How to Stand Still without Really Trying: A Critique of the New Mexico Administrative Procedures Act

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Stephen Potter has coined several phrases such as "How to win without actually cheating," and in the same vein, perhaps the most appropriate descriptive phrase for New Mexico's performance record on unifying its administrative procedures would be "How to stand still without really trying." The twin primary goals of an Administrative Procedures Act should be to assure minimum requirements of fairness applicable to all agencies and to establish uniformity in the procedures followed by agencies in carrying out their legislative and judicial functions. But, as Professors Kern and Sax of Harvard have pointed out, the goal of fairness is the more fundamental of the two, and "to a considerable extent, uniformity is achieved as a by-product of a code of minimum procedural requirements." Thus, any good administrative procedures act should establish minimum standards of fairness for all agencies which, in turn, lead to a good deal of harmony in the procedures used by the various agencies, while at the same time allowing for the different needs of different agencies.

When appraising the New Mexico Administrative Procedures Act, one may be tempted to look at those provisions of the Act that deal with the procedures themselves and to skip over the definitions section, using it only as a reference for understanding the remainder of the Act. The introductory definitions are, however, the key to the entire Act. Specifically, the term "agency" is of prime importance in that it determines the scope of the Act. The initial crossroads decision as to the relevance of the entire Act is made in this very first definition of what is an agency. One can follow either an inclusive or an exclusive approach. Under the inclusive approach, all agencies are included except those that are specifically excluded in the Act. New Mexico chose, instead, to follow the opposite approach so that under § 4-32-2(A) all agencies in New Mexico are excluded except those...
which are specifically placed by law under the Administrative Procedures Act. As a result, in New Mexico we have a reasonably good Administrative Procedures Act which establishes minimum rules of fairness and uniformity of procedures but which applies to no one. We are, therefore, faced with the cumbersome requirement of amending the Act every time a new commission or agency is created, or every time the political will can be marshaled to place an existing agency under the Administrative Procedures Act. We are, in New Mexico, in danger of having something akin to a road that leads to nowhere—a law that applies to no one. Recent experience with the Human Rights Commission indicates that perhaps the only time the legislature will want to put an agency under the Administrative Procedures Act is when it is displeased with the agency and punishes it by placing it under the Administrative Procedures Act; the legislative equivalent of banishment to the penalty box. In this instance, the legislature has required the Human Rights Commission, as a condition precedent to receipt of its appropriation, to place itself under the Administrative Procedures Act by its own rule-making power. This is an inept way of going about it. The Administrative Procedures Act itself excludes all agencies except those “specifically placed by law” under it, and to have an agency place itself under the Administrative Procedures Act is half a loaf at best, for what the rule granteth, the rule can also take away.

The 28th Legislature in Senate Joint Memorial number 10 stated in part that “there is no standardized procedure to govern the conduct of administrative hearings by state agencies, boards, bureaus, commissions and institutions in New Mexico; and much confusion exists because of the multitude of varying practices and procedures in the conduct of such administrative hearings. . . .” We now have standardized procedures, but they apply to no one, and still much confusion exists because of a multitude of varying practices. Our 200 plus agencies, boards, bureaus, commissions and institutions in New Mexico continue undirected on their diverse paths with their idiosyncratic procedures. We have accomplished something akin to the

6. N.M. Stat. Ann. § 4-32-23 (Supp. 1969) contains conflicting language saying the act applies to agencies made subject to it “by agency rule or regulation.” However the conflict is resolved, the criticism is still relevant.
7. In 1967 the number was reported as being 263. Governor's Comm. on Reorganization of State Govt., Interim Report, p.i. (15 Nov. 1967). In 1970 Governor Cargo put the number at 259 of which 224 were active. Albuquerque Journal, June 26, 1970, at F-2, col. 2.
proverbial boy sneaking into the circus tent; we have made the appearance of moving forward while, in fact, moving nowhere at all. This is always a trick which requires some considerable skill.

In the meantime, the job of unifying administrative procedures in New Mexico is still to be accomplished. Nonetheless, we have on the books an Administrative Procedures Act worth commenting upon. Taken as a whole, it is a commendable effort and, if made effective, would be a vast improvement over the confusing "no man's land" of administrative practice that reigns supreme in the Land of Enchantment. It should be made applicable to the administrative agencies of New Mexico. It has many admirable features, but it also has some shortcomings that should be corrected.

With the view that this Act offers great potential, this article will briefly discuss some of the strengths and some of the weaknesses of the New Mexico Administrative Procedures Act and suggest ways that it could be improved.

**Rule-Making**

Section 4-32-4 establishes rule-making prerequisites and in so doing, formulates procedures by which notice and hearings are afforded individuals having an interest in them. This section is broadly written so as to permit variations to fit different agency situations, but the minimum standard of affording all interested persons opportunity to present their arguments is preserved. This is extremely important in an age in which we are particularly in need of providing vehicles for the citizen to participate in those decisions affecting his life. The New Mexico legislation follows the lead of the Massachusetts Administrative Procedure Act in going beyond the Model Act in an attempt to provide notice to interested parties. The New Mexico Act requires agencies to publish notice of rule-making hearings unless otherwise prescribed by law in newspapers and in trade, industrial or professional publications "as will reasonably give public notice to interested persons." Also, notice is required to be given to any person who asks that notice be given to him, with "the request to be renewed yearly, as the agency directs by rule." This concept is borrowed directly from the innovative Massachusetts approach which assures that groups with special interests in the work and regulations of a particular agency can be assured of being kept abreast of that agency's action.

The section on rule-making procedures does allow for considerable

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variation, and in particular it allows an agency to respond promptly to emergency situations by allowing the notice period to be shortened when "necessary for the preservation of the public peace, health, safety or general welfare . . . or the public interest." A time limit is placed upon such emergency rules, even though it is phrased more indirectly and, therefore, less clearly than it might have been. When emergency rules "will" remain in effect for longer than 60 days, the agency must initiate the ordinary rule-making procedures by giving notice of the rule-making proceeding within 7 days. This requirement of starting rule-making procedures within 7 days might conceivably interfere with an agency's attempt to handle an emergency situation, and it would seem that the situation would have been better handled by a simple statement that "an emergency regulation or amendment shall not remain in effect for longer than three months unless during that time the agency gives notice and holds a public hearing as required by this section." This would have limited emergency regulations to a reasonable three-month period and, at the same time, it would have freed an agency from rule-making procedures while it was trying to meet an emergency. As a minor criticism, once again the legislature was not as explicit as it might have been in stating the sanction for failure to follow the rule-making procedures. A simple statement that "no rule hereafter adopted is valid unless adopted in substantial compliance with this section" would have left no room for doubt. However, § 4-32-2 makes it mandatory upon an agency to follow the rule-making procedures contained in this section, so there should be little room for confusion.

One last criticism of this section on rule-making procedures is that interpretive rules and general statements of policies are not exempted from the rule-making procedures. The motives of the legislature in not exempting interpretive rules and general statements of policy were undoubtedly laudable. The whole idea behind the rule-making procedures is to bring the actions of the agency out in the open, allow citizen participation and thereby avoid so far as possible the making of secret law. Ironically, by forcing interpretive rulings and general policy statements to follow the rule-making procedures of the Administrative Procedures Act, fewer interpretive rulings will be made and, therefore, there will be more secret law. As Kenneth Culp Davis says, "One of the major failings of many agencies is reluctance

12. Id.
to clarify the law they administer. Everything should be done that can be done to encourage agencies to move toward earlier clarification."¹⁴ He goes on to point out that two of the principal tools for clarifying the law are interpretive rules and general statements of policy, and that "good legislation should avoid any kind of new barriers to issuance of interpretative rules and general statements of policy."¹⁵ Putting these two principal weapons for clarification of the law under the requirements of ordinary rule-making procedure undoubtedly places an impediment in the way of their use and, therefore, will be counter-productive so far as clarification of the law. It is entirely admirable to give all interested parties the opportunity to participate in decisions which affect them, which include interpretive rulings and general statements of policy. However, as Professor Davis points out, the choice is not between party participation and no party participation, because with these impediments there will be fewer interpretive rulings and fewer general statements of policy; therefore, not only less party participation, but less clarification of the law. Davis rightly, therefore, would opt in favor of clarifying the law through the frequent use of interpretive rulings and general statements of policy, and to accomplish this end, agencies should be encouraged to use them by exempting these two means of clarifying the law from the ordinary requirements of rule-making.

Publication of Rules

The publication of rules provisions contained in § 4-32-6 are entirely desirable. The basic suggestions included in the revised Model State Procedure Act have been followed,¹⁶ with the modification that the burden of publication has been placed upon the State Records Administrator in conformity with similar duties imposed upon him by the existing State Rules Act.¹⁷ Subsection 3 falls short of requiring a complete compilation of the federal type, with a register and code in which all regulations are centrally compiled, published and made available. It allows the state records administrator to omit from the compilation any rule which would be unduly cumbersome and expensive to publish; but it does require that notice which states the general nature of the omitted rule be carried in the central compilation. This section presents a clear compromise between a complete register and code and an incomplete one, but the expense of a complete one would undoubtedly be considerable, and not just-

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¹⁵. Id.
tified by the amount of use of the compilation. Also, a description of the general nature of the omitted rule is carried in the central compilation, and any omitted rule is required to be made available at the adopting agency. Section 4-32-7 opens new channels for citizen participation. It provides that any interested person may petition an agency requesting that it promulgate, amend or repeal any rule, and requires the agency then to take definite action within thirty days by denying the petition in writing, stating its reasons, or initiating the requested rule-making proceedings. This could be a useful tool in encouraging agencies to clarify the law they administer.

Declaratory Judgments

Sections 4-32-8 and 4-32-9 provide additional mechanisms for clarifying the law. Section 4-32-8 has many virtues, primary among which is the liberal approach it takes toward declaratory judgments. It allows the plaintiff to ask for a declaratory judgment regarding any administrative action which “interferes with or impairs, or threatens to interfere with or impair, the interests, rights, or privileges of the plaintiff.” This broadly written standing provision is further expanded by the explicit statement that “any representative association, including but not limited to trade associations, labor unions or professional organizations” has standing to bring a declaratory action. This is highly desirable, in that “standing” is broadly granted to allow the affected person to ask for a declaratory judgment without having to run the risk of actually breaking the law before he can have it clarified. The court reports are rife with examples of the citizen being forced to risk being prosecuted in order to find out whether a proposed course of action is lawful. Government employees have been unable to find out whether they could lawfully be poll watchers under the Hatch Act; salmon workers have had to choose between losing their means of livelihood or risking exclusion from the U.S. as the way to test the meaning of administrative regulations; a bank has been forced to risk losing its membership in the Federal Reserve System to test the lawfulness of an administrative ruling. It is certainly in the interest of all to have the law clarified at as early a date as possible, and the declaratory judgment provisions of the New Mexico Administrative Procedures Act will be useful tools in clarifying the law.

However, regarding the principle of exhaustion of remedies, § 4-32-8 goes badly astray. It follows the Revised Model Act and specifically says that a declaratory judgment may be rendered

"whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question." Thus, all of the arguments for exhaustion of administrative remedies, such as making the maximum use of the experience and thinking of the administrative agency to aid the court when it does make its decision, and using efficiently the time and energies of the courts, are ignored. The sentence should have provided exactly the opposite: "a declaratory judgment may not be rendered unless the plaintiff has first requested the agency to pass upon the validity or applicability of the rule in question." It can be argued that the courts will have the advantage of the agency's thinking, since § 4-32-8 requires that "the agency shall be made a party to the action." But, nonetheless, the courts' time will be taken up on cases that might well have been dealt with satisfactorily by the agency without even requiring attention by the courts. It really boils down to a choice between requiring exhaustion or direct and quick access to the courts by by-passing the agency. The arguments for using the experience of the agency and efficiently using the time of the courts which underpin the concept of exhaustion are the most persuasive.

Section 4-32-9 is, on the whole, an admirably phrased section which provides for the early clarification of the law by agency declaratory rulings. But, unfortunately, the entire section is subverted and probably to a great extent made a nullity, because the language of § 4-32-8 short-circuits administrative agencies in the declaratory process. There is little incentive for a party at odds with the agency to petition the agency for a declaratory ruling when he can go directly to the courts without giving the court the opportunity to take full advantage of agency thinking on the matter. The federal Administrative Procedure Act follows a permissive approach, providing in § 5(d): "the agency . . . in its sound discretion . . . may issue a declaratory order. . . ." But the Hoover Commission concluded that this declaratory order provision had not worked to clarify the law, primarily because such orders were discretionary with the agencies. Section 4-32-9 is a great improvement over the federal Administrative Procedure Act in requiring the agency to issue declaratory rulings "except when the agency for good cause finds the issuance of such a ruling undesirable." Section 4-32-9 follows the Revised Model Act in being broadly available to test not only agency

22. RMSAPA § 7.
23. Davis, supra note 14, at 583.
rules but "the applicability of any statutory provision . . . decision, or order", as well. A desirable provision in the declaratory judgment section is that such cases shall be heard by the District Court of Santa Fe County. This is sensible from the point of view that this is where most of the agencies are located and, secondly, it will provide for some uniformity and consistency in treatment of declaratory judgments.

Subsection B of § 4-32-8 contains a potential time bomb, in that it provides that the District Court of Santa Fe County may take jurisdiction "upon any matter not otherwise provided for in the Administrative Procedures Act . . . at any stage of a proceeding . . . " In view of the comprehensive review provisions of § 4-32-16, it is difficult to contemplate what matters are "not otherwise provided for," but this section raises the potential for interrupting the administrative process at any point and, perhaps, making it possible to delay and frustrate the administrative process by frequent resort to the courts as a dilatory tactic. This not only, of course, could be destructive to administrative action, but would place further burdens on the time and energy of the courts, and could be a serious flaw in the New Mexico Administrative Procedures Act. Such attempts to circumvent the doctrine of exhaustion of administrative remedies should be corrected at the earliest possible time. The only thing that prevents this provision from being dangerous at the moment is that the law does not apply to anyone.

Adjudication

The second leg of the big two of the administrative process, rule-making and adjudicating, is contained in §§ 4-32-10 to 15. The fundamental concepts of justice require a trial-type hearing when the agency is adjudicating, while rule-making requires the rule-making or argument type of hearing; and these sections complete the distinction between the argument type of hearing for rule-making and the trial-type hearing for adjudicatory proceedings by establishing the procedures and requirements for a fair, trial-type hearing. Section 10-4-32(10) is one of the most important sections of the act. It answers a number of preliminary questions that often determine the scope of the hearing, such as the issues to be heard, right of intervention, the notices required, and the rights of all parties to respond, present evidence, and make arguments on the issues at stake. The entire hearing is directed toward building a record, with an eye to making judicial review possible.

26. See F. Cooper, 1 State Administrative Law 385 (1965).
Evidence

Section 4-32-11, relating to the rules of evidence to be followed in agency adjudicatory proceedings came through the legislature fairly reasonably. The rules of evidence should provide general guidelines to insure the use of evidence of probative value while taking into account that informality and efficiency are desirable in most administrative proceedings. One can criticize the New Mexico legislation for the apparently restrictive built-in presumption in favor of using the rules of evidence as applied in non-jury civil actions in district courts, but this presumption is hedged by the reasonably elastic phrase that "when necessary to ascertain the facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted . . . if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." The reference to non-jury civil actions was undoubtedly necessary to make this section politically palatable, but the "prudent man" standard should give agencies sufficient latitude to perform their duties, even though the language of the evidence section overall is not as direct and candid as it might have been.

The New Mexico statute is perhaps slightly superior to the revised Model Act in that the Model Act does not address itself to one of the most difficult problems about rules of evidence—that is, what evidence may be relied upon. The New Mexico statute does not explicitly state what evidence may be relied upon, but it could be argued that the statute implies that evidence that can be relied upon is that which is "of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." This language may have some influence on the New Mexico court but, nonetheless, still intact in New Mexico is the "residuum of legal evidence" rule which requires at least some evidence of a type admissible in court. It would have been better if the statute had talked not only in terms of the admission of evidence, but also had explicitly contained a provision such as: "a finding may be based upon the kind of evidence commonly relied upon by reasonably prudent men in the conduct of their affairs." The rules of evidence for administrative agencies must accomplish two primary tasks. They must provide general guidelines which will insure that a fair and complete hearing will be given to all interested parties and, at the same time, they must be

27. See Glidden & Utton, supra note 13, at 134.
29. See Davis, supra note 14, at 584 for further discussion, and Cooper, supra note 26, at 410-12.
flexible enough to be employed by all agencies while preserving the informality and efficiency that are desirable in administrative proceedings. The New Mexico statute accomplishes these primary tasks. The standard of the “prudent man” establishes a standard of reliability which allows the agency a good deal of flexibility in admitting and giving probative effect to evidence, and is strongly influenced not only by the Model Act, but by the Massachusetts Act.30

Subsection B of § 4-32-11 follows the lead of the Massachusetts Act in requiring the agency to come forth with all of its evidence, including any records, investigation reports, and documents, so that it may be made a part of the record. This is desirable in order to prevent the use of secret reports that are not made a part of the record and which would therefore be unknown to parties. This satisfies the basic fairness requirement of opportunity for the parties to be informed of the evidence so that they may have a chance to adequately prepare their case.

**Official Notice**

Although § 4-32-11(D) is well motivated, it is not thorough in its treatment of the problem of official notice. It naively requires that “whenever any office or agency takes official notice of a fact, the noticed fact and its source shall be stated at the earliest practical time.” This would appear to be simple and straightforward enough and good common sense, but as Kenneth Culp Davis points out, this requirement could not possibly be followed if the words were given their literal meaning.31 Agencies, for example, normally know the meaning of common words only through official notice. The fact that New Mexico has a government and that the legislature has authority to legislate are all matters which are officially noticed. Therefore, as Davis says, the requirement that parties must be notified of all matters noticed is “perfectly preposterous. The meaning of every word used has to be noticed. The agency usually does not know, except through official notice, that an automobile has four wheels, or that the District of Columbia is not a state. Every case involves hundreds of thousands of assumed acts; the first sentence of the first witness may require dozens of factual assumptions by the fact finders.”32 Therefore, because the provision as drafted in the New Mexico Administrative Procedures Act requires too much, a different approach should be followed. The most realistic thinking on the question of official notice has been done by Professor Davis

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31. Davis, supra note 14, at 585.
32. Id.
of the University of Chicago, and he succinctly sets out the pre-
requisites for a satisfactory provision on official notice; it should:

(1) assure that a party adversely affected will have the earliest
practicable opportunity to know of noticed facts which may be
disputable, and their source, (2) make clear that the agency need not
delay its action by allowing a challenge of utterly clear facts such as
that a Chevrolet is an automobile, (3) allow notice of highly prob-
able but nevertheless disputable facts, (4) limit challenges of noticed
facts to submission of written evidence or argument except when
evidence subject to cross-examination is needed, (5) authorize an
agency which takes official notice in the process of preparation of its
final report to determine whether fairness requires that parties be
afforded an opportunity to contest such facts before the decision is
announced, (6) make clear that procedural fairness may require op-
portunity for cross-examination when the noticed facts are adjuv-
cative, crucial, and doubtful, (7) allow the agency to deny cross-
examination if the agency smells a delay motive and believes that
cross-examination will serve no useful purpose. . . .

To attain these objectives, he suggests a provision as follows:

Official notice may be taken of all facts of which judicial notice may
be taken and of other facts within the specialized knowledge of the
agency, but whenever any officer or agency takes official notice of a
fact which may be disputable, the noticed fact and its source shall be
stated at the earliest practicable time (before or during the hearing,
in the proposal for decision . . ., or in the final report), and any
party shall on timely request be afforded an opportunity to show
the contrary through a written submission of evidence or argument:
Provided, however, that when an agency takes official notice of
disputable facts in the process of preparing its final report, the
agency shall in its discretion determine whether fairness requires that
parties be afforded an opportunity to contest such facts before the
decision is announced; and provided, further, that if a noticed fact is
adjudicative, crucial and doubtful, any party adversely affected by
the noticed fact shall have opportunity for cross-examination unless
the agency in its discretion is satisfied that (1) the request for cross-
examination is for purposes of delay, and that (2) cross-examination
will in the circumstances serve no useful purpose.

The central issue in the official notice problem is how to reconcile
the needs of procedural fairness—principally the right to know and
rebut all information used by the agency in reaching its decision on
the one hand, and the use of agency expertise based on experience
and specialized information on the other.

33. Id.
34. Id.
Equally impractical is the requirement in § 4-32-11(D) (3) that the record in the adjudicatory proceedings shall include a “statement of matters officially noticed.” This should be deleted, simply from the point of view that realism would not permit a record of all matters officially noticed. However, because the absolute language of the New Mexico Administrative Procedures Act is “preposterous,” the courts and lawyers will, of course, not follow it literally, but will follow a common sense approach. It would have been better if the Administrative Procedures Act had given them some guidelines to follow in exercising this common sense discretion, e.g., whether the facts are “adjudicative, disputed and critical.”

Proposed Decisions

Section 4-32-11(J) deals broadly with the problems relating to proposed decisions. In particular, § 4-32-11(J) (2) deals with an agency appellate system where initial or tentative decisions are made by a hearing officer and then are subject to a review and final decision by the agency itself. In such cases, it is important that interested parties should have notice of any initial decision made by a hearing officer which is adverse to them, prior to the time of review and final decision by the agency. Subsection (J) (2) implies that such initial decisions shall be made available to the parties but it does not explicitly say so. It would have been much better to say “that the final decision shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision. The proposal for decision shall contain proposed findings of fact and proposed conclusion of law; each conclusion of law shall be supported by authority of reasoned opinion.”

Instead of this direct approach, the New Mexico statute simply says that the parties shall be afforded a reasonable opportunity to submit briefs with exceptions for consideration by the agency “in all cases where recommended initial decision or tentative decision is subject to further agency review. . . .” Again, one would infer that of necessity, in order to submit exceptions to a proposed decision, one must have had access to that proposed decision. It would have been better drafting to have explicitly required the service of that report upon the parties.

Section 4-32-12 sets forth what must be contained in final agency decisions and orders. The basic policy involved is that such decisions and orders must be amenable to judicial review. This section insures

35. See Glidden & Utton, supra note 13, at 136.
this by requiring that written final orders and decisions include all findings of fact and conclusions of law. It also requires some explanation of the basis for the agency decision such as requiring that findings of fact be "accompanied by a concise ... statement of the underlying facts supporting the findings." However, there is one regrettable omission which not only affects the symmetry of this section, but also the capability of the court to review. The findings of fact should be accompanied not only by a concise statement of the underlying facts, but each conclusion of law should be supported by authority or by reasoned opinion. This omission could easily be corrected by inserting immediately after the phrase which says that all findings of fact shall be accompanied by a "concise statement of the underlying facts supporting the findings," a sentence as follows: "each conclusion of law shall be supported by authority or by reasoned opinion."36

Ex Parte Consultations

The section on ex parte consultations37 is designed to protect against the contamination of the judging process by limiting off-the-record communications with those who are to decide the case. The basic policy is to insure that all parties have notice of communications relative to their case, so that they may have an opportunity to prepare and rebut. The New Mexico Administrative Procedures Act directs itself at insulating the decision-maker from off-the-record communications between the agency and the parties, but it inadequately insulates the decision-maker from being biased by off-the-record prosecutorial influence. This issue is recognized only in the disqualification section, § 4-32-15(H), which goes part way to meet the prosecutorial influence problems raised in Wong Yang Sung v. McGrath.38 In this case, the court dealt with a problem of separation of functions where the duties of the prosecutor and judge were handled by the same person. The court quoted with approval the report of the Secretary of Labor who said "a genuinely impartial hearing conducted with clinical detachment is psychologically improbable, if not impossible, when the presiding officer has at once the responsibility of appraising the strength of the case and of seeking to make it as strong as possible."39

When the same agency is engaged in prosecuting and in judging, it

36. Id.
39. Id. at 44; Immigration and Naturalization Service, The Secretary of Labor's Committee on Ad Proc, 81-82 (mimeo, 1940).
is highly desirable to separate the two functions in order to avoid biasing the decision-maker. The New Mexico statute meets this problem in a very "back-door" way in the disqualification section, which provides that "[n]o officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision or agency review except as a witness or counsel in a public proceeding." It does not in fact say that a deciding officer can be disqualified if he is advised by an employee engaged in functions such as prosecuting—but since this language is grafted onto the disqualification section it is reasonable to infer that a deciding officer who has been a prosecutor or investigator or who has consulted or been advised by a prosecutor or investigator in that or a similar case can be disqualified—but it would have been better to say so explicitly.

Also, the ex parte consultation section itself would have been greatly strengthened by including language such as: "agency members, presiding officers, and staff members may communicate with each other, except that no one participating in the decision in an adjudicatory proceeding shall consult with any member of the agency's staff engaged in investigating, prosecuting, or advocating in connection with the case under consideration or a factually related case." The New Mexico Administrative Procedures Act does not address itself to the problem of judges who are subject to the power and control of prosecutors. This problem was raised in the case of Marcello v. Bonds, in which the special inquiry officer was subject to the supervision and control of officials in the Immigration Service charged with investigating and prosecuting functions. Mr. Justice Douglas dissenting in that case said with admirable understatement that "it is hard to defend the fairness of a practice that subjects judges to the power and control of prosecutors." The West Virginia case, State ex rel Ellis v. Kelly illustrates well this type of problem. The commissioner of motor vehicles inspected the respondent's business and recommended that his license to sell automobiles should be revoked. Notice of hearing was given, the hearing was held before a deputy commissioner who was appointed by and subject to the control of the commissioner. The commissioner testi-

41. Glidden & Utton, supra note 13, at 137.
42. 349 U.S. 302 (1955).
43. Id. at 319.
44. 145 W. Va. 70, 112 S.E.2d 641 (1960).
fied regarding his investigation and the deputy commissioner duly revoked the license, based on the commissioner's testimony. The court, in holding due process was violated, said:

"It can hardly be contended that the commissioner, in the making of the investigation and in testifying before the deputy commissioner appointed by him and responsible to him, beyond any reasonable probability, did not become biased and prejudiced in the matter being heard. It would seem to be beyond human experience and expectation for impartiality to result where the officer is the investigator, prosecutor, witness, and trier of facts... the deputy commissioner could not have acted with impartiality in the consideration of relator's rights. His actions were for the commissioner, and could not be expected to be free and independent of his influence." 4

This kind of situation could have been covered by the New Mexico Administrative Procedures Act, but was not. Language could and should have been inserted such as: "no staff member who is consulted about the decision in any adjudicatory proceeding shall be responsible to or subject to the supervision or direction of any officer engaged in investigating, prosecuting, or advocating, except that agency members may supervise all functions of their subordinates." 5 Thus, the New Mexico Administrative Procedures Act has glaringly omitted one of the two traditionally prime sources of contamination of the adjudication process, and it has inadequately handled the other.

Disqualification

The New Mexico provision for disqualification is exemplary in that it provides for the replacement of a disqualified officer who otherwise, in spite of his unsuitability, would be allowed to decide the case under what the courts call "the stern rule of necessity." 4

Under this doctrine courts have upheld decisions made by personally biased decision-makers because there was no other person legally authorized to make the decision. The unsavory result of resorting to necessity is well illustrated by the Massachusetts case of Mayor of City of Everett v. Superior Court, 4 in which the Mayor was not only accuser and prosecutor but the judge as well, in a proceeding to remove three license commissioners. The lower court found that "the action of the mayor... was not consistent with an open and unprejudiced mind; and that the charges were not made in good faith but were made as a part of a plan to carry out the mayor's de-

45. Id. at 644.
46. Glidden & Utton, supra note 13, at 137.
47. See cases collected by F. Cooper, supra note 26, at 349.
termination to remove the commissioners.14 9 In spite of this finding by the lower court, the Supreme Judicial Court of Massachusetts reversed because "even if the mayor were biased . . . the Legislature . . . made no provision that any other officer could act in case the mayor was disqualified by reason of bias or prejudice."30

The New Mexico Administrative Procedures Act anticipates this situation in § 4-32-15(H) by providing "the agency shall by rule provide for the appointment of a fair and impartial replacement of the person disqualified. If the replacement is disqualified, or in any case not otherwise provided for, a replacement shall be appointed by a justice of the Supreme Court."

Judicial Review

Judicial review stands as the final capstone of the entire edifice that the Administrative Procedures Act has been building. The provisions relating to notice and the opportunity to prepare and rebut are all designed not only to provide a fair hearing, but also to build a record for judicial review. Judicial review stands as the ultimate assurance of due process afforded to any party to an adjudicatory proceeding. The New Mexico Administrative Procedures Act provides judicial review to "any person suffering legal wrong because of any agency action or adversely affected or aggrieved by the action or inaction."51 Thus, standing is broadly granted for judicial review of administrative action.

Whereas in rule-making and adjudicatory proceedings the Administrative Procedures Act is primarily concerned with establishing minimum standards of fairness and uniformity is only a secondary, although valuable, result; in the area of judicial review, uniformity should be the primary goal. Unfortunately, this uniformity is subverted significantly in the New Mexico Administrative Procedures Act by the provision that "nothing in this section prevents resort to other means of review . . . because of constitutional provisions or otherwise prescribed by statute."52 The New Mexico Administrative Procedures Act does contain a simplified, unitary appeal procedure that could be looked to as a model to be followed, but, unfortunately, it also preserves the multiplicity of existing appeal procedures, and the appeals procedures in New Mexico are a confusing patchwork.53 The statutory and constitutional appeals procedures

49. Id. at 150-51, 85 N.E. 2d at 219.
50. Id.
52. Id. at (A).
grew up like Topsy, with different procedures being enshrined in the law with the creation of each new agency. Different appeal procedures have even been established within the same agency as different functions were added one by one to the initial ones. For example, the New Mexico Corporation Commission has nineteen different statutory appeal provisions and three constitutional methods for judicial review. A lawyer trying to penetrate this particular homegrown thicket would find that the procedures for reviewing commission actions relating to pipeline companies differ "substantially from review provisions relating to other carriers." The resulting patchwork is characterized by a lack of uniform pattern comparable to that of the old fashioned crazy-quilt.

Section 4-32-16(E) appears to be the most destructive in nullifying the attempts to attain some sort of uniformity in judicial review of administrative action. This subsection unnecessarily and gratuitously states that the form of proceeding for judicial review "shall be any special statutory review proceeding" or "any applicable form of legal action." This section does not appear in the Revised Model Act, but was borrowed almost verbatim from the federal Administrative Procedure Act, which, unlike the New Mexico Administrative Procedures Act, does not provide a model for a unified method for judicial review. Therefore, grafting the section of the federal act onto the New Mexico Administrative Procedures Act is something like mixing apples and oranges.

As if § 4-32-16(E) were not bad enough itself, it is a duplication of Subsection (A). Subsection (A) follows the Revised Model Act in providing "nothing in this section prevents resort to other means of review, redress or relief . . . "; then, like a man who wears both a belt and suspenders just to be on the safe side, § 4-32-16(E) reiterates the same point by borrowing the language of the federal Administrative Procedure Act as well. The explanation is undoubtedly political. It was necessary to preserve familiar pro-

56. Eaves, supra note 53, at 23.
57. Cooper, supra note 26, at 603-04.
59. RMSAPA § 15(a).
cedures—a *de novo* here and a *mandamus* there—in order to placate
special interests sufficiently to get the Administrative Procedures Act
through the legislature. The Commissioners on Uniform State
Laws in their comments to the review provisions of the Revised
Model Act anticipate these practical considerations:

"[I]f there is but one mode and scope of review, the state pro-
cedural structure is greatly simplified. On the other hand, local con-
siderations, including practical considerations connected with
obtaining adoption of the Model Act, may indicate or even require
the retention, at least for the moment, of the pre-existing methods
of judicial review."

In New Mexico these "local" practical considerations have severely
eroded the goal of uniformity for judicial review procedures. This
means that in New Mexico, "a baffling heterogeneity of methods
exists." The multiplicity of methods of review which is preserved
and continued by the New Mexico Administrative Procedures Act
would qualify for what Professor Davis calls a "system cunningly
planned for the evil purpose of thwarting justice and maximizing
fruitless litigation . . ." Such a system "for the purpose of creating
treacherous procedural snares and preventing or delaying the decision
of cases on their merits" would "insist upon a plurality of rem-
edies . . ." The New Mexico Administrative Procedures Act so in-
sists, with a vengeance. Historically, lawyers are extremely cautious
creatures, and the drafters of the Administrative Procedures Act were
no exceptions. They were so fearful of giving up any old forms of
review that they crossed themselves twice to make doubly sure that
no old form of review was replaced—a move against the interests of
both the litigant and his lawyer; against the lawyer's interest, because
it wastes his energy and time in attempting to choose the right pro-
ceeding; against the litigant's interest because it increases his legal
costs. Through our New Mexico Administrative Procedures Act we
should follow the admonition of the New York Court of Appeals and
ensure that "when a suitor shows a right to some relief the court
grants the relief to which he is entitled, unrestricted by the form of
the proceedings brought by the aggrieved person." The way to
ensure this would be to provide through the Administrative Pro-

60. Cognizance of such considerations led to similar multiplicity of review procedures
being suggested prior to the enactment of the N. Mex. A.P.A. See, Glidden & Utton, *supra*
note 13, at 143.
62. *Id.* at 603.
64. *Id.*
cedures Act a uniform procedure for reviewing administrative action. "The cure is easy. Establish a single simple form of proceeding for all review of administrative actions. Call it 'petition for review.' "66

Section 4-32-16(E) of the New Mexico Administrative Procedures Act provides such a "single simple form." Under this provision all one need do is file a "notice of appeal" which shall include "a concise statement" of jurisdictional facts, the facts of the grievance, the grounds "upon which the petitioner contends he is entitled to relief," and "the relief to which the petitioner believes he is entitled." Then the court may grant the relief to which the petitioner is entitled without concerning itself with the labels of the proceedings, much as the federal courts have done by using the injunction as a general "utility remedy."67 The Administrative Procedures Act itself gives the court on review a full arsenal—"the court may set aside... reverse, remand... or... compel agency action unlawfully withheld or unreasonably delayed...."68 The appeals are made to a single court—the court of appeals—so that a unitary body of precedent can be developed.69 The New Mexico Administrative Procedures Act does provide a means of judicial review that would be simple, economical, and readily available.70 The only unfortunate aspect is that we in New Mexico did not firmly support these admirable provisions for uniform review procedures. All we did was add one more proceeding to the existing "baffling heterogeniety," like another religion for added insurance. Appropriately, a recent study of the State Corporation Commission concluded that, in view of the fact that the New Mexico Administrative Procedures Act would leave on the books the existing nineteen different procedures for reviewing State Corporation Commission actions, no benefit could be seen "in leaving the present nineteen in force and also adopting an additional new one."71 One can only say it is worth paraphrasing the Davis dictum: "The cure for plurality of procedures is a single procedure."72

The New Mexico Administrative Procedures Act in its first sentence on judicial review expressed adherence to the principle of exhaustion of administrative remedies, but also provides for exceptions when justice dictates otherwise. Section 4-32-16(B) allows review of judicial action "at any stage of any agency proceeding,"

67. Id.
70. Cooper, supra note 26, at 607.
71. Eaves, supra note 53, at 37.
72. Davis, supra note 14, at 464.
upon showing "serious and irreparable harm or the lack of adequate and timely remedy otherwise," and thus allow the court to review administrative action when review after the agency's final decision is rendered would be too late to render relief. It is true that an agency's interlocutory action during a proceeding may have an immediate adverse affect on the parties which requires immediate judicial review or there will be nothing left to review. For example, in the case of Utah Fuel Co. v. National Bituminous Coal Commission, the Supreme Court held that administrative remedies need not be exhausted where the agency is threatening to disclose confidential information. Once the veil of privacy is pierced, all of the review in the world after the administrative proceeding has been completed will not put back together the broken vessel of confidentiality. Review must be granted prior to the breach of confidentiality, or never. Likewise, the Supreme Court has held that exhaustion of remedies does not apply where a board is about to make a decision on a record which includes reports which the plaintiff contends should have been excluded.

The courts have not, however, always been consistent. The case of Eastern Utilities Associates v. SEC particularly illustrates the type of case in which if the interlocutory action of the agency is not reviewed at once, it cannot be reviewed after the administrative remedies have been exhausted. In this case, the commission gave notice of the hearing in Philadelphia, and denied a motion to change the place of hearing to Boston, even though the principal offices of the companies and the residences and places of business of all prospective witnesses were in or near Boston. The petitioners sought immediate review in the Court of Appeals, but the court denied their petition and held that "administrative orders of a merely preliminary or procedural character are not directly or immediately reviewable." Thus, no matter what a reviewing court might think after the entire process has been exhausted, it would not have been able to have done anything about changing the site of the hearing after the hearing had already occurred. The result was a total denial of review of the issue of the location of the hearing. Section 4-32-16(B) of the New Mexico Act is broad enough and flexible enough to allow review of such interlocutory orders while at the same time making the obstacles to such review sufficient to inhibit capricious and dilatorious petitions for review.

73. 306 U.S. 56 (1939).
75. 162 F.2d 385 (1st Cir. 1947).
76. Id. at 386.
CONCLUSIONS

The New Mexico Administrative Procedures Act is a significant stride forward. It provides minimum fairness in the making and publishing of rules and the handling of adjudicatory hearings. In so doing, uniformity of proceedings is accomplished as a by-product throughout, and even in spite of the diluting provisions, uniformity is encouraged in judicial review proceedings. Therefore, every effort should be made to marshall the political will to place New Mexico agencies under the Administrative Procedures Act. The criticisms contained herein should not be construed as opposition to the Act as a whole. We should make the Act applicable and improve it as well. Would it be asking too much to have one’s cake and eat it too?