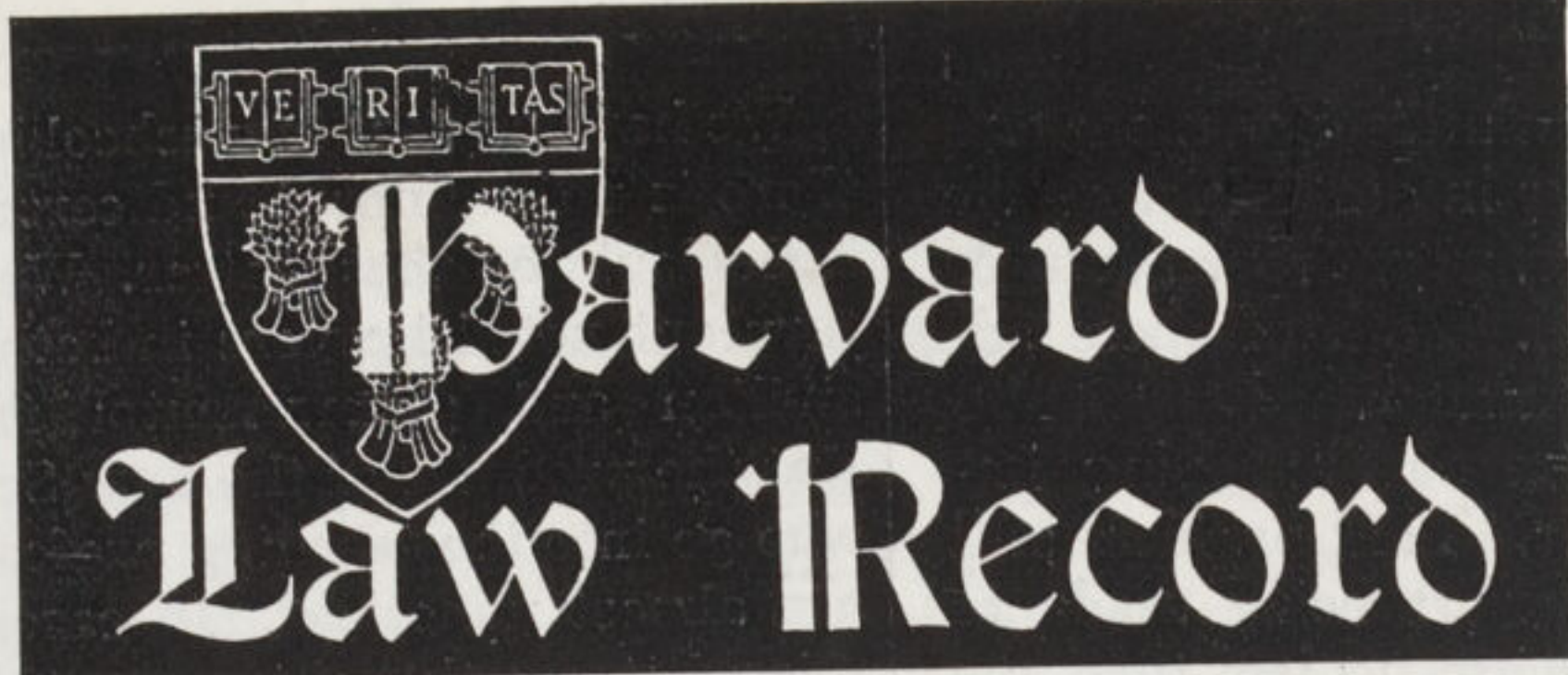


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NO. 1

Ames Winners Announced

By Clark P. Giles

Best brief and best oral awards have been made by the Board of Student Advisers to both first and second year students participating in the Ames Competition during the fall semester. John G. Wofford, New York, New York, of the Casner Equity Club won the award for the best oral argument of the second year.

There was a three-way tie for the best second year brief award among the teams of Irwin M. Berg, Brooklyn, New York, and Paul N. Crane, Los Angeles, California; Doyle J. Smith, Jr., Memphis, Tennessee, and Stephen A. Nye, Medford, Oregon, of the Kaplan Club; and Mark A. Michelson, Brookline, Massachusetts, and Stephen F. Ells, Cambridge, Massachusetts, of the Story Law Club.

In the first year competition Boyd H. Ratchye, Billings, Montana, of the Bruce Club submitted the best brief. Second place went to Richard B. Newman, Boston, Massachusetts, of the Coke Club. J. Patrick Hickey, Walla Walla, Washington, of the McNaughton Club and Fred C. Scribner, Portland, Maine, of the Story Equity Club tied for the award for the best first year oral argument.

The best second year club award went to the Casner Equity Club. The members of that club are Ellen R. Donovan, Emporium, Pennsylvania; Paul R. Duggan, Berkeley, California; James G. Greilsheimer, New York, New York; Louis L. Hoynes, Jr., Indianapolis, Indiana; George E. Pike, Jr., Dewitt, Arkansas; Samuel H. Seymour, Washington, D. C.; Michael Whiteman, Great Neck, New York; and John G. Wofford, New York, New York.

The eight 1962 quarter final clubs are Cardozo Club, Casner Equity Club, Casner Law Club, Harlan Law Club, Harlan-Marshall Club, Kaplan Club, Scott Club and Story Law Club.

ABA President Seymour To Speak Tomorrow

By John W. Rapchak

Whitney North Seymour, President of the American Bar Association, will speak to the students of the Law School tomorrow at 4 p. m. in the James Barr Ames Courtroom, Austin Hall.

The title of Mr. Seymour's address will be "The Young Lawyer and Bar Associations." His visit is under the auspices of the Harvard Law School Student Bar Association.

Mr. Seymour is an outstanding leader of the American Bar and is an active trial lawyer, particularly in anti-trust cases. He is a partner in the New York City firm of Simpson, Thatcher, and Bartlett, and a past president of the New York City Bar Association.

Mr. Seymour received his LL.B. degree from Columbia Law School in 1923. He has taught at New York University Law School (1925-31), served as Assistant Solicitor General of the United States (1931-33), and lectured at Yale Law School (1935-45).

Following Mr. Seymour's talk, the Student Bar Association will hold a reception and cocktail party in Harkness Commons for its members and the faculty.

Hearsay

It is time that we return to the subject of Harkness Commons and its problems. Lest we be accused of being unfair in our criticism, we would like to commend the management on two improvements of note: the better selection and the lower prices. Both of these advancements received praise in this space last semester.

However, what we pointed out at that time as requiring immediate attention was the problem of cleanliness. That problem still exists. And from all indications there is no effort being made to remedy the situation. Trays, dishes and tableware no less than the tables themselves serve as evidence of the insufficient efforts that go into the cleaning process. We are not used to living under such circumstances.

We are in no position to tell the management how to run its business. Be that as it may, we still have two suggestions that may save us from taking our meals amidst the rubble.

The more obvious of the two is the further use of some of the women from behind the serving counter in the table cleaning chores. Though they do get around to it occasionally, it might be better if it were impressed upon them that tables are to be cleaned with clean rags.

Our other suggestion is that more students be hired to aid in the clean-up program. Compared with last year, there seem to be fewer of these assistants complementing the regular staff. Although we do appreciate the necessity of a business showing a profit, it seems that this is no area in which to cut down on expenses.

It must be admitted that some students do not cooperate. Though this adds to the problem, it does not excuse the management from its responsibilities.

COMMENT

By Fenno

We have a great law school here; there is no argument and certainly little doubt on that matter. We can turn out noted lawyers in both the civilian and governmental fields. But the products of the Law School who go into the teaching profession are almost unnoticed. In case you missed it, we thought we would reprint a part of President Pusey's annual report to the Board of Overseers of Harvard University which demonstrates the Law School's impact on legal education.

"No less impressive is the record of the Harvard Law School in producing teachers. As the innovator of the case method of legal education it was the main source of law teachers for American law schools adopting that method late in the past century and early in this one. After use of the case method had become widespread it continued, as it still continues, to play a prominent role in the education of law teachers. *The Directory of Law Teachers in American Bar Association Approved Law Schools, 1960* lists 1,531 teachers of law in 131 schools. Of this number 338, or 25.3% either have Harvard degrees in law, or have taught or studied here and 209, or 13.6% have the Harvard LL.B. degree. Here Harvard's contribution is more than twice that of its nearest competitor. A study made a few years ago showed that over a quarter of all the graduate degrees held by teachers in the member institutions of the Association of American Law Schools were Harvard degrees. Also significant is the fact that during the past four years fellowship funds provided by the Ford Foundation, plus others controlled by the Law School, have brought sixty-eight young teachers of law from other American and Canadian law schools to Harvard for advanced training."

Of course, the saying is that statistics can be used to prove anything. The statistics in this instance, however, are strong enough to prove the point overwhelmingly.

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Third Year To Hold Elections

By Russell A. Winslow

Elections of class officers and committeemen for the Class of 1961 will take place in Property II classes on February 17 and 21, 1961. At that time voting will be held to fill the positions of Class Marshal, Class Secretary and three Class Committeemen. Those elected will then appoint four more committeemen.

Copies of the election rules will be distributed in Property II classes tomorrow and Monday. Nominating petitions must be submitted by candidates. The petitions are available at the receptionist's desk in Langdell Hall. As in the past, voting will be done by a double envelope system, which saves class time by eliminating the necessity for checking a class roster as votes are turned in. The system is similar to that used for absentee voting in national elections.

In the words of the class charter, which is available for inspection at the receptionist's desk in Langdell Hall, the duties of the class committee are to control the "affairs of the Class" and to "foster a close association of the members of the Class with each other and the Law School."

The Class Marshal is the ceremonial head of the class. The Secretary maintains liaison with the Law School Alumni Office and with the Committeemen and is responsible for such undertakings as reunions and newsletters. Committeemen serve as class representatives in the various geographical regions of the country.

Elections are being held under the direction of the class *Ad Hoc* Committee, a group formed each year by the Law School Committee of Phillips Brooks House at the request of the Law School administration. Chairman of the *Ad Hoc* Committee this year is Thomas F. Field, 3L, Wilmington, Delaware. Members are selected from a group of students who have been leaders in student organizations and this year include David W. Adamany, 3L, Green Bay, Wisconsin; Walter A. Baker, 3L, Columbia, Kentucky; P. Cameron DeVore, 3L, Spokane, Washington; Joseph A. Grimes, Jr., 3L, Providence, Rhode Island; Jerome A. Rabow, 3L, Buffalo, N. Y.; Walter M. Strine, Jr., 3L, Media, Pennsylvania; and Russell A. Winslow, 3L, West Newton, Massachusetts. Mrs. Jerry F. Rotman, president

of the Harvard Law Wives, is also a member of the committee.

Professor Casner Named As Associate Dean

By John W. Rapchak

Dean Erwin N. Griswold has announced the appointment of Professor A. James Casner as Associate Dean of the Law School. The appointment was approved by the Board of Overseers at its meeting on January 9th.

As Associate Dean, Professor Casner will be in charge of educational matters at the Law School. This will include teaching assignments and the development of new courses. In addition, Professor Casner will continue to direct the Law School's Summer Program for Practicing Lawyers.

Professor Casner is also Chairman of the Committee on Legal Education appointed two years ago to conduct an extensive re-examination of the Law School curriculum. This committee submitted its report last June, and it is now under consideration by the faculty.

An authority on property law and estate planning, Professor Casner has been on the Harvard Law School faculty since 1938. Since 1958 he has been Weld Professor of Law. Before coming to Harvard, Professor Casner taught at the University of Maryland and at the University of Illinois.

Professor Casner is a director of the Old Colony Trust Company and a member of the editorial board of Little, Brown and Company. During World War II, he served as a colonel in the U. S. Army Air Force. He received his A.B. and LL.B. degrees from the University of Illinois and also holds the J.S.D. degree from Columbia University.

The RECORD will publish ten issues during the current semester. This decision is due to budgetary problems which would allow of no other solution. However, we expect to be back to our normal schedule of 24 issues a year beginning in September.

Subscribers who have paid for a full year's subscription can obtain a twenty cent refund by bringing their subscription cards to our offices at 23 Everett Street.

Patent Club Hears of Patent Misuse

By Neal L. Rosenberg

Mr. William W. Rymer, partner in the Boston office of Fish, Richardson & Neave, addressed the Harvard Patent Law Club last week on the complex subject of patent misuse, the unlawful extension by a patentee of the monopoly granted him by the patent statute on a specifically-claimed invention.

In 1917 the U. S. Supreme Court overruled in principle a prior decision not recognizing the misuse defense in a patent infringement suit and allowed the defense that the plaintiff had misused his patent by attempting contractually to restrain purchasers of his patented motion picture projector from using it with films other than those specified. The linkage of film and projector in effect utilized the monopoly on the patented projector as a means of achieving a monopoly on the unpatented films used in the projector. The court rested its decision on the ground of a restraint on use after sale which was held to be against public policy and therefore invalid.

Mr. Rymer pointed out that in view of later decisions, the misuse doctrine is really grounded in something more fundamental, namely, the unclean hands defense in equity suits. The patentee's attempt to secure an unlawful monopoly on an unpatented article, through the leverage he can exert by refusing non-users of the unpatented article the right to use his patented article, may constitute unclean hands.

This analysis accounts for the extension of the misuse doctrine to cases in which the "restraint on use after sale" rationale is inapplicable on the facts, as where a small, inexpensive patented pressure gauge is sold only as part of a large, costly unpatented boiler, there being no restraint on use of the gauge after sale, but also no chance to purchase the inexpensive gauge except by purchase of the costly boiler-gauge complex.

Next Mr. Rymer noted that, if the equitable doctrine of unclean hands is the true foundation of the misuse defense, a patentee could, by restricting himself to a suit at law for infringement damages, avoid the, at least technically, inapplicable misuse defense. Mr. Rymer pointed out, however, that the misuse

defense had been allowed to some extent in suits at law.

Other misuse problems discussed included patent pools, grant-back devices, price fixing and false patent marking.

On Thursday, February 9, Mr. Robert Thompson will address the club on "Trademarks", and on Thursday, February 23, Mr. Melvin Jenney, on "Trial Tactics."

Areeda Assumes Teaching Duties

Phillip E. Areeda has assumed his duties as Assistant Professor of Law. This semester he began teaching Administrative Law and a seminar on International Business Regulation. Mr. Areeda served until this January under President Eisenhower as Assistant Special Counsel to the President.

Mr. Areeda received his A.B. from Harvard College in 1951 and his LL.B. from the Law School in 1954. He was note editor of the *Harvard Law Review*. He joined the White House staff while serving in the Air Force in 1956. As a civilian he became Assistant Special Counsel in 1958 and served in that position in Washington until his appointment to the Law School faculty.

Mr. Areeda's duties in Washington consisted of advising and assisting the President in the full range of the President's day-to-day work with the exception of military and political-foreign relations; he also saw that proper research was done by the various agencies so that the President could more efficiently make decisions.

Legal Aid Elects Two New Members

The Harvard Legal Aid Bureau has elected David W. Bernstein, 2L, New York, New York, Junior Director I and Michael Whiteman, 2L, Great Neck, New York, Junior Director II. These officers assumed their new duties in December and will serve until the spring elections.

Barbara A. Lee, 2L, Windsor, Connecticut, and Stuart L. Pachman, 3L, Elizabeth, New Jersey, have accepted invitations to join the Bureau.

Bull & Bear To Hear Broker

By Frederic M. Cassidy

Bradbury K. Thurlow, vice president of Winslow, Cohû and Stetson, will speak to the Bull and Bear Club tomorrow at 1:40 in the Wheeler Room of Holmes Hall. His subject will be "Special Situations"; he will answer questions following his address.

Mr. Thurlow writes a monthly market letter, "Commentary," sent to Winslow, Cohû and Stetson customers. In it he has frequently focused attention on stocks which are "special situations."

Stocks falling in this category are those which are likely to be favorably affected in the near future by a circumstance or group of circumstances other than strictly financial



(an increase in earnings). Examples are an impending merger, stock split, change in management, favorable reorganization, government action, new product or new plant.

One such "special situation" stock recommended last spring by Mr. Thurlow is General Plywood Corporation. It has patented a process of finishing lumber which drastically reduces the cost of painting or varnishing. Currently General Plywood is engaged in two patent infringement suits in defense of its process. Should it be victorious it would be able to grant licenses to and collect royalties from all the major lumber producers. Within eight trading days after Mr. Thurlow's first analysis of this "special situation," the price

of the stock doubled.

Announcements will be made at the meeting concerning the standings in the \$50,000 Investment Contest and the guest speakers and their topics for the remainder of the year. All students are invited to attend.

Assistant Professor Named For Next Year

Dean Erwin N. Griswold has announced that Charles Fried has been appointed as an Assistant Professor of Law effective July 1.

Mr. Fried is presently the law clerk to Justice John M. Harlan of the United States Supreme Court. His special interests are Roman Law, legal history, criminal law and other common law subjects.

Mr. Fried, a native of Czechoslovakia, received his A.B. degree from Princeton University in 1956. He studied at Oxford University for two years and then entered Columbia Law School, where he received his LL.B. degree in 1960. In his third year he was note editor of the *Columbia Law Review*.

Young Republicans To Sponsor Panel

By Paul R. Matia

The Harvard Law-Graduate Young Republican Club is sponsoring a forum on "The Role of Private Enterprise in America's Foreign Policy" to be held Thursday, February 9 at 8 p. m. in the James Barr Ames Courtroom, Austin Hall.

The members of the panel will be Sinclair Weeks, former Secretary of Commerce in the Eisenhower Administration; Professor Milton Katz of the Law School; Professor Raymond Vernon of the Business School; and Prescott C. Crafts, Jr., international banker associated with the First National Bank of Boston.

The panel members will discuss the role of private enterprise in helping the United States attain its foreign policy goals. Among the aspects expected to be covered are the present scope of these activities, their potential, past abuses of them and the possibility of more effective use of private enterprise.

Bar Exams vs. Law School Exams

By Sydney S. Traum

Mr. Louis A. Kass, lecturer on New York Pleading and Practice at Yale Law School and in his own New York bar review course, spoke to the Student Bar Association on the subject of "Law School Exams vs. Bar Exams" recently in Harkness Commons.

After stating that he was glad to be at Harvard again — he was here last March — Mr. Kass began by describing the similarities between the two types of examinations. The speaker quoted from an article in the *RECORD* of May 3, 1950, written by Dean Griswold, containing suggested procedures for taking finals. He noted that subsequently the instructions furnished with the New York Bar Exam bore a striking resemblance to the Dean's article.

The major similarities of both sets of instructions related to recognizing the issues involved and avoiding extensive irrelevant discussions. Within this framework, the audience learned that a restating of the question in the answer, illegible writing and disorganized answers are annoying to those grading examinations and detract from the worth of the answers.

Turning to the differences between law school and bar exams, Mr. Kass pointed out that in law school you know the idiosyncrasies of the professor grading the exam, while the graders of the bar exam are unknown to the students. "You know whether your professor wants the majority of the minority or the minority of the majority."

In law school the nature of the course determines the field of law on which the questions are based. On the bar exam the candidate must first determine what field or fields of law are involved. In short, "you fight as to what you're fighting about."

Another difference between the two types of exams relates to the "law review answer." On a law school exam this invariably gets an "A", while on a bar exam this answer may receive a zero. Bar examiners want to know what the law is, not what it was or what it should be.

Mr. Kass concluded his lecture by explaining his theory of "scientifically straddling" a question. This consists of raising and destroying possible answers to the question while

adopting a definite conclusion. The method is used when a candidate is not sure of his answer but wishes to obtain maximum credit.

Chancery Elects Treasurer

Chancery Club members elected by acclamation John L. Higgins, 2L, Providence, Rhode Island, to the Board of Governors as treasurer.

Lincoln's Inn Elects Board of Governors

Lincoln's Inn Society members elected a new Board of Governors at a meeting held last week. Harold E. Fitzgibbons, Jr., 2L, Duxbury, Massachusetts, a graduate of Harvard College, was elected President of the new Board of Governors.

Raymond G. Empson, 2L, Akron, Ohio, will serve as the new vice president. The secretary will be George E. Davies, 2L, Chappaqua, New York. Michael H. Trotter, 2L, Atlanta, Georgia, is the new treasurer.

The class of '62 will be represented on the new Board by Albert J. Beveridge, Hingham, Massachusetts; John M. Collette, Idaho Falls, Idaho; William K. Hoskins, Cincinnati, Ohio; and William B. Wisdom, New Orleans, Louisiana. The representatives of the class of '63 are David W. Brown, Evanston, Illinois, and James R. Hamilton, New York, New York.

Taft Elected President Of Young Republicans

The Harvard Law-Graduate Young Republican Club elected new officers for the spring and fall terms at a meeting held on Monday. The following officers were chosen: President, Sheldon A. Taft, 2L, Columbus, Ohio; Vice President, Diarmuid F. O'Scannlain, 1L, New York, New York; Secretary, Hugh A. Norton, 1L, Northridge, California; Treasurer, Paul R. Matia, 2L, Fairview Park, Ohio.

Elected to serve with the above officers on the Executive Committee were the following members-at-large: H. Stephen Cranston, 2L, El Cajon, California; Paul M. Frank, 1L, Bronxville, New York; and William K. Hoskins, 2L, Cincinnati, Ohio.

Morgenthau Speaks Before ILC

By Charles H. Baron

"The proper role of an international lawyer is the making of international law superfluous," the Harvard International Law Club was advised by Professor Hans Morgenthau at a general meeting held recently. "A viable international legal order cannot be based on a regime of inter-sovereign arbitration. It requires one supranational sovereign and a system of supranational law."

The starting point for Professor Morgenthau's observations was the proposition that it is unrealistic to deal with problems of international law without appreciating underlying problems of international politics. When we study the substratum of world politics we must become aware of the fact that international law works only when there is a "community of interest" among the states who are to be regulated by the regime.

But some internationalists expect much more from international law; they expect it to be able to change the opinions of its subjects so as to bring about a world order. One can see how difficult this is as regards the problem of integration in the United States, a sovereign municipality where there is a monopoly of organized violence. How much more difficult will it be in a system of loosely-bound sovereignties accepting the rule of law only when it is in their respective interests — at least in the long run?

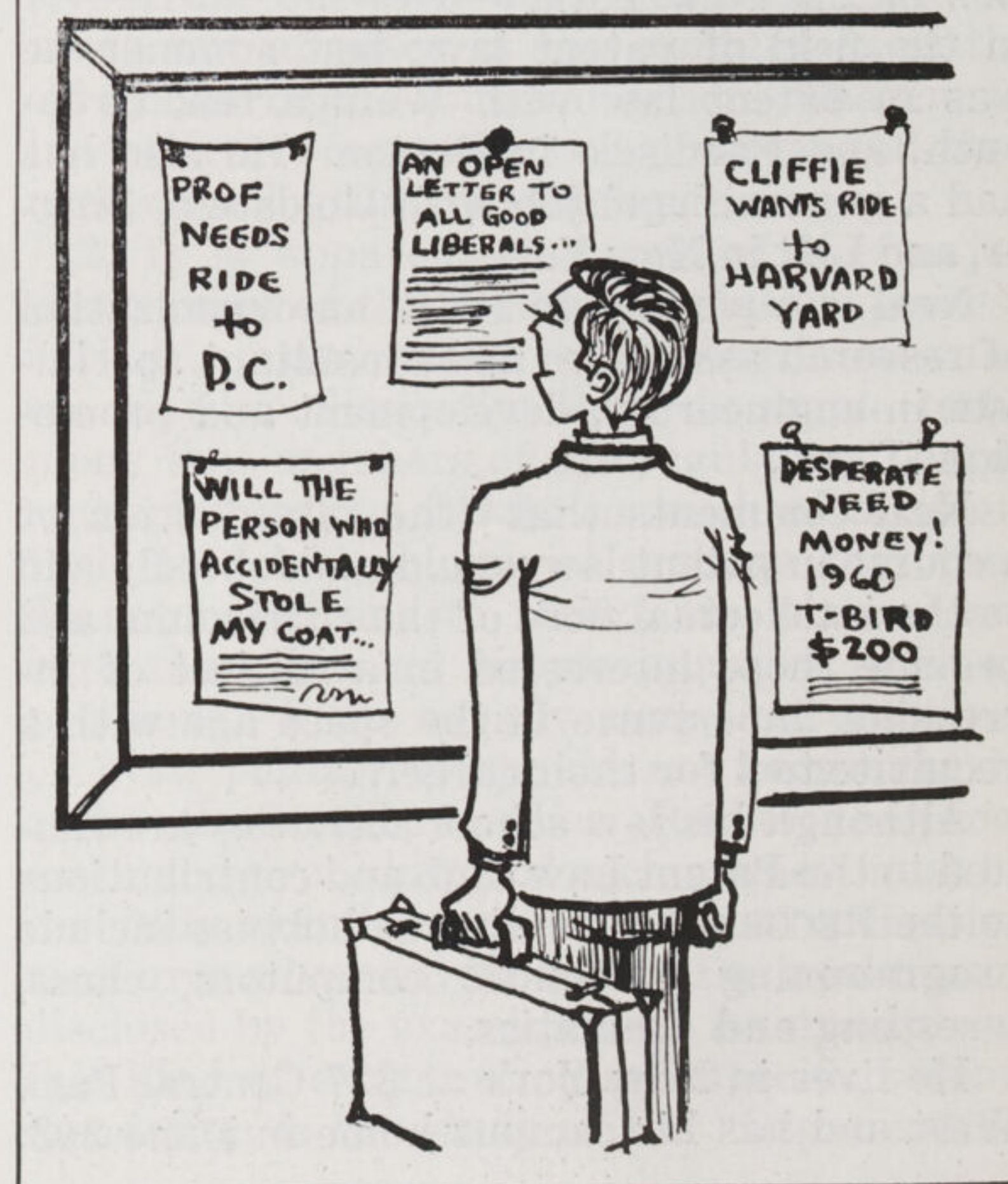
The only answer would seem to be the establishment of a supranational government which would regulate by means of controlling "incentives to action" without having to depend on the existence of a "community of interests" for the effectiveness of individual measures.

An illustration of the problems discussed is afforded by the negotiations toward agreements on cessation of atomic testing and disarmament. Because of fear that there is not sufficient "community of interest" for the strict performance of any agreement, the United States is demanding a system of 100 per cent controls which is a chimerical "Technological Utopia." The only way to effectuate a viable scheme of disarmament is to construct a supranational organ that will eliminate the incentives for violating the agreement.

As for the chances of laying the foundation for such an international sovereignty, Professor Morgenthau considers them good inasmuch as there already exists between the major powers an "inchoate community of interest" upon which the government can be constructed. The shared interest is that of self-preservation. However, there are countries, most notably China, which feel that in their present unindustrialized state they could afford an atomic war so much more than the major powers could that they do not really share in this "community of interest." Professor Morgenthau apparently feels that the answer to this is that we must wait several years for these countries to become industrialized before our plans for supranationalism can be fully implemented. Of course all this assumes that all countries will be able rationally to comprehend where their self-interest lies.

Professor Morgenthau is a professor of political science at the University of Chicago and is the author of several books in the field of government and foreign policy. His latest book is entitled "The Purpose of American

Commentaries



Policy." He practiced law in Germany and was also admitted to the Missouri bar. Upon his introduction by Friedrich Kessler, Visiting Professor of Law, as "Political Scientist, Moral Philosopher, and Lawyer," Professor Morgenthau observed that he was glad to be back, temporarily, where he started — "in law, which differs from the field of Government in that everything is certain, at least once the Supreme Court has spoken."

Profiles of Leaders

Neal Lewis Rosenberg, a native of New York City and a 2L man at Harvard, is president of the Patent Law Club.

Born March 3, 1937, in New York, Neal attended Horace Mann School and Yale University — where he took a five year program leading to a bachelor's degree in Chemical Engineering.

His scientific background has come in handy in giving him an interest in the field of patent law, and in getting him a teaching fellowship in chemistry at Harvard during his first year at the Law School.

This summer he will join Western Electric Co., Inc., in New York, in the field of patent law; last summer he was in patent law with Weingarten, Orenbuch, and Pandiscio in Boston. He also has had a general legal job with Goldstein, Singer, and Leit in New York.

Neal is a partner in DNR, an organization of research associates and consultant specialists in engineering, development and promotion.

Neal comments that "the introduction of a course in patent law would undoubtedly add to the intellectual fibre of the curriculum and provide those interested in a subject of increasing importance in the space age with a requisite tool for their careers."

Although his law school activities are limited to the Patent Law Club and contributions to the RECORD, Neal's diverse hobbies include programming automatic computers, chess, wrestling and dramatics.

He lives in New York at 327 Central Park West and has his campus home in Dane 303.



Lost and Found

Students having lost chattels may be able to recover them from the Lost and Found Department of the Law School, which is located in the Mail Room (Langdell Hall, West Wing Basement). For security purposes, valuable items, such as watches and billfolds, are held in the Librarian's Office. Upon proper identification, several items can now be claimed in the Librarian's Office.

Frederic M. Cassidy, a third year student from Wisconsin, is president of the investment-minded Bull and Bear Club at the Law School. A graduate of West High School, Madison, Wisconsin and the University of Wisconsin, where he received his Bachelor of Business Administration, Fred was born

May 1, 1937, at Ann Arbor, Michigan. Married to the former Miss Arlene Loth of Mukwonago, Wisconsin, in 1958, he lives at 217 C, Holden Green, Cambridge during the school year.



"The purpose of the Bull and Bear Club," according to Fred, "is to give law students a look at business from

the viewpoint of business and financial leaders, through our speakers program, and an opportunity to participate in investment at no financial cost through our investment contest."

In the contest, each member starts with \$50,000 and "invests" in stocks, and, at the end of the school year, the person whose investments have appreciated the most gets a first prize of \$50. Second and third prizes are also given.

In addition to his Bull and Bear activities, Fred is a member of the Young Republicans.

Other Officers of the club include Allen Smart, 3L, executive vice-president; Charles Kinnaird, 3L, vice-president in charge of the "Ticker Tape" publication; William Stratton, 3L, vice-president in charge of the \$50,000 investment contest; Clarke Hess, 3L, treasurer; Dyer Wadsworth, 2L, secretary; and Bevis Longstreth, Jr., 3L, Keith Libbey, 2L, and Paul Freehling, 2L, members-at-large.

FEATURES SECTION

Proposals For Administrative Agencies

By Professor Clark V. Byse

Recently there has been growing dissatisfaction with the operations and procedures of the federal regulatory agencies and, more specifically, with the vagaries of the Administrative Procedure Act of 1946. The American Bar Association and other groups have suggested extensive revisions of that Act. The Senate of the 86th Congress created the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary in order to study these proposals. The following article contains the proposals submitted to the Subcommittee by Professor Byse in response to a request by Senator John A. Carroll of Colorado, the chairman of the Subcommittee.

Were I in charge of organizing the work of your Subcommittee, I would give the proposed ABA revision of the Administrative Procedure Act a rather low priority — not because I think the ABA's proposal is bad, but because there are so many more pressing problems which deserve attention. Among these are the following:

1. Because of the doctrines of sovereign immunity and indispensable parties and the fact that district courts outside the District of Columbia have not expressly been given power to mandamus federal officials, a litigant may be unable to secure judicial review of adverse official action in any federal court but one sitting in the District of Columbia. And because of Rule 25(d) of the F.R.C.P. relating to abatement, a litigant may lose a judgment he has previously secured. In all these instances, the difficulties the litigant faces have *nothing* to do with the merits or demerits of his claim or with the propriety or lack thereof of judicial review of the ac-

Professor Byse received his B.E. from Wisconsin State Teachers College in 1935, LL.B. from the University of Wisconsin in 1938, LL.M. and J.S.D. from Columbia in 1939 and 1952. He is co-editor of a casebook on Administrative Law and co-author of Tenure in American Higher Education: Plans, Practices and the Law. At the Law School he teaches Contracts, Administrative Law and a seminar in Administrative Law.



Professor Byse

tion in question. Instead, his difficulties derive from outworn doctrines which are as much out of place in this century as is the old system of the forms of action. The courts have tried to cope with this problem, but they need some legislative assistance.

2. It is apparent that one of the major weaknesses of the federal regulatory process is that in many, many instances it moves far too slowly. Similarly, there is ample testimony that members of the regulatory boards and commissions devote so much of their efforts to relatively trivial matters that they do not have time to reflect and plan. I am sure there are no simple answers to these problems. I am equally sure that solutions or even palliatives should not be sought in across-the-board remedies. Rather, the processes and procedures of each agency must be carefully examined and individual corrective measures advanced in light of the weaknesses disclosed by the examination. An example of this kind of examination and specific recommendation is the study of the "Organization

and Procedure of the National Labor Relations Board" by the Advisory Panel on Labor-Management Relations Law. See Report to the Senate Committee on Labor and Public Welfare, Pursuant to S. Res. 66 and S. Res. 141, Sen. Doc. No. 81, 86th Cong., 2d Sess. (1960). I do not necessarily endorse all of the Advisory Panel's recommendations, but I do believe that its general method of procedure is sound: (1) determine the facts; (2) carefully tailor remedial measures to correct the weaknesses disclosed by the facts.

It is entirely possible that investigation of other agencies would lead to proposals similar to those of the Advisory Panel — particularly the Panel's recommendation that proceedings could be expedited and the time of Board members conserved if the responsibilities of the trial examiner were increased. Indeed, this is one specific area of agency process and procedure that deserves the most careful attention, for if more of the decisional load can be shifted to the examiners, decisions can be reached more quickly and the agency heads will have more time to devote to reflecting and planning. Establishment of intermediate appeal boards might also be helpful.

Calibre

3. It was Burke, I think, who said, "Constitute government how you please, infinitely the largest part of it must depend on the wisdom and uprightness of ministers of state." I have not made a study of the top personnel of the federal regulatory agencies; nor have I studied Senate Committees' hearings on nominations to those agencies. But I have the distinct impression that the calibre of agency members leaves much to be desired. [For an interesting discussion, see H. J. Friendly, *A Look at the Federal Administrative Agencies*, 60 Colum. L. Rev. 429, 444-446 (1960). And see Chapter XV of J. P. Harris, *The Advice and Consent of the Senate* (1953).] The Senate, The American Bar Association and perhaps other professional associations could well play a more active role in the endeavor to secure abler agency heads.

4. The federal regulatory agencies are often referred to as "arms of Congress." The implication is that they are and should be free from Presidential control. The Brownlow Committee in 1937 and Louis Hector twenty years later proposed that the agencies be dismembered in order that responsibility

for policy formulation would be vested in the Executive branch. Neither the Committee nor Mr. Hector have convinced me that the radical surgery they proposed is wise. But neither do I think that the regulatory agencies should be free from Executive control on matters of broad policy, particularly if the policy issue affects more than one agency or if it is an issue which the Executive Office believes is of critical national importance. The problem is to evolve procedures and structures which would permit Presidential coordination and broad policy guidance without permitting undesirable Executive intercession in particular adjudications and which also would not make the Executive Office a reviewing agency to be resorted to by every disappointed litigant or applicant. So far as I know, not much has been done on this subject.

Other Subjects

5. There are other subjects deserving attention, which I shall mention hurriedly: (a) There is danger that the primary jurisdiction doctrine is becoming a fetish. A study of the cases in which it has been applied and what happened afterward should be illuminating. (b) Can Congress provide more meaningful standards to govern administrative discretion? Is it not possible that competition — the forces of the market place — could be more widely relied upon as a control mechanism? Could not regulation be made less pervasive in some areas, i.e., could not there be a more selective basis of regulation? (c) Have the agencies been given adequate funds with which to do the job assigned to them? (d) Have adjudicative procedures been required (or utilized) in considering issues which should have been handled by legislative or managerial procedures? (e) Should some multi-headed boards and commissions be replaced by a single administrator, and vice versa?

Speaking generally, I feel that while judicial consideration has been improperly withheld or restricted in a few categories, the issue of the immediately foreseeable future does not relate to judicial review; nor does it relate to across-the-board procedures or to separation of functions, or even to ex parte influences, as reprehensible as they may be in some instances. The problem in the nineteen sixties is as it was in the thirties — to make the federal regulatory agencies more

effective instruments of regulation in the public interest. A good share of the blame for their ineffectiveness must be borne by the Congress and the Members of Congress. For in some, possibly in many, instances, it was Congress and its Members which: (a) launched the agency with but the broadest and vaguest of charters; (b) failed to provide adequate funds; (c) interceded in particular cases; (d) intervened unduly in the workings of the agency through exercise of its investigative or watchdog functions; (e) refused confirmation to able nominees; (f) failed to refuse confirmation to mediocre appointees; and (g) imposed hampering procedural requirements.

National Interest

Also speaking generally, it seems to me that conscientious Members of Congress should recognize that since they represent local and regional interests and are primarily responsible to local and regional constituencies, there is grave danger that in particular cases the national interest will be subordinated. This means, I believe, that the structure of regulation should be such as to provide a countervailing Executive power to represent the national interest. This is more easily said than done, I'm afraid.

Finally, let me emphasize that I am extremely suspicious of broad-scale, across-the-board proposals. The yearning for "uniformity" has always seemed to me to be more indicative of an emotional reaction than of rational analysis. The fruitful methods of

administrative law reform are those of the Attorney General's Committee and of Mr. Robert Benjamin. See Final Report of the Attorney General's Committee on Administrative Procedure 2-4 (1941); R. M. Benjamin, Administrative Adjudication in the State of New York 2-5 (1942). Their methods have been summarized as follows:

"The lesson to be derived from this brief account of the research methods followed by the Committee and Mr. Benjamin is that in appraising proposals for a uniform administrative code, initial generalizations and broadside criticisms are suspect; allegations of deficiencies and evils should be thoroughly investigated; if investigation discloses weaknesses, measures carefully tailored to correct particular defects should be proposed; affected agencies and private agencies should be given opportunity to comment on the proposed remedy before it is thrust upon them. The method of patiently pursuing facts and preparing remedial measures in light of specific evil disclosed is costly, slow, and unspectacular. Yet it is clear that only through such rational processes will meaningful and lasting reforms be achieved." Public Law Problems in India 22 (L. Ebb, ed. 1957).

Condolences

Jay B. Opal, 2L, Jamaica, New York, died of a heart attack on January 4, 1961, while home for the Christmas recess.

The RECORD extends condolences to the friends and family of Mr. Opal.

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Defense Policy Seminar *Plans For Securing Security*

By Richard A. Griscom



Robert Amory, Jr., Deputy Director of Intelligence in the Central Intelligence Agency, speaking to a recent meeting of the Defense Policy Seminar.

During the 1953 change of Administration in Washington, Professor W. Barton Leach, Story Professor of Law at the Harvard Law School then serving as an advisor to the Air Force, was able to observe the disturbing lack of familiarity with problems of national defense which was typical of the men then being appointed to important positions in the Department of Defense. This experience convinced him that a place should be made in the academic curriculum for courses giving interested students a background for public service in national defense. He hoped to make defense policy a respectable academic field, just as foreign affairs was injected into the stream of academic life when the United States assumed political prominence in the world. The United States had been the military leader of the West since World War II, but as of 1954 the universities had not responded to the need for courses exposing students to national problems concomitant to military preeminence.

With these considerations in mind, Pro-

fessor Leach initiated the Defense Policy Seminar at the Law School in 1954. It was a success and has been offered every year since that time. As an indication of its immediate usefulness, every year at least one student who has taken the course has gone directly from Harvard to the Pentagon. Because of their work in the seminar these men have found themselves better informed on defense policy matters than other men entering the Department of Defense without the benefit of a similar academic experience.

In the long run, of course, the seminar will prove even more useful in that many lawyers will at some time in their careers enter public service positions in which a background that includes the study of defense problems will prove helpful.

Another indication of the need for academic endeavor that exists in this field is that since 1954 similar courses have been started at West Point, the Air Force Academy, the University of Wisconsin, Ohio State University and George Washington University. The

course at George Washington was begun by a former student in the Harvard seminar.

In 1955 the idea was carried further, from it evolving the Defense Studies Program under the Graduate School of Public Administration. In addition to the seminar the Defense Studies Program has offered an Advanced Seminar on Comparative Defense Administration and a course in the History Department entitled "Emergence of the United States as a Global Military Power." Integrated with the Center for International Affairs, the program includes the research and writing of a varied group of scholars, civilian and military. This development gives the undertaking continuity of research — an important element in these years of rapidly changing technology and doctrine.

In the first years of its existence the seminar was the basic responsibility of Professor Leach, who was assisted during those crucial years by Professors Braucher and Sutherland of the Law School, Professor Gordon of the Business School and Professor Smithies of the Economics Department. Dr. Harry Howe Ransom came in 1955 as a Research Associate in the Defense Studies Program. In 1956-57 the Program was directed by Professor Edward Katzenbach. Professor Henry A. Kis-

singer came in 1958 and has been director of the seminar since that time.

The expenses of the first three years of the seminar were covered by a grant from the Ford Foundation. The Program is currently operating with the financial assistance of a Carnegie Foundation grant. In the first years there was so little published material on problems of defense policy that the staff of the Program had to write much of the material used in the seminar. These efforts led to the publication of *Military Defense and National Security*, a study of defense organization by Timothy M. Stanley, a teaching fellow in the Program, and Dr. Ransom's book, *Central Intelligence and National Security*. Many articles have been published by other members of the staff. The problem of a dearth of material no longer exists, since in recent years there has been a tremendous growth of material in the field.

The seminar is now offered for credit in the Government Department, the Law School, the Business School and the Graduate School of Public Administration. Since the seminar is non-legal, it may be asked why Harvard should include it in the Law School curriculum. One factor, of course, is that its founder is a Law School professor. Another is the

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fact that almost two thirds of the civilians in the Pentagon, as well as many members of the key Congressional committees, are lawyers. Professor Kissinger stresses the point that the training of lawyers gives them great analytic skills; he feels that law students should have the opportunity to use these tools on problems of government while still in law school, rather than having their first contact with these problems when they are called upon for public service later in life.

There are presently 51 students enrolled in the seminar. Of these, 29 are from the Law School, 6 from the Business School and a like number from the Graduate School of Public Administration. The rest come from Harvard College, the Graduate School of Arts and Sciences and M.I.T. In this group are four military men and one representative of the State Department. In addition there are many auditors of the Wednesday afternoon

sessions including Fellows from the Center for International Affairs and several Nieman Fellows.

The seminar is now divided into two parts. In the first semester the emphasis is on defense organization, while the second semester is spent studying problems of policy and strategy. Specific problems studied during the first semester include the National Security Act of 1947, the defense budget and the governmental division of powers concerning defense matters. Topics covered in the second semester include limited war, collective security and arms control. Special emphasis is given throughout to the relationship between defense and foreign policy.

Although the trend in recent years has been to put more emphasis on staff-led discussions of the more important topics, each semester a number of high-ranking officials appear as guest speakers.

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Recent Books

By Robert C. Berry

A HISTORY OF CAPITAL PUNISHMENT, by John Laurence. With a Comment on Capital Punishment by Clarence Darrow. Illustrated. Citadel Press. New York, 1960.

The preface to the current book asserts that the author does not attempt to state the pros and cons of capital punishment. However true this may be, the graphic word and pictorial illustrations of this edition can surely be understood only to slant in one direction—capital punishment as barbarism and inhumanity. That slant, moreover, seems to be a justifiable one, when viewed in the light of the centuries of condemnations and executions herein explored.

This book was first published in 1932 and was revived this past year with additional preface materials aimed directly at the evils of capital punishment. In addition to Clarence Darrow's forceful indictment, there is also reprinted an editorial from the *New York Herald Tribune* arising from Caryl Chessman's execution last spring and a listing of the states of the United States and of various other countries which have abandoned capital punishment.

When a book such as this appears, detailing as it does the item upon item of ways and means to kill, it runs the risk of becoming such a flood of facts as to deaden, eventually, the reader's reaction to the additional horrors systematically presented. This offering does not wholly avoid this pitfall. It is such a thorough immersion that the senses become somewhat dulled to that which is being produced. This is too bad, at least from the viewpoint of one who seeks fuel for urging the abolition of capital punishment; for what the author has to report could be used to much better advantage in pinpointing a most telling story.

Outright History

As it is, Mr. Laurence seems con-

tented to have confined his study to an out-and-out history of means of execution, famous executioners, places of execution and other tidbits, ending it all with no ending at all, letting it drift to its inconclusion. Offered in this guise, the substance fails of a sustaining quality that would command interest from beginning to end. There is no overall dynamic portrayal. It is more a listing than literature.

The best of this book, then, must be sought from the individual sections, or, at times, individual paragraphs. The first part, dealing with the development of modes of execution, reaches its high point where the author discusses the exacting studies that have turned executions into an art. For example, there is hanging, where the right type of rope and, more importantly, the correct distance that a certain weight body must fall aptly illustrate the paradox of perfecting a punishment that is the most lethal, yet the least painful.

This striving for bigger and better means of execution has, of course, marked the entire history of legalized killing. The result has been the picking of favorites, certain methods for certain locales. Hanging, a still popular choice, was at one time considered one of the more disgraceful ways of dying, not to be compared with the genteel mode of having one's head chopped off. But these two only start the list. Included in this book are also the guillotine and the electric chair, not to mention the concluding chapter which throws in a few extras, such as crucifixion, stoning, the

wheel, the garotte, the mazzatello and pressing to death.

Perhaps a strong nominee for the most colorful device must be the mazza or mazzatello, a heavy mallet or poleaxe, which flourished in the Papal States until Garibaldi's time. "Standing behind the condemned, the executioner then raised the awful mallet, swung it once or twice in the air, as if to test its strength, and then, with a resounding thud, brought it down with his full force on the head of the condemned man. To make his work complete the executioner drew a knife across the throat of the unconscious man."

It can be seen from the foregoing that the traditional role of the executioner was quite beyond that of today's anonymous man who steps forward simply to throw a switch. It is to be hoped that today's public servants are also not quite of the same character. For many of the executioners of yesteryear were little better than their victims. More than a few, in fact, were themselves condemned men, allowed to remain alive only on condition they pursue this rather unpopular occupation.

The story is told of a father and two sons who were sentenced to die. The father was offered the chance to live, provided he would be the executioner of his two sons. The father refused. Likewise, the oldest son deferred when offered the same deal. But the youngest evidently did not feel tied by such filial bonds. This young opportunist jumped at the chance, and his father and brother were only the first in a long line to end at his hands.

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The executioner in England, whoever he might be, has long been called "Jack Ketch." Apparently this has come from an executioner of a couple centuries ago who had that or a similar name. Though there is some doubt as to whether his name was actually Jack Ketch or whether it was Richard Jacquet, his successors thereby inheriting a corruption of his name, it is known he was efficient in his undertakings. As his wife noted, any bungler can kill, but Ketch *made them die sweetly*.

To complete this scene, of course, there are always the victims themselves. As such, men have reacted in every possible way — courageously, cowardly, indifferently, scornfully, remorsefully. Some, for example, have been so curious as to request a rehearsal to make certain nothing goes wrong. Others have

totally ignored their fate. And many have turned literary, such as John Selhurst who was hanged for the murder of his wife.

"With her a fearful life I led,
The drink it did so fly to her head;

On the devil's tippie she used to dote,

But I cured her with a cut on the throat.

I wish I could the deed undo,
And so, dear people all, must you."

As can be seen, despite its grizzliness, not all humor is lost. Much is sadistic; other is ironic. Foremost among the latter must surely be the former inflexibility of "scaf-

fold etiquette."

"The scaffold is the last place where one would expect to find any rules of etiquette. Yet there were many and those rigorously kept. Thus in cases where two or more peers have been beheaded, they were always brought to the block in order of precedence. Lord Capel, who tried to address the crowd with his hat on, was sharply reprimanded by the executioner; while in the case of Lords Balmerino and Kilmarnock, beheaded together in 1746, the latter offered his friend first place at the block, but etiquette would not allow Lord Balmerino to take advantage of his kindness."

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