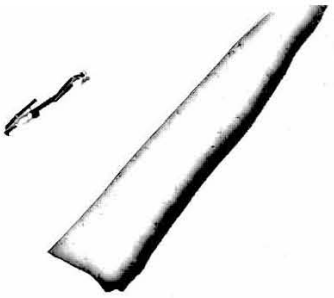

CHAIRMAN'S OFFICE
MAILED
delivered
MAR 10 1964

Signed by: _____

BY MESSENGER

Honorable Archibald Cox
Solicitor General
Department of Justice
Washington, D.C. 20530

Re: J. I. Case Co. v. Borak
(No. 402, Oct. Term 1963)

Dear Mr. Cox:

I am advised that you have been considering whether it would be appropriate to seek leave to have oral argument on behalf of the Commission in the above case and am writing this letter to advise you of the Commission's strong view that such argument should be presented.

While we do not doubt that the issue before the Court in this case is narrow and that the decision below might well be affirmed without oral presentation of the Commission's views, affirmance will substantially aid effective enforcement of our proxy rules. Judge Friendly, in a recent lecture to the Association of the Bar of the City of New York, has characterized the decision of the court below as a "significant step . . . toward the development of a federal common law of corporate responsibility."

More important, underlying the narrow issue directly involved is the very broad and basic issue of the existence of implied rights of action under the federal securities laws in general. This issue has never been considered by the Court. In this connection Professor Loss has stated (45 Va. L. Rev. at 792):

> "Indeed, one of the most interesting and most significant developments in the whole SEC area has been the largely unanticipated impact of the statutes and the Commission's rules on private rights through the common-law doctrine which makes torts out of certain crimes. If this development is sound, as it seems to be, a very substantial

> segment of the law of corporations, deceit and rescission has been federalized and, in the process, liberalized. But are we building on stone or sand? Although the argument has not prevailed in any of the lower courts, one cannot dismiss out of hand the contention that the recognition of additional implied remedies is not justified under statutes containing as elaborate a structure of express private remedies as the SEC acts do. Yet the Supreme Court has not once granted certiorari in any of these cases."

Now that the Supreme Court, after thirty years, has taken such a case, I think the Commission should have an opportunity to participate fully. In their briefs, petitioners appear at one point to concede the existence of private rights of action for violations of the securities laws. At other points, however, they appear to question these rights. They cite with approval a recent article in the Northwestern Law Review which makes a broadside attack on the existence of such rights. It cannot be assumed that they will not make such inconsistent arguments orally and counsel should be available to make clear the Commission's views on these matters.

Of course, we must assume that counsel for respondent will argue in support of the private right of action under Section 14(a) of the Securities Exchange Act, since his suit is based upon that section. We cannot assume, however, that counsel will refrain from making any concessions which, although possibly having an adverse effect upon private rights of action under other sections of the Act, will not adversely affect his action under Section 14(a).

Nor is the Commission in complete agreement with respondent upon all questions involved in the case. On the question of whether the present action is derivative or direct, and the significance of the distinction, petitioners have urged that the complaint asserts a derivative claim and that such claims may not be asserted under the proxy rules, citing Howard v. Furst, 238 F. 2d 790 (C.A. 2). Respondent takes the position that the complaint asserts a direct, rather than derivative, claim -- a position which, if adopted by the Court, could very well lead to a dismissal of the writ of certiorari as improvidently granted. The Commission, on the other hand, has argued in its brief that it does not matter whether the action be regarded as direct or derivative in the context of the proxy rules.

Substantial argument by the parties is devoted to the Commission's functions under the proxy rules and the relationship of private suits to the Commission's enforcement activities. While we have attempted to clarify these areas in our brief, we could not have anticipated all possible questions which could arise in these areas. Particularly here, we feel that the parties would be unqualified to provide any necessary enlightment to the Court during oral argument.

So far as I am aware, there have been no cases in the Supreme Court involving the construction of the Federal securities laws, where the Commission has filed a brief, amicus curiae, on the merits but has not participated in oral argument. In view of this precedent, and the importance of this case, I believe we should likewise participate in it.

I have attempted to outline several areas in which we believe that the Commission's views could be helpful to the Court during oral argument. Certainly, neither I nor anyone else can foresee whether the Court will in fact be concerned with these areas. It would seem, however, that the Court should at least be given the opportunity to decide whether it wishes to set aside some time to hear the Commission's views in this case and I strongly urge that an appropriate application be filed.

Very truly yours,

William L. Cary
Chairman

WLC/PALJr/DF/MJ:cs:el