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DEC 28 A.M.

MEMORANDUM

TO : Edward N. Gadsby
Chairman

December 23, 1960

FROM: Walter P. North
General Counsel

QUESTION PRESENTED: May the Commission adopt a rule establishing that the quorum may be less than a majority of its members?

RECOMMENDATION: In view of the doubtful legality of such a rule, it is my view that such a rule should not be adopted.

Attached is a memorandum by Andrew Andresen, prepared in 1953 for the then General Counsel, Roger S. Foster, which concludes that, in the situation where there are three vacancies, the two remaining commissioners may not act as the Commission. He further concludes that the Commission has no power to adopt a substantive rule to change whatever quorum requirement is otherwise applicable, citing, on page 4, Seiler v. O'Maley, 227 S.W. 141 (App. Ky. 1921); Borough of Florham Park v. Department of Health, 146 Atl. 354 (N.J. 1929) and Heiskell v. City of Baltimore, 4 Atl. 116 (App. Md. 1886). Further research does not disclose any departure from these precedents but has brought to our attention a later case, tending to support Mr. Andresen's conclusions: In re Walter's Appeal, 270 Wis. 561, 72 N.W. 2d 535 (1955). It was there said (at page 540):

> "Under these common law principles, it is plain that since the legislature did not prescribe the number of votes required for the passage of a matter before a county school committee or joint committee, a majority of the committee constitutes a quorum, and a majority of the quorum may decide the matter. The committee has no implied power to adopt a rule that a greater or lesser number shall constitute a quorum . . ."

This is in accord with the principles governing quorum requirements set forth in Seiler v. O'Maley, supra, as follows:

> "The common-law rule as to what constitutes a quorum of a representative body consisting of a definite number of members is that a majority of the authorized membership 1/ shall constitute a quorum for the purpose of transacting business, but it is everywhere held and recognized 2/

1/ There is some authority indicating that the common law rule is a majority of the number presently in office, rather than of the total authorized membership, but we have not explored this further since it would make no difference while there is only one vacancy on the Commission.

2/ The remaining portion of this quote is dictum.

> that it is competent for the statute or the constitution creating the particular body to prescribe the number of members that shall be necessary to constitute a quorum, or it may delegate to the created body the authority to so prescribe."

None of the cases cited by the Court in the Seiler case to support the quoted material dealt with a statute which had specifically delegated to the administrative agency the authority to prescribe its own quorum rule, nor has our research uncovered any such case. Mr. Andiesen points out, moreover, that Borough of Floral Park, supra, held that general rule making authority given to a municipal board does not permit it to alter the common law requirement that the quorum should be a majority of the whole board. This case also held that while a disqualified member must be counted as part of the whole board to determine its total membership, he cannot be counted among those constituting the quorum.

Accordingly, despite the wide rule making authority granted to this Commission by statute, it is unlikely that it could be construed to encompass the power to prescribe a rule setting a quorum at less than the common law majority. Indeed, shortly after it commenced operation, the Commission itself, in International Paper & Power Company, 2 S.E.C. 792 (1937), stated that "Three members of the Commission constitute a quorum for doing business", citing Section 210 of the Securities Exchange Act of 1934, which may have been construed as embodying a statutory quorum requirement[3/]. See also Otis & Co., 31 S.E.C. 330 (1950).

In the light of the foregoing, it is my view that it is very doubtful that the court would sustain a rule of the Commission authorizing less than three to act as a quorum, and an adjudication by a quorum so constituted could probably be reversed on appeal.

3/ This section is now Section 27 of the Securities Act of 1933.

MEMORANDUM

May 28, 1953

To : Roger S. Foster

From : A. L. Andresen

Subject: If because of vacancies there should be only two Commissioners, would they have power to act as "The Commission"?

Section 4(a) of the Securities Exchange Act establishes the Commission, "to be composed of five Commissioners." It provides that not more than three shall be members of the same political party. It does not expressly provide how many Commissioners must participate or concur in Commission action. The closest thing to a provision of this sort seems to be the provision of Section 210 of Title II of the Act, which provides for the transfer of power from the Federal Trade Commission to the Securities and Exchange Commission upon the expiration of 60 days after the date upon which "a majority of the members of the Securities and Exchange Commission appointed under Section 4 of Title I of this Act have qualified and taken office."

I. Quorum When There Are Five Commissioners in Office

There is what may be called a general rule, although it is subject to variation in different contexts, that in the absence of any provision to the contrary a majority of a body constitutes a quorum and a majority of a quorum can act for the body. On the basis of this principle and the provision of Section 210 quoted above, the Commission has held that: "Three members of the Commission constitute a quorum for doing business." Specifically, it upheld action taken by a two to one vote, even though two Commissioners were less than a majority of the Commission. In the Matter of International Paper and Power Co., 2 SEC 792 (1937), reversed on other grounds sub nom Lawless v. SEC, 105 F. 2d 574 (C.A. 1, 1939)

II. Is a Quorum Determined in Relation to the Number of Positions Created by Statute or the Number Actually Filled at a Given Time?

As stated above, the Commission held in the International Paper case that three members constitute a quorum for doing business. It appears

that there were five Commissioners in office at the time when the action was taken that is discussed in the cited opinion and that two of them were necessarily absent. Thus that decision may be limited by its facts. So far as I know the Commission has never passed on the question of what a quorum would be if there were only three Commissioners, or two Commissioners, in office.

It is not possible to give any general answer to the question whether a quorum is to be determined in relation to the total membership that is provided for by statute or the actual membership that exists at a given time. Many decisions involve interpretation of particular statutes other than the ones administered by this Commission. Beyond this there are differences in the results reached with respect to different types of bodies, and a fair amount of conflict among decisions. I would say that the area in which there is the least law is the very one in which we are interested: administrative agencies. I shall therefore discuss other types of bodies first.

In the case of bodies having no fixed membership, any number that assemble may constitute a quorum. For analogies, however, we must look to the more common situation where the body has some fixed membership.

As for legislative bodies, the rule in the U.S. House of Representatives is that: "After the House is once organized the quorum consists of a majority of those members chosen, sworn and living whose membership has not been terminated by resignation or by the action of the House." 1/ This is based on an interpretation of the constitutional provision that "a Majority of each [House] shall constitute a Quorum to do Business." Article 1, §5.

A similar result relating to a state legislature was reached in Pollard v. Green, 90 A. 176 (N. H., 1913). On the other hand, under a constitutional provision that a majority of each House shall constitute a quorum, the Supreme Court of Florida has held that there must be not less than a majority of the whole membership of which the House may be composed and that vacancies cannot be deducted in ascertaining the quorum. Opinion of Justices, 12 Fla. 653. 2/

1/ See, for example, Constitution, Jefferson's Manual and Rules of the House of Representatives, 70th Cong., 2nd Sess., H.R. Doc. No. 810, §53. Such material as we have in our library on the Senate's rules and practices does not appear to cover this question.

2/ According to summary in Words and Phrases under the heading "Quorum".

In the case of municipal governing bodies, the general rule seems to be that a quorum is calculated in relation to the number of members actually in office, when there are vacancies. This has been described in at least one case as the "common law" rule in this area. 3/

In the case of action by directors of private corporations, the decisions are largely affected by statutory and charter provisions. Fletcher, Cyclopedia of the Law of Private Corporations, §421, concludes that the general rule, in the absence of specific provision of statute or charter, is that a majority of the entire board is necessary to constitute a quorum, and not merely a majority of those actually in office at a given time. Thus the general rule applicable to private corporations seems to be directly contrary to that applied generally to municipal corporations and perhaps other governing bodies.

As for administrative boards, such decisions as there are seem to have little value as precedent since they generally are dealing with the interpretation of particular statutory provisions. By way of setting, it may be noted first that there is an indication in some authorities that the common law requirements were very strict. Many of the states have thought it necessary to adopt statutes to provide that, where power is entrusted to a board of three or more, a majority may act for the board. Some courts have indicated that these statutes were necessary in order to overcome a common law rule that all members of a board must meet before power can be exercised. See, for example, Morris v. Cashmore, 3 N.Y. Supp. 2d 624, 630 (App. Div. 1938) and Leavenworth v. Never, 49 Pac. 89 (Kan. 1897). The so-called common law rule did not require that all members of the board agree but seems to have required, at least in some jurisdictions, that they all meet and confer as a condition to the majority's being empowered to act. See also 42 Am. Juris., Public Administrative Law, Section 72. Here again there may be some conflict as to the details of the common law rule.

3/ Rose v. Miller, 178 A. 771 (N.J.). See also Foshlit v. Folz, 91 P. 2d 879 (Calif); Stein v. Orr, 56 N.E. 14 (Ohio); People v. Wright, 71 P. 365 (Colo.); State v. Farmer, 109 S.E. 240 (W. Va., 1921); 62 C.J.S., Municipal Corporations, §399c.
Perhaps there is no ground for distinction between municipal councils and larger legislative bodies. In any event, Corpus Juris Secundum states it as a general matter of parliamentary law that vacancies are to be deducted before computing a quorum and cites a city council case as authority; 5 C.J.S., Parliamentary Law § 5(1).

I have not found a strict rule along this line applied to any Federal agency, but the strict rule is not so tenuous that it has not been urged. In Technical Radio Laboratory v. Federal Radio Commission, 36 F. 2d 111, the petitioner urged that action taken by the Commission was invalid because only four out of the five Commissioners had acted, the fifth having disqualified himself. He contended that all members had to participate in the action. The court apparently was enough impressed with the contention that it did not reject it out of hand; instead it held that the petitioner could not raise such an objection where the fifth Commissioner had been disqualified on the initiative and motion of the petitioner.

As to the specific question of the effect of vacancies on an administrative body, Section 1 of the Federal Trade Commission Act provides: "A vacancy in the Commission shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission." In the absence of such a provision there is some authority to the effect that a single vacancy may render a commission powerless to act, even though, if there were no vacancy, a majority could act after notice to all members. Leavenworth v. Meyer, 49 Pac. 89 (Kan. 1897). In other words, while vacancies ease the quorum requirement in some contexts, this case goes to the opposite extreme and holds that a single vacancy renders the agency powerless to act.

I do not intend to suggest in any way that five Commissioners have to participate in every action of the SEC. The provision of Section 210 of the Exchange Act is sufficient to negative any such strict requirement. However I feel that the very existence, historically, of strict concepts of this sort as applied to administrative boards militates against any casual assumption that might otherwise be made to the effect that their quorum problems are necessarily governed by the liberal precedents applicable to municipal governing bodies and Congress, for example, where the quorum requirement may be reduced by reason of vacancies. While the question cannot be taken as settled, there is considerable doubt that two Commissioners would constitute a quorum at a time when there were vacancies.

There remains to be explored the question whether the Commission, under its general rule-making powers, has authority to adopt a substantive rule determining what shall be a quorum under the circumstances, as distinguished from an interpretative rule having no substantive effect. C.J.S. Parliamentary Law, §5(1) states: "It is competent for the statute or Constitution creating the body to prescribe the number of members necessary to constitute a quorum, or to delegate to the created body the authority so to prescribe." (Emphasis added.) The only authority cited for this statement is a dictum, apparently having nothing to do with the facts or arguments involved, in Seiler v. O'Maley, 227 S. W. 141 (App. Ky., 1921). This case happened to involve a city board of health. In another case involving a city board of health, Borough of Florham Park v. Department of Health,

146 Atl. 354 (N.J., 1929), there is a square holding that, even though the board was empowered to adopt rules, it could not by rule alter the common law requirement that a quorum shall be a majority of the whole board.

With respect to municipal governing bodies, Heiskell v. City of Baltimore, 4 Atl. 116 (App. Md., 1886) holds that the council of a municipal corporation cannot, by its own action, fix the number of its members necessary to constitute a quorum and that the common law governs when its charter is silent in this regard. This principle in stated also in Corpus Juris Secundum, Municipal Corporations, § 399, on authority of the Heiskell case. 4/

Many cases say that quorum requirements are jurisdictional and that action taken without a quorum is void. Some add that for this reason the requirement cannot be waived. See cases in West's Digest under the heading Administrative Law, key No. 125, and in Words and Phrases under the heading "Quorum." From this alone, it would seem to follow that the Commission could not adopt a substantive rule varying what would be the quorum requirement in the absence of such a rule.

4/ Analogies in the corporate field do not seem to be helpful with respect to this particular problem. The general rule is stated to be that the number of directors necessary to constitute a quorum may be determined by the by-laws, where not inconsistent with the charter or the statute, Fletcher, § 420. However, the general rule is also that the by-laws must be adopted by the stockholders, rather than by the directors, unless power to adopt by-laws is specifically given to the directors by charter or statute. Fletcher, § 4172. To the extent that the by-laws are adopted by stockholders, rather than by the directors, they are not analogous to rules that might be adopted by the Commission. There is one recent case that might be closely in point except for these considerations: Tuisp Mining and Smelting Co. v. Chelan Mining Co., 132 Pac. 2d 300 (Utah 1943). In that case the charter provided for 7 directors; the by-laws provided that a quorum should consist of a majority of the directors actually in office. It was held that the by-laws were valid and that 3 directors constituted a quorum at a time when there were 2 vacancies. However, the opinion notes that the by-laws in question were adopted at a meeting of the directors which "was in fact a meeting of the stockholders", pp. 304 and 310. So we do not have a case of the directors' lifting themselves by their own bootstraps.

In my opinion the Commission has no power to adopt a substantive rule that would vary whatever quorum requirement is otherwise applicable. On the other hand, if it should be felt that the two Commissioners would have to attempt to operate as a quorum at a time when there were three vacancies, notwithstanding the unsettled state of the law, it might well be desirable to have the position embodied in a rule, even though it had only an interpretative effect. Under Section 23(a) of the Exchange Act and similar provisions elsewhere such a rule might protect outsiders from civil liability in connection with acts done in conformity with it. Even here, however, there would unfortunately be an area of doubt, for the outsider would presumably be acting in conformity with a Commission order of some sort, rather than with reference to the rule as such.

III. Effect of the absence of a Quorum of the Commission

The requirement that matters be considered by a quorum of the body and that action by taken by a majority of the quorum are distinct and cannot be merged. Thus while the concurrence of two Commissioners would be sufficient to bind the Commission where three have participated in the matter, it does not follow that it is sufficient for two Commissioners to consider and vote together on a matter if it takes three to make a quorum. See, for example, E. C. Olsen Co. v. State Tax Commission, 168 P. 2d 324 (Utah).

This is illustrated also by the action of the Supreme Court in various cases. The statute specifies that six justices are necessary to constitute a quorum. 28 U.S.C. § 1. On various occasions the Supreme Court has decided matters by a four to three vote, but the fact that four justices in this way may bind the court does not in any way avoid the necessity of meeting the quorum requirement of six.

As I have indicated the cases commonly state that quorum requirements are jurisdictional and that action taken in the absence of a quorum is void. Once the number necessary to constitute a quorum has been determined by statute, interpretation, or common law, I have seen little indication that the courts will invoke any sort of rule of necessity to

permit action to be taken without a quorum. 5/ The effect of the "rule of necessity" that is sometimes invoked where bias is charged is to permit the disqualified member to act -- not to waive the quorum requirement and permit other members of the body to carry on notwithstanding a lack of quorum. Several years ago the Supreme Court was not able to obtain a quorum to hear an appeal in the anti-trust case against Aluminum Company of America, and it simply held the case inactive on its docket until legislation was passed in 1946 authorizing such cases to be referred to the appropriate court of appeals for final decision. United States v. Aluminum Co., 322 U.S. 716. 6/

In the executive departments the basic problem may be more serious since power is commonly entrusted to a single individual, the head of the department, and if he became unavailable for any reason, there would not only be "no quorum", but no person to act. The statutes, therefore, expressly provide for temporary reallocation of authority for 30 days to subordinates or heads of other departments in such circumstances. The statutory provisions in question are not of general application but are limited to named departments not including the SEC, 5 U.S.C. §§ 1-7. The Attorney General has ruled, for example, that there is neither statutory nor inherent authorityfor the president to designate an Acting United States High Commissioner to the Phillipines, a position which is not covered by the statutory provisions for the transfer of functions in the event of vacancy or temporary disability. See 38 Ops. Attorney General, 298 (1935).

The only power that the President has to avoid interruption of activities arising from vacancies on the SEC is the power to appoint new members with the advice and consent of the Senate and the power to make interim appointments during the recess of the Senate (Securities Exchange Act, § 4(a); Constitution, Art. 2, § 2.). So long as the Senate is in session there appears to be no shortcut method for dealing

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5/ However, 42 Am. Jur., Public Administrative Law, § 72, states: "Public authority conferred on two cannot be exercised by one without the other's consent; yet it seems that to prevent a failure of justice, where immediate action is necessary, one may act alone if the other is dead, absent, or interested." The only authority cited directly is Dowding v. Ruger, 21 Wend (NY) 178, 34 Am. Dec. 223, not available in our library. For a comparative holding, American Jurisprudence refers to the Technical Radio Laboratory case that I have already discussed.

6/ Possibly the disqualified justices could have heard the case under the "rule of necessity", but they did not do so.

with the problems created by vacancies, no matter how serious the emergency. 7/

If it be assumed that two Commissioners would not constitute a quorum, the only possibilities of avoiding complete paralysis would appear to lie in the continuing powers of the Chairman under Reorganization Plan No. 10 (assuming one of the Commissioners remaining was designated as Chairman) and in the possibility of the Commission's delegating certain powers to one or two Commissioners, or to staff members. I have in mind delegations made at a time when the Commission still had a quorum and, hopefully, remaining in effect thereafter.

First, I would like to comment on the subject of sub-delegation of powers in a general sense, before reaching the question as to the effect of such a delegation if the Commission thereafter ceased to have a quorum of members in office. The subject of sub-delegation of power is surrounded by some uncertainty. See Davis, Administrative Law, Sections 22 and following. In Cudahy Packing Co. v. Holland, 315 U.S. 357 (1942) the Supreme Court, by a 5-4 decision, refused to imply a power under the Fair Labor Standards Act to permit the Administrator of the Wage and Hour Division of the Department of Labor to delegate authority to issue subpoenas to subordinates, where the statute did not expressly give that power. The Court felt that the logical implications of a contrary holding would have permitted the delegation of other powers as well, and it said at p. 361:

> "A construction of the Act which would thus permit the Administrator to delegate all his duties, including those involving administrative judgment and discretion which the Act has in terms given only to him, can hardly be accepted unless plainly required by its words."

In Fleming v. Mohawk Co., 331 U.S. 111 (1937), the Supreme Court seems to have gone about as far as it could to narrow the precedent of the Cudahy case, without expressly overruling it. In the latter case

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7/ The President has broad reorganization powers under the Reorganization Act of 1949 which is still in effect by virtue of Public Law No. 3 of the 83d Congress. Whether or not this would authorize him to reduce the number of Commissioners or to transfer all powers to the Chairman is immaterial for present purposes, for no reorganization plan under this statute can take effect in less than 60 days. 5 U.S.C.A. Supplement § 1332-6

the Court held that under provisions of the Emergency Price Control Act, which were similar in many respects to the statute involved in the Cudahy case, the Administrator could delegate a function of signing and issuing subpoenas to regional administrators. The Court distinguished the cases partly on the basis of differences in the legislative history of the two statutes. In addition, the Court relied on a general rule-making power in the Price Control Act, which was similar in terms to that contained in our statutes. The Court said at p. 121:

> "Such a rule-making power may itself be an adequate source of authority to delegate a particular function, unless by express provision of the Act or by implication it has been withheld."

On the basis of this decision, I would say that the Commission has some reasonable power to delegate authority.

Before inquiring into the scope of this power and the circumstances under which it can be exercised, it is worth noting that the Administrative Procedure Act has some bearing on the problem. Section 7(a) provides:

> "There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act."

Section 7(b) provides that the officers presiding at hearings shall have authority of various sorts, including authority to "make decisions" and authority to "take any other action authorized by agency rule consistent with this Act."

With reference to decisions, Section 8 provides certain alternative procedures. The Commission, in its Rules of Practice, has adopted the procedure of having the hearing officer make merely a recommended decision. However, this is not the only procedure permitted under Section 8, or even the one primarily contemplated. Under the first alternative provided in the statute the decision of the hearing officer "shall without further proceedings . . . become the decision of the agency", in the absence of an appeal to the agency or review upon the agency's own motion. Ordinarily it does not make much difference whether the decision of the hearing officer is called a recommended decision or a final decision which is subject to review. In the absence of a quorum on the Commission, however, permitting hearing officers and single Commissioners to make final decisions would appear to provide a basis for disposition of certain types of cases, such as those where the action to be taken is favorable to an applicant, and no other parties are contesting it.

In a sense it might be said that the Administrative Procedure Act adds nothing to what the Commission might in any event accomplish by sub-delegation of authority under the Mohawk decision. There is a difference, however, which may become significant at a time when the Commission does not have a quorum. The ordinary sub-delegation rests on an order or rule of the Commission, the continuing vitality of which might be questioned if the Commission ceased to have a quorum of members. On the other hand, the Procedure Act contains a Congressional delegation of authority to subordinates and so is on a firmer footing. It is true that even under the Procedure Act the delegation may be implemented by action of the agency in designating the individual who is to exercise the powers in question, but it is possible that a designation once made might continue in effect notwithstanding increasing vacancies on the Commission or, under Reorganization Plan No. 10, the Chairman may have authority to make the necessary designation.

An additional problem arises from the fact that Sections 5, 7 and 8 of the Procedure Act are limited to cases of adjudication required by statute to be determined on the record after opportunity for an agency hearing. For example, these sections do not apply to the acceleration of the effective date of registration statements, for no formal hearing is required by statute in such cases and, in fact, none is customarily given. The Procedure Act is inapplicable in such a case at least in the sense that its requirements are not mandatory. I believe that there are statements in the legislative history of the Procedure Act which clearly indicate that it is the policy of the Congress to encourage agencies to follow the Procedure Act in exempted cases, to the extent appropriate; perhaps this would provide some Congressional authorization for the type of delegation I have mentioned in acceleration matters, so that in a sense such a delegation would not rest solely on the authority of the Commission -- which I assume would be without a quorum at the crucial time. 8/

The general pattern of Sections 7 and 8 of the Procedure Act provides a workable framework within which to handle requests for acceleration and other cases involving the granting of exemptions or other relief. If the relief is granted by a single Commissioner (or

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8/ On the other hand, I recall that there was some legislative history to the effect that the discretionary provisions of Section 5(d) of the Procedure Act, granting authority to make declaratory determinations, are limited in just the same way as the rest of Section 5 is -- to cases where hearing is required by statute. I have not made a study of the legislative history in connection with the present problem.

two Commissioners) his decision would be final ordinarily, for no one would seek to appeal to the full agency. On the other hand, if the single Commissioner denied the relief requested, the applicant might appeal, but until there was a quorum to hear the appeal he could not obtain requested relief in any event.

However, no affirmative, adverse action could be put into effect under this procedure, for the respondent would appeal to the full agency from the adverse decision and, if it was affirmative in character, it presumably would not take effect unless and until there was a quorum to hear the matter and affirm the decision - so far as the pattern of Sections 7 and 8 is concerned. This brings us back to the question of delegation of authority by the Commission itself, without reliance on any Congressional enactment so specific as the Procedure Act.

In some cases, agencies have delegated to subordinates or to single members of the agency the power to make final decisions in adjudications, not subject to appeal to the agency, and the power to promulgate rules, although these instances are rather exceptional. See Davis, Administrative Law, Section 26. I would not suggest this here, since the basic question of power to do this under our statutes would be complicated by the further doubts about the continuing vitality of such a delegation if the Commission ceased to have a quorum. The probability of judicial reversal would be too great.

As to this question generally - the continuing vitality after the Commission ceased to have a quorum of a previous delegation of power by the Commission, I feel that it is certainly open to doubt, for there would be no Commission to supervise, review or revoke the delegation. However, I would not have the same doubts about following this procedure in the narrow area that I have outlined - the disposition of applications for acceleration, exemption and other relief - for the following reasons:

> (1) If any of such proceedings are subject to the Procedure Act, the delegation of power to subordinates would rest on the authority of Congress, and not solely on that of the Commission, although the Commission or the Chairman might still have to designate the particular individual to exercise the power. (2) Even where such proceedings are not within the mandatory scope of the Procedure Act, they gain some support from the legislative history that encourages agencies to follow the Procedure Act to the extent feasible. A rule extending the Procedure Act's provisions in this manner, adopted when the Commission had a quorum, might well be held still valid even though the Commission ceased to have

a quorum. (3) Finally, in the particular types of cases that I am discussing, no one can effectively complain, for if the Commission's procedure should be invalid for any reason, the private party would still be stuck with the provisions of the statute, which would be no more favorable than any adverse action that might be taken by the single Commissioner.

While Section 8(a) of the Procedure Act may provide authority for delegation of the power of initial decision in cases of adjudication, it does not, in itself, provide a basis for delegation of power to institute proceedings or to designate hearing officers. Neither does it provide a basis for delegation of rule-making functions.

Quite apart from any sub-delegation of functions, there has of course been a transfer of certain functions to the Chairman under Reorganization Plan No. 10, so that if the Commission had only two members and one of them was designated by the President as Chairman or Acting Chairman, the powers that the Chairman may exercise could still be exercised. Reorganization Plan No. 10 transfer to the Chairman "the executive and administrative functions of the Commission." The quoted language is not as broad as might be assumed at first blush when it is read in context with the remainder of the Plan and its legislative history. The effect of the Plan has been analyzed in detail in a memorandum of April 7, 1950 from the General Counsel to the Commission. As that memorandum points out, there are many areas where administration and policy are intertwined. In such areas, the safest procedure ordinarily is for the whole Commission, and not just the Chairman alone, to act, since the Reorganization Plan contemplates that the Chairman's conduct of "administration" shall be guided by the general policies established by the Commission. It seems to me, however, that if a quorum of the Commission is temporarily lacking and it is necessary that action be taken, it might be appropriate for the Chairman to go further than is suggested in the memorandum of April 7, 1950, in carrying on administrative and executive action in conformance with general policies previously established by the Commission. At such a time it might be appropriate for the Chairman to order the institution of investigations, administrative proceedings and actions in court and the reference of matters to the Attorney General for criminal prosecution. Of course the decision in any adversary administrative proceeding would have to await the availability of a quorum of the Commission, and the Chairman could not adopt or amend substantive rules or otherwise determine general policy.

At a time when there is a quorum, it is obviously preferable for many of these matters to be acted upon by the Commission, and not by the Chairman alone, since they are intertwined with policy considera-

tions and it is desirable that there be close coordination in the adoption and execution of policy. If this should not be possible because of the unavailability of a quorum of the Commission for a time, I should think it would then be possible for the Chairman to continue to act in order to execute established policies, even though he lacked the power to adopt new policies.

I do not suggest this as a desireble state of affairs, but only as a sort of last resort to avoid paralysis due to vacancies. If the problem should become imminent, it might be desirable for the Commission, at a time when it had a quorum to formulate in a rule such a concept as to the scope of the Chairman's powers in emergency situations.

Conclusion

It might be argued that it would be possible for two Commissioners to carry on as a quorum of the Commission if there were three vacancies. A rule embodying such a quorum provision might serve to protect those who relied on it against civil liability, although this is not certain. As a practical matter, however, it would be unwise for the Commission to take any affirmative adverse action at a time when only two members were in office unless it were expected that that situation would continue for a long time, for the Commission would certainly be faced with litigation on the quorum question which would probably lead to more delay than would be involved in waiting for the appointment of additional Commissioners.

On the other hand, I believe that it would be possible for a two-man Commission, one of whom was designated as Chairman, to function temporarily with respect to applications for acceleration, exemption, and other relief, so long as such applications were not contested by any private party, and I believe that it would be possible for the Chairman to exercise more power than he presently does in connection with the institution of investigations and other actions and proceedings, being guided by previously established Commission policy.

The only matters that could not be disposed of at least without inviting serious litigation would be those involving affirmative final action adverse to private parties and rule-making and other matters involving general policy. The importance of this would depend upon the length of time during which the impasse continued in effect. If it were for more than a very short time, this paralysis would obviously be crucial.

Circ 12/20
for 12/21

DEC 28 A.M

MEMORANDUM

December 20, 1960

To: The Commission

From: Office of the General Counsel W.J.

Re: Applicability of the "Rule of Necessity" to preclude disqualification of a Commissioner from considering a case where it would prevent a quorum of the Commission from being present.

The Commission has consistently taken the position that three Commissioners must be present to constitute a quorum. This raises the question whether the so-called "rule of necessity" would permit the participation of an otherwise disqualified member in order to provide a quorum in view of the fact that there are only four Commissioners, who cannot all be present at all times, and two of whom have served on the staff in capacities which might disqualify them in particular cases.

The rule of necessity has been rarely invoked. We have found only one case that the Supreme Court has decided solely thereon: Evans v. Gore, 253 U.S. 245, where the Court was faced with a situation of absolute necessity, since it involved the applicability of the federal income tax to a Federal Judge. Therefore, whoever constituted the panel would ipso facto have an interest in the case.

We have found two other Supreme Court cases where the Court may have relied in part on the rule of necessity, and in these cases, as in Evans v. Gore, there was involved a challenge of prejudice of the entire body. FTC v. Cement Institute, 333 U.S. 683, involved an attack on the qualification of the entire membership of the FTC to hear a case of alleged price-fixing on the ground that the Commission had made reports to Congress and to the President expressing the opinion that the pricing system in question constituted a violation of the Sherman Act. Morgan v. United States, 313 U.S. 409, involved the alleged bias of the Secretary of Agriculture in fixing rates to be charged by market agencies for their services at the Kansas City Stockyards when he had publicly expressed his opinion criticizing a prior Supreme Court decision upsetting these rates on procedural grounds.

In both of these cases the court found there was no disqualifying bias on the part of the deciding body, and in the Cement case observed that the type of prejudice charged was, to a degree, inevitable in the administrative process. At page 701, the court said:

> "Moreover, . . . [defendant's] position, if sustained, would to a large extent defeat the congressional purposes which prompted passage of the Trade Commission Act. Had the entire

> membership of the Commission disqualified in the proceedings against these respondents, this complaint could not have been acted upon by the Commission or by any other government agency. Congress has provided for no such contingency. It has not directed that the Commission disqualify itself under any circumstances, has not provided for substitute commissioners should any of its members disqualify, and has not authorized any other government agency to hold hearings, make findings, and issue cease and desist orders in proceedings against unfair trade practices. Yet if . . . [defendant] is right, the Commission, by acting studies and filing reports in obedience to congressional command, completely immunized the practices investigated, even though they are 'unfair' from any cease and desist order by the Commission or any other governmental agency."

As indicated by the foregoing quotation, the decision appears to be that the pre-judgment charged involved a situation contemplated by the Congress and hence did not constitute legal prejudice. 1/

1/ In this connection, it may be pointed out that the last sentence of the Administrative Procedure Act exempts the members of the body comprising the agency itself from provisions with respect to separation of functions. In the light of the legislative history, however, it seems likely that this exemption was intended to avoid the disability which might necessarily arise from the combination of functions inherent in the administrative system, with the Commission itself initiating a proceeding and supervising the development of the government's case and then sitting as judge in the same matter. It was not intended to endorse the qualification of one who, while a member of the staff, has been directly involved in the prosecuting function and then is appointed to the Commission before which his case comes for hearing. See the Attorney General's Memorandum to the Departments and Agencies, Administrative Procedure Act, July 12, 1946, pp. 32-35, and, in particular, at pp. 34-35:

> "The last sentence of section 5(c) sets forth certain exemptions from the requirements of the subsection. These have already been discussed, except the provision that 'not shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.' It was pointed out that this exemption 'of the agency itself or the members of the board who comprise it -- is required by the very nature of administrative agencies, where the same authority is responsible for both the investigation-prosecution and the hearing and decision of cases.' Sen. Rep. p. 16; H.R. Rep. p. 30. Thus, if a member of the Interstate Commerce Commission actively participates in or directs the investigation of an adjudicatory case, he will not be precluded from participating with his colleagues in the decision of that case. Sen. Rep. p. 41."

In United States v. Aluminum Company of America and North American Company v. Securities and Exchange Commission, 320 U.S. 708, the Court deferred action where it lacked a quorum because of the disqualification of four of its members. The court stated:

> "As four justices have disqualified themselves from participating in the decision in each of these cases, the Court is unable to make final disposition of them because of the absence of a quorum of six justices as prescribed by 28 U.S.C., § 21. These cases will accordingly be transferred to a special docket and all further proceedings in them postponed in each case until such time as there is a quorum of Justices qualified to sit in it, when it will be restored to the regular docket for such further proceedings as may be appropriate."

Subsequently, a remedial act 2/ was passed by the Congress permitting the Supreme Court to certify the Aluminum case (which was on appeal from a district court decision) to the appropriate Court of Appeals. See United States v. District Court, 334 U.S. 258 (1948). 3/ The North American case was later heard by the Supreme Court itself after changes occurred in its membership. See North American Company v. Securities and Exchange Commission, 327 U.S. 686 (1946). 4/

2/ 15 U.S.C. 29.

3/ In his concurring opinion (at p. 265) Justice Frankfurter observed:

> "When this case originally came here by appeal, an extraordinarily rare, if not unique, situation in the history of the Court precluded its consideration for want of a qualified quorum. The impasse was met by the special jurisdictional Act of June 9, 1944, 58 Stat. 272, 15 U.S.C. § 29."

4/ In the interim between the two Supreme Court decisions in the North American case Justice Roberts retired from the bench and Justice Burton was appointed. In 1948, the Judicial Code was amended to provide:

> ". . . In [a case] brought to the Supreme Court for review [other than by direct appeal from a district court], which cannot be heard because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of the opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court."

From the foregoing, it is clear that the Supreme Court has been exceedingly sparing in its application of the rule of necessity, apparently never having indicated its applicability except where the whole body was affected with prejudice. Of course, when the Supreme Court itself is involved, a consideration which may influence its decision is that while it is possible to appeal from inferior tribunals in order to remedy truly prejudicial decisions which might be rendered, the Supreme Court is always the final arbiter. 3/

In the lower federal courts and in the state courts perhaps the broadest applicability of the doctrine is in Brinkley v. Hassig, 83 F. 2d 351 (C.A. 10, 1936). This involved the revocation of a doctor's licence by a state medical board for unprofessional conduct, including diagnosis and prescription over the radio. The Court of Appeals conceded that the medical board had a preconceived prejudice against Dr. Brinkley, stating, at page 357:

> "The publicity used by appellant made public prejudice well-nigh inevitable . . . . That the members of the board had radios in their homes is no constitutional disqualification. The unusual thing about this case is that one issue to be tried was whether such radio talks were in fact given and whether they violated professional standards of conduct. Members of the board having radios thus had personal knowledge of the act alleged, and necessarily formed some opinion as to whether they were in conflict with professional standards."

Citing Evans v. Gore, 253 U.S. 245, supra, the court held that since the law made no provision for alternative procedures the necessity of the case impelled the board to act, despite its prejudice, because "the law cannot be nullified or the doors to justice barred because of prejudice or disqualification of a member of a court or an administrative tribunal." This case may well present an instance of real necessity closely analogous to Evans v. Gore in that it is not to be expected that any doctor who might reasonably be selected to judge the ethical nature of Dr. Brinkley's conduct would not have formed an opinion on the matter.

3/ Cf. Minnesota State Board of Medical Examiners v. Schmidt, 207 Minn. 525, 292 N.W. 255 (1940), appeal dismissed, 311 U.S. 617 (1940), in which the court in rejecting a similar challenge to the qualifications of a board, observed at 292 N.W. 257, "Finally, the whole proceeding before the board is and has been subject to court review." See also State ex rel Barnard v. Board of Education of Seattle, 19 Wash. 8, 52 Pac. 317 (1898) where the court noted that since the board was in effect acting as a jury in deciding questions of fact, there could be no appeal from their determination. In this case the doctrine of necessity was not applied.

There are several state court cases which, although factually distinguishable from the Commission's present problem, have held the doctrine of necessity inapplicable to situations where it was possible to provide an alternative, unbiased tribunal. Thus in Smith v. Department of Registration and Education, 412 Ill. 332, 106 N.E. 2d 722 (1952), a case involving revocation of a physician's license by a medical board and in Wilcox v. Supreme Council of Royal Arcanum, 66 Misc. 253, 123 N.Y.S. 83 (St. Ct., Onondaga Cty., 1910) involving the expulsion of a member from a fraternal society, the Court found that under the rules of each organization the biased panel could have dissolved itself and the head of the organization could have selected a new panel from those eligible to serve. Therefore, these cases were held not to present the degree of necessity requisite for invoking the rule. Similarly, in People ex rel. Pond v. Board of Trustees of the Village of Saratoga Springs, 39 N.Y.S. 607, 4 App. Div. 399 (3rd Dept., 1896), where the board consisted of thirteen members of which seven constituted a quorum, and where only seven members were present, one of whom was biased, the court held that the doctrine of necessity would not justify participation in the decision by the biased member since the board could have waited until another of its members was present.

In Metsker v. Whitesell, 103 N.E. 1078 (S. Ct. Indiana, 1914), the court reversed a decision by a three-member tribunal, one member of which was prejudiced. The court said, at page 1083:

> "An exception to the general rule of disqualification is recognized by some courts, including this one, where the disqualification, if permitted to prevail, would destroy the only legal tribunal for the hearing of the matter in issue, and thus bar any hearing, the disqualified judge may be compelled to act. But the exception is not recognized except in cases of imperative necessity, and, in determining such necessity, the greatest of care must be exercised. There the tribunal, as here consists of three persons, an interested commissioner should act only where his refusal so to do would effectually bar any remedy." (citations omitted).

CONCLUSION

In the light of the foregoing only "imperative necessity" would seem to justify application of the rule. Since at present there is a vacancy on the Commission which will doubtless be filled before long, and the temporary absence of one Commissioner is due to ill health, it

would be unwise for any of the Commissioners to rely on the rule of necessity to justify his participation in deciding a case in which he feels he is disqualified by bias or prejudice. 6/

6/ As the court observed in Barnard v. Board of Education of Seattle, 52 Pac. 320 at 321:

> "The learned and observant Lord Bacon well said that the virtue of a judge is seen in making inequality equal, that he may plant his judgment as upon even ground. Caesar demanded that his wife should not only be virtuous, but beyond suspicion; and the state should not be any less exacting with its judicial officers. . . ."