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Bias in Administrative Rulemaking after Association of National Advertisers v. Federal Trade Commission

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NOTES

Bias in Administrative Rulemaking After *Association of National Advertisers v. Federal Trade Commission**

I. Introduction

Administrators must be silent and impartial when presiding over administrative cases against specific individuals or entities. Bias and prejudgment have been recognized as sufficient grounds for disqualification of an administrator from performance in an *adjudicative* capacity.[1] Until recently, however, an agency official, acting as a *rulemaker,* rather than as an adjudicator, has never been disqualified on the grounds of bias and prejudgment.

The first disqualification of an administrator for bias in rulemaking occurred recently in *Association of National Advertisers v. FTC.*[2] In April, 1977, the Federal Trade Commission (FTC) initiated a major trade regulation rulemaking proceeding to consider proposed restrictions on television advertising directed towards children.[3] Prior to the initiation of the rulemaking proceedings, FTC Chairman Michael Pertschuk openly described children's television advertising as "unfair and deceptive."[4] Various trade associations and companies filed a motion in the District Court for the District of Columbia requesting Pertschuk's disqualification.[5] The parties asserted that Pertschuk had "prejudged issues of fact whose resolution would be necessary to a fair determination of the rulemaking and which would come before him in a quasi-judicial capacity, and that by his public and private actions Chairman Pertschuk had also created the appearance of prejudgment and bias."[6] The district court granted the motion, thus barring Commissioner Pertschuk from participation in the rulemaking proceedings.[7] The court's decision to disqualify Chairman Pertschuk established novel precedent for disqualification for bias in the FTC and other agency rulemaking contexts. The implications of the court's decision, therefore, merit close consideration.

1 *See, e.g.,* Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970); American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966); Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964); Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962).

2 1978-2 TRADE CASES (CCH) ¶ 62,327.

3 43 Fed. Reg. 17,967-72 (1978). Pursuant to § 18 of the Magnuson-Moss Federal Trade Commission Improvement Act of 1974, the FTC has the authority to ban unfair or deceptive advertising. Pub L. No. 93-637, 88 Stat. 2193 (1974) (codified at 15 U.S.C. § 57a (1976)).

4 The following is an example of one of Chairman Pertschuk's statements as quoted by the movants in support of their disqualification request: "Cumulatively, commercials directed to children tend to distort the role of food. 'Consumer, stuff thyself' is the message. Rarely is there emphasis on good nutrition, or any suggestion that eating too much of any food can be bad." Association of Nat'l Advertisers v. FTC, No. 78-1421 (D.D.C., filed Aug. 1, 1978) (Complaint for Declaratory and Injunctive Relief).

5 Among the movants were the Association of National Advertisers (ANA), Kellogg, American Association of Advertising Agencies, American Advertising Federation and Toy Manufacturers of America.

6 1978-2 TRADE CASES at 75,966.

7 An appeal filed by the FTC is presently pending in the Court of Appeals.

A critical shift in the perception of due process in the administrative rulemaking context has been evidenced by the recent emphasis on participants' right to a hearing and in the development of hybrid rulemaking procedures. Generally, hybrid rulemaking procedures have authorized the use of more trial-type hearings in the rulemaking process in order to assure interested parties an opportunity for meaningful participation. The court's primary due process concern in *National Advertisers,* however, was not the right to a hearing. Rather, the court sought to ensure that the rulemaking participants received a *fair* hearing.[8] Based on the evidence presented by the plaintiffs, the court found a substantial showing that the Chairman's continued participation in the rulemaking would violate the plaintiffs' due process right to a disinterested objective rulemaking hearing:

> There is no reason, given the breadth and nature of the Chairman's preconceptions, to relegate plaintiffs to final appellate review while the Chairman participates in all aspects of the instant rulemaking. . . . [The] continued participation of the Chairman would render the proceedings void and so irrevocably tainted that any final determination that might flow from such proceedings would be invalid.[9]

The right to an objective hearing is essential to fundamental administrative due process.[10] The nature of that right, however, arguably varies according to the nature of the particular administrative proceeding involved. What constitutes inappropriate bias, therefore, also might vary with the nature of the proceeding. The hybrid rulemaking procedure employed by the FTC in *National Advertisers* is a unique combination of elements from both administrative adjudication and administrative rulemaking. The district court stressed the adjudicative nature of the FTC hybrid procedure. To protect the plaintiffs' due process right to an objective rulemaking hearing, the court imposed the same standard of neutrality and impartiality on an administrator performing in hybrid rulemaking proceedings as that imposed on administrative adjudicators.[11]

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8 FTC proceedings normally are reviewed in the United States Court of Appeals. 15 U.S.C. § 57a(e) (1976). The general rule is that the district court stay its hand until the termination of the administrative process. Nader v. Volpe, 466 F.2d 261, 265-68 (D.C. Cir. 1972). A recognized exception to this general rule, however, allows a party to "bypass established avenues for review within the agency . . . where the agency has very clearly violated an important constitutional or statutory right." Fitzgerald v. Hampton, 467 F.2d 755, 768 (D.C. Cir. 1972) (quoting Sterling Drug, Inc. v. FTC, 450 F.2d 698, 710 (D.C. Cir. 1971)). The district court in *National Advertisers* relied on this exception to justify hearing the plaintiffs' disqualification claim. 1978-2 TRADE CASES at 75,967.

9 1978-2 TRADE CASES at 75,967.

10 Gibson v. Berryhill, 411 U.S. 564 (1973) stands for the proposition that a fair trial in a fair tribunal is a basic requirement of due process in administrative agencies as well as in courts. *See Re* Murchison, 349 U.S. 133, 136 (1955).

11 The test for disqualification for bias in administrative proceedings is whether "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *See* Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), *cert. denied,* 361 U.S. 896 (1959). *Accord,* Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970). In most cases involving bias in adjudicative proceedings, however, this standard seems to have served as merely conclusory language that is unsupported by specific criteria for determining what type of statements or actions by an agency official may lead a disinterested observer to conclude that the facts have been prejudged. The courts largely have determined whether bias was inappropriate in the adjudicative context by distinguishing between adjudicative and legislative facts and between personal and institutional bias. *See* discussions accompanying notes 57-80 and notes 81-93 *infra.*

Although some aspects of every FTC proceeding are likely to be adjudicative in nature, hybrid proceedings nonetheless possess important rulemaking characteristics which merit consideration in deciding what standard of impartiality to impose in such proceedings.

Rulemaking increasingly has been preferred over adjudication as a more expeditious and flexible mechanism for establishing administrative policy. Effective operation of the administrative system depends largely on the work of officials "whose broad point of view is in general agreement with the policies [they administer] but who [maintain] sufficient balance to perceive and to avoid the degree of zeal which substantially impairs fairness."[12] Some form of check on the degree of zeal of rulemakers is necessary to insure an objective rulemaking hearing. The need to protect against unfairness in rulemaking, however, must be measured against the competing need for efficiency. A check on the impartiality of rulemakers, therefore, should not unduly restrict expeditious and flexible rulemaking. Imposing the same standard of impartiality on rulemakers as is imposed on adjudicators might be such an undue restraint on the effective operation of the administrative rulemaking process.

In addition to the competing needs for efficiency and fairness, the combination of legislative and adjudicative elements in hybrid rulemaking suggests the need for a unique approach for determining what constitutes inappropriate bias in a hybrid rulemaking proceeding. Courts have not addressed the question of how to balance the competing needs for fairness and efficiency in the hybrid rulemaking context. The due process right to a fair rulemaking hearing is an extension of rulemaking participants' basic right to a hearing. An investigation of how the courts have determined when due process requires an opportunity for a hearing, therefore, is a logical point of departure from which to consider the most appropriate framework for analyzing the due process right to a fair hearing in the hybrid context. Consideration of how the courts have determined what constitutes inappropriate bias in administrative adjudications also seems necessary to the development of an approach to the bias problem in rulemaking.

Accordingly, this note examines three possible theories for determining when alleged bias is a sufficient ground for disqualification in the unique hybrid rulemaking context. The first theory, which has been employed to determine whether to afford rulemaking participants an opportunity for a hearing, distinguishes between adjudicative and legislative facts. According to this theory, only bias as to adjudicative facts merits disqualification. The second theory, which has been employed to determine whether to disqualify an administrator for bias in an adjudicative proceeding, distinguishes between institutional and personal bias such that only a display of personal bias merits disqualification. Rather than relying on arbitrary distinctions, the third theory examined in this note focuses on the nature of the particular interests involved in the rulemaking proceeding. According to this theory, the decision whether to disqualify is thus made on a case-by-case basis. This theory provides a more flexible and pragmatic approach to a charge of bias in hybrid rulemaking and is thus the preferable approach.

12 K. DAVIS, ADMINISTRATIVE LAW § 12.01, at 247 (3rd ed. 1970). *See* text accompanying notes 58-62 *infra*.

Such flexibility allows consideration of the competing needs for fairness and efficiency and of the unique combination of legislative and adjudicative elements in the hybrid rulemaking context.

The hybrid rulemaking procedures employed by the FTC and those employed by other administrative agencies are essentially combinations of the legislative and adjudicative procedure prescribed by the Administrative Procedure Act (APA).[13] A brief discussion of those APA procedures is therefore essential to the present discussion of bias in the hybrid rulemaking context.

II. The Administrative Procedure Act

The APA prescribes a set of minimum standards for individual agencies in establishing their own rulemaking mechanisms.[14] The APA provides two alternative procedures for the promulgation of administrative regulations. The first, commonly known as "notice-and-comment" rulemaking, requires that (1) a notice of the proposed rule be published; (2) an opportunity be given interested persons to submit written data, views or arguments; and (3) there be a publication of a concise general statement of the basis and purpose of the promulgated rule.[15] Notice-and-comment procedures frequently have been characterized as legislative-type hearings.

The second alternative, commonly known as "on-the-record" or "formal" rulemaking, requires that (1) there be a "hearing" for the taking of evidence before the agency or a hearing examiner, and (2) the agency decision be based on the whole record and be supported by substantial evidence. Every party to a formal rulemaking proceeding "is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."[16] Accordingly, "formal" or "on-the-record" procedures frequently have been characterized as "trial-type" hearings.

Under the APA, agencies, in their discretion, may attach some, or even all, the attributes of a trial-type hearing to notice-and-comment rulemaking. In addition, if the agency chooses, it may conduct informal hearings with or without a stenographic transcript, conferences, and consultations with committees representing interested individuals or groups.[17] Likewise, the agency is authorized to substitute the submission of all or part of the evidence in written form for the oral submission of the evidence in formal rulemaking, depending on what is required to elicit truth and understanding in the particular situation.[18] Agencies which have developed hybrid rulemaking procedures have taken full advantage of the wide latitude afforded them by the APA. In order to afford rulemaking participants an opportunity for more meaningful participation, these agencies

13 5 U.S.C. §§ 553, 554 (1970).
14 S. Rep. No. 752, 79th Cong., 1st Sess. (1945), *reprinted in* Legislative History of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2nd Sess. 200 (1946).
15 5 U.S.C. § 553 (1970).
16 5 U.S.C. §§ 554, 556, 557 (1970).
17 U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 29, 31 (1949).
18 5 U.S.C. § 556(d) (1970).

have expanded the APA notice-and-comment procedures to include the use of more trial-type hearings.

III. Assuring Fairness: Development of Hybrid Rulemaking

Extensive use of APA formal or trial-type hearings has been considered by most as inappropriate and burdensome for the agency rulemaking function.[19] In addition, the APA notice-and-comment procedure, which has been the preferred administrative rulemaking form, increasingly has been deemed inadequate.[20] To insure fairness to interested parties while avoiding the imposition of undue formality, agencies, Congress, and the courts increasingly have chosen to allow hybrid rulemaking procedures. The typical approach has been to complement notice-and-comment rulemaking, in varying degrees, with additional procedural requirements such as oral argument, agency consultations with advisory committees and even, in some instances, trial-type cross-examination and rebuttal.

Judge Levanthal foreshadowed this proceduralization of informal administrative rulemaking in *American Airlines, Inc. v. Civil Aeronautics Board,* when he expressly recognized that "there may be wisdom in providing for oral testimony, at least in legislative-type hearings, in advance of the adoption of controversial regulations governing competitive practices."[21] He also revealed a "readiness to lay down procedural requirements deemed inherent in the very concept of *fair* hearing for certain classes of cases. . . ."[22]

The District of Columbia Circuit followed Judge Levanthal's suggestion in *Mobil Oil Corp. v. Federal Power Commission,*[23] in which Mobil Oil challenged the procedure by which the Federal Power Commission (FPC) set minimum rates required to be charged by natural gas pipelines for the transportation of certain liquid and liquefiable hydrocarbons. Mobil asserted that the Commission was required to use formal rulemaking procedures as prescribed by the APA.[24] The FPC maintained, however, that the pure APA notice-and-comment procedures were sufficient.

Contrary to the contentions of the opposing parties, the court of appeals interpreted the APA as allowing rulemaking procedures between the two extremes. In support of this interpretation, the court cited several cases in which courts have approved or required procedures that contained elements of both

19 The Administrative Conference has recommended that "Congress ordinarily should not impose mandatory procedural requirements other than those required by § 553, except . . . when it has special reason to do so." ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 2 RECOMMENDATIONS AND REPORTS, RECOMMENDATION 75-5(2), at 66 (1970-72). *See also* Verkuil, *The Emerging Concept of Administrative Procedure,* 78 COLUM. L. REV. 258, 311-12 (1978).

20 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *supra* note 19; Verkuil, *supra* note 19; Kastenbaum, *Rulemaking Beyond APA: Criteria for Trial-Type Procedures and the FTC Improvement Act,* 44 GEO. WASH. L. REV. 679, 690 (1976).

21 359 F.2d 624, 631 (D.C. Cir.) (*en banc*), *cert. denied,* 385 U.S. 843 (1966).

22 *Id.* at 632.

23 483 F.2d 1238 (D.C. Cir. 1973).

24 5 U.S.C. §§ 554, 556. 557 (1970).

APA formal and informal procedures.[25] Accordingly, the court refused to force the problem into "artificial cubbyholes" of "formal" versus "informal" proceedings merely to adhere strictly to APA procedural guidelines. In the court's opinion, the explicit dictates of the APA were not "the primary test for appropriateness of a particular type of procedure."[26] Rather, the court announced that the procedures should have been "realistically tailor[ed] . . . to fit the issues before it, the formation it need[ed] to illuminate those issues and the manner of presentation. . . ."[27]

The judicial trend toward proceduralization of administrative rulemaking has been paralleled by legislative action in numerous statutes prescribing hybrid rulemaking procedures. Examples of such statutes are the Consumer Product Safety Act of 1972,[28] the Securities Act of 1975,[29] and the Magnuson-Moss Federal Trade Commission Improvement Act of 1975.[30] These statutes require, in part, that all interested persons be given an opportunity for oral presentation of data, views and arguments.

The primary purposes of the additional procedural requirements imposed by these recent statutes are (1) to provide adequate means for interested persons to participate in the proceedings, either directly or indirectly; (2) to supplement the agency's information and views, possessed by virtue of its specialized knowledge and prior inquiries, with other relevant information and views; (3) to provide an auditory process through which participants can test the soundness of material introduced; and (4) to maintain the loyalty of administrators and insure that their actions are rationally based and within the scope of their authority.[31]

The Federal Trade Commission Improvement Act of 1975 (FTCIA) well illustrates how hybrid rulemaking procedures are designed to effect those purposes. As is true of other hybrid rulemaking statutes, Congress prescribed procedures that would encourage participation in FTC rulemaking by those knowledgeable in the disputed matters to aid the Commission in its determination of appropriate rules:

> It was the judgment of the Conferees that more effective, workable and

25 International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); City of Chicago v. Federal Power Comm'n, 458 F.2d 731 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1074 (1972); American Airlines, Inc. v. Civil Aeronautics Board, 359 F.2d 624 (D.C. Cir.) *(en banc), cert. denied,* 385 U.S. 843 (1966).

26 483 F.2d at 1252. *Accord,* 458 F.2d 731.

27 483 F.2d at 1252 (quoting 458 F.2d at 744).

28 15 U.S.C. §§ 2051-81 (1976).

29 15 U.S.C. § 78f (1976).

30 15 U.S.C. §§ 57a-b (1976). Other recent statutes which impose additional procedural requirements in administrative rulemaking include the following:

(1) Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 (1970).
(2) Occupational Health and Safety Act of 1970 (OSHA), 29 U.S.C. § 651 (1970).
(3) The Clean Air Act Amendments of 1970, 42 U.S.C. §§ 1857a, 1857g(a), 1857h (1970).
(4) The Egg Products Inspection Act, 21 U.S.C. §§ 1031, 1034 (1970).
(5) Toxic Substances Control Act of 1976, 15 U.S.C. § 2605 (1976).
(6) Department of Energy Organization Act of 1977, 42 U.S.C.A. §§ 7101-7352 (1977).

31 Fuchs, *Development and Diversification in Administrative Rulemaking,* 72 NW. L. REV. 83, 105 (1977). *See also* Nelson, *The Politicization of FTC Rulemaking,* 8 CONN. L. REV. 413, 430-31 (1976).

> meaningful rules will be promulgated if persons affected by such rules have the opportunity afforded by the bill, by cross-examination and rebuttal evidence or other submissions, to challenge the factual assumptions on which the Commission is proceeding and to show in what respect such assumptions are erroneous.[32]

As prescribed by the FTCIA, the FTC must publish notice of proposed rulemaking, stating with particularity the reason for the proposed rule.[33] In addition to affording an opportunity for interested persons to comment through written views and arguments, the Commission must publish comments received and subsequent remarks made with respect to those comments.[34] The FTCIA further requires that interested persons be afforded the opportunity for an "informal hearing" as the Commission may deem appropriate,[35] and that a verbatim transcript of informal hearings be maintained and made available to the public.[36] Finally, the FTC must promulgate, if appropriate, a final rule based on the matter in the rulemaking record together with a statement of the basis and purpose for the rule.[37]

The "informal hearing" referred to in the FTCIA differs from the APA informal, notice-and-comment procedure. In the informal FTC rulemaking hearing, interested persons are entitled to present their position orally or by documentary submissions, or both. Additionally, if the Commission determines that there are "disputed issues of material fact"[38] necessary for resolution, the parties are entitled to present rebuttal submissions and to conduct such cross-examination as the Commission determines to be appropriate and necessary for full and true disclosure with respect to such disputed issues.[39]

IV. Due Process in Administrative Law

As demonstrated in the previous discussion, recent judicial and statutory mandates to utilize more trial-type hearings than are prescribed by the APA evince a critical shift in the perception of administrative due process and in the court's role in assuring it. Similarly, in *National Advertisers,* the district court sought to protect the due process rights of the rulemaking participants. The court's primary due process concern, however, was not to ensure full and fair disclosure or to afford an adequate opportunity to be heard. The court was concerned with bias and prejudgment as a potential form of unfairness:

> [A]n administrative hearing must be attended not only with every element of fairness, but with the very appearance of complete fairness. . . . The parties to this proceeding are as a matter of fundamental due process entitled to a final rulemaking decision that will be premised on factual

32 CONFERENCE REPORT No. 93-1408, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7755, 7765.
33 15 U.S.C. § 57a(b)(1) (1976).
34 15 U.S.C. § 57a(b)(2) (1976).
35 15 U.S.C. § 57a(b)(3) (1976).
36 15 U.S.C. § 57a(c)(4) (1976).
37 15 U.S.C. §§ 57a(1)(B), 57a(d)(1) (1976).
38 The rule explaining the FTCIA characterizes disputed issues of material fact as "issues of specific, in contrast to legislative fact." 16 C.F.R. § 1.13(d)(5)(i)(A) (1977).
39 15 U.S.C. §§ 57a(c)(1) (1976). The Commission is granted sole discretion to determine what the disputed issues are and the extent of cross-examination which will be allowed. *See* 16 C.F.R. § 1.13(c)(1)(i) - (ix) (1977).

> determinations which have not been prejudged in advance or tainted by the participation of one whose objectivity is subject to serious question.[40]

The propriety of and justification for removal of a biased agency rulemaker have received little attention in judicial opinions and legal literature. An approach specifically for determining when due process requires disqualification of a rulemaker for bias and prejudgment has not been developed. The right to a fair rulemaking hearing is an apparent extension of the participants' due process right to an opportunity to be heard. A discussion of the approach courts have taken to determine whether to afford rulemaking participants the opportunity for a hearing is appropriate in the search for the proper approach to the bias problem in the hybrid rulemaking context.

A. *Adjudication versus Rulemaking*

Initially, the adjudication rulemaking distinction seemed an appropriate basis for the determination whether to afford parties involved in agency proceedings an opportunity for a hearing. As a practical matter, whether an agency was engaged in rulemaking or adjudication turned on whether the action was general in application or whether it applied to particular named parties. Rulemaking involved the adoption of rules concerning a general topic or group of persons and was premised on policy grounds or judgments and not on the evaluation of facts peculiar to affected individuals. Adjudication, on the other hand, typically was considered as dealing with the resolution of individual matters on the basis of facts pertinent to the parties involved.

Two early and related cases illustrate how this very fundamental distinction between rulemaking and adjudication led to the conclusion that trial-type hearings were inappropriate for resolution of factual disputes in rulemaking but were appropriate for resolution of factual disputes in adjudication.

In *Bi-Metallic Co. v. Colorado*,[41] the administrative action at issue was an across-the-board increase in Denver land valuations for state tax purposes. The United States Supreme Court held that there was no due process right to a hearing for individuals affected by legislative-type administrative action. The Court emphasized that the state agency's action was in the nature of a general rule "in which all were equally concerned."[42] In contrast, *Londoner v. Denver*[43] involved proceedings for the assessment of street-paving costs for Denver property owners. The Supreme Court ruled that the property owners were entitled to a hearing before they could be assessed.[44] Significantly, the Court in *Bi-Metallic* carefully distinguished *Londoner* on the ground that it had involved a "relatively small number of persons . . . who were exceptionally affected in each case upon individual grounds."[45]

40 1978-2 TRADE CASES at 75,966 (quoting 425 F.2d at 591).
41 239 U.S. 441 (1915).
42 *Id.* at 445.
43 210 U.S. 373 (1908).
44 *Id.* at 385-86.
45 239 U.S. at 446. *See also* 359 F.2d at 631, in which the District of Columbia Circuit found the proceeding before them to be a rulemaking proceeding because it was general in scope and prospective in operation rather than individual in impact and condemnatory in purpose.

The fundamental distinction between rulemaking and adjudication was later deemed an inadequate basis for deciding what type of hearing to afford parties involved in rulemaking proceedings:

> In many cases, it is unnecessary, and even unwise, to classify a given proceeding as either adjudicatory or rule-making. The line between the two is frequently a thin one and resolution of a given problem will rarely turn wholly on whether the proceeding is placed in one category or another. Moreover, obsession with attempts to place agency action in the proper category may often obscure the real issue which divides the parties and requires our resolution.[46]

Adjudication and rulemaking, especially hybrid rulemaking, have more typically involved complex intertwinings of adjudicative and legislative elements making it unrealistic to attempt to retain such a clear distinction between the two types of agency proceedings.

B. *Adjudicative Facts versus Legislative Facts*

A more functional distinction for deciding whether to use trial-type procedures in administrative rulemaking has been that between legislative and adjudicative facts. This distinction was first developed by Professor Davis[47] and apparently has roots in the results of *Londoner* and *Bi-Metallic*. Legislative facts are ordinarily general and do not concern the immediate parties.[48] They involve policy questions which can be resolved only by value decisions which by nature are not subject to empirical scrutiny.[49] Adjudicative facts normally concern the immediate parties involved, their activities, their properties or their business, and are therefore subject to reasonable dispute.[50]

The FTCIA illustrates the use of the adjudicative fact distinction to decide the hybrid rulemaking hearing issue. The Federal Trade Commission Improvement Act (FTCIA) illustrates the use of the adjudicative/legislative fact distinction to decide the hybrid rulemaking hearing issue. Under the FTCIA, for example, "an issue for examination including cross-examination, or the presentation of rebuttal submission,"[51] must be an issue of "specific, in contrast to legislative fact."[52] The Administrative Conference of the United States has also recommended that trial-type hearings be employed in rulemaking when "issues of specific fact" are in dispute. The Conference further suggests that Congress never require trial-type procedures for resolving "questions of policy or of broad general fact."[53]

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46 458 F.2d at 739.
47 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 15.03, at 353 (1958).
48 *Id.*
49 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 413 (1958).
50 According to Professor Davis, "when a court or agency finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts." 2 K. DAVIS, *supra* note 47, at 353.
51 16 C.F.R. § 1.13(d)(5)(i)(A) (1977).
52 *Id.*
53 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *supra* note 19, RECOMMENDATION 72-5(3).

Professor Davis has openly advocated the adjudicative/legislative fact formulation. Although he predicted that the law of the future would follow the Administrative Conference's recommendation,[54] Davis observed that a "good deal of consternation continues [as to the type of hearing which should be granted] when fact issues are less broad and less general" than mere policy questions, or policy questions intertwined with general facts.[55] The basic principles, Davis concluded, are yet to be created.[56]

V. Due Process Right to an Impartial Tribunal

In addition to an opportunity for a meaningful hearing, due process requires that a party charged with violating an agency rule have his case heard by an impartial tribunal.[57] An examination of the approaches taken by the courts to determine whether an administrator's lack of impartiality warranted disqualification in *adjudicative* hearings is an essential step toward resolution of the bias problem as it has recently surfaced in the hybrid rulemaking realm.

A. *Adjudicative/Legislative Fact Distinction*

Some courts have relied on the adjudicative/legislative fact distinction to determine whether an administrator should be disqualified for bias and prejudgment when presiding over cases against specific individuals or entities. Three types of bias have emerged relative to whether the factual issue involved in administrative adjudications was adjudicative or legislative: (1) bias as to broad general policy or legal theory, (2) bias as to understanding and opinion of general or legislative fact, and (3) bias as to specific or adjudicative facts.

1. Bias as to Broad General Policy or Legal Theory

The fundamental nature and operation of the administrative process make it impossible to expect administrators to be totally free from policy preconceptions. An administrative agency is established by the executive typically to get things done in the interest of one side that has the control over or the favor of the legislature for the time being.[58] As Professor Davis has observed, legislative policies are translated into action through administrators whose honest opinion-biases are favorable to those policies.[59] Accordingly, "a trade commissioner should not be neutral in anti-monopoly policies"[60] and an SEC commissioner should not be apathetic about the need for government restrictions.[61] The theoretically ideal administrator, in Davis' opinion, "is one whose broad point of view is in general agreement with the policies he administers but who main-

54 K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 6.01-5, at 190 (1976).
55 *Id.*
56 *Id.*
57 *See* 1978-2 TRADE CASES at 75,966; Friendly, *Some Kind of a Hearing*, 123 U. PENN. L. REV. 1267, 1279 (1975).
58 REPORT OF THE SPECIAL COMMITTEE ON AD. LAW, 63 A.B.A. REP. 331, 342 (1938).
59 K. DAVIS, *supra* note 12, at 247.
60 *Id. See* 336 F.2d at 767.
61 K. DAVIS, *supra* note 12, at 247.

tains the sufficient balance to perceive and to avoid the degree of zeal which substantially impairs fair-mindedness."[62]

The United States Supreme Court has held bias as to broad general policy or legal theory to be no ground for disqualification. The Supreme Court clearly expressed this position in *FTC v. Cement Institute*.[63] The FTC initiated proceedings concerning the Cement Institute's multiple basing-point delivered price system. Prior to the initiation of the proceedings, the Commission had sent reports both to Congress and to the President expressing its opinion that the legality of such a pricing system was questionable. The companies involved in the proceedings contended that, as a result of its initial investigations, the entire membership of the Commission had concluded that the operation of the multiple basing-point system was a violation of the Sherman Act. They argued that it would be a denial of due process for the Commission to act in the proceedings after having expressed such opinion.

The Supreme Court held that the formation and expression of the opinion by the Commission did not warrant disqualification, and advanced several reasons in support of its decision. First, the Court held that "the fact that the Commission had entertained such views as the result of its prior ex-parte investigations did not necessarily mean that the minds of its members were irrevocably closed"[64] and stressed that the parties were still entitled to participate in the proceedings through oral testimony and cross-examination. Second, the Court feared that if the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, opinions expressed in the first basing-point proceeding would disqualify the Commission from ever passing on another.[65] The experience acquired from their work as commissioners would thus be a handicap rather than the advantage Congress intended it to be.[66] Finally, while pointing out that the FTC would not be under stronger constitutional due process compulsions than a court, the Supreme Court maintained that it would not be a violation of due process even for a judge "to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. . . ."[67]

In *Skelly Oil Co. v. Federal Power Commission*,[68] the Tenth Circuit relied on *Cement Institute* to deny a disqualification request. The substantive dispute in *Skelly* arose from an FPC order relating to prices for jurisdictional sales of natural gas produced in certain basins. Certain of the natural gas producers affected by the FPC order sought disqualification of two commissioners on the grounds that each of them had prejudged the issue of whether substantial competition existed among natural gas producers. The charges stemmed from public addresses which had been made by the commissioners.

The Tenth Circuit found no basis for disqualification in the "fact or assump-

62 *Id.*
63 333 U.S. 683 (1948).
64 *Id.* at 701.
65 *Id. See* United States v. Morgan, 313 U.S. 409, 421 (1941).
66 333 U.S. at 702.
67 *Id.* at 702-03.
68 375 F.2d 6 (10th Cir. 1967), *modified on other grounds sub nom. In Re* Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

tion that . . . [the] administrative agency enter[ed] a proceeding with advance views on important economic matters in issue."[69] In addition, in the absence of contradictory evidence, the court ultimately relied on the commissioners as "men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances."[70]

In a more recent case, *Corning Glass Works v. FTC*,[71] the Seventh Circuit adopted a similar position with regard to a commissioner's open expression of policy opinion. In that case, Corning appealed an FTC order requiring it to cease and desist from the use of consumer price restriction clauses as applied to wholesalers in free trade states. Corning challenged the impartiality of the Commission because of its continued opposition to resale price maintenance in general and to legislative exemptions from antitrust laws for this particular form of price fixing.

The Seventh Circuit found no merit in Corning's challenge in light of the administrator's role in carrying legislative policy into action:

> It is certainly proper for the Commission to express the consumer point of view when antitrust amendments, or exemptions, are being considered by Congress. Its performance of that public service in no way disqualifies its status as an independent agency entitled to our respect in the discharge of its quasi-judicial functions.[72]

As the Supreme Court in *Cement Institute* had been wary of barring the FTC from further performance on the basis of its policy views, the Seventh Circuit avoided the danger of inhibiting the Commission from future expression of policy opinion as an important public interest service.

These cases demonstrate that bias regarding general policies by an adjudicator is not violative of due process. Similarly, a showing of bias on legislative facts has not been considered a due process violation.

2. Bias as to General or Legislative Facts

According to Professor Davis, notions of broad policy and legal theory are often inseparable from impressions of general facts, such as those applying generally to an industry or other recognizable class. Davis, among others,[73] maintains that "prejudgment of general facts of the kind that merge with points of view concerning issues of law or policy is probably inevitable and cannot properly be deemed a ground for disqualification."[74]

As shown with respect to policy preconceptions, justification for allowing bias as to general facts lies in the general nature of an administrator's function. "Agency members . . . are expected to be experts, bringing to each case a specialized knowledge formed by experience. Such knowledge and experience is

69 *Id.* at 18.
70 *Id.* (quoting 313 U.S. at 421).
71 509 F.2d 293 (7th Cir. 1975).
72 *Id.* at 303-04.
73 *See, e.g.*, Koch, *Prejudgment: An Unavailable Challenge to Official Administrative Action*, 33 FED. B.J. 218, 219-20 (1974).
74 2 K. DAVIS, *supra* note 47, at 144.

not, and should not be, confined to the record of a particular case."[75] Conscious or unconscious retrieving of knowledge, or general facts gained through investigations in prior proceedings involving particular parties for use in a later proceeding involving those same parties, therefore, does not constitute prejudgment.[76]

3. Bias as to Adjudicative Facts

Although strong convictions or points of view on questions of law, policy, or general facts have not been held to be grounds for disqualification in agency adjudications, several cases stand for the proposition that preconceptions as to specific or adjudicative facts in a particular case are grounds for disqualification.

Texaco, Inc. v. FTC[77] demonstrates judicial disfavor of bias as to specific facts. In *Texaco,* the FTC charged Texaco and B.F. Goodrich with engaging in unfair methods of competition regarding arrangements for promoting the sale of Goodrich products through Texaco dealers. While the proceeding was pending, FTC Chairman Dixon delivered a speech to the National Congress of Petroleum Retailers in which he openly stated that Texaco and Goodrich had engaged in unfair competitive practices as alleged in the complaint which had been filed against them. Texaco sought to disqualify Dixon because the speech evinced bias or prejudgment of the facts of the pending action.

The District of Columbia Circuit found that Dixon had prejudged specific issues involved in the case. Dixon's speech indicated that he had already concluded that Texaco and Goodrich were violating the Act and that he would protect the petroleum retailers from such abuses. The court concluded that "a disinterested reader of Chairman Dixon's speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act."[78] Accordingly, Dixon's participation constituted a denial of due process.

Similarly, in *American Cyanamid Co. v. FTC,*[79] the Sixth Circuit disqualified Commissioner Dixon for prejudgment of facts in an action charging certain drug companies with unfair methods of competition in the production and sale of tetracycline. The companies alleged that Dixon, while serving in his former capacity as Chief Counsel in a congressional investigation of the drug industry, had investigated many of the same facts at issue in the case then pending against the drug companies. In a report prepared by Dixon and his staff in connection with those investigations, Dixon condemned the named drug companies for the same anticompetitive practices.

In response to motions filed by the drug companies, the Sixth Circuit disqualified Dixon from participation in the determination of those factual issues pertaining to the alleged anticompetitive behavior. Significantly, the court's decision was based, not on Dixon's prior investigation of general issues, but on

75 Elman, *A Note on Administrative Adjudication,* 74 YALE L.J. 652, 653 (1965).
76 Koch, *supra* note 73, at 220.
77 336 F.2d 754 (D.C. Cir. 1964).
78 *Id.* at 760.
79 363 F.2d 757 (6th Cir. 1966).

the depth of the investigation into specific facts which ultimately arose in the commission proceedings pending against the companies.[80]

B. Institutional versus Personal Bias

Although the foregoing cases suggest an apparent judicial sensitivity to charges of bias and prejudgment as to specific facts, other cases support the proposition that the key distinction involved in agency adjudication is whether the bias or prejudgment is *institutional* or *personal.* When the spectre of bias has arisen in the context of an institutional process, courts have refused to disqualify an agency or its individual members. Instead, those courts have preferred to rely on the integrity and objectivity of the agency officials who were acting in their administrative capacity. If evidence of personal bias on the part of individual agency members existed, however, some courts have closely scrutinized decisions rendered by those officials.[81]

In *Berkshire Employees Association v. NLRB,*[82] the Third Circuit laid the foundation for the institutional/personal bias distinction. In *Berkshire,* an individual NLRB member had written a personal letter to a customer of the Berkshire Employees Association, which Berkshire interpreted as a solicitation of help in a union boycott. Although the court recognized that certain duties of an administrative body necessitate prejudgment of some issues of an adjudication, it refused to condone participation by the individual member who had already personally "thrown his weight on the other side."[83]

Following the Third Circuit's decision in *Berkshire,* the District of Columbia Circuit, in *Amos Treat & Co. v. Securities and Exchange Commission,*[84] refused to allow participation by a member of the SEC who had previously participated in the same case on the side of one of the parties involved. The individual member of the SEC had been responsible to the SEC for the initiation, conduct and supervision of the proceedings at issue while formerly serving as a member of the Commission's Division of Finance. The Court found that the potential for prejudgment was too great when the prejudicial information was derived from the Commissioner's prior prosecutorial role, rather than from his role as administrative judge. The court thus held that participation by that individual was contrary to the due process requirement that an administrative hearing be attended "not only with every element of fairness but with the very appearance of complete fairness."[85]

In both *Berkshire* and *Amos Treat,* the bias and prejudgment of the disqualified agency members were traceable to ex parte sources. In *NLRB v. Donnelly Co.,*[86] however, the Supreme Court defended the integrity of an individual

80 *See also* Safeway Stores, Inc. v. FTC, 366 F.2d 795, 802-03 (9th Cir. 1966), in which knowledge as to general facts gained through investigations prior to proceedings was not a basis for disqualification.
81 K. DAVIS, *supra* note 12, at 245.
82 121 F.2d 235 (3rd Cir. 1941).
83 *Id.* at 239.
84 306 F.2d 260 (D.C. Cir. 1962).
85 *Id.* at 267.
86 330 U.S. 219 (1947).

agency member whose alleged bias arose in connection with his activities as NLRB Commissioner.

In *Donnelly,* a hearing examiner recommended findings of fact after excluding certain testimony in an initial hearing. Upon review, the case was returned to the same examiner who, after hearing the testimony, found as he had previously. The court of appeals concluded that the examiner should not preside again because of possible prejudgment of the facts.[87] The Supreme Court unanimously reversed the Eighth Circuit, thereby upholding the examiner's decision and rejecting the challenge of illegal prejudgment. The Court in *Donnelly* thus chose to rely on the integrity of the agency official performing in his institutional capacity.

As previously discussed, the Supreme Court, in *FTC v. Cement Institute,*[88] refused to bar the entire FTC from hearing a case which was factually related to opinions expressed by the Commission in a report on the cement industry which it had submitted to Congress. Although the Court's refusal to disqualify the commissioner was explained in terms of policy bias, the Court's remarks indicated a reluctance to interfere with the agency's institutional function:

> If the Commission's opinions expressed in Congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another. . . . Thus experience acquired from their work as Commissioners would be a handicap instead of an advantage. Such was not the intendment of Congress.[89]

The First Circuit displayed a similar reluctance to interfere with congressionally intended administrative functions in *Pangburn v. Civil Aviation Board.*[90] The Civil Aviation Board (CAB) had affirmed an order of the Administrator of the Federal Aviation Agency suspending a pilot's license for ninety days after finding that he had negligently operated an aircraft in scheduled air transportation. The CAB had publicly committed itself to a finding of the pilot's error in an accident investigation report submitted prior to the conclusion of the license suspension proceeding. The pilot claimed a denial of due process on the ground that the CAB had prejudged the very issue involved in the adjudication. In addition, he sought to distinguish cases like *Cement Institute* from his own on the ground that in those cases the "finding related to general law and policy . . . and not to a concrete and specific factual determination."[91]

Despite the pilot's arguments, the First Circuit concluded that "the mere fact that a tribunal has had contact with a particular factual complex in a prior hearing, or indeed has taken a public position on the facts, is [insufficient] to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing."[92] The court felt this was true particularly since the agency's

87 151 F.2d 854, 870 (8th Cir. 1945).
88 *See* text accompanying note 63 *supra.*
89 333 U.S. at 702.
90 311 F.2d 349 (1st Cir. 1962).
91 *Id.* at 356.
92 *Id.* at 358.

contact with the case resulted from having followed the congressional mandate to investigate and report the probable cause of all civil air accidents.[93] Irrespective of the type of factual issues involved, the court preferred to protect the CAB while functioning within its institutional bounds at the risk of denying the pilot his right to an impartial tribunal.

As seen in the foregoing cases, an administrator acting as an adjudicator has been disqualified for personal bias and for bias as to adjudicative facts. In *National Advertisers,* the district court disqualified Chairman Pertschuk primarily to protect the participants' right to an objective rulemaking hearing. A necessary inquiry, therefore, is whether disqualification for personal bias or bias as to adjudicative facts is also necessary in hybrid rulemaking proceedings to protect the affected parties' right to a fair hearing.

VI. Due Process and Bias in Hybrid Rulemaking

The district court in *National Advertisers* ruled that, as a matter of fundamental due process, the participants in the Children's Advertising rulemaking proceedings were entitled to a determination of factual issues by a disinterested, objective tribunal.[94] On the basis of the facts and circumstances presented by the plaintiffs, the court concluded that the risk of unfairness in allowing Commissioner Pertschuk to participate in the rulemaking was "intolerably high" and thus due process demanded his disqualification.

Although the court seemed firm in its finding of an intolerably high risk of unfairness, it offered only vague and conclusory statements in support of such a finding:

> Upon examination of the Chairman's public statements, a very substantial showing has been made that the Chairman has conclusively prejudged factual issues which will be disputed in the rulemaking and whose resolution will be necessary for a fair determination of the rulemaking as a whole. . . . Going far beyond general observations of policy and tentative statements of attitude, the Chairman has by his use of conclusory statements of fact, his emotional use of derogatory terms and characterization, and his affirmative efforts to propagate his settled views made his further participation improper.[95]

Regardless whether the court's decision to disqualify Commissioner Pertschuk was a sound one, *National Advertisers* represents novel precedential support for disqualification in hybrid rulemaking which is likely to initiate a flood of disqualification motions in subsequent agency proceedings.[96] The court's memorandum in support of its decision, however, provides minimal guidelines or standards for coping with such charges of bias and prejudgment and motions for dis-

93 *Id.*
94 1978-2 TRADE CASES at 75,967.
95 *Id.* at 75,966.
96 A trucking group has already requested Daniel O'Neal, Chairman of the Interstate Commerce Commission, to disqualify himself from proceedings involving the proposed elimination of trucking rules. The group, Assure Competitive Transportation (ACT), has focused on Mr. O'Neal's expression of support for reducing trucking regulations that the industry wants preserved. National L. J., Feb. 26, 1979, at 7.

qualification in hybrid rulemaking. It neglects to mention specifically what public statements and what factual issues it was referring to as endangering the fairness of the rulemaking as a whole. Further, the court does not elaborate on its approach for determining that the bias was inappropriate.

In the absence of guidance from the court, uncertainty remains whether the problem of bias in hybrid rulemaking can be resolved in terms of the adjudicative/legislative fact distinction or perhaps in terms of the institutional/personal bias distinction. Perhaps neither of these approaches, which have been deemed proper bases for deciding either the due process hearing issue in hybrid rulemaking or the bias issue in adjudication can also serve as proper bases for deciding bias and prejudgment claims in the unique context of hybrid rulemaking. Accordingly, an important issue is to determine how the unique nature of hybrid rulemaking bears on the proper means for determining what constitutes inappropriate bias.

A. *Adjudicative/Legislative Fact Approach*

Since hybrid rulemaking procedures typically possess characteristics of both rulemaking and adjudication, the problem of bias and prejudgment of factual issues in such proceedings arguably lends itself to an analysis grounded on Davis' adjudicative/legislative fact distinction. When employed for purposes of determining whether a trial-type hearing should be allowed, this distinction led to a general conclusion that a hearing was necessary for resolution of adjudicative facts. When applied to the bias problem in adjudicative proceedings, the conclusion seems to have been that bias or prejudgment of broad policy or general facts was not a ground for disqualification, while bias or prejudgment of specific or adjudicative facts did merit disqualification. Before concluding, however, that an analysis of the type of factual issues involved is a useful means for ruling on a charge of bias in hybrid rulemaking procedures, several drawbacks of the fact distinction approach merit consideration.

Guidelines and criteria for determining whether a fact is adjudicative or legislative have not been well developed. Even cases which have based their decision on the fact distinction have referred to the distinction only in a vague and conclusory manner.[97]

Legislative facts, in their purest state, are general in nature, do not directly concern the immediate parties, and aid administrators in deciding questions of law, policy and discretion.[98] In both rulemaking and adjudication, disputed issues of legislative fact can be resolved by using judgment, without additional procedural safeguards such as oral argument, right of rebuttal, and cross-examination.

As one critic has observed, however, legislative facts involved in rulemaking are not always in a pure state.[99] Such legislative facts frequently are based on other factual predicates, some of which may be of an adjudicative nature and

97 *See* International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); Walter Holm & Co. v. Harding, 449 F.2d 1009 (D.C. Cir. 1971).
98 1 K. DAVIS, *supra* note 49, at 413.
99 Kastenbaum, *supra* note 20, at 691.

therefore subject to dispute. Acknowledging that an issue involves policy or legislative fact, therefore, may be inadequate for answering such crucial questions whether a trial-type hearing is required to resolve those facts[100] or whether an agency official's bias as to those facts necessitates disqualifying the official in order to protect the due process right of rulemaking participants.

The adjudicative/legislative fact distinction may prove to be even less valuable for answering the hearing and bias questions in hybrid rulemaking than in pure legislative rulemaking. The combination of adjudication and rulemaking characteristics in the administrative procedure is likely to lead to a more complex relation between legislative and adjudicative facts.

The ambiguity and confusion involved in the determination of adjudicative, or "specific," facts in FTC hybrid proceedings exemplifies one of the fundamental weaknesses of the adjudicative/legislative fact distinction as a useful approach to the due process hearing question. In order to be granted the right to cross-examination under the FTCIA, the "issue for examination including cross-examination, or the presentation of rebuttal submissions [must be] an issue of specific, in contrast to legislative fact."[101] As in prior court decisions referring to the adjudicative/legislative fact distinction, no definitions or explanation of the terms "adjudicative" or "legislative" fact is provided in the text of the FTCIA. Nor does the factual distinction become clear from the actual operation of the FTC hybrid proceedings to date.

Under the FTCIA, it is within the discretion of the Commission, or the presiding officer, to determine the disputed issues of material fact for which the trial-type procedures of cross-examination and rebuttal will be allowed. The process by which the Commission decides these critical specific issues provides little disclosure of the Commission's reasons for having determined certain issues to be specific.

In its initial notice of the proposed rulemaking, the Commission may refer to materials, such as information derived from extensive staff investigations, which prompted the initiation of the proceedings. The notice is usually followed by a general release of the staff report containing the basis for the staff recommendation. The Commission often refrains from expressing its views of the staff reports, thus further hindering an understanding of how it derived the specific facts. In addition, the Commission often disclaims any prejudgment in favor of the staff position.[102]

Also, in its initial notice, the Commission elicits comments on questions it proposes concerning possible remedial provisions and the prevalence and unfairness of the practice at issue.[103] The Commission typically maintains that the

100 Kastenbaum, *supra* note 20, at 691-92. *See also* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform,* 118 U. PENN. L. REV. 485, 521 (1971).

101 16 C.F.R. § 1.13(d)(5)(i)(A) (1977).

102 *See, e.g.,* Proposed Trade Reg. § 438, *Proprietary Vocational and Home Study Schools,* 40 Fed. Reg. 21052 (1975), in which the FTC stated, as it had in each initial notice, that it had "not adopted any findings or conclusions of the staff" and that "[a]ll the findings in [the] proceedings [would be] based solely on the matter in the rulemaking record."

103 *See, e.g.,* Proposed Trade Reg. § 67, *Children's Advertising,* 43 Fed. Reg. 17,967, 17,969-70 (1978).

questions posed are not an indication of which issues it will determine as warranting trial-type procedures.[104]

As a consequence of the ambiguity surrounding the determination of critical specific issues in FTC rulemaking, attorneys for interested parties often have blindly submitted any and every possible issue in cross-examination requests.[105] Presiding officers thus have become totally confused in ascertaining which of the proposed issues merit trial-type hearings.[106] Ultimately, the issues which have been designated as critical specific issues have not been logically distinguishable from those which were not chosen. The distinction between specific and legislative facts under FTCIA, then, has lost all meaning.

Resolution of the problem of bias in FTC hybrid rulemaking would be a simple matter if it were possible to maintain that bias as to specific facts automatically merits disqualification while bias as to legislative facts does not. As shown above, however, the specific/legislative fact distinction breaks down in the actual process. Specific facts are often indistinguishable from legislative facts, making it nearly impossible to determine which facts a rulemaker actually had prejudged. Moreover, the threat of such automatic disqualification by the courts may prompt the Commission to refrain from identifying as specific facts any facts as to which it may have exhibited bias or prejudgment.

Judicial scrutiny of the types of issues specified by the Commission as eligible for trial-type hearings might be a means of offsetting the possibility that the Commission will abuse its discretion to determine the specific issues in order to camouflage bias. In other words, upon submission of a motion for disqualification, a reviewing court might be permitted to make its own determination of what, in its opinion, should have been designated as critical specific issues. Authorizing a court to make such a determination, however, would undoubtedly encounter fundamental obstacles. First, with no established guidelines for determination of "specific facts," the courts would be free to develop their own concepts, which could differ from court to court as well as with the Commission's concepts. Second, the courts would be interfering with the discretion statutorily granted to the Commission. Under general administrative principles, only a clear abuse of agency discretion warrants such interference.[107] Third, the timing of the judicial intervention would be a sensitive matter. Premature judicial interference in the rulemaking process would inevitably hinder effective rulemaking operations.[108] Finally, since there is such a wide variety of hybrid procedures, the utility of combining the adjudicative/legislative fact distinction with a judicial review mechanism may be limited solely to FTC procedures.

104 A typical statement in this regard is likely to read as follows: "Neither the statement of factual premises nor the questions should be interpreted as designating disputed issues of specific fact. . . . [S]uch designation shall be made by the Commission or its duly authorized presiding official pursuant to the Commission's procedures and rules of practice." *See Proprietary Vocational and Home Study Schools, supra* note 102.

105 *Id.*

106 Kastenbaum, *supra* note 20, at 698.

107 5 U.S.C. § 706(2)(A) (1970).

108 The movants in *National Advertisers* did not have to await final promulgation of the rule. The district court ordered Chairman Pertschuk's disqualification even before the FTC had determined the disputed issues of critical fact. *See* note 8 *supra*. The propriety and wisdom of such early intervention are questionable.

B. *Institutional versus Personal Bias*

As shown above, the adjudicative/legislative fact distinction is not an adequate basis for coping with the problem of bias in hybrid rulemaking. The possibility remains, however, that the institutional/personal bias distinction as used to analyze the problem of bias and prejudice in administrative adjudications might serve as an alternative means for dealing with bias and prejudgment in unique hybrid rulemaking.

In *United States v. Morgan,*[109] the Supreme Court declared that, without a showing to the contrary, state administrators "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances."[110] Likewise, judgment exercised by Professor Davis' "Ideal Administrator" in his fact-finding function "would be guided by intellectual perception, not by emotion" and would call upon his integrity, character and ability.[111]

Several cases previously discussed in which courts have denied requests for disqualification suggest that courts also have relied on the integrity of the agency and its individual members to do the right thing when performing in an adjudicative capacity.[112] The fundamental nature of the fact-finding process in agency rulemaking, however, seems to demand a much greater reliance on the integrity of the administrator than is ever likely to be required in agency adjudication.

In some respects, the process of developing factual support for a proposed rule appears much like the process of gathering evidence in adjudications. Testimony will be presented in the form of raw perceptions from which the agency must draw certain inferences and reach a conclusion which implicitly involves some judgment on the agency's part.

At some point, however, the intellectual process involved in rulemaking diverges from that involved in adjudication. At a certain stage of any rulemaking proceeding, "the agency members inescapably doff their hats as value-neutral fact-finders and assume the role of legislators of values."[113] By contrast, an adjudicator is theoretically committed to applying a rule of law to the facts in a value-free way.

Rulemaking is a valuable and important administrative technique for evolution of general policy, "notwithstanding or perhaps because of, the freedom from the procedures carefully prescribed to assure fairness in individual adjudication."[114] The rulemaker's freedom to legislate values is enhanced by his ability to take outside information into consideration in formulating a final rule. The

109 313 U.S. 409 (1941).
110 *Id.* at 421.
111 K. Davis, *supra* note 12, at 247. *See* text accompanying note 62.
112 FTC v. Cement Institute, 333 U.S. 683 (1948); NLRB v. Donnelly Co., 330 U.S. 219 (1947); Pangburn v. Civil Aviation Board, 311 F.2d 349 (1st Cir. 1962). *See also* Kennecott Copper Corp. v. FTC, 467 F.2d 67, 80 (10th Cir. 1972) and FTC v. Cinderella Career and Finishing Schools, Inc., 404 F.2d 1308, 1314 (D.C. Cir. 1968), in which the courts of appeals upheld the right of agencies to communicate information pursuant to their public interest function.
113 Williams, *Hybrid Rulemaking under the Administrative Procedure Act: A Legal and Empirical Analysis,* 42 U. Chi. L. Rev. 401, 405 n.21 (1975).
114 359 F.2d at 630.

Supreme Court has explicitly recognized the need, in rulemaking proceedings, to gather general facts from sources beyond the particular record, including information and expertise gained by agency officials through prior investigations:

> [An agency] is not confined to the record of a particular proceeding. "Cumulative experience" begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.[115]

The complexity of factors and information incorporated into the formulation of an agency rule, especially in the hybrid rulemaking process, therefore, might lead to an even greater reluctance to probe the mind of an allegedly biased agency or its members as rulemakers than there has been with respect to an agency and its members as adjudicators.

From the previous examination of the FTC hybrid procedure,[116] clearly the amount of discretion granted to the Commission has enabled it to retain considerable control over the adjudicative as well as the rulemaking aspects of the hybrid procedure. The due process concern which forced the promulgation of hybrid procedures thus has not been sufficient to destroy the essentially independent nature of administrative rulemaking. A charge of bias on the part of an agency rulemaker involves a similar struggle between fairness and the institution of rulemaking. As seems true with respect to the trial-type hearing controversy, rulemaking institutions and their members may prevail. The result in *ANA,* however, suggests the possibility that a court's concern for fairness in rulemaking hearings may prevail over integrity, thus raising doubt as to the extent to which reliance on the integrity and objectivity of rulemakers will continue as a possible protection from disqualification in rulemaking.

As seen from the foregoing discussion, the adjudicative/legislative factual issue distinction falls short of providing an effective means for dealing with the problem of bias in the hybrid rulemaking context. Precisely what constitutes specific as opposed to legislative facts has not been well established.[117] Professor Davis himself has recognized the existence of a "borderland" area between these broad categories where the distinction often has little or no utility.[118] The utility of the institutional/personal bias distinction has also become questionable in light of evidence from the *ANA* case that reliance on the integrity and objectivity of rulemakers may ultimately be outweighed by the increasing concern

115 NLRB v. Seven-Up Co., 344 U.S. 344, 349 (1953). *See also* 333 U.S. at 702, in which the Supreme Court refused to disqualify the FTC so as to avoid making the expertise acquired by the Commission a handicap rather than an advantage.

116 *See* text accompanying notes 101-08.

117 According to Judge Friendly, "[T]he classifying test—that adjudicative facts are 'intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them,' is somewhat circular and not always satisfactory." Friendly, *supra* note 57, at 1268 n.6 (quoting, in part, K. DAVIS, *supra* note 49, at 413). *See also* Nathanson, Book Review, 70 YALE L.J. 1210, 1211 (1961).

118 1 K. DAVIS, *supra* note 49, at 414. *See, e.g.,* Petition of New York Water Serv. Corp., 283 N.Y. 23, 27 N.E.2d 221 (1940).

over administrative due process. The need for alternative means for coping with the bias problem is evident. The best alternative at present is that which focuses on the nature of the interests of the parties who stand to be affected by the proposed rules.

C. *Nature of the Interests Involved — A Case-by-Case Approach*

For purposes of determining generally what procedural safeguards must be imposed in administrative proceedings in order to satisfy due process requirements, Judge Friendly has recommended a balancing approach: "The required degree of procedural safeguards varies with the *importance of the private interest affected* and the need for and usefulness of the particular safeguard *in the given circumstances* and inversely with the *burden* and any other adverse consequences of affording it."[119] Although stated in general terms, this balancing approach has particular application to the current due process concern over bias in rulemaking.

Judge Friendly's emphasis on the "importance of the private interest affected" suggests a return to the *Londoner - Bi-Metallic* criterion previously used for purposes of distinguishing adjudication from rulemaking.[120] In *Bi-Metallic,* the Supreme Court found no due process right to a hearing for an across-the-board land valuation increase. In *Londoner,* on the other hand, the Court had held that due process required that the individual property owners be granted the right to a hearing before special property taxes could be assessed against them. The Court distinguished the two cases on the ground that in *Londoner* a relatively small number of persons were *exceptionally affected* in each case upon *individual grounds.*[121]

The distinction between adjudication and rulemaking as derived from *Londoner* and *Bi-Metallic* has lost true meaning, particularly in light of the mixture of adjudicative and rulemaking characteristics in hybrid rulemaking. These two cases are valuable for purposes of the present discussion, however, to the extent that they focused on both the number of persons involved and the effect the proceedings could have on those persons. In that respect, they lend support to Judge Friendly's balancing approach to due process questions.

Authority exists to support Judge Friendly's proposal for transcending the adjudicative/legislative fact distinction or any other such artificial distinctions. A focus on the importance of the interests involved can be seen in discussions relating to the hearing issue as it arose during the development of the hybrid rulemaking procedures. For instance, in 1972, the Administrative Conference recommended that trial-type procedures be used only "on issues of specific fact" and never . . . for resolving questions of policy or of broad or general fact."[122] The 1976 Conference, however, added that an agency should permit cross-examination "only to the extent that it believes that anticipated costs, such as those related to additional time and resources needed, are offset by anticipated gains in the quality of the rule and the extent to which the rulemaking will be

119 Friendly, *supra* note 57, at 1278.
120 *See* text accompanying notes 41-46 *supra.*
121 239 U.S. at 446.
122 *See* note 53 *supra.*

perceived as having been fair."[123] Professor Davis similarly recognized that while "[d]ebatable and critical legislative facts probably need not always be brought into the record, [they] . . . should be subject to challenge through briefs and arguments," and "the tribunal should have the discretionary power to determine whether cross-examination is appropriate *in the circumstances.*"[124]

Although the rules accompanying the FTCIA call for cross-examination only for specific, as contrasted with legislative, facts,[125] the Senate report accompanying the Act leaves room for providing an opportunity for presentation and rebuttal evidence and cross-examination if *"affected persons* . . . challenge the factual assumptions on which the Commission is proceeding and show in what respect such assumptions are erroneous."[126]

The District of Columbia Circuit took a similar approach in *American Airlines, Inc. v. Civil Aeronautics Board.*[127] In that case, the court of appeals concluded that the disputed issue was one of broad or general fact, involving expert opinions and forecasts, which could not be decisively resolved by testimony.[128] The court did not base its denial of the request for an opportunity for oral presentation and cross-examination on the nature of the issue involved. Rather, the court focused on the circumstances of the particular case and the particular parties: "Nowhere in the record is there any specific proffer by petitioners as to the subjects they believed required oral hearings, what kind of facts they proposed to adduce, and by what witness, etc. Nor was there any specific proffer as to particular lines of cross-examination. . . ."[129] The court's language seems to indicate that if the petitioners had specifically demonstrated why they were entitled to a hearing that it would have been granted.

Similarly, in the *Long Island Railroad Co. v. United States,*[130] Judge Friendly refused to grant the railroad company an oral hearing on matters described as involving broad or general fact. He noted, however, that the court, nonetheless, might have imposed additional procedural safeguards if "Long Island had pointed to specifics on which it needed to cross-examine or present live rebuttal testimony . . . to enable it to mount a more effective argument against the Commission proposal."[131] In the absence of such evidence, however, the railroad failed to demonstrate a denial of its due process right to full and fair disclosure and an opportunity to be heard.

In *International Harvester Co. v. Ruckelshaus,*[132] Judge Levanthal expressly alluded to a more individual, case-by-case approach to the hearing question, stating that a "right of cross-examination, consistent with time limitations, might well extend to *particular cases of need,* on critical points where the general

123 COMMITTEE ON JUDICIAL REVIEW ADMINISTRATIVE CONFERENCE OF THE UNITED STATES PROPOSED RECOMMENDATION 76-3, PROCEDURES IN ADDITION TO NOTICE AND THE OPPORTUNITY FOR COMMENT IN INFORMAL RULEMAKING 4 (May 10, 1976).
124 2 K. DAVIS, *supra* note 47, at 432 (emphasis added).
125 16 C.F.R. § 1.13(d)(5)(i)(A) (1977).
126 S. REP. No. 1408, 93rd *Cong.,* 2d Sess. 33, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7765.
127 359 F.2d 624 (D.C. Cir.) (*en banc*), *cert. denied,* 385 U.S. 843 (1966).
128 *Id.* at 633.
129 *Id.*
130 318 F. Supp. 490 (E.D.N.Y. 1970).
131 *Id.* at 499.
132 478 F.2d 615 (D.C. Cir. 1973).

procedure proved inadequate to probe *'soft' and sensitive subjects and witnesses.*"[133]

The hybrid rulemaking procedures prescribed by the Consumer Product Safety Act implicitly recognize the value in Judge Friendly's focus on the importance of the private interests affected. The Act requires the Commission to make appropriate findings with respect to: (1) the degree and nature of the risk of injury the rule is designed to eliminate or reduce; (2) the approximate number of consumer products, or types or classes thereof subject to it; (3) the need of the public for the consumer products and the probable effect the rule will have upon their utility, cost or availability to meet the consumer need; and (4) any means, consistent with the public health and safety, of achieving the objective of the rule while minimizing adverse effects on competition and disruption or dislocation of manufacturing or other commercial practices.[134] In addition, the Act sets forth standards for guiding the Commission, which prevent the Commission from promulgating a rule unless it finds that: (1) the rule is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the product and is in the public interest; and (2) if the rule bans a hazardous product, no feasible safety standard would adequately protect the public from the unreasonable risk of injury associated with the product.[135]

Consideration of the weaknesses inherent in both the adjudicative/legislative fact distinction and the institutional/personal bias distinction suggests that a case-by-case approach, focusing on the nature of the interests at stake, is a more practical approach to the problem of bias in hybrid rulemaking. According to cases such as *Londoner, American Airlines, Long Island Railroad,* and *International Harvester,* if an interested party presents evidence of potential bias sufficient to demonstrate a real threat to due process, a court should grant that party's disqualification request.

VII. Conclusion

In *National Advertisers,* the District Court for the District of Columbia ordered that FTC Chairman Michael Pertschuk be disqualified from participation in the Children's Television Advertising rulemaking proceeding. Chairman Pertschuk's disqualification was the first such disqualification of an administrator performing in a rulemaking role.

The district court based its decision to disqualify Chairman Pertschuk on the need to protect the participants' due process right to a fair rulemaking hearing. Although the right to a fair hearing is essential to fundamental administrative due process, the nature of that right arguably varies according to the nature of the administrative proceeding involved. The FTC rulemaking proceeding involved in *National Advertisers* was a hybrid proceeding which uniquely combined elements of both administrative rulemaking and administrative adjudication. The district court, however, emphasized only the adjudicative elements of the hybrid proceeding. To ensure that the participants received a fair rule-

133 *Id.* at 631 (emphasis added).
134 15 U.S.C. §§ 2058(c)(1)(A)-(D) (1976).
135 *Id.* at §§ 2058(c)(2)(A)-(C).

making hearing, the court imposed the same standard of impartiality and neutrality on Chairman Pertschuk as that imposed on administrative adjudicators.

By ignoring the rulemaking characteristics of the hybrid proceeding, the court failed to consider the need for efficiency in the rulemaking process. Efficiency is essential to the operation of the administrative rulemaking process as an effective means for establishing agency policies.[136] In order to determine what constitutes inappropriate bias and prejudgment in hybrid rulemaking, therefore, the need for fairness must be balanced against this competing need for efficiency.

The district court offered minimal guidelines and standards for coping with charges of bias and prejudgement in the unique hybrid rulemaking context. Other courts likewise have failed to develop a useful approach specifically for dealing with charges of bias in the hybrid context. As seen from the foregoing discussion, the adjudicative/legislative fact distinction fails to serve as an adequate basis for determining what constitutes inappropriate bias in hybrid rulemaking.[137] In addition, uncertainty remains whether courts will continue to accept the heavy reliance on the integrity of administrators, which reliance underlies the institutional/personal bias distinctions.[138] The most practical alternative at present is for courts to examine the nature of the interests involved on a case-by-case basis to determine whether an allegation of bias and prejudgment in a hybrid procedure warrants disqualification. This approach allows sufficient room for the balancing of the competing needs for fairness and efficiency in the unique hybrid rulemaking context.

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136 *See* discussion accompanying notes 109-17 *supra.*
137 *See* discussion accompanying notes 99-108 *supra.*
138 *See* discussion accompanying note 118 *supra.*