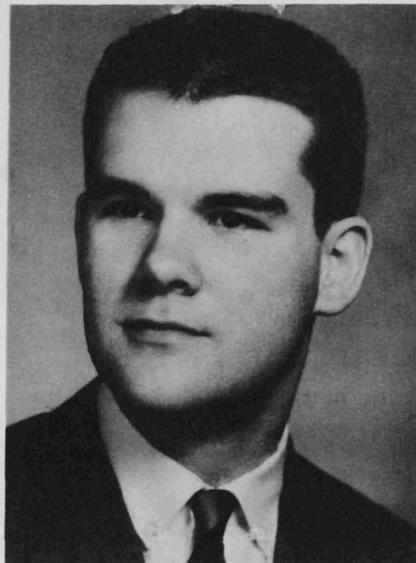
frames textual discussions in more readily understandable concrete settings."

The new work is a substantially enlarged and revised edition of *Tax and Business Planning for Closely Held Corporations*, published in 1968. The shift in emphasis is apparent from the new title. The new volume updates and expands the prior work, and includes treatment of corporate acquisitions, collapsible corporations, and business planning considerations. There also is detailed examination of buy-out arrangements for stock of closely-held corporations. This includes discussion of the relevant income and estate tax laws, state corporate laws, and alternative funding methods with particular emphasis on life insurance funding.

Prof. Kahn has already prepared an addendum to the new edition treating changes enacted by the 1969 tax reform act and cross-referring those changes to the appropriate portions of the book.

Recent Alumni Appointed Supreme Court Clerks

Two members of the Law School's 1969 class have been appointed U.S. Supreme Court law clerks for the 1970-71 term. Richard H. Sayler, (below) former editor-in-chief of the *Michigan Law Review*, will be a clerk to Justice Byron R. White. Robert E. Gooding, Jr., (col. 2) who served as an article and book review editor of the *Review*, will be one of five "joint clerks," a new arrangement under which the clerks are made available to all the Justices. The joint clerks are



appointed through the office of the Chief Justice on the recommendation of all the Justices. Sayler is currently clerking for Chief Judge J. Edward Lumbar of the U.S. Court of Appeals for the Second Circuit. Gooding is presently a law clerk for Judge Walter V. Schaefer of the Illinois Supreme Court.

Prof. Miller Appointed To Census Review Panel

Professor Arthur R. Miller of the U-M Law School, a prominent commentator in recent years on various aspects of computer technology and individual privacy and a frequent critic of some of the information and surveillance activities of the government and industry, has been appointed to a special Decennial Census Review Committee by Secretary of Commerce Maurice H. Stans. The purpose of the Committee is to evaluate and review the federal government's decennial census. The Committee's creation grows out of the widespread debate over the activities of the Census Bureau and the dissatisfaction with some of the questions on the 1970 census. Congress currently is considering legislation that would reduce the penalties for failing to reply to the census and reform some of the Bureau's practices in the hopes of insuring the privacy of citizens.

According to the statement of objectives of the Review Committee issued by Secretary Stans: "This review needs to bring to bear major different values and viewpoints that are concerned

with a fundamental question of the proper balance between the needs of society for information about itself to govern itself and guide its public and private activities, the rights of individuals to personal privacy and a degree of freedom from government injunction and restraint, and the obligation of individuals in a democratic society to assist and support the public responsibilities of that society."

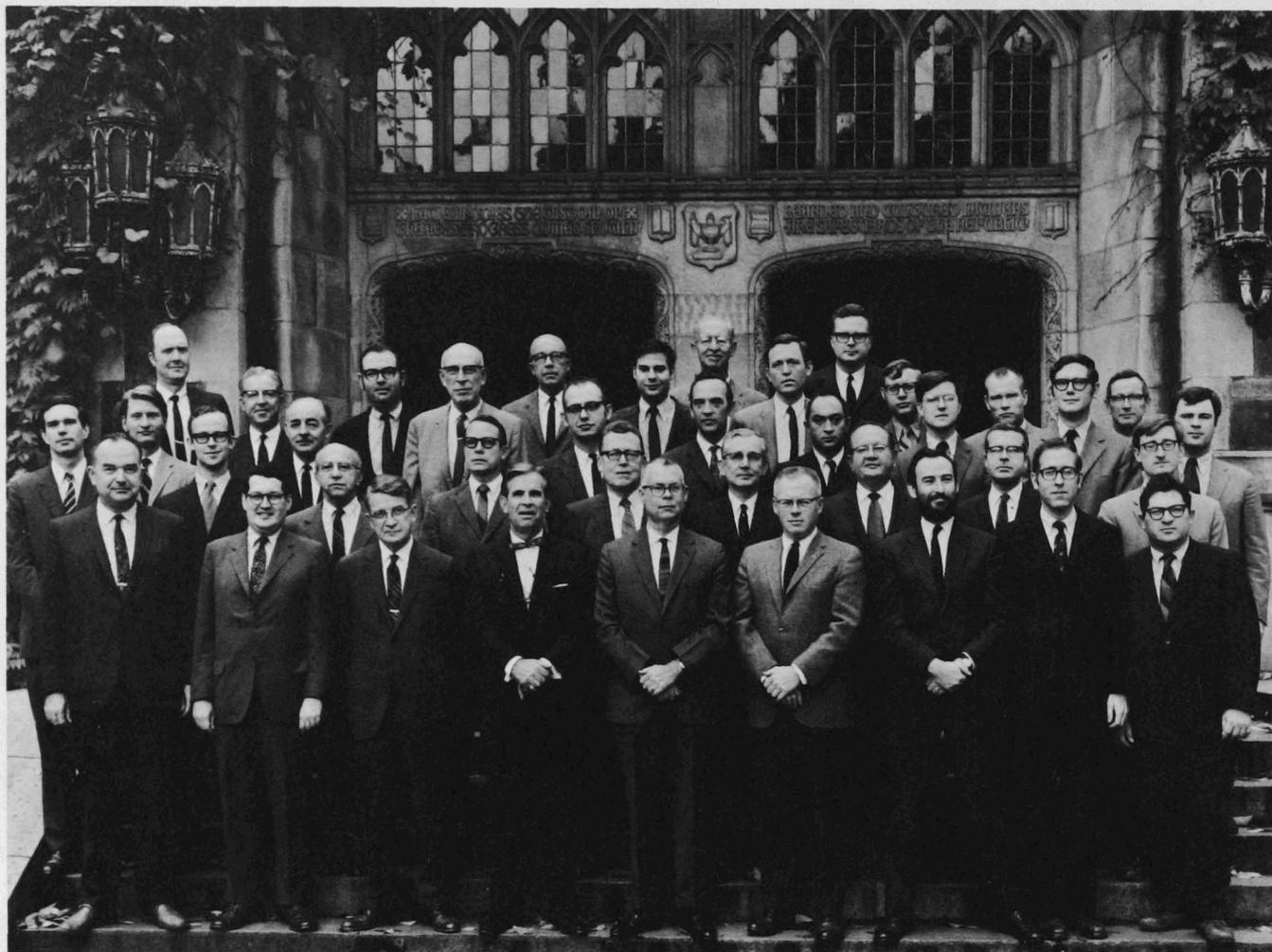
The Committee will inquire into the proper purpose, scope, and content of the decennial census; what measures can and should be taken to minimize the burden on the public in furnishing information for the census; whether there is a need for additional safeguards to protect individuals from any detriment that might arise from the census; and how to improve the accuracy of the census count and its other statistical activities.

Professor Miller has appeared before a number of United States Senate subcommittees on such subjects as the National Data Bank, credit bureaus, the census and other government questionnaires, and computers and privacy, and is currently writing a book tentatively titled *The Dossier Society* about the various threats to privacy in an increasingly information- and computer-based world.

Miller also is a member of the Advisory Panel of the National Academy of Sciences' Project on Computer Data Banks and serves on a panel on the Legal Aspects of Information Systems of the Federal Council on Science and Technology. The National Academy of Sciences panel will conduct a nationwide investigation into the growing use of computers and consider whether this poses a threat to civil liberties. The distinguished group consists largely of judges, congressmen, college presidents, scientists, and governmental officials.

Raymond Dykema, Alumnus, Given Achievement Award

Raymond K. Dykema, a member of the law firm of Dykema, Wheat, Goodnow and Trigg in Detroit, was presented the University of Michigan Outstanding Achievement Award. He was one of four University alumni to receive the honor last fall. He has left "a decisive imprint on the practice of law in Detroit and has exercised as well a strong and beneficent influence on the business community," the citation said.

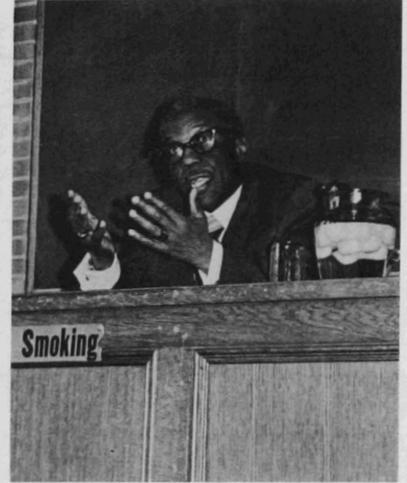


1. Douglas A. Kahn; 2. Stanley Siegel; 3. Beverley J. Pooley; 4. Joseph R. Julin; 5. Francis A. Allen; 6. L. Hart Wright; 7. George E. Palmer; 8. Theodore J. St. Antoine; 9. Luke K. Cooperrider; 10. G. Joseph Vining; 11. Donald Regan; 12. Whitmore Gray; 13. Eric Stein; 14. Roger A. Cunningham; 15. Marcus L. Plant; 16. Olin L. Browder, Jr.; 17. William J. Pierce; 18. Arthur R. Miller; 19. Matthew P. T. McCauley; 20. Craig Norville; 21. John W. Reed; 22. David D. Joswick; 23. James J. White; 24. David L. Chambers; 25. George L. Dawson; 26. Jerold H. Israel; 27. Richard V. Wellman; 28. Terrance Sandalow; 29. Paul G. Kauper; 30. Yale Kamisar; 31. Frank Kennedy; 32. Carl S. Hawkins; 33. Roy F. Proffitt; 34. Russell A. Smith; 35. Richard O. Lempert; 36. William W. Bishop, Jr.; 37. Paul D. Carrington; 38. John H. Jackson.

Faculty members not in the photo: Alfred F. Conard; Roger C. Cramton; Samuel D. Estep; Robben W. Fleming; Robert J. Harris; Thomas E. Kauper; Robert L. Knauss; Marvin L. Niehuss; Jack Richard Pearce; Alan N. Polasky; Joseph L. Sax; Peter O. Steiner; Andrew S. Watson; Layman E. Allen; Edmond F. DeVine; Charles Donahue; Patricia N. Blair; Virginia Davis Nordin; Angus Campbell; Robert A. Choate; Albert J. Reiss, Jr.



Sen. Philip Hart (lower middle), William Buckley (lower left), Ralph Nader (left), and Judge George W. Crockett, Jr., of the Detroit Recorder's Court (lower right) were among the many speakers who visited the Law School during the winter months.



Judges, from left: Dean Allen, Justice Dethmers, Justice White, Judge McCree, and Prof. Kauper; students, from left, William Scharf, David Kalberer, Robert Feeney, and Robert Gault.

Law School juniors James P. Feeney of Southfield and Robert M. Gault of Pittsburgh won the school's 46th annual Henry C. Campbell Moot Court Competition.

Defending a program of state aid to parochial schools, Feeney and Gault were chosen by a panel of five judges over David L. Kalberer of Harper Woods and William H. Scharf of Toledo.

Members of the Court were U.S. Supreme Court Justice Byron R. White; Judge Wade H. McCree, Jr., of the 6th U.S. Circuit Court of Appeals; Michigan Supreme Court Justice John R. Dethmers; and Dean Francis A. Allen and Prof. Paul G. Kauper of the law school.

Semi-finalists in the competition were:

- | | | |
|----------------|------------------|------------------|
| Wayne C. Dabb | Donald Law | Deanell Reese |
| Gene A. Farber | Alan R. Lepene | Ronald J. Styka |
| John P. Finch | J. Terence Lyons | Gary L. Walker |
| Thomas B. Huck | John A. Powell | Gerald V. Weigle |



A group of Law School students, with financial support from the Lawyers Club Board of Directors and the Law School, sponsored a one-day Conference on Legal Education last March. Various topics related to legal education were discussed in small group sessions in which both the faculty members and students participated.

Extracts from speech delivered March 5, 1970 at the House of the Association of the Bar of the City of New York



by Professor Robert L. Knauss

BACKGROUND

In looking at patterns or approaches to securities regulation in different countries, various factors make comparisons particularly difficult. A danger in any comparative

study is that the comparison may focus only on the specific statutes and regulations and not pay sufficient attention to the real differences in operation. It is obvious that differences in size and type of securities markets must be a part of any comparison of the existing regulation. One must also consider fundamental differences in business practices.

For example, in the United States, unlike England and the European countries, securities are *sold*. We take for granted the fact our brokerage houses are large, and have numerous branch offices and literally hundreds of thousands of account representatives. By comparison, in England up until very recently no brokerage house had more than 20 partners; there were none with more than four or five individuals who were not partners who would ever have any contact with clients, either institutional or individual. In Belgium the vast ma-

jority of brokers operate independently, and only one or two large firms have as many as a half dozen individuals working together. In Europe you have neither advertising and marketing, nor the extensive investment advisor services. This marketing in the United States not only helps maintain the liquidity of our secondary trading market but also is one of the major reasons for our extensive regulatory structure.

The salesman has begun to infiltrate Europe through the mutual fund route. It is significant that it is in this area that countries like Switzerland and Germany, which have practically no other securities regulation, as we know it, have enacted some regulation.

In almost every developed country (and also in many that under any classification must be regarded as "underdeveloped") there has been an explosion of new regulatory activity dealing with security

markets. A unique aspect of much of this activity has been its motivation.

Securities regulation in the United States has developed primarily out of catastrophe. The 1933 and 1934 acts coming after the "crash" and the depression were largely a result of the public reporting of manipulation and investor loss. While many have rationalized this legislation as designed to increase investor confidence, it has been, and continues to be, difficult in this country to get any changes in the regulation based on economic considerations. I recall the time when I was working with the Special Study of the Security Markets in 1962, and had drafted a report which I thought reasonably set out the desirability for treating the large over-the-counter companies, as far as their reporting requirements were concerned, the same as the listed company. The response to this proposal was that it could never be "sold" to Congress unless the report was spiced up with some horror stories of investor loss due to inadequate proxies and inadequate or non-existent annual reports. The pattern of development of most of the early securities regulation has been the same. The various amendments to the Company's Act in England have closely followed market recessions and then the various government studies reporting abuses. The Belgian act, as did ours, came as a direct result of the depression in 1930.

Japan is a special case. There the development of securities regulation can be traced to the occupation forces immediately after World War II. As part of his "Americanization" of Japan, General MacArthur instituted in 1948 a securities act which is a short-hand combination version of our 1933-1934 Security Acts. This included setting up an independent agency similar to our SEC. Japan has had serious problems digesting this regulation, and, despite the great similarity between the language of their statute and ours, the actual practice and

operation of their regulation is far different. In Germany the occupying forces ignored securities regulation and the German securities market until quite recently has been basically unregulated.

A completely different motivation has been behind much of the recent reforms in securities regulation. This is typified in the new French securities acts. Legislation resulted not from a desire to protect investors from loss, but from a desire to improve the quality of the security markets. While there were some specific problems such as takeover bids and the desire to control

"In almost every developed country (and also in many that under any classification must be regarded as 'underdeveloped') there has been an explosion of new regulatory activity dealing with security markets."

the sale of mutual funds, the regulation resulted in large part because of the belief that extensive regulation is one of the reasons the U.S. securities market is large and active. There have not been any particular crises or evidence of investor loss, but instead a desire to improve the quality of the security markets. Rightly or wrongly the weakness in national growth was laid in part to a weakness in the securities markets. This has been expressed by Servan-Schreiber, who in discussing the sale of Eurobonds by U.S. corporations and subsequent merger or purchase of French concerns by U.S.

subsidiaries said in effect "the damn Americans are using our capital to buy us"—perhaps a paraphrase of the Pogo statement "we have met the enemy and they are us." The desire in many countries now is to "improve" their own security markets, and the creation of regulatory structures is seen as an important prerequisite. Thus the motivation for much of the new regulation has been not from a negative position of protecting investors from fraud, but from a positive one that the regulation will be beneficial to the financial system. . .

CURRENT TRENDS IN REGULATION

As mentioned earlier there is current activity in new securities regulation in many countries. Among the trends I see in the future are the following:

a) *Trade Regulation.* There is a growing comprehension for the need to regulate trading. The desire is two-fold: (1) to concentrate all of the trading in one place and thereby improve liquidity, and (2) to protect investors since at least in theory the professional is less likely to be involved in manipulation or fraudulent activity. The role and importance of a good secondary market has only recently been recognized. We are far ahead in the area of disclosure of trading data, stock watch programs, guarantee funds to protect against broker insolvency, and margin and credit requirements. As mentioned earlier the regulation of selling practices has in the past been almost a unique problem to the U.S. The question being asked by many Europeans is how can you develop good active trading markets, and yet avoid what they see as the evils of the boiler-room operation and the hot issues. At the other end of the scale, the growing importance and problems created by the institutional investor are only beginning to be recognized. As yet these problems have not been adequately analyzed, or treated in the U.S. or elsewhere.

b) *Insider trading.* As a part of improving confidence in the trading market, there is widespread interest in regulating insider trading. The new French Act goes further in this respect than any regulation outside of the United States. It defines "insider" not only to mean officer and director or 10 per cent shareholder, but also to include other persons who because of their job have access to inside information—the definition sounds a bit like the Texas Gulf Sulphur opinion. To meet the problem of bearer securities (almost all equity securities in Europe are issued in bearer form) the French regulation requires that any individual designated as an insider must transfer his shares into registered certificates; the insider then must report any trading.

c) *Take-over bids.* These bids have been subject to special legislation in several countries. In England the City Code, a self-regulatory code developed under pressure of formal government regulation, places restrictions during takeover bids that are more extensive than present in the United States. In addition to protections directed to the target company and its shareholders, the Code contains protections to those making the take-over bid against some defense tactics on the part of the target company.

d) *Mutual Funds.* Regulation of these funds is probably the one area of almost universal concern. Sales practices involving mutual funds are under study in many countries, and the question of contractual plans and the front end load are the subject of much recent legislation. The regulation of management companies and management fees are also more far-reaching in some other countries than in the U.S.

e) *Continuous Reporting.* In the U.S. as elsewhere the primary burden on corporate disclosure has occurred at the time of new security offerings. The Wheat Report issued last year in this country stresses the importance of continuous registration and reporting of the company rather than the particular issue. I

would expect that this emphasis on continuous disclosure will be stressed in most countries, and the concept of "public offering" as a time for special disclosures will disappear.

f) *Opening up of the Board Room.* The final area in which I foresee new regulation may be the most controversial—but also the most important. It concerns the drive to "open up the board room," and to broaden the base of decision-making within a corporation. The ideas in this area are not new, but the pressures connected with our continued involvement in Vietnam

"The drive to 'open up the board room' and to broaden the base of decision-making within a corporation [is] not new, but the pressures connected with our continued involvement in Vietnam and our current concern for environmental issues gives [these ideas] a fresh importance."

and our current concern for environmental issues gives them a fresh importance.

I do not think that initially the new regulation will follow the direction of appointing government or other outside directors. Co-determination in Germany with labor representatives appointed to the Board of Directors is an example of this. My best guess is that regulatory pressure for reform will be evidenced through the proxy system. I think there will be pressures to allow shareholder proposals to appear on management proxy statements involving corporate institutional decisions in a broader sweep than at

present. An example is the pending lawsuit against Dow Chemical Company in which some shareholders want to place on the company proxy a proposal to amend the corporate charter to forbid the sale of napalm. Major corporations are soon going to be faced with shareholder resolutions regarding corporate decisions affecting the environment. I think, also, that there will be renewed pressure to allow alternate slates of nominees for directors to appear on the management proxy. In addition there will be efforts to open up the board room in the sense of requiring more disclosure concerning the decision-making process, a movement for open meetings and an opportunity for other interests in addition to shareholder interests to have a direct input to the board of directors.

The role of institutional investors may also become more important. Traditionally the management of institutional investments have tended to vote with management of the companies of the stock they hold. Those holding beneficial interests in the institution have not been able to vote the proxies in the underlying stock. Recently, a group of students and faculty at The University of Michigan requested that the University develop some mechanism by which students and faculty could influence how the proxies for Dow Chemical stock are to be voted. The outcome is not apt to shake the foundation of Dow, but the matter is not insignificant—the University is reported to hold over one million dollars of Dow stock in its endowment portfolio.

The regulation of the giant corporation is entering into a new phase of development both in this country and throughout the world. Securities regulation is progressing from limited concepts of investor protection to regulation designed to promote development of securities markets, and more broadly to regulations involving corporate decision-making. At a minimum it is clear that the corporate and securities lawyer in the next decade will be called upon to face important new challenges.

CON GLOM ERATES

AND THE PUBLIC INTEREST

**Extracts from a paper delivered at a conference
on the legal-economic aspects of conglomerates,
University of Chicago, October 17, 1969.**



**by Professor
Peter O. Steiner**

If by public interest we mean merely public curiosity, the answer to "What is the public interest?" is "considerable." The literature on conglomerates has expanded at least as rapidly as the conglomerates themselves and there is no shortage of policy prescriptions by economists, lawyers, and journalists. Indeed my concern has shifted from wondering if I could define the relevant issues to wondering if there is anything left to say. . . .

I take it we mean more by the public interest than mere curiosity. Elsewhere I have wrestled the definition of the public interest to a draw in 32 pages, and I will not repeat that exercise. But my central position is that a free people are free to define any areas of collective concern that they wish, using the political process and such limitations on majority rights as may previously have been established.

The implication of this view is that one must look to collective, subjective views as well as to objective facts in determining the public interest. It is more difficult to discern

such views than to admit they may exist. One is tempted to avoid the problem either by delegating it to "responsible political officials" or by redefining the public interest to make it independent of attitudinal matters. While political officials are ultimately responsible to the people, they can misperceive public preferences or choose to bend them toward their own views of what is proper. Debate about the legitimacy and wisdom of public policy requires an independent determination of where lies the public interest.

If we cannot delegate the problem of determining the public interest, can we define our troubles away? A narrow view of the public interest in conglomerates would focus on the notion of economic efficiency. In this view the task of defining the public interest is easy in principle, if harder in practice. It involves listing all of the possible effects on efficiency of conglomerate firms (or of conglomerate acquisitions), evaluating the probability that they will occur, determining their sign (*i.e.*, whether they generate benefits or evils), and making enough of a quantitative reckoning to form a judgment about over-all effect. This is a formidable task, unless one further defines it away by assuming that any arrangement which is made freely and which survives may be presumed efficient. But it is a task for which economic and quantitative analyses are well suited. Happily such evidence is being sought. Quantitative analyses are important in progressing from the easy job of listing possibilities to the required task of estimating probabilities.

Having made a bow toward orthodoxy, let me state my heresy boldly: there is nothing inherently compelling about this narrow definition.

People may and do care about other things. If by the public interest we mean something in which efficiency is but one element and in which such things as "size," "economic power," "fairness," "freedom," and "the quality of society" are also elements, we have a more formidable task of evaluation. We still require careful and ingenious identification and measurement of effects, indeed we require them more urgently. Nor is it acceptable to argue that most of these things are too difficult to measure and thus we have license to neglect them. To neglect them assigns their value as zero, and clearly there is no presumption for assuming that result here or elsewhere. But even if we solved all difficulties of this kind, we would need more—for instance how do we balance a "known" (and presumed beneficial) efficiency against a known (and presumed adverse) increase in economic power? Assigning weights is not a *measurement* problem, but a problem in social choice. Thus the questions of whether there is a "social view" of the proper weights, and if so how it is articulated and legitimized is of vital importance.

As an economist I will not refrain from dealing at length with the efficiency issues. But patently my assignment is broader. For although it is difficult to classify neatly the nature of public concern in the conglomerate phenomenon it is perfectly clear that it is not limited to efficiencies, competitive or otherwise, and the role of market structure therein. It is clear that even together, economists, lawyers, and businessmen engaged in or fearful of take-overs do not reflect the broader constituency that defines a clarion cry for public action. Whatever it is that motivates Mr. McLaren when he speaks of se-

"The danger is that the response of the courts or the Congress no less than the Department of Justice may be to attack the phenomenon of the conglomerate merger rather than the specific practices which give rise to a legitimate public concern."

vere economic and social dislocations, it is clear that he believes he is responding to a basic political demand that someone do something about the new development. I am not concerned here with whether (as he believes) the antitrust laws are the appropriate vehicle, or whether (as his predecessors believed) the principal problems should be dealt with by other agencies or by new legislation. The issue, instead, is whether there is a perceived demand for *public* action, and if so what kind of response is appropriate.

With some risk of oversimplifying, the effects, the public concern, and the debate over required public policy (if any) can be grouped into four categories which I will designate as (1) financial-speculative; (2) entrepreneurial; (3) macro concentration and centralization; and (4) economic efficiency. I will speak about each at least briefly, but I note as a preliminary matter that most of the lay discussion and curiosity revolves around the first two and most of the professional discussion around the last two. This lends some diffuseness to the discussion of conglomerates. . . .

Financial-Speculative

Under this heading I would collect the fears that hanky-panky—if not outright fraud—is being perpetrated upon a gullible public by shrewd promoters, insiders, and speculators and that this is encouraged by public authorities through tax policies and in other ways.

These considerations apply almost exclusively to the financial aspects of mergers. My guess is that if there is an unambiguous, deep, and abiding unease in the public at large about conglomerate mergers, it arises here. Even those who may admire either the dynamism or the efficiencies of

conglomerates tend to get apprehensive about phrases like "chain letter effect," "funny money," and "pyramidding of debt." Those who attack conglomerate mergers seldom fail to play upon these concerns.

Let me assume here (as I believe) that there is basis for some concern and that there is neither desire nor necessity to be bound by the rule of *caveat emptor* in securities transactions. The danger is that the response of the courts or the Congress no less than the Department of Justice may be to attack the phenomenon of the conglomerate merger rather than the specific practices which give rise to a legitimate public concern. An indiscriminating and vaguely articulated public dissatisfaction may legitimize an attack which visibly hits this target and less visibly hits the beneficial aspects of conglomerate firms as well. If there are financial-speculative problems, they are specific problems and they invite specific solutions. . . .

Let us suppose for the remainder of this paper that any financial or speculative dangers of conglomerate mergers can and will be remedied by appropriate specific policies. In so saying I do not wish to imply that all conglomerate mergers involve unfortunate financial manipulation, nor that there may not be potential or actual financial benefits to society (some of which we examine below) in some conglomerate mergers.

But such part of the case against conglomerates that arises here seems quite separable, and clarity is achieved by separating it.

Entrepreneurial

Unlike the speculative-financial, the entrepreneurial aspects are neither separable nor necessarily adverse since they are concerned with the heart of the organism. For the con-

glomerate firm, if it is anything, is a firm with faith in the entrepreneurial function, with belief that management matters and that profits can be made by substituting "alert," "dynamic," "progressive" managements for stodgy ones. The contemporary conglomerate firm is not merely a relatively static sum of its individual parts; it is not a holding company in the conventional sense of that word.

Nor are these firms' entrepreneurs (in Schumpeter's sense) the relatively faceless organization men that we have come to associate with large companies. The personality cult of the conglomerators—the Ling's, the Geneen's, the Ash's, the Bluhdorn's that *Fortune*, *Time*, and even the *Wall Street Journal* and the *New York Times* profile with such attention and loving care—is characterized (in restrained moments) by phrases such as "exuberant," "dynamic," and "high riding." Compare: "quietly competent," "shrewd," and "imaginative," adjectives recently used to describe the new Ford troika. Whether there is a real difference underlying such semantics is incidental to me and I leave the matter to the psychologists. But the attitude of the press and the public *is* revealing. For if it is true, as I believe, that these men and their companies excite more admiration than apprehension on the part of the public at large, it argues against the existence of a latent demand for public action to close the outlets for the dynamism. I am not enough of a social historian to know when Vanderbilt, Carnegie, Ford, and Rockefeller, and others of those now called robber barons, were transformed from folk heroes into sinister oligarchs, but it is clear that such a shift did occur sometime after the era of Horatio Alger, and before the time of FDR—helped no little by

"I . . . (don't) know when . . . those now called robber barons were transformed from folk heroes into sinister oligarchs, but . . . such a shift did occur sometime after . . . Horatio Alger, and before the time of FDR -- helped no little by Ida Tarbell, Upton Sinclair, and by the crash in 1929."

Ida Tarbell, Upton Sinclair and by the crash in 1929. In the train of sharp public concern we have legislative and judicial response, not always in that order.

If there is today a widespread, or even emerging, concern with the multimarket *firm* (as opposed to *merger*) or its leaders apart from its financial aspects, I do not find it. What I am asserting here is that the public image of the conglomerate firm seems good; it is regarded as alive, alert, prosperous, and newsworthy, if also possibly a bit daring.

The conglomerate *merger* is more difficult to appraise in these terms. For the entrepreneurial personality vents its energy by acquiring as well as by reorganizing and it is clear that the announcements of take-over attempts, tender offers, or consummated deals all have impact effects of their own. I have read almost ad nauseum the vast coverage given to the struggle between Northwest Industries and Goodrich simply in an effort to decide whether the writers regarded it merely as a public entertainment or as a struggle between forces of good or evil. My own private survey at the height of this contest showed about a 60-40 split in favor of the incumbent Goodrich management, but I suspect this reflects admiration of a sturdy underdog more than a belief that Mr. Keener promised more to American society than Mr. Heineman. It is a different matter to care about the Mets and Jets than it is to use the police power to restrain Baltimore. But the contested take-over, like the proxy fight, is so far a rare if colorful event. The bulk of the great conglomerate merger movement of the 1960's has been privately uncontested, the result of discovery of mutually agreeable bases of exchange. . . . It is true that contested mergers are

becoming more common, perhaps because of the demonstration effect of victories like Goodrich's, perhaps because of the courts, or perhaps because the mutually desired merger opportunities are being exhausted.

There are groups who regard the entrepreneurial firm with genuine apprehension. To some the spectre of take-over—sudden and sure—evokes a sinister law of the jungle. A recent Signal Company advertisement chose to put it: "If 'conglomerate' implies a profit-mad monster who gobbles up unsuspecting companies by means of underhanded tender offers, we do not qualify." Whether the prey of the acquisitive conglomerate species is small business or whether it is large business is an interesting and important question. It also matters whether the victims are the culls or the gulls of the business scene, for I take it that few would urge protection of the former.

One of the things we need is a thorough study of what the facts show about the nature of acquired firms in conglomerate mergers, classified in a number of different ways. I suspect that if there is a severe threat of take-overs opposed by the management of the acquired firms it is against large and perhaps stodgy managements rather than small ones. While most acquired companies are indeed small, how many were active participants in the search for merger partners? I suspect most.

In sum, absent financial abuse and ignoring competitive and efficiency considerations, I detect none of the broadly based public concern that would, if it existed, provide a clarion call to action by the public authorities against the market phenomenon of the conglomerate firm. There are here, as always, firms and individuals who get hurt, and they understandably seek redress through

political action. Representative Emmanuel Celler recently stated on television that he had received hundreds of letters from businessmen seeking "protection." But such grievances seem personal and have not—as yet—evoked a corresponding collective concern that would legitimize the self-serving demands of the affected few.

Macro Concentration and Centralization

The discussion so far has neglected size and power, always concerns of some who see business as a system of power. Today the most noticeable accretions in firm size seem to be taking a conglomerate form. Let me start by categorically rejecting the view that the only legitimate use of the concept of concentration is as a market phenomenon, i.e., as a proxy measure of the inherently unmeasurable concept "intensity of competition." That use, of course, continues to be a major one. But power, wealth, assets or talent can be widely or narrowly held and we—society—may be differently affected by different patterns of ownership. Thus we may care, and caring, may choose. Nor is the choice fruitfully posed in terms of the extremes of wholly concentrated or wholly dispersed. It makes for striking rhetoric to evoke the glories of a Jeffersonian society of resolute and independent freeholders, or (following Scott Fitzgerald, Art Buchwald, and Mr. Justice Douglas) to imagine the last tycoon master-minding the ultimate merger of Samson and Delilah into Universal Products, Inc. But hyperbole provides little analytic guidance. Ours is a society in which, for a variety of well known and well understood reasons, big companies play a big role, as do big organizations of other kinds. We need to evaluate the net

"[T]he contested take-over, like the proxy fight, is so far a rare if colorful event. The bulk of the great conglomerate merger movement of the 1960's has been privately uncontested, the result of discovery of mutually agreeable bases of exchange."

costs or benefits of changes in expected (or reasonably predictable) size from the position which we are in now.

We all know that the post-war merger movement has been dramatic, for it has appreciably changed the landscape of American corporate ownership. Let me mention some haphazardly collected statistics. Approximately a thousand manufacturing and mining firms with assets of \$10 million or more at the time of acquisition have been acquired since 1945. To put this in perspective, there are somewhat more than two thousand corporations of that size today. The acquired firms are a fair sample of America's large companies: of *Fortune's* 1955 list of the 500 largest corporations, about 15 per cent have been acquired in the period since then. Almost all of 1955's largest 500 participated in some mergers during the post-war period. The role of the *conglomerate* merger among all mergers has been large and growing. The average size of large firms has risen somewhat, and the over-all share of the largest companies in the nation's total production has increased. For example, between 1950 and 1962 the 200 largest manufacturing corporations' share of all corporate manufacturing assets rose from 49 per cent to 55 per cent. Approximately three quarters of this increase reflects assets acquired by merger (conglomerate and other). And so on and on.

Our task, however, is not to define the effect, but to evaluate it. Does this kind of change, as it has occurred and as it might be projected, pose a specific threat to social values that warrants public activity? It is more common to allude to this possibility than to defend it. . . .

Recognizing that only eight of what are commonly called conglomerates are in the current list of the

200 largest manufacturing companies, W. G. Shepherd, an ardent anti-truster, characterizes the present flurry of anti-conglomerate activity as a "tempest in a teapot [that] is diverting attention from the real unfinished business of antitrust policy: to reduce the degree of market power prevailing in a series of major industries."

A more common liberal view (here expressed by L. W. Weiss) is agnostic rather than hostile to attacks on conglomerates on macro concentration grounds:

"... [A] vague but widespread uneasiness exists about the political power of the huge, new firms. I am not sure that one, billion dollar conglomerate has more influence than ten, hundred million dollar firms. My guess is that the ten firms would be better able to win protective tariffs or special tax treatment because of the greater visibility of the conglomerate, but that is only a guess. In general, the superior political power of large firms is yet to be shown.

"The main concern of many observers is less specific than this. They are alarmed by the increase in over-all concentration to which conglomerate mergers contribute. I sympathize with their concern. . . . But I doubt that the social and political effect of a billion dollar corporation is different in any important way from that of hundred million dollar firms. . . ."

. . . But the case against macro concentration is a hard one to find articulated for one that is supposedly widely held. If it is not completely nebulous, as the Stigler task force asserted, it is at least vague. Richard McLaren, at least, has offered specificity:

"I am concerned also about the increasing size of these mergers. Aside from the competitive impact of

increased economic concentration, I am concerned over the human dislocations which result from these mergers. When the headquarters of one or two large companies are removed from the nation's smaller cities to New York or Chicago or Los Angeles, I think we all recognize that there is a serious impact upon the community.

"The loss is felt by its banks, its merchants, its professional and service people—accountants, lawyers, advertising agencies. The community loses some of its best educated, most energetic and public spirited citizens. . . ."

My reaction to this speculation is one of letdown. Surely the plights of displaced managers, disappointed city fathers and their constituent bankers, advertising men and *a fortiori* their used car dealers are not the foundation of an overriding social concern. After all, someplace must be Second City. This is not to say that such parochial concerns are contemptible; but is it a matter of relative indifference whether we cater to them or does it entail a major cost? We have, at last, come to the question of efficiency.

Efficiency

The effect of conglomerate firms and conglomerate mergers on economic efficiency is sometimes posed as a simple equation: The expected social net benefit produced by a conglomerate is the expected efficiency gain minus the expected competitive loss. The easy way to evaluate the equation is then to argue that one but only one of these two elements is zero, for then the other will be dominant. Let me draw two caricatures. The first would argue that the truly conglomerate acquisition has no direct competitive impact because the acquired firm is by definition in another market and competition is a

"Surely the plights of displaced managers, disappointed city fathers, and their constituent bankers, advertising men, and . . . their used car dealers are not the foundation of an over-riding social concern. After all, someplace must be Second City."

market phenomenon. Thus the competitive cost will be zero. But the acquisition may achieve efficiency benefits. If so, there is a net social gain. If there is no expected efficiency, the merger will not be undertaken or it will prove a mistake, and the market corrects mistakes. Therefore there is no need for public scrutiny since the *expected value* of benefits is necessarily positive.

The opposite caricature would argue that any real efficiencies can be achieved by other means, such as internal growth or *de novo* entry. Thus any attribution of efficiencies to a mere exchange of ownership is specious. At the same time comparing *de novo* entry with acquisition shows acquisition to be an inferior alternative, because there is one less competitor—the acquired firm. Since more competitors are better than fewer, the presumption is that an acquisition will lead to a worsening of the competitive situation. Since the expectation of efficiency gains is zero, and of competitive losses is positive, the acquisition must be adverse. There is thus no economic reason to permit it.

I want to do more than argue that there may be *both* efficiency gains and competitive losses and that thus we are required to measure and compare. I believe there may be either direct efficiency gains or direct efficiency losses, and that there may be increases in efficiency via the effect on competition or decreases in efficiency via competition. If so the efficiency problem is a complex quantitative problem, not a simple one.

Making a list of possible effects of conglomerates is sufficient to show that both directly and indirectly there may be either gains or losses in efficiency. Possibilities aside, it would be nice if we could reach a consensus

about probabilities. Can we here agree that in such circumstances the presumption of net benefit is overwhelming, and in such and such a situation the presumption of adverse effect is over-riding? It would be nice. For one thing we could avoid the roulette game of leaving these matters to the courts to decide. We could formulate reasonable guidelines. We might even be able to trust people less sophisticated than ourselves to make correct policy decisions, and so on. My hopes, however, are not my expectations. I have discussed these matters enough to believe that there is no consensus in the professions, or even in this room. This is not because some of us are stupid, or wholly immune to logical and compelling arguments . . . but rather because we have had insufficient attention to careful measurement of effects. Here as elsewhere we are too often content to use "competition" and "efficiency" as shibboleths and as attributes rather than as genuine variables. The survival test notwithstanding, it really is no longer acceptable simply to assert that certain effects are the relevant or dominant ones and thus to settle issues of fact without bothering to get the facts.

Having embarked upon this sermon, a modicum of respect for consistency requires that I do not solve the problem of conglomerate efficiency by assertion. But let me list some considerations that need evaluation. I provide a list not to encourage argument counting but to provide an agenda for research. . . . (A former student, Robert J. Kheel, offers as Kheel's Law the proposition that to every argument against conglomerate mergers there is an equal and opposite argument in favor of them. I think the theorem can be generalized.)

a. *Affecting competition by changing the firm and market behavior of existing competitors.*

The conglomerate merger movement has been credited with increasing the vigor of competition in many markets, where acquisitions have been feared as well as where acquisitions have occurred. The threat of take-over by a conglomerate increases the hazard under which all managements operate and thus stimulates them to be more efficient, more aggressive and more alert. The shadow of the conglomerate take-over threatens those managers who rely on dispersed stock holdings to insulate them from effective ownership control. It threatens inefficient, lazy or satisficing managements, and promotes efficiency thereby.

Contrariwise, it has been argued that the direct effect on competitive behavior has been adverse: that open and effective competition of a group of "loose" oligopolists may be snuffed out when one of them is acquired by a large and aggressive firm. This might occur because the newly acquired firm, a catalyst in a once competitive landscape, becomes the focus for price leadership or for tacit collusion. Alternatively, the large resources of the acquiring firm might compel noncompetitive behavior through fear of predatory or punitive retaliation.

Which of these arguments is right? persuasive? important? I incline toward the pro-competitive rather than the anti-competitive here, but that is prejudice and we need evidence.

b. *Affecting competition by changing the condition of entry.*

A good part of the Department of Justice attack on conglomerate mergers is based upon the assertion that

“Management . . . has recently . . . been transformed by management science and by the computer. Rational decision-making principles can be applied in a consistent way to vastly different enterprises and there are economies . . . by so applying them.”

conglomerates may adversely affect the condition of entry. A first possibility is that the mere presence of a large conglomerate in a given market may inhibit other potential entrants by virtue of the conglomerate's size and market occupancy and (presumably) greater ability to win a competitive struggle for custom. A second possibility is that the fact of entry via acquisition may have precluded *de novo* entry by the acquiring firm and thus the number of actual competitors has not increased while the number of potential competitors has declined by one. (This argument makes the considerable assumption that an entrant via acquisition would have been a viable *de novo* entrant.) Third, the possibility of reciprocity can serve to disadvantage a further potential entrant who sees the probability of making certain sales decrease. Such a decline in expected sales necessarily has the virtual effect of making entry objectively less attractive than it was previously. Thus the threat of entry as a competitive force is diminished.

Each of these adverse effects is fully possible. The probable importance depends both on the size of the inhibition to a new entrant and the number of potential entrants, and these are empirical matters. So, too, is the significance of possible opposite influences which might increase the probability of entry. Possibly important is the demonstration which successful entry gives that an outsider can succeed in a particular industry or that its practices are generally inefficient. Perhaps this explains certain trends in conglomerate acquisition. Litton, Lockheed and General Dynamics each entered the shipbuilding industry around 1960. LTV, AMK and Gulf and Western each entered, or tried to enter, meat packing. If LTV succeeds in steel, others may follow. Such a

demonstration may immediately increase the number of potential entrants—if only among other conglomerates.

Another source of possible increased ease of entry results from making exit from an industry easier. This may serve to make entry more attractive to small entrants since conglomerate firms provide a wider market than would otherwise exist for owners of firms who may change their minds and wish to withdraw their capital before liquidation of physical capital is possible. Greater liquidity should tend to reduce reluctance to invest—and thus serve to reduce barriers to entry.

Once again the problem is to evaluate empirically the likelihood of these possibilities.

c. The effect of conglomerate firms on market imperfections.

The conglomerate firm and the conglomerate merger movement may overcome some market imperfections and add to others and, so doing, may facilitate or impede market efficiency.

If there are impediments to inter-corporate and inter-industry flows of resources, the conglomerate firm by internalizing these shifts may facilitate them. It is widely believed that managerial mobility within a corporate hierarchy tends to be easier than between corporations, and the conglomerate firm makes even inter-industry moves intra-corporate. The diversion of capital from one use to another is a major possibility. . . . Intra-corporate shifts overcome tax induced barriers to capital mobility, and funds are more easily diverted to activities where their productivity is high.

The other side of the same coin, however, suggests possible impediments to market determination and thus to efficient resource use. Inter-

nal financing not only avoids the market test of the best use of resources but also weakens the private capital market as a source of funds. Conglomerates tend to displace the private capital market at the same time they supplement it, and to substitute personalized allocation decisions for impersonal ones. Moreover, it is at least possible that internal corporate accounting conventions serve to confuse or soften the market performance test within the branches of a large corporation. It is sometimes argued that these added market imperfections should not be attributed to the conglomerates but instead to foolish tax laws, arbitrary accounting conventions and so on. But that need not be persuasive. Consider the tax effect. An individual (or a society) may start from the position that it wants a corporate income tax, even if the tax has resource allocation disadvantages. If so, a further institution (e.g., the conglomerate) may exacerbate the disadvantage. Such a further cost is an opportunity cost of *both* the tax law and the conglomerate. As linear programmers know, if two constraints bind, each has a shadow price.

Reciprocity plays a potential role here too. If reciprocal trading patterns tend to insulate certain sales, or more generally, to lower the cross elasticities of demand between products of different sellers, they reduce to that extent the competitive interplay among sellers. That much is not seriously debatable. Non-believers in reciprocity argue that it is an improbable practice (an argument hard to sustain in the face of the factual record), or that it is a foolish practice which will not survive, or that it creates off-setting efficiencies. The last possibility is mentioned below. But the point here is that whenever reciprocity

occurs it has a potential for decreasing competitive vigor and this can have an adverse effect on efficiency. As to its *net* effect we require data, not assertion.

d. *Direct effects on efficiency*

The fact that conglomerate mergers seem to offer potential for profits suggests that conglomerate firms may do some things better than non-conglomerate firms. The literature exhibits no paucity of sources of potential efficiency. Prominently mentioned is the presence of economies of scale in unconventional—other than plant scale—dimensions. Management, research and development, promotion, public relations, and availability of capital are all mentioned. Unless these “outputs” are themselves anathematized, efficiency in their provision represents social gain. The managerial argument may be taken as illustrative. Management, once a prominent bottleneck to growth, has recently (goes the argument) been transformed by management science and by the computer. Rational decision-making principles can be applied in a consistent way to vastly different enterprises and there are economies to be had by so applying them. These economies are of the conventional kinds including advantages of specialization, of learning by doing, and of efficiently using the highly scarce resource: the trained management scientist. In the face of these innovations which increase optimal firm size, larger profits would have resulted from any increase in the size of the firm. But there are further profits to be earned because scientific managerial skills are learned by the young. As one commentator puts it, conglomerates make it possible “to remove assets from the inefficient control of old-fashioned managers and place them under men schooled in the new management science.”

... Yet other real economies may be realized through reciprocal buying arrangements where there are real but unexploited economies of plant scale. The argument is not different from the kind used with

respect to vertical arrangements. Thus if an imaginary firm called Liquid Carbonics could reduce costs by X per cent if only it could increase output by Y per cent, a merger with the equally imaginary firm, General Dynamics, might give Liquid Carbonics favored access to General Dynamics' suppliers and thus provide the basis for a Y per cent increase in sales. The resulting X per cent efficiency gain is social as well as private, and there is no reason in principle why it may not more than off-set any competitive harm....

Even the coin of “direct efficiency” has an opposite side. For example, so far as conglomerates encourage reciprocal buying arrangements, the resulting insulated markets may divert the attention of some managers from cost reduction, product quality, and keeping prices competitive, and permit them to enjoy an easier life. Moreover, it may divert attention from these potentially profitable (and socially valuable) activities to other potentially profitable (but arguably less socially valuable) activities such as lobbying, speculating, or “excessive” promotion.

Yet further, the very atmosphere of concern that conglomerate take-overs create—argued above as a stimulus to competition — may change corporate behavior in ways that distort resource allocation. Significant resources of existing firms may be devoted to resource consuming defensive moves, including legal services and public relations activity. More important this atmosphere may lead to a change in the risk distribution of ventures. Some firms may avoid risky ventures which should be undertaken and engage in safer ones with lower expected values, because the possibility of conglomerate take-over overly punishes an unsuccessful venture. Other firms may take foolish risks in order to appear dynamic.

There is no comfortable way to conclude this recital of possible efficiency gains or losses. Possibility theorems are an endless web, and I

have asserted (and believe) that no LaPlacian intellect will free us from the need to sort, sift, measure, and compare. And there are many more empirical problems than I have mentioned. For one example, if potential competition is important, how do we identify the potential entrants? How, in Joe Bain's phrase, do we measure the general condition of entry?

It may be that such empirical regularities as we find will be structure-oriented — that conglomerate mergers will prove benign in some well defined circumstances, and adverse in others. This is the hope of the Guideliners, but I find little comfort in the guidelines promulgated so far. Another possibility is that knowledge will prove that specific costs and benefits of conglomerates are attributable to specific practices—to particular forms of behavior or conduct. If so, an easy set of solutions is available. This is the will-o-the-wisp of the *per se* rule makers.

Conclusion

What, in conclusion, is the public interest in conglomerates? Financial considerations aside, the “problem of conglomerates” (if indeed it *is* a problem) seems no more tractable to easy policy solution than other hard problems. Indeed, hard problems are defined by the absence of obvious solutions. There are those who would say: “If the matter is close, let freedom swing the balance”—let private decisions stand in the absence of an overriding case against them. Others would reverse the burden of proof, fearing that structural change in the economy of the kind we have had in the last decade tend to be irreversible. But neither position is compelling. Fortunately I doubt if the future of either American capitalism or of American democracy is in the balance. The most satisfactory response to ignorance is to combat it. Let us have a moratorium on assertion and invite a search for evidence. Let us shed the mantles of our righteousness. Let us pry.



NONJUDICIAL ACTIVITIES OF SUPREME COURT JUSTICES

and other federal judges



The statement with which the Chairman opened these hearings last July noted that "[t]his is a difficult subject upon which to hold hearings." Candid public discussion of the issues raised by the subcommittee's inquiry risks embarrassment of the Supreme Court, a risk especially painful for those of us whose respect extends not only to

Statement submitted to the Subcommittee on the Separation of Powers of the Senate Committee on the Judiciary

by Professor
Terrance Sandalow

the Court as an institution but to its current membership. That risk is a necessary consequence of the extent to which public attention is focused upon the Court. It may be worth stressing, therefore, that the issues raised by the inquiry are not limited to the Supreme Court. Judges serving on inferior courts have also engaged in activities of the type under consideration by the subcommittee. The resulting problems are not unique to the Supreme Court but general to the judiciary.

During the past decade, members of the federal judiciary have with

increasing frequency engaged in out-of-court discussion of legal questions of contemporary significance. The practice is not entirely unprecedented, of course. Justice Story's *Commentaries on the Constitution of the United States*, to cite but one example from our early history, revealed no reticence on his part to speak extrajudicially on constitutional issues. Yet, the frequency and the character of out-of-court commentary in recent years, I think it is fair to say, involve a departure from the dominant tradition of the federal judiciary.

Perhaps the most striking characteristic of recent extrajudicial utterances has been the willingness of the judges to analyze in detail and ultimately to take positions on issues which are either in litigation or are certain to be so in the relatively near future, certain if for no other reason than that members of the bar will hardly fail to take notice of the invitation. The challenge to tradition implicit in these recent breaches of it by some of our most distinguished judges inevitably raises the question whether candid abandonment of that tradition would be a useful step. No lawyer who has sat through any substantial number of the lectures and after-dinner speeches with which the profession is afflicted can fail to view sympathetically any break in tradition which promises to enliven these events. Discussion of concrete issues of contemporary significance would, in this perspective, be viewed by most as infinitely preferable to the endless paeans of praise to the rule of law, the descriptions of how a particular court handles its case load, the expressions of alarm over crowded court dockets, and so on through the all too familiar list. More seriously, careful discussion of legal issues may contribute much to the understanding of the bar and of the public. Yet, much as any such contribution to the intellectual life of the profession and the education of the public is earnestly to be desired, the cost of achieving them in this way seems to me to be too great.

Extrajudicial discussions of specific legal issues are troublesome for a number of reasons. There is an understandable tendency on the part of those who have written on legal issues to view their own work as definitive. The attachment most of us feel toward what we have written leads to no embarrassment other than our own when, as is not infrequently true, the complexity of events or the deeper wisdom of others reveals the inadequacy of our theories. Ego involvement may blind an author to those inadequacies, but it does not impede a reassessment of his theories by others.

The matter stands rather differently with respect to judges, however; not because their egos are more likely than those of others to be involved in the defense of what they have written, but because they are not likely to be less so. Judges may, of course, change their minds, and it would be foolish not to recognize that under the pressure of events, of counsel's arguments, or of deliberation with colleagues, po-



"Extrajudicial discussion of issues likely to arise before the Court poses a risk of deepening . . . convictions without widening . . . experience . . ."

sitions advanced at an earlier time may on occasion be modified or abandoned. The only point I make is that both consciously and subconsciously it is likely to be a good deal more difficult for them to do so if the position has been taken publicly. There are enough impediments to collective effort on the part of the members of the Court without addition of new ones. The Justices are men of deep conviction and wide experience. Extrajudicial discussion of issues likely to arise before the Court poses a risk of deepening their convictions without widening their experience, thereby accentuating the obstacles to a collegial effort and minimizing the opportunities for the refinement of ideas through collective deliberation. It is not, after all, necessary to glorify composure of differences among the Justices as the prime value to recognize that a cacophony of individual performances is unlikely to bring forth the best efforts of the Court as an institution or its members as individuals.

Ultimately, the question before the subcommittee, if it concludes that extrajudicial discussion of legal issues is undesirable, is whether the Congress should act to arrest the trend. Constitutional questions aside, I think there is not much that can profitably be done beyond what the subcommittee has already done. The present hearings will undoubtedly focus attention on the problem and serve to communicate to the judges the consensus of the profession toward extrajudicial pronouncements, if indeed such a consensus exists. Hopefully, they will lead the judges to reconsider the wisdom of departing from what Justice Frankfurter once described as the tradition of "judicial lock-jaw." I do not believe the Congress ought to attempt more at this time.

Legislation, even in the form of a code of judicial ethics, is of doubtful feasibility. There is much about which judges may write or speak without embarrassment to their primary responsibilities. In doing so, they may, as they have in the past, contribute importantly to professional and public understanding of the courts and of our legal system. Yet, the draftsman's art is not, I suspect, equal to the task of formulating a standard which, with adequate clarity, will distinguish between that out-of-court commentary which is permissible and even desirable—and that which jeopardizes performance of the judge's primary function. In these circumstances, reliance on the discretion of the judges, a discretion informed if need be by occasional criticism from the profession, seems preferable to an attempt at legislative prescription.

Tradition speaks with rather less clarity concerning the propriety of extrajudicial activities other than out-of-court discussion of legal issues. The propriety of judges serving in nonjudicial governmental positions or of informally advising the President have been especially vexing questions throughout our history and, as already noted at these hearings, those questions have been answered variously by different judges.

The least defensible of these activities, in my judgment, is that of acting as advisor to the President. Public acceptance of the Court's unique role depends in substantial measure upon a belief in the disinterestedness of the Justices. Even in normal times, effective discharge of the Court's responsibilities requires that its members at least strive to meet the standard set for Calpurnia. The demands upon the Justices are even greater when, as now, the Court is under siege and, even more ominously, all the institutions of government are held suspect by a significant minority of the population, including many of those from whom leadership in future years would normally be anticipated. The withdrawal from active involvement in public affairs which traditionally has been assumed to follow appointment to the Court is rooted in wisdom, for it helps to inspire public confidence that the Justices are indeed disinterested, their deliberations unembarrassed by involvement with the men and events they are required to judge.

Potentially more is at stake than the Court's public image, however. There is also a need to be concerned with reality. We have lost the innocence of earlier generations. Judges do make law, and the law which they make is in no small part influenced by their personal philosophies and their loyalties. But it has been generally understood that this inevitably personal element of judicial decision is to be disciplined by detachment from the men and events potentially affected. An "independent judiciary" connotes more

than the protection of the Court from outside coercion. Independence may be threatened from within as well as from without.

The tendency of judicial participation in the affairs of executive, one fears without ever being entirely certain, is to threaten that detachment from political decision upon which rests not only public confidence in the Court but an important justification for judicial review. It is no doubt true that most



"The draftsman's art is not . . . equal to the task of formulating a standard which... will distinguish between that out-of-court commentary which is permissible . . . and that which jeopardizes performance . . ."

cases before the Court—including those to which the Government is a party—are of insufficient importance to engage the attention of the President. But every generation has witnessed cases in which the program or prestige of the President is deeply involved. Though few in number, they are typically of critical importance. Yet it is precisely in such cases that a failure to maintain adequate distance between the members of the Court and the President threatens disinterested performance of the judicial function. There is no need to belabor the point. Few would question the imperative responsibil-

ity of the members of the Court to disengage themselves, so far as humanly possible, from the loyalties of past association which may impinge upon their judicial responsibilities. That effort places enough strain upon human capacity without the added burden of a continuing relationship.

The question whether judges ought to be appointed to official nonjudicial positions raises quite different issues. At least in recent years, such appointments have not involved judges in the ongoing work of the executive and have posed no serious threat to the maintenance of an independent judiciary. As in the case of Chief Justice Warren's appointment to chair the commission to investigate the assassination of President Kennedy, recent appointments have tended to rest on the need to create public confidence in the handling of controversial issues by assigning them to men of unquestioned competence and integrity. It is that need, in my view, which is at once the strongest argument for permitting such appointments and for prohibiting them.

Ultimately, the issue is whether the prestige of the judiciary shall be put at the service of the government for purposes other than the performance of the judiciary's constitutional responsibilities. On the other hand, we must recognize that prestige is not a commodity in limitless supply. A decision that the participation of a prestigious judge will help to create public confidence in the outcome presupposes that the matter is controversial. That controversy is not likely to be entirely stilled, as the report of the Warren Commission demonstrates, however impeccable the credentials of the participants. The risk, which we have no way of measuring in advance, is that the judiciary will not emerge unscathed from the controversy, thereby impairing its ability to perform its primary role.

Nevertheless, it is a fair question whether in time of crisis these considerations ought not to give way to other compelling national needs. The maintenance of judicial author-



“ . . . controversy is not likely to be entirely stilled, as the report of the Warren Commission demonstrates, however impeccable the credentials of the participants.”

ity, though important, is after all but one value among many. Although I am not unmindful of the force of this argument, on balance I am unpersuaded by it for at least two reasons. Initially, the argument exaggerates the importance of invoking the prestige of the judiciary as a means of gaining the confidence of the public. Judges are not the only men upon whose integrity the public may rely. Secondly, the immediacy of a problem is likely to lead to an exaggeration of its importance, leading almost inevitably to increasing reliance upon judges for extrajudicial duties. If the circumstances surrounding Pearl Harbor or the assassination of President Kennedy threatened public confidence in government, of which I am by no means certain, the U-2 incident a decade ago surely did not. Yet, federal judges were appointed to conduct inquiries in connection with each. Once it is accepted that judges are available for such service, it seems inevitable that occasions for their appointment will multiply.

For these reasons, I am entirely in sympathy with what I understand to be the central objective of S.1097, the maintenance of an appropriate distance between the judiciary and the political branches of the federal

government. That the objective is an appropriate concern of the Congress seems to me beyond serious question. The effective functioning of the courts, no less than of any other part of the government, is a proper subject of Congressional consideration and, when required, of legislation. Regulation of judicial conduct directed toward that end, as long as it does not interfere with discharge of the judiciary's constitutional responsibilities, violates neither the letter nor the spirit of the Constitution.

My difficulties with S.1097 lie in another direction. The broad sweep of its language is in marked contrast with the relatively specific problems which may suggest the need for remedial legislation. Unless preceded by a careful analysis of its impact, there is a danger that language of such breadth, if enacted into law, will result in proscribing unintentionally activities which are both compatible with the judicial function and beneficial to the nation. One example will suffice to make the point. At the subcommittee's hearings last year on the Supreme Court mention was made of the fact members of the Court have on occasion visited other countries under the auspices of the State Department.

The purpose of the visits is to create good-will for the United States by building understanding of our legal system and familiarity with some of its most distinguished students among currently or potentially influential individuals from other countries. The program lacks domestic political significance. Neither does it appear to interfere in any other way with the proper performance of a judge's duties. Yet if I read S.1097 correctly, its enactment would require termination of the program. No reason for such a prohibition is apparent to me.

Perhaps legislation directed at the appointment of judges to nonjudicial positions is no more feasible than legislation dealing with out-of-court commentary on legal issues. I am reluctant to believe that is true. The periodic recurrence of the practice, notwithstanding criticism of it within and without the Congress, suggests that it is not likely to be curbed absent a more formal statement of Congressional policy. A serious effort by the Congress to provide guidance for the courts and the executive concerning the circumstances in which such activities are and are not appropriate would, I believe, return substantial dividends in the years ahead.

An Environmental Common Law for Michigan



by Professor Joseph L. Sax,
on research leave 1969-70

Extracts from testimony before the Committee on Conservation and Recreation, Michigan House of Representatives, on H. B. 3055, January 21, 1970. The bill authorizes the Attorney General, local governments and private citizens to go to court and challenge activities which infringe the right of the public to a clean, healthy and attractive environment. Courts are empowered to take evidence in such cases and to enter orders prohibiting or modifying conduct that is shown to impair or threaten the quality of the environment. In 1969 the Western Michigan Environmental Action Council retained Professor Sax to draft a model environmental quality bill.

H.B. 3055 incorporates the provisions of that model bill.

Legislative efforts in the area of environmental quality have thus far been essentially limited to setting out standards for particular problems, and creating some administrative machinery for enforcement. Such legislation is vital, but it is not sufficient. Every problem cannot be foreseen in advance; a means must be provided for coping with unanticipated or neglected matters.

Let me illustrate the point with a single, but striking, example. Today everyone is aware of the pesticide problem. But only two years ago, when an effort was made to call to attention in this state the burgeoning pesticide problem, our pesticides statutes were at essentially the level of the following law:

Whenever there may exist within this state any scourge, or threatened scourge, of grasshoppers or other similar pests, the board of supervisors of any county is hereby authorized to appropriate money for the purchase of poison and to provide such other means as may to them seem best, for the extermination of such pests.

To the best of my knowledge that statute is still on the books. I don't say this critically of the legislature. It is difficult enough to deal with today's most visible and pressing

problems, without having prescience about tomorrow's and the next day's.

The old way is to wait for a disaster and then legislate. But that is a luxury we can ill afford in coping with the problems of the environment.

Use of the courts will add a weapon to the arsenal of the public interest: the ability to meet problems as they arise, formulating a solution appropriate to the occasion, flexible, innovative, responsive. In short, the inventiveness of the common law system should be brought to the environmental crisis. We need to develop a common law for the environment; H.B. 3055 opens the door that makes this vitally needed development possible.

Our failure thus far to open the way to the development of a common law in this area has been very damaging. In a number of cases, judges have been deeply troubled by complaints put before them, which raised serious environmental problems; but they have felt duty bound to dismiss the cases because they felt the legislature had given them no mandate to cope with environmental problems. This is wrong and should not be countenanced. At the other extreme, concerned judges have reached out for legal straws to prevent a destructive act from going forward—as in one recent case where the parties dredged up a forgotten statute reg-



ulating "dikes" because it permitted a dubious project to be sent back for needed reconsideration, a result that breeds contempt for the dignity of the law and produces erratic and unpredictable results. Had there been no dike—a mere fortuity—there would have been no case. We must do better than this!

But—it will be said—we have administrative agencies to protect us. So we do, and I hope I will not be thought unkind if I suggest that our

administrative agencies at times leave something to be desired.

Official agencies which are created to promote and protect the public interest sometimes become too single-minded. In the past few years, a number of cases have brought home the degree to which important regulatory agencies failed to take into account all the information and all the perspectives which a proper regard for the public interest required. One recent opinion writ-

ten by the new Chief Justice of the United States said of traditional, unquestioning reliance on administrative agencies:

The theory that the Commission can always effectively represent the [public] interests . . . without the aid and participation of legitimate [citizen] representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long

as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it.

* * *

We cannot fail to note that the long history of complaints . . . had left the Commission virtually unmoved . . . and it seems not unlikely that the . . . application might well have been routinely granted except for the determined and sustained efforts of Appellants at no small expense to themselves.

I ask the committee to recall that when the agency in this state principally charged with agricultural pesticide regulation was asked to help restrain the use of hard pesticides their response was vigorously to defend — with the taxpayers' money—the use of dieldrin. And that was a mere two years ago. So the notion that some private citizen initiative may be needed is not just an invention of Mr. Chief Justice Burger and me. An agency ought not to be embarrassed to have it pointed out from time to time that it is not infallible, and if the citizens of the state, in whose interest the state's resources are to be maintained, do not have a legitimate interest in such vigilant regard for their own interest, who does?

THE NEED FOR THIS LEGISLATION

A memorandum filed on April 29, 1969 by the Attorney General, in commenting on this bill, suggests that we have all the remedies we now need for dealing with environmental problems. A careful reading of that memorandum makes clear

just how limited the citizen's right is today. He says that present statutes provide a means for citizens "to file complaints with state agencies." So they may, but I assume that even in the days of the monarchy citizens were perfectly entitled to file complaints with the king. Notably the law does not provide any general requirement that the agencies undertake a proceeding in response to such complaints, however meritorious, nor does it give citizens a right to challenge agency decisions in court. In essence it simply allows a citizen to tell an agency that he thinks it is wrong; and it allows the agency to say "oh no, we were right."

The Attorney General's memorandum also refers to the Water Resources Commission Act. Passing over the limitation in the law to the traditionally narrow category of "aggrieved" persons, and the limited judicial review permitted, the important thing to note is how many environmental problems exist outside the structure of even this modest kind of opportunity for remedial action by private citizens. The problems of noise, of odor, of airport and road construction, of pesticide use, and a dozen others at least, leave the citizen essentially without redress beyond the opportunity to plead with some public agency. Moreover, the Attorney General has omitted completely the environmental problems created by private enterprise; to take but a single example, that of utility companies with their extensive right of eminent domain—a power which has created many serious environmental problems throughout the nation. Rather than dealing in generalities, however, let us look at some specific examples of problems which have arisen in the State of Michigan, for which the Attorney General's memorandum supplies no answers.

CASE NO. 1

A city hired a contractor to install water and sewer lines. During the construction there was considerable dumping of pollutants into the river. Of course a state agency has jurisdiction over such matters, and I am informed that decisive action could have prevented serious damage. Our regulatory agency did not act decisively, however; only afterwards did remedial action get under way—after the fact, and after the damage was done. Concerned citizens might have provided that needed impetus for decisive action; but the law does not provide any clear right of action.

Indeed, a recent case in the Muskegon circuit court raised the very question whether private citizens could attack pollution alleged to have been inadequately dealt with by the state agency charged with that function. The judge allowed suit only by those who could qualify as property owners—but not by other plaintiffs without that traditional property interest. Even this decision as to property owners—still in dispute in the courts—is by no means clearly allowed by our law; and, of course, the scope of legitimate interest in environmental problems is by no means limited to those who hold adjacent property, as the next example demonstrates.

CASE NO. 2

A Michigan city has road building plans for construction within the city. The plans were made a long time ago, and many well informed persons believe they are unwise and ill-considered. They implement all the worst elements of the old "shortest, straightest, cheapest" philosophy of highway building—and the devil take anything that happens to be in the bulldozer's path. Among other problems with the present plan, it is said unnecessarily to destroy valua-

"[We are told] that present statutes provide a means for citizens 'to file complaints with state agencies.' So they may, but I assume that even in the days of the monarchy citizens were perfectly entitled to file complaints with the king."

ble parkland and scarce riverfront vistas. Citizens want very much that alternate routes—which they claim are feasible and practicable—be considered. But city officials won't be persuaded. Perhaps they think they are correct; perhaps they balk at having their authority challenged; perhaps they are too eager to save a little money; or too lazy to reconsider a job that was once done. Troubled citizens today have no place to turn once the city rejects their pleas.

CASE NO. 3

A real estate developer bought a choice piece of land at the top of a hill, overlooking a fine tract of city owned land which serves as a nature preserve and outdoor conservation laboratory for school children. The developer moved in quickly with bulldozers and denuded his hill; it sat that way for a year, with the usual consequences when the cover is stripped off a piece of land. Erosion had serious adverse impact on the land below. To save a few dollars pending the start of construction, a valuable public resource suffered serious environmental damage. No-one did anything about it. Many members of the community were outraged, but to the best of my knowledge they had no legal standing to act on behalf of the public interest. Public officials might have acted, but they did not. Perhaps they were busy with other things; perhaps they were afraid of controversy; perhaps they were simply unimaginative. The fact is they did not act—and concerned citizens did not have the legal wherewithal.

CASE NO. 4

Last I come to a case which is widely known, involving the leasing of public lands for oil and gas oper-

ations. I understand that public concern has led to amelioration of some of the problems, and that additional state agencies have been brought into this area of operations at least in an advisory capacity. The situation is an important one, for the process of disposition and leasing of public lands is one prolific source of environmental problems everywhere, and it is typically an area of government in which no regularized means is provided for citizen participation.

The committee might ask state officials to explain what the situation is if, for example, public land is proposed for leasing to a private company for mineral exploration and concerned citizens believe they have sound and powerful evidence which would cast serious doubt on the proposal—evidence which the state agency fails adequately to consider. The issue is by no means a fanciful one, for it is traditional for many agencies to view citizen interest, and a desire for citizen participation, as a nuisance. It may give a little perspective on this attitude to recall that before the federal leases were granted at Santa Barbara, California, local citizens wanted to have a forum to raise some questions and objections. But the lease-granting agency refused, assuring them that "maximum protection has been made for the local environment." Privately, a memorandum was circulated in the Interior Department arguing against holding public hearings because the Department "preferred not to stir the natives up any more than [necessary]." Of course the "natives" eventually got very stirred up, when oil began covering their beaches. Will anyone say, "it can't happen here."

* * *

The foregoing cases are, of course,

only a few examples of situations where the opportunity for some initiative outside the official channels of agencies which are supposed to be protecting the public interest might be quite useful. Anyone can compile his own list by simply walking around the state looking and smelling; we have lots of laws and lots of agencies which are charged with their enforcement, but we also have a lot of environmental problems. I am sure the committee has heard more examples than I of pollution clean-up orders which have been outstanding for years, unfulfilled and for some reason unenforced; of towns where pollution of the air is heavy and odors atrocious. A little private initiative by members of the community who are the daily victims of these problems might do wonders.

In citing these cases, I do not assert that in each instance the city, or the state agency, is wrong and the objecting citizen right. I only say that the questions sought to be raised are substantial—and that concerned and affected members of the public are entitled to have a forum in which such questions can be raised and considered.

Note too that opening a public right is not merely designed to challenge an agency which is ill-informed or willfully wrong. Public intervention may help to strengthen the resolve of an agency which is under pressure from interested parties, or it may encourage an agency to reconsider a problem it has ignored or held too long in abeyance. In short, we can sometimes help to liberate public agencies to do what they ought to be doing. I have spoken harshly of the pesticide problem in Michigan, but it is important to note that the lawsuits which were filed—though aborted because no ade-

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quate law existed upon which to base them—made enough of an impression by their presence that they helped advance and promote needed reexamination of the DDT problem.

We ought not to forget how useful it can be—indeed how essential—to ventilate important issues of policy outside the often confining traditional channels of the bureaucracy; particularly is this so when a bill like H.B. 3055 is under attack on the ground that it might shake up the well established formal channels of government a little bit. It might—and should.

THE ADMINISTRATIVE PROCEDURES ACT DOES NOT FILL THE NEED

Our new Administrative Procedures Act, for all its virtues, is not adequate to deal with the range of environmental problems now facing us. It governs only a limited class of public decisions which meet the definition of “contested cases”—a category which excludes much private conduct, dispositions of the kind which raise problems about the protection of the public trust, and most project building; it is essentially limited to “rate making, price-fixing, and licensing” and only to limited examples of even that conduct. Moreover, it is at best ambiguous about the right of members of the public to seek redress in the courts, with its rather circular definition of a party as someone “named or admitted, or properly seeking and entitled of right to be admitted as a party in a contested case.”

And of that uncertain group, only those “aggrieved” may seek judicial review. To limit the public to that source of redress—with all its ambiguity—is only to invite endless controversy and bickering over legalistic and procedural questions, filling the

courts with technical squabbles when their time and energy could be better spent in dealing with substantial matters.

WHY DOES THE BILL PROVIDE FOR CITIZEN INITIATED LAWSUITS?

The idea of citizens suing to protect the public interest is not a novelty at all. Michigan itself has long permitted citizens to sue “in the name of the State of Michigan” on behalf of the public to enjoin certain kinds of public nuisances like houses of prostitution and gambling dens. The principle of the public suit is well established and it might be asked whether that principle might not more needfully be applied to the conservation of our resources than to prostitutes and gamblers.

Indeed, such suits are permitted to be brought to enjoin a wide range of improper conduct in many states. At least a dozen states have statutes like ours, and Wisconsin (W.S.A. 280.02) and Florida (60.05) permit private citizens to sue on behalf of the public to enjoin public nuisances—itsself a rather broad concept—generally.

The right of citizens to sue on behalf of the general public has been recognized in a wide range of situations and the concept is receiving new approval with greatly increasing frequency. In Massachusetts citizens have been allowed to sue to protect Walden Pond, parks, reservations, and natural areas against highways, parking lots, and other destructive commercial encroachments. The Supreme Judicial Court of Massachusetts said they had standing “to enforce a public duty of interest to citizens generally.”

In the 1950’s citizen groups were allowed to challenge—and did so successfully—a proposed hydro-electric development on the Namekagon

River in Wisconsin. More recently a similar challenge has been allowed as to a proposed hydro development and expressway on the Hudson River in New York. Citizens have been allowed to sue in New York to implement their state’s constitutional natural resource protection provision. Very recently suits by private citizens challenging misuse of natural resources have been permitted in Tennessee, Minnesota, California, Colorado, and New York.

That the citizens’ suit is no novelty is clear enough. But is it necessary, when we have public officials who have authority to bring such suits? The answer to this question is clearly “yes.” In a recent case citizens sought to enjoin a program proposed by one state department on the ground that it would seriously impair environmental quality. The Attorney General or another state agency could, in theory, have challenged that proposal. But it was determined in the governor’s office that it would be unseemly for two equal state agencies to fight out a public question in the courts; and that it would have been improper for the Attorney General, who must defend state agencies in court, to be lawyer for both plaintiff and defendant in a single suit. Whatever the merits of such views, they are facts of life which tell us that without citizen participation important issues will sometimes go unexamined and unchallenged.

Moreover, citizen prodding may be required to encourage an agency, busy with its routine work, to take a careful look at all the implications of a program which it is promoting or regulating. In a recent roadway dispute in New York, citizen groups urged that a proposed location was improper. At first, both the state and federal agencies disagreed. But the

The argument that “the courts will be flooded with litigation . . . is simply a version of the argument that nothing new should ever be done because it is either unnecessary or dangerous.”

citizens persisted, and after promoting a careful study and analysis of all the alternatives, the state officials reversed themselves and sided with the protesters.

ARE THE COURTS COMPETENT TO CONSIDER AND EVALUATE ENVIRONMENTAL QUALITY QUESTIONS?

. . . This is a matter of great importance. A recent New Jersey case—*Texas Eastern Transmission Corp. v. Wildlife Preserves*—speaks impressively in response to this concern; it deserves the attention of every person who asks this question. Citizens sued to block a gas pipeline project on the ground that it would have severe adverse effects on the environment. The state supreme court held that a trial should be held on the question. A careful examination of the stenographic transcript demonstrates beyond doubt that the judge, an ordinary trial court magistrate like thousands of others across the nation, could and did do a perfectly competent and knowledgeable job of evaluating and sifting the evidence offered by each party. His experience at problem solving served him well in the pipeline case and he found a solution which was a compromise between the proposals of both parties, but which minimized environmental damage without preventing the pipeline company from getting its job done.

It should not be surprising that courts can work effectively in these cases, which are no more or less technical or obscure than a wide range of matters that routinely come before judges, ranging from the need to determine negligence in running an atomic power plant to railroad reorganizations, stock swindles, and patent applications.

No doubt this committee will be told that these matters cannot be tried practically. But the simple fact is they can be, and are. The New Jersey case is but a single example. This month a case will go to trial involving the environmental impacts of public land management in

Colorado—a case set down for trial by an experienced trial judge against the repeated bleating of government lawyers that it couldn't and shouldn't be done. The judge became so annoyed at this that he told to the government lawyers they always paraded the horrors, but the horrors never came to pass except in their minds.

In the January, 1970, issue of the *Michigan Law Review* I detail a case after case of environmental litigation, for nearly 100 printed pages. Don't let anyone tell you such litigation is impractical or unmanageable.

For lack of a statute like that now pending before you, judicial cognizance of such cases has been irregular and uncertain. But historically, in toto, there have been enough cases to make clear their practicality and feasibility.

THE PROPOSED BILL WILL NOT PREVENT NEEDED DEVELOPMENT

Section 3 of the bill has been carefully designed to steer a middle course between unthinking exploitation and unyielding preservation. Those who wish to object to any proposed project or activity must first bear the burden of showing that there is a reasonable likelihood that there will be some significant adverse effect on the state's resources. Only then is it incumbent upon the party who is proposing to act to show that his conduct is reasonable; that is, that what he wants to do is consistent with the public welfare and that no feasible or prudent alternatives exist for getting the job done. This section of the statute, in talking about alternatives, assures that the forum in which such controversies are worked out will not be mired down in abstract consideration of benefits and detriments, but will have before it solid and substantial proposals and alternatives to weight and evaluate comparatively.

The language of feasible and prudent alternatives already appears in statute law, including the federal transportation and highway acts.

Moreover, to put the burden of

establishing alternatives on the proponent of action is a simple matter of common sense, for we expect the proponent of any activity to have considered all reasonable alternatives and to have chosen the best of those available; to ask him to support his decision is merely to ask that he reveal the process which he must—if he operates rationally and with the public interest in mind—already have undertaken. Indeed, Michigan law itself imports even a stronger version of this approach in a number of statutes; the air pollution law, for example, requires that in judicial review of its orders the "commission shall have the burden of proving the correctness of its order or determination." (MCLA 336.23).

WILL THE COURTS BE FLOODED WITH LITIGATION?

This has been the historical complaint whenever a new or expanded legal right was recognized; it has been raised with monotonous predictability as an objection to every new idea that has ever been advanced in the law. It is simply a version of the argument that nothing new should ever be done because it is either unnecessary or dangerous.

For those who are inclined to worry, the statute contains two safeguards against unwarranted litigation. First, unless the plaintiffs can make out a prima facie case, they cannot succeed; thus frivolous cases can be disposed of at an early stage. In addition, the provision in section 3, permitting the court to allocate costs of litigation to the parties, gives the court authority to impose economic burdens associated with the case upon those who unreasonably impose upon the court. Finally, for better or worse, the economics of instituting litigation have always acted as a substantial deterrent to those who do not have a case with any reasonable prospect of success.

This initial requirement on the plaintiffs also puts to rest the fear of so-called crank cases. Unable to meet the initial burden of substantiality, such cases can be quickly and decisively dismissed by the court.