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DISQUALIFICATION OF SEC COMMISSIONERS APPOINTED FROM THE STAFF: *AMOS TREAT, R. A. HOLMAN, AND THE THREAT TO EXPERTISE*

Stuart C. Law†

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, [and] join in commission or agency rulings So to hold, in our view, would be tantamount to . . . denial of administrative due process

Amos Treat & Co. v. SEC, 306 F.2d 260, 266
(D.C. Cir. 1962) (Danaher, J.)

I cannot distinguish the present case from the Treat case. I think this doctrine is going to put a tremendous hardship on the Securities and Exchange Commission. However, that is something I can do nothing about because I must follow the dictates of the Court of Appeals.

R. A. Holman & Co. v. SEC, Civil No. 1888-62,
D.D.C., July 6, 1962 (Hart, J.)

INTRODUCTION

In 1962, the Court of Appeals for the District of Columbia enjoined the Securities and Exchange Commission from continuing revocation proceedings against Amos Treat & Co., a stockbroker, on the ground that Commissioner Cohen, who had taken part in deciding a question arising out of the hearing, had also participated in the development of the case when he was a staff member in charge of the Division of Corporation Finance. The Court's decision that due process required the Commission to dismiss and begin again, or, alternatively, expose its staff and private files to a "full evidentiary hearing" on the extent of Cohen's earlier participation (which Treat claimed it could not otherwise prove) was not based on a finding of actual bias; in fact, lack of actual bias was conceded by Treat. It rested instead on the assumption that Cohen's participation as a staff member might have been such as to create too great a possibility that he had thereby become unconsciously biased to such an extent that he could not judge fairly,¹ and that having established

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¹ See Attorney Gen'l's Comm. on Admin. Proc., "Final Report on Administrative Procedure in Government Agencies," S. Doc. No. 8, 77th Cong., 1st Sess. 56 (1941):

some participation, Treat must be given the chance to discover its extent if the proceeding was to continue.

Treat provoked an immediate and far-reaching crisis. Motions for "Treat-type relief" came from nearly all brokers facing revocation, and proceedings—representing the bulk of the contested broker fraud cases—were dismissed against a number of houses and individuals associated with them.² The painful process of retrial is not over.³

While the same court subsequently refused to enjoin the Commission in *Holman* (where, so far as appeared from the record, the prior participation as a staff employee consisted solely of formal authority held by the Division Director over the case's development rather than actual knowledge or active involvement), it unfortunately left unresolved the question of whether the court had tacitly retreated from its position in *Treat*: whether the distinction between prior participation as staff member or as Commissioner remained critical in determining whether respondents received due process; and whether a very slight prior knowledge

For the disqualifications produced by investigation or advocacy are personal psychological ones which result from engaging in those types of activity; and the problem is simply one of isolating those who engage in the activity.

This assumption is explicitly stated in *Amos Treat & Co. v. SEC*, 306 F.2d 260, 264 (D.C. Cir. 1962): "Decisions affecting human beings, made by human beings, necessarily are colored by the sum total of the thoughts and emotions of those responsible for the decision." It also underlies the standard for determining judicial disqualification. E.g., *Aetna Ins. Co. v. Travis*, 124 Kan. 350, 259 Pac. 1068 (1927). But it need not always be valid; exposure to ex parte data, or participation in investigation (and perhaps even in prosecution) might aid the decision maker. See generally Cooper, "Administrative Law: The Process of Decision," 44 A.B.A.J. 233 (1958) (discussing, inter alia, Michigan Law School study of staff review of FTC, NLRB, and CAB decisions). See also Frank, "Disqualification of Judges," 56 Yale L.J. 605 (1947).

² Administrative proceedings against A. T. Brod & Co., R. Baruch & Co., Seraphim & Co., and Fairfax Investment Corp. were terminated by Order of the Comm'n, Matter of R. Baruch & Co., No. 8-8712, SEC, Sept. 27, 1962 (involving Agricultural Research Company stock). Proceedings against Atlantic Equities Co., Blair F. Claybaugh & Co., Lenchner, Covato & Co., Klein, Runner & Co., and John R. Wilson, Jr. Co. were terminated by Order of the Comm'n, Matter of Siltronics, Inc., No. 24W-2490, SEC, Dec. 21, 1962. Proceedings against First Pennington Co., another respondent in the Siltronics proceedings, were dismissed by supplemental order of the Commission on Feb. 1, 1963. *Ibid.* Also dismissed were proceedings against a number of individuals named as "causes" or willful violators in connection with the above proceedings (pursuant to § 15A(b)(4), added by 52 Stat. 1070 (1938), 15 U.S.C. § 78o-3 (1958) and § 15(b), added by 49 Stat. 1377 (1936), 15 U.S.C. § 78o (1958) respectively of the Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. § 78 (1958)).

³ E.g., Matter of Siltronics, Inc., *supra* note 2 where the Commission ruled that the prior record could be reintroduced (Memorandum Opinion and Order, SEC Securities Act Release No. 4645, SEC Securities Exchange Act Release No. 7150, Sept. 30, 1963); the hearing is progressing. In the Agricultural Research Company case (Matter of R. Baruch and Co., *supra* note 2), the question of reintroduction of the former record is under Commission advisement.

A number of respondents have accepted sanctions and are no longer involved in the proceedings. E.g., Blair F. Claybaugh & Co., A. T. Brod & Co., and R. Baruch & Co. Finding, Opinion, and Order Revoking Broker-Dealer Registration, Matter of Blair F. Claybaugh & Co., No. 8-2851, SEC, Oct. 18, 1963; Findings, Opinion, and Order Suspending Membership in National Securities Association, Matter of A. T. Brod & Co., No. 8-6503, SEC, Sept. 11, 1963; Findings, Opinions, and Order Revoking Broker-Dealer Registration, Matter of R. Baruch & Co., No. 8-8712, SEC, Sept. 11, 1963.

or participation, similar to that in *Treat*, would still trigger an injunction if discovered.

But *Treat* has produced far more than an enforcement crisis at the SEC, with the extensive delays and wasted man-hours caused by wholesale dismissals and retrials. Every proceeding initiated or developed when a Commissioner served previously on the staff is potentially threatened; fear of *Treat's* result necessarily will hamper efficient agency administration, and, even worse, will weigh against the appointment of career staff employees, whose expertise is critically needed, to membership on the SEC and other federal regulatory agencies. These costly results may nonetheless be warranted, but only if respondents' due process rights, viewed realistically, would be seriously threatened otherwise. Beyond this, and for the most part beyond the scope of this article, the cases raise anew the question whether, in the context of federal administrative agencies, any disqualification should result, absent proven actual bias, from any intra-agency participation by a commissioner, as a staff member or as commissioner, including ex parte communication with the staff.⁴

THE TREAT AND HOLMAN CASES

Participation of commissioners or board members of federal administrative agencies in the investigation of a case, or exposure to the facts uncovered, has not been grounds for automatic disqualification of the commissioner as an adjudicator on constitutional due process grounds.⁵

⁴ See Peck, "Regulation and Control of Ex Parte Communications With Administrative Agencies," 76 Harv. L. Rev. 233 (1962) where the suggestion is made, though not developed, that ex parte communications between commissioner and staff might be distinguished from those between staff or commissioner and outsiders.

⁵ E.g., *Brinkley v. Hassig*, 83 F.2d 351 (10th Cir. 1936). And even where the court has held against the agency the principle has been affirmed. *Berkshire Employees Ass'n v. NLRB*, 121 F.2d 235, 238 (3d Cir. 1941); see *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); 2 Davis, *Administrative Law* § 13, at 225 (1958).

But this does not imply any lack of discontent over this and other rules of current administrative procedure, particularly as regards failure to separate functions and exposure of decision makers to data ex parte. In 1929, Senator Norris introduced a bill to create a separate administrative court. S. 5154, 70th Cong., 2d Sess. Other pre-APA bills include: H.R. 4235, H.R. 4236, H.R. 6324 (Walter-Logan Bill, vetoed Dec. 18, 1940), S. 915, S. 916, 76th Cong., 1st Sess. (1939); S. 3676, 75th Cong., 3d Sess. (1938); H.R. 12297, S. 3787, 74th Cong., 2d Sess. (1936); S. 1835, 73d Cong., 1st Sess. (1933). See discussion in *Wong Yang Sung v. McGrath*, supra. More recent proposed changes include those of the ABA Special Comm. on Legal Serv. and Proc., "Report on Code of Federal Administrative Procedure," 81 A.B.A. Rep. 491 (1956) and bills reflecting the proposed Code. See also S. 1887, 87th Cong., 1st Sess. (1961); S. 1070, 86th Cong., 1st Sess. (1959).

The following discussions are representative of principal problems and points of view: Davis, "Separation of Functions in Administrative Agencies," 61 Harv. L. Rev. 389, 612 (1948); Gellhorn, "Administrative Procedure Reform: Hardy Perennial," 48 A.B.A.J. 243 (1962); Hanslowe, "The Malaise of the Administrative Process," 1962 Duke L.J. 477; Hector, "Problems of the CAB and the Independent Regulatory Commissions," 69 Yale L.J. 931 (1960); Kintner, "The Current Ordeal of the Administrative Process: In Reply to Mr. Hector," 69 Yale L.J. 965 (1960); Peck, supra note 4 (distinguishing between ex parte reports from the staff and from outsiders); Woll, "Administrative Law Reform: Proposals

The 1935 National Labor Relations Act, for instance, provided that Board members could not be disqualified from subsequently participating in a Board decision "in the same case" by prior participation in its investigation.⁶ And in 1936 the Tenth Circuit observed: "if an administrative tribunal may on its own initiative investigate, file a complaint, and then try the charge . . . due process is not denied . . . because one or more of the board aided the investigation."⁷

While section 5(c) of the Administrative Procedure Act of 1946 provided that "[no] officer, employee or agent engaged in . . . investigative or prosecuting functions" could "participate or advise" in the decision of that or any "factually related" case, 5(c)'s last clause made it inapplicable "in any manner to the agency or any member or members of the body comprising the agency."⁸ According to the Attorney General's Report, the section "would not preclude . . . a member of the Interstate Commerce Commission personally conducting or supervising an investigation and subsequently participating in the determination of the agency action arising out of such investigation."⁹ *Treat* varied from this situation principally in that the prior participation occurred while the commissioner was a staff member, and presents, *inter alia*, the question whether this difference is sufficient to inject due process issues where there would otherwise be none.

Treat was charged with having fraudulently sold stock in South Bay

and Prospects," 41 Neb. L. Rev. 687 (1962); "Administrative Regulation: A Symposium," 26 Law & Contemp. Prob. 179 (1961).

Of interest is Professor Hanslowe's statement (*supra* at 482-83):

Whether it be the National Labor Relations Board, the Interstate Commerce Commission, the Federal Power Commission, the Federal Communications Commission, the Civil Aeronautics Board, or the Federal Trade Commission, the fact seems to be that, with but very few exceptions, none of them has been doing a more than barely adequate job and some considerably worse than that. The conclusion seems inescapable that the competing pressures toward effective regulation, on the one hand, and toward fairness to the regulated, on the other, have produced a situation where we have achieved neither goal.

⁶ Section 5 of the NLRA (49 Stat. 452 (1935), 29 U.S.C. § 155 (1958)): "The Board may, by one or more of its members . . . prosecute any inquiry necessary to its functions A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case." See also testimony of ICC Commissioner Aitchison that he personally conducted investigations in Hearings on Federal Administrative Procedure Before the House Committee on the Judiciary, 79th Cong., 1st Sess. 50-55 (1945).

⁷ 49 Stat. 451 (1935), 29 U.S.C. § 154 (1958), as amended limits the freedom of Board members, particularly as to their relations with the staff.

⁸ *Brinkley v. Hassig*, *supra* note 5; cf. *Berkshire Employees Ass'n. v. NLRB*, *supra* note 5.

⁹ Administrative Procedure Act, 60 Stat. 239 (1946), 5 U.S.C. § 1004(c) (1958). For the legislative history of § 5(c), see H.R. Rep. No. 1980, 79th Cong., 2d Sess. 28-29 (1945); S. Rep. No. 752, 79th Cong., 1st Sess. 18, 41 (1945); Attorney Gen.'s Comm. on Admin. Proc., *supra* note 1, at 55-57.

¹⁰ Statement of the Attorney General, S. Rep. No. 752, 79th Cong., 1st Sess. 41 (1945); cf. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 46 (1950): "The Administrative Procedure Act did not go so far as to require a complete separation of investigating and prosecuting functions from adjudicating functions."

Industries to the public. During the course of the proceedings, some matter—its nature undisclosed¹⁰—was decided by a three-man quorum which included Commissioner Cohen, recently appointed from his position as director of the SEC's Division of Corporation Finance, responsible for processing registration statements for new securities issues. During Cohen's directorship his division had investigated both informally and formally the accuracy of South Bay's registration statement, which later became an issue in the revocation proceedings against Treat subsequently brought by the SEC's Division of Trading and Exchanges; however, apart from formal responsibility as director, there was little evidence that he participated in the case or had known much about it. Cohen's own statement, made later, indicated virtually no recollection of the case, but admitted that he had seen a copy of the Division's memorandum to the Commission recommending formal investigation and also that his files had copies of "three brief memoranda of telephone conversations" by staff personnel. He had, in addition, appeared before the Commission as director with regard to requests for acceleration of the effective dates of some other securities (not involved in the charges forming the basis for proceedings) underwritten by Treat,¹¹ and had, after becoming a commissioner, seen a memorandum concerning the case sent to the Commission collectively.

Treat's application to the district court for a preliminary injunction was denied. But the court of appeals' motions division, on a motion to stay the district court's order, decided the case on the merits. To the court of appeals, which used the analogy of a prosecutor-turned-judge, due process required that "the investigative as well as the prosecuting arm of the agency . . . be kept separate from the decisional function."¹² The above participation made a "substantial showing" that Treat had

¹⁰ *Amos Treat & Co. v. SEC*, 306 F.2d 260, 265 (D.C. Cir. 1962). The question involved does not appear from the opinion except that it concerned a ruling "deemed critical by the appellants." *Id.* at 262.

¹¹ *Id.* at 265. Requests for accelerating the effective date of a registration statement are frequent and routine. Section 8(a) of the Securities Act of 1933, 48 Stat. 79 (1933), 15 U.S.C. § 77h (1958) provides that the effective date shall be the twentieth day after filing "or such earlier date as the Commission may determine, having due regard to the adequacy of the information . . . theretofore available to the public . . ." Acceleration is not normally a contested issue, and Cohen's appearance was to support, not oppose, the requests. See Brief for Appellants in Support of Petition for Rehearing En Banc, *Amos Treat & Co. v. SEC*, Civil No. 17002, D.C. Cir., May 25, 1962: "acceleration . . . was a general policy problem unconnected with the facts in the present revocation proceeding . . ."

¹² *Amos Treat & Co. v. SEC*, supra note 10, at 265. Federal judges are subject to statutory disqualifications. E.g., *United States v. Vasilick*, 160 F.2d 631 (3d Cir. 1947); *Rose v. United States*, 295 Fed. 687 (4th Cir. 1924); 28 U.S.C. § 455 (1958); see 28 U.S.C. §§ 47, 144 (1958); Frank, supra note 1. There is no discussion in the case as to whether failure to segregate functions renders the NLRA unconstitutional, see note 6 supra, nor as to why the court's separation principle is not equally violated when an existing commissioner participates in, or learns facts ex parte about, preliminary stages of a proceeding.

a right, as a matter of due process, to discover in a "full evidentiary hearing" whether there had been enough further participation on Cohen's part to deny due process, or to dismissal without prejudice to the institution of new proceedings, provided Cohen qua commissioner did not participate.¹³ The court rejected the Commission's argument that the last clause of section 5(c) of the APA exempted Cohen from the section's general separation of functions provision, which held that the prohibition traveled with Cohen when he went to the Commission. It read the section narrowly as meaning merely that commissioners who were commissioners at the time could initiate investigations or proceedings.¹⁴ The upshot was that the *Treat* proceedings were stopped.¹⁵

Despite *Treat's* unrealistic construction of 5(c), and its clash with at least the philosophy of cases permitting commingling of functions by existing commissioners, the SEC did not apply for certiorari;¹⁶ it felt that *Holman* (where respondents had won *Treat*-type relief in the district court)¹⁷ provided the better vehicle for appeal, since the commissioner involved—Woodside, Cohen's predecessor as director—had submitted a sworn affidavit that he had no knowledge of the case whatever when he was director.¹⁸

¹³ The full evidentiary hearing was used in FCC cases involving improper ex parte communications, *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959); *Massachusetts Bay Telecasters, Inc. v. FCC*, 261 F.2d 55 (D.C. Cir. 1958); *WKAT, Inc. v. FCC*, 258 F.2d 418 (D.C. Cir. 1958), but is not acceptable to the SEC: "an evidentiary hearing is unwarranted. To impose the additional burden of an evidentiary hearing upon the Commission would be destructive of the administrative process, subjecting the Commission, its staff and its files to time-consuming examination, subjecting . . . personnel to the inhibiting knowledge that such inquiries are ever a possibility . . ." Brief for Appellant, p. 15, *SEC v. R. A. Holman & Co.*, 323 F.2d 284 (D.C. Cir. 1963). The Commission has jealously protected its staff and its private files from exposure; the leading (and quite humorous) case is *Appeal of United States SEC*, 226 F.2d 501 (6th Cir. 1955); see Securities Act of 1933, Rule 122, 17 C.F.R. § 230.122 (Supp. 1962).

¹⁴ *Amos Treat & Co. v. SEC*, supra note 10, at 266:

Section 5(c) applied to Commissioner Cohen as director of the Division of Corporation Finance. Its prohibitory impact followed him and attended when he became a member of the Commission.

It is our view that the exclusionary sentence relied upon was intended to permit one who is a Commissioner to participate in a decision of the Commission that an investigation go forward

¹⁵ New proceedings were instituted and a settlement reached. SEC Securities Exchange Act Release No. 6971, Dec. 17, 1962.

¹⁶ Failure to request the Solicitor General's Office to seek certiorari may have been unwise, particularly in light of the equivocal *Holman* decision. The SEC's decision was in part a reaction to losing its Petition for Rehearing En Banc, supra note 11. The SEC's current position on *Treat* is that it is "not to be regarded as a precedent with respect to future cases since the Commission respectfully disagrees with [the *Treat*] . . . opinion." SEC Securities Act Release No. 6855, July 17, 1962.

¹⁷ *R. A. Holman & Co. v. SEC*, Civil No. 1888-62, D.D.C., July 6, 1962. As indicated by the preface quotation, the district court did not relish granting the preliminary injunction, but felt *Treat* indistinguishable, a view privately held by most of the SEC staff involved in the case.

¹⁸ The Commission's denial "that defendant Woodside . . . acquired . . . knowledge of the facts in issue" was based on the fact that his subordinate, Eisenhart, had responsibility for processing the registration statement of Pearson Corporation, which led to the investiga-

Meanwhile, *Treat* proved just that to other beleaguered litigants. In 1962, as part of the same policy that produced the Special Study of Securities Markets,¹⁹ the SEC stepped up its antifraud program against brokers, particularly over-the-counter houses, and reorganized the Division of Trading and Exchanges.²⁰ By May, when the *Treat* opinion came down, a crash enforcement program had resulted in a large number of broker-dealer revocation proceedings. In many of these cases questions arising during the hearing had been certified to, and decided by, a Commission which included Cohen or Woodside, thus spawning a host of *Treat*-type motions to dismiss. Since *Treat* appeared to cover all such cases, all except the R. A. Holman & Co. proceedings were dismissed and begun anew.²¹

A different panel of the court of appeals distinguished *Holman* from *Treat* and reversed the district court²² which had enjoined the Commission. *Holman* set *Treat* apart as being "the exceptional case." Ordinarily, it said, the administrative process will not be stayed to consider disqualification questions; these will be decided only on appeal from a final agency decision, and the party alleging disqualification must first introduce in the administrative hearing "whatever relevant evidence he possesses."²³ And, although the court avoided the issue of how far into

tion of *Holman*. Eisenhart's affidavit stated that he had not discussed the statement "and its apparent problems" with Woodside. During fiscal 1960, 1,638 registration statements were filed with Woodside's Division, in addition to some 1,400 posteffective amendments. Reply Brief for Appellants, pp. 6, 8, SEC v. R. A. Holman & Co., supra note 13.

¹⁹ SEC, "Report of Special Study of Securities Markets," H. Doc. No. 95, 88th Cong., 1st Sess. pt. 1 (1963).

²⁰ The reorganization, which is at this writing still in progress, involved both personnel and structural changes, including establishment of SITE (Special Investigation Trial and Enforcement Branch) subsequently superceded by a more elaborate branch system. Another major change was the appointment of I.M. Pollack, criminal enforcement expert, as Associate Director of the Division. For general discussion of the enforcement problem faced by the Division and by the SEC's Washington Regional Office, see Statements of William H. Cary, Chairman on May 14, 1962, Hearings on H.R. 11670 Before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 87th Cong., 2d Sess. (1962) and on May 2, 1963, Hearings on H.R. 4200 Before Subcommittee No. 2 of Committee for the District of Columbia, 88th Cong., 1st Sess. (1963).

²¹ See notes 2-3 supra.

²² SEC v. R. A. Holman & Co., 323 F.2d 284 (D.C. Cir. 1963). The panel of the court of appeals which decided *Treat* consisted of only two judges, Danaher and Chief Judge Miller. The *Holman* panel consisted of Judges Burger, who wrote the opinion, Bastian, and Chief Judge Bazelon. The short *Holman* opinion came out considerably after argument, suggesting considerable difference of opinion within, and quite likely between, panels.

²³ *Id.* at 287: "While the scope and nature of that inquiry has never been fully delineated it must be sufficient to allow the challenging party to introduce whatever relevant evidence he possesses bearing on disqualification since he, of course, has the burden of proof." Cf. Administrative Procedure Act § 7(a), 60 Stat. 241 (1946), 5 U.S.C. § 1006 (1958).

Such a procedure is also in accord with both the statutes administered by the SEC and prior cases. Section 9(a) of the Securities Act of 1933, 48 Stat. 80 (1933), 15 U.S.C. § 77i (1958) and § 25(a) of the Securities Exchange Act of 1934, 48 Stat. 901 (1934), 15 U.S.C. § 78y (1958) rest "exclusive jurisdiction to review Commission orders with the federal Courts of Appeal." See *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535, 553 (1954) (against claim of due process violation and the sixth, seventh, and eighth amendments, held: premature to rule until exhaustion of required administrative procedures); *Wolf Corp. v. SEC*, 317 F.2d

the workings of an agency a respondent may go to find relevant evidence—"the scope and nature of that inquiry has never been fully delineated"—it is apparent that respondents must obtain the evidence without the full evidentiary hearing envisioned by *Treat*, since otherwise there would be no distinction between it and the normal case; in fact, the phrase "he possesses" suggests evidence gathered without any access to testimony or documents from the agency or its personnel concerning non-public matters.²⁴ Both the right to enjoin agency proceedings and the right to a full evidentiary hearing thus appear linked to the "exceptional" case.

To the court, the "exceptional" relief accorded *Treat* and withheld from *Holman* "rested solely on due process grounds, so clearly established on the record made there,"²⁵ the two cases being "factually dis-

139, 143 (D.C. Cir. 1963); *National Lawyers Guild v. Brownell*, 225 F.2d 552 (D.C. Cir. 1955), cert. denied, 351 U.S. 927 (1956); *Young v. Higley*, 220 F.2d 487 (D.C. Cir. 1955); *Johnson v. Nelson*, 180 F.2d 386 (D.C. Cir. 1950) (administrative remedies must be exhausted even if the administrative action involved "probably erroneous"); *American Sunatra Tobacco Corp. v. SEC*, 93 F.2d 236, 239 (D.C. Cir. 1937) ("Congress meant the Act itself to cover the entire field of review of the Commission's judicial action"); *SEC v. Andrews*, 88 F.2d 441, 442 (2d Cir. 1937) ("It is perfectly clear that a suit against the Commission . . . can be maintained only in the Courts and upon the terms specified in the statute"); cf. *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). Other cases have permitted intervention before exhaustion of administrative remedies "where the statute is so obviously violated that 'a sacrifice or obliteration of a right . . . is clearly shown . . .'" *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 566 (1946); accord, *Wettre v. Hague*, 168 F.2d 825, 826 (1st Cir. 1948).

²⁴ It usually is improper for any Commission employee to discuss nonpublic matters outside the Commission. Securities Exchange Act of 1934, Rule 4, 17 C.F.R. § 240.0-4 (Supp. 1961); Securities Act of 1933, Rule 122, 17 C.F.R. § 230.122 (Supp. 1961).

Resolution of the problem in a manner satisfactory to both sides would be difficult indeed. Assuming, as one must, that there is a degree of participation which a commissioner could reach which would disqualify and result in reversal by the court of appeals on review, and assuming, as one also must, that the data necessary to show this is exclusively in the hands of the agency in the normal case, respondent's rights remain stunted absent full "fishing rights" or, alternatively, dismissal. Yet such rights are plainly incompatible with agency administration which in this situation must prevail unless proof of involvement—short of that needed to prove a lack of due process, but certainly substantial—is presented by respondent using ordinary areas of inquiry. In this respect the treatment is similar to that where fatal impropriety on the part of a nonstaff commissioner is alleged (the first *Holman* case, *R.A. Holman & Co. v. SEC*, 299 F.2d 127 (D.C. Cir.), cert. denied, 370 U.S. 911 (1962), an earlier appeal in the *Holman* case seeking injunctive relief inter alia for alleged ex parte communications between staff and commission) or other decision makers, note 51 *infra*, except where statutory procedures exist. *Frank*, *supra* note 1. The SEC position, which rests in part on § 7(a) of the APA, 60 Stat. 241 (1946), 5 U.S.C. § 1006 (1958), is that no inquiry beyond that normally permitted would be allowed absent "a substantial charge of personal bias or corruption"; presumably evidence of actual bias. See Reply Brief for Appellants, p. 15 n.20, *SEC v. R. A. Holman & Co.*, *supra* note 22.

Logically, evidence sufficient to overcome the presumption that acts of federal officers regular on their face are legal (*National Lawyers Guild v. Brownell*, *supra* note 23; *United States v. Chemical Foundation, Inc.*, 272 U.S. 1 (1926)) would be sufficient to justify a "full evidentiary hearing."

²⁵ *SEC v. R. A. Holman & Co.*, *supra* note 22, at 286 [emphasis in original]; see *Wettre v. Hague*, 168 F.2d 825, 826 (1st Cir. 1948) which appeared to rest injunctive relief given despite the normal rule that administrative remedies must be exhausted on the allegations: "Since this clearly alleges a violation of the plaintiffs' legal rights . . . there is no longer any occasion for the requirement that they exhaust . . . administrative remedies . . ."

tinguishable" in that in *Treat* the Commission "did not deny plaintiff's allegations of the claimed disqualifying factors" (Cohen conceded the slight participation alleged) while in *Holman* it did.²⁶ But the implied factual differences (which the district court could not discern) between Woodside's and Cohen's participation hardly have constitutional stature. Both made ex parte statements and that Woodside's was in affidavit form can scarcely matter.²⁷ Cohen's appearance before the Commission regarding other securities *Treat* underwrote is patently irrelevant (as is the fact that he "then officially discussed with the Commission the general policy to be followed"²⁸), particularly since, as the court failed to point out, his recommendation was in *Treat's* favor. His receipt of a staff memorandum *after* coming to the Commission (which the court found significant) is equally irrelevant, since the others received it also, and since even *Treat* read section 5(c) of the APA as exempting agency members considering whether to bring proceedings. Furthermore, the memorandum supporting the Division's request for a formal order of investigation which Cohen saw was seen at the same time by the then commissioners, and would have been properly seen by him even in *Treat's* view had he been on the Commission at the time.²⁹ The three memoranda of telephone conversations consequently provide the principal factual distinction between the cases, memoranda whose subject matter does not appear to have been important to the *Treat* panel. But in all probability these would have transmitted far less ex parte information than Cohen received from the formal order memorandum, or that urging proceedings, since normally these are highly detailed summaries of the evidence gathered at that point,³⁰ in fact, the memoranda almost cer-

Compare *Franklin v. Jonco Aircraft Corp.*, 346 U.S. 868 (1953) (per curiam) where mere allegation of violation was insufficient. See also *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

²⁶ *SEC v. R. A. Holman & Co.*, supra note 22, at 286. Presumably Cohen's admissions made the presumption of governmental regularity (see *United States v. Chemical Foundation*, supra note 24) irrelevant, in contrast to Woodside's flat denial, which brought the presumption into play.

²⁷ Cohen's statement was in the form of an attachment to the Commission's order of April 11, 1962, denying *Treat's* request for a separate disqualification hearing.

²⁸ *Amos Treat & Co. v. SEC*, 306 F.2d 260, 265 (D.C. Cir. 1962); see note 13 supra.

²⁹ See § 5 of the NLRA, 49 Stat. 452 (1935), 29 U.S.C. § 155 (1958); note 14 supra. Compare *FTC v. Cement Institute*, 333 U.S. 683, 701 (1948). While due process need not require a hearing in accord with § 5(c)'s standards, *Marcello v. Bonds*, 349 U.S. 302, 310-11 (1955), one which was in accord with § 5(c) would also give the respondent due process. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

³⁰ Such memoranda provide the vehicle for communication concerning the case from staff to commission, although normally a staff member will appear ex parte before the commission to explain orally the staff position. The memoranda are usually quite detailed. Prepared by the staff attorneys investigating the case, and reviewed by branch or section chiefs, they contain the "facts" as seen by the investigators, whose word must largely be taken for granted in composing the document. No potential party may normally dispute the accuracy of the contents or the conclusions contained, since he does not know about it in the first place. On at least one occasion, in a nonpublic matter, the author was involved in a successful attempt

tainly contained less information than a commissioner would be likely to acquire in the course of casual lunch table or car pool conversation with staff members.³¹

The unfortunate consequence is that *Holman* can be read in either of two more or less opposite ways: as abandoning *Treat* as best it could, or, alternatively, as holding that whenever there is any degree of participation, however slight, due process is violated absent a full evidentiary hearing.

Also surprising is the court's summary rejection of section 7(a) of the Administrative Procedure Act, which sets up a specific procedure for allegations of bias. Section 7(a) provides that any presiding officer or officer participating in decisions "may at any time withdraw if he deems himself disqualified; and upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case." The SEC argued (1) that a commissioner fell within the scope of the section, and (2) that the section provided an exclusive vehicle for attacking bias not followed in *Holman*. But the court construed the section as referring only to hearing examiners, even though the motive behind the section, which was to avoid delaying the proceedings on a collateral issue, would apply also to commissioners.³² And the section's reference to "all presiding officers and officers participating in decisions" is redundant if confined to hearing examiners. In any event, the result in *Holman* is substantially identical to that which would have been reached had section 7(a) applied. On the other hand, application of section 7(a) to *Holman* would have been inconsistent with *Treat*, which may serve to explain the court's narrow construction.³³

PROCEDURAL EFFECTS AND UNCERTAINTIES

The most obvious procedural effect is, of course, that it makes already interminable proceedings longer. The consequence of this is fre-

by a potential respondent who was privately informed by a staff member of the impending staff request to block the action sought.

³¹ Wholly apart from formal lines of communication such as described above, commissioners keep informed on cases coming up through informal contact with the staff—"car pool justice"—which alone makes *Treat* at best a completely unrealistic decision.

³² "Congress has made no specific provision for considering challenges of disqualification addressed to members of regulatory or administrative agencies acting as such, as it has, for example, concerning hearing examiners, Section 7(a) of the Administrative Procedure Act . . ." *SEC v. R. A. Holman & Co.*, 323 F.2d 284, 287 (1963). An interesting question is presented where, assuming § 7(a) is applicable, the requirement of a "timely" affidavit is met when respondent attempts to discover from the agency the facts re participation and is refused. See generally *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 35 (1952).

³³ I.e., § 7(a) would have been applicable to *Treat* also, and even assuming the respondent's motion to have met the section's requirements, no injunction could have been granted, at least on the facts there present.

quently lost by critics of administrative procedure. Delay is serious not so much because of harm to the industry respondents—indeed, delay is usually a respondent tactic, as witnessed by the *Holman* proceeding, where 120 out of a total of 140 hearing days lost due to postponements were requested or joined in by *Holman*³⁴—but rather because it cripples an effective enforcement program. Respondents in SEC revocation proceedings, for instance, nearly always continue operating during the course of the hearing; and this alone may well make a long, drawn-out (albeit losing) fight worthwhile.³⁵

Another serious effect is that it is impossible for the SEC or any other agency to determine how much prior involvement and of what nature is permissible. There is no way of knowing, for instance, whether a commissioner who has participated in some adjudication in the case may have previously (as a staff member): (1) Participated in the investigation directly, as where he interviewed witnesses and examined documents; (2) Advised or supervised subordinates in conducting the investigation; (3) Read *ex parte* reports on the case from staff employees, or conversed with them about it; (4) Appeared before the commission or board with respect to some aspect of the investigation or prosecution of the case; or (5) Advised or supervised the prosecution of the case, including preparation of briefs and other papers, or advising in their preparation. A commissioner or board member who was a conscientious staff executive will frequently have performed all five functions, depending upon whether it presents only routine problems which subordinates can handle. If *Treat* and *Holman* are taken at face value, any of these activities would disqualify; indeed, *Treat* might well use due process to bar a commissioner from adjudicating in a case where he has performed functions (1) or (2), even if he engaged in the activity as commissioner or board member and not staff employee, despite the evident mandate given by the NLRA to similar activity.³⁶

Further, both cases focused on the tainted commissioner's activities as a staff member, rather than on the nature of the matter decided as commissioner. But this latter aspect is important also in determining

³⁴ Brief for Appellants, p. 7, *SEC v. R. A. Holman & Co.*, *supra* note 32.

³⁵ E.g., the consolidated proceedings in *Holman* were begun in Sept. 1960. They included one appeal where *Holman* alleged, *inter alia*, that Regulation A as applied was unconstitutional. *R. A. Holman & Co. v. SEC*, 299 F.2d 127 (D.C. Cir.), cert. denied, 370 U.S. 911 (1962). The proceedings already contain over 8,000 pages of testimony. Reply Brief for Appellants, p. 15, *SEC v. R. A. Holman, & Co.*, *supra* note 32. *Holman* has been operating continuously throughout the period.

³⁶ *Amos Treat & Co. v. SEC*, 306 F.2d 260, 266 (D.C. Cir. 1962). Commissioners are apparently restricted to such data as might be necessary for their decision to initiate proceedings. The opinion does not appear to sanction active participation in the investigation. Compare the NLRA, 49 Stat. 452 (1935), 29 U.S.C. § 155 (1958).

disqualification. For example, Cohen, too, participated in a Commission decision involving *Holman*, but it was on a motion for a continuance and his disqualification was not considered in issue by the court of appeals even though urged in the original injunctive complaint. While curiously neither *Treat* nor *Holman* discloses the nature of the matters decided by Cohen or Woodside which disqualified them, *Treat* suggests that to some extent the aggrieved party's subjective view will determine the question of whether the matter was sufficiently important.³⁷ To avoid disqualification the matter will have to be classifiable as "ministerial," and even here the SEC has dismissed in response to *Treat*-type motions.³⁸

Also, the nature of the matter acted on as commissioner may affect admissibility of all or part of the old record in proceedings reinstated after dismissal. The SEC staff retrying the cases has offered the old record to shorten the tedious process of having all witnesses testify again, and the issue, after Commission resolution, will probably be raised on appeal.³⁹ A tainted commissioner may have participated in a wide variety of commission decisions involving the case, ranging from "ministerial" to final determination, including the following five, which either have raised, or are likely to raise, issues of admissibility.

Participation in "Ministerial" Decisions

In the dismissed *Siltronics* hearing⁴⁰ subsequently reinstated, Cohen participated in Commission decisions fixing hearing dates, denying requests for copies of transcripts of testimony, changing hearing examiners, and amending the order for proceedings against one of the respondent brokers.⁴¹ The staff's position is that these are ministerial, had nothing directly to do with creation of the record or its contents, and hence

³⁷ See note 10 *supra*.

³⁸ Order of the Commission, Matter of *Siltronics, Inc.*, No. 24W-2490, SEC, Dec. 21, 1962.

³⁹ *Ibid.*; see Memorandum Opinion and Order, Matter of *Siltronics, Inc.*, No. 24W-2490, SEC, Sept. 30, 1963, at 3 where the Commission ruled the former transcript admissible in the new proceedings: "It is contended that, under the *Treat* case, a special 'taint' attaches to the record of the earlier proceedings which makes it inadmissible. We think not." In the Agricultural Research case (Matter of *R. Baruch & Co.*, No. 8-8712, SEC, May 20, 1963) the matter is under advisement. See Brief of the Division of Trading and Exchanges, Matter of *R. Baruch & Co.*, *supra*.

⁴⁰ See note 38 *supra*.

⁴¹ In Matter of *Siltronics, Inc.*, *supra* notes 38 and 39 Cohen participated in Commission decisions substituting one hearing examiner for another; postponing the hearing for one month; amending the order for proceedings against one of the respondents to add the question of whether that respondent should be suspended or expelled from membership in the Boston, Philadelphia-Baltimore-Washington, and Pittsburgh stock exchanges; and denying motions for more definite statements, for transcripts of testimony taken in the course of the investigation, for severance, for continuance, and for leave to take depositions. The staff took the position, with which the Commission agreed, that these were "ministerial" (the Commission minutes use the phrase "not . . . substantial") as distinguished from a "Commission vote to admit any evidence proffered by the staff or reject any evidence proffered

could not taint it. Decisions on motions for continuance, severance, leave to take depositions, and for more definite statements also fit into this category.

Of course, if the tainting decision is regarded as insignificant, the proceedings should not have been dismissed in the first place, and conversely, that they were dismissed might arguably be evidence of significance on the Commission's part, were it not for the fact that the SEC's concern over possible injunction or reversal caused it to dismiss cases indiscriminately. Assuming admissibility, the proceedings will merely begin where they left off, dismissal and reinstatement being wasted motion by an enforcement staff needed urgently to process the backlog of fraud cases.

Participation in the Initial Decision to Bring Proceedings or Start a Formal Investigation

The SEC's *Siltronics* brief at least leaves open the possibility, although the issue was not directly involved, that such participation would taint the entire record. It is hard to see why this would be so, since according to *Treat* the last clause of section 5(c) exempts commissioners deciding to initiate proceedings or investigations. In carrying out this function, a commissioner would be able to review all the fruits of the investigation to the same extent as a staff director. Furthermore, in this situation the record is not tainted; at most, the proceedings should not have been brought, but once they are reinstated by a "clean" commission, all defects disappear and no denial of due process is possible.⁴²

Participation in a Decision to Permit Introduction of a Document Offered in Evidence by the Staff

Such participation presumably taints that portion of the record, assuming, as would have to be the case where dismissal was appropriate, that the doctrine of harmless error is inapplicable (an assumption which may not be factually warranted in light of the SEC's post-*Treat* dismissal policy). But the old record with the offending parts removed should satisfy all due process requirements. That the triers of fact—the hearing examiner and the commission or board—were exposed to the exhibit and testimony ultimately deleted is no more significant than it would have been had they determined to exclude the evidence initially.

by movants." Memorandum Opinion and Order, Matter of *Siltronics, Inc.*, supra note 39, at 3 n.5.

⁴² E.g., the act of reinstatement in effect has replaced the decision to initiate proceedings in the original hearing and wiped out whatever defects might have attached. Certainly no such defects could attach to the record itself.

Participation in a Commission Ruling on Admissibility, Procedure, or Conduct of the Hearing Which Turns Out to be Legally Correct

In the dismissed proceedings involving Baruch & Co. and a number of other brokers, staff attorneys conversed with a Government witness off the record during a recess taken in the middle of the witness' testimony. It could, of course, be expunged from the record as in the preceding example. But suppose, as seems the case here, that the decision of the Commission permitting the conversation is "legally" correct in the sense that it would be decided the same way by a reviewing court of appeals.⁴³ Even if the commissioner erred in participating, no respondent was injured and could not have been denied due process.

Participation in the Final Decision in the Case, Adversely to Respondents

Such participation would not affect the record upon which the decision was based. Here, too, there is a flavor of a ritualistic administrative ballet: the actual effect of dismissal and reinstatement would be merely a new decision on the old record with the tainted commissioner absent.

While the common-law rule of strict necessity is relaxed in administrative proceedings,⁴⁴ admission of the former record still requires identity of parties and issues unless adequate safeguards otherwise exist.⁴⁵ In the *Baruch* proceedings, Sutro Bros., an original party, settled the case and accepted a stipulated penalty.⁴⁶ The remaining respondents have argued that requisite identity of parties is lacking and that the old record—some 4,000 pages of testimony—cannot be introduced. But all

⁴³ In the example given, that the decision of the commission was legally correct seems beyond dispute. *Matter of United States*, 286 F.2d 556, 562 (1st Cir. 1961), rev'd on other grounds sub nom. *Fong Foo v. United States*, 369 U.S. 141 (1962) (double jeopardy); see *Frazer v. United States*, 233 F.2d 1, 2 (9th Cir. 1956).

⁴⁴ At common law, the requirements are that prior testimony be under oath and with opportunity for cross-examination, that the parties and issues be the same, and that there be some necessity for using a former record. Necessity required unavailability due to death, disqualification, etc. See 5 Wigmore, *Evidence* § 1402, at 148 (3d ed. 1940). This has been relaxed in administrative proceedings when undue delay would otherwise result. *Hertz v. Graham*, 23 F.R.D. 17 (S.D.N.Y. 1958); *Garner v. Pennsylvania Pub. Util. Comm'n*, 177 Pa. Super. 439, 110 A.2d 907 (1955). Transcripts are frequently admitted in administrative proceedings. *Railway Express Agency v. CAB*, 243 F.2d 422 (D.C. Cir. 1957); *Harrison Constr. Co. v. Pennsylvania R.R.*, 311 I.C.C. 521 (1960).

⁴⁵ In the *Agricultural Research* case, presence of requisite identity of both parties and issues was contested in the reinstated proceedings. Brief of the Division of Trading and Exchanges, *Matter of R. Baruch & Co.*, supra note 39. *Sutro Bros. & Co.* and several individual respondents were severed from the proceedings having agreed on a stipulation of facts and a recommended penalty. See Order of Suspension, *Matter of Sutro Bros. & Co.*, No. 8-776, SEC, April 10, 1963. This resulted in fewer parties in the reinstated proceedings and, pro tanto, issues. But the issues severed pertained only to the severed parties. And rights of remaining respondents are adequately protected since in the old proceedings they had full right of cross-examination against severed parties.

⁴⁶ See note 45 supra. The penalty was suspension from the National Association of Securities Dealers for a 15-day period. Findings and Opinion, *Matter of Sutro Bros. & Co.*, supra note 45.

witnesses testified under oath and were subject to cross-examination, so even where the testimony of severed parties is applicable to the remaining respondents, their rights are protected, and in any case, the severed parties can be recalled as respondent witnesses.

EFFECTS ON AGENCY ADMINISTRATION AND EXPERTISE

Treat's spectre, in the form of an ever-present threat that an administrative proceeding involving thousands of man-hours will be upset, has already affected the attitudes of SEC commissioners toward their respective, and, to some extent, conflicting, duties of adjudication and administration. Informal conversations with the staff indicate that the Commission is more sensitive about staff contact and possible connection with cases coming before it. This adversely affects performance of their rule-making functions under the Securities Act of 1933 and the Securities Exchange Act of 1934,⁴⁷ as well as their function to supervise effectively the performance of the staff, functions which require continuous exposure to the work of the agency. For example, several years ago a report was prepared on the effectiveness of the SEC's enforcement program, particularly in the New York area. The report discussed frankly the handling of specific cases by the staff, including some then still open. This went to the Commission, and its preparation and the investigation that preceded it were supervised by a commissioner. *Treat's* philosophy could well squelch such an inquiry, even though it was obviously necessary for effective administration.

Another inevitable response to *Treat's* threat, at least at the SEC, will be frequent voluntary disqualification of commissioners formerly on the staff, which in turn will deprive the Commission of needed expertise;⁴⁸ initially, since the experienced staff member turned commissioner is absent, and later, to the extent that it, and the continued danger that counsel might nonetheless discover some involvement as a staff member, operate to discourage appointment of staff members to the Commission. While there are always notable exceptions, in general the quality of the

⁴⁷ Securities Act of 1933, 48 Stat. 74 (1933), 15 U.S.C. §§ 77a-77aa (1958); Securities Exchange Act of 1934, 48 Stat. 881 (1934), 15 U.S.C. §§ 78a-78jj (1958). The 1933 act leaves to the Commission's discretion, inter alia, rules for registration of securities issues not over \$300,000 (§ 3(b) and Reg. A, 17 C.F.R. §§ 230.220-.224 (Supp. 1962)) and the contents of registration statements (§ 10). The 1934 act leaves to the Commission's determination, inter alia, information to be required of stock exchanges (§ 6(a)(2)), rules regulating price stabilization (§ 9(a)(6)), operation of exchanges (§ 9(b)), puts, calls, and straddles (§ 9(c)), manipulative or deceptive practices (§ 10(b)), and broker information and practices (§§ 15(b), (c)(1)). See *Charles Hughes & Co. v. SEC*, 139 F.2d 434 (2d Cir. 1943).

⁴⁸ Expertise was the motivation behind federal administrative agencies. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *Charles Hughes & Co. v. SEC*, supra note 49; *SEC v. Associated Gas & Elec. Co.*, 99 F.2d 795 (2d Cir. 1938);⁴ *Attorney Gen'l's Comm. on Admin. Proc.*, supra note 1, at 12-20; Jackson, "The Administrative Process," 5 *J. Social Philosophy* 143 (1940).

product of the SEC and other agencies seems to be in proportion to the expertise and knowledge of the laws and regulations enforced by the agency on the part of individual commissioners, qualifications most likely to be found in career employees. Anything which discourages appointment of such persons to any regulatory agency will rob the agency of an expert it badly needs (particularly since most federal agencies have no ex-staffers serving). It also robs the staff member of a just reward and an incentive important to counteracting low executive pay levels. And it deprives the staff of a sympathetic commissioner familiar with agency routine, who does not need to spend the major portion of his term being "educated" by the career employees.

Moreover, these adverse effects on agency effectiveness are not necessary for the protection of respondent's rights, since *Treat* adds little or nothing to the likelihood that a commissioner will be more unbiased in making adjudicatory decisions. Not only do staff directors normally limit their activities to receiving progress reports from the staff, or participating in group discussions of specific problems,⁴⁹ but even had Cohen or Woodside actively participated in investigation or prosecution supervision, they could hardly have gotten more information than commissioners are entitled to under *Treat*. Nor does a staff director have a greater "vested interest" in the outcome. Commissioners qua commissioners are subject to similar forces; their multiple functions produce a "point of view" and they, too, will generally have an interest in a record which shows an effective enforcement program.⁵⁰ The reorganization of the

⁴⁹ See description of the Director's job in 17 C.F.R. § 200.18 (Supp. 1962): "Only a small portion of his responsibility embraces duties of a prosecutory nature, or, indeed, of an investigative nature." Brief for Appellants, p. 23, *SEC v. R. A. Holman & Co.*, 323 F.2d 284 (D.C. Cir. 1963).

⁵⁰ A "point of view" is not disqualifying. Even where commissioners have openly expressed bias in the sense that they have formed a tentative prejudgment, a subsequent decision by them does not offend due process. *FTC v. Cement Institute*, 333 U.S. 683 (1948); *Lumber Mut. Cas. Ins. Co. v. Locke*, 60 F.2d 35, 38 (2d Cir. 1932) ("However tactless [the remarks indicated] . . . only that when so full an examination had been made no matters affecting the result were likely to be developed"). Justice Frankfurter, who was a member of the Court which decided the last Morgan case, *United States v. Morgan*, 313 U.S. 409, 421 (1941), felt that both judges and cabinet officers "may have an underlying philosophy in approaching a specific case." In the same year, the Attorney Gen'l's Comm. on Admin. Proc., supra note 1, at 20 noted: "the agencies cannot take a wholly passive attitude toward the issues which come before them."

Treat took the position that while a judge does not sit in a vacuum, he cannot have crossed the line of fairness and "thrown his weight on the other side." *Amos Treat & Co. v. SEC*, 306 F.2d 260, 264 (D.C. Cir. 1962) quoting *Berkshire Employees Ass'n v. NLRB*, 121 F.2d 235, 238-39 (3d Cir. 1941).

But see President's Comm. on Admin. Mgt., "Report on Administrative Management in the Government of the United States," 40 (1937) ("The same men are obliged to serve both as prosecutors and as judges. This . . . undermines judicial fairness; it weakens public confidence . . ."). See also Hanslowe, supra note 5, at 485: "To the extent that the administrator is concerned with . . . fairness, he will be distracted from . . . discharge of his executive . . . functions. To the extent that he focuses upon the latter, he will necessarily tend to discount fairness . . ."

SEC's Division of Trading and Exchanges referred to was partly due to the fact that the Commission was more enforcement minded than some of the staff.

CONCLUSION

Treat was certainly not legally compelled; indeed, the opposite appears true. Whatever subtle distinctions may exist between a commissioner who was first exposed to the case at the staff level and one who was exposed as commissioner, they are at best slight; yet the NLRA, section 5(c) of the APA, and judicial decisions of long standing permit commissioners to commingle functions and receive ex parte data from the staff. *Treat's* difficulty appears largely one of adverse emotional reaction—couched in due process terms—to the roles that the functional demands of the agency and the APA require commissioners to play. But as the Supreme Court observed over thirty-five years ago in *Tumey v. Ohio*: "All questions of judicial qualifications may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion."⁵¹ Neither in cases of judicial disqualification, nor where attacks are made on decisions of zoning boards, juries, and the like are due process questions normally raised by allegations such as present in *Treat*.⁵² And while there is certainly a place for emotional due process, it seems singularly inappropriate where the wrongful act boils down to three memoranda of telephone conversations.

Holman should have flatly rejected *Treat*. Its failure to do so, and the consequent uncertainty engendered will, until remedied, be an unnecessary and unfortunate threat to the effectiveness of the SEC and other federal regulatory agencies which perform adjudicatory functions.

⁵¹ *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); accord, *FTC v. Cement Institute*, supra note 50, at 702: "Most matters relating to judicial disqualification [do] . . . not rise to a constitutional level." Compare *Matter of Murchison*, 349 U.S. 133, 136 (1955).

⁵² See generally *United States v. Vasilick*, 160 F.2d 631 (3d Cir. 1947); *Rose v. United States*, 295 Fed. 687 (4th Cir. 1924); *Glatstein v. Grund*, 243 Iowa 541, 51 N.W.2d 162 (1952); *State v. DeZeler*, 230 Minn. 39, 41 N.W.2d 313 (1950); Frank, "Disqualification of Judges," 56 *Yale L.J.* 605 (1947). As pointed out in the SEC's *Holman* brief, Brief for Appellants, pp. 31-32, *SEC v. R. A. Holman & Co.*, supra note 49, Supreme Court justices do not normally disqualify themselves merely because they were Attorney General when the case was being investigated, prosecuted, or defended. E.g., *United States v. Rabinowitz*, 339 U.S. 56 (1950) (Clark, J.); *United States v. Alpers*, 338 U.S. 680 (1950) (Clark, J.); *United States v. Dickerson*, 310 U.S. 554 (1940) (Murphy, J.); *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940) (Murphy, J.). "Certainly, the Federal Trade Commission cannot possibly be under stronger Constitutional compulsions . . . than a court." *FTC v. Cement Institute*, supra note 50, at 703; see *Annot.*, 15 *A.L.R.2d* 1152 (1951).