



TELLING TRUTH TO POWER

By Professor Roberta Karmel

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The last time I tried to give an after dinner speech at an event full of securities industry folks was when I was a Commissioner at a Securities Traders Association of New York dinner in Palm Springs, California. I had prepared a serious talk about national market system initiatives but my timing was terrible. It was beastly hot, at least half of the conference participants had lost luggage in the Denver airport on the way to Palm Springs (in fact, Stanley Sporkin was threatening an investigation into airline baggage procedures at that airport), the air conditioning in the hotel had gone off due to a power failure and almost everyone at the dinner, not to put too fine a point on things, was roaring drunk. I gave my speech anyway since I had nothing else prepared and I knew it would be publicly circulated, and I sat down feeling totally humiliated. So for this event I wondered whether I should try humor rather than some serious remarks, but I am not good at jokes.

So I will start with a story about myself. My first day as an SEC attorney was not particularly auspicious. Despite an outstanding law school record, I was unable to land a job as an associate at a Wall Street law firm, or as a clerk to a federal judge due to what in retrospect I realize was sex discrimination. But I was offered a position as an enforcement attorney in the New York Regional Office of the SEC and I had a letter giving me a starting date at the beginning of August. This was during the Kennedy Administration after William Carey had been appointed Chairman of the SEC. Under President Eisenhower, the New York Office had 6 enforcement attorneys but in the summer of 1962, 30 new enforcement attorneys were joining the office. When I showed up for work I was told that

Lambert Francis, the Personnel Director, was on vacation and I should come back in 3 weeks. I supposedly had been sent a notice of the change in my start date and I could not be processed.

“But I have a letter to prove I should start today,” I exclaimed. “I returned from out of town to start work today, I need the money” and (with all the over confidence of a new lawyer I added), “this letter is a contract. I am staying here until I am given some work to do.” So I sat down and waited. How I had the nerve to take this stand (or sit in) I really don’t know, except I really did need the money. Well, after a while, since I would not leave and nobody knew what to do with me, someone in the personnel office put me in an office with another attorney who gave me the job of digesting the testimony of witnesses in a market manipulation case. I did that for 3 weeks until Lambert Francis returned and I was properly processed. I should add that Lambert Francis was one of the nicest people ever to work at the SEC and he was very apologetic. The result of this little fracas was that I had seniority over the 30 other new attorneys in the office. Also, I had some idea of how an administrative proceeding was tried.

This was my first experience of telling truth to power in my own small way and that dynamic continued throughout my career. Sometimes, this gambit worked out well; sometimes it was very problematic. However, it helps explain the trajectory of my career.

I loved the work at the SEC and these were fulfilling years, professionally and personally. In addition to learning to be a lawyer, my late husband Paul and I started our family. I am very glad that my oldest child Philip, also a lawyer, is here tonight. Philip probably was destined to become a lawyer after I testified in a grand jury proceeding, very pregnant with him, and everyone laughed. The facts of this case, about two jailbirds who started making a market in an otc stock 15-16, were hilarious but I wondered whether the grand jurors were also amused by my condition. After Philip I had 2 more children while at the NYRO and I became known as the pregnant enforcer by the people we were investigating.

Those days had a madcap quality. This was before Watergate, so almost all the judges gave the SEC whatever relief we wanted, but the entire office was

composed of newly minted attorneys who knew very little about the securities business or practicing law. We thought the head of the office was a grown up because he was tall and distinguished looking and we did not realize that he was not much older than we were and his only job experience had been as an associate in a Wall Street law firm.

I will tell you a story to give you the flavor of the times and my own naiveté. I spent some time working up a case for a criminal contempt against a stock fraudster who had already been enjoined by the SEC, but before I could complete my investigation he was arrested for carrying a concealed weapon. Shortly thereafter he shot himself on his way to jail for that crime. Like any ambitious prosecutor I did not want to waste my work so I turned the case into a proceeding against the brokerage firms through which he had accomplished his manipulation. "You can't bring this case," I was told by higher ups, "these are member firms." "Members of what?" I asked. "As far as I am concerned, they are all crooks."

Because the NYRO had so much trouble getting Washington to sign off on this case, during a Regional Administrator's Conference in Washington, I was asked to present it to the Commission. I had been warned about going to the TABLE, as if this was some kind of a religious ceremony or maybe a Supreme Court argument, and I found the experience disappointing. The SEC was then in the left over World War II tar paper shack and the table looked to me like a piece of used dining room furniture. I looked at the Commissioners who all looked alike to me and all I could think was, "So these are the old men who are keeping me from going to court or bringing administrative proceedings, when defunct brokers are running away with their customers' funds!" But I was determined to persuade them to authorize my case.

This case against several member firms and one important over-the-counter trading firm was finally authorized. It took about a year to try and I learned to be a lawyer on the case because the attorneys for the respondents were all experienced and outstanding lawyers. My mindset was that they were better lawyers than I was, but I had the facts on my side. Eventually, most of the respondents settled and those who did not were sanctioned by the Hearing

Officer and then the Commission. Bob Berson, who is here tonight and who tried this case with me, always wondered about my trial methodology. This, like many administrative law proceedings, was a documents case and so I put every document I thought we needed in evidence into a separate envelope and said all we needed to do was to get every envelope emptied into the trial record. The one document never produced was the conspiracy agreement demanded by one of the lawyers for the respondents every morning.

As a Commissioner, I also sometimes stood my ground against the conventional wisdom, and some of these stands were very difficult for me personally. Generally, my dissents were on Enforcement cases and I was not so happy having to write them, but I felt I was trying to protect the Commission from adverse court rulings. Lately, I have given considerable thought to the difference between principled disagreements among government appointees and partisan differences which seem to be destroying the country and even the SEC. When I was a commissioner, I believed that one of the functions of a 5 person commission was to generate some discussion and even disagreements about appropriate agency actions, but I never intended that any of my dissents sully the SEC's reputation or undermine the agency's actions. And I always understood that if I was outvoted, the majority's decision was the law.

Sometimes I dissented because I did not believe that securities laws authorized a case the SEC was bringing, but later on when the securities laws were amended to do so, for example in the Sarbanes-Oxley Act, I thought that was a good result. I believe that the thoughtful and orderly development of securities law is an important component of compliance with the law and respect for the SEC. If the SEC is unable to pass new regulations during the Trump Administration, it will resort to regulation by enforcement as it has done in the past. I have usually objected to this kind of an initiative, but I understand why it occurs.

Rulemaking is difficult and, of late, too often ends up being second guessed by the courts. Some of the ideas about regulation now circulating in Congress would make it very difficult for the SEC to pass new regulations or repeal existing

regulations. These ideas fail to respect the SEC's independence and expertise and are designed to hamstring the agency.

For most of my career I have carefully watched the SEC and commented on its regulatory initiatives and the cases it has brought. Yet, I believe that the problems and accomplishments at the SEC are indicative of what is happening in the rest of the government. So I am more than a little concerned about the future of the Commission at this time when the Administration and the Congress seem to be set upon taking a hacksaw to all regulation, trying to take the country back to an idyllic past which never existed except perhaps in the first grade Dick and Jane readers.

I have always believed that good regulation requires buy-in from regulated businesses. But today many politicians are clamoring for no regulation. All of the deregulatory talk in Washington seems to be for the benefit of the very wealthy and not those who have been left behind by the country's current prosperity, especially the factory workers and middle managers who have been replaced by robots and computers. Deregulation and putting up a Great Wall around the country will only further impoverish them.

What does this have to do with the SEC? The trade wars of the 1920s led to the Depression of the 1930s and the creation of the SEC. Economic deregulation historically has led to stock market bubbles that hurt everyone when they burst. The role of the SEC traditionally was to stand up to powerful interests in Washington and on Wall Street in order to protect public investors. In a certain way this role was telling truth to power by compelling public companies to make full disclosure about their business operations and affairs and to broadcast accurate accounting statements. Further, the SEC required participants in the securities industry to deal fairly with their customers and keep the public markets fair and orderly. The SEC's mission has focused on what it means for communication to be truthful. Perhaps this ability to distinguish truth from falsehood should become more widespread.

Today's markets have become very complicated and today's investors are primarily institutions that invest and trade on behalf of others, so that the role of

the SEC in mediating between public companies, market makers and investors is changed, not necessarily for the better. Many institutional investors need to be regulated in order to protect beneficial owners of securities and the capital raising mechanism. Many public companies need to be mindful of their impact on constituents in addition to shareholders. It does not follow that the SEC should police corporate compliance with every regulatory scheme through disclosure requirements. When the SEC is pushed into disclosure of matters not material to investors, the agency becomes too politicized and its independence is undermined.

The SEC has had a role in pushing back against some market-oriented ideas like privatizing social security and injecting too much leverage into the securities markets. Further, at least since the late 1970s the SEC has recognized that the capital markets are global, and so the SEC needs to cooperate with regulators in other countries and harmonize our regulatory system with theirs in order to maintain and strengthen the U.S. market. The next Chair of the SEC will have a difficult time, in an Administration of billionaires, regulating on behalf of the millions of Americans with their meagre life savings in the capital markets. I wish him well and I hope he is able to maintain the independence and integrity of the SEC and look beyond partisan interests to the public interest.

SEC commissioners and employees have always been a very important community to which I have been honored to belong. I thank ASECA for fostering that sense of community in so many of us and for honoring me tonight. I am happy to be in the company of those who have gone before me and received the William O. Douglas award. I also want to thank everyone who ever worked for me at the SEC, either at the NYRO or when I was a Commissioner. I could not have achieved whatever I did achieve without their hard work and loyalty. In particular, I need to mention John Ketels, Linda Griggs and Ann Sullivan, who have stayed such good friends and the late Jack Wheeler. I think I disappointed all of them by not becoming more famous and influential but rather retreating from government and private practice into academia. However, I know there are some of my former students here tonight and I hope that whatever you learned in my

courses made you better securities lawyers, and that you will help influence the SEC to work for the good of the public even if that means telling truth to power.