REVIEWS

THE WASHINGTON LAWYER. By Charles A. Horsky. Boston: Little, Brown and Company, 1952. Pp. xx, 179. $3.75.

THE Washington lawyer is becoming as much of a legal and political symbol as the Wall Street lawyer of the last generation and the Philadelphia lawyer before that. All three terms have probably connoted comparable degrees of ability, power, and success. But a distinctive aroma has become associated with the Washington lawyer which his predecessors managed to avoid. The Washington lawyer is supposed to live and act through "influence." If John Q. Citizen were to take the psychiatrists' free association test, "influence" would doubtless be his first response to "Washington lawyer."

In this admirable little book, an able and experienced Washington lawyer sets out to define the species. As Mr. Horsky notes,[1] some 3,700 private lawyers now practice in the District of Columbia; one of every 183 persons in the District is a private lawyer. Even in New York, the true Mecca, only one out of 415 persons is a private lawyer. There are approximately three times as many private lawyers in Washington as one would normally expect to find in a city of its size. Further, many lawyers with offices in other cities are today "Washington lawyers" in the sense that the bulk of their practice relates to activities of the Federal Government and a large part of their time is spent in dealing with federal agencies. Perhaps 10 to 15 percent of the nation's 170,000 attorneys are Washington lawyers in the professional sense of the term. It is high time to study and record the activities of so large and flourishing a group.

The bulk of this book is a detailed description of what the Washington lawyer does from day to day. The Washington lawyer, as Mr. Horsky points out, spends his fair share of time in the courts—primarily to seek review of Government action in the District Court or the Court of Appeals—but his principal public appearances occur in the hearing rooms of the semi-judicial group of regulatory administrative agencies. Even hearing-room practice before the administrative agencies does not bulk too large in the life of most Washington lawyers. They devote at least as much time to other dealings of businessmen with the Executive Branch—such as the negotiation of procurement contracts and financing agreements, and applications for tax and similar rulings—and to dealings with the Congress.

Mr. Horsky shows that in each of these fields the Washington lawyer is retained because of his special skills and experience. He knows the past and present policies of the Government agency with jurisdiction over the problem; he knows which individuals will act; and he also knows enough about the

1. P. 7.

individuals themselves to tailor the presentation of his case accordingly. In performing these tasks, the Washington lawyer exercises the traditional skills of his profession—the ability to marshal and present facts accurately and effectively; the ability to anticipate and take precautions against various contingencies; the ability to sense the basic objectives and desires of his client and the other party, and to interpret each to the other. These skills are, of course, the product of native ability multiplied by experience.

Mr. Horsky's point is soon apparent: the Washington lawyer is merely another specialist. Business today finds itself facing the Government on every side, as a source of capital and contracts, as an umpire on trade practices and labor disputes, and always as the tax collector. Lawyers do much of this work for the Government; the citizen needs his own lawyer to deal with the Government lawyer and his regulations. Private lawyers throughout the country cannot hope to keep pace with every new Washington development, and they and their clients employ Washington lawyers to do the job for them. The specialized skills of the Washington lawyer permit him to exercise "influence," but only in the same sense that "influence" is exercised by the trial lawyer, the corporation lawyer, the individual small-town practitioner, the stockbroker, the management executive, the star salesman, and every other specialist hired for his skill in his particular field of human relationships.

Mr. Horsky freely concedes that Washington lawyers have an important "influence" on day-to-day decisions of the Government. Indeed, this is half the primary function of the Washington lawyer in his capacity as "principal interpreter between Government and private person, explaining to each the needs, desires and demands of the other."[2] But the Washington lawyer also "influences" the day-to-day conduct of his clients. He counsels them on what they may or may not do consistent with the laws and rules and policies of the Government. A private citizen, he does not enforce the laws, but he probably does more than the enforcement authorities to see that the letter and spirit of the laws are obeyed.

But when all this is said, it remains true that the Washington lawyer is associated by the public not merely with the advocate's ability to "influence" decisions, but with "influence-peddling." He is supposed to be able and willing to persuade Government officials to do things for him that the officials would not do for anyone else. He is supposed to be a fixer. To some extent, lawyers everywhere are subject to this charge. Public opinion does not exactly take the integrity of lawyers for granted. Clergymen, doctors, teachers, even business executives probably rate higher on today's moral scale than do lawyers. Lawyers fall more in the category of politicians, civil servants, and jockeys; some of them are probably honest, but how can you ever be sure?

In addition to this general handicap of the profession, the Washington lawyer is peculiarly vulnerable to the charge of being a fixer. There are two principal reasons.

2. P. 10.

First, a large area of Washington practice is essentially *ex parte* in nature. Public hearings are feasible for many operations of the Government, but they are impracticable as a means of negotiating procurement contracts, granting loans, issuing tax rulings, or communicating between legislators and their constituents. And even in fields where the public hearing procedure is used, it often functions best when preceded and followed by informal conferences between Government officials and interested private citizens and their lawyers. True, two sides are represented in every meeting between a Washington lawyer and a Government official, but there are often three, ten, or a hundred sides to a matter involving the Government; what one Washington lawyer seeks for his citizen-client, many other citizens might oppose, or want for themselves. Yet these other citizens are unrepresented at the meeting; they may not even know it is going on, or how it came out. So long as Government officials and legislators continue, as they must, to hold private meetings with individual citizens and their lawyers, some influence-peddling will certainly occur; and far more than occurs will certainly be suspected.

Second, Washington is a frontier town for lawyers. And like any frontier town, Washington has its quota of badmen. The city is a mother lode for legal business; law school graduates and ex-Government attorneys swell the ranks of the District's private bar each year. A firm's longevity is measured in years, rather than decades; an "established" firm is one that has been in existence perhaps five years. New firms spring up full-blown almost overnight, particularly when an Administration changes; for some lawyers leaving Government to enter private practice, the first few years are the easiest, not the hardest. The clients, by and large, live in other cities, and they know very little about the Washington lawyer or his reputation when they first consult him. Even in this favorable climate, there flourish fewer legal influence-peddlers than the public believes—fewer even than many non-Washington lawyers believe. But there are enough to convince any believer in the smoke-and-fire theory.

What can or should be done about the cry of "influence-peddling"? Is it something that statutes or canons of ethics can legislate into oblivion? Are there other ways in which the Government and the Bar can attack the problem? Or should "influence-peddling"—or at least the general public belief that it exists—be shrugged off as part of the price for democratic government, as fundamentally American as congressional rumor-mongering and the fixed parking ticket?

On this subject, Mr. Horsky has a number of acute observations. He demonstrates some of the ambiguities in the American Bar Association's well-intended Canon 26, which declares it "unprofessional" for a lawyer dealing with the Government "to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding, to influence [here is that word again] action." Does the ban on "secret personal solicitations" mean that a lawyer cannot meet a Government official in his office, or

accompany a constituent who visits an individual member of Congress to express views on a pending bill? And what are means "addressed to the reason and understanding"? Does this draw some sharp line between "the merits" and the many other elements that properly go into the making of any complex Government decision? Must a lawyer refrain from mentioning the political consequences of acting one way or the other on a particular issue? If so, the lawyer who strictly observes Canon 26 must refrain from discussing what may be the key issue in the mind of the official or legislator whom he addresses. Plato's totalitarian Republic might have been able to resolve complex issues solely on the basis of pure reason and understanding, but in a democratic republic compromises must be reached among the interests of competing groups, and empirical judgments of right and wrong must be tempered by judgments of what is politically acceptable. A famous illustration is Senator Ashurst's reply to the colleague who congratulated him for finally voting in favor of a bill he had vigorously opposed on the floor. The colleague said to Ashurst, "I am glad you saw the light," to which Ashurst replied, "I didn't see the light, I felt the heat!"

Mr. Horsky also stands up against blanket legislative prohibitions fettering the overcriticized and underpaid Government lawyers who resign their Government positions to practice law in Washington. He points out that the Government service manages to attract and hold large numbers of skilled lawyers at salaries far below the going rate because Government service offers a young lawyer the inducement of acquiring a special skill which he can later apply in private practice. Unless we are to insist on life tenure for Government lawyers, we must not "surround the Government service with so many snares, snags and spring guns that only the unwary can be recruited."[3] Mr. Horsky would, however, extend the present statutory prohibitions in two respects. He would make permanent the present two-year ban on an ex-official's appearance in a matter which he passed on while with the Government. He also favors a two-year sterilization period before permitting a high-ranking public official to practice on *any* matter before the agency from which he resigned. He properly cautions that any such rule be limited to officers of sufficiently high rank to be capable of exercising influence over former employees because of previous favors or promotions. He would exempt "the vast body of Government lawyers whose area of work and responsibility is limited in scope, and whose future livelihood may well depend on the right to continue to make use of their experience."[4]

Mr. Horsky agrees that "we cannot legislate a moral attitude or a cure for influence-peddling."[5] He notes that many influence-peddlers are neither ex-Government employees nor even lawyers. But he rightly calls for further

3. McElwain & Vorenberg, *The Federal Conflict of Interest Statutes*, 65 HARV. L. REV. 955 (1951).

4. P. 153.

5. *Ibid.*

steps by Government agencies and by the Bar to *enforce* ethical professional standards. Today, every Government agency makes its own rules as to who may practice before it and indeed as to what constitutes "practice" before it. Some agencies permit practice only by card-carrying members of its Bar, but cards are usually obtainable after little or no investigation. Most Washington lawyers carry perhaps three such cards, but practice before a dozen agencies. Few agencies have established disbarment procedures, and fewer still have ever disbarred anybody in recent times. Some agencies have no rules at all on the subject.

Nor is there any established private association of lawyers capable of policing the private Federal Bar. The Bar Association of the District of Columbia cannot control the thousands of lawyers who practice from time to time in Washington but maintain offices elsewhere; less than half of the lawyers in the District are members; indeed a lawyer does not have to be a member of the Bar of the District of Columbia to maintain an office there and practice anywhere outside of the District Court, so long as he does not represent himself to be engaged in general practice. The District Bar's Grievance Committee thus lacks jurisdiction over a large segment of the Federal Bar, including numerous lawyers with offices in Washington. The Bars of other states are unlikely even to learn of offenses committed by their members in Washington, much less to discipline the offender. There is today no Government or Bar Association Grievance Committee capable of deterring or punishing unethical conduct by lawyers practicing before the Federal Government.

Here is a matter to which the Bar Association and Attorney General Brownell might profitably turn their attention. Would it not be advisable for the Federal Government to establish a single Federal Bar, and to require that all lawyers representing clients before any Government agency become members of that Bar? Membership might be open to any member of a State Bar, but applicants might be disbarred or suspended after hearing on a showing of unprofessional conduct. The power to disbar or suspend might be vested in a representative board of outstanding private and Government lawyers practicing throughout the country, and in subordinate regional boards. The boards might be jointly selected by the Government and by the Bar Associations. It may be time for all lawyers, and particularly Washington lawyers, to devote serious study to such a plan.

But even a national grievance committee for the Federal Bar cannot do more than deter "influence-peddling" by *lawyers*. It cannot prevent the seeking of influence-peddlers by clients. Many shrewd and straight-laced businessmen, who can instantly spot a phony proposition in their own fields of experience, lose all sense of judgment when they are confronted with the shapeless mass and inertia of the Federal Government, and they are easy marks for the barkers outside the tent. A surprising number of businessmen believe that legal "influence" helps in Washington and is worth buying. They rarely

get the influence they pay for, and they often get a shoddy piece of legal work in the bargain. Even then, they sometimes conclude only that the other fellow's lawyer had a better "in," and they buy his influence the next time. At best, they get a guide through the Washington maze that could be furnished by any competent and ethical lawyer. At worst, they do themselves serious harm by tainting their cases with "the ill-will with which most government employees will regard a known or apparent influence-peddler."[6]

This sort of behavior reflects a lack of familiarity with how the Government works. It is the kind of mistake that is almost never made by the companies which maintain their own offices in Washington to deal with the Government, staffed by men who have grown up within the company. These men have learned Washington and its inhabitants by trial and error. They pick their Washington lawyers for their experience and ability, rarely for their "influence." For the businessman unable to afford his own Washington office, Mr. Horsky's book is the next best thing. It is also a good antidote for "inside" tipsheets such as *Washington Confidential,* and is a far better guide for avoiding legal clip joints.

Mr. Horsky next discusses a problem which sometimes bothers every attorney, but presses heavily on the Washington lawyer because he acts at the center of the major political issues of the day. This is the ethical question once posed by Justice Brandeis: whether to support, as a lawyer, a point of view on a Government policy which, as a private citizen, the lawyer would oppose.[7] Mr. Horsky does not pretend to answer this question. He does show, however, that most matters engaging the Washington lawyer are so dynamic and complex that neither he nor anyone else can ever be certain where the public interest really lies.

Mr. Horsky then proceeds to his final topic—the role of the Washington lawyer in the loyalty program. How to cull out the disloyal from the Government service, while preserving the rights and freedoms of public servants as a class, is a problem that tries all our souls. Many Washington lawyers, Mr. Horsky and his partners among them, have responded nobly to the needs of Government employees facing the frightening and lonely prospect of a loyalty hearing. They have acted as lawyer, confessor, psychiatrist, and friend, usually with little or no pay, often with a considerable risk of guilt by association.

But is it enough that a number of Washington lawyers have acted as counsel to the suspects, in the tradition of *in forma pauperis* assistance for persons accused of crime? Mr. Horsky does not think it is enough. He notes[8] that the fair hearing procedures prescribed by Section 11 of the Administrative Procedure Act, so rightly and vigorously pressed by the American Bar Association and the Washington Bar to assure fundamental justice and fair hear-

6. P. 147.
7. Brandeis, *The Opportunity in the Law,* 39 AM. L. REV. 555 (1905).
8. Pp. 163, 168.

ings for their business clients, would, if applied to loyalty adjudications, probably invalidate every adverse one to date; and that the Bar Associations remain silent on this subject. He might also have noted that when the President changed the standard of dismissal in 1951 from proof of *disloyalty* to "reasonable doubt" as to *loyalty*, a distinguished partner of Mr. Horsky's was one of the few lawyers in or out of Washington to raise his voice in protest at this change in the Anglo-Saxon burden of proof.[9] And now even the loyalty boards are apparently to be abolished, and without a word of protest from the lawyer-citizen, or any suggestions by lawyers as to alternative procedures for assuring a fair hearing. Here again an organized Federal Bar, brought into being by the new Attorney General, might exercise the proper "influence" of the profession as the defender and guardian of our ancient liberties. I cannot improve on Mr. Horsky's summation of the matter:

> "We have an obligation, as members of the legal profession, to examine these procedural problems. That one may decide on the unwisdom of complete disclosure of every counter-espionage agent in every loyalty case does not mean that we need go to the other extreme and maintain an almost total anonymity of accusers or adverse witnesses. That specification of charges may necessarily be limited in occasional instances by security considerations does not mean that sweeping, general allegations should be the rule. That it might be unwise to permit an unlimited right in the accused to subpoena witnesses does not mean that the right to subpoena should be wholly denied. Is there not a need for a fundamental reexamination of the concept of guilt by association? These are basic matters, where a whittling away of safeguards is portentous for us all."[10]

LLOYD N. CUTLER†

CORPORATION GIVING. By F. Emerson Andrews. New York: Russell Sage Foundation, 1952. Pp. 361. $4.50.

FOR the most part, this is pretty thin stuff. It is supposed to be a little helper for business executives looking for "efficient procedures and creative patterns for their gifts."[1] There isn't much in it that a young girl fresh out of library school and waiting to get married couldn't locate in a day and a half. But the business executive isn't the only beneficiary of this compilation with comments from the top of Mr. Andrews' head—lawyers, bankers, other business consultants, colleges, welfare agencies, other fund solicitors, stockholders,

9. O'Brian, *New Encroachments on Individual Freedom*, 66 HARV. L. REV. 1 (1952).

10. p. 167.

† Member of the District of Columbia Bar.

1. Publisher's Prospectus, p. 2, distributed with letter dated November 28, 1952. The author is the publisher's Director of Publications.