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STANDARDS OF DISQUALIFICATION FOR FEDERAL
TRADE COMMISSIONERS IN "HYBRID"
PROCEEDINGS: ASSOCIATION OF NATIONAL
ADVERTISERS v. FTC

"While 'an overspeaking judge is no well tuned cymbal' neither is an amorphous dummy unspotted by human emotions a becoming receptacle for judicial power."¹

These words, written by Justice McReynolds in 1921, reflect the tension between the competing ideals of a judge as a neutral, detached entity perfunctorily applying the law² and the judge as a decisionmaker properly influenced by independent societal values.³ An administrative agency commissioner is particularly susceptible to personal bias because of his knowledge in a particular field.⁴ Although Congress has attempted to structure administrative procedures to avoid bias,⁵ individual agency offi-

¹ *Berger v. United States*, 255 U.S. 22, 43 (1921) (McReynolds, J., dissenting). The defendants in *Berger*, Germans charged with espionage, alleged that the judge in the case was biased and personally prejudiced against them. The defendants based their charges on statements made by the judge which included: "[a]s between him [a safeblower] and this defendant I prefer the safeblower." *Id.* at 29. The Supreme Court held that, in light of his statement, the original judge should not preside at the defendant's trial. *Id.* at 36.

² In *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 251 (1824), Chief Justice Marshall characterized the judiciary as a mere instrument of the law. According to Marshall, a judge does not exercise power to give effect to his will, but rather to give effect to the legislature's will which is the "will of the law." *Id.* at 282. Roscoe Pound, however, criticized the assumption that a judge's function is to interpret and mechanically apply an authoritatively given rule by logically deducing its content. R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 100-06 (1922) [hereinafter cited as R. POUND].

³ See B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 167-80 (1921). Cardozo observed that judges do not stand aloof from the rest of society. "The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by." *Id.* at 168. Cardozo condoned the doctrine that judges should be in sympathy with the spirit of their times. *Id.* at 174; see R. POUND, *supra* note 2, at 100-43.

⁴ Professor Davis described the ideal administrator as one who has a broad viewpoint consistent with the policies he administers, but who also retains a sufficient balance to avoid the zeal which impairs fairmindedness. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 12.01, at 138 (1958) [hereinafter cited as K. DAVIS]. Professor Davis identified four distinguishable types of administrative bias. First, a judge may have a preconceived view on issues of law or policy. In addition a judge may be predisposed regarding issues of fact about particular parties. Also a judge may have a personal prejudice for or against a particular party, or he may have a financial interest in the decision. *Id.* at 130-31.

⁵ See LANDIS, THE ADMINISTRATIVE PROCESS 96 (1938). Landis notes that Congress established the Federal Trade Commission partly to bypass the judiciary's bias in the field of industrial regulation. *Id.* at 96-97; see Jennings, *Courts and Administrative Law—The Experience of English Housing Legislation*, 49 HARV. L. REV. 426, 454 (1936); DAVIS, *supra* note 4, § 12.01 at 135. But see Note, *Bias in Administrative Rulemaking After Association of National Advertisers v. Federal Trade Commission*, 54 NOTRE DAME LAW. 886, 895 (1979)

cials often are biased on specific subjects because of the very expertise which qualifies them for their positions.⁶ Administrative agency commissioners, like judges,⁷ may be disqualified from an agency proceeding for bias on due process grounds.⁸

In determining how due process guarantees apply,⁹ courts may rely on

[hereinafter cited as *Bias*].

⁶ See J. Freedman, *Expertise And The Administrative Process*, 28 AD. L. REV. 363, 363-67 (1976). In *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966), the court disqualified Commission Chairman Dixon from a hearing because of his previous investigative work for the Senate Subcommittee on Antitrust and Monopoly. *Id.* at 765-67; see Note, *Regulator Disqualification from Rulemaking Proceedings*, 57 TEX. L. REV. 1193, 1197 & 1209 (1979) [hereinafter cited as *Regulator Disqualification*]. Similarly, in *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C. Cir. 1962), the court held that a commissioner who had previously acted in an investigating or prosecuting capacity in a case cannot sit as a member of the commission deciding it. The court held that due process required the Commission to use procedures which guaranteed a fair trial. *Id.* at 263.

⁷ The federal statute on disqualification of district court judges for bias provides in part:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice against either him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. 28 U.S.C. § 144 (1976).

See *Laird v. Tatum*, 409 U.S. 824, 824 (1972) (mem). Each Supreme Court justice judges himself to determine whether he should be disqualified. See K. DAVIS, *supra* note 4, § 12.05 at 167. In *Laird*, Justice Rehnquist explained why he refused to disqualify himself from the case under 28 U.S.C. § 455 (1976), the disqualification statute for Supreme Court justices. According to Justice Rehnquist, a judge's expression of his understanding of a provision of the Constitution prior to his nomination is not grounds for disqualification. 409 U.S. at 839.

⁸ The due process clause of the fifth amendment to the Constitution provides in part: "no person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

The Supreme Court has held that due process requires a fair trial in a fair tribunal. *In re Murchison*, 349 U.S. 133, 136 (1955). The due process guarantees to a fair trial in a fair tribunal also apply to the FTC and other administrative agencies. *American Cyanamid Co. v. FTC*, 363 F.2d 757, 763-64 (6th Cir. 1966); see *Home Box Office v. FCC*, 567 F.2d 9, 56 (D.C. Cir. 1977) (fundamental notions of fairness and reasoned decisionmaking are basic to administrative law); Douglas, *On Misconception of The Judicial Function And The Responsibility Of The Bar*, 59 COLUM. L. REV. 227-30 (1959). Our legal system provides for safeguards and guarantees which protect the citizen not only against mobs but against the government, including its agencies. *Id.* at 228-29; see Note, *Disqualification of Administrative Officials For Bias*, 13 VAND. L. REV. 712-714 (1960).

Section 7(a) of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-59 (1976), provides in part:

A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

By comparison, a Supreme Court Justice determines individually whether he should be disqualified from a case. See K. DAVIS, *supra* note 4, § 12.05 at 167; note 7 *supra*.

⁹ The effect of agency activities on individuals may determine how the courts apply due process guarantees. Early in this century, the Supreme Court distinguished between agency

a classification of agency actions as either rulemaking or adjudicative.¹⁰ In an adjudicative proceeding, a commissioner's prejudgment of the facts of a case is sufficient to disqualify him,¹¹ although bias in the sense of a definite view as to issues of law or policy is not grounds for disqualification.¹² In a rule-making proceeding, which by definition involves applying general principles prospectively,¹³ a commissioner is virtually immune from

activities which particularly affected a relatively small number of persons and those which applied more generally to a large group. In *Londener v. City of Denver*, 210 U.S. 373 (1908), the Court held that due process entitled property owners to a hearing before the owners could be assessed for street paving costs. *Id.* at 378-79. Subsequently, in *Bi-Metallic Investment Co. v. Board of Equalization*, 239 U.S. 441 (1915), the Court held that due process did not require a hearing for citizens affected by a raise in property taxes. *Id.* at 445. The Court held that these citizens' rights were protected by the citizens' power, immediate or remote, over those who make the rule. *Id.* The Court distinguished *Londener* because that case concerned a small number of persons who were affected on individual grounds. 239 U.S. at 446; see Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 AD. L. REV. 377, 383 (1978).

¹⁰ The definitions of rulemaking and adjudication are basic to the APA. B. SCHWARTZ, *ADMINISTRATIVE LAW* 142-43 (1976) [hereinafter cited as B. SCHWARTZ]; see Kestenbaum, *Rulemaking Beyond APA: Criteria for Trial-Type Procedures and the FTC Improvement Act*, 44 GEO. WASH. L. REV. 679, 682 (1976) [hereinafter cited as Kestenbaum]. Rulemaking is defined as "the process for formulating, amending, or repealing a rule," 5 U.S.C. § 551(5) (1976), while adjudication is defined as "the agency process for the formulation of an order." *Id.* § 551(7). The distinction is, therefore, between the type of administrative action to be taken, either a rule or an order. An order is defined as an agency's final disposition in a matter other than a rulemaking. *Id.* § 551(6). Thus, the distinction between rulemaking and adjudication turns on the definition of "rule." The APA defines rule as "an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy." *Id.* § 551(4).

Justice Holmes, in *Prentis v. Atlantic Coast Line*, 221 U.S. 210 (1908), dealt with the problem of classifying an administrative action as rulemaking or adjudication. In a challenge to a rulemaking proceeding by the Virginia State Corporation Commission, Holmes noted that an adjudication investigates, declares and enforces liabilities on present or past facts and under laws that already exist. Holmes characterized legislative or rulemaking activity as prospective in nature because such activity changes existing conditions by promulgating a new rule. Since the action in *Prentis* involved setting a rate for the future, Holmes classified the act as legislative or rulemaking and therefore not adjudicative. *Id.* at 226; see B. SCHWARTZ, *supra* § 55 at 144-45; ATTORNEY GENERAL'S REPORT ON THE ADMINISTRATIVE PROCEDURE ACT 14 (1947).

¹¹ In *Texaco, Inc. v. F.T.C.*, 336 F.2d 754, 760-63 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965), the court disqualified a commissioner from a proceeding because of a public speech that indicated that he had already determined the defendant's guilt. See K. DAVIS, *supra* note 4, § 12.01 at 131. The determination of a commissioner's disqualification for prejudging the facts of a case may depend upon whether the facts involved are "legislative facts" or "adjudicative facts." See *id.* § 15.03 at 353-64; *Bias, supra* note 5, at 894-95.

¹² In *FTC v. Cement Institute*, 333 U.S. 683 (1948), the Commission had indicated that multiple basing point systems violated the Sherman Act before it brought an action against the defendant on these same grounds. *Id.* at 700-03. The Supreme Court held that the Commission's prior conduct was not grounds for disqualification because the opinion concerned an issue of law. *Id.*; see K. DAVIS, *supra* note 4, § 12.01 at 131; *Regulator Disqualification, supra* note 6, at 1107.

¹³ See note 10 *supra*.

disqualification. Since rulemaking is prospective, a petitioner charging bias in a rulemaking proceeding faces the almost impossible task of showing that a commissioner's predisposition as to past events should disqualify that commissioner from a proceeding which only affects the future.¹⁴ Congress relied on the basic distinction between rulemaking and adjudication in structuring the Administrative Procedure Act (APA).¹⁵ Despite the APA's effort to clarify the two administrative procedures, however, the distinction between rulemaking and adjudication has remained elusive.¹⁶

Recently, the courts as well as Congress, have blurred the already fuzzy APA distinction between rulemaking and adjudication in certain agency proceedings by imposing a variety of procedures which do not fit the traditional APA scheme.¹⁷ One of these hybrid procedures is included

¹⁴ See *Regulator Disqualification*, *supra* note 6, at 1199; note 10 *supra*.

¹⁵ 5 U.S.C. §§ 551-59 (1976). The APA distinction between rulemaking and adjudication turns on the definition of "rule." See note 10 *supra*.

The APA provides two types of procedures for the promulgation of rules by administrative agencies. The first is an informal notice and comment rulemaking procedure which requires the agency to publish notice of the proposed rulemaking, to give interested persons the opportunity to submit written or oral comments and to include a concise general statement of the basis and purpose of the final rules. 5 U.S.C. § 553 (1976). Informal rulemaking procedures are applicable to most rulemaking authority given to federal agencies. R. Hamilton, *Procedures for the Adoption of Rules of General Applicability, The Need for Procedural Innovation in Administrative Rulemaking*, 60 CAL. L. REV. 1276, 1276 (1972).

The second type of procedure is a formal or trial proceeding. When a statute requires an agency to make rules "on the record after opportunity for an agency hearing," the APA requires a hearing to present evidence, give rebuttal and provide cross-examination to ensure a full and true disclosure of the facts. The agency must promulgate the rule on substantial evidence from the whole record. 5 U.S.C. §§ 554, 556, 557 (1976); see *Phillips Pet. Co. v. FPC*, 475 F.2d 842, 851 (10th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974).

Professor Antoni Scabia, former chairman of the Administrative Conference of the United States, has pointed out that every statement is of either general or particular applicability, and all agency actions are designed to implement, interpret, or prescribe law as policy. A. Scabia, Vermont Yankee; *The APA, The D.C. Circuit, And The Supreme Court*, 1978 Sup. Ct. Rev. 345, 383 (1978) [hereinafter cited as A. Scabia]. The only limiting part of the definition of rulemaking therefore, is that dealing with future effect. *Id.* Professor Scabia criticizes this temporal classification of proceedings, traceable to Justice Holmes' opinion in *Prentis v. Atlantic Coast Line*, 211 U.S. 210 (1908), as absurd. See note 16 *infra*.

¹⁶ *United States v. Florida East Coast Ry.*, 410 U.S. 224, 245 (1973); see *Bell Tel. Co. v. FCC*, 503 F.2d 1250, 1268 (3rd Cir. 1974). The *Bell* court noted that an attempt to draw a line between adjudication and rulemaking is unresponsive to the problems in a given case. *Id.* at 1268 n.26.

¹⁷ Prior to 1978, the courts actively imposed additional procedural requirements on administrative agencies beyond those of the relevant statute. See *Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1015-16 (D.C. Cir. 1971) (tomato importers entitled to oral presentation on appeal of dispute concerning allowable size of tomatoes); *Marine Space Enclosures, Inc. v. Federal Maritime Comm'n*, 420 F.2d 577, 582-84 (D.C. Cir. 1969) (Federal Maritime Commission required to hold appropriate hearing before acting to disapprove, cancel or modify unjustly discriminatory agreement); *American Airlines, Inc. v. CAB*, 359 F.2d 624, 632 (D.C. Cir. 1966) (court may require adjudicatory procedures in certain cases despite absence of congressional authorization).

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,

in the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1974 (Act),¹⁸ which empowers the FTC to prescribe specific rules defining unfair or deceptive acts in or affecting commerce.¹⁹ Since the FTC procedure is not a classic rulemaking or adjudication, the courts' usual analysis for determining whether a commissioner should be disqualified is not applicable.²⁰ In *Association of National Advertisers, Inc. v. Federal Trade Commission*,²¹ the District of Columbia Circuit Court clar-

435 U.S. 519 (1978), however, the Supreme Court indicated that reviewing courts could not impose procedural requirements upon federal agencies conducting rulemaking proceedings. In *Vermont Yankee*, the Atomic Energy Commission had instituted a rulemaking proceeding to consider the environmental effects associated with uranium in the individual cost-benefit analysis for nuclear reactors. *Id.* at 528. The Commission had issued a rule and held that since the environmental effects of uranium were insignificant, the rule did not apply to an earlier licensing proceeding. *Id.* at 530. On appeal, the D.C. Circuit overturned the rule and held that, although the AEC had employed all the procedures required by the informal rulemaking provision of the APA, 5 U.S.C. § 553 (1976), the proceedings were inadequate. 435 U.S. at 535. The Supreme Court concluded that § 553 establishes the maximum procedural requirements which Congress wishes to impose on agencies. Reviewing courts, therefore, are not free to impose additional procedural rights, although the agencies themselves may. *Id.* at 523-25; see A. Scabia, *supra* note 15, at 356-75. Professor Davis has contended that *Vermont Yankee* is limited to its facts and the Court's sweeping language which forbids courts from supplementing the procedural requirements of § 553 does not apply to other situations. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6: 36 at 609-10 (2d ed. 1978).

Several statutes impose stricter procedures than § 553 but less than the full requirements of formal proceedings under §§ 556 and 557. See note 14 *supra*; 15 U.S.C. § 2058 (1976) (Consumer Product Safety Act); 15 U.S.C. § 2605 (1976) (Toxic Substances Control Act); 29 U.S.C. § 655 (1976) (Occupational Safety and Health Act); 15 U.S.C. § 57 (1976) (Magnuson-Moss Warranty—Federal Trade Commission Improvement Act); W. Pedersen, *The Decline of Separation of Functions in Regulatory Agencies*, 64 VA. L. REV. 991, 1011 (1978) [hereinafter cited as Pedersen].

¹⁸ 15 U.S.C. § 57(a) (1976).

¹⁹ *Id.* Prior to the Magnuson-Moss Act, the District of Columbia Circuit Court upheld the FTC's power to make substantive rules in *National Pet. Refiners Ass'n v. FTC*, 482 F.2d 672, 678-81, 697-98 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). Congress imposed procedural limitations on the Commission's rulemaking power under Magnuson-Moss which requires the Commission to proceed in accordance with § 553 of the APA and also:

- (1) to publish a notice of proposed rulemaking stating with particularity the reason for the proposed rule.
- (2) to make all submissions publicly available with no provision for rulemaking without an opportunity for public comment.
- (3) to provide an opportunity for an informal hearing where interested parties may present their position and if the Commission determines that there are disputed issues of material fact it is necessary to resolve their cross examination of persons the Commission determines to be appropriate and to be necessary for a full and true disclosure of the issues shall be allowed.
- (4) to incorporate in any rule a statement of its basis and purpose including the manner in which the arts or practices are deceptive and the economic effect of the rule.

See *Recommendations of the Administrative Conference of the United States*, 44 Fed. Reg. 38818-19 (1979) (to be codified in 1 C.F.R. § 305.79-1) [hereinafter cited as *Conference Report*].

²⁰ See text accompanying note 10 *supra*.

²¹ [1980] 1 Trade Cas. (CCH) ¶ 63,098 (1979).

ified the due process requirements which disqualify an FTC commissioner for bias²² from the hybrid rulemaking proceeding under section 18 of the Act.²³

In 1978, the FTC published a notice of a proposed children's advertising rulemaking proceeding.²⁴ The proposed rule was intended to limit or eliminate the advertising of sugared food products to children who are too young to evaluate commercials objectively.²⁵ Before the rulemaking proceedings began, several trade associations and companies petitioned FTC Chairman Michael Pertschuk to recuse himself from the proceeding.²⁶ The petitioners claimed that Pertschuk had prejudged factual issues necessary to a fair determination of the rulemaking.²⁷ Further, the petitioners claimed that Pertschuk had created the appearance of prejudice and bias. The petitioners cited interviews, speeches, and letters as evidence of Chairman Pertschuk's prejudice and bias prior to the children's advertising rulemaking proceeding.²⁸ The evidence included a speech by Pertschuk which stressed the manipulation of children's attitudes by techniques such as fantasy and animation.²⁹ Pertschuk refused to remove himself voluntarily from the proceeding. Five days later, the Commission, without Pertschuk participating, also determined that Pertschuk need not disqualify himself.³⁰

The affected parties next petitioned the District of Columbia District Court to disqualify Pertschuk and issue preliminary and permanent injunctions barring Pertschuk's participation.³¹ The district court applied the standard for disqualification announced by the D.C. Circuit in *Cinderella Career and Finishing Schools, Inc. v. FTC.*³² Under *Cinderella*,

²² See note 8 *supra*.

²³ See note 9 *supra*.

²⁴ 43 Fed. Reg. 17, 967 (1978). In compliance with the Magnuson-Moss Act, the FTC's notice of a proposed rulemaking regarding children's advertising set forth the reason for the proposed rule. See note 18 *supra*.

²⁵ The Commission reported that television advertising of any product directed to children who are too young to evaluate commercials may be unfair and deceptive under the FTC Act. 16 C.F.R. § 461 (1978). For a review of federal agencies' attempts to regulate advertising and limit its effect on children, see generally Thain, *Suffer The Hucksters To Come Unto the Little Children? Possible Restriction of Television Advertising To Children Under Section 5 of the Federal Trade Commission Act*, 56 B.U.L. REV. 651 (1976).

²⁶ The organizations that petitioned Chairman Pertschuk to recuse himself from the proposed children's advertising rulemaking included the Association of National Advertisers, Inc., the American Association of Advertising Agencies, Inc., and the Toy Manufacturers of America, Inc. The Kellogg Company later joined in the effort to disqualify Chairman Pertschuk. [1980] 1 Trade Cas. (CCH) ¶ 63,098, at 77,463.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Address by FTC Chairman Michael Pertschuk, Action for Children's Television Research Conference, in Boston (Nov. 8, 1978).

³⁰ [1980] 1 Trade Cas. (CCH) ¶ 63,098, at 77,463.

³¹ *Id.*

³² 425 F.2d 583 (D.C. Cir. 1970). In *Cinderella*, the FTC filed a complaint against a career and finishing school for false and deceptive advertising under § 5 of the FTC Act.

the court may disqualify an agency commissioner from adjudicative proceedings if a disinterested observer may conclude that he has prejudged the facts as well as the law of a particular case.³³ The district court applied the *Cinderella* standard,³⁴ despite the fact that *Cinderella* involved an adjudication rather than a rulemaking proceeding.³⁵ The district court in *National Advertisers* stressed the adjudicative aspects of Magnuson-Moss rulemaking, including the possibility of cross-examination and the right to review on the whole record, as support for applying an adjudicative standard.³⁶ The district court held that, under *Cinderella*, Pertschuk's continued participation in the proceeding violated the petitioners' due process rights.³⁷

On appeal, the District of Columbia Circuit Court reversed, holding that the *Cinderella* standard was not applicable to a section 18 Magnuson-Moss rulemaking proceeding.³⁸ The court emphasized that despite the adjudicatory characteristics of section 18,³⁹ the product of a section 18 proceeding was a rule.⁴⁰ Therefore, a higher standard than the *Cinderella* adjudication standard should apply.⁴¹ The court held that due process requires disqualification only when a petitioner convincingly shows that a commissioner has an unalterably closed mind on matters

The complaint charged that the school falsely advertised that the school was a college, that all of the school's graduates assumed executive positions, and that students at the school could qualify as airline stewardesses. *Id.* at 584 n.1. Before the adjudication proceedings began, Federal Trade Commissioner Dixon, in a speech on the obligation of newspapers to screen ads, stated, "What about carrying ads that offer college educations in five weeks . . . or becoming an airline's hostess by attending a charm school? . . . Granted that newspapers are not in the advertising policies business, their advertising managers are savvy enough to smell deception when the odor is strong enough." *Id.* at 590. After the Commission, with Dixon participating, found that the school's advertising was deceptive, the D.C. Circuit held that Dixon should have been disqualified from the adjudicatory proceeding. *Id.* at 592; see *Texaco, Inc. v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964) *vacated on other grounds*, 381 U.S. 739 (1965); *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 468-69 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959).

³³ 425 F.2d at 591. *Cinderella* stressed that, "an administrative hearing must be attended, not only with every element of fairness but with the very appearance of complete fairness." 425 F.2d at 591 (*quoting* *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962)). See *Regulator Disqualification*, *supra* note 6, at 1214.

³⁴ See note 32 *supra*.

³⁵ *Id.*

³⁶ 460 F. Supp. 996, 997 (D.D.C. 1978).

³⁷ 460 F. Supp. at 999; see *Texaco, Inc. v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964) *vacated on other grounds*, 381 U.S. 739 (1965).

³⁸ [1980] 1 Trade Cas. (CCH) ¶ 63,098 at 77,466-68; see *Hercules, Inc. v. EPA*, 598 F.2d 91 (D.C. Cir. 1978). In *Hercules*, the D.C. Circuit held that an Environmental Protection Agency's regulation limiting discharge into waterways was the result of a rulemaking proceeding under the APA, despite review under the substantial evidence standard. *Id.* at 118-19.

³⁹ See note 19 *supra*.

⁴⁰ [1980] 1 Trade Cas. (CCH) ¶ 63,098 at 77,466-68

⁴¹ See text accompanying note 10 *supra*.

which are critical to the rulemaking.⁴² The D.C. Circuit in *National Advertisers* held that an unalterably closed mind test is necessary to allow rulemakers to perform their policy-based functions.⁴³ The circuit court criticized the lower court's classification of the section 18 proceeding as hybrid,⁴⁴ and held that section 18 was included in the APA distinction between rulemaking and adjudication.⁴⁵

The circuit court also reasoned that the *Cinderella* standard should not apply because the facts to be determined in the present case were "legislative facts" rather than "adjudicative facts."⁴⁶ The court held that the petitioners had not convincingly demonstrated that Pertschuk had an unalterably closed mind on matters critical to the proceedings.⁴⁷ The court therefore reversed the lower court and allowed Commissioner Pertschuk to participate in the proceeding.⁴⁸

The majority in *National Advertisers* chose an all or nothing approach to the due process guarantees applicable to a section 18 rulemaking by insisting that the proceeding be categorized as either rulemaking or adjudication.⁴⁹ As the *National Advertisers* dissent emphasized, the precise purpose of the section 18 proceeding was to transcend the APA rulemaking-adjudication scheme,⁵⁰ thereby insuring that fair rules could

⁴² [1980] 1 Trade Cas. (CCH) ¶ 63,098 at 77,475.

⁴³ *Id.*

⁴⁴ [1980] 1 Trade Cas. (CCH) ¶ 63,098 at 77,466.

⁴⁵ *Id.* at 77,471.

⁴⁶ [1980] 1 Trade Cas. (CCH) ¶ 63,098 at 77,468-70. The court characterized adjudicative facts as facts concerning the immediate parties and legislative facts as general facts without reference to specific parties. *Id.* Professor Davis has described adjudicative facts as facts which relate to the parties, their activities, their properties and their businesses. Adjudicative facts are the facts which normally go to the jury in a jury trial. Legislative facts, according to Davis, are general and do not concern the immediate parties. Legislative facts help the tribunal determine the content of the law and determine what course of action to take. DAVIS, *supra* note 4, § 15.03 at 353. Professor Davis's distinction between adjudicative and legislative facts is of little aid in some cases because the distinction encompasses the ultimate question of what is at issue, law or policy. N. Nathanson, Book Review, 70 YALE L. J. 1210, 1211 (1961); see B. SCHWARTZ, *supra* note 10, at 202-03; W. Pedersen, *supra* note 17, at 1011-13.

Professor Davis has acknowledged that the distinction may not always be helpful. He has conceded that some facts may be unclassifiable, and has proposed a third category of "unclassifiable" facts to complement his earlier distinction. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 12:3 at 413 (2d ed. 1978).

⁴⁷ See text accompanying note 38 *supra*. The Supreme Court, in *FTC v. Cement Institute*, 333 U.S. 683, 701-03 (1948), held that the Commission would not be disqualified where the minds of its members were not irrevocably closed on the subject of the defendant's activities. See note 12 *supra*.

⁴⁸ [1980] 1 Trade Cas. (CCH) ¶ 63,098 at 77,478. Chairman Pertschuk withdrew from the children's television advertising rulemaking proceeding after the circuit court decision in *National Advertisers*. The chairman stated that despite the opinion upholding his participation, his withdrawal was in the public interest. [1980] 420 TRADE REG. REP. (CCH) 3.

⁴⁹ [1980] 1 Trade Cas. (CCH) ¶ 63,098 at 77,484 (MacKinnon, J., dissenting and concurring).

⁵⁰ *Id.* at 77,485. The Administrative Conference of the United States analyzed the hy-

be passed without limiting the FTC's effectiveness.⁵¹ Section 18 provides for formal notice and comment rulemaking, with cross-examination and a review on the record.⁵² In addition, Congress specifically intended that the APA would not encompass the section 18 proceeding.⁵³

Therefore, the standard for disqualification should not be determined by the court's classification of the proceeding as an APA rulemaking or adjudication.⁵⁴ A due process analysis of the standard for disqualification should begin with the uniqueness of the section 18 proceeding.⁵⁵ The circuit court characterized the product of the section 18 proceeding as a rule and applied the appropriate disqualification standard accordingly.⁵⁶ Relying on the label of rule, the circuit court disguised the direct effect of section 18 proceedings on individuals.⁵⁷

Even more significant than the due process implication,⁵⁸ is the im-

brid nature of Magnuson-Moss rulemaking requirements and contrasted the requirements with notice and comment requirements for informal rulemaking under § 553 of the APA. *Conference Report*, *supra* note 19, at 38817-18.

⁵¹ The goals in administrative proceedings should be overall fairness and accuracy, as well as efficient resolution of the issues and participant satisfaction. P. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279 (1978).

⁵² See note 19 *supra*.

⁵³ *Id.* During debate on the Magnuson-Moss Act in the House of Representatives, Representative Broyhill of North Carolina explained that the Act did not transform rulemaking proceedings into adjudicatory proceedings as those terms had been understood under the Administrative Procedure Act. "Rather, we have tried to develop a wholly new type of proceeding." 120 CONG. REC. 41407 (1974).

The D.C. Circuit has also treated the rulemaking provisions of Magnuson-Moss as hybrid in other contexts. In *FTC v. Brigadier Industries Corp.*, 47 Ad. L. 2d (P&F), 78 (1979), the circuit considered a challenge to the Commission's power to issue subpoenas *duces tecum* in a rulemaking proceeding on behalf of interested persons in accordance with the FTC's rules of practice. *Id.* at 82. Responding to the appellant's argument that the use of a subpoena transformed the rulemaking into an adjudication, the court held that the Magnuson-Moss Act incorporates a totally new type of hybrid proceeding, which is between conventional rulemaking and adjudication. *Id.* at 87.

⁵⁴ See text accompanying note 16 *supra*.

⁵⁵ See notes 19 & 53 *supra*.

⁵⁶ [1980] 1 Trade Cas. (CCH) ¶ 63,098 at 77,471.

⁵⁷ Senator Taft, during Senate debate on Magnuson-Moss, noted that the provisions relating to rulemaking were very broad. Senator Taft expressed concern that, "the actual rights of individuals and business concerns are involved here." 120 CONG. REC. 40723 (1974); see note 13 *supra*. After the D.C. Circuit in *National Pet. Refiners Ass'n v. FTC*, 482 F.2d 672, 698 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974), held that the FTC had substantive rulemaking power, see note 19 *supra*, Congress recognized the due process implications of that power by shifting its debate on Magnuson-Moss from whether the Commission should have that power to what limitations should be placed on it. See *Conference Report*, *supra* note 18, at 38818.

⁵⁸ See text accompanying note 8 *supra*. The D.C. Circuit has recognized due process guarantees in the area of *ex parte* contacts. In *Home Box Office, Inc. v. FCC*, the circuit court applied due process restrictions on contacts an administrative decision-maker may have with interested parties. 567 F.2d 9, 57 (D.C. Cir.) (*per curiam*), *cert. denied*, 434 U.S. 829 (1977). The court held that after notice of a rulemaking proceeding has been given, an agency official who may be involved in the decision-making process should refuse to discuss matters relevant to the proceeding with any interested party. *Id.* at 57. Subsequently, in

part of the section 18 procedures for evaluating congressional intent regarding administrative bias during a section 18 proceeding.⁵⁹ Congress intended the special procedures of section 18 to provide a fair and efficient proceeding.⁶⁰ The provisions which call for presentation of evidence, limited cross examination, and review of agency action on the entire record demonstrate this congressional commitment to fairness.⁶¹ A proceeding cannot be fair if the administrator is openly prejudiced as to what decision he will make, especially when the prejudice is as blatant as Chairman Pertschuk's.⁶²

Equally important, open bias results in an inefficient procedure. If the affected parties believe that the Commission is biased, they will engage in delay tactics or attempt to create a record of reviewable procedural er-

Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977), the court narrowed the scope of *Home Box Office*. The *Action* court held that *ex parte* contacts should be prohibited only in proceedings which involve "competing claims to a valuable privilege." *Id.* at 477; see Note, *Ex Parte Contacts in Informal Rulemaking: Home Box Office, Inc. v. FCC and Action for Children's Television v. FCC*, 65 CAL. L. REV. 1315, 1315-16 (1977).

Proposed legislation to amend the Federal Trade Commission Act would require meetings with commissioners and rulemaking staff or outside parties once a rulemaking proceeding has begun. S. REP. NO. 96-500, 96th Cong., 1st Sess. 22 (1979).

⁵⁹ See A. Scabia, *supra* note 15, at 408-09 n. 255.

⁶⁰ The legislative history of the Magnuson-Moss Act clearly shows congressional concern with insuring the fairness of FTC rulemaking proceedings. Representative Broyhill of North Carolina, during House discussion of the Act, noted that Congress was relying on the common sense and fairness of the FTC and the review function of the courts. Representative Broyhill emphasized that the courts were not to affirm rules if "the FTC's handling of rebuttal evidence and cross examination has prevented full disclosure of material issues of fact and thus prevented a fair determination of the entire proceedings." 120 CONG. REC. 41407 (1979).

Similarly, Senator Magnuson, during Senate debate on the Act, stated that the purpose of the rulemaking proceeding was to assure the establishment of fair rules without allowing the affected parties' participation to reduce the Commission's effectiveness. 120 CONG. REC. 40713 (1979).

⁶¹ One of the approaches Congress took in conferring agency rulemaking power was "to heighten the element of reasoned decision-making in trade regulation rulemaking." *A report to the Administrative Conference of the United States by the Special Project for the Study of Rulemaking Procedures Under the Magnuson-Moss Warranty-Federal Trade Commission Act 7* (May 1979) [hereinafter cited as *Special Project*]. This report was prepared for consideration by the Committee on Rulemaking and Public Information of the Administrative Conference of the United States, however, and represents only the views of the authors, and not necessarily those of the Conference, the Committee, or the Office of the Chairman.

A more recent expression of congressional intent regarding the Magnuson-Moss rulemaking procedures may be garnered from pending legislation to amend the Federal Trade Commission. The legislation is aimed at the rulemaking authority of the FTC, intending to eliminate "unfairness" as a basis for FTC rulemaking. The legislation would require the FTC to publish the text of any rule at the commencement of a rulemaking proceeding. The Senate Committee on Commerce Service and Transportation specifically noted that the legislation would require termination of the children's advertising rulemaking proceedings. S. REP. NO. 96-500, 96 Cong., 1st Sess. 2-3 (1979).

⁶² See text accompanying notes 26-29 *supra*.

ror.⁶³ Instead of providing an opportunity to challenge or support a rule on the facts, such a proceeding would be reduced to a game played at the expense of the taxpaying consumer whom the FTC is legislatively empowered to protect.⁶⁴ The legislative history of the Act and the adverse effects of an administrator's open bias on the efficiency of the proceeding demonstrate that the standard for disqualification should be lower than the standard used by the circuit court in *National Advertisers*.⁶⁵

The proper standard of disqualification from a rulemaking or hybrid rulemaking proceeding should be responsive to a commissioner's obligation to remain open to different viewpoints while retaining the capacity to take action in response to his perception of public policy.⁶⁶ By focusing on the proper role of the administrators, instead of agency procedures,⁶⁷ courts could avoid the analytical quagmire of distinguishing adjudication from rulemaking and legislative fact from adjudicative fact.⁶⁸ *Cinderella* held that administrative hearings must be attended with every subjective element of fairness, as well as the objective appearance of complete fairness.⁶⁹ *National Advertisers* rejected the objective portion of *Cinderella* as inapplicable to rulemaking proceedings.⁷⁰ The *National Advertisers* court held that an administrator must be disqualified from a rulemaking only when a petitioner demonstrates that the commissioner has an irrevocably closed mind on matters critical to the proceeding.⁷¹ The closed mind standard is overly protective of a commissioner's role as a policy advocate in a rulemaking.⁷² Courts could allow commissioners sufficient freedom as policy advocates in hybrid rulemaking proceedings without requiring that petitioners prove actual bias,

Cinderella's premise was that administrative hearings must be attended with the very appearance of fairness.⁷³ According to one commentator, this premise translates into an objective standard which would require an administrator to be disqualified if a disinterested observer would conclude that an administrator's actions show he is irrevocably disposed on relevant policy issues.⁷⁴ Applying such an objective standard in *National Advertisers*, clearly Chairman Pertschuk was irrevocably disposed

⁶³ *Special Project*, *supra* note 61, at 25.

⁶⁴ *See id.* The Federal Trade Commission Act was not originally interpreted as a consumer protection statute. Congress made it clear that the Commission's protection extended to consumers in the Wheeler-Lea Act of 1938. *Conference Report*, *supra* note 17, at 38818.

⁶⁵ *See* text accompanying notes 60-63 *supra*.

⁶⁶ *See* note 4 *supra*; *Regulator Disqualification*, *supra* note 6, at 1206.

⁶⁷ *Regulator Disqualification*, *supra* note 6, at 1214.

⁶⁸ *See* note 46 *supra*.

⁶⁹ 425 F.2d at 591 (*quoting* *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962)); *see* note 33 *supra*.

⁷⁰ [1980] 1 Trade Cas. (CCH) ¶ 63,098 at 77,473.

⁷¹ *Id.* at 77,475.

⁷² The *National Advertisers* majority emphasized the functions of administrators as policy makers. *See* note 4 *supra*.

⁷³ *See* note 33 *infra*; *Regulator Disqualification*, *supra* note 6, at 1214-16.

⁷⁴ *Regulator Disqualification*, *supra* note 6, at 1214-16.

on the issue of regulating children's advertising and should have been disqualified.⁷⁵ An objective test such as the irrevocably disposed standard is the proper compromise between allowing administrators in hybrid proceedings to overspeak themselves and requiring them to be little more than unfeeling receptacles of judicial power.

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⁷⁵ See text accompanying notes 26-29 *supra*.