DUE PROCESS IN QUASI-JUDICIAL ADMINISTRATIVE HEARINGS: CONFINING THE EXAMINER TO ONE HAT

> [A] fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge.[1]

While sifting through the day's mail, a stockbroker may come across an envelope bearing the insignia of the New Jersey Bureau of Securities.[2] Upon opening it, he discovers that he has been subpoenaed by the Bureau Chief for the purpose of interrogation and investigation.[3]

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1 NLRB v. Phelps, 136 F.2d 562, 563 (5th Cir. 1943).

2 The Bureau of Securities implements the Uniform Securities Law in New Jersey. In addition to New Jersey, fifteen other states as well as the territory of Puerto Rico have adopted it. They include: ALA. CODE tit. 53, §§ 28 *et seq.* (Supp. 1960); ALASKA STAT. §§ 45.55.010 *et seq.* (1962); ARK. STAT. ANN. §§ 67-1240 *et seq.* (1966); HAWAII REV. LAWS §§ 485-1 *et seq.* (1968) (does not contain an investigation provision); KAN. STAT. ANN. §§ 17-1252 *et seq.* (1964); LA. REV. STAT. §§ 51.701 *et seq.* (1965) (does not contain an investigation provision); MD. ANN. CODE art. 32A, §§ 13 *et seq.* (Supp. 1957); MICH. COMP. LAWS §§ 451.501 *et seq.* (Supp. 1956); MO. REV. STAT. §§ 409.101 *et seq.* (Supp. 1952); OKLA. STAT. tit. 71, §§ 1 *et seq.* (1965); P.R. LAWS ANN. tit. 10, §§ 851 *et seq.* (Supp. 1963); S.C. CODE ANN. §§ 62-1 *et seq.* (Supp. 1962); UTAH CODE ANN. §§ 61-1-1 *et seq.* (1968) (empowering the commission as a whole to investigate and adjudicate); WASH. REV. CODE §§ 21.20.005 *et seq.* (1961); WIS. STAT. §§ 551.01 *et seq.* (1957); WYO. STAT. ANN. §§ 17-117.1 *et seq.* (1965).

3 The Chief of the Bureau of Securities has discretion to investigate and subpoena witnesses pursuant to N.J. STAT. ANN. § 49:3-68 (1970), which provides:

> (a) The *bureau chief* in *his* discretion (1) may make such private investigations within or outside of this State as *he* deems necessary to determine whether any person has violated or is about to violate any provision of this law or any rule or order hereunder, or to aid in the enforcement of this law or in the prescribing of rules and forms hereunder, (2) may require or permit any person to file a statement in writing, under oath or otherwise as the bureau chief determines, as to all the facts and circumstances concerning the matter to be investigated, and (3) may publish information concerning any violation of this act or any rule or order hereunder, provided that there shall be no publication until such rule or order becomes effective;
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> (b) For the purpose of any investigation or proceeding under this law, the bureau chief or any officer designated by him may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, correspondence, memoranda, agreements or other documents or records which the bureau chief deems relevant or material to the inquiry;
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> (c) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Superior Court, upon application by the bureau chief, may issue to the person an order requiring him to appear before the bureau chief, or the officer designated by him, there to produce documentary evidence if so ordered or to give evidence touching the matter under investigation or in question. The court may grant injunctive relief restraining the issuance, sale or offer for sale, purchase or offer to purchase, promotion, negotiation, advertisement or distribution from or within this State of any securities by a person, or agent, employee,

On the scheduled day the broker presents himself before the Chief, and is informed that he is under investigation for possible violations of New Jersey's Blue Sky laws.[4] The Chief then initiates the investigation by questioning the stockbroker in an effort to determine whether there is any substance to the suspicions. Upon completion the broker is advised that he will be notified of any further action.

Some time later the stockbroker may again be confronted with the now ominous emblem of the Bureau of Securities. A removal of the contents of the envelope reveals numerous preliminary findings of facts, the fruit of the Bureau Chief's investigations, and a Proposed Order, signed by the Chief, revoking his broker-dealer registration.[5] Unsure

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broker, partner, officer, director or stockholder thereof, until such person has fully complied with such subpoena and the bureau has completed its investigation. The court may proceed in the action in a summary manner or otherwise;

(d) No person is excused from attending and testifying or from producing any document or record before the bureau or in obedience to the subpoena of the bureau chief or any officer designated by him, or in any proceeding instituted by the bureau, on the ground that the testimony or evidence (documentary or otherwise) required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after claiming his privilege against self-incrimination, to testify or produce evidence (documentary or otherwise), except that the individual testifying is not exempt from prosecution and punishment for perjury, false swearing or contempt committed in testifying.

(e) When it shall appear to the bureau chief that the testimony of any person is essential to an investigation instituted by him as provided by this chapter, and that the failure of such person to appear and testify may defeat the proper and effective conduct thereof, the bureau chief, in addition to the other remedies provided for herein, may, by petition verified generally, setting forth the facts, apply to the Superior Court for a writ of ne exeat against such person. The court shall thereupon direct the issuance of the writ against such person requiring him to give sufficient bail conditioned to insure his appearance before the bureau chief for examination under oath in such investigation and that he will continue his appearance therein from time to time until the completion of the investigation and will appear before the court if the bureau chief shall institute any proceeding therein as a result of his investigation.

The court shall cause to be indorsed on the writ of ne exeat, in words at length, a suitable amount of bail upon which the person named in the writ shall be freed, having a due regard to the nature of the case and the value of the securities involved. All applications to be freed on bail shall be on notice to the bureau chief and the sufficiency of the bail given on the writ shall be approved by the court. All recognizances shall be to the State and all forfeitures thereof shall be declared by the court. The proceeds of the forfeitures shall be paid into the State treasury. (emphasis added).

[4] N.J. STAT. ANN. §§ 49:3-47 *et seq.* (1970).

[5] When the Bureau Chief completes his investigation he plays the role of a grand jury by making preliminary findings of facts. As prosecutor, he issues a Proposed Order of Revocation pursuant to N.J. STAT. ANN. § 49:3-58(c)(2) (1970), which provides:

(2) When the *bureau chief* finds that a registration should be suspended or revoked *he* may enter a proposed order to suspend or revoke such registration and *he* shall promptly notify the registrant, as well as the employer if the registrant is an agent, of the proposed order, of the reasons therefor and that the

of the exact import of this latest communication, but totally cognizant of the consequences attendant to a revocation of his registration, the broker, through his attorney, requests a hearing before the Bureau.[6]

On the hearing day, an inquiry as to the examiner's identity discloses that the Chief will serve as judge.[7] Objections that it is unfair for the same person who has investigated and prosecuted a case to also act as judge go for naught. The Bureau Chief may agree with the broker, but, notwithstanding, he can refuse to disqualify himself since he is permitted by New Jersey law to exercise these functions.

Convinced that those sections of the Uniform Securities Law[8] which sanction such seemingly incompatible roles are unconstitutional, the stockbroker may decide to challenge it. He reasons that such a situation works an obvious injustice on many persons. For example, it places an unnecessary and unfair temptation before the Bureau Chief to determine that his investigation was successful. More importantly, it subjects the broker to a hearing before a possibly predisposed tribunal, apparently contravening a basic right secured by the fourteenth amendment to the United States Constitution.

The stockbroker in this hypothetical situation is entitled to the rudimentary requirements of due process and fair play since he is involved in an administrative hearing of a quasi-judicial nature.[9] One

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matter will be set down for hearing if a written request for such hearing is filed with the bureau chief within 10 days after receipt of such notice by the registrant. If no hearing is requested within the specified time the *bureau chief* shall enter the proposed order as a final order, which shall be effective when entered. If a hearing is held the bureau chief shall withdraw the proposed order or enter a final order in accord with the findings at the hearing, which order shall be effective when entered. (emphasis added).

[6] By statute, all parties in a contested case are entitled to a hearing after reasonable notice. *See* N.J. STAT. ANN. § 52:14B-9 (1970).

[7] N.J. STAT. ANN. § 49:3-58(a) (1970) provides in part:

(a) The *bureau chief* may by order deny, suspend, or revoke any registration if *he* finds (1) that the order is in the public interest and (2) that the applicant or registrant or, in the case of a broker-dealer or investment advisor, any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment advisor . . . . (emphasis added).

See Higgins v. New Jersey Bureau of Sec., 100 N.J. Super. 266, 241 A.2d 660 (App. Div. 1968), where the Bureau Chief acted as investigator, prosecutor and judge.

[8] The Uniform Securities Law was drafted in 1956 after two years of intensive study. Its principal architects were Professor Louis Loss of the Harvard Law School and Edward M. Cowett. *See* 9C UNIFORM LAWS ANN. 84 (1957). It was adopted in New Jersey in 1967; *see* N.J. STAT. ANN. §§ 49:3-47 *et seq.* (1970).

[9] Morgan v. United States, 304 U.S. 1, 14-15 (1938):

[I]n administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand "a fair and open hearing,"—essential alike to the legal valid-

of the most fundamental of all due process guarantees is a fair trial conducted by an impartial tribunal. This right is so deeply engrained in our jurisprudence that even where a mere "probability of unfairness" exists, due process is denied.[10]

Although the Uniform Securities Law provides the classic example, it is merely part of an overall administrative due process problem in New Jersey, since this state's case law sanctions such a merger of functions and its Administrative Procedure Act fails to prohibit it.

NEW JERSEY'S POSITION

In an early case,[11] three members of an investigative committee were permitted to sit as part of a tribunal deciding the very case they had investigated. The court reasoned that in the absence of a personal interest there could be no disqualification. But some years later it was held that a liquor license could not be revoked by a tribunal which included members who had served as witnesses for the agency in that case.[12] Apparently, fundamental fairness is breached only when the investigator-prosecutor-judge attempts to assume the additional role of witness.

In *New Jersey State Board of Optometrists v. Nemitz*,[13] defendant's license was revoked by the Board of Optometrists. One member of the hearing tribunal had caused the investigation to be made, procured the investigator, and provided funds for it. On appeal, the court held that the defendant was denied a fair hearing.[14] It predicated its decision

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ity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process.

Accord, Juzek v. Hackensack Water Co., 48 N.J. 302, 314, 225 A.2d 335, 341 (1966); Mazza v. Cavicchia, 15 N.J. 498, 516, 105 A.2d 545, 555 (1954).

10 *In re* Murchison, 349 U.S. 133, 136 (1955) (held to be a denial of due process for the same judge who had ordered defendant to appear in court to show cause why he should not be punished for criminal contempt, to then preside at the contempt trial); *accord*, Offutt v. United States, 348 U.S. 11, 14 (1954); Tumey v. Ohio, 273 U.S. 510, 532 (1927); Van Sweringen v. Van Sweringen, 22 N.J. 440, 126 A.2d 334 (1956).

11 Reimer v. Freeholders of Essex, 96 N.J.L. 371, 115 A. 385 (Sup. Ct. 1921), *aff'd*, 97 N.J.L. 575, 117 A. 926 (Ct. Err. & App. 1922).

12 Drozdowski v. Sayreville, 133 N.J.L. 536, 45 A.2d 313 (Sup. Ct. 1946).

13 21 N.J. Super. 18, 90 A.2d 740 (App. Div. 1952).

14 The *Nemitz* court demonstrated its awareness of the basic problem of many administrative agencies, *viz.*, that the functions of investigation, prosecution and adjudication are within their general powers. It said:

[W]here the investigation, prosecution and judicial functions repose in the same board, its members must be zealous in the recognition and preservation of the

upon the intense personal interest manifested by that member toward the defendant's activities. Nevertheless, the court, albeit by dictum, noted the danger of potentially prejudiced tribunals resulting from the repose of investigatory, prosecutorial and adjudicatory powers within a single administrative agency. A fortiori, the merging of functions within a single person would seem to exacerbate this risk.

In *Mackler v. Board of Education of City of Camden,*[15] this precise issue arose. The Board appointed a committee composed of three of its members to investigate the plaintiff. An investigation was conducted and, when completed, formal charges were filed by two members of the three-man investigatory commission. The court refused to disqualify these men from sitting as judges in the case. Distinguishing *Nemitz,* it differentiated between complaints made where there was a showing of personal interest from those made as a mere "formality of office."[16] In short, the court concluded that absent a showing of personal interest, prior contacts as investigator and prosecutor are not sufficient grounds for barring participation as judge.

In the sphere of decisional law it is now firmly established that

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right to hearing by impartial triers of the facts and the courts must impose a most careful supervision of that element of the hearing.

21 N.J. Super. at 37, 90 A.2d at 750.

Generally, if a judge or hearing examiner has a focused bias in advance of the hearing he will be disqualified. For a general discussion of this proposition, *see* Tumey v. Ohio, 273 U.S. 510 (1927); Eisler v. United States, 170 F.2d 273 (D.C. Cir. 1948); Berkshire Employees Ass'n v. NLRB, 121 F.2d 235 (3d Cir. 1941); Johnson v. Michigan Milk Mktg. Bd., 295 Mich. 644, 295 N.W. 346 (1940); Comment, *Disqualification of Administrative Officials for Bias,* 13 VAND. L. REV. 712 (1960). *See generally* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 12.01 *et seq.* (1958).

15 16 N.J. 362, 108 A.2d 854 (1954).

16 The court said:

The making of a complaint does not disqualify a board member where its making is a formality of office and no personal interest is shown.

Id. at 367-68, 108 A.2d at 856-57.

See Kramer v. Board of Adjust., 45 N.J. 268, 212 A.2d 153 (1965) (holding certain members of the Board of Adjustment not to be disqualified even though they indorsed the mayor's support for a zoning variance which they were to decide upon); Hoek v. Board of Educ., 75 N.J. Super. 182, 182 A.2d 577 (App. Div.), *cert. denied,* 38 N.J. 497, 185 A.2d 869 (1962) (where the court found personal ill will as a ground for disqualification, but saw nothing improper with the prior investigation and subsequent filing of charges by the board member); Connelly v. Jersey City Housing Auth., 63 N.J. Super. 424, 164 A.2d 806 (App. Div. 1960) (discussing the functioning of commissioners under the Veterans Tenure Act as judge, jury and witness, the court noted the patent danger in such situations, but concluded that the Legislature allowed for no alternative); Robertson v. Newcomb, 27 N.J. Super. 314, 99 A.2d 361 (App. Div. 1953) (where defendant charged plaintiff with incompetency and discrimination and then sat as judge in the hearing on the charges, the court dismissed the complaint on other grounds). *See also In re* Larsen, 17 N.J. Super. 564, 574, 86 A.2d 430, 435 (App. Div. 1952) (concurring opinion).

an administrative determination must be based exclusively on the record as adduced at the hearing.[17] As the supreme court in *Mazza v. Cavicchia* stated:

> In any proceeding that is judicial in nature, whether in a court or in an administrative agency, the process of decision must be governed by the basic principle of the exclusiveness of the record. "Where a hearing is prescribed by statute, nothing must be taken into account by the administrative tribunal in arriving at its determination that has not been introduced in some manner into the record of the hearing." . . . Unless this principle is observed, the right to a hearing itself becomes meaningless. Of what real worth is the right to present evidence and to argue its significance at a formal hearing, if the one who decides the case may stray at will from the record in reaching his decision?[18]

Although this decision was not made with a view to the procedures discussed herein, it nevertheless has application. Even if a hearing examiner discloses for the record the investigations he has made and the conclusions derived, a complete disclosure is virtually unachievable. In the first place, it is doubtful whether all the facts and conclusions gleaned from his investigation can be recalled with exactness. Second, the impossibility of recognizing the influences on his subconscious precludes their incorporation into the record.

Juxtaposing *Mazza* with the preceding cases highlights an apparent philosophical inconsistency—the spirit of fairness so evident in *Mazza* is curiously absent from the others.

Some New Jersey administrative agencies have striven to avoid the merger of functions. The Division of Professional Boards, for example, maintains a separate Bureau of Inspectors which conducts most of the investigations for the professional agencies, thus insulating the hearing examiner from that phase of the case.[19]

Concern for this problem is also evidenced by the legislative history of New Jersey's present Administrative Procedure Act.[20] Between 1948

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17 Mazza v. Cavicchia, 15 N.J. 498, 105 A.2d 545 (1954). The majority opinion in *Mazza* is critically discussed in 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 11.09 (1958), and, by the same author, in *New Jersey's Unique Conception of "Fair Play" in the Administrative Process*, 10 RUTGERS L. REV. 660 (1956). *See also* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 1063-73 (4th ed. 1960).

18 15 N.J. 498, 514, 105 A.2d 545, 554 (1954).

19 Author's interview with Herman C. Litwack, Secretary-Director of the State Board of Architects, and with Stephen F. Bonora, Chief Inspector of the Bureau of Inspectors, on November 18, 1970. *See also* N.J. Pharmaceutical Ass'n v. Furman, 33 N.J. 121, 162 A.2d 839 (1960).

20 N.J. STAT. ANN. §§ 52:14B-1 *et seq.* (1970). Unfortunately, while predecessors of

and 1961 comprehensive administrative procedure acts were proposed in the New Jersey Legislature. The first of these proposals would have established a new procedure for governing the judicial functions of administrative agencies.[21] The hearing and initial decision of all contested cases would have been taken from the agencies themselves and reposed in a body of independent hearing commissioners assigned to them, as needed, by the president of the Civil Service Commission.

This proposal met resistance at the public hearing on the bill. Opponents contended that it placed an undue amount of discretion in the president of the Commission and, furthermore, that it would be ludicrous to assign hearings to laymen not specially qualified in the area.[22] Nevertheless, even foes of the bill recognized the justified resentment against administrative procedures which permitted the same person in the same case to act as investigator, prosecutor and judge. As one opponent stated:

> Admittedly, the resentment against the administrative agency procedure, whereby investigator, prosecutor and judge may be the same person . . . is to [*sic*] widespread that, regardless of the merits in certain instances of such a setup, there should be a change at least with respect to the enforcement agencies . . . .[23]

As a result of the public hearing, a committee substitute to the bill was introduced, which attempted to satisfy the criticism that hearing commissioners must be experts. No hearing, however, was held on the substitute and it died in the Senate. In 1952, a similar bill was introduced, but it too met the same fate.[24]

In 1954, an administrative procedure act was prepared by a Special Committee on Administrative Law for the New Jersey State Bar Association. The Committee was composed of experts in the field who wrote and reviewed their draft with exhaustive thoroughness. The fruit of their labor contained a provision prohibiting the very procedure permitted by New Jersey case law and sanctioned by the Uniform Securities Law. Section 20 of the proposed act provided:

> *No person shall be designated a hearer who was engaged in investigative or prosecuting functions for the agency in the particular*

this Act proscribed the alliance of investigator, prosecutor and judge, the current Act does not.

21 N.J. Senate Bill 21, § 31 (1948).

22 *Public Hearing On Senate Bill No. 21* (1948).

23 *Id.* at 34.

24 N.J. Senate Bill 48 (1952).

> *matter being heard.* The function of all such presiding officers shall be conducted in an impartial manner.[25]

It is highly significant that this committee of specialists, in discarding the establishment of an independent body of hearers suggested in the 1948 and 1952 bills, nevertheless retained the concept of divorcing the investigative and prosecutorial aspects of a case from the decisional phase.

This proposed act was viewed as an effort to unify the procedure and practice before all agencies as well as adopt "a set of minimum standards of fair procedure below which no agency may fall."[26] Introduced as a bill in 1955, this proposal died in judicial committee.[27]

A prominent reason for the present Act's failure to adopt the same or similar provision suggested by its predecessors was the concern among various state agencies that such a provision would not only restrict their powers, but also require a reorganization of their structures.[28] Such reasoning, however, has not impeded courts in the past where the due process rights of a licensee were in jeopardy.[29] No one has attacked the logic inherent in preventing the same person who has investigated and prosecuted a case from serving as judge in it. Indeed, the salutary features of such a procedure have been recognized by many legislators and experts; the same provision regarding the separation of investigative and prosecutorial functions from those of adjudication may be found in all administrative procedure acts introduced in New Jersey between 1955 and 1961.[30]

The View of Other Jurisdictions

Other jurisdictions have provided for various agency structures designed to avoid the results sanctioned in New Jersey.

Consistent with its reputation as a progressive jurisdiction, California has implemented an enlightened approach to administrative quasi-judicial hearings.[31] Its Administrative Procedure Act provides for

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25 77 N.J.L.J. 413, 418 (1954) (emphasis added).

26 *Id.* at 413.

27 N.J. Senate Bill 277 (1955).

28 89 N.J.L.J. 714 (1966).

29 *See* Mazza v. Cavicchia, 15 N.J. 498, 105 A.2d 545 (1954).

30 N.J. Senate Bill 42 (1956); N.J. Assembly Bill 515 (1957); N.J. Assembly Bill 338 (1958); N.J. Senate Bill 34 (1958); N.J. Assembly Bill 240 (1959); N.J. Assembly Bill 176 (1960); and N.J. Assembly Bill 144 (1961).

31 Cal. Gov't Code § 11502 (1966):

> All hearings of state agencies required to be conducted under this chapter shall

an independent body of hearing examiners, thus assuring the fairness of the hearing by separating the investigatory and accusatory aspects of a case from its adjudication.[32] This procedure evidences an overall consciousness that administrative hearings must comply with the requirements of procedural due process; that to meet this requirement the adjudicatory tribunal must be impartial; and that to assure this impartiality it is imperative that the hearer play no part in either the investigation or prosecution of a case in which he intends to act as judge.[33]

Other jurisdictions also prohibit any person from taking part in the decision of a case which he has investigated or prosecuted. A recent Pennsylvania case disqualified an individual from a commission reviewing an agency decision where that person had instituted the action by his complaint.[34] A somewhat earlier Connecticut decision reached a similar conclusion, prohibiting two members of an adjudicatory tribunal from functioning as judges in the same case they had investigated.[35] Both courts believed that the mere fact no actual bias on the part of the examiner had been shown was immaterial. As the Connecticut court stated:

> Such investigation might well lead them to approach the hearing with a preconceived idea of the guilt or innocence of the accused. [The accused] would, very likely, be placed in the position of having to overcome, by evidence he might produce, this idea.[36]

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be conducted by hearing officers on the staff of the Office of Administrative Procedure. The presiding officer of the Office of Administrative Procedure has power to appoint a staff of hearing officers for the office as provided in Section 11370.3 of the Government Code. Each hearing officer shall have been admitted to practice law in this State for at least five years immediately preceding his appointment and shall possess any additional qualifications established by the State Personnel Board for the particular class of position involved.

32 Kuchman, *The Role of the Hearing Officer*, 44 CALIF. L. REV. 212, 213 (1956). This article criticizes California's approach; it recognizes the salutary features of the statute, but questions its application in California.

33 *See also* Nevada's Administrative Procedure Act, NEV. REV. STAT. § 233B.122 (1967), which provides:

> No agency member who acts as an investigator or prosecutor in any contested case may take any part in the adjudication of such case.

See generally Lakusta, *Operations in an Agency Not Subject to the APA: Public Utilities Commission*, 44 CALIF. L. REV. 218 (1956). This article traces the history of California's Administrative Procedure Act. It notes that California has a body of full-time hearing examiners and reviews their qualifications and compensation, the method of their assignment, the conduct of the hearing, and the decisional process.

34 Gardner v. Repasky, 434 Pa. 126, 252 A.2d 704 (1969).

35 Reardon v. Dental Comm'n, 128 Conn. 116, 20 A.2d 622 (1941).

36 *Id.* at 119, 20 A.2d at 623-24. *Accord*, Nider v. Homan, 89 P.2d 136 (Cal. Dist. Ct. App. 1939) (a commissioner who filed charges against a physician was disqualified from

THE PRACTICE ON THE FEDERAL LEVEL

Federal Administrative Procedure Act and Federal Case Law

The defects of New Jersey's judicial position and its Securities Law are glaringly illustrated when compared with the Federal Administrative Procedure Act[37] and federal case law.

The Federal Administrative Procedure Act provides for what is termed an "internal separation of functions". The investigation, prosecution and adjudication of a case are carried on under the auspices of a particular agency, but within that agency investigation and prosecution are kept separate from adjudication. The Act provides:

> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review . . . , except as witness or counsel in public proceedings.[38]

The disuniting of roles was designed to prevent the "ominous spectre of judge-jury-prosecutor, rolled into one,"[39] thereby assuring an impartial hearing in accord with the traditions of Anglo-American jurisprudence.[40] The legislative intent is unmistakably clear in the following language:

> [T]hose persons who engage in the activities of investigation or

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sitting as a member of the commission designated to try the charges); Sandahl v. City of Des Moines, 227 Iowa 1310, 290 N.W. 697 (1940) (holding that a municipal civil service employee was denied a fair and impartial tribunal where some of its members had investigated and filed charges against him); People *ex rel.* Miller v. Elmdorf, 51 App. Div. 173, 64 N.Y.S. 775 (1900) (reinstating a policeman due to an unfair hearing resulting from the mayor's role of investigator, prosecutor and judge); Hanna v. Board of Aldermen, 54 R.I. 392, 173 A. 358 (1934) (in a proceeding to remove the chief of police for dereliction of duty, those members of the board of aldermen who had preferred the charges were disqualified from acting as triers at the hearing); State *ex rel.* Ball v. McPhee, 6 Wis. 2d 190, 94 N.W.2d 711 (1959) (characterizing as highly improper the conduct of the hearing tribunal member who served as counsel for the complainant). *Compare* State *ex rel.* Ging v. Board of Educ., 213 Minn. 550, 7 N.W.2d 544 (1942). *Contra,* Griggs v. Board of Trustees, 61 Cal. 2d 93, 389 P.2d 722, 37 Cal. Rptr. 194 (1964); State *ex rel.* Yuhas v. Board of Med. Exam., 135 Mont. 381, 339 P.2d 981 (1959); Seidenberg v. New Mexico Bd. of Med. Exam., 80 N.M. 135, 452 P.2d 469 (1969).

37 5 U.S.C. §§ 500 *et seq.* (Supp. III, 1967).

38 5 U.S.C. § 554(d)(2) (Supp. III, 1967); *see* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 13.06 (1958); W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 944 (4th ed. 1960).

39 Brown, *The Office of Administrative Hearings,* 29 CORNELL L.Q. 461, 462 (1944); *cf. Report of the Special Committee on Administrative Law,* 59 A.B.A. REP. 539 (1934).

40 Smith, *Improving the Administration of Justice in Administrative Processes,* 30 A.B.A.J. 127 (1944). *See also* N. VOGEL, ADMINISTRATIVE AGENCIES IN NEW JERSEY 75-76 (1941).

> advocacy should be segregated from those who engage in the activity of judging . . . .[41]

Attempts by federal agencies to empower a single individual with these various functions have been held to deny due process.[42] The leading case of *Amos Treat & Co. v. SEC*[43] involved the revocation of a broker-dealer's securities license, a penalty which could be imposed under the New Jersey Securities Law.[44] Nevertheless, the decision reached in *Amos Treat* is hostile to the practice legitimated by the Uniform Securities Law.

In *Amos Treat*, the SEC had commenced a public hearing to determine whether the plaintiff's broker-dealer registration should be revoked. The investigation had been carried on by the Division of Corporate Finance, headed by Manuel F. Cohen. When Cohen attempted to participate as judge in the revocation proceedings, the firm sought to disqualify him. The court agreed with those efforts, finding a denial of due process:

> We are unable to accept the view that a member of an investigative or prosecuting staff may initiate an investigation, weigh its results, perhaps then recommend the filing of charges, and thereafter become a member of that commission or agency, participate in adjudicatory proceedings, join in commission or agency rulings and ultimately pass upon the possible amenability of the respondents to the administrative orders of the commission or agency. So to hold, in our view, would be tantamount to that denial of adminis-

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41 Feller, *Administrative Law Investigation Comes of Age*, 41 COLUM. L. REV. 589, 600-01 (1941); *accord*, *The Final Report of the Attorney General's Committee on Administrative Procedure*, 41 COLUM. L. REV. 585 (1941); U.S. CODE CONG. & AD. NEWS 1195 (1946):

> [T]he same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. *Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the Commission, in the role of prosecutor, presented to itself.* (emphasis added).

42 Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583, 589-92 (D.C. Cir. 1970); San Francisco Mining Exch. v. SEC, 378 F.2d 162, 170 (9th Cir. 1967); R.A. Holman & Co. v. SEC, 366 F.2d 446 (2d Cir. 1966), *cert. denied*, 389 U.S. 991 (1967); American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966); Citta v. Delaware Valley Hosp., 313 F. Supp. 301, 311 (E.D. Pa. 1970); Taylor v. New York City Transit Auth., 309 F. Supp. 785, 788 (E.D.N.Y. 1970); Mack v. Florida State Bd. of Dentistry, 296 F. Supp. 1259, 1263 (S.D. Fla. 1969), *modified*, 430 F.2d 862 (5th Cir. 1970), all of which recognize that the minimum standards of due process dictate that no person who has investigated and prosecuted a case can take part in its adjudication because the legal rights and livelihood of the defendant are at stake. *See* Hannah v. Larche, 363 U.S. 420, 442 (1960).

43 306 F.2d 260 (D.C. Cir. 1962).

44 N.J. STAT. ANN. § 49:3-58 (1970).

> trative due process against which both the Congress and the courts have inveighed.[45]

In one instance, the right to be judged by a person other than an investigator has been held to be of greater value than the right to be represented by counsel. In *Wasson v. Trowbridge*,[46] the petitioner, along with a group of other cadets, had thrown a fellow student into Long Island Sound. At a disciplinary hearing scheduled to decide whether he should be expelled, some of the same persons who had investigated the charges attempted to act as judges. The court held that while due process did not require representation by counsel at such a hearing, it did require an impartial trier of the facts.

> It is too clear to require argument or citation that a fair hearing presupposes an impartial trier of fact and that prior official involvement in a case renders impartiality most difficult to maintain.[47]

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45 306 F.2d at 266-67; *see* Maremont Corp. v. FTC, 431 F.2d 124, 128 (7th Cir. 1970).

46 382 F.2d 807 (2d Cir. 1967).

47 *Id.* at 813; *accord*, Camero v. United States, 375 F.2d 777 (Ct. Cl. 1967); National Biscuit Co., 21 AD. L.2d 1021 (FTC 1967); Texaco, Inc. v. FTC, 336 F.2d 754, 764 (D.C. Cir.) (Washington, J., concurring in part and dissenting in part), *vacated and remanded*, 381 U.S. 739 (1965), where the court observed:

> A fair hearing is denied . . . [when] an adjudicator has taken a position apparently inconsistent with an ability to judge the facts fairly, subsequent protestations of open-mindedness on his part cannot restore a presumption of impartiality. Whether justice was in fact done is not the issue; an administrative hearing "must be attended, not only with every element of fairness but with the very appearance of complete fairness." We must presume that a fair hearing was denied if a disinterested observer would have reason to believe that the Commissioner had "in some measure adjudged the facts * * of a particular case in advance of hearing it."

For further discussion of the problem and its solution on the federal level, *see* Pangburn v. CAB, 311 F.2d 349 (1st Cir. 1962); Trans World Airlines v. CAB, 254 F.2d 90 (D.C. Cir. 1958); McBride v. Roland, 248 F. Supp. 459, 466 (S.D.N.Y.), *aff'd*, 369 F.2d 65 (2d Cir. 1966). *Contra*, Levers v. Berkshire, 159 F.2d 689, 693 (10th Cir. 1947); Converse v. Udall, 262 F. Supp. 583 (D. Ore. 1966). *Cf.* Phillips v. SEC, 153 F.2d 27, 32 (2d Cir.), *cert. denied*, 328 U.S. 860 (1946). A special exception to the general federal view is the policy followed in excluding or expelling aliens. In Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), the Supreme Court held that one person could not provide investigation for and preside over a deportation proceeding. Congress answered the Supreme Court with the McCarran-Walter Act, 8 U.S.C. §§ 1101 *et seq.* (1964), which, in effect, permits such merging of functions in exclusion and deportation proceedings. Finally, in Marcello v. Bonds, 349 U.S. 302 (1955), the Supreme Court held that an alien was not denied due process even though the hearing examiner was supervised and controlled by persons who had performed investigative and prosecutorial functions in that case. There was, however, a strong dissent by Justices Black and Frankfurter who emphasized the inherent due process problems. *See generally* Shaughnessy v. Accardi, 349 U.S. 280 (1955); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); United States *ex rel.* Catalano v. Shaughnessy, 197 F.2d 65 (2d Cir. 1952); Reynolds v. United States, 68 F.2d 346 (7th Cir.), *cert. denied*, 291 U.S. 679 (1934).

The preceding review of decisions, along with the Federal Administrative Procedure Act, clearly demonstrate a well-reasoned approach to a serious situation. The virtually unanimous condemnation of the merger of investigative, prosecutorial and adjudicatory functions in the same person renders New Jersey's position inscrutable as well as potentially unconstitutional.

Organization and Procedure of Some Federal Agencies

Persuasive precedent exists in the organization of and procedures established by some federal agencies since they do not attempt to combine in the same person the functions of investigator, prosecutor and judge. Organizational dividing lines of these agencies serve to illustrate this point.[48]

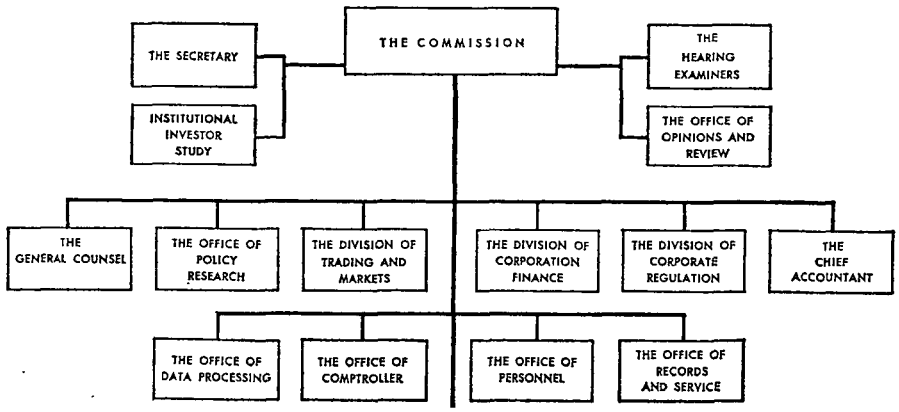
Because the Securities and Exchange Commission and the New Jersey Bureau of Securities regulate similar activities, they necessarily adjudicate similar controversies. Nevertheless, the SEC maintains a separate body of hearing examiners,[49] each of whom is appointed by the Commission and serves independently of the interested division or office. This structure assures an impartial tribunal and has been an effective safeguard of procedural due process which licensees at a quasi-judicial administrative hearing have a right to expect.[50]

The Federal Communications Commission also has a body of hearing examiners which is responsible for hearing all adjudicatory cases

48 W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 1018-19 (4th ed. 1960).

49 17 C.F.R. § 200.14 (1970).

50 SEC, THE WORK OF THE SECURITIES AND EXCHANGE COMMISSION 19 (1969). The following is an organization chart of the SEC. Note the separate body of Hearing Examiners:



"designated for any evidentiary adjudicatory hearing."[51] Their objectivity and impartiality are guaranteed, since any employee assigned to hear a case "shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency."[52]

The organization and procedure of other federal agencies exemplify the rigid adherence on the federal level to the principle of internal separation of functions.[53] Thus, the Federal Administrative Procedure Act and the internal structure of many federal agencies have obviated the likelihood that prejudicial commitments or prosecutorial zeal will ever conflict with adjudicatory responsibility.

SOLUTIONS AND CONCLUSION

While discussion has centered about New Jersey's statutory and case law which permit the merger of inconsistent functions in quasi-judicial proceedings, it should be noted that the Uniform Securities Law has also been adopted in fifteen other states.[54] Since some or all of these states can fall victim to the very evils existent in New Jersey, the solutions offered in this comment can be utilized by them.

For various reasons, some known and others unknowable, New Jersey has chosen to be less protective than other jurisdictions in delineating the due process rights of a licensee in a quasi-judicial proceeding. While allowing hearing examiners to become involved in any other aspects of a proceeding has been scorned at the federal level and by several states, absent a showing of personal interest New Jersey will tolerate it.

New Jersey's posture falls short of the minimum standards adhered to by other jurisdictions in a number of ways. Irrespective of the absence or presence of a personal interest, the preconceived ideas necessarily formed by an investigator's or prosecutor's prior contacts with a case must preclude him from subsequently taking any part in its adjudication. The overriding goal must not only be a just resolution of controversies, but also the maintenance of an appearance of justice in achieving that end.

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51 47 C.F.R. § 0.151 (1970).

52 47 U.S.C. § 155(d)(8) (Supp. 1970). *See also* the structure of the Federal Maritime Commission in the UNITED STATES GOVERNMENT ORGANIZATION MANUAL 1969-1970, at 615 (1970). In particular, note 46 C.F.R. §§ 502.145, 502.284 (1970), which establish a separation between investigation and adjudication.

53 *See* UNITED STATES GOVERNMENT ORGANIZATION MANUAL 1969-1970, at 590-634 (1970).

54 *See* note 2 *supra*.

The segregation of roles, moreover, would not only avert the type of situation inveighed against by the fundamental concept of due process, but would also adhere to the deeply engrained tradition of Anglo-American jurisprudence that "no man shall be a judge in his own case."[55]

Aside from the more obvious "probability of unfairness," there are some subtle exposures to injustice. Since appellate tribunals accord more deference to an administrative determination than the decision of a trial court, the likelihood that an aggrieved licensee would obtain judicial relief is remote.[56] Furthermore, the very informality of administrative hearings, coupled with the broad discretion vested in the hearing examiner, facilitates the imposition of a prejudicial decision.[57]

There are additional practical considerations. Abolishing the asserted infirmity at the hearing stage would remove a ground for judicial review, thus reducing the oppressive case load of our appellate courts. In addition, by maintaining an appearance of justice a basis for assailing our administrative agencies will be removed.

The fact that timeworn practices would have to be altered cannot be an adequate reason for depriving a person of his due process rights. Certainly the avoidance of a conscious or subconscious bias must prevail over speculative fears that the necessary reorganization will adversely affect efficient management of any agency.

There are a number of solutions to this problem. An Administrative Court, functioning similar to a Tax Court or Court of Claims, can be established. While this tribunal would be the forum for all quasi-judicial administrative proceedings, it would be independent of the agencies.[58] However, the creation of such an Administrative Court could impair the expertise of the judge, since he would exercise only adjudicatory responsibilities and would not possess the overall personal regulatory experience needed to fully comprehend the technical questions

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55 Bonham's Case, 77 Eng. Rep. 646, 652 (K.B. 1610).

56 Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); *accord*, NLRB v. James Thompson & Co., 208 F.2d 743 (2d Cir. 1953); Close v. Kordulak Bros., 44 N.J. 589, 598-99, 210 A.2d 753, 758 (1965); Mead Johnson & Co. v. South Plainfield, 95 N.J. Super. 455, 466, 231 A.2d 816, 821 (App. Div. 1967).

57 *See* N.J. STAT. ANN. § 52:14B-10 (1970); NLRB v. Phelps, 136 F.2d 562, 563 (5th Cir. 1943) (noting that administrative tribunals should be more impartial than judicial tribunals, since many safeguards have been removed from administrative quasi-judicial hearings).

58 Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960); *see* Fuchs, *The Hearing Officer Problem—Symptom and Symbol*, 40 CORNELL L.Q. 281 (1955).

before him, nor would he have "the benefit of the combined judgment and experience of the [administrative] staff."[59]

Another solution, the creation of a separate body of hearing examiners, has been adopted by California and was proposed in 1948 and 1952 in New Jersey.[60] The expertise problem, however, is equally compelling here. Moreover, since there are over three hundred agencies in New Jersey,[61] a large new office would be required to meet their adjudicatory responsibilities, causing an additional drain on the already overburdened state treasury.

The most viable solution is to provide for an internal separation of functions. This result could be achieved by means of a statute such as the following:

> No administrative agency member who acts as an investigator or prosecutor in a contested case may take any part in the decision making of that case.

Such a simple provision can be inserted as an amendment to the New Jersey Administrative Procedure Act. Or, the Director of the Division of Administrative Procedure can establish this provision as an essential to the conduct of hearings pursuant to the power vested in him by statute.[62] This solution does not fall prey to any of the pitfalls in the preceding alternatives. The expertise of the hearer will not be sacrificed, since he will be able to rely on his regulatory experience when adjudicating a case. That a new office will not be required avoids the fiscal problem.

Even though some agencies have seen fit to impose this separation upon themselves, others have not. Furthermore, agencies are bound neither by statute nor case law to adhere to such a segregation. Legislative fiat or judicial decision is therefore needed to formalize the practice followed by some New Jersey agencies while compelling others to adopt this new approach. The "probability of unfairness" arising from the merger of functions was recognized and removed by Congress in 1946.[63] Nevertheless, the Uniform Securities Law, New Jersey's case

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59 Cary, *Why I Oppose the Divorce of the Judicial Function from Federal Regulatory Agencies*, 51 A.B.A.J. 33, 37 (1965); *cf.* Nathanson, *Separation of Functions Within Federal Administrative Agencies*, 35 ILL. L. REV. 901 (1941); Kintner, *The Current Ordeal of the Administrative Process: In Reply to Mr. Hector*, 69 YALE L.J. 965 (1960); Smith, *Improving the Administration of Justice in Administrative Processes*, 30 A.B.A.J. 127 (1944).

60 *See* notes 21, 24, 31 *supra*.

61 Author's Communication with Melvin Mounts, New Jersey's Administrative Rules Analyst, November 18, 1970.

62 N.J. STAT. ANN. § 52:14B-6(e)(8) (1970).

63 *See* note 37 *supra*.

law[64] and its Administrative Procedure Act have failed to prohibit such inconsistent roles. So long as the "probability of unfairness" exists, due process is being denied.

The provisions of the Uniform Securities Law which sanction such unfair practices can be stricken or amended to remedy its deficiency. By amendment to the Administrative Procedure Act or appropriate action by the Director of the Division of Administrative Procedure, however, the "probability of unfairness" will be removed from the proceedings before *all* New Jersey administrative agencies. Only by confining the examiner to one hat will New Jersey possess an Administrative Procedure Act which can be truly hailed as a "great stride forward" in the field of administrative law.[65]

Ronald J. Riccio

64 As a precursor to reform, a recent unreported chancery decision, F.S. Donahue, Santo & Co. v. Krupsky, C-843-70 (N.J. Ch., Feb. 11, 1971), permanently enjoined the Chief of the New Jersey Bureau of Securities from hearing, deciding, or imposing a penalty in a case which he had investigated and prosecuted. While the court found that resolution of the controversy did not require a decision as to the constitutionality of the Uniform Securities Law, it strongly condemned agency practices which permit a hearing examiner to decide a case in which he has had prior contacts as an investigator or prosecutor. This is the first such decision in New Jersey and one would hope that the philosophy of fairness it espouses will be formalized either by legislative action or an appropriate rule promulgated by the Director of the Division of Administrative Procedure. No appeal has yet been filed.

65 Editorial, 92 N.J.L.J. 52 (1969), wherein the Administrative Procedure Act, absent the provision suggested in this comment, is hailed as a great stride forward.