

## THE CORPORATE MACHINERY FOR HEARING AND HEEDING NEW VOICES

### A Panel Discussion\*

MR. RICHARD J. FARRELL: First of all, as moderator of this panel, I am going to presume to respond on behalf of the panel in its entirety to your introductions, and remind them, after those rather generous references you have made, of the fellow who was basking in the warm reflected light of his introduction at an after-dinner speech, and, on the way home, turned to his wife and said, "Dear, you know, isn't it striking that there are so few leaders in this business of ours!"

And she said, "Yes, my dear—and there's just one fewer than you think!"

This subject, as we have been reminded a time or two today, is one that's caught the public fancy. It seems a very current thing, yet it has been commented on many times before. I was struck recently, in finishing a book I'd been at for some time, with some of the concluding observations made by Sir Kenneth Clark in his work on "Civilisation." I think many of you saw it produced on our NET television, although it was earlier popularized on the BBC. In the concluding paragraphs of his commentary, Sir Kenneth says two things I thought were worthy of quotation, here:

"Well, one doesn't need to be young to dislike institutions. But the dreary fact remains that, even in the darkest ages, it was institutions that made society work, and if civilisation is to survive, society must somehow be made to work."

And, in the very final paragraph of his book, that:

"The trouble is that there is still no centre. The moral and the intellectual failure of Marxism has left us with no alternative to heroic materialism and that isn't enough. One may be optimistic, but one can't exactly be joyful at the prospect before us."

So, our contemporary subject is one of great importance, but it certainly isn't very new, as we were reminded at lunch by Mr. Lundborg, and, in reflecting on this characteristic of the problem, I thought it might be of interest to look back at some commentaries I recalled from law school. In the Thirties, up in Cambridge, Massachusetts, Professor Dodd and Professor Berle got into a colloquy on the subject,

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\* Panelists were: John R. Bunting, Philadelphia, Pennsylvania, President, The First Pennsylvania Banking and Trust Company; Professor Alfred F. Conard, Ann Arbor, Michigan; Professor Jan Deutsch, New Haven, Connecticut; Richard J. Farrell, Chicago, Illinois; Leon Hickman, Pittsburgh, Pennsylvania.

Editor's Note—These remarks were presented in a program of this Section in New York on July 6, 1971.

all of which is published in the May and June 1932 issues of the *Harvard Law Review*.

Professor Dodd started all this by making some observations to the effect that he thought business had some social responsibility, and he painted some background in his first article by quoting from one of the old English cases—Lord Bowen, in 1887, in *Hutton v. Westcourt Railroad*, to this effect:

“The law, being reflected in the state, the law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.”

And, I guess that’s pretty good law, perhaps, right down to today. But, Professor Dodd took issue with that, and said:

“If business is tending to become a profession, then a corporate person engaged in business is a professional, even though its stockholders, taking no active part in the conduct of the business, may not be. Those through whom it acts, therefore, may employ its funds in a manner appropriate to a person practicing a profession and imbued with a sense of social responsibility, without thereby being guilty of a breach of trust.”

This clearly raised some hackles on Mr. Berle’s neck, and he responded at length. In summing up he had this to say:

“It is likely, the claims upon corporate wealth and corporate income will be asserted from many directions. The shareholder, who now has a primary property right of a residual income after expenses are met, may ultimately be conceived of as having an equal participation with a number of other claimants, or he may emerge, still, with a primary property right over residual income but subordinated to a number of others, such as labor, customers, patrons and by the community, which would like to cut down on that residue. ‘It would,’ as Professor Dodd points out, ‘be unfortunate to leave the law in such shape that these developments could not be recognized as a matter of institutional or corporation law. But it is one thing to say that the law must allow for such developments; it is quite another to grant uncontrolled power to corporate managers in the hope they will produce that development.’”

I think it is fair to say that we have not resolved that controversy, at this point in time.

We thought we’d start this afternoon with our two members from academia, because great ideas usually do generate in the academic community, it taking a while for them to filter down. It’s my conviction, most of the ideas moving the world are generated somewhere in the academic community.

In order to give us some background against which to perhaps best test some of the propositions, we are very fortunate to have both Professors Conard and Deutsch with us today, and will start with Al Conard, who will, I think, as he has indicated, try to give us some semblance of an understanding of approaches to this problem, some of which may seem foreign to us—they come from other parts of the world—but approaches which perhaps have worked pretty well.

Al, would you take the podium?

PROFESSOR ALFRED F. CONARD: We are invited today to consider the ways in which “new voices” can be made more audible in the corporate auditorium. By new voices is meant, I suppose, voices other than those of the shareholders. There is a certain irony in this, since a good deal of the scholarship of the last forty years—dating from the seminal work of Berle and Means—has been devoted to showing that managers do not even hear or heed the voices of shareholders. An effective voice for shareholders might be as new as any other. But I will play the game according to the rules, and assume that shareholders are an old voice, to which some new ones should be added.

What are these new voices that ought to be listened to? Obvious candidates for attention are laborers who work in the company, and consumers who buy its products. However, a good deal of the current demand for change is directed toward a louder voice in defense of air, water, and that mysterious something or nothing called ether, which bears waves of light, heat, and television, to mention only the basic necessities. Naturally, there are a number of eager candidates for the job of representing oxygen and ether, not to mention egrets, grizzly bears and coyotes. It’s an attractive job, because when the coyotes howl, you can always say, “Listen to the support I’m getting from my constituency.” In order to escape the ambiguity in the voice of the constituency, I think it is better to view the constituency as constituted by those human beings who share the same air, water, and ether as the corporation, even if they are neither investors in it, workers for it, nor customers of it. They might be called the cohabitants—those who cohabit with the corporation in the same hydrosphere. A few years ago, I would not have used so coarse a word as “cohabit” in a dignified meeting like this, but *Hair* has dulled my sensibilities.

If we are to think about the interests of cohabitants, I think we should include not only those who are affected by the changes in the content of the air, the water, and the ether, but also those who contribute to and draw from the same tax fund. Speaking as an employee of a State, a very large part of whose income depends on the income of General Motors, I feel that I have a much more direct interest in the policies of that company than do many of its shareholders.

Although laborers, consumers and cohabitants have been the group chiefly mentioned as deserving a new hearing for their voices, there

are at least two other groups which have a very immediate interest which is not reflected in the present structure of corporations. These are the lenders and the vendors—the people who supply the money and the goods on which the corporation operates.

The question before us is how we are to hear these new voices. The idea we hear on every hand is to give a seat on the General Motors board to Ralph Nader Associates, or to the Medical Committee on Human Rights, or the Sierra Club—or one seat to each. This would doubtless still the clamor for a while. But if we are sincerely interested in helping the consumers and cohabitants, we should probably ask ourselves whether we are putting our money on the best horse. After all, shareholders have had up to now the right to name *all* the directors, and most people agree that their voice is very weak and squeaky. So maybe we ought to analyze more carefully what effects we are seeking to achieve, and what processes are likely to achieve them.

If we are to offer a constructive solution to this problem, we have to separate the possible means from the probable ends. From the viewpoint of a professional representative of consumer or cohabitant interests, perhaps obtaining a General Motors directorship is itself an objective. It furnishes him with a nice income, a platform from which to speak, and possibly, resources for further propaganda. However, viewing the matter from the viewpoint of laborers, consumers, cohabitants, lenders, and vendors, the ultimate aim is not to get a directorship for Ralph Nader, but to change the behavior of General Motors in a way which will be more beneficial to these groups.

#### *The Decisional Process*

If we are going to think about how to change the decisional process in General Motors and other corporations so as to alter the input of information and motivation, we have to start by thinking how General Motors works today. One thing which will *not* help us very much is to look at the Delaware statute, which tells us that the board of directors shall manage the affairs of the corporation, unless otherwise provided in the charter. As Orval Sebring remarked in some of the correspondence preparatory to this colloquium, it is patently impossible to carry out the statutory injunction. As a general rule of human organization, we can say that for every ten operatives (and usually less) there will be a person who supervises and directs—in short, manages. If General Motors has 700,000 employees, it has at least 70,000 managers, every one of whom makes decisions affecting labor, consumers and cohabitants.

Many critics will be more particularly interested in who decided to provide a 400-horsepower high-compression engine for a small Chevrolet car. This decision is not made in the board of directors, and will not be, even if Ralph Nader sits there. Somewhere in the products planning division a possible high-performance car is outlined, and the pro-

posal is forwarded to body designers, engineers, and market analysts to develop and report on its feasibility. Their reports probably point to a decision which nearly everyone would make—if he were dependent on the same reports. At the same time as the engine decision is being made, scores of other environmentally significant decisions are being made about the brakes, the tires, the body shape, the model name, the paint options, and the sales pitch with which the automobile is to be presented to the public. Other people are making important decisions about the location of new plants, the allocation of production tasks among facilities, the disposals of wastes at different plants, and all sorts of other decisions affecting consumers and cohabitants. Not one of these decisions comes before the board of directors.

### *Changing the Inputs*

With this view of the decisional process and its dispersion through thousands of different employees, we are ready to take the next step in asking how to give the new voices a bigger share of the input into General Motors decisions. There are five principal ways of affecting this input.

The first and most important way to affect decisions in any enterprise—large or small, public or private—is to change the thinking of the great mass of Americans who fill the management positions, which in General Motors are roughly estimated at 75,000. Nothing will reorient company policy so much as having the American people environment-conscious, because that is the only way to make sure that every designer, engineer, advertising copywriter, and foreman is thinking more about the environment. This is the modicum of sense behind Charles Reich's "Consciousness III," which says we have to change the minds of men before we can change the world. It is only a new application of a principle enunciated by now forgotten best-sellers such as Jesus Christ and Rabbi Hillel. Today, when all Americans have become environment-conscious, we can be sure that GM managers are, too. A few years ago, it was considered good citizenship for corporations to hire well-educated, church-going, monogamous, golf-playing types, and they did. Now we think they have an obligation to hire drop-outs, addicts, convicts and other social rejects, and they do.

However, there are quite a number of situations in which general education doesn't help at all. Monopoly and restraint of trade are examples. The more the managers are educated, the more they recognize the benefits to themselves and their company of monopoly and price fixing. Neither does anyone advocate putting representatives of the Attorney General on the board. To restrain monopoly and restraint of law, we rely on the force of law. The same approach is appropriately used to control the adulteration of foods and drugs, and their correct labeling. This may prove to be the most effective, or perhaps the only effective, way of protecting environmental interests.

A third method of changing institutional behavior is disruption, ranging from ordinary strikes—which have progressed from a crime to a civil right—to boycotts and sit-ins. This is the historic means of obtaining change in the terms of labor, and has recently emerged in colleges as a means of changing terms of admission, curriculum, and grading. The leverage potential of disruption and bargaining depends a good deal upon the tightness of organization of the group. If automobile dealers, for example, were legally free to organize a boycott of automobile manufacturers, they could probably achieve very quick and spectacular results. Realism forces us to recognize that the purely passive aspects of disruption are usually supplemented by more violent ones. Although strikes consist most visibly of the non-working of union members, and their “peaceful picketing,” the tensions of the situation are likely to produce the throwing of bricks through windows and the slashing of tires; we can expect disruption in the consumer or environmental area to present some of the same trimmings. Some current attempts at disruption to advance environmental goals include billboard chopping, and dumping large collections of bottles in the foyers of bottling company offices.

A fourth method of influencing corporate behavior is the representation of the new voices in the corporate structure—presumably by the power to appoint officers or directors. This is the primary focus of today’s discussion. As we consider its pros and cons, we must constantly ask ourselves not only whether it is good or bad, but whether it is better or worse than other alternatives which seem to be available.

Let us now consider the appointment of representatives of labor, or of consumers, or of some group of cohabitants on the board of directors and imagine what effects that might be expected to have on corporate behavior.

#### *Consequences—Pluses and Minuses*

One thing I am sure of. There will be some desired effects, and some undesired effects, and in the biggest sector no effects at all. Let me talk first about the no-effect sector. I feel pretty confident about this one, since the shareholders have had all the voices for the last hundred years, and each year they seem to have less effect on how the directors act, and even on who they are.

Is there any reason to think that the new voices would be louder than the old ones? Coincidentally, the modern world offers a remarkable experiment in new voices, which is labor representation in the supervisory council of German corporations. Most of the observers seem to think that it has had very little effect, and no one claims that its consequences are clearly discernible.

The ineffectiveness of the shareholder voice has sometimes been attributed to some kind of a conspiracy of the managers to insulate themselves from true responsibility, but I think we may be dealing

with a more fundamental aspect of human organization. If you have 75,000 different people making decisions, you can't do very much just by changing 3 of the top 30. Even if you reach pretty far down in the organization and insert new faces, they will be confronted with reports from the same old designers, engineers, and market analysts, so they will make the same decisions. The phenomenon is particularly well known in the federal government, where administrations succeed one another with promises to make all kinds of revolutions in our foreign policy, our defense policy and in social security, but the government seems to go on its same glacial way. Look at Vietnam.

Let us look, however, at a brighter side—the desirable results which might flow from new voices on the board.

One possibility is that the mere presence of a laborers' or consumers' or cohabitants' representative on the board will dramatize the corporation's concern with interests other than those of the management, so that designers and engineers and copywriters throughout the company will have a little more "Consciousness III." It may give courage to an environment-conscious designer, just as the presence of a black man on the board may give some supervisor more courage to appoint a black man as a production foreman.

Beyond this symbolic effect, there is a possibility that the new voice on the board will call attention to consumer-oriented or environmental factors in company decisions, leading other directors to be more conscious of them than they would otherwise be. I think this effect will be pretty small in General Motors, because I don't think the General Motors board of directors spends much time debating the size of the afterburner or even the compression ratio of the engines.

Probably the proponents of new-voice representation on the board aspire to more positive effects than either of these. They want to swing the vote in their own direction. This assumes either that they hold a majority of the seats, or that the board already has a large minority of actual or potential insurgents who can be catalyzed into action by a few leaders from the new voice. Neither of these assumptions is sufficiently probable to merit much further thought.

The only hypothesis on which one of the new voices might expect to have a voting impact would be if there were some other independent group with which they could combine. Suppose, for instance, that labor and consumers were each given one fourth of the votes; a small number of votes for an environmental voice would suddenly acquire leverage.

Finally, let us look at the negative side—the undesired consequences which would or might result from new-voice representation. If we assume that the new-voice representatives will be completely ineffective, this in itself will have some unfortunate consequences in that these representatives will take the place of other directors who might make affirmative contributions.

Another negative consequence would arise if the new-voice representatives, finding themselves in a hopeless minority, tried to force attention upon themselves by talking too loud and too much, and to obstruct other business in order to force attention on their own. More seriously, they might make hostile use of the information delivered to them as directors. Suppose for example that the company is considering a merger, which has some vulnerability to antitrust attack, but decides to go ahead anyway. The minority representatives may avail themselves of the information to fuel government antitrust action, or shareholder derivative suits.

If either obstructive tactics or the hostile use of information is employed, the effect will be to denature the board of director's meetings by keeping serious discussion out of them. The main questions will be discussed and decided in executive committee meetings, and in caucuses. This type of operation will not kill the company, but it will probably make it less efficient, and will probably increase its tendency to pursue the narrowest of monetary objectives.

#### *Structuring for Positive Effects*

Given the possibility of both positive and negative reactions to the representation of new voices, we are in a position to consider what structural arrangements are likely to favor the positive results and diminish the negative ones.

The first requirement for any positive effect is that the new-voice representatives should be numerous enough to have some impact on voting. A single representative of consumer interests seems likely to do more harm than good; to escape evident futility, he would probably be driven to disruption. On the other hand, it does not seem wise to give a majority of the board to any one group such as consumers or laborers, which would only substitute one form of tyranny for another. A simple solution to this problem would be a tripartite board, a third of which were elected by shareholders, a third by labor, and a third by consumer representatives (for instance). One might go another direction by having one-third elected by shareholders, with other sixths elected respectively by lenders and vendors, by labor, by consumers, and by cohabitants. This would prevent the danger of any one group establishing tyranny while giving every group some chance of forming a coalition on vital issues.

A second requirement of any effective representation would be to define the constituency in such a way that it is capable of mobilizing its interests. A good example of a constituency well able to mobilize itself is labor; it will be biased by the power of labor union leaders, but it will not be ineffective. Another constituency which would be well able to organize itself if given a chance is the lender-vendor combination. These will be small in number, and will know what they want. The principal thing one can say about them—at least the lenders—is

that they are well able to take care of themselves, even without structural representation.

When we turn to consumers, we have a real problem. If we think of immediate customers, it is not so bad. For General Motors, these would be the dealers. They are well able to organize and be represented, if given the chance. I think they might have some beneficial interests in insisting on better warranty service, and greater emphasis on product liability. The representation of immediate customers would be even more beneficial in basic industries like coal and steel, where the big users are sophisticated and powerful, and definitely interested in lower prices.

On the other hand, neither representation is going to do a great deal for the ultimate consumer. Neither has a consuming interest in producing a cheaper, lighter car containing less steel, or one that won't rust out.

To get the ultimate consumer effectively represented through any facsimile of the democratic process seems out of the question. To determine the collective will of General Motors consumers is only a little easier than finding the will of the population of the United States. We have some difficulty doing that even with 435 representatives and 100 senators. Although Ralph Nader will doubtless offer, like General de Gaulle, to lead his people in this critical hour, who can tell whether they really prefer him to Jeffrey O'Connell, Virginia Knauer or Andy Granatelli? There are two realistic options. One is to let a government department name representatives; another is to let the GM board co-opt them.

If the representation of consumers is enigmatic, the representation of cohabitants is utterly impenetrable. Recent developments along the Connecticut River illustrate the conflict of interest between the downstream and downwind cohabitants, and the cohabitants of the company town whose wages, tax base, and real estate values all depend on the survival of a plant. The only thing we can say for sure about the cohabitants of General Motors is that they live not only in Delaware, Michigan, and the United States, but also in Canada, Kamchatka, and Madagascar. Here again, we cannot talk about representatives chosen by the concerned cohabitants, but only about representatives appointed by government or co-opted by the shareholder board to represent the designated interests.

While we are giving our attention to the effective representation of the new voices, it would be only fair to do something about the traditionally ineffective representation of the old voice—that of the shareholders. If investors' interests are to be effectively expressed in the board of directors, it is important that brokers and institutional investors should be strongly encouraged by the government to exercise their own opinions about the interests of their customers. Although there is no law against vigorous position-taking by investment trusts

and brokerage firms, there are a number of regulations which discourage their doing so. These were born of a legitimate fear of the financial fraternity exercising an undue influence on corporate policy. This fear was well based, so long as there were no other interests but shareholders represented, and the shareholders were too dispersed to protect themselves. But if powerful voices of laborers and consumers were present, the danger of undue domination by financial interests would be well controlled; at the same time, it would be essential to give new vigor to the representation of shareholder interest, in order that they not be completely submerged by the more activist representatives of labor and consumers. Thus, we have the interesting possibility that the increased representation of new voices might actually increase the effectiveness of the representation of the old voice.

This is not so surprising as it seems, and is related to the proposition that the granting of increased power to one group does not necessarily reduce the power of another. It used to be thought that if labor had more control of working conditions, management would have less. Experience has shown that in many cases sharing control with labor means that both management and labor have more control than either had before. The reason why this is possible is because in a poorly organized situation there is no control by anyone.

One may think about this paradox in terms of the ghetto, which is out of control of the police. One might think that by giving ghetto dwellers a voice in police command, the police control would diminish even further. On the contrary, the police control may increase, precisely because it is shared. In the same way, shareholder control of corporations might be enhanced rather than diminished by effective sharing with labor and consumer interests.

Finally, a third requirement for positive results is the possibility of finding some common ground between each "new voice" and the other voices—old or new. If one of the voices is eternally at odds with the majority, it will achieve nothing positive, and will only impair the effectiveness of the board. The "new voices" vary immensely in their potential for compatibility with other voices.

To be more specific, the interests of laborers and shareholders in an enterprise are harmonious on many points. Both want the market for the product to expand, so that opportunities for profits and wage increases are enhanced. Both want to get more money from the consumer at a lesser expenditure. Both would suffer from losses in the competitive race, and from antitrust suits or other government interference. They differ chiefly on the rather narrow issue of how much of the gross income should be allocated to shareholders and how much to laborers.

Similarly, lenders and vendors share with the shareholders a lively interest in the continuity of the enterprise and in its rake-off of money from customers. Neither lenders or vendors want the company to be

harassed by private or public law suits.

When we turn to ultimate consumers, we have a more mixed picture. Unlike the immediate consumers (the dealers), the ultimate consumers (or car owners) may have very little commitment to the survival of General Motors as an enterprise and might be expected to join in killing the goose that laid the golden egg. Presumably they would be quite pleased to obtain information which could be used in customer-class suits against the manufacturer, to put money in the pockets of disappointed car buyers. These hostile potentialities may be somewhat muted by the traditional loyalty of a user to the brand that he has bought, although it is unlikely that the loyal buyers will be the ones who become consumer representatives.

When we turn to the cohabitants, we find the lowest possibility of common interests, and the highest possibility of antagonistic ones. There are probably many Sierra Club members who would like to see the private automobile perish in favor of railroad trains, canoes, bicycles, and hiking boots. Even among cohabitants less separated ideologically, there may be a gross incompatibility of interest. Undoubtedly the cohabitants of Dearborn would favor the continued health and wealth of the Ford Motor Company, but the cohabitants of Grosse Point and Windsor, who live down-wind from the blast furnaces, and mostly work for GM and Chrysler, might be quite happy to see Ford knuckle under. Thus, cohabitant representatives would have a minimum chance of finding a community of interest with the other voices, or even among themselves. Thwarted in any effort to exercise voting power, they would be almost forced to adopt destructive tactics.

### *Restructuring the Board*

If we solve the problem of representing some or all of the new voices, we will stand face to face with the problem of ineffectiveness of the board itself. This was a problem before new voices were even mentioned. *Business Week* for May 22, 1971, features a long report entitled "The board: it's obsolete unless overhauled."

The essential problem with the board is that it is trying to fulfill too many incompatible roles. Of these, two stand out. One is the "team role" in which the board works and thinks together to win the game according to the signals called by the president. The other is the "Senate role" in which the board members exercise maximum independence of thought in evaluating and criticizing the leadership, and advocating conflicting views on where the company should be going. The "inside" or officer members play chiefly the team role. If the outside members have a function other than an iconographic one—like the saints carved on the door of the baptistry—it is in the second role. Certainly the new voices would be expected to act in this way.

In large companies, as everybody knows, the team role is almost abandoned because the board is too big, and the outside members are

not equipped to play it. As a result, all of the team work is done in the committees on finance, marketing, products planning, and so. The price we pay is that the whole body of team members has no huddle. It is like a football team where so many alumni crowd into the huddle, that it is no longer used for anything but shouts of "Yea, Wabash," and the only real huddles are the separate ones between interior linemen, ball carriers, and off by themselves, the split ends and flankers.

The Senate role is also abandoned for a variety of reasons, one being that the team members—that is, the inside directors—don't want to play it. They want to show loyalty by backing up the quarterback.

This incompatibility is already legendary, but it will become even more glaring as new voices are introduced into the board. If Ralph Nader or Jeffrey O'Connell gets on the General Motors board, you can bet that Roche is not going to put him on the executive committee for product planning. In fact, Roche will let even less information about product planning get to the board of directors than he does now.

There is a solution to the problem, with which many American businessmen are familiar because of their experience with subsidiaries in Germany, Austria, Japan, and France since 1966. It is the two-board system. There is an upper board, called the supervisory council, which contains only outsiders; company officers are ineligible. Then there is the lower board, commonly called the management board, which consists entirely of full-time officers of the company. The management board performs the team functions; it runs the company. The supervisory council performs the Senate role; it decides how well the managers are doing, and who should be promoted. They are categorically forbidden to meddle in the management of the company's day-to-day business.

This arrangement has been developed over the past hundred years, long before there was any concern with new voices. Primarily it was a solution to the conflict-of-interest problem. The supervisory board passes on the conflict-of-interest questions affecting the managers, including their salaries and bonuses. The supervisory board themselves have very few conflicts of interest, because they do not participate in any of the operational decisions of the company.

When the idea of labor participation in governance of companies—known as *Mitbestimmung*, or codetermination—came in after World War II, the supervisory council turned out to be a very handy device for permitting labor to have a voice without becoming involved in the active management. Since 1950, labor representatives have constituted one third of the supervisory council of the major German corporations, except in the coal and steel industries, where they constitute one half.

There have been no end of studies of the institution of codetermination, most of them rather inconclusive. Most observers have difficulty seeing that it has any consequences at all. The sharpest critics are those on the left who complain that it has lulled labor into passivity. One

thing sure: it has not destroyed private enterprise. West Germany today must be regarded as the world's best illustration of the vitality of capitalism today. This is pretty good evidence that codetermination is not destructive of the capitalist system.

The most impressive thing about the two-board system is that the rest of Europe is taking it over. When the French corporation law was completely rewritten in 1966—for the first time in 99 years—they introduced the two-board system as an option in French corporations. They gave it a distinctive French flavor, by renaming the lower board the *directoire*—which reminds us of the beautiful clean-lined furniture of the early Napoleonic era. It is so much more elegant than the German *Vorstand*, which means the “front men.”

On June 30, 1970—almost exactly a year ago—the executive commission of the European Communities submitted a proposed uniform law to govern interstate corporations within the Community, which will make the two-board system not optional but mandatory for all companies coming under the new law. They may or may not have codetermination; that is up to the various states. But they must have the two-board system. This does not prove that American corporation laws should adopt the system. If we have a system that is working well, and seems adaptable to the demands of new voices, we should stick with it. If, however, we have a system that is clumsy even when all the voices are the shareholders, and looks like it will work even worse when new voices are introduced, I think we should give sympathetic study to a model which has been proposed for our competitors across the Atlantic.

#### *Summary*

For the past thirty minutes, I have been pulling apart the engine of corporate management, looking at the pieces, and considering several alternative substitutions. Now let's pretend that we have a free choice of what we will put in as we rebuild the engine.

I propose that we give the shareholders quite a few new bedfellows. I would cut in for equal shares the employees, the lenders and vendors, and the immediate customers. At the same time, I would give the big shareholders—institutional investors and the brokers—a lot of freedom and encouragement to exercise their franchise aggressively. All of these people would have voices in a supervisory council, which would not have anything to do with running the operations of the company, but would have everything to do with evaluating the managers, hiring and firing them, and raising or cutting their pay. I propose all of this, not with the intention of cutting down on the power of the shareholders, but in the belief that a livelier board will actually increase the power of the shareholders over the managers. And I think there will be far more areas of agreement than of difference among the union leaders, bankers, brokers, and dealers whose faces now show in the upper board's meetings.

However, I have left out the groups whose claim to participation is the subject of all the shouting—the ultimate consumers and the cohabitants. There are insuperable difficulties to these groups' selecting their own representatives; they will inevitably be represented by self-appointed champions, or by government appointees. Since some cohabitants' interests are in fundamental conflict with others, whatever representatives are appointed will misrepresent more constituents than they represent.

Even if flawless representatives could be found, they might not do much good on the board of directors. They would immediately be at each other's throats to decide whether new factories should be built in Mississippi to improve employment opportunities there, or kept out to preserve the silence of the bayous. The same argument that rages in Congress about bombing or not bombing in Vietnam would have to be debated in the directors' meetings of Dow Chemical and Olin Mathieson.

Consequently, I am led to the conclusion that the consumers and cohabitants of General Motors will be better off urging their concerns in Congress, the Supreme Court, and the Office of Management and Budget—to name three principal branches of American government.

At the same time, I do not predict ruin if consumer and environmental representatives are placed on boards. The presence of these invaders cannot do worse than confirm the boards in their present sterility, and perhaps hasten the day when American corporations turn to the European two-board system. Their presence may possibly encourage the development of "Consciousness III" in the corporate hierarchy.

In conclusion, I think that new voices in corporate structure are something that we cannot only live with; we may even live better with them. In view of the decrepitude of present boards of directors, we have less to lose than to gain by trying something new.

**PROFESSOR JAN DEUTSCH:** Let me start talking about the corporate machinery for hearing and heeding new voices, by adding one fact to the introductions you have heard, that seems important to me, and that fact is that I did practice corporate law, as well as teach. Now, it may be that it's because of that that I like *THE BUSINESS LAWYER* so much, but it's also because of that that I am very loath and always have been loath to discuss corporate machinery, as such. Too often, what corporate machinery should be depends on the size of the corporation, the nature of the business, the manner in which the enterprise was founded. In addition, I have learned, as I have tried to teach students, that, usually, when one starts examining a corporate problem, one starts by looking to the statutory provisions. But, most corporation statutes are enabling acts, not complexes of guidelines or governing rules for difficult problems, and I think the hearing and heeding of new voices is a difficult problem.

I, myself, still think the most helpful place to look is that of the law of cases. That's why I'd like to do what I propose to do—identify three sets of new voices and use three cases that I hope are familiar to everyone—*Dodge v. Ford Motor Company*,<sup>1</sup> *Sylvia Martin Foundation v. Swearingen*<sup>2</sup> and *Medical Committee for Human Rights v. Securities and Exchange Commission*<sup>3</sup>—to describe how the new voices have changed over time and how the law has changed as a result of hearing and heeding.

There were at least three varieties of new voices about which I think there is a need for all of us to be concerned. First, those associated in firms practicing corporate law and that portion of the new generation of corporate managers to whom questions of social responsibility and social activity seem far more important than they did to their predecessors. I know that our luncheon speaker was a predecessor, but I don't think, in that regard, he is very typical. Many corporations and law firms have already recognized the extent to which this class of new employees shifted the burden from business, and law students, to persuading firms they should be hired, to firms having to persuade those students that the students should come to work with them. Second, there is the growth of public interest law firms and study groups. A good example, I think, is the conglomerate organized by Ralph Nader. I know Ralph Nader wouldn't like that description, but these organizations are new factors with which corporate lawyers ought to be prepared to deal. Finally, there are the new causes to which dissident shareholders are giving voice. The example I have used is out of the *Wall Street Journal* of May third of this year. The headline says, "Dissident groups cause pandemonium at FMC meeting—firm's war goods, pesticides, phosphates attacked!"

What is striking about that description, to me, is the variety and particularity of the substantive policies being attacked, compared to the battles for that general goal called "shareholder democracy" that Wilma Soss and Lewis Gilbert have waged for so many years, that we are so familiar with. Whether one agrees with Soss and Gilbert or not, it seems to me far easier for us in the United States—I don't know about the Germans and French—to make machinery more democratic, to accommodate the number and variety of different social demands being made on corporations today. But, it also seems to me important to note that it's not a new problem.

Corporate law—and, I mean, the cases that we've got—has already had considerable experience in dealing with demands, not for democracy but for social responsibility. In 1919, the date of the decision by the Supreme Court of Michigan in *Dodge v. Ford Motor Company*, the earliest of my cases, the new voices in the United States were being raised, and not very loudly, not on behalf of shareholder democracy

1. 204 Mich. 459, 170 N.W. 668 (1919).

2. 260 F. Supp. 231 (S.D.N.Y. 1966).

3. 432 F.2d 659 (D.C. Cir. 1970).

but on behalf of labor. Needless to say, those voices became considerably louder in the Thirties and Forties, and I think it also fair to say that, even if Walter Reuther didn't sit on the board of the Ford Motor Company, as he might have—as you have just heard, in some European companies, the Ford corporate machinery heard and heeded Walter Reuther's voice.

But, what's more startling is that the voice raised on behalf of labor in the 1919 case was that of the original Henry Ford. The Ford Motor Company was being sued to compel the declaration of a dividend, and Henry Ford, who controlled the board of directors, had stated that no more special dividends would be declared at present and that the greater portion of the profit should be put back into the business in order to expand it, thereby increasing employment and selling a larger number of cars at lower prices per car.

"My ambition," said Mr. Ford, "is to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profit back in the business."

Henry Ford lost the precise issue, in terms of which we have defined it as a new voice. On this issue, what the court held is that it is not within the lawful powers of the board of directors to shape and conduct the affairs of the corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others. And, no one will contend that, if the avowed purpose of the defendant directors was to sacrifice the interest of the shareholders, it would not be the duty of the courts to infer that the "cakes and ale, they're for the company"—for shareholders—to quote our Chairman, especially given the post-1919 record of automobile sales in the United States.

However, it seems clear, today, that Henry Ford's only mistake, in terms of this issue, was in not framing it in terms suggested by Mr. Lundborg, at lunch—long-term, rather than short-term profit maximization. If he'd done that, he would have invoked the mantle of the business-judgment rule, and that would have protected him against shareholder action.

The most recent case I mentioned—*Medical Committee for Human Rights v. Securities and Exchange Commission*—decided almost exactly a year ago by the District of Columbia Court of Appeals, seems to me to cast serious doubt on the efficacy, today, in very many situations, of the advice to Henry Ford that I have suggested, or Mr. Lundborg suggested, at lunch—that of speaking in terms of long rather than short-term profit maximization and invoking the business-judgment rule in terms of long-term profit maximization. The fact is that the economic sophistication of today's new voices and specialness of management in discussing its position are both considerably greater than in the past. Thus, the brief of the Medical Committee in the District of Columbia Court of Appeals, arguing that the SEC had erred

in raising no objection to the refusal of Dow Chemical Company to include in its proxy statement a resolution requesting the board of directors to consider the advisability of recommending a certificate of incorporation amendment prohibiting the company from producing napalm, cited corporate statements contained in the record to the effect that napalm contracts had little economic significance to Dow. There may be outstanding businessmen or scientists of the future who have been lost to Dow because of personal feelings on the matter; from a long-range viewpoint, we could be hurt in many ways.

Secondly, in terms of the business-judgement rule, in denying that the proposed resolution dealt only with the sort of general political or social causes which have, historically, been excludable from corporate proxy statements under SEC rules, the court correctly held that the proposal relates totally to a matter that is completely within the accepted sphere of corporate activity and control, saying:

“No reason has been advanced in the present proceedings which leads to the conclusion that the management may properly place obstacles in the path of shareholders wishing to present to their co-owners, in accord with applicable state law, the question of whether they wish to have their assets used in a manner which they believe to be more socially responsible but possibly less profitable than that which is dictated by present company policy.”<sup>4</sup>

Now, you could object that the statement I have just quoted refers not to the business-judgement rule but to the corporate democracy that is the banner of those earlier new voices I have mentioned—Wilma Soss and Lewis Gilbert. It’s a very valid objection in terms of the opinion, itself. In the paragraph immediately before the one I just quoted, the court, referring back to the statement about lack of economic significance and possible long-term profits, argued that the decision to continue manufacturing and marketing napalm was made not because of business considerations but in spite of them, and it concluded that:

“The proper political and social role of modern corporations is, of course, a matter of philosophical argument extending far beyond the scope of our present concern; the substantive wisdom or propriety of particular corporate political decisions is also completely irrelevant to the resolution of the present controversy. What *is* of immediate concern, however, is the question of whether the corporate proxy rules can be employed as a shield to isolate such managerial decisions from shareholder control. We think that there is a clear and compelling distinction between management’s legitimate need for freedom to apply its expertise in matters of day-to-day business judgement, and management’s patently il-

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4. 432 F.2d at 681.

legitimate claim of power to treat modern corporations with their vast resources . . . [of personnel to act in] implementing personal, political, or moral predilections. It could scarcely be argued that management is more qualified or more entitled to make these kinds of decisions than the shareholders who are the true beneficial owners of the corporation; and it seems equally implausible that an application of the proxy rules which permitted such a result could be harmonized with the philosophy of corporate democracy which Congress embodied in Section 14(a) of the Securities Exchange Act of 1934.”<sup>5</sup>

The rhetoric—and, that is a quote from the opinion—makes clear, I think, that the case was being presented as one involving corporate democracy rather than social responsibility. I disagree in particular with the Court of Appeal’s statement that the substantive wisdom or propriety of a particular corporate or political decision is also completely irrelevant to the resolution of the present controversy.

What I cite in support of that disagreement is the other case I mentioned earlier—*Sylvia Martin Foundation v. Swearingen*. In that case, suit was brought against corporate directors seeking to hold them liable for having financed their company’s expansion abroad by borrowing in Europe at interest rates higher than those imposed by American lenders, and were borrowing that way solely for the purpose of alleviating the drain on the United States gold reserves. The complaint was dismissed on a variety of jurisdictional and procedural grounds. I will not bore you with a discussion of why I feel the decision on those issues might well have gone the other way. What seems to me significant is that, before entering judgement dismissing the complaint, the court went out of its way to say the following:

“But had our decision on service been otherwise, the ultimate result would not have differed since, as a matter of law, the complaint does not plead a claim over which the Court would presume to act involving as it does an attack on a matter of business judgement and policy of defendant’s directors in the management of corporate affairs for which, absent an allegation of fraud, personal profit or gain, the undisputed facts show complete justification.”<sup>6</sup>

And, you have heard all the undisputed facts in that brief description I gave you of the case. But, the three cases I have discussed indicate, to me, in short, that the substantive wisdom or propriety of particular court or political decisions might well play a determinative part in court decisions involving proxy rules and shareholder derivative suits, and corporate lawyers and directors must recognize that fact in offering advice and reaching decisions.

5. *Id.*

6. 260 F. Supp. at 235.

The primary difficulty in connection with the new voices in this regard, as I have indicated when I started, is the extraordinary variety of different social demands being made on corporations today. The essence of the matter, in other words, is that, in any corporation with an average number of shareholders, any particular corporate political decision may well have a loud set of new voices raised against it.

What I hope my remarks have made clear is why, in the context of new voices, as in almost all areas of corporate law, I think it is a mistake to talk about "corporate machinery," as such, in connection with the problem of new voices, as I see it. For example, I think there are significant differences, depending upon the size of the corporation and the mode of its financing, in the extent to which competition—the market, in our luncheon speaker's phrase—can be relied upon to provide the mechanism in terms of which new voices should be heard and heeded. To the extent that a corporation is dependent upon the consumers, the new voices are truly in control. The life of the corporation, again, as Mr. Lundborg pointed out, is dependent upon hearing and heeding them. Insofar as consumers are in control, moreover, there seems little need to limit the extent to which the business-judgement rule protects directors against shareholder attack, provided, only, there is sufficient deference to the norms of corporate democracy to permit stockholders to replace directors.

Among the most important difficulties in assessing the extent to which a corporation fits into this category of consumer control is the nature of the category of the consumer. The fact is that new voices may be neither heard nor heeded, even assuming that a corporation does not possess sufficient financial or public-relations resources to ignore or manipulate them, provided, only, that the nature of the business be either sufficiently specialized so the profit or loss really depends upon the voice of only one customer, or diverse, so that no single set of consumers can have enough impact to be heard or heeded.

For such a firm—and, I think many of the publicly-held corporations fit into this category—I believe a variety of avenues ought to be explored. First, as the *Medical Committee* case makes clear, there is the possibility of greater utilization of mechanisms of corporate democracy that are already in existence. Second, as Leon Sullivan's election to the General Motors board of directors indicates, much can be done simply in terms of rethinking what views need representation on that board. Third, in many areas, there may well be a need for such corporations to utilize the machinery of government, which is far better designed to hear and heed new voices. By this last point, which goes very much against what Mr. Lundborg was saying, all I mean is that, if we take the task of hearing and heeding new voices seriously, many publicly-held corporations in many areas have a very real interest in being regulated by government, in having standards set for them and in abiding by and adhering to those standards, rather than having them diluted or diverted, or not having such standards—therefore being un-

able to live up to them without at least having a profit-and-loss statement, showing the fact that they are living up to the standard and their competitors are not.

Finally, two points I'd like to make in connection with the role lawyers can play in regard to large corporations relatively free from consumer control to hear and heed new voices. First, there are the public-interest law firms—and, again, I think Ralph Nader is a good example—who, if they receive sufficient support may well, on many issues, bring to bear sufficient legal and public-relations techniques to force the corporation to hear and heed new voices. I have used “public-relations techniques” because I don't think that the public-interest law firms are going to win many issues at shareholder meetings, but I think, as public relations entities, they win many issues by making the directors who have heard the debate vote differently, and the issue is settled in their favor.

Second, at least where shareholder derivative actions or corporate democracy norms are at issue, there seem to me to be grounds to believe that the capacity of a lawyer—who is either an employee of the corporation or serves on the board of directors—to hear and heed new voices ought to be inspected. Again, if we take the task of hearing and heeding new voices seriously, I think that the role of either house counsel or director and counsel may well involve the disqualifying conflict of interest—which would not be disqualifying only if we didn't take the task of hearing and heeding new voices very seriously—and, I am not saying that we have to. I am saying, we seem to.

**MR. FARRELL:** Thank you very much, Professor Deutsch. At breakfast this morning, when Jon alluded to this shift that's occurred in many areas, such as the law student no longer having to scratch and seek employment but the firm having to scratch and seek law students, I told him of a remark I heard recently from Paul Porter, in Washington. Paul said he didn't mind the shift in emphasis in new burdens with respect to hiring students. What he objected to was, when they became associated with the firm, the only people they were interested in suing was the firm's clients! So, you get this boring-from-within problem. And, certainly, nobody in American business, I think, is better equipped to address himself to that question than the spy in our huddle, on my left, an economist turned business executive, and one with great courage, and we are all interested to hear from Mr. Bunting, who has some very interesting remarks to make and, I think, an announcement or two that will be of great interest to the audience. Mr. Bunting.

**MR. JOHN R. BUNTING:** Thank you, very much. I am delighted to be here before this august body. I come as a representative of the rougher elements in commercial banking. They only recently let me

into the trust department, when I became chief executive. It's a real pleasure to deal with lawyers. I am accustomed to the tougher types. I am also delighted to have the opportunity on a day that gives me a forum for announcing something we have just released from the First Pennsylvania Corporation. That's Philadelphia's largest and the nation's oldest bank—3½ billion in assets, and all that. We have announced, today, the election of three new directors for our corporation. One is Henry G. Parks, who is a black gentleman and is the chief executive of H. G. Parks Inc. You know it as "More Parks Sausages, Mom," a Baltimore-based firm. I venture to say that he is the outstanding black chief executive of a major corporation in the United States, and we are very pleased to have him join us.

We also have Mrs. Joan Ganz Cooney to announce. Joan Cooney is obviously a woman, and she is the originator and an executive director of "Sesame Street," which has achieved some renown on national educational television.

We also announced the election of Harry Gangloff—and, if you said, "Who is he?" that's a good question. Mr. Gangloff is a Drexel graduate student. (Drexel is a university in Philadelphia.) He is going to sit on a special seat on the board that will be rotated among the three schools—Temple, Drexel, and Penn—and the students. He is twenty-four. And, while he has six years until he is an old man, we are only giving him three years in order to keep that seat moving. Of these three appointments—at least one of them, the last one, I think, is relatively unique. I know of no other major corporation having a graduate student. By now, of course, a few of them have blacks and a few have women, but perhaps this is the first graduate student, the first person selected principally because he is young.

As some of you know, I have spoken in the past about the need for new kinds of people on the boards of directors of large public corporations. I derive my notion, in part, out of the role played by boards of directors. The legal role of directors is not at the crux of my argument so much as the role they actually play in board rooms across the country. When I was with the Federal Reserve system for fourteen years, one of the things I did, as an economist, was tour the regions addressing board meetings of banks and other corporations to discuss the economy, the business outlook, the Federal Reserve, and things of that sort. The board of directors would hear my talk and ask questions and then carry on their usual business. Typically, I'd stay through the meeting. I observed good boards, and some that were not as good. As I became an executive at First Pennsylvania, I assumed some board seats. My observations led to the conclusion that on any good public board the directors perform two roles, and only two roles. One, they appraise management. The most important role that directors have is to measure management, measure whether it's good against its competitors, measure its worth to the community in which it operates, and measure it

subjectively and objectively in a variety of ways. And, secondly—the directors influence management by embodying attitudes and points of view. Management has to be sensitive to the directors, or you can put it the other way, more positively for the directors, and say that directors may influence management; but I think the influence here is a very subtle thing. I think those directors who try to help management manage make a serious mistake, so that, by influencing management, they influence, not help, management to manage.

This, of course, is not something with which everyone agrees. But it is an emerging idea that is being shared more widely as time passes. At the time I made my first statements nearly a year ago, they were picked up in the *Wall Street Journal* and discussed editorially in many other publications. Most—I think it's a fair statement to say nearly all—large corporate managements were being appraised and influenced by the same kinds of people. In other words, John Bunting is chief executive of First Pennsylvania and is a white Presbyterian, making in excess of a hundred thousand dollars a year, and was being evaluated and influenced by other white Presbyterians, or Episcopalians making in excess of a hundred thousand dollars a year. And, in the case of a bank, what is worse, in a sense, is that directors are often the biggest bank borrowers. Objectivity is not an easy thing. For directors of this ilk, true objectivity is really almost impossible. So I didn't think it was a totally healthy situation and I spoke about it.

Corporations were anything but complementary about the suggestion that their boards were not representative enough to properly perform their intended function. But the idea is resulting in some action. Someone mentioned Leon Sullivan, who is another Philadelphian, and a very excellent one. He was recently elected to the board of General Motors, and I think things of this sort are beginning to happen. We can learn a great deal from our critics. When I first mentioned this idea, I got a letter from an irate stockholder who told me that he sold his hundred eighty-seven shares of First Pennsylvania Corporation stock because he didn't like this idea. He used a lot of language which was indicating that he really didn't like the idea of putting new types on the board, and told me exactly what type he was, and that was the type that should be on the board, and so forth and so on. I usually throw that kind of mail away. In this case, I wrote him a letter and said I was terribly sorry he'd sold our stock because, I was just as interested in having various shades of opinion among the stockholder group, and I was sure, in his case, he was irreplaceable! The amusing thing was, he never wrote me back—not even a comment, and I was a little disappointed. But, we have had many who are substantive critics. John Bunting is identified with modernizing his board of directors and, therefore, our customers and other interested parties often discuss their views with me. I am criticized as doing something, in adding the three new directors, that is merely symbolic. There are a number of answers,

and certainly deeper ones than I will give for the moment here, but my answer, in part, is that the board itself is a symbol, so why should not the people on it be symbols? That is not an affront to any board. And if the board membership is already symbolic, why should we not just introduce new symbols to assist and augment?

Symbols can be terribly important. Some years ago, long before I had anything to do with it, The First Pennsylvania Bank was the first bank in Philadelphia to put a Jewish gentleman on its board, and, when a Jewish person first took a seat on First Pennsylvania's board, I am sure it was largely for symbolic purposes and it could easily have been criticized.

About two and a half years ago, First Pennsylvania Corporation, then a new one-bank holding company, wished to acquire a company. Because we were using our own stock to purchase the company the acquisition was going to mean, and did subsequently mean, that the president of the company that we were acquiring was going to be the largest single stockholder of First Pennsylvania. This, by the way, doesn't mean he is the dominant shareholder. First Pennsylvania stock is dispersed widely. The Jewish gentleman holds perhaps four percent of the outstanding stock. Nonetheless, the largest single stockholder in First Pennsylvania was going to be the Jewish gentleman that owned the corporation we wanted to purchase.

This went down a little hard with our directors. First Pennsylvania is the oldest bank in the United States, largest bank in Philadelphia, naturally; and this wasn't easy for some of them to absorb. But, at the board meetings, and the executive committee meetings, in some measure at least because we already had Jewish representation on the board, the ethnic issue was never discussed. A symbol helped us make an extremely important acquisition. Just how important is shown by First Pennsylvania profits in the first quarter this year. For the bank alone, earnings were up one-point-seven percent, approximately. The Corporation as a whole, including the bank and recent acquisition, was up fifteen percent. The other thirteen percent which swung the whole Corporation came mostly from that company that we purchased two and a half years ago, and from its Jewish chief executive. So that I say two things—the board, itself, is a symbol; and symbols can be important.

There is a tendency to think that, because we are electing young people, blacks, and women to the board, that we are going to choose the wildest, stupidest people you could imagine among those groups; that we are going to put an African tribesman or a woman wrestler or a pot-smoking, needle-punching dope fiend on the board, as a youth, and some of the criticisms we get on this are just absurd. One reason we took so long to do what we did was, we wanted to make choices that would indicate the kind of people we wanted.

Henry Parks (a black who is a black), is not, in the parlance they

use, an Uncle Tom of any sort. He was formerly a councilman in Baltimore. Mr. Parks feels so strongly about his blackness that he refused other board seats because he didn't think they wanted him for the right reasons. And he has warned us before coming on the board, that he is not going to lose his identity in joining the First Pennsylvania board.

Mrs. Cooney is a modern woman in every sense. Her résumé lists a membership in NOW, the women's rights organization. But the reason Mrs. Cooney is on our board is her proven ability to cope with our business and urban society as a woman, without compromising that quality.

The youth that we have, his hair isn't quite long enough to suit my fancy—I'd rather have a picture of a guy with hair down to there—but the fellow has all the rest of it. He cuts his hair; it's up to him. We wanted a little bit more symbolic a person, but he is excellent. He is going for a Ph.D. in engineering, and he is an ecology buff, and so forth, so that we have a real student. We are very interested in achieving better communications from the corporation and within the corporation; and I suppose I could summarize my remarks by saying that we think these symbols, if that's all they are, are going to be extremely important symbols. Thank you.

MR. FARRELL: Thank you very, very much, Mr. Bunting. That was a stimulating and very interesting set of remarks, and I think it's made a real contribution to our thought process here.

The next gentleman we will be hearing from is certainly one of the most respected practitioners of corporate law, certainly in the domain of corporate counsel, to my knowledge. His contributions to literature in the area of the role of the corporate counsel in our society are legion and tremendously well known; and we have asked Leon Hickman today to address himself to perhaps some of the little more specific and particular features of this question of the new voices which need to be recognized and the degree to which perhaps it may seem appropriate to do so. Mr. Hickman.

MR. LEON E. HICKMAN: Mr. Farrell, ladies and gentlemen, my experience is a little different than the other speakers and, consequently, my viewpoint on the problem is probably a little different, although I think we all recognize that none of us have the definitive answer.

I think it has been well said about these new voices that we are being concerned about today—that seldom have so many complained so vociferously about so much. It ranges from the field of civil rights to war to the environment, to poverty, to women's liberation, to consumer protection, to population control, public transportation and the costs and quality of our schools; and these voices tend to agree on only one thing, and that is that the Establishment is to blame, and

that the Establishment, in its most visible components, is the government, the universities and the corporations—and we have seen these voices, perhaps aided and abetted by other things, bring down one national administration, bring about changes in administration at the University of California and Harvard, and various points in between.

And, under the threat of the same dire consequence to our corporate structure, we are asked to orchestrate those voices into some constructive pattern. I do not, for the moment, quarrel with the fact that these voices must be heeded. I agreed entirely with what Mr. Lundborg said, at lunchtime—that the corporation exists by public consent and that it must earn and re-earn its right to exist, every day. In a democracy, it cannot be otherwise. As we have seen it, historically, the public lost confidence in the railroads, and we got the Interstate Commerce Commission—a dire consequence, indeed! The securities market came into disfavor, and we got the securities legislation of 1933 and 1934. And, more recently, truth-in-lending and consumer-protection legislation. It doesn't matter whether the corporations deserve what they got or not. When the public passes a judgement, that's final.

So, I do not question, at all, that corporations, if they are to survive, must heed these new voices; but I do say, though, that they must not only heed them but must sort them out, because not all the new voices are going to be helpful.

From what I know of corporate life, and I have been in it for some time, I think the corporations are heeding these new voices right now. The voice that they are hearing from the minority groups is that these men and women want jobs and want to earn a living, and, if these people are not qualified to hold down jobs, and good jobs, they want to be trained for the jobs. And the corporations have organized the National Alliance of Businessmen and have enrolled in it some twenty-seven thousand firms and have trained and put to work some two hundred sixty-five thousand hard-core, otherwise unemployed men. Now, that's just a drop in the bucket—but, they are hearing that voice.

These minorities want an equal share of the business of the corporation, whether it's bank deposits or subcontracts or what-not, and that is realized in the corporate councils that I know about. The consumer voice is demanding safety in the products and it's demanding an end to planned obsolescence, and I think that is pretty generally recognized; and I think the corporations today, without any new machinery, know what the environmentalists want. They want our air and our water to become pure once more, and they want noise to be abated to reasonable limits. And corporations are studying these environmental problems right now. The one I know best brought an eminent university president into its ranks as an officer and put him in charge of determining, through the research department, what

our environmental problems were and what it would cost to solve them.

Ultimately, on the environmental issue, the corporations have got to wait for the statutory standards—otherwise, the corporation with a conscience and a concern about the environment will spend itself out of competition with its competitor who doesn't observe the same standard. So, there must be externally-imposed standards.

Now, as I see it, there are three places in the corporate structure where these new voices are or could be heard. One is in the proxy statement; one is in the annual shareholders' meeting; and the other is on the board of directors. I would favor, very much, enlargement of the material made available to shareholders on the proxy statement. I think one great weakness in the corporate structure today is the fact that shareholders are as ineffective as they are in management of the business that they own, and, in part, that is because they are so numerous. Our businesses are owned by thirty million shareholders, and a company, not very large, can have ten, twenty, thirty or forty thousand shareholders; and it's very hard for those voices to be heard.

I think we can and should improve what we do at the proxy level for our existing shareholders, the people who own the business. For example, it has been suggested that if any of them want to put up a nominee for the board other than those suggested by management, they should have the right to have that nominee and a biographical sketch about him submitted on the proxy statement so that the cost of that solicitation does not fall on the individual. And, just as management nominees are presented at corporate expense, in my judgment, so should nominees suggested by other shareholders.

There should likewise be the fullest disclosure of information about the corporation's conduct. The financial information is already full—it is, perhaps, so full that many people pass it over as just too complicated to understand. It should be simplified.

It is suggested that corporations should be asked to report to the shareholders on what they are doing in the field of environmental and employment policies and other public activities. I think that would be a step in the right direction. It would be hard to define. If you turned a corporation's public-relations department loose on defining what it's done in the public field, of course, it sweeps everything in. I don't know quite how you define your area, but I think the corporation's stockholders should know what is being done by the corporation in the public field.

The only danger that I see, or the most obvious danger I see, in what I am suggesting is that, with as many shareholders as we have, the proxies may become inordinately long and complicated. I think it would be appropriate to require a shareholder to have a minimum number of shares before he could submit either a nominee or a question for shareholder action in the proxy statement. A candidate can't run for public office unless he gets a certain number of voters on his

petition, and this seems to me reasonable. Even in the recent General Motors fight, with all the publicity and promotion that it had, the shareholders presenting these new members got only two or three percent of the vote.

Now, the influence, I quite agree, went way beyond the two or three percent, but there ought to be some cut-off. The owner of one share of stock or twelve shares of stock in a national corporation, I don't think, really has enough of a position—unless he gets the support of some other shareholders—but we should establish some reasonable, minimal level; and I think we ought to go much further than we ever have in making it possible for a shareholder to present his point of view, either on whom he wants as a board member or on other appropriate issues of the day, through the proxy statement. That's a matter that's being regulated and, as far as I can see, regulated well by the Securities Exchange Commission.

The second place new voices can be heard is at the annual meeting, and often are heard there, very decidedly, indeed. The annual meeting is an anachronism from another day, when corporations were small and when the owners could really assemble. That isn't true anymore. Today, you couldn't get a hall big enough to get a representative selection of the shareholders present, if you hired the largest auditorium you know about. First of all, because of proxies, the votes have been already counted before the meeting is held. I really think that the annual shareholders' meeting is obsolete, as obsolete as the electoral college—and, it may sound revolutionary, but I can't think of any very good argument as to why it couldn't be abolished.

If you could enlarge what you do by proxy, that's where the real action is. I think there would be something to be said for dropping the shareholders' meeting, particularly if it's going to become a forum for voices seeking to regulate the foreign policy of the United States and everything but the corporate business. But, even when they are on corporate business, you can't have in the room at one time more than a small fraction of your members.

The third place new voices can be heard is on the board of directors. And, with great deference, I would be very reluctant, personally, to see us change the present system where directors represent the shareholders. What I say is not directed at what Mr. Bunting has done in his Philadelphia bank, but, when a black person is put on the Board as a symbol of being a black person, I ask, "Who chose him, whom does he represent?" I wonder if, perforce, he does not have to represent the black constituency, who are not shareholders, and, instead of the chief executive of the company being in charge of the policy as to how many blacks are to be hired and where black department stores are to be made, I wonder if that director, perforce, due to the pressures on him from the outside, isn't required to take an independent position of his own.

It has been my experience that most corporate executives that I

know are very well aware of today's problems, and I, for one, would trust the average chief executive I know, particularly if he's been a good general counsel before, to make the decisions as to how many blacks are to be employed and what is to be done at the various social levels.

I have noted, for example, that the Reverend Leon Sullivan had to speak against his company at the stockholders' meeting, on the issue of doing business in South Africa. He simply couldn't have stayed on that board, if he'd supported management on that—I mean, his constituency, in my judgement, is not the shareholders, it's the black community, and he had to take that position. And, after he goes down to defeat on a half-dozen of those positions, I wonder what happens to the corporation when he resigns in disgust and says, "This corporation simply has me here as a symbol, and they don't mean business"? I question that, and I question whether—just to stay with the black community for a moment—whether they are as interested in a symbol, or even if it's more than a symbol, having someone in a position of power, as they are in how many people of that color are employed by that corporation, and where they are employed—something that the chief executive could direct, without the intervention of a director for that purpose.

I would also be fearful with somebody representing not shareholders but a special interest like that. I would be fearful because we are dealing with a situation where we have a moving target. The situation is—and in most of these other issues, they are long-range public issues on which we, in typical American fashion, are demanding instant answers—that it's simply impossible to meet the standard—that is, the question is always going to be not, "What did you do for me, yesterday?" but "What are you going to do for me tomorrow?" I could well be wrong, but, in wanting to know how do you hear those voices, I, for one, would counsel getting in control the best chief executive you can have, and leaving the matter in his hands.

If there are to be representatives in the corporate structure, I question whether the best place for them would not be as a vice president, reporting to the chief executive, where the line of authority was clear but where his voice could be heard.

Now, I apologize for directing a sort of an argumentative note into the discussion, but I have genuine reservations on that point. And, with that, I conclude my remarks.