

The Father of Enforcement

*By Theodore A. Levine & Edward D. Herlihy**

Judge Stanley Sporkin¹ has been a remarkable public servant. He possesses a rare combination of integrity and dedication, along with an outstanding intellect. Judge Sporkin has shown himself to be extremely innovative with his fertile mind constantly developing pragmatic solutions to problems presented to him. His loyalty to the public interest and respect for fairness and the rights of all persons is unique.

As Director of Enforcement of the SEC, Judge Sporkin used these talents to develop the most admired and emulated enforcement program in the world.² Under his leadership, the Division of Enforcement was able to achieve a mixture of enforcement and regulation designed to foster self-regulation and to afford a full measure of protection to the public,³ regardless of budgetary and staffing limitations.⁴ The period from 1970 to 1981, during most of which time Judge Sporkin was Director of the Division of Enforcement,⁵ is considered to be the “Golden Age” of enforcement at the Commission; shortly thereafter it became known as the “Sporkin Era.”⁶

Judge Sporkin graduated from Yale Law School in 1957 and is also a Certified Public Accountant. He joined the SEC in October 1961 to work on the groundbreaking Special Study of the Securities Markets.⁷ His assignments, which he completed in March 1963, resulted in the modification of procedures of the NASD.⁸ Thereafter, he held a series of ever-more senior supervisory positions in the Division of Trading and Markets, predecessor to the Division of Enforcement. Judge Sporkin worked most closely with Irving Pollack,⁹ the then-Director of the Division of Trading and Markets and later the first Director of the Division of Enforcement after the SEC’s restructuring in 1972. Judge Sporkin became the Director of the Division of Enforcement in 1974 when Irving Pollack became a Commissioner at the SEC.¹⁰

Judge Sporkin was involved in every major enforcement action by

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the Commission between 1970 to 1981, and he was primarily responsible for the Commission's expansive approach to enforcement. Under his direction, the Division of Enforcement investigated a wide variety of violations of the securities laws and creatively used various enforcement approaches and remedies to achieve the broadest possible impact of its actions. Moreover, Judge Sporkin was a strong believer in self-enforcement of the securities laws by corporate officials as well as inside and outside counsel.¹¹ The Division, under his leadership, encouraged the securities industry and corporate America to improve their business and ethical standards.¹² In short, Judge Sporkin understood the Commission's primary role to be a regulator, not a prosecutor.

Although not without vocal critics, Judge Sporkin earned accolades from the private defense bar as being not only tough but fair. Milton Gould, a prominent defense attorney and frequent adversary during enforcement proceedings, wrote in an article entitled "In Defense of the SEC's Enforcement Chief,"¹³ "[w]hat emerges from the lawyers' views is reluctant admiration for [Stanley's] integrity, his persistence and his competence." Many other experienced securities lawyers expressed similar praise.¹⁴ For example, Manny Cohen, a former Chairman of the Commission and one of the great SEC practitioners, on his deathbed wrote a letter to Judge Sporkin, which concluded with the following: "The thing that has given me great pleasure, is to bring to a meeting with you an inside General Counsel or CEO who has heard you are a devil or madman and then hear him report to his board that you are hardly an unreasonable person" ¹⁵

The most significant aspect of the SEC's enforcement authority was its remedial non-punitive nature.¹⁶ Congress enacted a system of enforcement of the securities laws that relied on the efforts of the SEC, the Department of Justice and individual investors.¹⁷ Judge Sporkin implicitly understood this; the Commission focused on using its limited resources to bring those enforcement actions that would have a significant impact on the markets and corporations.

During Judge Sporkin's tenure as Director of the Division of Enforcement, the civil injunctive action was the SEC's principal enforcement weapon.¹⁸ In the early 1970s, injunctive relief, which was designed to prevent the recurrence of alleged violative conduct, was viewed by the courts as "a mild prophylactic."¹⁹ In order to deter serious wrongdoing,²⁰ the Division of Enforcement sought to invoke the equitable powers of the courts to garner additional relief.²¹ Examples of this relief granted by the courts included disgorgement of unlawfully obtained profits, rescission, orders freezing assets, undertakings to enhance controls through the appointment of independent directors and the creation of audit or similar committees. Under Judge

Sporkin's leadership, the Commission often obtained the appointment of independent auditors or counsel, or Board committees to investigate past activities and report publicly on them. All this relief was designed to be remedial.

Judge Sporkin's greatest achievement in leading the Commission's expanding enforcement program was the use of the consent decree.²² Typically, Commission or court orders were agreed to by defendants or respondents prior to trial or adjudication of any issue of law or fact, and without admitting or denying the allegations in the complaint or the Commission findings.²³ These consent decrees, which normally included various forms of equitable relief,²⁴ were the most effective way to resolve an enforcement matter because they avoided the expense and risk of litigation, allowed the Commission to get the relief it had sought, and allowed defendants to avoid collateral consequences.²⁵

Judge Sporkin also greatly expanded the use of Rule 2(e) of the Commission's Rules of Practice (now Rule 102(e)), as part of the Access Strategy²⁶ to bring administrative disciplinary proceedings against attorneys, accountants and other professionals who practiced before the Commission.²⁷ Rule 2(e) was creatively used against accounting firms to impose sanctions designed to improve auditing and accounting standards. For example, in the *Peat Marwick Mitchell & Co.* settlement,²⁸ the remedial sanctions included (1) the use of a peer review committee of accountants to examine the accounting firm's control processes and audit practices, and (2) a limitation on the acceptance of new Commission-related clients for a prescribed period of time. The Commission also used Rule 2(e) against attorneys and was able to set standards of professional care for both corporate and securities lawyers.²⁹

Judge Sporkin also pioneered the use of Section 21(a) Public Reports of Investigation³⁰ as a means of alerting the public and markets about activities that the Commission found questionable and signaling the Commission's intent to bring future enforcement actions if similar activities were uncovered. Importantly, the special investigative reports that Judge Sporkin directed in the *Penn Central* and *Lockheed* actions represented, at the time, the most incisive analysis into large-scale and highly complicated financial operations.³¹ The reports caused widespread examination of standards of performance of directors, management, accountants, attorneys, and other professionals, in addition to a broader inquiry into the standards of disclosure applicable to defense contractors and related enterprises. The Commission also used Section 21(a) Reports at least 10 other times while Judge Sporkin was Division Director,³² when "substantial issues of public concern, widespread investor impact or other matters of significance relating to

the federal securities laws were involved.”³³

There are numerous examples of the innovative enforcement approaches implemented by Judge Sporkin when confronted with unprecedented challenges. One such example occurred during the 1968 to 1969 period, when the brokerage community was experiencing a serious back-office crisis. Simply put, trading volumes outstripped the brokerage firms’ abilities to process and record customer transactions and, as a result, broker-dealers could not accurately reflect the trading transactions in their books and records. In response to this crisis, Judge Sporkin imaginatively used the Commission’s administrative process to give those broker-dealers who were on the brink of disaster an opportunity to reconcile their transactions and clean-up their books and records.

This approach involved the use of *private* administrative proceedings and conditional suspensions of the firms to compel them to take immediate creative steps to eliminate the backlogs and deficiencies and enable the Commission to delay the imposition of public remedial sanctions until after the firms had resolved their problems.³⁴ As a result, when the public announcement of enforcement proceedings was ultimately made, there was little investor reaction. This combination of enforcement and remedial regulatory actions was an early example of Judge Sporkin’s approach to all types of violative activities. It served not only to remedy existing problems but to obviate future ones as well. The back-office crisis was averted using this approach as the Commission had used its powers to protect the public interest rather than punish the broker-dealers.

Judge Sporkin also had an enormous influence over the rulemaking and other activities of the other Divisions and Offices of the Commission. A refrain constantly replayed when proposed rules and regulations were being discussed at the Commission was “What does Stanley think?” When Judge Sporkin used enforcement investigations and actions to identify problems in the markets and with corporate America, he then worked with the other Divisions and Offices to develop an appropriate regulatory program to remedy those problems permanently. For instance, in certain takeover cases the Commission determined that there was a lack of disclosure and transparency. This problem was remedied by the Commission adopting the beneficial ownership rules and tender offer rules.³⁵ In addition, the going private rules came out of issues identified during investigations of going private transactions.³⁶ Judge Sporkin always had a seat at the Commission table during the rule-making decisions and his views were very influential.

Another demonstration of Judge Sporkin’s creative enforcement approach is Rule 15c2-11 of the Exchange Act. During the course of

investigations of fraudulent and deceptive stock manipulations, Judge Sporkin realized that OTC markets were being made by broker-dealers without the availability of current or accurate information. Judge Sporkin's solution, codified in Rule 15c2-11, required that OTC market makers know whether there was current and accurate information in the marketplace before entering quotes, thus assuring that such information would be available to the investing public.³⁷

A hallmark of Judge Sporkin's tenure at the Commission was the development of the "Access Strategy."³⁸ Soon after becoming Director, it became clear to him that the Enforcement Division did not have enough resources to properly regulate the markets, broker-dealers and investment advisors as well as corporate America. As a result, Judge Sporkin asked himself what kind of enforcement strategy "could [the Enforcement Division] use to make life easier" and "help stretch [their] enforcement dollar as far as it would go."³⁹ The theory behind his Access Strategy was simple: for a fraudulent promotion to be effective, "access" was needed to the marketplace; in most cases that access was through the services of "a lawyer, an accountant, a broker-dealer and maybe a banker."⁴⁰ As Judge Sporkin discussed in a speech to the Corporate Counsel Institute in 1976, "systemized frauds frequently depend on the cooperation, intentional or otherwise, of professionals. Many of the most egregious frauds of the past few years . . . involved the full panoply of professional participation."⁴¹

Under the Access Strategy, enforcement cases focused on those professionals who provided access to the marketplace, thereby encouraging them to "discharge their responsibilities with care and diligence" while also conserving Commission resources for the pursuit of other elements of its oversight function.⁴² The public benefited greatly through implementation of this strategy as the burden was placed directly on the professionals involved and "was done without any increase in the SEC's budget."⁴³ Another benefit included the positive response from access providers to the new strategy. For example, the focus on broker-dealers caused those firms to create a new internal role: the compliance official and compliance departments dedicated to ensuring compliance with the securities laws. In addition, as described above,⁴⁴ the Enforcement Division brought a series of unprecedented 2(e) proceedings to hold professionals "strictly accountable for their own participation in such unlawful activities."⁴⁵ Finally, with regard to lawyers the implementation of the Access Strategy demonstrated that they "do not have any immunity; when they participate in a crime, they're going to be treated like other law violators."⁴⁶ In a 2003 interview, Judge Sporkin said he was "pleased that [the Access Strategy] has been validated by Sarbanes-Oxley."⁴⁷

One of Judge Sporkin's most noteworthy accomplishments was the role he played in the creation of the Foreign Corrupt Practices Act

(FCPA),⁴⁸ a prohibition of bribery of foreign officials that, as he describes, did not simply occur “by an architect coming in and designing [the] program.”⁴⁹ In 1973, Judge Sporkin watched the nightly televised replays of the Watergate hearings, which he found “absolutely fascinating.”⁵⁰ After hearing several corporate officials testify about impermissible contributions made by their corporations to the reelection campaign of President Nixon, Judge Sporkin was intrigued; he thought of a series of accounting questions, attributable to his CPA background, such as “how did a publicly traded corporation record such an illegal transaction?” and “[w]hat, if any, information did the outside auditors have?”⁵¹ Judge Sporkin asked his staff to determine how these transactions were booked; they quickly learned the transactions were “disguised on . . . the books and records” of the corporation, “masked in secret mislabeled accounts.”⁵² Notably, the SEC learned that the use of company funds was not confined to illegal political contributions; moreover, the funds were also used to make other “illicit payments, including payments of bribes to high officials of foreign governments.”⁵³ Given the potential significance to the public of these activities, “nondisclosure of which might entail violations of federal securities laws,” the Commission published a statement in March 1974 “concerning disclosure of these matters in public filings.”⁵⁴

Under Judge Sporkin’s leadership, the Division began an investigation of these activities and soon brought enforcement actions against companies that made illegal payments. As Judge Sporkin recently explained:

I was left with the question of “what do we do about it?” And my thinking was how does this fit in with[in] the SEC’s disclosure program? . . . I came to the conclusion . . . “Well, why shouldn’t they have to disclose this?” This is something material to a shareholder to know that their company is getting business by paying bribes. So, at least they should know how much of that business and what would happen if they didn’t get that business.⁵⁵

Within one year of the Commission’s initial statement on this matter, investigations led to “the institution of injunctive actions against nine corporations” and cases were subsequently brought involving “questionable or illegal foreign and domestic payments and practices.”⁵⁶

As the number of investigations and cases grew,⁵⁷ the SEC’s “meager resources were tapped to the utmost.”⁵⁸ Judge Sporkin, along with Alan Levinson, Director of the Division of Corporate Finance, and John “Sandy” Burton, the Commission’s Chief Accountant, devised an innovative solution: a voluntary disclosure program “inspired by the spirit” of the securities laws.⁵⁹ The concept was simple—if a company retained outside counsel to perform a comprehensive review of the il-

legal practices, made a credible report to the Commission and made public disclosures, the Commission would most likely not take formal action against the company. In essence, companies would self-investigate and report the nature and extent of their illegal activities to the Commission as well as their shareholders. This approach shifted the enforcement burden from government to corporate America.⁶⁰ The resulting internal investigations led to more transparent corporate governance and compliance.⁶¹ As a result of this successful initiative, the Commission's enforcement actions and voluntary disclosure program ultimately showed that over 450 issuers had concealed illegal payments in foreign or domestic transactions totaling over \$300 million.⁶² These disclosures led to various corporate and political scandals and further increased pressure for congressional action,⁶³ ultimately leading to the enactment of the FCPA.

In 1976, Judge Sporkin was contacted by the staff of Senator William Proxmire, Chairman of the Senate Committee on Banking, Housing and Urban Affairs, to determine if "legislation could help the SEC [continue] to ferret out illicit corporate activities."⁶⁴ In addition, Senator Proxmire asked whether the Commission would help draft legislation to address these illegal corporate activities. In response to Senator Proxmire's request for proposed legislation, Judge Sporkin came up with a simple proposition to curtail these illegal corporate practices: new legislation need only require a corporation to keep fair and accurate books and records. Sandy Burton, the Commission's chief accountant, also suggested a provision requiring a company put in place an effective system of internal controls. These ideas were the cornerstones of the Commission's legislative proposals in the SEC Report submitted to Senator Proxmire's committee in May 1976.⁶⁵ Senator Proxmire, not entirely satisfied with such an approach, added a specific anti-bribery provision to the law which explicitly made it unlawful for a U.S. corporation to bribe foreign officials.⁶⁶ In December 1977, the FCPA became the law of the land in large part due to the efforts of Judge Sporkin and the Commission.⁶⁷

During his tenure as Director of the Division of Enforcement, Judge Sporkin implemented major structural changes in the Division to meet ongoing challenges. For example, Judge Sporkin recognized that for the settlement process to work most effectively, the Enforcement Division needed to have sufficient trial capabilities to go to court against the likes of Edward Bennett Williams, Milton Gould and some of the other renowned litigators in private practice.⁶⁸ As a result, he created a trial unit within the Division of Enforcement and hired an experienced trial lawyer, Ben Greenspoon, to run the unit.⁶⁹ As the Division grew, the trial unit became larger and the Commission's ability to take a case to trial successfully made the settlement process

much more effective.

Judge Sporkin also was instrumental in creating a market surveillance unit within the Division of Enforcement. That unit was staffed with accountants, analysts, and examiners, and its purpose was to surveil the exchange and OTC markets and look for potential violations such as insider trading and market manipulation. At the time the market surveillance unit was created, the technology used today to enable sophisticated automated systems to surveil markets did not exist. Nevertheless, the surveillance unit was highly successful in working with the attorneys and other professionals in the Division of Enforcement to identify improper market activities.

Judge Sporkin also recognized that the Division needed its own chief accountant to work with the Commission's chief accountant and other professionals in the Division of Enforcement to address the variety of accounting and auditing questions that regularly arose in the investigations and controls. In a related move, Judge Sporkin established a group within the Division of Enforcement to review annual reports (10-Ks) and other periodic reports of public companies. This review was designed to proactively identify potential accounting and financial fraud, and other disclosure-related issues. The trial unit, the market surveillance unit, and the accounting improvements are just a few examples of the significant changes Judge Sporkin implemented within the Division that remain central to the operations of the present-day Division of Enforcement.

During the "Sporkin Era," the SEC developed a lasting reputation of professionalism and integrity throughout the federal government.⁷⁰ This reputation led the Administrator of the then-Federal Energy Administration ("FEA") in May 1977 to choose Judge Sporkin to lead an interagency Task Force⁷¹ whose mandate was to review all aspects of the FEA's administration of the oil price and allocation programs created under the 1973 Emergency Petroleum Allocation Act.⁷² Amidst wide-spread pressure to remedy the failings of the FEA programs, the Task Force was given 60 days⁷³ to complete its evaluation of the FEA's compliance and enforcement programs and produce a report detailing findings and recommendations.⁷⁴ The Task Force completed its work within the prescribed timeframe and produced a report that determined the "FEA's enforcement program ha[d] historically been ineffective without either the commitment or direction to do the job"⁷⁵ and that there were potentially "several billion dollars" of alleged overcharges by the nation's major oil refiners yet to be recovered.⁷⁶

The Sporkin Report, as the Task Force report came to be known publicly, made a series of sweeping recommendations to allow the FEA to successfully pursue legal proceedings against the alleged oil refiner violators. Judge Sporkin prepared his own Report of the Chair-

man to accompany the final Task Force report that reflected his “personal impressions and observations” and his enforcement philosophy is clearly evident in passages where he discussed the FEA program’s inadequacies.⁷⁷ One of the principal recommendations was that the “most effective way” to reform the FEA was to engage a “specially appointed high level official with a national reputation as a tough enforcer and litigator who is possessed of high integrity and outstanding management skills.”⁷⁸ The report suggested an immediate audit of the largest 15 oil companies so the FEA could evaluate the severity of the identified problems.⁷⁹ Notably, other recommendations reflected the effective methods long-utilized by the Division of Enforcement, including the use of subpoena power, utilization of civil injunctive authority, and the “authority to represent themselves in federal courts—particularly in the context of seeking remedial judicial orders.”⁸⁰ Ultimately, most major aspects of the Task Force’s recommendations were accepted by Congress and the FEA’s successor, the Department of Energy, and were implemented successfully.

After his tenure at the Commission, Judge Sporkin has continued to have an outsized influence on the Commission as well as on the development and reform of securities laws and corporate governance issues. Through regular speeches and articles he has proposed creative solutions to what he saw as ongoing problems and challenges. We wish to highlight three of Judge Sporkin’s innovative ideas that have been debated and discussed: “Business Practices Officer,” “Consultative Attorney,” and “Leading From Behind.”

- Business Practices Officer

In 1995, in a speech at a business ethics conference in New York,⁸¹ Judge Sporkin proposed the creation of a new corporate position—a “Business Practices Officer” (“BPO”).⁸² Judge Sporkin envisioned that this position would ensure that both internal *and* external affairs of a corporation were conducted in compliance with standards established by a corporation’s Board of Directors. The BPO would oversee the adequacy of a company’s internal conduct policies, investigate any improper payments or practices, and review whether management uses corporate assets for personal benefit. The BPO would report his or her findings directly to the Board of Directors and would work with both the Board and management in creating and implementing corporate policies to address the findings. In essence the BPO would act as a corporate watchdog to ensure that the corporation’s integrity was not compromised.

- Consultative Attorney

In a 1983 article, Judge Sporkin advocated for the creation of the role of the “Consultative Attorney,” a lawyer who would render second

opinions in situations calling for specific expertise or independence.⁸³ According to Judge Sporkin, the services of the Consultative Attorney would complement resources provided to the client by its principal counsel. As a general rule, second opinions would be sought when there were complex issues, where conflicts of interest may exist, or where a client had doubts as to the appropriate path to take. The second opinion also would be valuable where the Consultative Attorney brought a unique expertise to a problem or where primary counsel had “lost their perspective.”⁸⁴ Judge Sporkin saw the main function of the Consultative Attorney as one offering new insights, suggesting possible solutions and providing impartial and dispassionate advice. The proposal was received positively by commentators at the time, though there was discussion whether an informal version of this role was already being practiced.⁸⁵

● Regulation From Behind

In a February 2013 speech entitled “The SEC Can No Longer Regulate From Behind,”⁸⁶ Judge Sporkin criticized the SEC’s failure to have a “robust regulatory program to partner with” its strong enforcement efforts. The simple thesis of his speech was that “regulation from behind is a prescription for failure.”⁸⁷ He lambasted the current deregulation mode of the Commission, recent attempts to scale back Dodd-Frank, and proposals to “tear[] down many of the investor protection measures that were created over the years in connection with the issuance of new securities to small and unseasoned companies.”⁸⁸ Judge Sporkin’s recommendations echoed the spirit of many successful programs he initiated during the 1970s:

[T]he SEC must become more proactive . . . and recognize it is foremost a regulator, and as such, it must not over rely on its enforcement arm to bring about compliance. Putting individuals out of the business or in jail should not be its only mission. Ideally, foresight should be given as equal a role as hindsight.⁸⁹

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After Judge Sporkin left the SEC, he continued to be a devoted public servant by serving as the General Counsel at the Central Intelligence Agency (CIA) and as a United States District Court Judge for the District of Columbia. Even after leaving the bench to enter private practice, he never lost his devotion to public service, his sense of fairness and his uncompromising integrity. In 2006 he was appointed the first Ombudsman for BP America. In all those positions, Judge Sporkin continued to be a tough, respectful, highly creative and independent lawyer.

Judge Sporkin left the SEC in May 1981 when William Casey became Director of the CIA. Judge Sporkin had developed a close rela-

tionship with Casey while Casey served as Chairman of the SEC, and Judge Sporkin joined Casey at the CIA as General Counsel. Judge Sporkin helped the Agency through a number of challenging issues and circumstances, including the Iran-Contra controversy.

In 1985, President Reagan appointed Judge Sporkin as a United States District Court Judge for the District of Columbia. Judge Sporkin was involved in a number of significant cases while on the bench. One matter in which Judge Sporkin exercised his independence was his refusal to approve an antitrust settlement between the Justice Department and Microsoft since he could not determine whether the settlement was in “the public interest” unless he received more information about the negotiations leading up to the settlement.⁹⁰ The parties appealed to the D.C. Circuit Court of Appeals, which reversed Judge Sporkin’s decision and remanded the case to a different District Court judge with instructions to enter an order for final approval of the settlement.⁹¹ The issues raised in Judge Sporkin’s decision and the holding enunciated in the Circuit Court’s reversal led to extensive debate over the appropriate standard of review for administrative antitrust settlements as promulgated under the Tunney Act.⁹² Ultimately, this debate inspired Congress to address this issue in amendments to the Tunney Act passed in 2004.⁹³

Another important case before Judge Sporkin was the Lincoln Savings and Loan case, where Judge Sporkin displayed his signature independence by rejecting Charles Keating’s attempt to reacquire control of Lincoln Savings after the thrift had been seized by the government. In his decision,⁹⁴ Judge Sporkin concluded that officials of Lincoln Savings’ parent company had looted the S&L and that it would not be appropriate to return control of Lincoln Savings back to Keating.

Perhaps most noteworthy were the questions Judge Sporkin posed at the beginning of his Lincoln Savings opinion: “Where were the professionals . . . when these clearly improper actions were being consummated? Why didn’t any of them speak up or disassociate themselves from the transaction? Where, also, were the outside accountants and attorneys . . .?”⁹⁵ Those words became powerful ammunition for government regulators. In focusing on the role of the private sector in the S&L crisis and, in particular, accounting firms, consultants and lawyers, Judge Sporkin once again got to the heart of the issue and focused attention away from the various government participants for the S&L crisis. In doing so, he had restored a necessary focus on the same ethical issues underlying actions such as the “Access Strategy” and 2(e) enforcement actions taken by the SEC while he was Director of Enforcement.⁹⁶

To address criticism about BP’s history of safety and environmental violations, the company created an Ombudsman Office in 2006 to

obtain information from employees who had been unwilling to bring matters to the attention of their supervisors. Employees were going directly to public authorities, effectively denying the firm the opportunity to fix the matters promptly. BP wanted its Ombudsman to have “integrity and independence [and] to encourage transparency as part of the corporate culture,”⁹⁷ so unsurprisingly Judge Sporkin was chosen to fill the position. In an email to all BP U.S. employees, BP America Chairman and President Bob Malone said Judge Sporkin was “empowered to do whatever is necessary to assemble the facts and identify solutions for problems.”⁹⁸ Judge Sporkin described his role at BP as one where he “will listen to the issues, determine the facts, and take the action that is required.”⁹⁹ He continues to serve in this position with distinction.

Conclusion

Throughout his professional life, Judge Sporkin has been an extraordinary lawyer, public servant and leader. His intellectual talents, creativity and problem solving instincts have been exceptional. Nothing captures the essence of Judge Sporkin better than the following statement, made while talking about his guiding philosophy: “The premise I operate on is that this is the greatest country the world has ever seen, that the freedoms we have and the free enterprise system are the reasons it’s so good, and that you can’t afford to compromise those freedoms.”¹⁰⁰ Judge Sporkin never lost his sense of public service. His professional life has been a model for all of us who care about public service and excellence in government. That his counsel continues to be sought today is a true test of his greatness. There is no one who enjoys greater respect and affection from his colleagues, peers and people in and out of government.

NOTES:

¹During the period from 1974 to 1981, Judge Sporkin was Director of the Division of Enforcement of the SEC. After serving as General Counsel of the CIA, in 1985 he was appointed as a United States District Court Judge for the District of Columbia. *See infra* p. 20.

²*See infra* note 10. *See also* David A. Vise & Steve Coll, *Eagle on the Street*, at 3-4 (1991).

³*See* Joel Seligman, *The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance* 540 (3d. ed. 2003) (Recognizing that a history of the SEC would not “be complete without noting the competence and ingenuity” of the Division under Judge Sporkin’s leadership.).

⁴During a 1979 speech in which Judge Sporkin discussed the Commission’s recent achievements, he proudly stated that the enforcement programs were not “operat[ing]

with an over-abundance of resources. Indeed, the budget and staffing of the entire Commission ha[d] been extremely lean.” Stanley Sporkin, *The Saxe Lectures in Accounting: A Regulator Responds* (Dec. 18, 1978) [hereinafter “Judge Sporkin, A Regulator Responds”], available at http://www.baruch.cuny.edu/library/alumni/online_exhibits/digital/saxe/saxe_1978/Sporkin_78.htm.

⁵Senator William Proxmire, Chairman of the Senate Banking Committee from 1975 to 1980, persuaded prospective SEC Chairmen appearing before him at confirmation hearings to agree not to fire Judge Sporkin. During a 1975 budget hearing, Senator Proxmire asked all five Commissioners whether they had any intention of firing him. To then-Chairman Ray Garrett, Jr., Senator Proxmire asked, “Mr. Garrett, do I have your pledge to . . . stand behind him?” Garrett replied “You certainly do.” See 122 Cong. Rec. 5,762 (daily ed. Mar. 9, 1976) (Statement of Sen. William Proxmire entering into the record L. Stuart Ditzen, *He Sleeps with One Eye Open*, Philadelphia Sunday Bulletin, Feb. 29, 1976). See also Jenkins, *Meet the Enforcer*, 7 Student Law. 34 (Oct. 1978); Michael Ruby, *Sporkin the Enforcer*, Newsweek, Oct. 24, 1977, at 94. (Judge Sporkin was “as close to being unfireable as anyone in town since J. Edgar Hoover” according to one “veteran officeholder.”).

⁶Francis M. Wheat, *Corporate Law in the Eighties: New Trends/New Challenges*, Address Before the Seminar on Delaware Corporate Law Today (May 1, 1981), in 6 Del. J. Corp. L. 563, 566 (1981). (“[T]he corporate system has survived the Sporkin Era alive and well. In fact, I believe its prospects are improved.”) See also Annual Review of Federal Securities Regulation, 38 Bus. Law. 1851, 1910 (Aug. 1983).

⁷Report of the Special Study of the Securities Markets of the Securities and Exchange Commission, H.R. Doc. No. 95, 88th Cong., 1st Sess. (1963) [hereinafter “Special Study”]; Interview with Stanley Sporkin, SEC Historical Society, at 1, 3-4 (Sept. 23, 2003), available at http://www.sechistorical.org/collection/oral-histories/Sporkin092303_Transcript.pdf. [hereinafter “Interview with Judge Sporkin”]. For a comprehensive discussion on the origins, conclusions and lasting impact of the Special Study by its key contributors, including Judge Sporkin and the Director of the Special Study, Milton Cohen, see also *The Roundtable of the 1963 Special Study*, SEC Historical Society (Oct. 4, 2001), available at <http://www.sechistorical.org/collection/programs/1963Transcript.PDF>. As then-SEC Chairman Harvey Pitt said at the roundtable, the study “catapulted the SEC to a level of significance in our country’s financial and economic history that the Commission has tried to maintain ever since.” *Id.* at 7.

⁸*Id.* at 5-6. (Among the Special Study recommendations adopted by the NASD was the addition of a professional hearing officer as “one of the three member panels” in order to eliminate what Judge Sporkin saw as “cocktail justice.”).

⁹Irv Pollack was the other creator of the SEC’s enforcement program. Irv always exercised balance and reasonableness in arriving at decisions. While his extraordinary legal skills have been universally recognized, his greatest qualities were his complete honesty and integrity and his rare ability to identify improper or unethical conduct. “How would it look on the front page of the New York Times?” was a guiding Pollack principle.

¹⁰Judge Sporkin received numerous awards during his tenure as Director of the Division of Enforcement of the SEC, including the National Civil Service League Special Achievement Award in 1976, the 1978 Rockefeller Public Service Award (generally viewed as the most prestigious award presented to citizens working in the public service) from the Woodrow Wilson School of Public and International Affairs at Princeton University under the category “Administering Justice and Reducing Crime,” and the 1979 President’s Award for Distinguished Federal Civilian Service, the highest honor granted to career employees. The President’s Award recognizes “exceptional

achievements that are of unusual benefit to the nation” by individuals “who exemplify to an exceptional degree, imagination, courage and high ability in carrying out the mission of the Government.” Judge Sporkin’s award noted how he “contributed immeasurably to the maintenance of investor confidence in the fairness and efficiency of the Nation’s securities markets.” Text of President’s Award to Stanley Sporkin, Nov. 21, 1979, *available at* http://www.sechistorical.org/collection/papers/1970/1979__1121__Sporkin__Pres Award.pdf.

¹¹In a 1978 interview with *Fortune* magazine, Judge Sporkin addressed this newer approach to the “traditional adversarial system” by focusing on what enforcement could and could not achieve. “We’re prodding the private sector to do as much as it can. We only do as much regulation as is necessary to prime the private sector, to get it to do what it should do and what has to be done.” *What the SEC Expects from Corporation Lawyers*, *Fortune*, Oct. 23, 1978, at 143, 144.

¹²*See* Gould, *infra* note 13 (“Sporkin and his [staff] are unfailingly dedicated to the exposure of corruption, unfailingly since in their effort to extirpate corporate wrongdoing . . . I am convinced that American corporate business *needs* the kind of ventilation it is getting from the SEC’s enforcement program.”) (emphasis in original).

¹³Milton S. Gould, *In Defense of SEC’s Enforcement Chief*, N.Y. L.J., Nov. 5, 1976.

¹⁴Lloyd Cutler, one of the most respected lawyers in Washington, commented in a letter to Congress that Judge Sporkin “exhibited the highest degrees of professional ethics, conscience and courtesy. He was a vigorous but fair investigator and prosecutor.” Letter from Lloyd N. Cutler to Hon. Charles McC. Mathias, Chairman, Senate Comm. on Rules and Admin. (Dec. 2, 1985), *available at* http://www.sechistorical.org/collection/papers/1980/1985__1202__Cutler__Mathias.pdf (supporting Judge Sporkin’s nomination to be a judge on the U.S. District Court of the District of Columbia). Milton V. Freeman, a leading SEC practitioner, said that despite “wars . . . over SEC procedures which I regard as unfair . . . [Judge Sporkin] is honest, sincere, able and decent, a credit to the public . . . because right or wrong, he listens to and understands what the other fellow says. He may not always agree, but he listens.” Ruby, *supra* note 5, at 94.

¹⁵Letter from Manuel F. Cohen to Stanley Sporkin (May 7, 1977) (on file with author).

¹⁶The Securities Exchange Act of 1934 (the “Exchange Act”), Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78aa to 78mm (et seq.)) authorizes the SEC to act in the “public interest and for the protection of investors.” 15 U.S.C.A. § 78u(f).

¹⁷*See* Section 21(d)(1) of the Exchange Act, 15 U.S.C.A. § 78u(d)(1).

¹⁸The Securities Enforcement Remedies and Penny Stock Reform Act of 1990 for the *first time* authorized the SEC to obtain civil monetary penalties in cases other than insider trading. Pub. L. No. 101-429, Oct. 15, 1990, 104 Stat. 931.

¹⁹*See Securities and Exchange Commission v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 84 S. Ct. 275, 11 L. Ed. 2d 237 (1963); *cf. Aaron v. Securities and Exchange Commission*, 446 U.S. 680, 100 S. Ct. 1945, 64 L. Ed. 2d 611, Fed. Sec. L. Rep. (CCH) ¶ 97511 (1980). *See also Securities and Exchange Commission v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, Fed. Sec. L. Rep. (CCH) ¶ 96351, 24 Fed. R. Serv. 2d 1387 (2d Cir. 1978).

²⁰During most of the time Judge Sporkin was Director of Enforcement, the Commission did not need to prove “scienter” to establish a fraud cause of action. However, when the Supreme Court issued its landmark *Hochfelder* decision in 1976 requiring

plaintiffs in private actions to prove “scienter” for a Rule 10b-5 violation (and in 1980 the *Aaron* decision applied the same standard to SEC actions), Judge Sporkin rationalized the decision as follows: “If they want scienter, it’s no problem—we’ll give them scienter!” See Mathews, *Litigation and Settlement of SEC Administrative Enforcement Proceedings*, 29 *Cath. U. L. Rev.* 215, 249 n.153 (1979-1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14, 96 S. Ct. 1375, 47 L. Ed. 2d 668, Fed. Sec. L. Rep. (CCH) ¶ 95479 (1976); *Aaron*, 446 U.S. at 695.

²¹See *Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 2 A.L.R. Fed. 190 (2d Cir. 1968); see also Comment: *Equitable Remedies in SEC Enforcement Actions*, 123 *U. Pa. L. Rev.* 1188 (1975); Farrand, *Ancillary Remedies in SEC Civil Enforcement Suits*, 89 *Harv. L. Rev.* 1779, 1806 n.144 (1976).

²²See Mathews, *Effective Defense of SEC Investigations: Laying the Foundation for Successful Disposition of Subsequent Civil, Administrative and Criminal Proceedings*, 24 *Emory L.J.* 567 (1975).

²³See *S.E.C. v. Citigroup Global Markets, Inc.*, 752 F.3d 285, 296 (2d Cir. 2014) (“The job of determining whether the proposed S.E.C. consent decree best serves the public interest, however, rests squarely with the S.E.C., and its decision merits significant deference.”) See also *S.E.C. v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984) (“Compromise is the essence of settlement. . . . The SEC’s resources are limited, and that is why it often uses consent decrees . . .”).

²⁴See *S.E.C. v. Materia*, 745 F.2d 197, 200 (2d Cir. 1984).

²⁵See *S.E.C. v. Citigroup*, 752 F.3d at 295. (“Consent decrees are primarily about pragmatism” and “provide parties with a means to manage risk.”).

²⁶See *infra* pp. 9-11.

²⁷For over 40 years, Rule 2(e) disciplinary proceedings were adjudicated privately but in 1976 the Commission litigated its first public Rule 2(e) proceeding against Touche Ross & Co., Commission Proceeding No. 3-5076 (Sept. 1, 1976). Touche Ross challenged the SEC’s authority in federal court. Ultimately the Second Circuit ruled that Rule 2(e) proceedings are a “valid exercise of the [SEC’s] rulemaking power” and a “necessary adjunct to the [SEC’s] power to protect the integrity of its . . . procedures and the public in general.” (*Touche, Ross & Co. v. S.E.C.*, Fed. Sec. L. Rep. (CCH) ¶ 96415, 1978 WL 1084 (S.D.N.Y. 1978) *aff’d*, 609 F.2d 570, 582 (2d Cir. 1979)). In 1988, the Commission amended Rule 2(e) to require public proceedings unless otherwise ordered. *Disciplinary Proceedings Involving Professionals Appearing or Practicing Before the Commission*, Exchange Act Release No. 34-25893, 53 Fed. Reg. 26,427 (July 13, 1988).

²⁸In re Peat Marwick Mitchell & Co., Accounting Series Release No. 173 (July 2, 1975). See also In re Arthur Andersen & Co., Accounting Series Release No. 157 (July 8, 1974), In re Touche Ross & Co., Accounting Series Release No.153, (Feb. 25, 1974) and In re Laventhol Krekstein Horwath & Horwath, Accounting Series Release No.144 (May 23, 1973).

²⁹See In re Keating Muething & Klekamp, Exchange Act Release No. 15,982 [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82124 (July 2, 1979); see also In re William R. Carter, SEC Ad. Pro File No. 3-5464 [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82175 (Mar. 7, 1979).

³⁰Section 21(a) of the Exchange Act authorizes the Commission to conduct investigations of violations of the Exchange Act and “to publish information concerning any such violations.” 15 U.S.C.A. § 78u(a). See also *The Commission’s Practice Relating to Reports of Investigations and Statements Submitted to the Commission Pur-*

suant to Section 21(a) of the Securities Exchange Act of 1934, Exchange Act Release No. 15,664 [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82014 (Mar. 21, 1979) (“Commission’s Report on 21(a) Statements”).

³¹See SEC Staff Study of the Financial Collapse of the Penn Central Company [1972-73 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78931 (1972); Public Investigation Concerning Disclosures by Registrants Engaged in Defense Contracting (Lockheed investigation) SEC Minute [1970-71 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77905 (Sept. 11, 1970); SEC Report of Investigation, In re Disclosures of Registrants Engaged in Defense Contracting, SEC Ad. Pro. File No. 3-2485 (1972).

³²See *e.g.*, In re Transactions in the Securities of the City of New York, Final Report [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81936, at 81242–81261 (Feb. 5, 1979) (“[T]he Commission . . . calls for legislation to deal with problems of national concern within existing municipal securities markets No [independent] checks are required [to] reasonably assure that what is publicly disclosed by municipalities is reliable and accurate The Commission stands ready to make its knowledge and experience available to the Congress to achieve an appropriate legislative solution to the deficiencies in the issuance and marketing of municipal securities, of which the New York City matter was a unique but instructive example.”); see also In re The National Telephone Company, Inc., Section 21(a) Report, Exchange Act Release No. 14,380 (Jan. 16, 1978); In re Gould Corp. Inc., Exchange Act Release No. No 13,612 [1977-78 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96077 (June 9, 1977); and In re Government Employees Insurance Co., Exchange Act Release No. 12,930 [1976-77 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95750 (Oct. 27, 1976).

³³See Commission’s Report on 21(a) Statements, *supra* note 30, at 81,557-59. (“The Commission today affirms its intention to continue its practice of issuing [Section 21(a)] reports in appropriate instances The Commission believes that this practice will make available information and provide disclosure in a simple and effective way.”).

³⁴See, *e.g.* In re Lehman Bros., Exchange Act Release No. 34-8518 (Feb. 5, 1969). For further discussion of this matter, see Ferrara, SEC Division of Trading and Markets: Detection, Investigation and Enforcement of Selected Practices That Impair Investor Confidence in the Capital Markets, 16 *How. L.J.* 950, 985 (Summer 1971).

³⁵See generally Davidoff, The SEC and the Failure of Federal Takeover Regulation, 34 *Fla. St. U. L. Rev.* 211, 215-224 (2007) (Detailing the SEC’s “heightened involvement in takeover regulation throughout the 1970s.”).

³⁶Notice of Public Fact-Finding Investigation and Rulemaking Proceeding in the Matter of “Going Private” Transactions by Public Companies and Their Affiliates, Exchange Act Release No. 11231 [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80104 (Feb. 6, 1975).

³⁷17 C.F.R. §§ 240.15c2-11 (as enacted at 36 F.R. 18641, Sept. 18, 1971). The Commission was able in part to enforce this new rule through the use of its power to suspend trading for 10 days under Section 12K when current or accurate information was not available.

³⁸This approach became one of the underpinnings of the Sarbanes-Oxley Act of 2002 (“SOX”), PL 107-204, July 30, 2002, 116 Stat. 745. In 2004, the then-Director of Enforcement evoked Judge Sporkin’s legacy of reform in explaining the historical basis of the new SOX regulations. Stephen M. Cutler, The Themes of Sarbanes-Oxley as Reflected in the Commission’s Enforcement Program, Address before UCLA School of Law (Sept. 20, 2004), available at <http://www.sec.gov/news/speech/spch092004smc.htm>. (Quoting remarks Judge Sporkin made in 1974, “The public corporation is cur-

rently under severe attack because of the many revelations of improper corporate activity . . . I believe certain strong measures are required. We must take steps to assure the corporate governance functions as designed. Directors must direct and accountants must make a proper accounting.”).

³⁹Interview with Judge Sporkin, *supra* note 7, at 13. (“We didn’t have the resources to police every crooked promoter. There were too many out there.”).

⁴⁰*Id.* at 12-13.

⁴¹Stanley Sporkin, Speech to the Corporate Counsel Institute: SEC Enforcement Practices Against Corporations (Oct. 7, 1976).

⁴²Judge Sporkin, A Regulator Responds, *supra* note 4.

⁴³*Id.*; Interview with Judge Sporkin, *supra* note 7, at 14.

⁴⁴*See supra* p. 6 and notes 27-29.

⁴⁵Monroe H. Freedman and Stanley Sporkin, The Securities and Exchange Commission’s Enforcement Program: A Debate on the Enforcement Process, *in* 38 Wash. & Lee L. Rev. 781, 786 (1981).

⁴⁶*Id.* (Judge Sporkin emphasized that “lawyers understand that they are obligated not to involve themselves in the dishonesty of their clients. If they do, they’re going to have to pay whatever price they have to pay.”).

⁴⁷*See* Theodore A. Levine and Daniel M. Hawke, Sarbanes-Oxley: Back to the Future, Chief Legal Executive, Winter 2003, at 14, 17. (“At least two provisions of the Sarbanes-Oxley Act—Section 602 (Appearance and Practice Before the SEC) and Section 307 (Professional Responsibility of Attorneys)—are doctrinal extensions of the access or ‘gatekeeper’ theory as it is currently referred to.”).

⁴⁸Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. § 78dd-1 et seq.).

⁴⁹*See* Fireside Chat on the Foreign Corrupt Practices Act, SEC Historical Society (Apr. 15, 2010), at 2 [hereinafter “Fireside Chat”] *available at* <http://www.sechistorical.org/collection/programs/sechistorical-041510-transcript.pdf>.

⁵⁰Sporkin, The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday, 18 Nw. J. Int’l L. & Bus. 269, 271 (1998) [hereinafter “Judge Sporkin, Worldwide Banning”] (“To a trial lawyer, [watching the corporate officials testify at the Watergate hearings] was real theater.”).

⁵¹*Id.*

⁵²*Id.* at 272. *See* Securities & Exchange Comm’n, Report on Questionable and Illegal Corporate Payments and Practices (submitted to the Senate Comm. on Banking, Housing and Urban Affairs), 94th Cong., 2d Sess. at 3 (1976) [hereinafter “SEC Report”] (This initial inquiry revealed “falsifications of corporate financial records, designed to disguise or conceal the source . . . as well as the existence of secret ‘slush funds’ disbursed outside the normal financial accountability system.”).

⁵³*Id.*

⁵⁴SEC Report *supra* note 52, at 2-3 (citing Exchange Act Release No. 5466 [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79679 (Mar. 8, 1974)).

⁵⁵Fireside Chat *supra* note 49, at 2. *See* SEC Report *supra* note 52, at 1 (“These practices cast doubt on the integrity and reliability of the corporate books and records which are the very foundation of the disclosure system established by the federal securities laws.”).

⁵⁶SEC Report *supra* note 52, at 3.

⁵⁷See Seligman *supra* note 3, at 541 (“By mid-1975, the number of SEC questionable payments investigations had increased so rapidly that the full Commission concluded it could no longer afford to deal on a case-by-case basis with determining what specific disclosures each firm publicly would be required to make.”).

⁵⁸Judge Sporkin, Worldwide Banning *supra* note 50, at 272.

⁵⁹*Id.* at 272-273.

⁶⁰Vise & Coll, *supra* note 2, at 13 (“No longer was the SEC merely a cop on the Wall Street beat, whistling on the proverbial street corner with its eyes open for suspicious activity. Instead, Sporkin projected an image of the commission as a kind of regulatory confessional. Wrongdoers of every stripe, but especially those at the country’s largest corporations, were invited to admit their sins voluntarily in the SEC’s public filing room—or else face the commission’s wrath.”).

⁶¹*In re Sealed Case*, 676 F.2d 793, 819, Fed. Sec. L. Rep. (CCH) ¶ 98647, 82-1 U.S. Tax Cas. (CCH) ¶ 9335, 10 Fed. R. Evid. Serv. 490, 33 Fed. R. Serv. 2d 1778, 50 A.F.T.R.2d 82-5637 (D.C. Cir. 1982) (“The program was valuable to corporations because their boards of directors often had inadequate knowledge of the corporations’ actual business practices. . . . [and] was valuable to the SEC because it brought hundreds of corporations into compliance with the law without a massive commitment of government resources.”).

⁶²Pitt and Shapiro, *Securities Regulation by Enforcement*, 7 Yale J. on Reg. 149, 194-95 (Winter 1990); see Comm. On Interstate & Foreign Commerce, Unlawful Corporate Payments Act of 1977, H.R. Rep No. 95-640, at 4 (1977) (These issuers “included some of the largest and most widely held public companies in the United States; over 117 of them rank in the top Fortune 500.”).

⁶³See Herlihy and Levine, *Corporate Crisis: The Overseas Payment Problem*, 8 L. & Poly Int’l Bus. 547 (1976) for a comprehensive survey of the extent of corruption uncovered during SEC investigations and the related enforcement activities commenced *before* the passage of the FCPA.

⁶⁴Judge Sporkin, Worldwide Banning *supra* note 50, at 274.

⁶⁵SEC Report *supra* note 52, at 63-69. The SEC Report also detailed the Commission’s investigations into questionable payments and the conclusions derived from its enforcement activities.

⁶⁶Foreign and Corporate Bribes: Hearings Before the S. Comm. on Banking, Housing and Urban Affairs, 94th Cong. 46 (1976). (“The SEC’s voluntary disclosure program depends on the premise that foreign bribes are information material to investors which must be disclosed under existing law. The SEC has made the most of this approach, but the enforcement program would be much more effective if bribes were directly prohibited.”).

⁶⁷Senator Proxmire lauded Judge Sporkin’s pivotal contribution to the development of the FCPA. “More than any single individual, he is responsible for the revelations of bribes and other illegal payoffs made by many of our largest corporations both at home and abroad.” 122 Cong. Rec. 5,762 (daily ed. Mar. 9, 1976) (Statement of Sen. William Proxmire). See also Gould, *supra* note 13 (“Sporkin and his staff have made a contribution to corporate morality and corporate credibility that is nothing short of revolutionary.”).

⁶⁸Interview with Judge Sporkin, *supra* note 7, at 18.

⁶⁹*Id.* at 19.

⁷⁰In a 1976 study of nine regulatory agencies by the House Commerce Subcommittee on Oversight and Investigations, the SEC was ranked first in effectiveness, concluding that the SEC “has maintained consistently vigorous enforcement efforts over the past several decades. Its courageous handling of the ongoing investigation of corporate payments is commendable.” Federal Regulation and Regulatory Reform, A Staff Report by the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 94th Cong., 2d Sess. at 11(1976).

⁷¹Judge Sporkin asked Theodore A. Levine and Ralph C. Ferrara to participate from the SEC; the balance of the 14-member task force was comprised of senior FEA personnel.

⁷²Pub. L. No. 93-159, 87 Stat. 628. The Act authorized price controls for the “purpose of minimizing the adverse impacts of . . . shortages” experienced as a result of the 1973 OPEC oil embargo. § 2(b).

⁷³Judge Sporkin, Levine and Ferrara split their work during the 60 day period between the SEC and the Task Force.

⁷⁴On the day the Task Force was announced, Judge Sporkin said “the purpose of the study is not to find abuses; the purpose is to see whether the system is working effectively.” Sporkin Named to Head Inquiry of Oil Programs, Wash. Post, May 17, 1977, at A8.

⁷⁵FEA Task Force on Compliance and Enforcement, Final Report, Report of the Chairman (1977). Hearings Before the Subcommittee on Energy Conservation and Regulation, 95th Cong. S. REP No. 96, at iii [hereinafter “Sporkin Report”].

⁷⁶J.P. Smith, 15 Oil Refiners Face Audit on Alleged Overcharges, Wash. Post, July 26, 1977, at A2.

⁷⁷Sporkin Report, *supra* note 75, Report of the Chairman, at ii-iii. (“The effectiveness of any regulatory program depends in large part upon the enforcement effort which underlies it. Rules and regulations permitted to be transgressed without consequence will ultimately undermine public confidence. . . . Those subject to FEA’s jurisdiction must meticulously comply with the regulatory requirements if the energy program is to be successful and achieve its goals. A strong and vigorous enforcement effort is essential if that degree of compliance is to be assured.”).

⁷⁸*Id.* at vi.

⁷⁹*See* Smith *supra* note 76, quoting Judge Sporkin that the audit made “the most sense from a cost-benefit basis.”

⁸⁰*See* Sporkin Report *supra* note 75, at IIIb-c; Report of the Chairman, at xxvii. Judge Sporkin discussed other vital recommendations of the Task Force within his Report of the Chairman including: hiring of sufficiently skilled personnel “to administer a complex legislative scheme which regulates an industry with the wherewithal to employ the finest legal, management and auditing talent to oppose its directives. Presently, most of the Agency’s lawyers are not sufficiently skilled to investigate complex cases (at xvii); centralization of enforcement activities (at xviii); and enforcement of a “rigid code of ethics” given that “nothing can be more harmful to the proper functioning of an enforcement program than practices that compromise its integrity” (at xviii-xx).

⁸¹Judge Sporkin, Address before the Annual Business Ethics Conference (May 3, 1995) (on file with author).

⁸²Judge Sporkin first raised the BPO idea in a 1976 speech given amidst the

questionable payments investigations. Stanley Sporkin, Restoring Integrity to American Business, Address before the Chief Executives Forum, (April 29, 1976). He proposed that the BPO “would be responsible for . . . implementing codes of ethical conduct.” Levine & Hawke *supra* note 47 at 17.

⁸³Stanley Sporkin & Marc I. Steinberg, *Second Opinion for Lawyers—The ‘Consultative Attorney,’* N.Y. L.J., Jan. 3, 1983, at 1, 3.

⁸⁴*Id.*

⁸⁵See John S. Martin, Jr., *A Second Opinion*, Nat’l L.J., Jan 10, 1983, at 12 (“We agree with Mr. Sporkin and Mr. Steinberg that the concept is a good one, and that attorneys should be open to its use in the future. It is a provocative and workable area within the legal profession And there is no one better qualified to discuss the important ethical and practical considerations . . . involved in the practice than Stanley Sporkin.”). See also Lawrence B. Pedowitz, Letter to the Editor, N.Y. L.J., Jan. 21, 1983, at 12 “[W]hile I wholeheartedly endorse the suggestion that lawyers should regularly consult in order to improve the quality of their judgements, I believe it is incorrect to suggest that the ‘second opinion’ practice is not already extant in our profession.” See also Steinberg, *Counsel Conflict Dilemmas in Mergers and Acquisitions*, 47 S. Tex L. Rev. 3, 10 (2005) (“During the past decade . . . the consultative attorney mechanism to render a second opinion has been employed to a greater extent.”); Klausner, *et al.*, *Second Opinions in Litigation*, 84 Va. L. Rev. 1411 (1998).

⁸⁶Judge Stanley Sporkin, The SEC Can No Longer Regulate From Behind, Remarks at C-LEAF Conference on “The Political Economy of Financial Regulation,” (Feb. 7, 2013) in 18 N.C. Banking Inst. 65 (2013).

⁸⁷*Id.* at 68.

⁸⁸*Id.*

⁸⁹*Id.* at 69.

⁹⁰*U.S. v. Microsoft Corp.*, 159 F.R.D. 318, 332, 1995-1 Trade Cas. (CCH) ¶ 70897 (D.D.C. 1995) (The Antitrust Division of the DOJ “did not provide the court with the information it needs to make a proper public interest determination” as required under the Tunney Act.). See generally Anderson, *United States v. Microsoft, Antitrust Consent Decrees, and the Need for a Proper Scope of Judicial Review*, 65 Antitrust L.J. 1 (1996).

⁹¹*U.S. v. Microsoft Corp.*, 56 F.3d 1448, 1995-1 Trade Cas. (CCH) ¶ 71027 (D.C. Cir. 1995), on remand 1995 WL 505998 (D.D.C. 1995).

⁹²Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, Dec. 21, 1974, 88 Stat.1706, as codified at 15 U.S.C. § 16(e) to (f). See also Frankel, *Rethinking the Tunney Act: A Model for Judicial Review of Antitrust Consent Decrees*, 76 Antitrust L.J. 549, 551-554 (2008).

⁹³*Id.* at 564-570.

⁹⁴*Lincoln Sav. and Loan Ass’n v. Wall*, 743 F. Supp. 901 (D.D.C. 1990).

⁹⁵*Id.* at 920.

⁹⁶“Where were the lawyers?” has become widely used by commentators, legislators and academics during each successive series of financial industry scandals as the optimal description for the continued ethical dilemmas—and potential failings—of professionals within the marketplace. See *e.g.*, Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers’ Responsibility for Clients’ Fraud*, 46 Vand. L. Rev. 75, 76 (1993) (“Where were the lawyers? Perhaps rhetorical, even sarcastic, this

question is being asked all too frequently after large financial frauds.”) *See also* Coffee, Jr., Understanding Enron: “It’s About the Gatekeepers, Stupid,” 57 Bus. Law. 1403, 1405 (2002).

⁹⁷Allison Conte, BP America names Sporkin as first ombudsman, *Horizon*, Nov. 2006, at 15.

⁹⁸*See* Email from Bob Malone, BP America President, to All US Employees of BP, Former Federal Judge Named BP Ombudsman, Aug. 31, 2006, http://www.ombudsmanecp.com/ombudsman_email_employees.pdf (last visited Sept. 2, 2014).

⁹⁹*Id.*

¹⁰⁰Nathaniel C. Nash, Washington at Work; For Judge in Keating Case, Being on the Bench is Not Sitting on the Sidelines, *N.Y. Times*, Jan. 11, 1990.