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Is the Rule of Necessity Really Necessary in State Administrative Law: The Central Panel Solution

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IS THE RULE OF NECESSITY REALLY NECESSARY IN STATE ADMINISTRATIVE LAW: THE CENTRAL PANEL SOLUTION

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I. Introduction

It is well established that the due process right to a hearing includes the right that the decisionmaker be impartial.[2] This applies not only to judicial proceedings, but quasi-judicial administrative proceedings as well.[3] In fact, it has been stated that of all the rights encapsulated within due process, the requirement of an impartial decisionmaker is the most important because without that right, the other rights become meaningless.[4]

The likelihood of a biased decisionmaker is higher in state administrative hearings than in federal administrative hearings. While cases do exist where federal agency decisions have been challenged based on bias,[5] the federal cases are greatly out numbered by cases at the state level attacking agency decisions due to bias, many of which conclude that disqualifying bias does exist. While in part the discrepancy in the number of cases alleging bias between the federal and state courts is attributable to the larger number of administrative

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[2]Tumey v. State of Ohio, 273 U.S. 510 (1927); In re Murchison, 349 U.S. 133 (1955); General Motors Corp. v. Rosa, 82 N.Y. 2d 183, 624 N.E.2d 142, 604 N.Y.S. 2d 14 (1993); First American Bank & Trust Co. v. Ellwein, 221 N.W. 2d 509 (N.D. 1974). Michael Asimow, *Toward A New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L.Rev. 1067, 1143 (1992).

[3]Schweiker v. McClure, 456 U.S. 188 (1982); Regan v. Board of Chiropractic Examiners, 355 Md. 397, 735 A. 2d 991 (1999); Christopher B. McNeil, *Similarities and Differences Between Judges In the Judicial Branch and the Executive Branch*, 18 JNAALJ 1 (1998).

[4]Ann M. Young, *Evaluation of Administrative Law Judges: Premises, Means and Ends*, 17 J.NAALJ 1, 29 (1997), citing Martin H. Redish & Laurence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L. J. 455, 456-57 (1986).

[5]See, e.g., Cinderella Career & Finishing Schools v. FTC, 425 F.2d 583 (D.C. Cir. 1970); Texaco v. FTC, 336 F.2d 754 (D.C. Cir. 1964), vacated on other grounds, 381 U.S. 739 (1965).

hearings at the local level, also significant is the fact that local agency decisionmakers are more likely to be personally familiar with the parties and facts involved in the cases they decide as compared to their federal counterparts. It is much more likely therefore that allegations of personal, financial, and prejudgment bias of state agency officials will be successfully made in state courts.

An exception exists to the requirement that decisionmakers be unbiased and impartial. This exception, known as the rule of necessity, provides that even if disqualifying bias exists, the biased decisionmakers can still decide the case if they are the only authority empowered to make the decision. Despite the tension this exception creates with the due process right to an impartial decisionmaker, it has been relied upon by a significant number of cases from state courts.

The purpose of this article is to discuss the rule of necessity as it has been applied to state administrative agencies, and discuss the different approaches that have been offered to avoid its application. The article will show that state courts have relied on the rule of necessity liberally, and have thus tolerated biased administrative decisionmaking. The article will argue that the current alternative solutions to the use of the rule of necessity are inadequate. The article will then propose that mandatory referral to central panels of administrative law judges be utilized as the best solution to the bias-rule of necessity issue.

II. The Rule of Necessity

The rule of necessity is a common law doctrine which permits a judge to decide a case despite the judge's personal interest or bias in the matter if there is no provision for appointment of another judge to decide the case.[6] The leading case in the United States discussing the rule of necessity is *United States v. Will*[7] which involved a challenge by thirteen federal district court judges to statutes which had the effect of reducing the compensation of all federal judges by changing the formula for annual cost of living increases. Even though every federal judge had a personal financial interest in the outcome of this case, because it was not

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[6]In re Doe, 2 F. 3d 308 (8th Cir. 1993); Reily v. SEPTA, 330 Pa. Super. 420, 479 A. 2d 973 (1984); Bliss v. Tyler, 149 Mich. 601, 113 N.W. 317 (1907).

[7]449 U.S. 200 (1980).

possible to obtain a disinterested judge, the rule of necessity was invoked, and the case was decided by persons who would be personally impacted by the decision. The Supreme Court in *Will* noted that the rule of necessity had been recognized as early as 1430,[8] and had been "so [taken] for granted" that the Supreme Court had never made "express reference to it" or felt that "extended discussion of it was needed."[9] In *Will*, the Court further noted that the rule of necessity had "been consistently applied in this country in both state and federal courts."[10] Even though the rule of necessity developed as a common law doctrine relating to the disqualification of judges, it has also been applied to administrative proceedings where the administrative agency is acting in a quasi-judicial capacity.[11]

In practice, the rule of necessity has not played a significant role in federal administrative law. The only major federal administrative law case discussing the rule of necessity is *Cement Institute v. Federal Trade Commission*.[12] In *Cement Institute*, the target of a FTC unfair trade practice adjudication argued that the FTC had prejudged the case. The prejudgment contention was based on earlier reports filed by the FTC with Congress and the President concerning pricing practices in the cement industry which had concluded that the cement industry's prevalent pricing system constituted an illegal restraint of trade. In *Cement Institute*, the Supreme Court held that just because the FTC had reached a particular conclusion as a result of its own non-adversarial investigation did not mean that the FTC had prejudged the case which was now before it.[13] Disqualification on account of prejudgment bias therefore was not appropriate.

Although the Supreme Court had expressly held that no disqualifying prejudgment bias existed on the part of the FTC, the

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[8]Id at 213.

[9]Id at 216. The Supreme Court had earlier applied the rule of necessity in Evans v. Gore, 253 U.S. 245 (1920). Evans was a federal district court judge who sued for a refund of his federal income taxes. He argued that Congress had no power to tax the compensation of federal judges. Even though every federal judge had a direct personal financial interest in the outcome of this case, the case was decided by federal judges.

[10]449 U.S. at 214.

[11]See, e.g., Brinkley v. Hassig, 83 F. 2d 351 (10th Cir. 1936); First American Bank & Trust Co. v. Ellwein, 221 N.W. 2d 509 (N.D. 1974); and cases discussed in Section III.

[12]333 U.S. 683 (1948).

[13]Id. at 700-703.

Supreme Court nevertheless discussed the rule of necessity.[14] Because the FTC was the only agency empowered to decide an unfair trade practice case, if the FTC were to be disqualified, the purposes of the Federal Trade Commission Act would be defeated.[15] Alleged price fixers who had been the subject of statutorily required reports to Congress would be free to violate the law because no one would be able to enforce the law. The solution in such a situation was to allow the FTC to decide the adjudication even if guilty of prejudgment bias.

The Supreme Court's Cement Institute discussion of the rule of necessity is the only significant federal court discussion of the doctrine as applied to a federal administrative agency. The Supreme Court's discussion of the rule of necessity was totally unnecessary since the Court had earlier held that no disqualifying prejudgment bias existed. In contrast, to the federal experience, however, there are many cases from state courts concerning state administrative agencies where disqualifying bias was found, yet, relying on the rule of necessity, the state court permitted the biased state agency decisionmakers to decide the case. The rule of necessity, therefore, although recognized at the federal level, has much greater significance in state administrative law.

III. Application of the Rule of Necessity to State Administrative Agencies

To illustrate the significance of the rule of necessity in state administrative law, this section will discuss some of the significant cases from various states where the doctrine was applied to permit biased state administrative decisionmakers to decide cases.

Barker v. Secretary of State's Office of Missouri[16] involved a worker's compensation claim. At the initial hearing before an administrative law judge, the claimant's employer and the employer's insurance company were represented by attorney Hannelore Fischer. After the administrative law judge ruled in favor of the employer, an appeal was taken to the Labor and Industrial Relations Commission. Between the time of the initial hearing and the appeal to the Commission,

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[14]Id. at 701.
[15]Id.
[16]752 S.W. 2d 437 (Mo. App. 1988).

Hannelore Fischer was appointed chair of the Commission.[17] The Commission affirmed the administrative law judge's denial of benefits by a 2-1 vote, with Fischer in the majority. Fischer issued a separate statement in which she wrote that she had taken no part in the case until after the other two commissioners had deadlocked. Despite Fischer's earlier involvement as counsel in the case, the Missouri Court of Appeals upheld Fischer's participation and vote as part of the Commission's review by invoking the rule of necessity.[18]

Adkins v. City of Tell City, Indiana[19] involved a challenge by a police officer to his removal from the police force. The allegations of wrongdoing involved the police officer's sexual activity with a sixteen year old while on duty and in uniform. The Board of Safety, the agency empowered to remove police officers, first heard evidence of the sexual misconduct at a meeting which was held without the police officer's presence and without placing any witness under oath or subject to cross examination.[20] Subsequent to this first meeting, the board met in executive session, again outside the accused police officer's presence to further consider the charges. At the executive session, the Board voted to discharge the police officer.[21] Ten days later, however, the Board rescinded the discharge because of the lack of procedural regularity of its earlier actions, and scheduled a public hearing on the charges. Shortly thereafter, a public hearing was held which provided the required procedural protections.[22] After this public hearing, the Board voted to discharge the police officer for improper conduct while on duty.

The discharged police officer challenged the Board's discharge decision on the ground that the Board members should have been disqualified because they had been irreparably prejudiced by the ex parte information received at the earlier procedurally defective sessions.[23] Interestingly, the Indiana Court of Appeals agreed with the police officer that the Board's exposure to the "grave charges" prior to the procedurally

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[17]Id. at 438.

[18]Id. at 439.

[19]625 N.E. 2d 1298 (Ind. Ct. of Appeals, 1993).

[20]Id. at 1301.

[21]Id.

[22]At this hearing, witnesses were under oath, subject to cross examination, and a proper record was created. Id.

[23]Id. at 1303.

proper public hearing warranted the disqualification of the entire Board.[24] However, because no other body had the authority to remove a police officer, the rule of necessity was applied, and the court upheld the Board's decision to remove the police officer.[25]

In *Gay v. City of Somerville, Tennessee*,[26] a chief of police challenged his dismissal on the basis of prejudgment bias. In this case, prior to the hearing on the chief's removal, members of the deciding agency, the Board of Mayor and Aldermen, had told the city administrator to begin accepting applications for the position of chief of police.[27] Moreover, it was alleged that the mayor, who was a voting member of the Board, had told others prior to the hearing that "it was pretty well a done deal," and that "there was no way in hell" the present police chief would keep his job.[28] The Tennessee Court of Appeals held that there was sufficient evidence of bias on the part of the Board;[29] however, because the Board was the only agency authorized to make the decision whether the chief of police was to be removed, it was "appropriate to apply the Rule of Necessity."[30]

Removal of a police officer was also the issue in *Siteman v. City of Allentown, Pennsylvania.*[31] Seven months after being first informed of his proposed discharge, the police officer at a meeting of the Allentown City Council objected to the lack of sufficiently detailed notice of the charges against him.[32] Based on this objection, the city council ordered the police department to provide more information. In response, the police department filed a brief which included exhibits which it was argued caused the members of the council to be prejudiced against the officer.[33] A city council meeting was thereafter convened where two of the seven council members recused themselves. The council then voted 3-2 to dismiss all charges.[34] Two days later, however, the council

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[24]Id.
[25]Id. at 1304.
[26]878 S.W. 2d 124 (Tenn. Ct. of Appeals, 1994).
[27]Id. at 127.
[28]Id. at 127n. 3.
[29]Id. at 128.
[30]Id.
[31]695 A.2d. 888 (Pa. Comm.Ct. 1997).
[32]Id. at 889.
[33]Id.
[34]Id.

reconsidered, and voted 3-2 to hold further hearings on the matter. The next day, another council member recused himself, as did another council member a few weeks later.[35]

Only three of the seven council members were now left. The rules of the Allentown City Council required a quorum of four. Nevertheless, the remaining three council members held evidentiary hearings on the charges against the police officer, and eventually voted 3-0 for removal.[36] Faced with this unusual set of circumstances, the Pennsylvania Commonwealth Court invoked the rule of necessity, and remanded the case for a new hearing before the entire city council including members who had recused themselves.[37]

In *Acme Brick Company v. Missouri Pacific Railroad Company*,[38] a petition was filed with the Arkansas Highway Commission by a railroad requesting permission to discontinue a spur track which serviced the brick company's factory. When the brick company learned that counsel for the railroad was simultaneously representing the Commission and its members in two other lawsuits, the brick company sought disqualification of the Commissioners. The Arkansas Supreme Court held that "the representation of both [the railroad] and the Commissioners by [the same] counsel created an appearance of bias or impropriety on the Commission's part mandating their recusal from consideration of [the railroad's] petition."[39] However, because there was no procedure for appointment of replacements to hear the matter, the rule of necessity was invoked, and the commissioners were allowed to decide the railroad's petition.[40]

The rule of necessity was also invoked in an Illinois case involving both financial and prejudgment bias concerning the expansion of a landfill.[41] E & E Hauling had a contract to operate a landfill with DuPage County and the DuPage Forest Preserve District. In April 1981, E & E Hauling and the Forest Preserve District agreed to seek an

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[35]Id. at 890.

[36]Id.

[37]Id. at 891-92.

[38]307 Ark. 363, 821 S.W. 2d. 7 (1991).

[39]821 S.W. 2d at 10.

[40]Id. at 11.

[41]E & E Hauling, Inc. v. Pollution Control Board, 116 Ill. App. 3d 586, 451 N.E. 2d 555 (1983).

expansion of the landfill, and in September 1981, they jointly filed a petition with the Illinois Environmental Protection Agency (IEPA) which at that time had the authority to approve requests for landfill modifications.[42] Also in October 1981, the DuPage County Board passed an ordinance giving its approval to the proposed expansion. Significantly, by statute, the members of the DuPage County Board also served as the commissioners of the DuPage Forest Preserve District.

In November 1981, the Illinois State General Assembly amended the Illinois Environmental Protection Act to transfer responsibility for deciding landfill modifications from the IEPA to the relevant local authority, which in this case was the DuPage County Board.[43] In 1982, pursuant to the new authority granted to it by the 1981 amendment, the DuPage County Board held a hearing and voted to approve the landfill modification.

Opponents of the landfill expansion challenged the County Board's approval on various grounds including financial bias because the Forest Preserve District received a percentage of the fees E & E Hauling received from the waste deposited at the landfill,[44] and on prejudgment bias because the County Board had earlier passed an ordinance approving the expansion.[45]

The Illinois Appellate Court held that the County Board suffered a disqualifying conflict of interest. The increased royalty revenue to Forest Preserve District was "undeniably substantial"[46] which the court believed could improperly influence the County Board members who were also commissioners of the Forest Preserve District. Moreover, the County Board members had a disqualifying prejudgment bias because in their role as District Commissioners, they had approved the modification, were co-applicants with E & E Hauling in the petition to the IEPA, and had applied to the County Board for its approval.[47] In their role as County Board members, they had approved the expansion during the pendency of the application before the IEPA.[48] Despite all this evidence

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[42]451 N.E. 2d at 559.
[43]Id. at 561.
[44]Id. at 562.
[45]Id.
[46]Id. at 565.
[47]Id. at 566.
[48]Id.

of bias, the court upheld the County Board's approval of the landfill modification. The court said that this was a "true case of necessity"[49] because the County Board was the sole body empowered to make the decision.

A condemnation decision as part of a city's eminent domain power was the center of the controversy in *Kunec v. Brea Redevelopment Agency*.[50] In order to exercise the City of Brea, California's power of eminent domain, an affirmative vote of four of the five council members was required. A problem existed, however, in that two of the council members had property or financial interests adjacent to the property which was subject of the condemnation resolution. In order to get four votes, the two conflicted council members flipped a coin to decide which one should vote. After the coin toss, the council approved the resolution 4-0. The owner of the condemned property challenged the council's decision. The California Court of Appeal upheld the council's reliance on a California statute[51] which essentially codified the rule of necessity. The court held that it was proper for one of the biased council members to vote on the resolution in order to obtain the four votes needed to pass the resolution.[52]

Borough of Fanwood v. Rocco[53] involved an application to transfer a liquor license to a location which was about one block from the Fanwood Presbyterian Church. Under New Jersey's system of liquor control, the initial power to decide a liquor license matter was vested with the local municipal body with a right of appeal to the state Division of Alcoholic Beverage Control.[54] In this case, the initial hearing was held before the Fanwood Borough Council. Included in the hearing record was a letter from the Fanwood Presbyterian Church expressing its view that the application should be denied.

The borough council voted to deny the liquor license transfer.

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[49]Id. at 567.

[50]55 Cal. App. 4th 511, 64 Cal. Rptr. 2d 143 (1997).

[51]California Government Code § 87101; Cal. Code Regs., tit. 2, § 18701, subd. (a).

[52]The court ordered a remand to the council because it had failed to make full public disclosure in the minutes of the meeting why the council members had a conflict, and failed to explain on the same public record why there were no alternative decisionmakers available as required by the California statute. 64 Cal. Rptr. 2d at 148-149.

[53]33 N.J. 404, 165 A.2d 183 (1960).

[54]165 A. 2d at 188-189.

When challenging this decision in court, the applicant challenged the fairness of the decision because five of the six members of the borough council were members of the Fanwood Presbyterian Church. The New Jersey Supreme Court stated that the proper course would have been for these five members not to have decided the application because it is "important that the appearance of objectivity and impartiality be maintained as well as their actuality."[55] However, because disqualification of the five council members would have left no quorum, the rule of necessity was followed, and disqualification was not ordered.[56]

Stroudsburg Area School District v. Kelly[57] applied the rule of necessity to order a self proclaimed biased school board to vote on a school principal's dismissal. Pursuant to Pennsylvania law,[58] a 2/3 vote of the school board was required to remove a school principal. Prior to any hearing on her dismissal, Kelly challenged the participation of three board members against whom Kelly had earlier filed a civil rights action.[59] Another bias problem existed with a different school board member who had openly supported Kelly by publicly wearing a green ribbon, and had been quoted in the newspaper as against Kelly's removal.[60] The school board on its own motion voted that it could not provide a fair and impartial hearing.[61] Nevertheless, relying on the rule of necessity, the Pennsylvania Commonwealth Court reversed this decision by the school board, and ordered it to hold a hearing and decide whether Kelly should be removed as principal.[62]

A public school board decision to dismiss a teacher was involved in *Danroth v. Mandaree Public School District Number 36.*[63] The dismissed teacher argued that she had been denied a fair and impartial hearing because the spouse of one of the school board members was the moving force behind the dismissal. The spouse had publicly threatened to withdraw her child from the school if the teacher was retained.[64] The

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[55]Id. at 190.
[56]Id.
[57]701 A.2d 1000 (Pa. Comm. Ct. 1997).
[58]24 Pa. Stat. § 11-1129.
[59]701 A.2d at 1001.
[60]Id.
[61]Id.
[62]Id. at 1002-03.
[63]320 N.W. 2d 780 (N.D. 1982).
[64]Id. at 783.

North Dakota Supreme Court relied in part on the rule of necessity to affirm the teacher's dismissal despite the participation of the board member who was the spouse of the complaining party.[65]

Fitzgerald v. City of Maryland Heights, Missouri,[66] involved the impeachment of a mayor by the city council. The mayor challenged the participation of three council members on the basis of bias because each had been accused earlier by the mayor of various acts of serious personal wrongdoing.[67] The Missouri Court of Appeals held that the past accusations by the mayor against these three council members "would lead reasonable people...to question the councilman's impartiality,"[68] and that the "appearance of bias created by this evidence should have been avoided if possible."[69] Nevertheless, because disqualification of the three council members would have made it impossible to obtain the required 2/3 vote of the eight member council, the court applied the rule of necessity to uphold the mayor's removal.[70]

In each case just discussed, the subject of the administrative decision was denied the right to an impartial and unbiased decisionmaker because of the court's invocation of the rule of necessity.

Besides the cases just discussed in which reliance on the rule of necessity was deemed essential by the court in order to uphold the agency decision, there are other cases where the court, although holding that no disqualifying bias existed, nevertheless went on to hold that even if it had found disqualifying bias, it would not have ordered disqualification because it would have invoked the rule of necessity. Examples of cases that fall within this group include a case involving alleged prejudgment bias on the part of the Michigan Public Service Commission;[71] a case

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[65]Id. at 783-84.

[66]796 S.W. 2d 52 (Mo. App. 1990).

[67]One council member was accused of a conflict of interest in voting on a solid waste ordinance while he owned a solid waste hauling business. Another was accused of drunk driving and resisting arrest. The third was accused of trying to fix a speeding ticket. 769 S.W. 2d at 60.

[68]796 S.W. 2d at 60.

[69]Id.

[70]Id.

[71]Champion's Auto Ferry, Inc. v. Michigan Public Service Commission, 231 Mich. App. 699, 588 N.W. 2d 153 (1998). The prejudgment bias allegation was based on the state agency's participation in a proceeding before the federal Interstate Commerce Commission involving the same petitioner.

involving alleged personal and financial bias on the part of the Maryland Board of Chiropractic Examiners;[72] a case involving a medical review panel in California involving alleged prejudgment bias;[73] a case involving the Pennsylvania Department of Insurance and alleged prejudgment of wrongdoing by an insurance agent;[74] a case involving the Oklahoma Corporation Commission and alleged personal bias;[75] a case involving a public school board in North Dakota and alleged prejudgment in a teacher removal;[76] two cases from Missouri, one involving a board of education and an allegation of financial bias,[77] and the other involving removal of a mayor by a city council accused of politically motivated prejudgment;[78] and a case involving an Illinois board of police commissioners and an allegation of prejudgment.[79] Although in each case, the court's ruling on the rule of necessity was not necessary to its decision to uphold the agency's decision, each case clearly constitutes authority for the application of the rule of necessity in cases where actual bias can be proven.

There is also a group of cases where the court skipped the issue

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[72]Regan v. Board of Chiropractic Examiners, 120 Md. App. 494, 707 A. 2d 891 (Md. 1998), affirmed, 355 Md. 397, 735 A.2d 991 (1999). The allegation of personal bias was based on claims that the target of the board's investigation sought to compromise board members by asking two women to have sexual relations with them. The allegation of financial bias was based on the fact that board members had personal chiropractic practices in the same geographic area as the chiropractor whose license was subject to revocation.

[73]Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center, 62 Cal. App. 4th 1123, 73 Cal. Rptr. 2d 695 (1998). The allegation of prejudgment bias was based on the combination of investigatory, prosecutorial and adjudicatory functions of the same board.

[74]Sherman v. Kaiser, 644 A. 2d 221 (Pa. Comm. Ct. 1995). The allegation of prejudgment bias was based on a report and a press release that concluded that violations had occurred.

[75]Southwestern Bell Telephone Co. v. Oklahoma Corporation Commission, 873 P.2d 1001 (Okla. 1994). The alleged personal bias was based on a commissioner's public announcement that he had been acting as a secret FBI informant regarding the conduct of other commissioners and Southwestern Bell Telephone Co.

[76]Opdahl v. Zeeland Public School District No. 4, 512 N.W. 2d 444 (N.D. 1994).

[77]Westbrook v. Board of Education of the City of St. Louis, 724 S.W. 2d 698 (Mo. App. 1987). The alleged financial bias was based on the Board's desire to avoid litigation with the family of a student who drowned during a school trip supervised by teachers whose discharge was sought.

[78]Powell v. Wallace, 718 S.W.2d 545 (Mo.Appeals, 1986).

[79]Collura v. Board of Police Commissioners of the Village of Itasca, 135 Ill. App. 3d 827, 482 N.E. 2d 143 (1985). The allegation of prejudgment bias was based on the board's prior exposure to polygraph results.

whether there was any disqualifying bias, and resolved the case merely by directly invoking the rule of necessity. For example, in *Northeast Occupational Exchange, Inc. v. Bureau of Rehabilitation*[80] a vocational rehabilitation facility was decertified by the Maine agency in charge of administering programs for handicapped individuals. One challenge to the decertification decision was that it was the product of prejudgment bias. In response, the Maine Supreme Judicial Court held that it need not consider whether the decisionmakers should in fact have been disqualified based on bias; the rule of necessity required the matter to be resolved by the only agency official empowered to decide the case even if he was biased and had prejudged the case.[81] Cases from other states have also taken this approach.[82]

All of these cases in this section demonstrate the vitality of the rule of necessity in state administrative law, and the willingness of state courts to invoke the doctrine to uphold decisions made by biased agency officials.

IV. Refusal to Invoke the Rule of Necessity

In contrast to the large number of cases from many states invoking the rule of necessity, there are only a few cases where the doctrine could have been invoked, but the court based on some notion of fairness, refused to invoke it.

In Board of Education of Community Consolidated High School District Number 230, *Cook County v. Illinois Educational Labor Relations Board,*[83] a hearing officer's initial decision regarding the definition of an employee bargaining unit was appealed to a three member board. The Board at first reversed the hearing officer's decision by a vote of 2-1, but shortly after this vote, one of the board members who had voted in the majority, recused himself because of a conflict of

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[80]473 A.2d 406 (Maine 1984).

[81]Id at 411.

[82]See, Mosman v. Mathison, 90 Idaho 76, 408 P. 2d 450 (1965) (allegation of personal interest of member of State Board of Highway Directors who owned property adjacent to road whose abandonment was sought); Yuhas v. Board of Medical Examiners, 135 Mont. 381, 339 P. 2d 981 (1959) (allegation of prejudgment bias in case involving unprofessional and unethical conduct by medical doctor).

[83]165 Ill. App. 3d 41, 518 N.E. 2d 713 (1987).

interest in the case.[84] The two remaining board members, faced with a 1-1 tie, agreed to allow the hearing officer's decision to become the final agency decision but without precedential value. The party who had lost at the hearing officer level (the school board) argued to the court that the rule of necessity should be invoked, and that the recused board member's original vote should be counted.[85] The Illinois court disagreed. The court first stated that it did not believe that the rule of necessity should operate to break a tie vote.[86] Moreover, the court reasoned, there really was no tie vote -- the two remaining board members both agreed to permit the hearing officer's decision to stand.[87]

Another case where the court did not accept the invitation to invoke the rule of necessity was *Clisham v. Board of Public Commissioners of the Borough of Naugatuck*[88] which involved the removal of the police chief. The town charter of Naugatuck, Connecticut required the unanimous vote of the five members of the board of police commissioners to remove the police chief.[89] All five members voted to remove Clisham. Upon hearing Clisham's appeal, the Connecticut Supreme Court held that one commissioner was guilty of improper prejudgment bias by his earlier repeated public statements that Clisham should be removed from office.[90] However, rather than invoke the rule of necessity, which the Board had argued was the proper solution if the court found disqualifying bias,[91] the court ordered a remand for a new hearing before an impartial panel.[92] The court wrote that "It would be a miscarriage of justice to uphold the board's actions in this instance merely because the town has not provided a procedure for replacing disqualified board members. There can be no public confidence in a decision rendered by a board" infected with prejudgment bias.[93] The

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[84]518 N.E. 2d at 715.

[85]518 N.E. 2d at 717.

[86]518 N.E. 2d at 717-718, citing 73 C.J.S. Public Administrative Law and Procedures § 1 (b) (1983). Compare, Barker v. Secretary of State's Office of Missouri, 752. S.W. 2d 437 (Mo. App. 1988).

[87]518 N.E. 2d at 718.

[88]223 Conn. 354, 613 A.2d 254 (1992).

[89]613 A.2d at 256n. 2.

[90]613 A. 2d at 258.

[91]613 A. 2d 265.

[92]Id.

[93]Id.

court then stated that it "need not determine what alternatives the board might have pursued." [94] The court noted the suggestion of two cases from the 1920's that board members with a disqualifying interest could remedy the problem by resigning. [95] In Clisham, this was unnecessary because the commissioner who had been disqualified by the court was now dead. Therefore, remand back to the same board was possible.[96] It is questionable whether the court would have been as willing to reject application of the rule of necessity if the disqualified commissioner were still on the board.

The strongest statement against the use of the rule of necessity is found in a dissenting opinion in a case involving revocation of an insurance agent's license by the Pennsylvania Commission of Insurance.[97] It was alleged that the commissioner was guilty of prejudgment bias.[98] The dissenting judge voted against the application of the rule of necessity, and wrote: "I realize that the outcome I have suggested prevents any further adjudication on the propriety of [the insurance agent] Sherman's actions. However, what appears to be justice to the Department [of Insurance] in seeking to proceed further against Sherman is in reality, an injustice to Sherman...If this court does not let the Commissioner know that it is intolerable to use one's political position to publicly destroy an individual's reputation without regard for that person's due process rights, then such public officials will never learn."[99]

The sentiments of this dissenting judge, and the two cases just discussed that did not invoke the rule of necessity, are clearly the minority position among the states. As this article has so far established, the rule of necessity has been consistently adopted by state courts when presented with decisions by biased agency officials if no alternate decisionmaker is available. The rule of necessity has become a well established part of state administrative law. It is not the rare case that the doctrine is invoked.

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[94]Id.

[95]Miller v. Aldridge, 212 Ala. 660, 103 So. 835 (1925); Stahl v. Board of Supervisors, 187 Iowa 1342, 175 N.W. 772 (1920).

[96]613 A. 2d at 265.

[97]Sherman v. Kaiser, 664 A. 2d 221 (Pa. Comm. Ct. 1995).

[98]The allegation of prejudgment bias was based on a report prepared by the agency and a press release which discussed the contents of the report. 664 A.2d at 227.

[99]664 A. 2d at 232 (J. Friedman, dissenting opinion).

V. Agency Attempts to Avoid the Rule of Necessity

In a couple cases, the agency itself tried to avoid the need to rely on the rule of necessity, or at least minimize its impact, by seeking an alternative decisionmaking process. In these cases, however, the courts rejected the agency's attempt.

In *Stroudsburg Area School District v. Kelly*,[100] in an attempt to avoid the need to rely on the rule of necessity, the school board, after having voted 5-3 that it was unable to provide a fair hearing, filed a petition on its own behalf with the state Secretary of Education to have him conduct the hearing. Despite the fact that the Secretary had statutory authority to make a de novo review of the school board decision, the Pennsylvania Commonwealth Court required the rule of necessity be invoked, and ordered the full school board to hear the case.[101] The court said that the Secretary of Education could not be vested with initial jurisdiction just because the school board had declared itself biased.[102]

In *Kunec v. Brea Redevelopment Agency*,[103] in order to minimize the impact of the rule of necessity, when two members of the five person council had a financial interest in a pending condemnation case, and a vote of four out of five council members was required to pass a condemnation resolution, the council on its own decided to flip a coin and have one, but not both, conflicted members vote.[104] The California court, however, did not see the coin flip as a viable alternative to the rule of necessity.[105]

VI. Heightened Substantive Review

Despite the widespread acceptance of the rule of necessity in state administrative law, there is general recognition of its unfairness, and the inherent tension between it and the right to an impartial decisionmaker. Application of the rule of necessity has been called a "regretful

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[100]701 A.2d at 1000 (Pa. Comm. Ct. 1997).

[101]701 A. 2d at 1003.

[102]Id.

[103]55 Cal. App. 4th 511, 64 Cal. Rptr. 143 (1997).

[104]64 Cal. Rptr. at 145.

[105]64 Cal. Rptr. at 147-48. See also E & E Hauling, Inc. v. Pollution Control Board, 116 Ill. App. 3d 586, 451 N.E. 2d 555 (1983) where an attempt to resolve a bias problem without relying on the rule of necessity by having an ad hoc panel of elected officials decide the case was rejected because the officials had no authority to hear the matter.

circumstance"[106] and a "choice between two evils."[107] Because of the discomfort with the rule of necessity, many cases have adopted the suggestion usually attributed to Professor K. C. Davis[108] that in cases where the rule of necessity has been invoked, the reviewing court should review the agency decision with heightened scrutiny.[109] The effectiveness of this suggestion to minimize unfairness of the rule of necessity is questionable. There appears to be no case where such heightened scrutiny led to a result different than if traditional review was applied.[110]

A related suggestion is for a reviewing court to employ a different standard of review, for example, clear or convincing evidence or de novo review, when it is reviewing an agency decision made by a biased agency acting pursuant to the rule of necessity. No court has adopted this approach, and it has been expressly rejected by some courts.[111] Moreover, in this author's opinion, focusing on substantive review is not the answer to the rule of necessity dilemma. The fact that the agency's findings turned out to be supported by substantial evidence does not establish the fairness of the hearing.[112]

VII. Solutions to the Problem

This article has demonstrated that the rule of necessity is a well

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[106]Brinkley v. Hassig, 83 F. 2d 351, 357 (10th Cir. 1936).

[107]First American Bank & Trust Company v. Ellwein, 221 N.W. 2d 509, 515 (N.D. 1974). The rule of necessity has also been referred to as "stern." New Jersey State Board of Optometrists v. Nemitz, 21 N.J. Super. 18, 90 A.2d 740, 750 (1952).

[108]3 K. Davis, Administrative law Treatise § 19.9 (2d ed. 1980).

[109]Southwestern Bell Telephone Co. v. Oklahoma Corporation Comm., 837 P.2d 1001, 1009 (Okla. 1994); Gay v. City of Somerville, 878 S.W. 2d 124, 128 (Tenn. Ct. of App. 1994); Adkins v. City of Tell City, 625 N.E. 2d 1298, 1304 (Ind. Ct. of App. 1993); Barker v. Secretary of State's Office of Missouri, 752 S.W. 2d 437, 441 (Mo. App. 1988); deKoevend v. Board of Education of West End School District RE-2, 688 P. 2d 219, 229 (Colo. 1984); See also, Board of Education, Laurel Special School District v. Shockley, 52 Del. 277, 156 A. 2d 214 (Del. 1959); Wisconsin Telephone Co. v. Public Service Comm., 232 Wis. 274, 287 N.W. 122 (1939).

[110]A few cases have reserved judgment on whether heightened scrutiny is appropriate. See, Champion's Auto Ferry, Inc. v. Michigan Public Service Comm., 231 Mich. App. 699, 588 N.W. 2d 153, 160 (1998); General Motors Corp. v. Rosa, 82 N.W. 2d 183, 624 N.E. 2d 142, 145 n* (1993); Northeast Occupational Exchange, Inc. v. Bureau of Rehabilitation, 473 A. 2d 406, 410 n.10 (Maine 1984).

[111]See, Gay v. City of Somerville, 878 S.W. 2d 124, 128 (Tenn. Ct. of App. 1994); Barker v. Secretary of State's Office of Missouri, 752 S.W. 2d 437, 441 (Mo. App. 1988).

[112]First American Bank & Trust Co. v. Ellwein, 221 N.W. 2d 509, 513 (N.D. 1974).

accepted doctrine in state administrative law. Is there any chance of a change so that biased agency officials will be stopped from deciding cases in state and local administrative agencies?

In a couple cases, it has been argued that the rule of necessity is unconstitutional.[113] This argument has received little attention from the courts. The cases easily reject this claim by citation to *United States v. Will*.[114] Although *United States v. Will* dealt only with the rule of necessity for federal judges, it seems highly unlikely that the rule of necessity will be held unconstitutional as applied to state administrative decisionmakers.[115]

The most promising solution to the problem of the rule of necessity is to develop a fair, predictable method of selecting alternative decisionmakers for those situations where the primary decisionmakers are biased. It is well established that the rule of necessity is not applicable if there is an alternative decisionmaker who is empowered to decide the case.[116] For example, in *General Motors Corp. v. Rosa*,[117] the New York Commissioner of the State Division of Human Rights had relied on the rule of necessity in deciding a discrimination case against General Motors. The commissioner had shortly before her appointment served as

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[113]See, Gay v. City of Somerville, 878 S.W. 2d 124, 128 (Tenn. Ct. of App. 1994); Fitzgerald v. City of Maryland Heights, 796 S.W. 2d 52, 60 (Mo. App. 1990).

[114]See, Gay v. City of Somervile, 878 S.W. 2d at 128; Fitzgerald v. City of Maryland Heights, 796 S.W. 2d at 60 (also citing Barker v. Secretary of State's Office 752 S.W. 2d 437, 440-41 (Mo. App. 1988.)

[115]In Opdahl v. Zeeland Public School District No. 4, 512 N.W. 2d 444 (N.D. 1994), the North Dakota Supreme Court was asked to "revisit the application of the rule of necessity." The court declined to do this because it found that there was no disqualifying bias that required the doctrine's application. In Ririe v. Board of Trustees of School District No. One, Crook County, Wyoming, 647 P. 2d 214 (Wyo. 1983), the Wyoming Supreme Court, after holding that there was no disqualifying has on the board's part, "reserve[d]" the question whether the rule of necessity permits an admittedly biased administrative board to preside at a hearing. Id. at 224 (footnote omitted).

[116]Champion's Auto Ferry, Inc. v. Michigan Public Service Comm., 231 Mich. App. 699, 588 N.W. 2d 153, 160 (1998); Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center, 62 Cal. App. 4th 1123, 73 Cal. Rptr. 2d 695, 707 (1998); Acme Brick Co. v. Missouri Pacific Railroad Co., 307 Ark. 363, 821 S.W. 2d 7, 10 (1991); Mank v. Board of Fire and Police Commissioners, Granite City, 7 Ill. App. 3d 478, 288 N.E. 2d 49, 54 (Ill. App. 1972); Rose v. State Board of Registration for the Healing Arts, 397 S.W. 2d 570, 576 (Mo. 1965); Yuhas v. Board of Medical Examiners, 135 Mont. 381, 339 P. 2d 981, 985 (Mont. 1959); New Jersey State Board of Optometrists v. Nemitz, 21 N.J. Super. 18, 90 A.2d 740, 750 (1952); Brinkley v. Hassig, 83 F. 2d 351, 357 (10th Cir. 1936).

[117]82 N.Y. 2d 183, 624 N.E. 2d 142 (1993).

counsel on behalf of the employee filing the complaint. The New York Court of Appeals reversed the Commissioner's decision to decide the case herself, which had been adverse to General Motors, holding that because the New York Human Rights Law and the New York Public Officers law permitted appointment of a subordinate to decide the case, there was no necessity for the commissioner to issue the final order.[118] The court remanded for a new hearing before an impartial official.

The next issue becomes, accepting that obtaining an alternative decisionmaker is the best way to avoid the rule of necessity, what should be the process for the selection of the alternate. There are various options, but one is clearly the best.

One option is that the court have the power to appoint an impartial replacement for a biased agency decisionmaker. Although this has been suggested,[119] it has never been adopted, and it is not the proper solution for a few reasons. Agencies are creatures of the legislature, not the courts. The appointment process lies with the executive branch, not the courts. Moreover, judicial appointments could only be made after a biased decision has been rendered and the case has made its way through the judicial process. It is much better to have a replacement mechanism that can function before a biased hearing is held.

As opposed to looking to the courts for a solution, it is better to have the legislature create a procedure for appointment of replacements so that the rule of necessity is not necessary.[120] One legislative approach which has been adopted in some states is based on the Model State Administrative Procedure Act which authorizes the Governor to appoint a replacement.[121] This provision has been utilized in a few reported cases.[122] This approach, however, has many weaknesses. First, the

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[118]624 N.E. 2d at 145-46.

[119]Southwestern Bell Telephone Co. v. Oklahoma Corporation Comm., 873 P. 2d 1001, 1010-29 (Okla. 19940) (dissenting opinion of Judge Opala).

[120]See, Acme Brick Co. v. Missouri Pacific Railroad Co., 307 Ark. 363, 821 S.W. 2d 7, 11 (1991) suggesting that the legislature reconsider the absence of a procedure for appointment of replacements for biased board members.

[121]Model State Admin. Procedure Act of 1981 §§4-202(e)-(f), 15 U.L.A. 31 (Supp. 1991); See Michael Asimow, *Toward A New California Administrative Procedure Act: Adjudication Fundamentals*, 39 U.C.L.A.L. Rev. 1067, 1150 (1992).

[122]See, Easter House v. Dept. of Children and Family Services, 204 Ill. App. 3d 312, 561 N.E. 2d 1266 (1990); International Harvester Co. v. Bowling, 72 Ill. App. 3d 910, 391 N.E. 2d 168 (1979); In the Matter of Rollins Environmental Services, Inc., 481 So. 2d 113 (La.

Governor is only authorized to appoint a replacement after the bias has been established. The selection process therefore will be made in the midst of controversy. This draws the Governor into the controversy. The appointee is more likely himself or herself to also be accused of some bias than if an alternate were in place before the need arose for a replacement. Related to this problem is whether the replacement is to come from inside or outside the agency.[123] If the replacement comes from within the agency, allegations of institutional bias and coziness among co-workers will surely arise. If the replacement comes from outside the agency, allegations of political pressure and lack of expertise will occur. It has also been suggested that it may be improper for the Governor to appoint a replacement when the disqualified official has been elected.[124]

Another problem with having the Governor appoint the replacement is that it is more desirable to have the replacement become involved as quickly as possible. Governors are extremely busy with a myriad of concerns and tasks which will lead to delay in an appointment. Delay will also be created by the need to screen and interview possible replacements. Using the Governor to select a replacement also appears inappropriate in local matters such as teacher and police officer discharge cases.

The best solution to the problem of bias and the rule of necessity is a legislative requirement that any administrative case in the state that would require invoking the rule of necessity be decided by an administrative law judge who is a member of the state's central administrative panel (often known as the Office of Administrative Hearings). The use of a central panel of administrative law judges represents the modern trend in state agency adjudications.[125] Under such

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1985).

[123]See, In the Matter of Rollins Environmental Services, Inc. 481 So. 2d 113, 121 n. 26 (La. 1985).

[124]Michael Asimow, *Toward A New California Administrative Procedure Act: Adjudication Fundamentals*, 39 U.C.L.A.L. Rev. 1067, 1150 (1992).

[125]See, John W. Hardwicke, *The Central Hearing Agency: Theory and Implementation In Maryland*, 14 J.NAALJ 5 (1994); Allen Hoberg, Administrative Hearings: State Central Panels in the 1990's, 46 Admin. L. Rev. 75 (1994); Christopher B. McNeil, *Similiarities and Differences Between Judges In the Judicial Branch and the Executive Branch: The Further Evolution of Executive Adjudications Under the Administrative Central Panel*, 19 J.NAALJ 1 (1998); Sheila B. Taylor, *The Growth and Development of a Centralized Administrative Hearings Process in Texas*, 17 J.NAALJ 113 (1997); Malcolm C. Rich, The

a system, administrative law judges are organizationally attached to a central office in charge of holding adjudications for many state and possibly local agencies. Under a central panel system, the state administrative law judges, unlike the federal model, are not assigned to hear cases from one agency.

The central panel concept has been adopted in slightly over half the states, and although there is variation among central panels in different states,[126] there is general agreement among the commentators that central panels offer advantages over the single agency administrative law judge. Among the numerous advantages of a centralized panel,[127] foremost is the advantage of impartiality.[128] This of course is the main reason to eliminate the rule of necessity. Moreover, a major advantage of using administrative law judges from a central panel is that the judges are already in place. A system that relies on central panel judges as substitutes for biased decisionmakers will not be subject to criticisms relating to delay or appointment based on political pressure or bias. Additionally, the concern relating to lack of expertise of substitute

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Central Panel System and the Decisionmaking Independence of Administrative Law Judges: Lessons For A Proposed Federal Program, 6 Western New England L. Rev. 643 (1984); Edwin L. Felter, *Colorado's Central Panel Experience - Lessons For The Feds*, 14 J.NAALJ 95 (1994); Ronald Marquardt & Edward M. Wheat, *The Developing Concept of an Administrative Court*, 33 Admin. L. Rev. 301 (1981); Duane R. Harves, *The 1981 Model State Administrative Procedure Act: The Impact in Central Panel States*, 64 Western New Eng. L. Rev. 661 (1984); Harold Levinson, *The Central Panel System: A Framework that Separates ALJ's from Administrative Agencies*, 65 Judicature 236 (1981).

[126]See, e.g., Malcolm L. Rich, supra note 124; Harold Levinson, supra note 124; Alan Hoberg, supra note 124.

[127]The advantages of central panels of administrative law judges include efficiency of decisionmaking which saves costs and leads to quicker resolution of cases; avoiding burnout of administrative law judges who get to decide cases involving various issues from various agencies; strengthening the appearance of justice by separating prosecutorial and investigative functions from the decisionmaking process; permitting adoption of uniform rules of administrative procedure; better reasoned decisions; better evaluation of administrative law judges; better recruitment of administrative law judges by providing diversification; reducing exparte communications between agency and administrative law judges; and increased prestige for administrative law judges. See authorities cited in note 124 supra. See also Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 U.C.L.A.L. Rev. 1157 (1995); Lori K. Endris & Wayne E. Penrod, *Judicial Independence In Administrative Adjudication: Indiana's Environmental Solution*, 12 St. John's J. of Legal Commentary 125 (1996).

[128]See e.g., Malcolm Rich supra note 124; and Duane R. Harves, supra note 124. See also Judith K. Meierhenry, *The Due Process Right to An Unbiased Adjudicator In Administrative Proceedings*, 36 S.D.L. Rev. 551 (1991).

decisionmakers is diminished when judges from central panels are used because such administrative law judges routinely decide cases from various agencies dealing with many different areas of law. The very adoption by a state legislature of a central administrative law judge panel is a legislative decision that impartiality and fairness override considerations of expertise.[129] Central panels can also be authorized to hear issues from local boards.[130] The use of central panel judges is also consistent with the Model State Administrative Procedure Act approach which authorizes the Governor to appoint a substitute decision maker[131] in that the Governor typically controls the appointment of central panel administrative law judges through the Governor's selection of the chief administrative law judge.[132]

It would appear that it is essential that the central panel alternative to the rule of necessity be mandatory, and not just an available option. This is illustrated by *Regan v. Maryland Board of Chiropractic Examiners*[133] which involved a disciplinary proceeding against a chiropractor. Although the case revolved mostly around the chiropractor's alleged assisting the unauthorized practice of chiropracty, also involved were allegations that while the Board's investigation was ongoing, Dr. Regan, the target of the investigation, asked two women to have a sexual affair with two members of the Board so that Regan "could have something to use against the Board."[134] Regan first sought to disqualify these two board members. Regan also sought to disqualify other board members because he intended to call one as a witness, and

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[129]Edward Tomlinson, *The Maryland Administrative Procedure Act: Forty Years Old In 1997*, 56 Md. L. Rev. 196, 253 (1997).

[130]See, e.g., Annotated Code of Maryland, State Government § 9-1604 (b)(1)(ii) giving the chief administrative law judge the power to furnish administrative law judges on a contractual basis to other governmental entities. See also, Annotated Code of Maryland, Crimes and Punishment, Art. 27, Section 225(c)(u)(2) authorizing Maryland Office of Administrative Hearings to hear cases from Washington County Gaming Commission.

[131]Model State Admin. Procedure Act of 1981 §§ 4-202(e)-(f), 15 U.L.A. 31 (Supp. 1991).

[132]See e.g. Annotated Code of Maryland, State Government § 9-1603 (a) (chief administrative law judge appointed by Governor with advice and consent of the State), and § 9-1604 which gives the chief administrative law judge the power to appoint administrative law judges.

[133]120 Md. App. 494, 707 A.2d 891 (1998) affirmed, 355 Md. 397, 735 A. 2d 991 (1999).

[134]707 A. 2d at 894.

because two had a financial interest in having Regan lose his license because Regan's practice was within the same geographic area as theirs.[135]

Regan argued that because the disqualification of the members he sought would make it impossible for the Board to convene a quorum, the case should be delegated to the Maryland Office of Administrative Hearings (OAH) which is the central panel of administrative law judges in Maryland.[136] The court rejected this argument because the delegation of cases to the Maryland OAH from the Board of Chiropractic Examiners was discretionary, not mandatory.[137]

The Maryland court's preference for the rule of necessity over referral to OAH was unfortunate. To avoid a conclusion such as the one in Regan, referrals to the central panel should be made mandatory in situations where the other alternative is application of the rule of necessity.

The central panel solution to the rule of necessity is superior to merely delegating the decisionmaking power to a subordinate official within the same agency for all the reasons discussed by various commentators why central panels are superior to the traditional system of having subordinate officials within an agency decide cases from that agency.[138] Because New York State does not have a central panel of administrative law judges, the New York Court of Appeals' solution in *General Motors, Corp. v. Rosa*[139] was better than applying the rule of necessity, but delegation within the same agency does not satisfy the fairness concerns as does referral to a central panel. States that do not have a central panel of administrative law judges should consider adopting a central panel. This article provides an additional justification for such adoption. At the least, if a state is unwilling to adopt a full central panel system, the legislature should establish a "Rule of Necessity Central Panel" to decide cases which would otherwise be decided by biased agency officials.

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[135]Id.

[136]707 A. 2d at 896.

[137]707 A. 2d at 900.

[138]See authorities in notes 124-127.

[139]See discussion accompanying notes 116-117 supra.

Conclusion

The rule of necessity has become a mainstay of state administrative law. This is unfortunate because biased agency decisionmakers are antithical to a fair administrative process. Mandatory use of administrative law judges from central panels to avoid the need to invoke the rule of necessity should be adopted as the solution to end reliance on the rule of necessity in state administrative law.