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A history filled with terror, violence, and arbitrariness has tainted the regard that Anglo-American jurisprudence gives to the inquisitorial system, upon which the terrifying image of Torquemada, Grand Inquisitor of Spain, has left its mark. Our memory of many such inquisitions contains historical episodes of biased examiners who elicited "the truth" of religious doctrinal inertia, leading to witch-burnings and stunting the growth of science. Our conscience retrieves these recurring themes in literature and the media.

We hope, then, that in our modern democratic societies, we have left the old practices in the past. We no longer condone the secret hearings, the confessions and testimony extracted by torture, and the public burning of convicts and people found to be witches at the stake. Despite the discard of these harsh practices, the inquisition as a style of eliciting the truth has retained its dark images. Society attaches to the word "inquisition" connotations of witch hunts designed to discover the rampant work of Satan in early Salem, Massachusetts, and connotations of McCarthyism with its goal of uncovering the work of communists in our midst.

So deeply imbedded in our psyche are the negative connotations of inquisition that the view appears in our jurisprudence. Courts will often term disapproved methods of inquiry as "Inquisitorial," when they mean to condemn violations of due process, "manifestly unjust methods," and coercive questioning. In other contexts, however, the word does not vitiate such concerns. "Inquisitorial" is not a negative when used in comparison to "adversarial." In other words, the courts do not view the inquisitorial style of fact-finding as per se unconstitutional, so long as such a hearing meets basic requirements of due process.

In fact, we have many inquisitorial proceedings in our system today, such as arbitrators, coroners' inquests, summary courts material, Congressional hearings many administrative hearings, and institutional hearings such as those held by universities. This Abstract and the Article which will follow focus on the Ohio Unemployment Compensation Board of Review as an example

of an inquisitorial proceeding. We would not immediately dismiss these hearings as barbaric tools of terror.

The Unemployment Compensation Board of Review shares common factors with inquisitorial hearings. The directions of the hearings vis-a-vis questioning of witnesses, is controlled by the hearing officer rather than by the parties. The issues already are defined by statute rather than by the pleadings. Statutes provide the Board of Review with investigative authority. There is no burden of proof. The Board of Review has its own rules, but it is not bound by strict rules of civil procedure or by standard rules of evidence. There is no jury.

Although Unemployment Compensation appeals *are* administrative hearings, the special circumstances of the large numbers of hearings that the system must bear will differentiate them. When an administrative system need only conduct relatively few hearings, *e.g.*, the Public Utilities Commission, it may devote more resources to the inquest. The hearing examiner may apply rules of procedure and evidence. Parties may have representation by counsel and procure discovery. Such hearings are more adversarial and begin to resemble traditional court proceedings. When the administrative system is burdened by a heavy volume of hearings, however, the process becomes more inquisitorial, driven by the constraints of time and scarce resources. Ohio's hearing officers last year heard 20,419 appeals, which typically lasted no more than forty-five minutes each.

Yet, the inquisitorial structure still has redeeming values. Its evident durability, growing from the Justinian Code of Roman Law, has become the basis for the legal systems of Continental Europe and Latin America. The especially well-developed European inquisition has brought meticulous investigatory methods, careful scrutiny of testimony, strict standards of evidence and investigation, and magistrates who control the detailed investigatory procedures throughout the entire hearing.

American courts have indicated that inquisitorial procedures are not in themselves unconstitutional of unfair, so long as they meet due process requirements. The question, then, is how to define due process. Traditional methods of defining the term include a right to cross-examine witnesses and a right to adequate counsel. This definition does not apply to an administrative hearing, however, because the definers have assumed an adversarial system. The intent of the right to cross-examination in an adversarial system is to ensure that opposing

sides have the opportunity to elicit the truth from what is presented to the record. In an examination, it is possible that neither side has representation competent enough to make an effective cross-examination of the evidence. In such a case, the hearing officer must take the place of the counsel in examining the evidence. The officer's dilemma is maintaining impartiality, while making an effective examination. Without this impartiality, the procedure is in danger of being a sham.

The Unemployment Compensation Board of Review maintains an informal proceeding. A recent survey indicated that parties had representation by counsel in only twenty-six percent of cases. This informality presents a challenge to a system that needs to ensure due process. A trial judge is bound by rules of evidence and procedure, whereas a hearing officer is not. The hearing officer is bound only by discretion, and therein lies a danger of arbitrariness.

The Supreme Court has analyzed the question of due process in several approaches. In *Goldberg v. Kelly*,[1] the Court describes minimal procedural safeguards: the opportunity to be heard at a meaningful time and manner, timely and adequate notice, oral presentation of evidence and argument, well stated reasons for decisions based upon the record, and an impartial decision maker. The Court in *Mathews v. Eldridge*[2] adopted a balancing test, balancing the affected private interests, the government interests, and the risk of erroneous deprivation of private interests against the probable value of substitute procedural safeguards.

The requirement of due process remains critical in both the adversarial and the inquisitorial systems, but the methods of achieving it differ. In an examination, where the parties might not have adequate representation, a hearing officer, unlike a judge presiding over an adversarial process, has a duty to conduct the hearing in the manner that counsel would have used. The hearing officer has the duty to delineate the issues, to present factual contentions in an orderly manner, to conduct effective interrogation of witnesses, and to safeguard the rights of the parties. The failure to recognize this distinction between a traditional trial proceeding and an examination limits the hearing officer to following the example of the adversarial trial court, which has been the bias of our jurisprudence. In order

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1. 397 U.S. 254 (1970).
2. 424 U.S. 319 (1976).

to insure the legitimacy of the administrative hearing, we should conduct first class examination rather than second class trials.