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# Disqualification of Administrative Officials for Bias

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contract exists between the parties; and it would be changing horses in the middle of the stream to apply a restitutionary remedy.

*Third.*—This theory is in accord with the *Restatement.* It is true that section 90 does not provide for the means of enforcing the promise. However, this section appears under the chapter entitled "Formation of Informal Contracts" and under the topic designated as "Informal Contracts Without Assent or Consideration."[41] Informal contracts are defined as any contracts other than contracts under seal, recognizances, and negotiable instruments.[42] Thus it is clear that if the requirements of section 90 are satisfied, the *Restatement* requires the conclusion that a contract is in existence. This conclusion is buttressed by the fact that in that part of the *Restatement* dealing with damages there is no mention of a different rule governing this type of situation,[43] and by the fact that Professor Williston, the Reporter for the *Restatement of Contracts,* said that it was his intention that section 90 allow recovery as in any contract.[44]

### III. CONCLUSION

Thus it would seem that, on the basis of those cases already decided and because of the nature of the doctrine as defined by the courts or the *Restatement of Contracts,* in cases where a promise is held binding because of reasonable reliance by the promisee the proper measure of damages is the value of the promised performance to the promisee. Indeed, if a court defines such reliance as a species of consideration or a phrase of similar import, or if it purports to follow the *Restatement,* it would be logically inconsistent to treat the legal relation between the parties as a sort of second class contract, the "enforcement"[45] of which is obtained by a mere restoration of the *status quo.*

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## DISQUALIFICATION OF ADMINISTRATIVE OFFICIALS FOR BIAS

*For the same reason no man in any Cause ought to be received for Arbitrator, to whom greater profit, or honour, or pleasure apparently ariseth out of the victory of one party, than of the other: for hee*

41. It will be noticed that an inconsistency exists between the cases which define such action as a species of consideration and the *Restatement's* designation of these promises as contracts without consideration, but under either view a contract is created, thus justifying recovery on a contractual theory.
42. RESTATEMENT, CONTRACTS §§ 7, 11 (1932).
43. See RESTATEMENT, CONTRACTS §§ 326-84 (1932).
44. *Supra* note 17.
45. RESTATEMENT, CONTRACTS § 90 (1932).

*hath taken (though an unavoydable bribe, yet) a bribe; and no man can be obliged to trust him.*

*Thomas Hobbes*

## I. Background and Scope

For centuries English and American writers on jurisprudence have been concerned with the problem of the impartial tribunal. With the rise in importance of the administrative agency, which often may function as investigator, prosecutor, and judge in the same proceeding, this concern has found a new focal point.[1] This note is designed to explore one question arising from the problem of administrative prejudice: When should an administrative official be disqualified from acting because of his bias?

In investigating this problem, we shall examine the various formulas developed by the courts before whom disqualification has been urged; call attention briefly to the influence of statutes on these formulas; and comment on the adequacy and logical consistency of the present law in this field.

Since the question of administrative bias arises most frequently when an agency has acted judicially,[2] it is not surprising that the courts have tended to apply principles designed for the disqualification of judges[3] and jurors.[4] At common law a judge was not permitted to sit in a case in which he had a pecuniary interest.[5] But what if the judge's bias resulted not from pecuniary interest, but from personal hostility or friendship? Here, the English and American courts seem to have parted company. British authorities favor compelling a

1. See generally Davis, Administrative Law §§ 12.01-.06 (1958); Fuchs, *The Hearing Officer—Symptom and Symbol,* 40 Cornell L.Q. 281 (1955); Note, *Administrative Law—Bias of Trial Examiner and Due Process of Law,* 30 Geo. L.J. 54 (1941). Special reference and acknowledgement must be made to Note, *The Disqualification of Administrative Officials,* 41 Colum. L. Rev. 1384 (1941). While certain of its conclusions, such as the idea that constitutional prohibitions are virtually non-existent in this area, are disagreed with herein, its copious citations (especially of cases from the early years of the century) and excellent organization commend it to anyone working with this problem. In that article, it should be noted, the terminology differs somewhat from that used in this Note. Bias is used in the present article as a broad term, virtually the equivalent of prejudice, rather than simply personal enmity. We have seen fit to isolate a separate factor, preconceived opinion, from the general concept of prejudgment, which is restricted herein to the result of certain procedural factors. See also Rothstein, *Vacation of Awards for Fraud, Bias, Misconduct and Partiality,* 10 Vand. L. Rev. 813 (1957) which deals with many of these problems in the field of arbitration. A comprehensive table of citations arranged by states appears at the end of the article.

2. See *infra* § III(1).

3. See, *e.g.,* United States v. Morgan, 313 U.S. 409, 421 (1940); Note, 41 Colum. L. Rev. 1384 (1941).

4. This is especially true of assessment groups and eminent domain commissions. See, *e.g.,* Folmar v. Folmar, 68 Ala. 120, 123 (1880).

5. Anonymous, 1 Salk. 396, 91 Eng. Rep. 343 (1699).

judge to recuse himself for personal prejudice,[6] while the American courts have held that "the bias or prejudice of a judge would not, at common law, disqualify or incapacitate him to try a case."[7] The American courts have nonetheless been as ready as their English counterparts to disqualify jurors for personal hostility,[8] racial prejudice,[9] prejudgment,[10] and certain preconceived opinions.[11]

In analogizing from the courts to administrative bodies, the tendency has been to apply the rules formulated for application to judges.[12] This has meant that administrative decisions have been overturned for bias only when the official was interested in the decision, or so prejudiced for other reasons that his conduct of the proceedings demanded reversal.

## II. THE FORMULAS OF DISQUALIFICATION

The bases on which disqualification is most often urged can be segregated into five general categories: pecuniary interest, relationship, personal hostility, preconceived opinion, and prejudgment. The reasoning of the courts can best be understood by examining each of these separately.

*1. Pecuniary Interest.*—Persons seeking to overturn administrative decisions for bias have been most successful in this area because of the ready analogy to the disqualification of judges for the same reasons. The interest which is sufficient to disqualify must be more than a "minute, remote, trifling or insignificant interest."[13] Thus where the only interest an administrative official has in the result of his deliberations is that of being a local taxpayer or resident, he is ordinarily not disqualified, even when a statute requires that he be disinterested.[14] As one court has said, "the interest of a taxpayer

6. See Note, *Disqualification of Judges Because of Bias and Prejudice*, 51 YALE L.J. 169 (1941); Note, *Disqualification of a Judge on the Ground of Bias*, 41 HARV. L. REV. 78 (1927).

7. State *ex rel.* Germain v. Second Judicial District Court, 56 Nev. 331, 51 P.2d 219, 221, 102 A.L.R. 393 (1935) and articles cited *supra* note 6.

8. Turner v. State, 128 Tenn. 27, 157 S.W. 67 (1913).

9. Aldridge v. United States, 283 U.S. 308 (1931).

10. Neace v. Commonwealth, 313 Ky. 225, 230 S.W.2d 915 (1950).

11. Rhoades v. El Paso & S.W. Ry., 248 S.W. 1064 (Tex. Comm. App. 1923).

12. Note, 41 COLUM. L. REV. 1384, 1384-85 (1941). Numerous analogies to judges are present in the cases cited throughout this Note.

13. Tumey v. Ohio, 273 U.S. 510, 532 (1927). See also Perry v. Cobb, 88 Me. 435, 34 Atl. 278, 279 (1896) (arbitration).

14. Oates v. Cypress Creek Drainage Dist., 135 Ark. 149, 205 S.W. 293, 294 (1918); Less Land Co. v. Fender, 119 Ark. 20, 173 S.W. 407, 409 (1915); Mayor of Montezuma v. Minor, 73 Ga. 484 (1884); Scott v. People *ex rel.* Lewis, 120 Ill. 129, 11 N.E. 408 (1887); *In re* Valley Center Drain Dist., 64 Mont. 545, 211 Pac. 218, 221 (1922); Cook v. Borough of Allendale, 79 N.J.L. 285, 75 Atl. 769, 770 (1910); County of Orange v. Storm King Stone Co., 229 N.Y. 460, 128 N.E. 677 (1920); Johnston v. Rankin, 70 N.C. 550 (1874); State *ex rel.* Dorgan v. Fisk, 15 N.D. 219, 107 N.W. 191, 193 (1906); Hamilton v. Board of Comm'rs of Hardin County, 108 Ohio St. 566, 141 N.E. 684, 687 (1923); *In re* Cranberry Creek Drainage Dist., 128 Wis. 98, 107 N.W. 25

. . . is too remote and contingent to disqualify."[15]

On the other hand, if the official is a condemnor or condemnee, rather than simply a resident, he should not be allowed to take part in eminent domain proceedings.[16] If he owns land which is to be specially assessed by a board of which he is a member, the rule varies from state to state. While the federal constitution has been held not to disqualify for this reason,[17] a large number of jurisdictions feel it is improper for such an official to act.[18] Similarly, where the administrative body has the power to confer a pecuniary benefit, one of its members may be disqualified by being a recipient of such benefit.[19] Occasionally officials have been disqualified when the alleged benefit seems remote. For instance, a relatively recent Wyoming case held that a Water Board member was ineligible to engage in a water rate hearing when the party being charged was a firm for which he had once worked, and which owed him money at the time of the hearing.[20] Disqualification for these reasons can

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(1906). *But see* Stahl v. Board of Supervisors of Ringgold County, 187 Iowa 1342, 175 N.W. 772, 776-77 (1920). As examination of these cases will show, the contention is made almost solely in assessment cases.

15. McInnis v. Brown County Water Improvement Dist. No. 1, 41 S.W.2d 741, 743 (Tex. Civ. App. 1931).

16. Bliss v. Junkins, 106 Me. 128, 75 Atl. 386 (1909); Peninsular Ry. v. Howard, 20 Mich. 18 (1870); Stephenson v. Oatman, 71 Tenn. 462, 464 (1879).

17. Hibben v. Smith, 191 U.S. 310, 323-24 (1903); Lent v. Tillson, 140 U.S. 316, 333 (1891). These cases specifically entrust the decision on this matter to the state legislatures.

18. City of Naperville v. Wherle, 340 Ill. 579, 173 N.E. 165, 166 (1930) (assessing commissioner disqualified because he was secretary of a board of education whose school grounds would be assessed); Markley v. Rudy, 115 Ind. 533, 18 N.E. 50, 52 (1888); Stahl v. Board of Supervisors of Ringgold County, 187 Iowa 1342, 175 N.W. 772, 776 (1930); *In re* City of Rochester, 208 N.Y. 188, 101 N.E. 875 (1913) (commissioners disqualified to act in eminent domain proceedings whose lands would be assessed for purchase price); King's Lake Drainage & Levee Dist. v. Jamison, 176 Mo. 557, 75 S.W. 679, 682 (1903) (statute). *But see* City of Coral Gables v. Hayes, 74 F.2d 989, 999 (5th Cir. 1935); City of Lewiston v. Braden, 9 Ill.2d. 620, 138 N.E.2d. 504, 508 (1956) (particular interest too remote); Hamilton v. Board of Comm'rs of Hardin County, 108 Ohio St. 566, 141 N.E. 684 (1923).

19. Van Hovenberg v. Holeman, 201 Ark. 370, 144 S.W.2d 718 (1940) (councilman disqualified from voting himself a permit to operate a filling station); State v. Shea, 106 Iowa 735, 72 N.W. 300 (1897) (increase in salary); Napier v. Gay, 264 Ky. 359, 94 S.W.2d 682 (1936) (member of council held to have vacated office by voting to pay himself and his daughter $2500 in settlement of a claim); Petition of Jacobson, 234 Minn. 296, 48 N.W.2d 441, 445 (1951); State *ex rel.* West Jersey Traction Co. v. Board of Public Works of City of Camden, 56 N.J.L. 431, 29 Atl. 163 (1894) (granting a franchise to operate a railway); Commonwealth v. Peoples, 345 Pa. 576, 28 A.2d 792 (1942) (statute); Antigo Water Co. v. City of Antigo, 144 Wis. 156, 128 N.W. 888, 890 (1910). *Contra,* City of Coral Gables v. Hayes, 74 F.2d 989 (5th Cir. 1935) (semble); Hamrick v. Town of Albertville, 219 Ala. 465, 122 So. 448 (1929) (ownership of property whose value would be increased by improvement); Beale v. City of Santa Barbara, 32 Cal. App. 235, 162 Pac. 657 (1917); Story v. City of Macon, 205 Ga. 590, 54 S.E.2d 396 (1949); Smith v. City of Winder, 22 Ga. App. 278, 96 S.E. 14 (1918) (Presumption favors validity of agency action); State *ex rel.* Dorgan v. Fisk, 15 N.D. 219, 107 N.W. 191 (1906).

20. Lake DeSmet Reservoir Co. v. Kaufmann, 75 Wyo. 87, 292 P.2d 482,

normally be prevented by a statute permitting such officials to take part in the agency's action.[21]

When the administrative official is elected, he is ineligible to determine a contested election in which he was involved.[22] On the other hand, there has been at least one holding that an official is not disqualified from participating in a removal proceeding on the ground that he will replace the incumbent if removed.[23] Conversely, it has been held that a council member is ineligible to cast the deciding vote on whether to accept his own resignation from the group.[24] Members of a local commission have likewise been prohibited from trying themselves for an offense in which a majority of the commission allegedly took part.[25]

In *Tumey v. Ohio*[26] the Supreme Court held that a mayor could not sit in a quasi-judicial capacity on criminal matters when he would receive pay for his action only if he found a verdict of guilty. Where no criminal sanction was involved, however, some courts have permitted the official's compensation to depend on his decision.[27]

Since the legislature prescribes the qualifications of many administrative officials, its role in this field is highly significant. It is normally provided by statute that a state commissioner of insurance shall not be interested in any insurer or insurance agency.[28] Owner-

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484-85 (1956). A similar holding, that a commissioner was disqualified because several of his clients were members of the Association of American Railroads, which had aided in preparing a case against one of the parties, is *In re* Heirich, 10 Ill.2d 357, 140 N.E.2d 825 (1956).

21. The most usual case is that of statutes requiring residence or ownership of land in the area to be benefited or assessed. See Oates v. Cypress Creek Drainage Dist., 135 Ark. 149, 205 S.W. 293 (1918) (the statute may not be absolutely essential to this holding); Nemaha Valley Drainage Dist. v. Marconnitt, 90 Neb. 514, 134 N.W. 177 (1912); State *ex rel.* Pieper v. Patterson, 246 Iowa 1129, 70 N.W.2d 838 (1955).

22. Lammot v. Walz, 48 Del. 532, 107 A.2d 905, 914-15 (1954); Scott v. Roberts, 255 Ky. 34, 72 S.W.2d 728, 729 (1934) (statute); Rollins v. Connor, 74 N.H. 456, 69 Atl. 777 (1908).

23. State *ex rel.* Starkweather v. Common Council of Superior, 90 Wis. 612, 64 N.W. 304, 306 (1895). The case is discussed at length in an excellently researched opinion in State *ex rel.* Cook v. Houser, 122 Wis. 534, 100 N.W. 964, 975-79 (1904). Perhaps the doctrine of necessity called for this decision. On that doctrine, see *infra*, § III(4).

24. Stevens *ex rel.* Kuberski v. Houserman, 113 N.J.L. 162, 172 Atl. 738 (1934).

25. State *ex rel.* LaCrosse v. Averill, 110 S.W.2d 1173, 1176 (Tex. Civ. App. 1937). The holding would be more compelling if not so closely bound up with art. 5, § 11 of the state constitution.

26. 273 U.S. 510 (1927).

27. De Pauw University v. Brunk, 53 F.2d 647, 650 (W.D.Mo. 1931), *aff'd on jurisdictional grounds*, 285 U.S. 527 (1932); Probasco v. Raine, 50 Ohio St. 378, 34 N.E. 536 (1893); Tennessee Fertilizer Co. v. McFall, 128 Tenn. 645, 650-52, 163 S.W. 806, 809 (1912). *Contra*, Meyers v. Shlieds, 61 Fed. 713 (C.C.N.D. Ohio 1894); Chase v. City of Evanston, 172 Ill. 403, 50 N.E. 241 (1898). See annot., 50 A.L.R. 1256 (1927). The reasoning of the *Shlieds* and *Chase* decisions commends itself to the reader more than do those permitting this practice.

28. See, *e.g.*, N.Y. Ins. Laws § 5; TENN. CODE ANN. § 45-105 (1952).

ship of a farm, however, does not disqualify one from being a commissioner of agriculture[29] even though one of his duties may be to set certain agricultural prices.[30] In such cases, the legislature has apparently decided that the possible prejudice of the official is more than counterbalanced by the value of his experience and training.

Quite commonly the legislature entrusts the regulation of a profession to its own members. Licensing boards made up of members of the profession are the rule rather than the exception.[31] This seems proper enough, since, although the board may be interested in the outcome from the viewpoint of controlling competition, it shares many common interests with those appearing before it. Where the interests of the regulating agency and those subject to it are not identical, it is less reasonable to permit a prejudiced group to act simply because of its supposed professional expertness. A recent Tennessee decision may have pushed this concept beyond its proper limits. Reversing the holding of the chancellor below, the state supreme court upheld the Tennessee Dealer-Manufacturer Licensing law[32] as constitutional in spite of a provision that the Tennessee Automobile Dealers Association should nominate all the members of the board in charge of licensing manufacturers. As counsel for one of the manufacturers stated: "It is as if by statute the national labor unions (or the national manufacturers association) were given the power to approve and nominate all appointees to the National Labor Relations Board; or the Association of American Railroads (or the American Trucking Association) were given like power with respect to its appointees to the Interstate Commerce Commission."[33] It is submitted that the situation is hardly one in which the need for experts in government is so pressing as to recommend a biased agency.

Far more justifiable is the attempt occasionally made to balance the competing interests of various groups within an agency. The National Railroad Adjustment Board, for example, consists of thirty-six mem-

29. See, *e.g.*, LA REV. STAT. § 3:4 (1950); N.Y. Agric. & Mkts. Laws § 5; TENN. CODE ANN. § 43-102 (must be a "practical farmer").

30. LA. REV. STAT. § 40:898 (1950). See Ricks v. Louisiana Milk Comm'n, 32 So.2d 643 (La. App. 1947); Miami Laundry Co. v. Florida Dry Cleaning & Laundry Bd., 134 Fla. 1, 183 So. 759, 764, 780 (1938). *But see* Johnson v. Michigan Milk Marketing Bd; 295 Mich. 644, 295 N.W. 346 (1940), 54 HARV. L. REV. 872 (1941), 89 U. OF PA. L. REV. 977 (1941). Deference to legislative judgment must be supposed to be the basis for these holdings. See State Bd. of Funeral Directors and Embalmers v. Cooksey, 148 Fla. 271, 4 So. 2d 253, 254 (1941).

31. See, *e.g.*, Prosterman v. Tennessee State Bd. of Dental Examiners, 168 Tenn. 16, 73 S.W.2d 687 (1934).

32. TENN. CODE ANN. § 59-1701 through 1720 (Supp. 1959).

33. Brief of General Motors Corporation, *amicus curiae*, at 43, Ford Motor Co. v. Pace, _____ S.W.2d _____ (Tenn. 1960). The Court treats the point rather summarily.

bers, eighteen selected by the carriers, and eighteen by labor.[34] The Railroad Retirement Board consists of three members, one from management, one from labor, and one neutral member who represents the public at large.[35] In contrast with these, the closely related National Mediation Board is composed of three members, none of whom can be "pecuniarily interested in any organization of employees or any carrier . . . ."[36] The reason for the different composition of these various groups lies in the purpose of each board. The Adjustment Board is evenly split so that the grievances of either side will be received and discussed sympathetically. By the time a dispute reaches the Mediation Board, however, there are two bitterly contested camps engaged in a prolonged argument. In such a situation a totally disinterested agency is far more likely to make progress than one divided by feelings of kindred interest.

*2. Relationship.*—Relatively few cases deal with administrative officials who are related to those interested in the proceedings. It has been held that a husband is ineligible to cast a ballot in proceedings to re-zone his wife's land.[37] Under statutes, a number of courts have held assessment officers and highway commissioners disqualified because of relationship.[38] Other cases, however, indicate that the relationship must be a close one or the possibility of prejudice will be too slight to justify disqualification.[39] A Texas decision furnishes an excellent illustration of the disinclination of the courts to disqualify on this ground. A board of adjustment granted Neiman-Marcus, Inc. a variation in zoning to allow the department store to construct a parking lot. The appellate court refused to overturn the decision of the board, even though one board member was a cousin of the president of the corporation, and another's wife worked for the firm, saying "their interest being characterized in law as too remote—in no sense tantamount to a disqualification."[40]

*3. Personal Hostility.*—The disqualifying factors denominated as hostility, preconceived opinion, and prejudgment frequently occur in concert, and often it is difficult to distinguish between them. An

34. 48 Stat. 1189 (1934), 45 U.S.C. § 153 (a) (1958). More notably, each of these thirty-six is to be paid by those whose interests they represent. 48 Stat. 1190 (1934), 45 U.S.C. § 153 (g) (1958).

35. 49 Stat. 970 (1935), 45 U.S.C. § 228j (a) (1958).

36. 48 Stat. 1194 (1934), 45 U.S.C. § 154 (a) (1958).

37. Low v. Town of Madison, 135 Conn. 1, 60 A.2d 774 (1948). As a discussion of the theoretical basis of disqualification, this is an excellent opinion, and deserves careful attention.

38. Beck v. Biggers, 66 Ark. 292, 50 S.W. 514 (1899); Bradley v. City of Frankfort, 99 Ind. 417 (1884); Taylor v. County Comm'rs of Worcester, 105 Mass. 225 (1870); Lyon v. Hamor, 73 Me. 56 (1881).

39. *Re* Sadsbury Road, 9 Pa. County Ct. 521 (1891); Chase v. Town of Rutland, 47 Vt. 393 (1875); Bogue v. De Long, 147 Mich. 63, 110 N.W. 119 (1907) (semble); People v. Wheeler, 21 N. Y. 82 (1860).

40. Moody v. City of University Park, 278 S.W.2d 912, 919 (Tex. Civ. App. 1955).

attempt has been made to arrange the various cases under each heading according to the emphasis indicated by the court's language.

Do feelings of enmity toward one party, or friendship for another, disqualify? Frequently, the answer will be no.[41] One court has said that the fact that a board which removed one public official "was governed by bias or motives of personal hostility to the ousted official is immaterial . . . ."[42] Many courts are willing to criticize such biased conduct, but unwilling to reverse because of it. "While the use, by one who is to preside in a case, of expressions indicating bias or prejudice against a party are exceedingly indecorous, improper, and reprehensible, and calculated to throw suspicion upon the administration of the law, in the absence of a statute they cannot be made a ground of disqualification."[43]

Since this relutance to disqualify is probably the result of the usual analogy to the rules applicable to judges,[44] it is not surprising to find that in the two states which have long followed the English tendency to disqualify judges for personal hostility as a rule of common law, administrative officials have been held disqualified on the same basis for many years.[45] Where the usual common law rule has been altered by statute, like reasoning would seem appropriate.[46]

There are a number of cases involving the NLRB and its trial examiners which treat the problem of personal hostility which is manifested at trial. The Ninth Circuit used the word "hearing" in the NLRA as a starting point to require impartiality. The term was thus defined in *Inland Steel Co. v. NLRB*: "This must mean a trial by a tribunal free from bias and prejudice and imbued with the desire to accord to the parties equal consideration."[47] In line with this

41. Many of the refusals to disqualify for hostility occur in removal cases, and seem to be based on a desire for the legislatively prescribed method of removal to be adhered to. See, *e.g., In re* Marshall, 363 Pa. 326, 69 A.2d 619 (1949). *But see* People *ex rel.* Miller v. Elmdorf, 51 App. Div. 173, 64 N.Y.S. 775 (1900).

42. Lyon v Bell, 275 Ky. 69, 120 S.W.2d 752, 756 (1938).

43. Tibbs v. City of Atlanta, 125 Ga. 18, 53 S.E. 811, 812 (1906).

44. See Note, *Disqualification of a Judge on the Ground of Bias,* 41 HARV. L. REV. 78 (1927).

45. State *ex rel.* Miller v. Aldridge, 212 Ala. 660, 103 So. 835 (1925); State *ex rel.* Barnard v. Board of Education of City of Seattle, 19 Wash. 8, 52 Pac. 317, 319-20 (1898). The discussion in the *Barnard* case is the one most precisely in point, and is an eloquent presentation of the arguments favoring disqualification for bias in general.

46. See the discussion of Matter of Segal, 5 F.C.C. 3 (1937) appearing in 51 HARV. L. REV. 1101 (1938). Statutes broadening the basis for disqualification of judges are common. See *e.g.,* 62 Stat. 908 (1948), 28 U.S.C. § 455 (1958).

47. 109 F.2d 9, 20 (9th Cir. 1940). In support, the court cites Tumey v. Ohio, 273 U.S. 510 (1927), a pecuniary interest case discussing due process, and a holding that an insane juror voided a criminal trial, also on due process grounds. Jordan v. Massachusetts, 225 U.S. 167 (1912). While neither case seems directly controlling, the inference that impartiality and freedom from personal enmity are involved in due process is quite significant. See Note, 30 GEO. L.J. 54 (1941).

concept are two well-known decisions from the Fifth Circuit, in one of which an NLRB order was denied enforcement because the trial examiner gave advice and support to the government attorney.[48] The other refused enforcement of orders issued after a hearing in which the examiner became incensed by the testimony of one of the company's employees.[49] The Second Circuit has been unwilling to follow this reasoning, however, arguing that it is the Board and not the examiner which is the true fact-finder and that unless the Board in some ways acquiesces in the examiner's hostility, there is no prejudicial error.[50] In any event, the suggestion of prejudice must be strong to justify reversal. It is not enough that the trial examiner rules consistently for one party and against the other. The Supreme Court has said: "We are constrained to reject the court's conclusion that an objective finder of fact could not resolve all factual conflicts arising in a legal proceeding in favor of one litigant. . . . Where the number of facts in dispute increases, the arithmetical chance of their uniform resolution diminishes—but it does not disappear."[51]

Whatever the outcome of these cases, it is significant that many of them speak of the impartial tribunal in terms of due process. As more courts adopt this point of view it seems probable that disqualification on the ground of personal hostility will occur more often.[52]

*4. Preconceived Opinion.*—The idea that an official should be disqualified because of his strongly held convictions on law and policy has been vigorously stated in England. The famed Sankey Committee Report[53] reached the conclusion that "it is clear that bias from strong and sincere conviction as to public policy may operate as a more serious disqualification than pecuniary interest . . . ."[54] It is evident that the American courts have totally rejected this idea. The best-known statement of their usual approach to the problem appears in

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

49. "A careful comparison of the report with the evidence leaves us in no doubt that the examiner . . . was carried away with his justified wrath toward Fier, which he mistook for righteous indignation toward all of the respondents." NLRB v. National Paper Co., 216 F.2d 859, 868 (5th Cir. 1954).

50. NLRB v. Air Associates, Inc., 121 F.2d 586 (2d Cir. 1941). The court takes note of the *Phelps* and *National Paper* cases, and attempts to distinguish them, largely on a factual basis. 121 F.2d at 589 n.2.

51. NLRB v. Pittsburgh S.S. Co., 337 U.S. 656, 659 (1949). See NLRB v. Houston & North Texas Motor Freight Lines, 193 F.2d 394, 397 (5th Cir. 1951) *cert. denied,* 343 U.S. 934 (1952); NLRB v. Robbins Tire & Rubber Co., 161 F.2d 798, 800 (5th Cir. 1947). *But see* Local No. 3, United Packinghouse Workers v. NLRB, 210 F.2d 325, 329-30 (8th Cir.), *cert. denied,* 348 U.S. 822 (1954).

52. Note that two statutes already permit disqualification on a voluntary basis for this reason. 60 Stat. 240 (1946), 5 U.S.C. 1006(a) (1958); Calif. Gov't Code § 11512(c).

53. *Report of the Committee on Minister's Powers* (House of Lords, April, 1932).

54. *Id.* at 78.

the *Fourth Morgan* case.[55] The then Secretary of Agriculture had expressed severe criticism of a previous Court decision in the same matter in a letter to the New York *Times*. The Supreme Court upheld his refusal to disqualify himself because of the letter, stating:

> That he not merely held, but expressed strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings ordered by this Court. . . . Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.[56]

The Court apparently reaffirmed this position in the case of *FTC v. Cement Institute*[57] although the statements in the later case are less compelling because of the apparent application of the doctrine of necessity.[58]

Many lower court decisions indicate general agreement with these ideas.[59] Even where the official is appointed to office largely because he is believed to be biased, he is not ineligible to serve. Thus where a public service commissioner was appointed by the governor only after stating that he agreed with the governor's campaign statements that rates must be reduced, he was still competent to participate in a rate determination.[60]

It is especially true that "bias in the form of a firm belief in the objectives of a statute, which the official is given to enforce, rather than in the form of personal hostility, is not such bias as disqualifies.[61] Indeed it seems desirable and even necessary for the official to possess this type of bias—sometimes called "zeal"—in order to achieve the desired results.[62] The administrative agency is created

55. United States v. Morgan, 313 U.S. 409 (1941).
56. *Id.* at 421. The language just quoted makes it evident the Court is analogizing to the rules applicable to judges. See Tuttle v. Tuttle, 48 N.D. 10, 181 N.W. 898, 906 (1921); Elder v. Camp, 193 Ga. 320, 18 S.E.2d 622 (1942).
57. 333 U.S. 687, 702-03 (1948).
58. *Id.* at 701.
59. Lumber Mut. Cas. Ins. Co. v. Locke, 60 F.2d 35, 38 (2d Cir. 1932) (commissioner's expression of opinion did not mean his mind was closed); National Lawyers Guild v. Brownell, 126 F. Supp. 730 (D.D.C. 1954) (attorney general's statements that he believed the Guild to be subversive made in two public speeches did not disqualify him from presiding at a hearing to designate the group as a communist front organization); Montana Power Co. v. Public Serv. Comm'n, 12 F. Supp. 946 (D. Mont. 1935) (statements made in the heat of a political campaign do not disqualify).
60. Georgia Consolidated Telephone Co. v. Georgia Pub. Serv. Comm'n, 8 F. Supp. 434 (N.D. Ga. 1934).
61. Pennsylvania Publications, Inc. v. Pennsylvania Pub. Util. Comm'n, 152 Pa. Super. 279, 32 A.2d 40, 49 (1943).
62. See Jaffee, *The Reform of Federal Administrative Procedure*, 2 PUB. AD. REV. 141 (1942). As Professor Jaffee states: "Our tradition rightly interpreted is that the judge shall be neutral toward the question of whether the specific defendant is guilty. It is a perversion of that tradition to demand that the judge be neutral toward the purposes of the law." *Supra* at 149.

by the legislature to attain a given objective. It is illogical to suppose that a man who totally disagreed with this objective would be capable of fulfilling his position as an agency member. Realizing this, Congress inserted in the statute creating the Tennessee Valley Authority a requirement that members of the TVA Board of Directors "shall be persons who profess a belief in the feasibility and wisdom of this chapter."[63]

There is, however, one type of opinion which may disqualify, perhaps because it borders on interest, prejudgment, or personal hostility. This is the opinion of members of a profession regarding the wisdom and ethics of certain conduct. The most clear-cut illustration involves the Koch method for the treatment of cancer, once in vogue with several physicians. The method has been condemned by the American Medical Association. A state registration board, composed entirely of AMA members, revoked the license of a physician who used the method after a hearing in which no evidence was received as to its efficacy. The reviewing court held that the board had applied their own opinion of the Koch treatment in deciding the case so as to deny the accused the "impartial hearing before a fair and impartial tribunal" required by the due process clause.[64]

5. *Prejudgment.*—Other than the factors already considered, there are three principal reasons to suppose that an official would have predetermined the result of his deliberations: (1) He may have been instrumental in bringing charges against the party whose interests are involved. (2) He may have been called on to conduct a previous investigation, and make recommendations or prosecute the cause. (3) He may have rendered a previous decision in the same proceeding.

While there is authority to the contrary, it has been held that an official is disqualified because he brought the charges (unless he merely brought them formally in the name of the group)[65] or contributed to a fund for prosecution of those charges.[66]

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63. 48 Stat. 59 (1933), 16 U.S.C. § 831(h) (1958).

64. Smith v. Department of Registration & Educ., 412 Ill. 332, 106 N.E.2d 722, 726 (1952).

65. There are many instances in which an agency member brings charges simply as a matter of procedural form. There can be no reason for disqualification where that is all that is done. See, *e.g., Brinkley v. Hassig,* 83 F.2d 351, 357 (10th Cir. 1936).

66. State *ex rel.* Miller v. Aldridge, 212 Ala. 660, 103 So. 835 (1925) (in spite of the doctrine of necessity); Abrams v. Jones, 35 Idaho 532, 207 Pac. 724, 727 (1922); Sandahl v. City of Des Moines, 227 Iowa 1310, 290 N.W. 697, 699 (1940); New Jersey State Bd. of Optometrists v. Nemitz, 21 N.J. Super. 18, 90 A.2d 740, 749-50 (1952); People *ex rel.* Pond v. Board of Trustees of Saratoga Springs, 4 App. Div. 399, 39 N.Y.S. 607 (1896) (leading case); State *ex rel.* Getchel v. Bradish, 95 Wis. 205, 70 N.W. 172 (1897) (aggravated fact situation akin to entrapment; commissioner disqualified when he sent out his minor son to purchase liquor from relator to justify revocation of license). *Compare* Nider v. Homan, 32 Cal. App. 2d 11, 89 P.2d 136, 141 (1939) *with* Butler v. Schofield, 54 Cal. App. 217, 201 Pac. 625, 626-27 (1921).

Bitter criticism has been directed at times toward the combination of prosecuting and adjudicating functions in the same agency.[67] It is usually felt, however, that it is sufficient to provide merely that the same official does not serve in both capacities. As one former administrator has said, "to 'separate' the hearing officer from possible agency pressure so as to secure objective consideration of the positions taken by other parties appearing before him seems essential to a 'fair hearing.' "[68]

The principle that no man should be the judge in his own cause[69] is assuredly the basis of section 5 of the Administrative Procedure Act:

> No officer, employee or agent engaged in the performance of investigation or prosecuting functions for any agency in any case shall, 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.[70]

A substantially similar provision appears in the Indiana administrative laws.[71] Many proceedings are, however, excepted from these requirements, and it has been held that an NLRB agent was not prohibited from sitting because he had conducted a preliminary investigation of the case while acting in another capacity.[72] Commenting on the limited scope of section 5, Professor Davis has described this as a "middle position" and indicated some dissatisfaction with the present situation.[73]

As for the last of the three situations we have combined under "prejudgment," mention need be made only of two propositions that have been urged before the courts. The first is that no official should

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*But see* Tarr v. Hallihan, 375 Ill. 38, 30 N.E.2d 421, 422 (1940); State *ex rel.* Lillard v. Humphreys, 163 Tenn. 20, 23, 40 S.W.2d 405, 406 (1931); DAVIS, ADMINISTRATIVE LAW § 13.10 (1958) (numerous cases are cited in n.16). The latter authorities are probably in the majority.

67. See, *e.g.*, *Report of the Special Committee on Administrative Law*, 61 A.B.A. REPORTS 721, 732-36 (1936). For a criticism of the combination of these functions on an individual basis, see State *ex rel.* Ball v. McPhee, 6 Wis. 2d 190, 94 N.W.2d 711 (1959).

68. Fuchs, *The Hearing Officer—Symptom and Symbol*, 40 CORNELL L.Q. 281, 288 (1955).

69. See Bonham's Case, 8 Co. 114a, 118a (1610); Anonymous, 1 Salk. 396, 91 Eng. Rep. 343 (1699); *In re* Murchison, 349 U.S. 133, 137 (1955).

70. 60 Stat. 240 (1946), 5 U.S.C. §1004(c) (1958).

71. "No agent or representative conducting a hearing shall perform any of the investigative or prosecuting functions of said agency in the case head or to be heard by him or in a factually related case . . . ." IND. STAT. ANN. §63-3014 (1951).

72. NLRB v. Botany Worsted Mills, 133 F.2d 876, 882 (3d Cir. 1943), *cert. denied*, 319 U.S. 751 (1943) (a representation proceeding, not an unfair labor practice case).

73. DAVIS, ADMINISTRATIVE LAW §§ 13.09, 13.11 (1958). Prof. Davis does not feel apparently that any great harm results from allowing an officer to be acquainted with many facts of the case prior to hearings.

sit in review of his own decision.[74] This is much the same problem as that of the official who has investigated charges, especially if he has made recommendations. The second proposition is that an agency is not prevented from rehearing a case after its initial determination on the matter has been struck down by the courts.[75] This would seem to be in accord with the usual remand procedures used in NLRB and similar cases.

### III. AVOIDING DISQUALIFICATION

The preceding summary of the principal rules of disqualification may indicate some reluctance on the part of the courts to prohibit administrative officials from acting because of bias. If so, the reluctance is still more apparent in the many situations where the courts have refused to disqualify, even when normally sufficient showings of bias have been made.

*1. Legislative and Ministerial Acts.*—To facilitate the application of traditional principles to administrative bodies, the courts have often delineated certain acts as judicial, others as ministerial and others as legislative.[76] It has been said that when the official acts ministerially his discretion is so limited that bias becomes too unimportant to justify disqualification.[77]

When acting in a "legislative" capacity, the official is certainly exercising discretion, and the Connecticut court has quite logically stated that the administration of its power by a commission "whether it be denominated legislative or quasi-judicial, demands the highest

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74. See United States *ex. rel.* Pazos v. Redfern, 180 Fed. 500 (E.D. La., 1910). This idea has been incorporated into §5 of the Administrative Procedure Act, quoted *supra* p. 723, which prohibits an agency member from participating in the agency's review proceedings when he decided the case below.

75. Board of Medical Examiners v. Steward, 203 Md. 574, 102 A.2d 248 (1954); *Cf.* U.S. v. Lowery, 77 F. Supp. 301 (W.D. Pa. 1948), *aff'd,* 172 F.2d 226 (3d Cir. 1949) (per curiam).

76. While making this distinction may at times be necessary, it tends to ignore the fact that in many cases the individual function is as easily classified one way as the other. Why should a Texas zoning agency be judicial, and its Florida counterpart legislative? *Compare* Moody v. City of University Park, 278 S.W.2d 912, 922 (Tex. Civ. App. 1955) *with* City of Miami Beach v. Schauer, 104 So. 2d 129, 132 (Fla. 1958). It would seem more reasonable to take the institutional approach to all decisions involving the use of discretion. See Fuchs, *The Hearing Officer—Symptom and Symbol,* 40 CORNELL L.Q. 281 (1955).

77. Thus where members of a board are under a duty to order an election, they may not refuse to do so simply because their names appear on the election petition. Galey v. Board of Comm'rs of Carrol County, 174 Ind. 181, 91 N.E. 593 (1910). See also State *ex rel.* Sink v. Circuit Court of Cass County, 214 Ind. 323, 15 N.E.2d 624 (1938), which holds that no appeal lies from a ministerial act performed by a board, even though some discretion is involved. Perhaps the word "ministerial" in the case is used in the sense of "executive." The case is cited with approval in Decatur Township v. Board of Comm'rs of Marion County, 39 N.E.2d 479, 484 (Ind. App. 1942).

public confidence."[78] Others have refused to disqualify administrative officials called on to act in a legislative capacity, reasoning that the courts should not inquire into the motives of legislators.[79]

*2. Waiver.*—Failure to raise the issue of disqualification for bias at the proper time may result in a holding that this defect has been waived.[80] One Indiana case has held that in the absence of statute the pecuniary interest of a board member made its decision voidable, not void, and that therefore it was fatal to those claiming disqualification not to have objected at the earliest possible opportunity.[81] By this reasoning, if a disqualifying statute is applicable, the decision of a biased administrator is void, and no waiver is possible. In a review of an NLRB decision which was denied enforcement because of a biased trial examiner, it was indicated that an objection may not be necessary when it is apparent that the objection would be futile.[82]

*3. Review.*—An official who is otherwise disqualified for bias may be allowed to proceed when a full review of his action is provided for.[83] Even where the review is less than complete, some courts have allowed the interested official to act.[84] Where the reviewing body has authority to reverse only on very limited grounds, however, the better rule would seem to be that disqualification is not avoided.[85]

*4. Necessity.*—By far the most widely recognized basis for refusing to disqualify biased officials is the doctrine of necessity. Simply stated, the doctrine is this: Where disqualification of the official would mean that no tribunal exists capable of resolving a given issue, then the official must be allowed to act even if biased. Cases re-

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78. 135 Conn. 1, 60 A.2d 774, 778 (1948). See also Pyatt v. Mayor & Council of Dunellen, 9 N.J. 548, 89 A.2d 1, 4 (1952); Stahl v. Board of Supervisors of Ringgold County, 187 Iowa 1342, 175 N.W. 772, 776-78 (1920).

79. City of Miami Beach v. Schauer, 104 So. 2d 129, 132 (Fla. 1958) (zoning); Moore v. Village of Ashton, 36 Idaho 485, 211 Pac. 1082, 1083-84 (1922); Bradshaw v. Hedrick, 294 Mo. 21, 241 S.W. 402 (1922); Blankenship v. City of Richmond, 188 Va. 97, 49 S.E.2d 321, 324 (1948).

80. Democrat Printing Co. v. FCC, 202 F.2d 298, 305 (D.C. Cir. 1952); Bethlehem Steel Co. v. NLRB, 74 App. D.C. 52, 120 F.2d 641, 652-53 (1941). *But see* NLRB v. Washington Dehydrated Food Co., 118 F.2d 980, 996 (9th Cir. 1941).

81. Decatur Township v. Board of Comm'rs of Marion County, 39 N.E.2d 479, 482 (Ind. App. 1942); Carr v. Duhme, 167 Ind. 76, 78 N.E. 322, 324 (1906); Stahl v. Board of Supervisors of Ringgold County, 187 Iowa 1342, 175 N.W. 772, 773 (1920).

82. NLRB v. Washington Dehydrated Food Co., 118 F.2d 980, 996 (9th Cir. 1941). See Note, 30 GEO. L.J. 54 60-61 (1941).

83. Marquette Cement Mfg. Co. v. FTC, 147 F.2d 589, 594 (7th Cir. 1945); Meredosia Lake Drainage & Levee Dist. v. Evermeyer, 244 Ill. 115, 91 N.E. 95 (1910) (review de novo); Vandalia Levee & Drainage Dist. v. Hutchins, 234 Ill. 31, 84 N.E. 715 (1908) (defining the nature of an adequate review, found not to be present).

84. *In re* Valley Center Drain Dist., 64 Mont. 545, 211 Pac. 218, 221 (1922). Perhaps this reasoning is akin to that in NLRB v. Air Associates, *supra* note 50 and accompanying text.

85. Stahl v. Board of Supervisors of Ringgold County, 187 Iowa 1342, 175 N.W. 772 (1920).

lying on the doctrine in whole or in part are legion.[86]

Since its basis is the desire to have a body capable of determining the issue in controversy, it follows that where another agency or official can act, the principle should not be applied.[87] Similarly, it would seem logical that where the disqualification of a single agency member would leave a quorum able to act there is no reason to apply the rule.[88] The Alabama court, in an exceptional opinion, refused to apply the necessity principle when it felt that the matter to be decided was not sufficiently important to make any action truly necessary.[89] Another court has held that the doctrine "does not justify members of such board in voluntarily corrupting or prejudicing themselves by . . . abetting the commission of the offense in order that they may pronounce judgment upon the offender . . . ."[90] The Connecticut court has gone so far as to suggest that a disqualified agency member should resign when a unanimous vote is required for agency action, and has refused to approve the agency's decision until this has been done.[91]

## IV. RATIONALE OF THE DECISIONS

The principles that underlie the rules calling for disqualification are easily stated, even if not so easily applied. The idea of disqualification appeared early in the common law, and in connection with a type of administrative agency, an association of physicians. In *Dr.*

86. United States v. Morgan, 313 U.S. 409, 420-21 (1941); Loughran v. FTC, 143 F.2d 431, 433 (8th Cir. 1944); Brinkley v. Hassig, 83 F.2d 351, 357 (10th Cir. 1936); Scannell v. Wolff, 86 Cal. App. 2d 489, 195 P.2d 536 (1948); Mayor of City of Everett v. Superior Court, 324 Mass. 144, 85 N.E.2d 214, 219 (1949); Renaldi v. Mongiello, 4 N.J. Super. 7, 66 A.2d 182, 184 (1949); Zober v. Turner, 106 N.J.L. 86, 148 Atl. 894, 895 (1930); Sharkey v. Thurston, 268 N.Y. 123, 196 N.E. 766 (1935); Rainier v. Martineau, 136 A.2d 814 (R.I. 1957); State *ex rel.* Lillard v. Humphreys, 163 Tenn. 20, 40 S.W.2d 405, 406 (1931); Emerson v. Hughes, 117 Vt. 270, 90 A.2d 910, 915 (1952); Kennet v. Levine, 50 Wash.2d 212, 310 P.2d 244, 248-49 (1957); Stafford v. County Court, 58 W.Va. 88, 51 S.E. 2 (1905); Clark v. Blochowiak, 241 Wis. 236, 5 N.W.2d 772, 774 (1942); State *ex rel.* Cook v. Houser, 122 Wis. 534, 100 N.W. 964 (1904). Once again, this is a rule analogous to that applied to judges. See Gordy v. Dennis, 176 Md. 106, 5 A.2d 70 (1939).

Historically, it is interesting to note that in one of the earliest disqualification holdings, the Mayor of Hertford was reversed for sitting in a case involving the rights of one of his own lessees, even though no other party was competent to sit. Anonymous, 1 Salk. 396 (1699).

87. Craft v. Davidson, 189 Ky. 378, 224 S.W. 1082 (1920); People *ex rel.* Hayes v. Waldo, 212 N.Y. 156, 105 N.E. 961, 967 (1914); State *ex rel.* La Crosse v. Averill, 110 S.W.2d 1173, 1176 (Tex. Civ. App. 1937).

88. Nider v. Homan, 32 Cal. App. 2d 11, 89 P.2d 136, 141 (1939); Stahl v. Board of Supervisors of Ringgold County, 187 Iowa 1342, 175 N.W. 772 (1920); Narragansett Racing Ass'n v. Kiernan, 59 R.I. 90, 194 Atl. 692 (1937). *Contra,* State *ex rel.* Dorgan v. Fisk, 15 N.D. 219, 107 N.W. 191, 193 (1906).

89. State *ex rel.* Miller v. Aldridge, 212 Ala. 660, 103 So. 835 (1925). See also People *ex rel.* Miller v. Elmedorf, 51 App. Div. 173, 64 N.Y.S. 775 (1900).

90. State *ex rel.* Getchel v. Bradish, 95 Wis. 205, 70 N.W. 172 (1897).

91. Low v. Town of Madison, 135 Conn. 1, 60 A.2d 774, 776 (1948). *Contra,* Brinkley v. Hassig, 83 F.2d 351, 357 (10th Cir. 1937) (resignation not required because of disqualification in a single isolated case).

*Bonham's* case Lord Coke, striking out at the power of this group, made the famous statement: *"quia aliquis non debet esse Judex in propria causa, imo iniquim est aliquim suae rei esse judicem."*[92] This maxim persists today even without the aid of statute.[93] Recently, the impartial tribunal seems to have become a part of that standard of fairness known as "due process."[94]

Not only should unfairness itself be avoided, but also the appearance of unfairness. "Caesar demanded that his wife should not only be virtuous, but beyond suspicion; and the state should not be any less exacting . . . ."[95] From this one would conclude that wherever there may be any reasonable suspicion of unfairness, it is best to disqualify.

On the other hand, the courts have often been factually reluctant to apply these principles so as to disqualify, as our preceding discussion has indicated.[96] The primary reason for this reluctance is doubtless a desire for administrative efficiency.[97] Certainly the courts have also felt bound to honor the apparent will of the legislature to limit the review of administrative decisions.[98]

What can be the result of balancing these concepts of fairness and due process against the desire for efficiency and vigor in agencies which further legitimate legislative purposes? Some years ago, it was suggested that the two points of view are virtually irreconcilable,

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92. Bonham's Case, 8 Co. 114a, 118a (1610).

93. "It is the general rule even apart from statute that officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided." Naperville v. Wherle, 340 Ill. 579, 173 N.E. 165, 166 (1930). To the same effect is Carr v. Duhme, 167 Ind. 76, 78 N.E. 322 (1906).

94. Abrams v. Jones, 35 Idaho 532, 207 Pac. 724, 727-28 (1922); Smith v. Department of Registration & Educ., 412 Ill. 332, 106 N.E.2d 722, 726 (1952). See Note, *Administrative Law—Bias of Trial Examiner and Due Process of Law*, 30 GEO. L.J. 54 (1941).

95. State *ex rel.* Barnard v. Board of Educ. of City of Seattle, 19 Wash. 8, 52 Pac. 317, 321 (1898). To the same general effect are the statements in Low v. Town of Madison, 135 Conn. 1, 60 A.2d 774, 777 (1948).

96. Are the courts more lax with administrators than with judges? The writer of the Note, 41 COLUM. L. REV. 1384, 1402 (1941) seems to think so, while his counterpart writing at the same time in 30 GEO. L.J. 54, 62 (1941) finds the opposite to be the case.

97. See, *e.g.*, the argument that combining the functions of prosecutor and judge in the person of the Secretary of Agriculture is necessary in order that he might function effectively in the suppression of monopolies. Farmers Livestock Comm'n Co. v. United States, 54 F.2d 375, 382 (E.D. Ill. 1931).

98. The desire of the legislature is well illustrated by the limited number of bases upon which the courts may reverse administrative findings. Reversal for bias would seem to fall within the frequently mentioned category of "arbitrary or capricious" administrative decisions. See MD. ANN. CODE art. 41 § 255(g) (1957); MASS. ANN. LAWS ch. 30A, § 14(8) (Supp. 1959); MICH. COMP. LAWS §§24.101 through 24.108 (1948); MO. ANN. STAT. §536.140 (Supp. 1959); N.H. REV. STAT. ANN. §541.13 (1955); N.C. GEN. STAT. §150-27 (1958); N.D. REV. CODE §28-3219 (1943); OHIO REV. CODE ANN. §119.12 (1959); ORE. REV. STAT. §183.480 (1959); PA. STAT. ANN. §§1710.41 through .44 (Supp. 1958); TENN. CODE ANN. §§27-901 through -914 (1952); WASH. REV. CODE § 34.04.130 (1959).

that those who emphasize the former must do so to the detriment of the latter.[99] There is force in this argument, but the conclusion that would seem to follow—that to choose administrative efficiency is to be unconcerned with historic notions of fair play—is abhorrent.

## V. CONCLUSION

It is submitted that the confused multitude of decisions on bias, varying as they do from jurisdiction to jurisdiction, result not so much from the futility of attempting to combine impartiality with efficiency as from a failure to re-evaluate the rules borrowed from decisions related to the purely judicial function when applying them to the administrative situation. As one judge has said, if there is to be any difference between the treatment of administrative decisions, and those of the courts, "the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed."[100] So long as the administrator is exercising broad discretionary powers, should it make a great deal of difference that his acts are labeled legislative rather than quasi-judicial? If the official is strongly prejudiced for or against a party whose interests are subject to the official's power, does it matter that the prejudice results from a deep-set personal hostility rather than from pecuniary interest?

On the surface at least, it seems absurd to disqualify an Ohio mayor from fining a miscreant because the mayor will thereby receive a twelve dollar fee, [101] while permitting a Georgia utilities commissioner to enter a rate determination with his mind already made up that the rates must be reduced.[102] And even the doctrine of necessity can hardly justify upholding the Massachusetts mayor who investigated the activities of his license commissioners, helped prepare the evidence to be used against them, and then sat in judgment at their hearing.[103] Surely had the court been more willing to question his decision it could have found an alternative in mandamus or quo warranto proceedings.[104]

99. Cooper, *The Proposed United States Administrative Court,* 35 MICH. L. REV. 565, 577 (1937).

100. NLRB v. Phelps, 136 F.2d 562, 563-64 (5th Cir. 1943).

101. Tumey v. Ohio, 313 U.S. 409 (1941).

102. Georgia Continental Tel. Co. v. Georgia Pub. Serv. Comm'n, 8 F. Supp. 434 (N.D. Ga. 1934).

103. Mayor of City of Everett v. Superior Court, 324 Mass. 144, 85 N.E.2d 214 (1949).

104. See MASS. ANN. LAWS ch. 249 §§ 5, 12 (1956). Admittedly these remedies are more limited in scope than those available in some other states. See, in contrast with this decision, the holding in State *ex rel.* La Crosse v. Averill, 110 S.W.2d 1173 (Tex. Civ. App. 1937) wherein members of a city commission were not permitted to try themselves on charges of misconduct. The

It is suggested that several steps can be taken to insure the party appearing before an administrative group an impartial tribunal, without impairing the efficiency of the institutional process. First, it would seem wise to place less emphasis on the origin of bias, and more emphasis on its extent.[105] This would mean disqualifying for pecuniary interest when that interest is substantial, rather than minute or remote; for relationship, when the tie between the official and an interested party is factually close enough to impair confidence;[106] for pre-conceived opinion or prejudgment when an official would be supposed as a reasonable man to be unduly influenced. Such a rule would not call for disqualification for zeal, nor for mere expressions of opinion by an official who remains open to suggestion of change.

In order to dispose of cases of disqualification as quickly as possible, it would seem wise to follow the example of the Federal Administrative Procedure Act, and the California statute, which provide for voluntary disqualification for personal bias, and for a prompt decision on the matter by the administrative group.[107] To discourage frivolous charges of bias, it would be wise to provide some form of sanction to be used by the courts against those whose allegations of bias are without reasonable foundation in fact.

So long as the adjudicating officers are afforded true independence within the agency, there will be no reason to forbid the combination of prosecuting and decision-making powers in the single agency. Nor does it seem necessary to disqualify an official simply because of a brief preliminary investigation. Both these factors can be a considerable aid to expeditious settlement of complex cases.

Finally, the example of the Connecticut court in breaking through

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doctrine of necessity was urged, but the court pointed out that quo warranto proceedings could be had in place of trial by the commission.

105. Thus, it is suggested that the question: Does this alleged bias arise from pecuniary interest or from some other factor? should be replaced by another: Is it probable that a reasonable man would be influenced unduly by the alleged prejudicial factors? It seems probable that emphasis was originally placed on the origin of bias because of a feeling that pecuniary motives or ties of blood were more likely to result in unfairness than an intellectual conviction. If a party can show in any case that a given official is more likely to be influenced by his convictions than by pecuniary motives, it would seem nonsensical not to reverse the traditional holding. At least one court has indicated that it feels that the time is past when the origin of a judge's bias should control. Payne v. Lee, 222 Minn. 269, 24 N.W.2d 259, 264 (1946).

106. Thus a cousin might be disqualified who had been a constant companion of the interested party, when a brother with whom there had been no contact for many years might not be. Admittedly, putting disqualification for relationship on a purely factual basis might call for factual determinations too complex or unwieldy for effective use within the administrative system. Perhaps automatic disqualification of members of the immediate family should be provided for, with a proviso that disqualification might be had on a factual basis in a limited category of determinations.

107. 60 Stat. 244 (1946), 5 U.S.C. § 1004(a); Calif. Gov't Code § 11512(c).