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Friendly: Benchmarks

Manuel F. Cohen
Securities and Exchange Commission

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BENCHMARKS. By *Henry J. Friendly*. Chicago: University of Chicago Press. 1967. Pp. viii, 324. $7.95.

A collection of previously published essays is often tedious to read and difficult to review. What appeared fresh on first publication has many times become obvious or irrelevant with the passage of time. Frequently the author gives no indication of his present beliefs or earlier errors. *Benchmarks*, a collection of writings of Judge Henry J. Friendly, suffers from none of these shortcomings. The essays, written over the past eight years, are as relevant and fresh today as when they first appeared, notwithstanding that subsequent events have mooted some arguments. Moreover, two chapters of this volume, which update earlier writings, are as current as tomorrow's newspaper.

The book contains writings on five general themes. The first concerns the law-making functions of legislatures and courts, the business and art of judging, and the study of the law. The second focuses on the problems of federal administrative agencies, a subject with which Judge Friendly has been intimately involved throughout his professional career. The third group of essays deals with the proper relationship between state and federal law and the growth of the federal common law. The fourth treats what Judge Friendly describes as the Supreme Court's seeming use of the Bill of Rights to impose a uniform code of criminal procedure on the states. The final section consists of essays on the four great judges whom Judge Friendly has admired most: Holmes, Brandeis (for whom Judge Friendly clerked), Learned Hand, and Frankfurter.

The thread that unifies these seemingly disparate sections is the call to those whose decisions affect society to engage in reasoned decision-making. Judge Friendly states that there is a "need for judges and administrators to decide cases on the basis of 'clear and distinct' propositions and to make their reasons for decisions readily available" (p. vii). He also puts it another way:

> It means rather that the decider should cerebrate rather than emote about what he is deciding; that he should endeavor to provide a principle that can be applied not simply to the parties before him but to all having similar problems; that he should tell what he is doing in language that can be understood rather than indulge in flights of rhetoric; and that if he finds a principle is not working properly, he should qualify or overrule it candidly and openly rather than continue to profess adherence while reaching inexplicable results. [P. vii.]

To achieve this goal, the "decider" must have great knowledge and understanding—both of the law and of human nature—combined with courage and a sense of humor.

The book is beautifully written. There are few writing anywhere today (certainly few lawyers) with a felicity of style to match Judge Friendly's. His sense and use of imagery and his deft references to history, literature, and music enhance the reader's pleasure and understanding while giving added dimension to his arguments. He also has the rare gift of writing a paragraph which makes the reader anticipate the next with pleasure. There is scarcely an essay in which his great wit, sensitive taste, and impeccable style are not present. Indeed, this reader had to control his involvement in Judge Friendly's prose so that he could focus on the ideas being expressed—an equally enjoyable task.

While the reviewer has occasionally considered and struggled with the answers to difficult and specific questions so logically put by Judge Friendly's court, the book takes these questions and weaves them into a larger tapestry. Often this is done by describing a case in new ways so as to challenge the reader to re-examine the case and his own thoughts on it. One example will suffice:

> More dramatically, as the result of the encounter between an Erie freight train and the not otherwise illustrious Tompkins in Hughestown, Pennsylvania, in the early hours of a July morning in 1934, what was thought for a century to be a happy hunting ground for the creative effort of federal judges was abruptly fenced off, and their activity denounced as poaching on the preserves of others. [P. 43]

The significance of *Erie Railroad Co. v. Tompkins*[1] for federal judges deeply concerns Judge Friendly. He develops this theme in several essays in the book, the most important of which is *In Praise of Erie—and of the New Federal Common Law*.[2] Perhaps because he is a former Brandeis clerk, he feels the reader may subject his discussion to the most critical analysis. He is particularly eager to prove that the detractors of *Erie* do not really appreciate its meaning and effect, as well as to defend the result and the opinion in the case. He rejects the view that *Erie* limited the freedom and ingenuity of federal judges. He argues that, in fact, the decision, by relieving federal courts of the substantial burden of dealing with matters of local and limited concern, made it possible for those courts to use their time and skill more productively and fruitfully in developing, in areas of national concern, a true federal common law.

As Judge Friendly recognizes, the federal courts have been assisted in this by the rapid growth of the newer areas of the law opened up

1. 304 U.S. 64 (1938).

2. Reprinted from 19 RECORD OF N.Y.C.B.A. 64 (1964); also reprinted in 39 N.Y.U.L. REV. 383 (1964).

by congressional concern with problems with which the states were unable to cope. He cites the willingness of the federal courts to imply private rights of action against corporations and their managements for violations of rule 10b-5[3] under the Securities Exchange Act of 1934[4] and other provisions of the federal securities laws as an example of this type of development.[5] The resulting "federal common law of corporate responsibility" (p. 186) is, with only a few exceptions, uniform, binding in every forum, and, consequently, predictable. Before *Erie*, of course, this was an area foreign to the federal courts.

Judge Friendly's analysis of the growing application of principles of federal law to the rights and duties of stockholders and corporate officials is, not surprisingly, particularly acute, for he has been instrumental in that growth. His opinion in *Brown v. Bullock*[6]—"decid-[ing] that the standard of conduct to which directors of a registered investment company must conform in voting the renewal of a contract of an investment adviser or principal underwriter as required by section 15 of the Investment Company Act is a matter of federal law" (p. 187, footnotes omitted)—is significant and far-reaching. It was also among the early cases to imply a private right of action for a shareholder under the federal securities law, and subsequent opinions have relied heavily on his opinion in this case.

Judge Friendly wrote *In Praise of Erie* in 1964; subsequent federal court decisions demonstrate the accelerated development of the federal law of corporate responsibility which that essay presaged.[7] In part, the nature of the modern corporation—whose problems and business transcend state boundaries—accounts for this development. It can also be explained in part by the recent tendency of some state legislatures to weaken rather than strengthen their corporation codes, thereby abandoning their efforts to legislate standards of conduct for corporate managers.[8] More and more shareholders now enjoy fewer and fewer protections under state law. The fear which Judge Friendly expressed in 1964—that state legislatures would impose too rigid a burden on corporations and corporate managers—has proved groundless, and the federal courts have stepped in to fill the resulting gaps in shareholder protection.[9]

3. 17 C.F.R. § 240.10b-5 (1968).

4. 15 U.S.C. 78 (1964).

5. *E.g.*, J. I. Case Co. v. Borak, 377 U.S. 426 (1964); Brown v. Bullock, 294 F.2d 415 (2d Cir. 1961); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946), *as modified*, 73 F. Supp. 798 (1947).

6. 294 F.2d 415 (2d Cir. 1961).

7. *E.g.*, Dasho v. Susquehanna Corp., 380 F.2d 262 (7th Cir.), *cert. denied*, Bard v. Dasho, 389 U.S. 977 (1967); Mutual Share Corp. v. Genesco Inc., 384 F.2d 540 (2d Cir. 1967).

8. Folk, *Corporation Statutes: 1959-1966*, 1966 DUKE L.J. 875.

9. Some states have resisted the tendency and have strengthened their corporation laws. For example, *see* the proposed California Corporate Securities Law of 1968, par-

A striking comparison exists between the developments in state corporation law in the United States and provincial corporation law in Canada, where the provinces have jealously guarded their sovereignty against alleged attempts at inroads by the federal government. In Ontario, for example, the Lawrence Report[10] examined the existing Ontario Corporations Act[11] and found it deficient in the protections which it afforded shareholders. The Report recommended numerous changes in the Act, including the authorization of the derivative suit, the existence of which in British law has always been, in the view of some, questionable. The Report also recommends strengthening the independence of auditors, and the adoption of a clearly defined set of obligations to be placed upon corporate management. Legislation to implement some of these recommendations has already been introduced, but has not yet been adopted.

The most significant current material in the book is found in the two chapters dealing with recent Supreme Court decisions on criminal procedure. These chapters contain a closely reasoned dissent from decisions such as *Escobedo*[12] and *Miranda*,[13] and they demonstrate Judge Friendly's willingness to take the less popular view on crucial issues.

In essence, he argues that the Supreme Court's opinions in these cases detract from an ordered development of the law, and that the Constitution did not require the Court to lay down detailed rules of criminal procedure which are binding on both the federal government and the states. He sees the problems of balancing the demands of society against the rights of the individual who is suspected or accused of a crime as too complex to be resolved in the framework of constitutional absolutes. He contends that the variety of local experiences in law enforcement must be considered in achieving the necessary balance. He also argues that satisfactory results can be reached only after a careful study of the nature and effect of every stage of the pretrial process, and he invites "Brandeis briefs" on this subject. As he puts it, we must know "how far *Miranda* will have prevented the detection or the successful prosecution of serious crime and the rendition to the victim of the aid society owes him, when questioning not offensive to a general sense of decency would have yielded a better result" (p. 283). Until we know this—and Judge Friendly recognizes that the answer will not be easily obtained—he mistrusts the absolutes

ticularly § 25,402 which is patterned after the S.E.C.'s Rule 10b-5 and the decisions under that rule which have given it flesh and blood. 1 CCH BLUE SKY L. REP. ¶ 8497-36 (1968).

10. ONT. SEC. COMM'N SELECT COMM. ON COMPANY LAW, 1967 INTERIM REPORT (available from the Queen's Printer, 26 Breadalbane St., Toronto, Ontario).

11. ONT. REV. STAT. ch. 71 (1960).

12. Escobedo v. Illinois, 378 U.S. 478 (1964).

13. Miranda v. Arizona, 384 U.S. 436 (1966).

and the specifics which he feels have filled the Supreme Court's opinions.

This brief summary cannot do justice to the sophistication and erudition of Judge Friendly's argument. It is an argument which is entitled to additional force because it is accompanied throughout by an obvious and ungrudging concern for the individual and his rights. Like Justice Frankfurter, whom he admires so much, Judge Friendly is deeply involved with the rights of man, and yet, like Frankfurter, he believes that the Supreme Court, in the name of those rights, has been acting unwisely and without historical or legal support.

The subject to which Judge Friendly allots most space is the performance of federal administrative agencies.[14] He has long been one of their most articulate critics; this book includes some of his earlier writings[15] as well as his analysis of the agencies' more recent performance. His criticism of the agencies relates principally to what he describes as their failure to develop standards sufficiently definite to permit fairly predictable decisions, and their failure to articulate the reasons for these decisions so that they might be understandable by those subject to the agencies' jurisdiction. He is almost equally concerned with the agencies' failure to recognize and to deal with problems before they reach a stage of crisis. He has directed other major criticisms at the increasing delay in the disposition of cases, the neglect of rule-making, and the overemphasis on ad hoc decisions.

Judge Friendly suggests remedies for these defects, although he is shrewd enough to recognize that cures cannot be effected overnight. He believes that agencies have an obligation to improve themselves through the hiring of better staffs, but, he comments, able permanent staffs are possible only if the agencies are manned by members of high quality. Moreover, he suggests that recruitment and retention of able staffs are possible only when enabling statutes provide clear legislative mandates and permit the agencies to implement and enforce them without fear of retribution from constituents dissatisfied with the agency's decision. He rejects the suggestion that agency performance would improve if the policymaking and adjudicatory functions were separated.[16] Such fragmentation,

14. Judge Friendly limits his discussion to the principal independent regulatory agencies.

15. Chapter 5 of *Benchmarks* is a reprint of *A Look at the Federal Administrative Agencies*, 60 COLUM. L. REV. 429 (1960); chs. 6 & 7 are reprinted from H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS (1962).

16. *Accord*, Hector, *Problems of the C.A.B. and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960); letter from Newton M. Minow to the President, May 31, 1963 (available from the Federal Communications Commission). For other views in support of Judge Friendly's position, *see* W. CARY, POLITICS AND THE REGULATORY AGENCIES (1967); Auerbach, *Some Thoughts on the Hector Memorandum*, 1960

even if possible, would lower the agencies' performance and morale.

In his new essay *Watchman, What of the Night?* Judge Friendly notes that agency performance has improved since his initial writings. He attributes some of this to stimuli such as the Administrative Conference and to the higher caliber of men appointed as agency members.[17] He also detects increased willingness by agencies to issue policy statements and to rely to a greater extent on rule-making procedures; he singles out the Federal Trade Commission's Trade Regulation Rules for particular praise.[18] While recognizing that adjudication is often useful,[19] he nevertheless reiterates his strong preference for rule-making as the principal weapon in an agency's policy-making arsenal. He believes that agencies should prefer rule-making to adjudication in three situations: when a detailed code of conduct or set of standards is to be prescribed; when the agency's statement of a principle will be in numerical terms; and, when the agency is about to move into an area in which it has previously not exercised its jurisdiction.

Whether rule-making or adjudication is the better method for the development of policy is a question to which every professor, practitioner, judge, and agency member is drawn.[20] Unfortunately, this is a question frequently better-suited to the theoretical analysis of the printed page than to the practical world in which agencies must operate. In that world, the intellectual, political, and philosophical predilections of agency members may facilitate, if not make essential, the use of one technique rather than the other to deal with and to conclude necessary business.

Clearly, there are many advantages in the use of adjudication. Agency members will often agree more readily on the language of a policy statement when that language appears in an opinion based on a specific record than when it is put in a rule which, divorced from the limitations of a record, may be susceptible to broad application. The power to institute proceedings also affords an agency the opportunity to insure that cases which raise important policy questions come before it. An agency seeks consistency in its decision wherever possible, and this consistency should result, as it does in

WIS. L. REV. 183; Auerbach, *Should Administrative Agencies Perform Adjudicatory Functions?*, 1959 WIS. L. REV. 95; 1 K. DAVIS, ADMINISTRATIVE LAW § 1.04 (Supp. 1965).

17. Judge Friendly is kind enough to include me in the group he cites. Apart from this slip, I agree with his argument and with his examples.

18. *E.g.*, the rule on cigarette labelling. 29 Fed. Reg. 8324 (1964).

19. He cites with approval the SEC's decision in Cady, Roberts & Co., 40 S.E.C. 907 (1961).

20. *See, e.g.*, W. CARY, POLITICS AND THE REGULATORY AGENCIES (1967); Cohen & Rabin, *Broker-Dealer Selling Practice Standards: The Importance of Administrative Adjudication in Their Development*, 29 LAW & CONTEMP. PROB. 691 (1964); Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78 HARV. L. REV. 385 (1964); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

the courts, in a body of law from which meaningful standards can be distilled. And, as Judge Friendly recognizes, it is often better for an agency to deal with a variety of specific situations in actual cases before attempting rule-making.[21] Adjudication is not, however, without its weaknesses. It is necessarily a slow process, and the final record may not be sufficiently complete to afford the agency adequate opportunity to articulate broad standards. When dealing with a limited record, agencies will respond as courts do: deciding on a narrow ground and sometimes not reaching the major issues raised but insufficiently developed in the case.[22]

The advantages of adjudication should not blind an agency to the benefits to be gained from rule-making. When important to do so, agency members can and do quickly unite on the language of a rule which solves a pressing problem. In complex situations, rule-making may be the easiest, and perhaps the only, way to obtain the facts necessary to govern particular behavior. It is also the simplest device for obtaining or soliciting the views of all parties whose activities the agency's decision may affect. On the other hand, the type of conduct to be regulated, fraud, for example, may be so difficult to define in a rule without encompassing other activities not intended to be reached that the agency has no choice but to rely upon adjudicated cases.[23] Indeed, in these situations, the decision to rely upon rule-making may create serious problems of enforcement if the adoption of a rule is delayed or abandoned.

Judge Friendly stresses rule-making because he believes it is the way best to satisfy the concern which is at the core of his principal theme—the necessity for agencies to articulate their reasons for action or inaction. As he recognizes, the choice between adjudication and rule-making is not one between ad hoc decisions and formulating broad standards. An agency must maintain flexibility, but, more critically, it must develop understandable standards which will permit those whom it regulates to order their behavior with some knowledge of the potential consequences.

As one who participates in the daily business of being an agency member, I am heartened by Judge Friendly's optimistic answer to his own prophetic question.[24] Despite his criticisms, he expresses a more hopeful, confident view of the administrative process than do

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21. *See, e.g.*, Friendly's comments on the SEC's *Cady, Roberts* decision (pp. 145-46).

22. Much has been written about Judge Friendly's criticisms of the administrative agencies, but it is interesting to note that he levels many of the same criticisms at the courts. Indeed, the passages in which he assesses the strengths and weaknesses of both courts and agencies are among the most significant in the book to the agency member and private practitioner.

23. For a further discussion of my views on the possible hazards of rule-making, *see* my review of W. CARY, POLITICS AND THE REGULATORY AGENCIES in Cohen, Book Review, 35 U. CHI. L. REV. 399 (1968).

24. Isaiah 21:11.

many recent writers. Indeed, his view seems far mellower today than when he first examined administrative agencies. I think this is because he is now primarily concerned with the substance of the administrative process rather than with its procedural shortcomings, real or supposed. Recognizing how much regulation pervades our daily lives, he now urges the agencies to fulfill their original promise by utilizing their expertise sensitively and intelligently. If we in the agencies succeed in this task, we must acknowledge how much of our success is due to the stimulus he has provided us (and for which, characteristically, he does not take credit) in recent years.

The last few chapters are devoted to his reflections on four great judges. He recognizes and enjoys their literate qualities, their sensitivity, and above all their appreciation and recognition of the fallibility of man. Judge Friendly will one day be counted among them.

A careful reading of the book leaves the reader with a deep admiration for Judge Friendly as a man, as a literary craftsman, and as a judge. His writings are marked by a constant search for a rational and consistent view of society and the role of law; and, like other great judges, he is a humanist rather than a narrow-minded preacher. Writing these essays appears to have given him pleasure. Reading them gave this reviewer both pleasure and a pride that our system can produce a judge with his unique qualities.

*Manuel F. Cohen,**
Chairman,
Securities and Exchange Commission

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