

BOOK REVIEWS

The Washington Lawyer. By Charles A. Horsky. Boston: Little, Brown and Company, 1952. Pp. 179. \$3.75.

The practice of the Washington lawyer is unique, at least as to those lawyers whose work primarily involves the relations of their clients to the federal government. Of course, there are lawyers in Washington whose work is largely confined to rendering the usual type of legal services concerning purely private business transactions—the same function lawyers perform in any other community. These, however, are not the lawyers about whom Mr. Horsky writes in *The Washington Lawyer*. Rather, his book focuses on the lawyers in and out of Washington whose work is centered on the problems arising out of the direct impact of the federal government on the affairs of their clients.¹

Mr. Horsky has characterized the Washington lawyers who are the subject of his book as follows: "The Washington lawyer represents a recent development in the legal profession sufficiently distinctive to repay separate consideration, because he has become an essential part of our present scheme of government. His function, broadly, is that of principal interpreter between government and private person, explaining to each the needs, desires and demands of the other. His corollary function is that of seeking to adjust the conflicts that inevitably arise" (pp. 9-10).

The author is eminently qualified for the task he has undertaken. After graduation from law school with distinction, he served a year as legal assistant to Circuit Judge Augustus N. Hand in New York. Thereafter, in 1935, he was appointed a member of the staff of the Solicitor General of the United States, where he served for approximately three years. Since 1939 he has been in private law practice in Washington.

Mr. Horsky first describes the historical background of the Washington lawyer. There have been a few federal agencies which have attracted their own specialized bars almost from the very beginning of our government. The patent Bar, for example, consisted for many years of a specialized group of lawyers whose practice was concentrated in Washington. And there early arose a group of lawyers who practiced before the General Land Office. A legal notice in *Hubbell* in 1895 showed the continuing effect of the Civil War on Washington law practice: "Pensions secured for soldiers, sailors, widows, parents and minor children, write for particulars" (p. 19). The Court of Claims, after the Civil War, seems to have had a Bar of its own.

¹ The "Washington lawyer," as the term is used by Mr. Horsky, does not necessarily reside and work in Washington. Lawyers having a governmental practice in Washington may be found in many cities of the United States.

But notwithstanding these sporadic instances of practice peculiar to Washington, there was no substantial group of practitioners during the nineteenth century or early part of the twentieth century whose practice was primarily governmental and distinct from that of the usual local practitioner. Mr. Horsky believes that the genesis of the present group of Washington lawyers was in the Wilson administration. More lawyers appeared who listed themselves in *Hubbell* as specializing in patents, and others appeared who announced special competence in practice before the Interstate Commerce Commission, and in the field of pure food and drugs, income taxes and other revenue matters. Tax practice soon became a leading part of the Washington lawyer's job. After summarizing this history, Mr. Horsky concludes that the beginnings of the modern Washington lawyer trace back about thirty years and "that only in the last two decades has he become numerous and important enough to warrant treatment as a distinctive element of the American bar" (p. 21).

It is to the modern Washington lawyer of the last two decades that the book is chiefly directed, and Mr. Horsky roughly classifies his treatment into a discussion of the relationship of the Washington lawyers to the courts, to Congress, and to the executive branch of the government.

In his relation to the courts, the function of the Washington lawyer is the least unusual. In the early days of the Supreme Court, mainly perhaps because of travel difficulties, arguments in many important appeals to the Supreme Court were referred by local counsel to Washington lawyers, and many of the outstanding Supreme Court counsel of that period resided in Washington. But now, counsel who have handled cases in the lower courts customarily, although not always, come to Washington and argue the cases themselves before the Supreme Court. The Washington Bar certainly has no monopoly on Supreme Court practice.

Washington lawyers do handle a substantial volume of litigation in the Court of Claims. The United States Tax Court and the Court of Customs and Patent Appeals hear cases from lawyers residing in all parts of the country, although, of course, the Washington Bar also handles many cases before these tribunals.

As for the regular courts of the District of Columbia, the Municipal Courts review local cases and the Washington lawyers who are the subject of this book seldom appear in these Municipal Courts. They may, however, frequently appear in the United States District Court and the United States Court of Appeals. Both these latter courts have a dual jurisdiction—they function like state courts when dealing with matters arising out of private controversies in the District of Columbia; they also function as regular federal courts. In connection with this latter function, matters arise which frequently require the service of Washington lawyers. In addition, special jurisdiction is vested in the Court of Appeals to review the decisions of certain government agencies, for example, the National Labor Relations Board and the Federal Communications Commission.

One frequently finds such cases handled by the Washington lawyer specializing in governmental practice.

Mr. Horsky devotes considerable attention to the legislative activities of Washington lawyers. This requires the Washington lawyer, among other things, to interpret and evaluate legislative activity for the benefit of clients living in various parts of the country. Proper performance of this job demands that the lawyer have "considerable understanding of the prevailing political moods of individual Senators and Congressmen, of Congressional Committees, and of Congress as a whole" (p. 33).

The author then turns to the subject of lobbying. He gives us a very intelligent discussion of this subject which, unfortunately, it is impossible to summarize adequately in the scope of a book review. Sufficient to say, the author points out that it is the legitimate function of a lawyer to assist Congress in the legislative process, to serve his clients by seeking to prevent the passage of ill-conceived legislation and to advance his clients' point of view in support of positive enactments by Congress. Such function is a desirable part of the operation of a democracy. Mr. Horsky clearly distinguishes between such legitimate activities and so-called "influence-peddling." He also calls attention to the fact that lawyers can perform an invaluable service to Congress by assisting in the drafting of complicated legislative measures. Congress is short-staffed on competent draftsmen who thoroughly understand the problems involved in proposed legislation. The informed lawyer acts in the public interest when he seeks to render this useful assistance. By so doing, he will assure that his client is not the victim of poorly drafted legislation, easily subject to judicial misinterpretation.

Mr. Horsky admits that there are lawyers who take undue advantage of their position and engage in unethical activities as lawyer-lobbyists. But this is not an adequate reason for condemning all of the activities of lawyers in seeking to protect the interests of clients in respect to pending legislation, because most of this activity is quite legitimate and is an invaluable aid to Congress.

Approximately one-third of Horsky's book is devoted to a discussion of the work of the Washington lawyer in connection with the federal administrative agencies and the executive branch of the government. The growth of modern administrative law is one of the most interesting phenomena of our time in the legal field. The lawyers of several decades back practiced almost entirely before courts. Their cases were prepared and tried under principles of the common law or under state or federal statutes. They were accustomed to a strict observance of the conventional rules of evidence. There was a certitude about their practice which probably never will be attained for those who choose to practice in the field of public administrative law.

These earlier lawyers, thoroughly schooled both in the common law and in the principles of strict statutory construction, generally resented the appearance

and growth of administrative law as applied and enforced by administrative agencies and tribunals. Mr. Horsky quotes John Foster Dulles, as late as 1939, saying: "The lawyer dealing with a commission should not carry into his work prejudices and resentment which are perhaps natural but which, in justice to the client, must not be allowed to color the lawyer's judgment and action. He should, for example, be very sure that he does not unwittingly encourage the client to fight a commission because this will afford the lawyer a chance to vent his general feelings against commissions as such" (p. 65).

But whether we like it or not, administrative law is here to stay. The growth of large industry, the increasing concentration of economic power in the hands of a few, the growing complexity of modern life, and other factors, have made inevitable a corresponding enlargement in the powers and functions of the federal government. The type of regulation which is exemplified by the Securities and Exchange Commission, and many similar regulatory agencies, is here to stay because without it there would be chaos in the businesses under regulation. Just as modern congested traffic conditions require traffic lights, so modern economic and social conditions require regulation of varying degrees in different industries.

The courts are not equipped for the regulatory job. Agencies with special expertise must do this work subject, of course, to appropriate judicial review where the agencies perform an adjudicatory function.

Mr. Horsky gives an interesting brief history of this trend toward administrative regulation, which he believes commenced in the first administration of Woodrow Wilson. He points to the creation of the Federal Trade Commission, the Federal Reserve Board, and the Department of Labor, as well as the new limitations on business activity imposed by the Clayton Act, as indicating the beginning of the modern administrative process which had its flowering in the 1930's. But it is only during the last twenty years that the importance of administrative law has been fully recognized.

The author certainly is right when he points out that this development did not come about through any preconceived plan as to the ideal structure of government. Most of the new administrative agencies were created step by step as some concrete problem arose which Congress or the Executive thought could only be solved by administrative regulation. Inevitably, a new type of governmental activity which proliferated as rapidly as has the work of administrative agencies would commit some excesses which run counter to the letter or spirit of the Constitution and to principles of fair play. This has been true particularly in regard to procedure. In some agencies, the same individuals who represented their agency in adversary proceedings would participate in the decision of the case, thus acting both as prosecutor and judge. Attention was first centered on this problem in the *Morgan* cases,² in which the Supreme Court laid down cer-

² *Morgan v. United States*, 298 U.S. 468 (1936), 304 U.S. 1 (1938), 307 U.S. 183 (1939), 313 U.S. 409 (1941).

tain fundamental principles to guide administrative agencies in framing their procedures. The essence of these principles was later embodied in the Administrative Procedure Act. That act, though not entirely satisfactory, is clearly a step in the right direction. If administrative agencies are to exercise the vast powers now delegated to them by Congress and the Executive, they should follow the principles of fair play inherent in our constitutional safeguards.

After reviewing the history of the growth of the administrative process, and its increasing importance in our legal system, Mr. Horsky turns his attention concretely to the work of the Washington lawyer in the administrative law field. He points out the duty of the Washington lawyer "to see and interpret trends, to evaluate directions and speed, and to advise in the light of what is probably best described as an informed hunch" (p. 71). Business clients all over the country constantly need an informed opinion as to what will be the probable course of the agencies to whose regulation they are subject. The Washington lawyer usually cannot solve these questions merely by reference to books or even to rules and regulations. He must have a speaking acquaintance with the key figures in the agency and must be in close touch with the thinking of the agencies in which his client is interested. From the various sources of information at his command, a well-informed Washington lawyer can be of invaluable service to a client by advising, even in advance of the event, of probable public actions and of trends.

It is suggested by Mr. Horsky that there are three general groups of clients whom the Washington lawyer must serve: first, there is the client who is not concerned about immediate agency action but who wants advice as to how he may avoid trouble in the future. Second, there is the client who wishes to pursue a course of conduct which must be passed upon in advance by some agency. Third, there is the client who seeks representation because an agency has already taken or is considering taking action adverse to his interests.

When a client wants advice about avoiding trouble, the lawyer draws upon various avenues of information already referred to and exercises his best informed judgment as to the course that should be followed. The proper performance of this duty "requires a knowledge of the intimate details of the client's business, an appraisal of business facts, and the making of business judgments" (pp. 89-90). Such knowledge comes into the field of the lawyer because these business facts now often settle the legality for purposes of agency determination. The Washington lawyer measures these facts in relation to his knowledge of the agency's attitudes and renders an informed opinion to his client.

In regard to the client who wishes an advance ruling by an agency on his prospective conduct, many agencies will be of great assistance to trustworthy lawyers in making constructive suggestions as to what type of conduct would be considered acceptable to the agencies. Whereas judges cannot be consulted for advice or assistance in avoiding legal difficulties or in securing advance rulings, the usual governmental agency is available for consultation and on many types

of problems will render helpful aid. This, of course, does not apply to situations where the law provides for a formal administrative hearing. In such instances, informal, off-the-record contacts must be held to a minimum and in many instances would be quite as improper as informal consultation with a court. Nevertheless, there is a vast area within which informal conference procedures are permissible and the Washington lawyer can benefit his clients by utilizing these procedures in order to secure what amount to advance rulings or advisory opinions.

Then, of course, there are the clients who are already faced with adverse agency action. Here the Washington lawyer has a natural advantage because of his familiarity with the procedures of the various agencies and his acquaintance with agency personnel. In most instances, even after a complaint has been served, negotiation for settlement remains available and is frequently successful. If the matter comes on for hearing, and perhaps subsequently for judicial review of adverse agency action, the Washington lawyer should have the specialized knowledge and experience to ably represent his clients in this type of proceeding.

There remains the important field of agency rule making. Administrative rules may have a significant effect on many businesses since these rules have the full force and effect of law. The procedures for rule making vary with the different agencies, although the Administrative Procedure Act now lays down certain minimum procedural requirements. However, many clients have a legitimate interest in having their point of view on various proposed rules properly presented. In many instances, cooperation from Washington lawyers can considerably facilitate the formulation of fair and equitable rules by the agencies. By so cooperating, the Washington lawyer renders a public service at the same time that he is helping his client.

Perhaps the most interesting chapter in Mr. Horsky's book is the last chapter, entitled, "Some Reflections on the Role of the Washington Lawyer." In this chapter he brings out the important impact and effect of the lawyer's activity on the course of government. Indeed, the Washington lawyer is functionally a part of the government's enforcement machinery. In the simple act of advising his clients he saves the government a great deal of enforcement effort. His work promotes the observance of law. As Mr. Horsky puts it: "[The] work of the Washington lawyer in making the mandates of government meaningful is both a part of the lawyer's professional responsibility and a long step toward enforcement" (p. 125). Thus, the lawyer is consulted on a proposed course of action; he says no and the proposal is abandoned or modified. Mr. Horsky thinks that this is just as significant as an injunction obtained by the government against the same proposal. And he says, "Most clients, whether they be businessmen, labor unions, or just ordinary citizens, do not employ Washington lawyers to tell them how they can violate the federal laws and get away with it. . . . Most clients seek assistance in helping them obey the laws as they are" (p. 128). Moreover, "what the lawyer seeks for his client is a fair deal, in the

sense of equal treatment before the law and before the various governmental agencies which administer the law" (p. 129). The lawyer's opportunity to influence the development of administrative law is greater than in a judicial proceeding because as Mr. Horsky says, "the usual quasi-judicial agency is not quite so wedded to *stare decisis*" (p. 130).

Even in administrative adversary proceedings the Washington lawyer has a greater opportunity to influence the course of justice than in judicial proceedings because less importance is attached to *stare decisis* and the range for potential development of administrative law is still extremely wide.

Mr. Horsky also devotes a part of the last chapter to a discussion of the problem of "influence-peddling" as contrasted with the proper function of the Washington lawyer. He warns against imposing restrictions on ex-government lawyers going into private practice which are so onerous as to make it impossible for the ex-government lawyer to render service to clients in the field in which such lawyer is most competent and experienced. Statutes place limitations upon the activities of ex-government lawyers after they leave government service. Mr. Horsky agrees, of course, that ex-government lawyers should never participate in any matter as private practitioners with which they had anything to do when they were in government. But he criticizes the present statutes and suggests that perhaps the best rule of conduct evolved is that contained in Canon 36 of the Canons of Professional Ethics.³

The author voices his high respect for the competence of most lawyers in government service. He undoubtedly believes that as a whole they are high-minded public servants who adequately represent the government's interests and are a good match for their brethren in private practice.

In his closing remarks, Mr. Horsky refers to the "lack of cohesiveness and of integration with their locality" (p. 155) of the Washington lawyers. As a rule, they are not a part of the local community in the same sense as the typical lawyers who practice in other cities. Most of the Washington lawyers came originally from other parts of the country, many of them as government appointees. It is not uncommon for them to have residences elsewhere. Their clients are drawn from all over the country and, indeed, from throughout the world. The result is that they are not, in a true sense, members of the Washington community. There are certain inherent obstacles to overcoming this problem which have not yet been satisfactorily solved by the bar associations or any other media.

It is obvious that despite its ups and downs, Mr. Horsky personally enjoys the Washington law practice. And it is an exhilarating experience for one whose interests cover not only law, but government, politics, indeed, the whole field of human affairs. Though we did not will it, the inexorable course of events has

³ Canon 36 provides: "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

made Washington, at least for the time being, a world capital. For those who, in addition to enjoying the practice of their profession, would thrive upon living and working in the center of activity which is shaping the course of world events, practice in Washington presents an exciting challenge.

There are many important and interesting aspects of the Washington practice covered by Mr. Horsky's book which this reviewer has not undertaken to discuss, and even as to those points which have been mentioned, your reviewer has necessarily had to telescope a great deal of informative material which warrants a fuller discussion. So far as is known, no previous author has undertaken to write a book on the subject of Washington law practice; thus, Mr. Horsky has performed a pioneering job. *The Washington Lawyer* is well worth reading by lawyers and laymen who have a curiosity about this new development in the handling of relations between our government and its citizens.

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Studies in Legal Philosophy. Vol. I, Pogo, 1951. Pp. 182. Vol. II, I Go Pogo, 1952. Pp. 190. By Walt Kelly. New York: Simon and Schuster. \$1.00 per volume.

This is a day in which there has been desperate need for Professor Kelly's study. For over a hundred years, among many of the peoples of the world, the theory has been gaining ground that the work of law was a Marxian consequence merely of economic struggle and of consequent economic and political exploitation. The Soviet revolution did indeed fail to disestablish law and the work of law, but the Edenists¹ then promptly insisted that that was only because of the perversion of that revolution into the channels of a power-hungry dictatorship.

Professor Kelly utterly refutes both the original Marxian and the later Edenist views. In an environment *in which there is no economic struggle*, and in which (as measured against *need*) there is no economic scarcity, and which is in addition utterly devoid of any machine of political or economic dictatorship or exploitation, Kelly records observation after observation of the relentless production of friction, disruption, injustice, even devastation, by what in the lay tongue would be known as nosy brashness,² the irresponsible dandelion

¹ Garden of, not Anthony. In the finer tradition of jurisprudential controversy, I refrain from citing any particular Edenist, or any specific passage. Why should I, when I can by mere anonymous attribution to a school both make my issue *my* way and magnify my victory? See Teufelsdröckh, *Jurisprudence, The Crown of Civilization*, 5 *Univ. Chi. L. Rev.* 171 (1938).

² E.g., *In re P. T. Bridgeport*, vol. II, p. 50; *Bridgeport v. Pogo*, vol. II, p. 157 et seq. In a subsequent communication, Professor Kelly has informed me that the Bridgeport persecution has driven Pogo into flight and concealment, without any legal remedy having been as yet discovered by any counsel in these United States.