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# TOWARD NEUTRAL PRINCIPLES: THE SEC'S DISCHARGE OF ITS TRI-FUNCTIONAL ADMINISTRATIVE RESPONSIBILITIES\*

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The subject matter of this essay is ever-evolving,<sup>1</sup> ever-evocative of the conflicting currents that buffet the independent federal regulatory agencies, and ever-provactive of angry disagreement. I believe, therefore, that it is ever-timely.

More than a half century ago, President Franklin Roosevelt, in transmitting to Congress the report of a special commission on administrative management, the Brownlow Committee Report,<sup>2</sup> used the phrase "a headless 'fourth branch' of the [g]overnment" to describe independent regulatory commissions.<sup>3</sup> The report he sent to Capitol Hill in January, 1937, included a summary paragraph, which is where this discussion begins.

In the language of the President's report:

These independent [regulatory] commissions have been given broad powers to explore, formulate, and administer policies of regulation; they have been given the task of investigating and prosecuting business misconduct; they have been given powers, similar to those exercised by courts of law, to pass in concrete cases upon the rights and liabilities of individuals under the statutes. They are in reality miniature independent governments set up to deal with [in those times] the railroad problem, the banking problem, or the

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1. For instance, the issue of the *Administrative Law Review* published just before oral presentation of this Essay explored the potential of administrative grand juries, which has a direct bearing on this discussion. See Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465 (1992).

2. THE PRESIDENT'S COMM. ON ADMINISTRATIVE MANAGEMENT, REPORT OF THE COMM. WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT (1937) [hereinafter BROWNLOW COMMITTEE REPORT].

3. *Id.* at 40.

radio problem. They constitute a headless "fourth branch" of the Government, a haphazard deposit of irresponsible agencies, and uncoordinated powers. . . . The Congress has found no effective way of supervising them, they cannot be controlled by the President, and they are answerable to the courts only in respect to the legality of their activities.<sup>4</sup>

Since *Chevron v. Natural Resources Defense Council*,<sup>5</sup> the courts' self-imposed mandate for deference has eaten deeply into President Roosevelt's belief that there was or is agency answerability to the courts with respect to the legality of the agencies' own activities. And, for ill or for good, the agencies' independence from the direct intervention of the Congress and of the President has continued to this very day.

Still, whether because of or without regard to *Chevron*, in our constitutional republic founded on the notion of limited federal powers and steeply biased in favor of fair process as the safeguard of the citizenry, that very independence elicits an examination of the exercise by these agencies of the powers bestowed upon them.

Let me repeat what those powers are: to formulate general policies of regulation; to administer those policies and investigate and prosecute violations of those policies; and to pass, in concrete cases, upon the rights and liabilities of individuals accused of such violations—quasi-legislative, quasi-executive, and quasi-judicial powers.

But to use the "quasi" power terminology carries connotations which perhaps advantage the argument and viewpoint of this Essay. So I shall try to use a more neutral formulation and shall narrow my focus to the Securities and Exchange Commission (SEC), not only because it is the paradigm of agencies but because I speak out of experience principally in practice before, and only in service with, the SEC.

The tri-functional model of federal administrative authority, of which the SEC is but one example, combines policymaking and enforcement activities, characteristic of the legislative and executive branches of the federal constitutional structure, with adjudicatory responsibilities substantively akin to those of the judicial branch. It is the impact of that combination on the SEC's discharge of its adjudicatory responsibilities, particularly taking into account practical developments affecting policymaking by the SEC, that is the subject of this Essay.

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4. *Id.* at 39-40.

5. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In *Chevron*, the Supreme Court held that where Congress did not express its intent on the precise issue at hand, the courts should defer to the interpretation evidenced in agency regulations. *Id.* at 842-45. Agencies assert interpretations evidenced by other kinds of agency action, i.e., internal agency action, as well in order to merit the same *Chevron*-type deference from the courts.

It is not enough to recite the generality that the SEC "must combine its judicial work with work of policy-determination," as the Brownlow Committee suggested in 1937.<sup>6</sup> Some account of the extent of intersection between those two functions and, similarly, of the extent of difference between one and the other, must be presented as background to the analysis.

The starting point is the responsibility vested in the SEC for the "accomplishment" of the federal regulatory policies embodied in the statutes committed to its administration.<sup>7</sup> According to Professor Schwartz, "[e]specially significant in this respect is the affirmative duty . . . to ensure that the terms of [the federal securities laws] are in fact complied with and to ferret out violators."<sup>8</sup> The performance of that duty involves policy determination by requests for supplemental statutory provisions, by implementary rulemaking, by statutory and regulatory interpretation, and by prosecution of persons whose conduct is not in accord with the law and rules as so interpreted.

The SEC's policymaking through the exercise of its quasi-legislative function<sup>9</sup> is occasional in time and interstitial in coverage. By contrast, its policymaking through exercise of its quasi-executive function is quotidian, addressing in interpretations a myriad of varying contexts and problems. The quasi-legislative implements are few: legislative submissions to Congress, statutory drafts, explanatory transmittals, section-by-section analyses, pre-rulemaking concept releases, rule proposing and repropounding releases, and rule adoptions with explanations included. The quasi-executive instrumentalities, by contrast, are many: staff letters commenting on filed material, staff presentations and responses at professional conferences, staff interpretive and "no action" letters, staff accounting bulletins, staff and certain Commission public studies and reports, Commission and certain staff interpretive releases, *amicus* briefs, complaints and consent stipulations in prosecutory proceedings brought in federal courts, orders instituting administrative proceedings, SEC-accepted consent orders making findings in those proceedings based on offers of settlement, appellate briefs, responses to congressional and White House inquiries, testimony before congressional committees, and, recently, SEC press releases, among others.

It is only to be expected, therefore, that the emphasis is heavily on quasi-executive interpretation for enunciation of applicable policy, because the

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6. BROWNLOW COMMITTEE REPORT, *supra* note 2, at 222 (Study Report of Robert E. Cushman, *The Problem of the Independent Regulatory Commissions*).

7. Bernard Schwartz, *Administrative Justice and Its Place in the Legal Order*, 30 N.Y.U. L. REV. 1390, 1406 (1955).

8. *Id.* at 1408.

9. I use the term "quasi-legislative function" to include not only rulemaking, but also the crafting and submission to Congress of prospective additions to the existing statutory canon.

statutory provisions that the SEC enforces and the supplementary rules it adopts

are not and cannot be as clear and precise as a promissory note or bill of sale. They necessarily describe in general terms, and with emphasis upon tendency or effect, those practices which are forbidden. It is and must be left to the [SEC acting in its quasi-executive capacity] to apply these general prohibitions to a great variety of conduct. As this is done, it is expected that the general terms will take on concreteness and that subsidiary principles may be worked out by which certain types of conduct will be known as improper and others as permissible.<sup>10</sup>

Every observer of the SEC accepts that these powers of policy determination and policy implementation—both the quasi-executive and the quasi-legislative powers—“must be exercised consistently and, therefore, by the same body, not only to realize the public purposes which the statutes are designed to further but also to avoid confusion of private interests.”<sup>11</sup> My concern arises when programmatic consistency infects the determination of cases<sup>12</sup> heard by the Commission in its role as appellate tribunal from decisions of administrative law judges (ALJs) in the exercise of its quasi-judicial power.<sup>13</sup>

My experience suggests that consistency in SEC quasi-executive and quasi-legislative policymaking has assumed an increasingly self-generative and self-vindicative character, demanding the ratification afforded by the quasi-judicial process with its appearance of disinterestedness. Ultimately, in my view, the more consistency the SEC as a body achieves in application of administrative policies, the more committed the SEC as a body becomes to vindication, in whatever capacity it is acting, of the policies thus consistently applied.

Perhaps my concerns will be best presented by hypothetical illustrations. I consider the following three situations.

The first is a hypothetical illustrating substantive specifics. The SEC requires amendments to Schedule 13D<sup>14</sup> to be filed “promptly” under Rule 13d-2.<sup>15</sup> For a fairly long while, the regulated community and its lawyers

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10. SENATE COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENTAL AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 59 (1941) [hereinafter ATTORNEY GENERAL'S COMMITTEE REPORT].

11. *Id.* at 58.

12. I use the word “cases” deliberately to invoke echoes of Article III.

13. The SEC also decides appeals from the decisions of the highest internal disciplinary organs of the several self-regulatory organizations. Some of the same concerns apply to the process for deciding those appeals, but the cases heard by the administrative law judges place those concerns in starker relief.

14. 17 C.F.R. § 240.13d-101 (1992).

15. 17 C.F.R. § 240.13d-2(a) (1992); see, e.g., *In re Livingston*, Exchange Act Release No. 31,785, 53 S.E.C. Docket (CCH) 625, 1993 SEC LEXIS 136, \*8 (Jan. 28, 1993).

believed that promptness was determined by analogy to the ten days allowed in the statute itself for the filing of the initial Schedule 13D.<sup>16</sup> The consent order in *In re Cooper Laboratories, Inc.* put an end to that belief.<sup>17</sup> One year later, in *In re Revlon, Inc.*,<sup>18</sup> the SEC determined in a closely related context that, when the wire was tripped no later than a late Thursday evening, promptness required a filing on a Schedule 14D-9, at least from New York, not later than Monday before the market opening. *Revlon*, like *Cooper*, was initiated administratively and determined by consent order. I note, and underscore, that senior SEC staff, and even commissioners, have repeatedly lectured on the mandates of *Cooper* and *Revlon*.<sup>19</sup>

In a different, but not wholly dissimilar context, courts have analyzed the speed with which companies have publicized operational developments in their businesses, as opposed to tactical developments in their tender offers, and have focused on the absence of undue delay in a multi-step review process as a criterion for promptness. A variation of that focus has been presented to the SEC in the "Wells submission" context<sup>20</sup> relating to Schedule 13D amendments and, consistent with the prior SEC actions arising out of takeovers, has been rejected when presented.

How does the Commission—not the staff, but the Commission—now react when, hypothetically, upon appeal of an ALJ decision in a matter in which the same argument was rejected at the Wells stage, the argument that no undue delay was involved in a seven-day multi-step review of a crucial Schedule 13D amendment, briefed and orally argued in a quasi-judicial context?

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16. Securities Exchange Act of 1934, § 14(d)(1), 15 U.S.C. § 78n-(d)(1) (1992).

17. See *In re Cooper Lab., Inc.*, Exchange Act Release No. 34-22171, 33 S.E.C. Docket (CCH) 647 (June 26, 1985). In *Cooper*, the SEC expressed the view that "the promptness of an amendment to a Schedule 13D must be judged in light of all the facts and circumstances of a particular situation, [and] '[a]ny delay beyond the time the amendment reasonably could have been filed may not be deemed to be [prompt].'" *Id.* at 651.

18. *In re Revlon, Inc.*, Exchange Act Release No. 23,320, 1986 SEC LEXIS 1368 (June 16, 1986).

19. See e.g., Daniel L. Goetzer et al., *Disclosure Issues in Contests for Corporate Control*, in *HOSTILE BATTLES FOR CORPORATE CONTROL 1988: THE NEW MARKET ENVIRONMENT 227* (1988); Daniel L. Goetzer et al., *Recent Developments in Tender Offer Regulation*, in *2 HOSTILE BATTLES FOR CORPORATE CONTROL 465* (1990); see also Complaint, *In Re Allied Stores Corp.*, No. 3-6869, 1987 WL 222242 (SEC).

20. "Wells submission" is a procedure by which a person, whom the SEC enforcement staff has advised "may be the subject of a recommendation by the staff to the Commission that law enforcement action be taken, may submit a written statement to the [enforcement] division explaining why no . . . action should be brought against him or her. . . . The staff forwards the Wells Submission to the Commissioners [for their consideration] in conjunction with its own memorandum recommending the enforcement action. . . ." Alternative Dispute Resolution Policy, Securities Act Release No. 6974, 53 S.E.C. Docket (CCH) 564, 569 (Jan. 22, 1993). The Wells submission procedures are set forth at 17 C.F.R. § 202.5(c) (1992).

The second situation is a hypothetical that shifts from the specifics of violation of a single rule to the programmatically general: For most of the first twenty years of its life, the jurisprudence of Rule 10b-6<sup>21</sup> characterized the rule as objective, i.e., as one of those anti-fraud rules “which concentrate on the general adverse effect of [specified] practices on the public, as distinguished from whether, in given cases, there is claimed absence of harm or of evil motivation.”<sup>22</sup> The reasoning behind this gloss on the rule, originated by the SEC, was quite pragmatic: given the context in which Rule 10b-6 is most frequently applied, the SEC has always believed that the rule has to function automatically in order for it to function effectively.

It therefore became a part of SEC lore that a Rule 10b-6 violation requires no intent. That the Supreme Court in *Ernst & Ernst v. Hochfelder*<sup>23</sup> purported to find a scienter requirement in Section 10(b)<sup>24</sup> was troublesome, but there was no recession by the SEC with respect to Rule 10b-6 as opposed to Rule 10b-5. The SEC knew what it had intended in 1956 and thereafter, and it never changed that position.

Just to be safe, when Rule 10b-6 amendments were adopted in 1987, but without ever drawing attention to the addition, the SEC added an additional *Federal Register* authority source<sup>25</sup> for Rule 10b-6: Section 15(c)(2).<sup>26</sup> Section 15(c)(2) contains “means reasonably designed” language,<sup>27</sup> which is absent from Section 10(b).

Now, how does the Commission—not the staff, but the Commission—react when, upon appeal of an ALJ decision in a matter in which the same conclusion was rejected at the Wells stage, the argument that some form of

21. Rule 10b-6 provides:

It shall be unlawful for any person

. . .

. . . directly or indirectly, by the use of any means or instrumentality of interstate commerce . . . to bid for or purchase for any account in which he [or she] has a beneficial interest, any security which is the subject of such distribution, or any security of the same class and series, or any right to purchase any such security, or to attempt to induce any person to purchase any such security or right . . .

17 C.F.R. § 240.10b-6(a) (1992).

22. EZRA WEISS, REGISTRATION AND REGULATION OF BROKERS AND DEALERS 93 (1965).

23. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

24. Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1992).

25. Exchange Act Release No. 24003, 37 S.E.C. Docket 602, 1987 WL 111649 (S.E.C.) (Jan. 16, 1987).

26. Securities Exchange Act of 1934, § 15(c)(2), 15 U.S.C. § 78o(c)(2) (1992).

27. Construing this same language as added to Securities Exchange Act Sec. 14(e) by a 1970 amendment, the Supreme Court stated: “The amendment gives the Securities and Exchange Commission latitude to regulate nondeceptive activities as a ‘reasonably designed’ means of preventing manipulative acts, without suggesting any change in the meaning of the term ‘manipulative’ itself.” *Schreiber v. Burlington Northern Inc.*, 472 U.S. 1, 11 n.11 (1985).

scienter was required to find a manipulation, is briefed and orally argued in a quasi-judicial context?

The third, and last hypothetical moves from the direct to the leveraged application. The House Banking Committee in 1988, as part of the legislative history of FIRREA,<sup>28</sup> responded to the approach of several principally Washington lawyers. The Committee made clear, in a special addition to the Committee Report on FIRREA, that it was appropriate, and within the responsible performance of their professional function, for lawyers to render advice to their clients that the applicable regulatory agency positions on whatever issue happened to be under dispute were simply incorrect or without statutory foundation and that, absent special circumstances, such advice could be wrong but should not be grounds for regulatory prosecution of the lawyers.<sup>29</sup> FIRREA, as passed in 1989, was changed in many substantive ways, but the House Banking Committee Report is an important interpretive aid.

In 1990, the SEC amended its own prior legislative proposals to request of Congress the present Section 21C of the Exchange Act,<sup>30</sup> subjecting to SEC "cease and desist" prosecution any person, including a lawyer, who causes (in the sense of "contributes to") a violation. The scope of the language of the SEC's statutory amendment quietly extended the scope of the SEC's enforcement authority so that it would apply in the very circumstances that had been in the House Banking Committee's consideration two years earlier, i.e., to include lawyers giving exactly the sort of advice to which the House Banking Committee referred. The draftspersons at the SEC were well aware of FIRREA's history as they composed the statutory summary and section-by-section analysis, and specifically, were aware of the House Banking Committee Report insert. Conspicuous by its absence in the 1990 Act or its legislative history—which, in this context at least, adopted almost verbatim what the SEC had approved without public discussion and had submitted to the congressional committees—is any analogue to the House Banking Committee Report language.

In the past, the SEC has often cited Judge Friendly's reference in *United States v. Benjamin*<sup>31</sup> to the crowbar-like destructive capability of lawyers' advice.<sup>32</sup> Recently, the commissioners and the senior staff of the SEC have

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28. Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified as amended at 12 U.S.C. § 1811 (1989)).

29. H.R. REP. NO. 54(I), 101st Cong., 1st Sess. 291, 467 (1988).

30. Securities and Exchange Act of 1934, § 21(c), Pub. L. No. 101-429, 104 Stat. 939 (codified as amended at 15 U.S.C. § 78u-3 (1990)).

31. 328 F.2d 854 (2d Cir.), cert. denied, 377 U.S. 953 (1964).

32. In *Benjamin*, Judge Friendly wrote: "In our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than



stood squarely behind Judge Sporkin's indictment in *Lincoln Savings* two years ago: "Where *were* the lawyers?"<sup>33</sup> Only one week before this Essay was first delivered, the SEC's then-general counsel credited the SEC with self-restraint in acting against lawyers (and, curiously, keyed that self-restraint to the reciprocal self-restraint of the Bar).<sup>34</sup>

The leverage in prosecuting lawyers is well-known to every division of the SEC. The temptation to discipline those who debase our mutual profession is magnified by the temptation to multiply programmatic achievements through prosecution of those whose SEC-contradicting advice is limited in scope only by their sales ability to reach prospective clients.

Now does the Commission—not the staff, but the Commission—react when, hypothetically, upon appeal of an ALJ decision in a matter in which the same argument was rejected at the Wells stage, the argument, that there must be room under Section 21C for honest lawyers' disagreement with SEC positions, however strongly held, without liability for contributing to a client's violation is briefed and orally argued in a quasi-judicial context?

The three foregoing illustrations are constructed to focus on different portions of the SEC's policy formulation and policy administration. They are constructed to bring attention to the inertial force of SEC staff attitudes that develop into written interpretive law or "no action" positions, then are incorporated into illustrative footnotes in SEC releases, then are cited in *amicus* briefs, and, finally, are inhaled or imbibed by commissioners as received wisdom with long genealogy.

These illustrations are also intended to focus upon the expansive force of individual SEC policy positions that are taken in the heat of abusive market contexts, undoubtedly for the benefit of investors, are then gradually extended to a different market issue, and then another, without analysis of how far from the original context the underlying reasoning has been stretched.

They are further intended to examine the function both of prosecutory orders or complaints and of settlements, whether by judicial or administrative order, in setting forth the SEC's view of the law as a guide to lawyers' advice and regulatees' conduct, but not as precedent in any *stare decisis* sense.

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the chisel or the crowbar." *Id.* at 863. For Commission decisions citing to Judge Friendly's quote, see, e.g., *In re Carter*, Exchange Act Release No. 17,597, 22 S.E.C. Docket (CCH) 292, 298 n.21 (Feb. 28, 1981).

33. The relevant text of Judge Sporkin's opinion is as follows: "The questions that must be asked are: Where were these professionals . . .? . . . Where also were the outside accountants and attorneys . . .?" *Lincoln Savings & Loan Assn. v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990) (Sporkin, J.).

34. James R. Doty, Remarks at New York University Law School (Sept. 15, 1992) (notes on file with Author).

They are intended as well to bring attention to the effect of the prosecutory process itself as that process has been affected by the Sunshine Act<sup>35</sup> and by the Wells process. The more complex the matter, and the broader the scope of likely impact of the proposed charges or the proposed settlement, the deeper is the likely involvement of individual commissioners and the more lengthy and probing is the likely pre-approval discussion at the commissioner's table.

Finally, these three illustrations are intended to avoid any issues that may be identified with any specific cases decided between 1986 and 1992.

Two concerns are intertwined in the analysis both of the illustrations and of their implications. The first is the overlapping, if not the intermixture, of prosecuting and judging.

Even when determining that such overlapping or intermixture is constitutional, the Supreme Court suggested a continuing alertness for what it called "special insights into local realities" of the particular multi-functional body.<sup>36</sup> Seventeen and a half years have passed since then, seventeen years of evolution, of agenda multiplication, of the declining sensitivity borne of simple overexposure, and of the increasing commitment born of habit and self-assurance.

The local realities are clearly not the same as they were in 1975. The question is: Have they merely evolved or have they generically altered? Can we refute today, as we believed we could convincingly seventeen years ago, what concerned the members of the pre-war Attorney General's Committee: the perception by an affected respondent "that, in this combination of functions within [the SEC or any other of the tri-functional agencies], he has lost all opportunity to argue his case to an unbiased [commission]"?<sup>37</sup>

The second concern—and they are indeed intertwined—is the impairment, if not the envelopment, of the adjudicative function by the policymaking role.<sup>38</sup> In repeatedly asking "How does the Commission—not the staff, but the Commission—now react?," it is at the commissioners as individual

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35. 5 U.S.C. § 552(b) (1988).

36. *Withrow v. Larkin*, 421 U.S. 35, 58 (1975).

37. ATTORNEY GENERAL'S COMMITTEE REPORT, *supra* note 10, at 204 (Additional Views and Recommendations of Messrs. McFarland, Stason, and Vanderbilt); *see also* American Conference of United States, Rec. No. 86-4, The Split Enforcement Model for Agency Adjudication, *reprinted in* 1 C.F.R. § 305.86-4 (1991) ("[T]he experience with internal separation of functions has never entirely silenced the critics who argue that it is impossible to achieve evenhanded justice when enforcement and adjudicative functions are lodged in the same agency.").

38. *Cf. Martin v. OSHRC*, 111 S. Ct. 1171 (1991) (holding that, under a split enforcement agency model, an adjudicatory Commission must defer to the Secretary when both the Commission and the Secretary offer reasonable but conflicting interpretations of an ambiguous regulation).

human beings that I look to seek some indication of an institutionalized appreciation of undertaking, or some indication of an institutionalized effort to discharge, a substantively different role in the adjudicative area.

The effort that adjudication requires of each commissioner is almost impossible to make in the absence of institutional incentive, and perhaps institutional pressure, to individual insight into the extent of crystallization of personal attitudes in support of prevailing policy interpretations. For lack of that insight, as the Brownlow Committee noted, "[t]he discretionary [policy-oriented] work of the administrator is merged with that of the judge,"<sup>39</sup> to the rapid and potentially total eclipse of the latter.

When applied to the initiation of prosecutions as a tool for the further consistent implementation of policy, the commitment to consistent vindication of policies is understandable and, in my view, appropriate. The SEC should be expected to prosecute, and even in some instances to stretch somewhat to prosecute, those persons whose conduct is not in accord with the SEC's interpretation of the law.

By contrast, I believe there ought to be a clear attitudinal distinction in the discharge of quasi-judicial responsibilities; a withdrawal by the SEC in the performance of adjudicatory duties from those "[p]ressures and influences properly directed toward officers responsible for formulating and administering policy";<sup>40</sup> and a *de novo* review not only of the case record but also of applicable law, of analogous practice and other relevant materials, and, above all, of fundamental (and therefore neutral) principles of administrative law relevant to the case at bar, undertaken in a manner as distinct from the manner in which the quasi-executive and quasi-legislative functions are usually performed, in a manner as close as attainable to what has been called the "cold neutrality of an impartial judge."<sup>41</sup>

If we agree only that the issue of fairness and the appearance of fairness are fundamental to the discharge of its adjudicatory responsibility by *any* regulatory agency,<sup>42</sup> then my concern comes down to this: first and foremost

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39. BROWNLOW COMMITTEE REPORT, *supra* note 2, at 40

40. *Id.*

41. Schwartz, *supra* note 7, at 1409.

42. See, e.g., Administrative Conference of the United States, Rec. No. 91-8, Adjudication of Civil Penalties Under the Federal Aviation Act, *reprinted in* 1 C.F.R. § 305.91-8 (1992) ("The regulated community has concerns about the fairness of FAA's administration of . . . [its] . . . program, resulting from the fact that appeals of . . . [those] . . . cases are heard by the FAA Administrator."); *cf.* Rec. No. 86-4, *supra* note 37 ("Fairness is an important but an unquantifiable and subjective value."); H. REP. NO. 671, 102d Cong., 2d Sess. 9 (1992) ("[W]e are unwilling to change the procedures of the . . . program on the basis of perceptions of unfairness, when these perceptions have no basis in reality. We will of course continue to oversee the . . . program and if unfairness develops[,] . . . we will not hesitate to take appropriate corrective action.").

among the “local realities”<sup>43</sup> heightening the “risk of unfairness”<sup>44</sup> in an SEC adjudication is that, by exercising to the fullest its constitutionally permitted power to sit in judgment on cases in which the construction of applicable law turns on policy-oriented interpretation of its own making, “the [SEC] itself . . . maintains a vested interest in ensuring that a particular result is reached, that particular policies are protected or advanced”<sup>45</sup> under the guise of adjudication.

Put more harshly, it would be neither untruthful nor unsympathetic to the SEC to conclude, as the Brownlow Committee Report suggested, that the risk of unfairness has, in fact, been magnified, and that the “policies . . . determined by a body also doing judicial work”<sup>46</sup> have, in fact, affected that part of its decisionmaking in a manner “demoralizing the impartiality of the judge.”<sup>47</sup> It would not be untruthful, as reflected in the selection of matters by the SEC for administrative prosecution as opposed to prosecution in an Article III court. And it would not be unsympathetic because, in the final analysis, one can only expect the reality of that unhappy conclusion to become evident, sooner than later, to the federal appellate judges in appeals from SEC adjudicatory decisions and once evident, to “touch a sensitive judicial nerve”<sup>48</sup> with repercussions unfortunate for the very policies to whose consistent promotion the SEC’s processes of administrative justice have been bent.

Perhaps in light of *Chevron* and its progeny, that sensitive judicial nerve is forever beyond the constitutional touching. But even if so, as the SEC itself has on more than one occasion written in decisions under the Exchange Act, we have it on the high authority of Mr. Justice Frankfurter that “much which should offend a free-spirited society is constitutional.”<sup>49</sup>

Fairness it is to which the SEC, like all government agencies, should aspire. It is fairness and the appearance of fairness we admire and whose absence we deplore in the functioning of a government agency. And, unhappily, it is fairness and the appearance of fairness that are left behind when the SEC bends its adjudicatory responsibilities to the services of its policymaking function. When that happens—and my *J'accuse* is that it *has*

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43. *Withrow v. Larkin*, 421 U.S. 35, 58 (1975); see *supra* note 37 and accompanying text.

44. *Withrow*, 421 U.S. at 58.

45. George R. Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315, 344 (1987).

46. BROWNLOW COMMITTEE REPORT, *supra* note 2, at 222 (Study Report of Robert E. Cushman).

47. *Id.*

48. Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 767 n.41 (1981).

49. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 670 (1943) (Frankfurter, J., dissenting).

happened—at the SEC, then it appears that “the prime aim of [the SEC’s] administrative justice is, paradoxically, not justice at all, but the execution of the legislative policy”<sup>50</sup> to which the SEC owes its political existence.

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50. Schwartz, *supra* note 7, at 1406.