FROM SEC ENFORCEMENT ATTORNEY TO COMMISSIONER

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I began working as an enforcement attorney at the Securities and Exchange Commission (SEC) in the summer of 1962 after my graduation from law school. This was the beginning of the Kennedy administration; the country was supposed to start moving again after the "do nothing" Eisenhower years. Professor William Cary was appointed Chairman of the SEC, an activist, he was responsible for the Special Study of the Securities Markets[1] and the 1964 amendments to the Securities Exchange Act of 1934 (Exchange Act).[2] The Exchange Act extended the reach of company annual and periodic disclosure requirements to all public companies, not simply those listed on stock exchanges,[3] and also gave the SEC the power to sanction all individuals associated with broker-dealers, not only their employers.[4]

The SEC was divided into the Commission's home office in Washington, D.C. and as many regional offices as there were federal circuit courts. The New York Regional Office (NYRO) was the most important, and perhaps the most political regional office, because it was where the securities industry was centered, to a much greater extent than is true today. All of the member firms of the New York Stock Exchange (NYSE) were required to have an office below Chambers Street, for clearance and settlement purposes, and the NYRO office also was below Chambers Street, in the Transportation Building on Broadway. As a result, the enforcement attorneys in New York did not share the bias held by many enforcement attorneys in Washington against the securities industry; namely, we did not assume that Wall Street was full of crooks. The people who worked in the securities

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1. U.S. SEC. AND EXCH. COMM'N, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS OF THE SECURITIES AND EXCHANGE COMMISSION, H.R. REP. NO. 88-95 (1963).

2. Securities Acts Amendments of 1964, Pub. L. No. 88-467, 78 Stat. 565.

3. Securities Exchange Act of 1934, ch. 404, § 12(g), 48 Stat. 881, 894 (codified as amended at 15 U.S.C. § 78l (2000)); *see* Summary and Interpretation of Amendments to Securities Act of 1933 and 1934, Exchange Act Release No. 33-7425, 34-7425, 29 Fed. Reg. 13,455, at 13,458 (Sept. 30, 1964).

4. Securities Exchange Act § 15(b) (codified as amended at 15 U.S.C. § 78o(b) (2000)).

industry were part of the community in which we lived and our job was to help keep that industry honest.

There were only about six enforcement attorneys in the NYRO during the Eisenhower years. I was hired along with thirty other new enforcement attorneys in a move to beef up the SEC's prosecutorial activities. Due to an error in the personnel department, I began working two weeks before the other new hires and so I had seniority over them. The cases in the office involved cleaning up the wreckage of the 1959 collapse of an over-the-counter (OTC) bull market. Many small firms were put out of business for fraudulent sales practices, manipulation of securities, and net capital violations. These were small cases, usually injunctive actions, so all of the attorneys had the opportunity to go to court. More important cases were often transferred to the home office in Washington. Although I now recognize that this was an effort to manage high profile cases, the NYRO attorneys saw this practice as a grab for power and we resented being sidelined.

When I began working at the SEC there were few women on the staff. The NYRO did have a few women and a few more were hired when I was. This was in part because the person responsible for our hiring policies, David P. Bicks, had a mother who was an attorney, and Dave decided the office should hire female enforcement attorneys. My first boss, a branch chief, was a woman: Irene Duffy, the wife of Kevin Duffy who later became Regional Administrator of the NYRO and then a federal judge. Irene also became a judge in the New York state courts. It was nice to have a female supervisor, especially one who was as competent as Irene.

The home office of the SEC in Washington, by contrast, had hardly any women. The General Counsel's Office and the Division of Trading and Markets, which at that time included what was to become the Enforcement Division, had few, if any, female attorneys. The Division of Corporate Finance had perhaps a few more. The SEC had always had a few women employees, but only a few. When I became a Commissioner of the SEC in 1977, an old timer, Rose Jaffee, came into my office and said, "I never thought I would see a woman in this job!" She told me she was the second female attorney hired by the Commission, stating "Bill Douglas hired one and then they had to hire me." I did not think deeply about the paucity of women at the SEC. There had been few women in my law school class (about four percent) and the Civil Rights Act of 1964[5] had not yet been passed. I

5. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

felt fortunate to have landed any job as a lawyer, and then when I started a family, I felt even more fortunate because unlike my friends who were teachers, I did not get fired when I became pregnant.

I recall two incidents which today would be regarded as sexist but which at the time I found amusing and maybe even flattering. When I went to court on my first case to obtain my first injunction, in Newark, New Jersey, Irene Duffy accompanied me. I was geared up for my argument to obtain a TRO, although now I wonder why we kept up the routine of asking for a TRO when the issuer was in bankruptcy and no one was continuing to sell stock in the company (I think it was because we could obtain an order ex parte). The judge took one look at Irene and me and said: "If I knew two ladies were coming to see me this afternoon, I would have gotten a haircut. Where do you want me to sign?" I felt a little disappointed that I did not have a chance to argue my case, but I was happy to go back to the office with my TRO.

Some time later, I was selected to work with the Associate Regional Administrator—a career attorney named Jack Devaney—on a quick investigation of a case against two forgers who came into possession of a book of stock certificates in a dissolved company right after their release from jail and started making a market in OTC pink sheets.[6] This was a fairly easy fraud to nip in the bud; we made a criminal reference in three weeks.[7] Mr. Devaney said to me when we completed this work: "You were hired over my objections, but you've worked out O.K." I felt that he did not need to explain that his objections were based on my sex. Some time later I testified before a grand jury on this case, and by then I was very pregnant with my first child. The grand jury began laughing during my testimony. To this day, I am not certain whether this hilarity was because the facts of the case were so comical or because members of the jury were taken aback by the sight of a pregnant enforcement attorney.

I think that Dave Bicks remained oblivious to the problems of the women he had hired. Once, he wanted to wire me to go to Lou

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6. The OTC market has been transformed into today's electronic Nasdaq Stock Market, but in the 1950s and 1960s, quotations for OTC securities by market makers appeared in daily quotation sheets (on pink paper) and were circulated to broker-dealers, who then negotiated transactions over the telephone. One of the questions raised in this prosecution was whether the pink sheets were instrumentalities of interstate commerce.

7. Criminal cases were at that time formally referred to the Department of Justice in a written report, authorized by the Commission. By the time I became a Commissioner, the practice had changed to granting the Department of Justice access to the Commission's files, with no formal reference being made and no written report being drafted. Although this change made for greater efficiency, it led to less focus on the legal theories upon which criminal prosecutions could be based.

Siegel's Restaurant in midtown Manhattan where a group of securities law violators customarily hung out. I was appalled as I was again pregnant and all of these fraudsters not only knew me but talked about me. They used to call me the "pregnant enforcer". (I had three children during the six-and-a-half years I worked in that office, and a fourth later while in the private sector). I told Dave in no uncertain terms that I could not go incognito to Lou Siegel's to obtain evidence.

When I went to work at the SEC, I was a somewhat shy woman who looked young for my age, and the idea of becoming a prosecutor frightened me. I was not sure I could handle the work, and many of the attorneys and witnesses who came into the office tried to throw me off guard by making statements like "you look too young to be an attorney." I felt empowered, however, by having the American flag behind me. I was aware that I could cause people to lose their jobs and even go to jail. Thus, in the psychological warfare which was an important part of my work, I had the ultimate weapon. Moreover, perhaps because I was a woman, I found the art of taking testimony very easy. Others in the office would frequently ask me how I could wring admissions of wrongdoing out of the targets of our investigations. I used to just keep asking questions because I found cases to be challenges like jigsaw puzzles. I wanted to learn how the evidentiary pieces would fit together to form a picture of the fraud we were investigating, and perhaps I used some wiles in getting con men to keep on talking and trying to impress me with their cleverness.

Our office operated in a madcap manner. The time was prior to Watergate and there were few constraints on government lawyers. We almost always obtained our injunctions as easily as I obtained my first TRO. The NYRO had a large number of inexperienced young lawyers and we were all playing cops and robbers. Almost everyone was planning to be in the office only a short time and then go on to a "real" job. I was probably the only attorney in the office who had no future plans. I had experienced too much discrimination getting a job out of law school to be interested in going out on the job market again soon. Perhaps because the attorneys in the office were the same age and were not really in competition with one another, or perhaps because teamwork was required for our jobs, we formed a fairly tight-knit social group. To my delight and surprise, I fit in with everyone else. I was considered "one of the boys." When I was in my job only a few years, with a small child at home and pregnant again, I was made a branch chief, and I had six attorneys under my supervision. A few years later, I was promoted to Assistant Regional Administrator and

then had about fifty staffers under my supervision—attorneys, investigators, secretaries, and those in the managing clerk's office.

Although I was not the first female branch chief in the NYRO, there was not a female branch chief in the Enforcement Division in Washington until the mid-1970s when I was a Commissioner. I believe I was the first SEC female staffer to rise to a grade fifteen, an important mark of achievement for a government lawyer, as well as a pay increase. I was happy that Linda Chatman Thomsen was promoted to Director of the Division of Enforcement, the first woman to achieve this honor, after this Symposium. Being a female boss in a professional organization in the 1960s was a difficult challenge, but in some ways I found it easier than being an equal or underling. I tried to prove I deserved my job by working hard and being fair. I was too young to act like everyone's mother, so I assumed the role of an older sister to the attorneys in my branch, trying to advise them on their cases and help them out instead of bossing them around. I was much younger than the investigators who worked for me, but they respected me because I had a professional degree. Many of them had Wall Street experience but no formal higher education. Yet, I felt in their debt because they taught me so much about the securities business. I put myself on the line for everyone who worked for me and tried to get them raises. I fought to have the investigators reclassified from GS-13s to GS-14s and once that reclassification came through many of them would do anything they could for me.

I worked on some fairly high profile cases during my years at the NYRO. One of these, *In re D.H. Blair & Co.*,[8] alleged margin violations and market manipulation by a number of NYSE member firms. At first I was told that I could not bring this case because it was against member firms. "Members of what?" I asked naively, "they violated the law, didn't they?" This case provided me with an education as a practicing lawyer because the respondents were represented by outstanding lawyers, including the late Milton Freeman of Arnold & Porter, a leader of the securities defense bar, and Alvin Hellerstein, then an associate at Stroock & Stroock & Lavan, and now a federal district court judge. Trying a complex case against lawyers of this caliber was the highlight of my experiences as an SEC enforcement attorney. I felt that I and my small team of two other lawyers did not have the brainpower, experience, or resources to match the small army of lawyers for the defense, and the Wall Street litigators intimidated me. I felt the game was rigged in our favor, however, because we knew the

8. 44 S.E.C. 320 (1970).

facts, which were on our side, the hearing examiner was an SEC employee who favored us, and I had an American flag in my hand. I was confident of prevailing, even though our theories were a bit novel. Thinking up novel cases when I was an enforcement attorney did not always endear me to my supervisors. One of them (who, tellingly, frequently called me by his wife's name) once asked me how I had concocted some new theory. "I read the statute," I said. "What?" he shouted at me with obvious annoyance, "you read the statute?"

Another seminal case on which I worked was *SEC v. VTR, Inc.*,[9] the first case in which the SEC obtained ancillary relief in an injunctive action.[10] The General Counsel's Office became heavily involved in the matter because of possible implications of the request for ancillary relief for *SEC v. Texas Gulf Sulphur Co.*[11] and was not willing to allow a young female enforcement attorney like me to go to court. I spent a hot summer weekend in Washington working with the General Counsel's Office, but then the case was taken over by the home office.

I worked on a number of criminal cases that Washington considered important during my days on the staff, generally teamed with the late Arthur Matthews, from the home office, who became a prominent defense attorney after leaving the staff. Our most difficult case was a market manipulation of Allied Entertainment Corporation of America, Inc. by Marvin Hayutin.[12] We obtained a sealed indictment against Hayutin and I was flabbergasted when he was arrested at Kennedy Airport and brought to the U.S. Attorney's office. I did not believe the government was sufficiently organized enough to find him. The FBI agents were a bit mystified about why they were arresting Hayutin. "All he has in his luggage," they told us, "is pornographic magazines and stock certificates."

I was also requested to work on some Rule 2(e)[13] cases against some of the attorneys who frequently represented persons under investigation by the NYRO. I declined this assignment because I did not feel comfortable prosecuting defense attorneys, even though some of these attorneys were engaged in troublesome and even criminal activi-

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9. 39 F.R.D. 19 (S.D.N.Y. 1966).

10. SEC Litigation Release No. 3311 (Sept. 8, 1965), 1965 SEC LEXIS 68.

11. 401 F.2d 833 (2d Cir. 1968). This was the first case in which the SEC obtained disgorgement as an ancillary remedy. George W. Dent, Jr., *Ancillary Relief in Federal Securities Law: A Study in Federal Remedies*, 67 MINN. L. REV. 865, 869 n.11 (1983).

12. United States v. Hayutin, 398 F.2d 944 (2d Cir. 1968).

13. Now Rule 102(e) of the SEC's Rules of Practice. 17 C.F.R. § 201.102(e) (2005).

ties.[14] My philosophical objections to prosecutorial actions against defense attorneys persisted, becoming even stronger in later years,[15] and led to controversial dissents in SEC cases when I was Commissioner.[16]

Looking back, I can only theorize whether or not my independence of mind was related to my status as a woman in a predominantly man's world because I did not consciously think about my situation in such terms when I was a young prosecutor. Nevertheless, I began to think for myself when I was a little girl, otherwise I would never have had the fortitude to become a lawyer in the first place. I loved law school and the law, and I was propelled forward by the belief that my work mattered and also that because law was about justice, the legal profession was just, merit counted, and I would succeed.

At some point, I became bored with securities fraud cases and uncomfortable with some of the prosecutions we brought. I did not harbor a burning desire to put people in jail, and I thought some of the SEC's prosecutorial tactics and decisions were unwarranted. Thus, I began looking for a job in the private sector. Although this was another bull market period—the late 1960s—and my male friends who were leaving the NYRO had no trouble obtaining jobs, I looked for an entire year to find another job. Part of my problem was that I wanted to go to a law firm and at that time law firms had few female associates and virtually no female partners. Finally, I received two offers from major Wall Street law firms on the same day. I chose to go to work as an associate at Willkie Farr & Gallagher, where I worked primarily for Kenneth Bialkin, who served as a real mentor and friend to me at a time when I badly needed a guide in the legal profession. It was much harder to be a woman in a law firm than it had been to be a woman on the staff of the SEC. I was not in the social loop at the firm where associates learned how to manage the personal politics of an organization, and Wall Street law firms in the 1960s were generally much more conservative and less welcoming to women than government agencies.

I will not dwell on my years as an associate at Willkie Farr & Gallagher, or later (beginning in 1972) as a partner at Rogers & Wells, except to note that I built up a large book of business (thanks prima-

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14. *See In re* Coven, 49 S.E.C. 46 (Dec. 21, 1979); *In re* Germaise, SEC Admin. Proc. File No. 3-2606 (Oct. 29, 1971), 1971 SEC LEXIS 3974; SEC Litigation Release No. 6722 (Feb. 7, 1975), 1975 SEC LEXIS 2283. Ironically, a Rule 102(e) case against Coven did not reach the Commission until I was a Commissioner and I dissented in this matter on principle.

15. *See* Joseph C. Daley & Roberta S. Karmel, *Attorneys' Responsibilities: Adversaries at the Bar of the SEC*, 24 EMORY L.J. 747, 789 (1975); Roberta S. Karmel, *Attorneys' Securities Laws Liabilities*, 27 BUS. LAW. 1153, 1163-64 (1972).

16. *See infra* notes 30-37 and accompanying text.

rily to the friends I had made at the NYRO who had moved on to become legal and compliance officers at brokerage firms). Rather, I will now turn to what it was like to become the first female SEC Commissioner, in 1977, after the SEC had been operating for forty-three years essentially as a male-dominated law firm with support staff.

The SEC is both a regulatory and prosecutorial commission, holding enormous power because it operates at the heart of the capital-raising function of our capitalist system. In this Essay, I will focus on the Commission's prosecutorial functions while I was a Commissioner and my role in trying to shape an enforcement policy that differed from the then-prevailing view on the SEC staff. The agency has long tried to remain independent and has usually succeeded. It has enjoyed a generally good reputation over the years because the staff is smart, dedicated, and hard working, and despite the financial and political pressures sometimes brought to bear on the Commission, the staff has only very rarely suffered from any corruption.

I believed it was a great honor to become an SEC Commissioner, about the best job a securities lawyer could ever have. Quite a bit was made in the press about my appointment as the first woman Commissioner, and I was even interviewed by reporters for the women's pages of general circulation newspapers. I did not think it would assist professional women to gain parity in business or the law for me to play up the women's angle. I told reporters that stocks and bonds were gender-neutral and that I did not think that I would bring a female perspective to my office. Rather, I felt the best strategy I could follow was to do the best job possible, so that other women would be appointed after I left the SEC. In that ambition I succeeded, but perhaps my objectives were too modest. There has been one female on every SEC Commission since I was appointed. It would be nice if there were more than one out of five.[17]

When I was interviewed by President Carter to become a commissioner of the SEC, he asked me if I thought I was strong enough for the job. It was clearly suggested in my interviews with the SEC Chairman Harold Williams and President Carter that one part of the job would be to constrain an enforcement staff that many in the private sector then thought was out of control. Actually, I thought so too. During the Watergate years the White House tried to undermine the

17. After this Symposium, Annette Nazareth, formerly Director of the Division of Market Regulation, became a Commissioner, so there finally are two women on the Commission at the same time.

SEC's prosecution of Robert Vesco,[18] an SEC Chairman had been forced to resign for misstatements in congressional testimony, and the SEC was trying to prove to the world at large that it was a vigorous and untainted prosecutor, which would go after anyone, however highly placed in business or government. Indeed, going after high government officials became something of a sport on the part of the enforcement staff, and they were encouraged in this game by members of Congress and the press. Unfortunately, some of the cases being prosecuted were weak on their provable facts or legal theories.[19]

I was not only the first female Commissioner, but I was very young, forty years old, and a generation younger than the other commissioners. Furthermore, two of the other commissioners were former SEC staffers, and another a former Senate Banking Committee staffer, who felt their first obligation was to the SEC staff. I had spent time in the private sector. Most of my clients had been Wall Street firms. I did not think business people were a bunch of crooks but rather the same mix of good and bad men and women found in other parts of our society, including government. I believed it was important to preserve the SEC's reputation and integrity by bringing cases that could be won on the provable facts and the law and not on suspicions of wrongdoing or because the facts had a bad smell.

I questioned the SEC enforcement efforts because I was concerned that the staff did not appreciate the changes in the political climate or the courts, and as a result, the SEC, for the first time in its long history, began losing important cases in the U.S. Supreme Court.[20] I suspected that the staff did not always have hard evidence to prove its cases, but planned to use its leverage over regulated entities and persons to obtain settlements. I was concerned that some of the staff's theories were not grounded in the securities statutes but rather on a philosophy that the law was an instrument of social policy. My debates at the Commission table with the enforcement staff became legendary and often degenerated into shouting matches. I can sum these up by a remark made once in the heat of battle by Stanley Sporkin, who headed the Enforcement Division, and who asked, "Why

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18. John F. Berry, *Post Left Empty at SEC Raises Concerns, Hopes; Leaving SEC Job Open Causes Concern, Raises Hope*, WASH. POST, June 11, 1978, at H1.

19. History has repeated itself to some extent in the aftermath of the Enron and WorldCom debacles, when the SEC found itself upstaged in its regulation of Wall Street by New York Attorney General Elliot Spitzer. Today, however, the staff is prosecuting corporate officials to demonstrate its prosecutorial effectiveness.

20. *E.g.*, Int'l Bhd. of Teamsters v. Daniel, 439 U.S. 551, 566 n.20 (1979); SEC v. Sloan, 436 U.S. 103, 117-19 (1978).

do you care so much about what the courts think and not what I think?"

My beliefs brought me into direct conflict with the Enforcement Division staff and some other SEC staffers.[21] This was an extremely macho group accustomed to investigating and terrorizing Wall Street and even some SEC commissioners. Further, I had worked under the head of the Enforcement Division when I was on the staff of the NYRO. It was difficult for us to establish a good working relationship when I returned to the SEC. Many staff members thought the commissioners worked for them; I had a bit of this attitude myself when I was on the staff. Who were these foot dragging old men, I often wondered, who kept me from running off to court when I was ready to do so? Why did I need to wait for their permission to obtain an injunction to protect the public? Furthermore, since I had been an aggressive and sometimes creative prosecutor at the NYRO, when I tried to rein in the Enforcement Division as a Commissioner, I was suspected of having been corrupted by my experiences in private practice. Certainly, I was informed by my experiences in representing persons under investigation by the SEC, or even targets of SEC actions, but my objections to certain types of cases, in particular the use of publicity as a sanction, predated my becoming an SEC prosecutor.

As a Commissioner, I began to dissent from some Commission decisions and rule making proposals. This is now commonplace and has been since I was a Commissioner, but at the time I was considered heretical or worse. The first time I decided to dissent in a rule making proceeding I was told there was no procedure for doing so. I rarely dissented in rule making proceedings, however.[22] Most of my dissents were in enforcement cases, in particular cases involving the issuance of section 21(a) Reports[23] and Rule 102(e) cases,[24] in which I believed

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21. *See* Burt Schorr, *SEC's Tough Case: New Commissioner with Abrasive Style*, WALL ST. J., May 18, 1979, at A1.

22. I dissented in three rule making proceedings. *See* Tender Offers, Securities Act Release No. 6158, Exchange Act Release No. 16384, Investment Company Act Release No. 10958, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,373, at 82,581 n.8 (Nov. 29, 1979); Promotion of the Reliability of Financial Information and Prevention of the Concealment of Questionable or Illegal Corporate Payments and Practices, Exchange Act Release No. 15,570, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,959, at 81,401 (Feb. 15, 1979); Proposed Rules Relating to Shareholder Communications, Exchange Act Release No. 34-14970, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,645, at 80,579 (July 18, 1978).

23. SEC Staff Report on Proxy Solicitations in Connection with Compass Investment Group, Exchange Act Release No. 16,343, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,352, at 82,476 (Nov. 15, 1979).

24. Statement Submitted by Vance, Sanders & Company, Inc. Pursuant to Section 21(a) of the Securities Exchange Act, Exchange Act Release No. 15,746, [1979 Transfer

the SEC was improperly using publicity as a sanction. My fear of prosecutorial excess by frustrated government officials dates back to the 1950s McCarthy era when Congress was on a witch hunt for communists and held many citizens in contempt for refusing to name persons who had been members of the Communist Party in the 1930s. In law school, I wrote a paper on contempt of Congress and concluded that it was rarely a justified sanction. To me, Rule 2(e) was akin to a contempt power, and section 21(a) merely grants the SEC power to conduct public investigations of cases. Neither should ever have become a general enforcement tool, especially when used to enunciate new policies. I fear we have not learned from history and today are engaged in similar questionable uses of government power, where we rationalize improper means to justify the ends of hunting for terrorists or malefactors in the business world. It is very difficult to stand up to prosecutorial zealots. Public opinion and the press generally are on their side. My criticisms of the SEC's enforcement policies made my life as a Commissioner a much lonelier sojourn than my rather heady experiences on the staff. I began my career as an enthusiastic prosecutor, but as a Commissioner, I seriously questioned regulation by prosecution.[25]

My first dissent in an enforcement case was *In re Spartek, Inc.*,[26] in which section 21(a) was used to terminate an enforcement investigation without any determination as to whether the facts constituted a violation of the securities laws. This provision of the Exchange Act authorizes the SEC to investigate and make public any facts regarding violations of the statute, but it is not a remedial power like the power to obtain an injunction against statutory violations. I believed that this use of publicity as a sanction was wrong, and if the SEC was unwilling to authorize administrative or injunctive proceedings based on the facts uncovered in an enforcement investigation, the investigation should be closed.[27] Enormous pressure was placed on me not to dissent in this case, but I felt very strongly that the SEC was utilizing an

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Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,058, at 81,703 (Apr. 18, 1979); *see, e.g., In re* Keating, Muething & Klekamp, 47 S.E.C. 95, 109 (1979).

25. After I left the SEC, I wrote a book about this subject. ROBERTA S. KARMEL, REGULATION BY PROSECUTION (1982).

26. *In re* Spartek, Inc., Exchange Act Release No. 15,567, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,961, at 81,408 (Feb. 14, 1979).

27. I elaborated on this view in my separate statement in The Commission's Practice Relating to Reports of Investigations and Statements Submitted to the Commission, Exchange Act Release No. 15,664, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,014, at 81,558 (Mar. 21, 1979). Subsequently, I dissented in six more cases where section 21(a) was used to settle cases which I believed did not involve provable securities law violations.

improper prosecutorial procedure. I thereafter dissented in every section 21(a) settlement that came before the Commission during my term in office. After I was no longer a Commissioner, the SEC stopped publishing section 21(a) statements,[28] but then, in 2002, the SEC began using section 21(a) to compel companies to certify their financial statements and issue explanations of earnings restatements.[29]

My most well-known dissent was in *In re Keating, Muething & Klekamp*,[30] an enforcement proceeding against a small law firm of eleven partners, eight associates, and one of counsel. The firm represented American Financial Corporation (AFC) and its subsidiaries, and AFC failed to disclose various self-dealing transactions in various SEC filings, including transactions with the law firm's principals.[31] The SEC's opinion was grounded on findings that the law firm did not meet standards of professional responsibility.[32] I objected to the SEC's order on two grounds: first, I doubted that the SEC had statutory authority to discipline law firms, and second, I believed that the conscription of lawyers to enforce the securities laws and the promulgation and enforcement of regulatory standards of conduct for securities lawyers was bad policy.[33] I suggested that the SEC only use Rule 2(e) as a disciplinary tool in cases where an attorney improperly conducted himself while personally representing clients before the SEC, and further, that such misconduct should thwart the SEC's ability to function or obstruct administrative justice.[34] Although I was unable to persuade the majority of the commissioners to side with me, and in fact, Chairman Harold Williams wrote a special concurring opinion on the corporate accountability of counsel, when Edward Greene was General Counsel, he formulated a policy for the SEC not very differ-

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28. American Bar Association Section of Business Law, *Report of the Task Force on Exchange Act Section 21(a) Written Statements*, 59 BUS. LAW. 531, 538 (2004). I believe that once the SEC obtained the power to issue cease and desist orders, it felt it was unnecessary to utilize section 21(a) to settle cases.

29. *Id.* at 532. Harvey Pitt, who was General Counsel when I was a Commissioner, reactivated section 21(a) when he later became SEC Chairman. *Id.* at 538.

30. 47 S.E.C. 95, 109 (1979). Subsequently, I dissented in four additional Rule 2(e) cases and the publication of a petition for rule making concerning relationships between attorneys and registrants. *See* Request for Comments on Petition Concerning Disclosure of Relationships Between Attorneys and Registrants, Exchange Act Release No. 16,405, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,144, at 82,051 n.3, 82,052 n.4 (July 25, 1979).

31. *In re Keating, Muething & Klekamp*, 47 S.E.C. at 95-97.

32. *Id.* at 107-08.

33. *Id.* at 109.

34. *Id.* at 110.

ent from what I set out in the *Keating* case.[35] This policy was in effect for about twenty-five years, until Congress gave the SEC authority to discipline attorneys in the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley).[36] I think that was an unwise policy decision because giving a prosecutor the power to promulgate and enforce regulatory standards for defense counsel sows the seeds for government abuse of power. I do not believe the courts or the public would think this was a good idea if U.S. Attorneys had this power. But the SEC now, at least, has the statutory authority to discipline attorneys, which, as a staff attorney, private practitioner, and Commissioner, I doubted the Commission had in the past.

For a period of time, my dissents in the SEC's section 21(a) Policy Statement and in the *Keating* case were included in securities regulation casebooks[37] and proved to be a harbinger of changed SEC policies. But these changed policies were probably due to the emphasis on deregulation in the Reagan administration and thereafter, and certain changes in the securities laws, as much as to any lingering influence of my dissents. Furthermore, the enactment of Sarbanes-Oxley again altered the course of the SEC's policies and enforcement priorities and techniques.

When I was a Commissioner, the Commission was divided on many issues in addition to section 21(a) and Rule 2(e) cases, and the votes were often 4-1, where I was the minority, or 3-2, where I was in the majority. Although the commissioners probably agreed on ninety percent of the matters brought before the Commission, the disagreements on the other ten percent were serious. Although the Chairman and the other commissioners were always respectful of my views, I often felt beleaguered by the staff, particularly the Enforcement Division attorneys. Yet, I thought that I was on the right side of the arguments that occurred, and even the President of the United States had cautioned me to be strong and persist in my views. Some of the adverse comments about me as a commissioner annoyed me because they perpetuated the usual stereotypes about ambitious women. I was criticized for being abrasive in situations where a man would have been called aggressive or praised for exhibiting leadership. Generally,

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35. *See* Edward F. Greene, Lawyer Disciplinary Proceedings Before the Securities and Exchange Commission, Remarks to the New York County Lawyers' Association (Jan. 13, 1982), *in* SEC. REG. & L. REP. (BNA), Jan. 20, 1982, at 168.

36. *See* 15 U.S.C. § 7245 (Supp. II 2002) (describing professional responsibility obligations of attorneys).

37. *See, e.g.*, LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 776 n.368 (3d ed. 1989).

however, I did not reflect on my situation as a woman as much as my circumstances in trying to shift the SEC's priorities. This was a lonely and uphill battle and in some instances I succeeded and in other instances I failed. If I had been more mature and more politically astute I might have had a greater number of successes, but I also might not have tried so hard or been so persistent in advocating my views. In the final analysis, I was more concerned about my integrity and consistency as a Commissioner than with how well-liked I was or what the consequences would be of how I performed my job. Is that a female angle on being a prosecutor? I do not know. If I had been a man would I have been more effective? I do not know the answer to that question either. But I believe that to a much greater extent than in other organizations in which I have worked, the SEC was a meritocracy where hard work and intellectual firepower mattered much more than one's sex.