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BIAS IN *WEBSTER* AND BIAS IN ADMINISTRATIVE LAW—THE RECENT JURISPRUDENCE

Bernard Schwartz*

"Some courts," wrote the Supreme Court of Georgia over a century ago, "live by correcting the errors of others and adhering to their own.... [T]hey must discover error abroad and be discreetly blind to its commission at home."[1] This comment is peculiarly appropriate in light of the Supreme Court of Oklahoma's 1994 decision in *Southwestern Bell Telephone Co. v. Oklahoma Corporation Commission.*[2] That case bids fair to become a leading case on bias in administrative agencies — but unfortunately as an example of an egregiously wrong decision on the subject. However, before we discuss the case it is necessary to say something about bias in agencies and its relationship to the rule-making/adjudication distinction that is so crucial throughout administrative law.

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1. Ellison v. Georgia R.R. & Banking, 13 S.E. 809, 810 (Ga. 1891).
2. 873 P.2d 1001 (Okla.), *cert denied*, 115 S. Ct. 191 (1994).

I. RULE-MAKING VERSUS ADJUDICATION

It is hornbook administrative law that "a 'fair trial in a fair tribunal is a basic requirement of due process.' . . . This applies to administrative agencies which adjudicate, as well as to courts."[3] An administrative decision may not stand if either the hearing officer or the agency was infected with legal bias. This has been a basic administrative law principle for over a century. Justice Field declared, as early as 1884:

> It need hardly be said that it is an elementary principle of natural justice that no man shall sit in judgment where he is interested, no matter how unimpeachable his personal integrity. The principle is not limited to cases arising in the ordinary courts of law in the regular administration of justice, but extends to all cases where a tribunal of any kind is established to decide upon the rights of different parties.[4]

In the same case, the Court indicated that the rule against bias applied to an agency authorized to fix the rates charged by a company supplying water to San Francisco.[5] Such an agency, said the Court, may not act in "violation of the principle that no man shall be a judge in his own case."[6]

Application of the rule against bias in administrative agencies turns upon what the Supreme Court has called the "recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other."[7] This fundamental distinction between rule-making and adjudication is basic in administrative law.

As a starting point, there is a constitutional parallel between rule-making and statute-making procedural requirements. Agencies engaged in rule-making are, as a general proposition, no more subject to constitutional procedural requirements than is the legislature engaged in enacting a statute.[8] "Proceedings which are legislative in nature do

3. Withrow v. Larkin, 421 U.S. 35, 46 (1975) (citing *In re* Murchison, 349 U.S. 133, 136 (1955)).

4. Spring Valley Water Works v. Schottler, 110 U.S. 347, 364 (1884).

5. *Id.* at 354; *see also id.* at 364 (Field, J., dissenting).

6. *Id.* at 354.

7. United States v. Florida E. Coast Ry., 410 U.S. 224, 245 (1973).

8. *See* Association of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1166 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

not implicate judicial processes and do not require application of the judicial standards" that govern agency adjudications.[9]

Accordingly, courts have held that rule-making is not governed by the strict rule against bias that prevails in adjudicatory proceedings.[10] Judicial roles must not be imposed upon administrators when they perform functions very different from those of judges. The model of a completely neutral and detached adjudicator is not the appropriate model for an administrator exercising a legislative function, who translates broad statutory commands into concrete social policies. The disqualification of a rule-maker will not be ordered "absent the most compelling proof that he is unable to carry out his duties in a constitutionally permissible manner."[11]

The quote above is from *Association of National Advertisers v. FTC*[12] — now the leading case on the matter. The case arose out of a rule-making proceeding instituted by the FTC under the Magnuson-Moss Act.[13] The Commission's proposed regulations imposed substantial restrictions on television advertising aimed at children (hence they were popularly dubbed the "Kid Vid" rules). Plaintiffs moved to disqualify FTC Chairman Pertschuk from participating in the proceeding because he had so prejudged the issues involved that he could not judge them fairly.[14] The motion was based upon statements made by Pertschuk in speeches, articles, interviews, memoranda, and correspondence which showed that he had already decided the issues involved in the proceeding.[15] In particular, plaintiffs cited a speech in which he had asserted that children's TV advertising might be deceptive, that children needed protection from such advertising, and that the FTC would take necessary protective measures.[16] After unsuccessfully presenting the issue to the commission, plaintiffs sought a court order barring Pertschuk from further participation in the proceeding.[17]

9. Southwestern Bell Tel. Co. v. Oklahoma Corp. Comm'n, 873 P.2d 1001, 1005 (Okla.), *cert. denied*, 115 S. Ct. 191 (1994).

10. United Farm Workers of Am. v. Arizona Agric. Employment Relations Bd., 1983 WL 21393 at *5, *reh'g granted and opinion withdrawn*, 707 F.2d 1023, *reh'g granted*, 727 F.2d 1475 (9th Cir. 1983).

11. Association of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1175 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

12. *Id.*

13. *Id.* at 1154 n.2.

14. *Id.* at 1155.

15. *Id.*

16. *Id.*

17. *Id.*

The district court granted plaintiffs' motions for summary judgment, holding that the FTC Chairman had demonstrated legal bias which required his disqualification.[18] Yet, even if the district court was correct in disqualifying an administrative adjudicator in similar circumstances, it should be stressed that the agency here was engaged, not in adjudication, but in rule-making. Should the agency in such case be held to the bias standard which governs adjudications? This was the crucial question decided by the court of appeals in the *National Advertisers* case.[19]

Answering in the negative, the appellate opinion of Judge Tamm stressed the difference between rule-making and adjudication.[20] "When a proceeding is classified as rule-making," it stated, "due process ordinarily does not demand procedures more rigorous than those provided by Congress."[21] The disqualification standard here must be consistent with this principle. It follows that "[w]e never intended the *Cinderella* rule [governing bias in adjudications[22]] to apply to a rule-making procedure such as the one under review."[23] On the contrary, the concept underlying the rule against bias for an adjudicator "is simply an inapposite role model for an administrator who must translate broad statutory commands into concrete social policies" — i.e. what the administrator does when engaged in rule-making.[24]

This case, involving "assertions of an agency head that he discerns abuses that may require corrective regulation,"[25] well illustrates why the adjudicatory bias standard should not apply to rule-making. As Judge Leventhal explained in a concurring opinion,

> [o]ne can hypothesize beginning an adjudicatory proceeding with an open mind, indeed a blank mind, a tabula rasa devoid of any previous knowledge of the matter. In sharp contrast, one cannot even conceive of an agency conducting a rule-making proceeding unless it had delved into the subject sufficiently to become concerned that there was an evil or abuse that required regulatory response.[26]

As already stated, *National Advertisers* turns upon the parallel between rule-making and the enactment of statutes. That parallel is

18. *Id.* at 1156.
19. *Id.* at 1168.
20. *Id.* at 1168-69.
21. *Id.* at 1165-66.
22. *See infra* notes 172-85 and accompanying text.
23. *National Advertisers*, 627 F.2d at 1168.
24. *Id.* at 1168-69.
25. *Id.* at 1176.
26. *Id.*

as true in a case where the rule against bias is at issue as in other cases. "Indeed, any suggestion that congressmen may not prejudge factual and policy issues is fanciful."[27] The legislative analogy requires the same result in the case of an administrator engaged in rule-making. However, the *National Advertisers* court did not follow the congressional analogy to its logical conclusion, that of an absolute refusal in any case to disqualify the administrator engaged in rule-making. Instead, the Court indicated that there are cases in which an administrator may be disqualified even in a rule-making proceeding.[28] That is true said Judge Tamm, when "the purpose of [the rule-making proceeding] would be frustrated if a Commission member had reached an irrevocable decision on whether a rule should be issued prior to the Commission's final action."[29] This means that in rule-making an administrator should "be disqualified . . . when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding."[30]

The possibility of disqualification under the unalterably closed mind test distinguishes the administrative rule-maker from the legislative statute-maker. The member of Congress or other legislator could not be disqualified, no matter how closed his mind may be before he votes on a pending bill. On the other hand, while there is a distinction between the administrator and the legislator concerning potential disqualification, that distinction may be one without practical difference. This is true because the unalterably closed mind test "establish[es] a legal principle that evidence of bias and prejudice would not be disqualifying unless it could surmount a fence that is horse high, pig tight and bull strong."[31]

In practice, it is virtually impossible to meet the court's test. This is shown by the *National Advertisers* case itself. FTC Chairman Pertschuk had plainly concluded that it was necessary to issue a rule imposing restrictions on TV advertising aimed at children.[32] From his prerule-making speeches, interviews, memoranda, and correspondence, "[c]an any reasonable person contend that such remarks do not

27. *Id.* at 1165.
28. *Id.* at 1170.
29. *Id.*
30. *Id.*
31. *Id.* at 1188 (MacKinnon, J., dissenting in part, concurring in part).
32. *See id.* at 1187-92.

indicate that he has prejudged TV Advertising and decided that it *exploits* children?"[33] Yet, the court concluded that Pertschuk's mind was not unalterably closed on the matter.[34] "The statements do not demonstrate that Chairman Pertschuk is unwilling or unable to consider rationally argument that a final rule is unnecessary."[35]

It is difficult, however, not to conclude that the FTC Chairman's "public statements repeatedly reveal fixed conclusions upon the primary issue that the agency proceeding contemplated would only be determined *after* the [rule-making proceeding]."[36] As a leading treatise puts it, "[i]f anyone ever evidenced an 'unalterably closed mind' . . . it was the FTC Chairman on the issue of children's advertising . . . ."[37] If Pertschuk did not display an unalterably closed mind, it is difficult to think of anyone who would meet the court's test.

II. RATE-MAKING AND BIAS

This brings us to *Southwestern Bell Telephone Co. v. Oklahoma Corporation Commission*[38] — the case referred to at the beginning of this article. That case arose out of a telephone rate hearing before the Commission.[39] Southwestern Bell sought a court order disqualifying a commissioner after he revealed that he had been secretly acting as an informant in an ongoing FBI investigation into allegedly improper conduct by company employees involving his fellow commissioners.[40] The Oklahoma court recognized that it might have "the power . . . to disqualify a corporation commissioner, if he were sitting in a *judicial* capacity."[41] However, "[r]ate hearings are legislative in nature."[42] To support this proposition, the court relied upon the 1908 case, *Prentis v. Atlantic Coast Line Co.*,[43] the Supreme Court's recent reaffirmation of

33. *Id.* at 1189.
34. *Id.* at 1174.
35. *Id.*
36. *Id.* at 1197 (emphasis in original).
37. 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.8 at 88 (3d ed. 1994).
38. 873 P.2d 1001 (Okla.), *cert. denied*, 115 S. Ct. 191 (1994). With the consent of the parties, this writer submitted a brief in support of the petition for certiorari. For a criticism of the denial of certiorari see Ernest Gellhorn, *Supreme Court Docket Skirts Critical Issues*, NAT'L L.J., Dec. 5, 1994, at A21.
39. *Id.* at 1004-05.
40. *Id.* at 1004.
41. *Id.* at 1008 (emphasis in original).
42. *Id.* at 1005.
43. 211 U.S. 210 (1908).

rate-making as a legislative act,[44] as well as Oklahoma decisions to the same effect.[45]

Since, according to the court, this was not a judicial proceeding in which the commissioner was performing an adjudicatory function, "due process requirements, including neutrality," were not demanded.[46] The proceeding, says the court,

> was unarguably legislative in nature, and while participating in it Commissioner Anthony was acting in a legislative capacity which did not require him to comply with judicial standards of conduct. Accordingly, this Court is without jurisdiction to disqualify Commissioner Anthony from participation in this or any other SWB rate hearing.[47]

It is undoubtedly true, as already seen, that the strict adjudicatory rule against bias does not apply in rule-making proceedings. The *National Advertisers* decision to that effect has been followed in more recent cases.[48] Nevertheless, one may wonder whether the commissioner in *Southwestern Bell*, who had served as an FBI informant against the company, would not come within the unalterably closed mind exception laid down by *National Advertisers*. Could such a commissioner really have an open mind in any proceeding involving the company against which he was informing?

More important is the *Southwestern Bell* court's answer to the question of whether the strict rule against bias is applicable to an agency engaged in rate-making. The United States Supreme Court confirmed a few years ago that rate-making is legislative in character.[49] However, that should be only the beginning, not the end, of the judicial inquiry. Rate-making, such as that in *Southwestern Bell*, may be legislative in character, yet it is normally particular in applicability since it involves the fixing of prices to be charged by utilities or carriers. When an agency fixes the rates charged by a telephone company, where there is only one company whose rates are being fixed, the impact on that company is virtually that of a judicial decision, and it has

44. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 371 (1989).

45. *Southwestern Bell*, 873 P.2d at 1005 (citing Turpen v. Oklahoma Corp. Comm'n, 769 P.2d 1309 (Okla. 1989); State, *ex rel.* Cartwright v. Southwestern Bell Tel. Co., 662 P.2d 675 (Okla. 1983); Chickasha Cotton Oil Co. v. Oklahoma Corp. Comm'n, 562 P.2d 507 (Okla. 1977); Wiley v. Oklahoma Natural Gas Co., 429 P.2d 957 (Okla. 1967)).

46. *Southwestern Bell*, 873 P.2d at 1006-07.

47. *Id.* at 1007.

48. Alaska Factory Trawler Ass'n v. Baldridge, 831 F.2d 1456, 1466 (9th Cir. 1987); Housing Study Group v. Kemp, 736 F. Supp. 321, 331 (D.D.C. 1990).

49. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350 (1989).

a due process right to be heard. Regardless of its theoretical legislative nature, the proceeding is an adversary one, with the company and the agency as opposing parties who can best present their sides in a trial-type format.

In particularized rate-making, the required hearing is an evidentiary one, governed by the requirements imposed upon such hearings in adjudicatory proceedings.[50] As the *Southwestern Bell* dissent points out, our administrative law by now has placed individual rate-making into a special category called on-the-record rule-making.[51] This phrase gives recognition to the accepted constitutional position — that the legislative process of individual rate-making requires adversarial, trial-type hearings. On-the-record rule-making is now acknowledged to be surrounded by a host of procedural safeguards[52] — including the rule against bias. That has been the established law since the 1884 Supreme Court decision in *Spring Valley Water Works v. Schottler*.[53] In that case, both the opinion of the Court and the dissent by Justice Field proceed upon the principle that "the rates shall be established by an impartial tribunal"[54] — one whose members are not infected by legal bias. To hold the contrary, as *Southwestern Bell* does, is to make a decision that, to put it charitably, is worse than a crime, it is a blunder — contrary to both established administrative law principles and all the jurisprudence on the matter. In rate-making, as in purely adjudicatory proceedings, "appellant was entitled to an impartial decision-maker who had not prejudged the issues."[55]

III. Adjudicatory Bias: Interest and Personal Bias

Without a doubt, a fair hearing in a fair forum is the basic right in an adjudicatory proceeding — whether in a court or an administrative agency. "When agency members are performing adjudicatory functions, they must abide by the same disqualification standards that are

50. Southwestern Bell Tel. Co. v. Oklahoma Corp. Comm'n, 873 P.2d 1001, 1004 (Okla.), *cert. denied*, 115 S. Ct. 191 (1994).

51. *Id.* at 1014 (Opala, J., dissenting).

52. *Id.* at 1025.

53. 110 U.S. 347, 364 (1884).

54. *Id.* at 363.

55. Michigan Intra-State Motor Tariff Bureau, Inc. v. Public Serv. Comm'n, 504 N.W.2d 677, 681 (Mich. Ct. App. 1993); *see also* New England Tel. & Tel. Co. v. Public Util. Comm'n, 448 A.2d 272 (Me. 1982).

applicable to judges."[56] The governing principle here is not the *National Advertisers* rule, but the strict rule against bias that is applicable in judicial proceedings. "Administrative decision-makers do not bear all the badges of independence that characterize an Article III judge, but they are held to the same standard of impartial decision-making."[57] Thus, the two types of legal bias that clearly require judges to recuse themselves: 1) financial interest and 2) personal bias or prejudice, will also disqualify administrative adjudicators.[58]

Gibson v. Berryhill[59] is the leading case showing that a financial interest requires an administrator to be disqualified. In *Gibson*, the Alabama Board of Optometry charged licensed optometrists with unprofessional conduct because they were employed by a corporation.[60] By statute, only members of the Alabama Optometric Association could be members of the Board, and the Association barred from its membership optometrists employed by others.[61] The Court held that the Board was disqualified by personal interest.[62] Success of the Board's efforts in the case would rebound to the personal benefit of the Board members since they competed with the optometrists employed by corporations. Therefore, the Board's financial interest created sufficient bias to cause disqualification.

The difficulty with *Gibson* is that *Friedman v. Rogers,*[63] a more recent case, rejected a due process attack upon the composition of the Texas Optometry Board where the governing statute required two-thirds of the agency members to be members of the professional organization of optometrists in private practice.[64] Can *Gibson* and *Friedman* be reconciled? I have attempted to do so by distinguishing the two cases.

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56. Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n, 844 S.W.2d 151, 164 (Tenn. Ct. App. 1992).

57. Barry v. Bowen, 825 F.2d 1324, 1330 (9th Cir. 1987); *see also Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, resolutions at art. 10, U.N. Doc. A/810 (1948) ("Everyone is entitled . . . to a fair . . . hearing by an . . . impartial tribunal, in the determination of . . . rights and obligations."); Heldman v. Sobol, 846 F. Supp. 285, 289 (S.D.N.Y. 1994).

58. *See* 28 U.S.C. § 455 1993) (stating a judge must disqualify himself "(1) Where he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding . . . [or] (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding.").

59. 411 U.S. 564 (1973).

60. *Id.* at 567-68.

61. *Id.* at 567.

62. *Id.* at 579.

63. 440 U.S. 1 (1979).

64. *Id.* at 17.

> In *Gibson* the Court examined whether personal interests precluded an impartial hearing after disciplinary proceedings were actually instituted. In *Friedman* the challenge to the Board's fairness did not arise from an actual disciplinary proceeding. Tying together both *Gibson* and *Friedman*, the result is that an agency composed of or dominated by representatives of those regulated is not per se invalid. However, its proceedings can be challenged on the ground of the members' personal interests.[65]

In other words, though "a general economic interest in the subject matter is insufficient to disqualify a decision-maker,"[66] that is not true where the decision in specific cases would result in possible personal benefit for the decision-maker.[67]

More recently, the Court has indicated that not everyone in an adjudicatory proceeding must be disqualified because of some pecuniary interest. According to *Marshall v. Jerrico, Inc.*,[68] the disqualification requirement does not apply to those engaged in the performance of prosecuting functions.[69] In that case it was claimed that the rule against bias was violated by a section of the Fair Labor Standards Act which provides money collected as civil penalties for employment of child labor must be returned to the Department of Labor as reimbursement for amounts expended in determining the violation.[70] The assistant regional administrator imposed a substantial fine on appellee for child labor violations.[71] After hearing, an administrative law judge reduced the fine.[72] The district court held that the statute's reimbursement provision created an impermissible risk of bias because a regional office's greater effort in uncovering violations could lead to an increased amount of penalties and a greater share of reimbursements for that office.[73] The Supreme Court reversed, holding that the financial interest bar was not applicable to the determinations of the assistant regional administrator, whose functions resemble those of a prosecutor more than those of a judge.[74] The strict requirements of

65. BERNARD SCHWARTZ, ADMINISTRATIVE LAW 341 (3d ed. 1991).

66. 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.8 at 73 (3d ed. 1994).

67. *See id.*

68. 446 U.S. 238 (1980).

69. *Id.* at 251-52.

70. *Id.* at 241.

71. *Id.* at 240.

72. *Id.* at 241.

73. *Id.* at 241-42.

74. *Id.* at 251-52.

neutrality, said the Court, cannot be the same for an administrative prosecutor as for an adjudicator, who makes the decision in the case.[75]

A recent case, *United States v. Edwardo-Franco*,[76] demonstrates how personal bias or prejudice works to disqualify an adjudicator. That case involved a drug prosecution against four Columbian nationals.[77] The judge made the following remarks about Colombians: "They don't have too much regard for Judges. They only killed 32 Chief Judges in that nation. Their regard for the judicial system, the men who run their laws, I'm glad I'm in America."[78] These remarks were held to be an indication of extrajudicial bias which demonstrated that defendants could not receive a fair trial.[79]

The same would be true of a comparable case in an administrative agency. Such blatant indications of personal bias are, however, rare. Ordinarily, it is difficult to demonstrate personal bias merely from adverse comments by an agency official. Thus, the fact that the hearing officer called petitioner's attorney "smart ass" and "nasty little fellow" was ruled not enough to show personal bias.[80] Similarly, bias was not shown by "remarks [at a hearing] by the chairperson and panel members that, albeit intended as humor, were made at the expense of the plaintiff," though the court did say that they "lend an air of impropriety and bias to the hearing."[81]

On the other hand, the hearing officer may demonstrate such partiality in conducting the hearing that personal bias may be presumed. The case usually cited to illustrate this, *NLRB v. Phelps*,[82] was decided over a half a century ago. In that case the NLRB examiner took over the prosecution, personally issuing a show cause order converting the proceeding into one against a corporation not named as respondent.[83] The court held that the actions of the examiner prevented a fair and impartial trial.[84]

There are comparable recent cases. In one, the hearing officer declared at the close of the state's evidence, "Okay, now. You have to

75. *Id.* at 250.
76. 885 F.2d 1002 (2d Cir. 1989).
77. *Id.* at 1005.
78. *Id.* at 1005.
79. *Id.* at 1007, 1010.
80. Neoplan USA Corp. v. Industrial Claim Appeals Office, 778 P.2d 312 (Colo. Ct. App. 1989).
81. Pet v. Department of Health Serv., 638 A.2d 6, 14 n.11 (Conn. 1994).
82. 136 F.2d 562 (5th Cir. 1943).
83. *Id.* at 564.
84. *Id.* at 567.

convince me that you're not guilty."[85] The court held that this statement showed an improper bias against the individual being tried.[86] In another case, the administrative law judge (ALJ) expressed constant impatience at plaintiff's procedural requests, meeting them with such comments as "That's a bunch of nonsense," and continually harassed plaintiff's attorney.[87] The court held that "there was not even the pretense of a full and fair hearing."[88]

May personal bias be shown by demonstrating that the agency adjudicator starts with the assumption that the case should be decided against the private party? Such a novel bias claim was raised in a recent Third Circuit case.[89] An unsuccessful claimant for disability benefits challenged the decision denying her benefits on the ground that the ALJ was biased against *all* disability claimants and was "inclined in every disability case to deny benefits."[90] The case was certified as a class action for all claimants who had received or would receive adverse decisions from this ALJ.[91] While the case was pending, the agency conducted its own investigation and, after a detailed examination of 212 of the ALJ's cases, concluded that the charge of bias against claimants was generally unfounded.[92] The court held that the district court could not properly conduct a trial and make findings of fact regarding the ALJ's alleged general bias.[93] The fact-finding role in a social security case is exclusively the agency's domain, and the district court has no fact finding role.[94] In this case, where the agency had conducted an investigation and issued a report, the proper remedy was to seek judicial review of the agency's findings.[95] In addition, there is the broader question of how to establish bias in such a case. The plaintiff, through discovery, had delved into the ALJ's decision-making process by questioning agency personnel who had assisted the ALJ in writing opinions and sought the ALJ's notes on cases he had decided.[96] According to the court, such an effort to prove an ALJ's thinking and decision-making process "would pose a substantial threat

85. *In re* Tumminia, 527 N.Y.S.2d 673, 675 (N.Y. Sup. Ct. 1988).
86. *Id.* at 675.
87. Rosa v. Bowen, 677 F. Supp. 782, 784-85 (D.N.J. 1988).
88. *Id.* at 785.
89. Grant v. Shalala, 989 F.2d 1332 (3d Cir. 1993).
90. *Id.* at 1334.
91. *Id.* at 1335.
92. *Id.* at 1336.
93. *Id.* at 1346.
94. *Id.*
95. *Id.*
96. *Id.* at 1344-45.

to the administrative process. Every ALJ would work under the threat of being subjected to such treatment if his or her pattern of decisions displeased any administrative litigant or group with the resources to put together a suit charging bias."[97]

IV. COMBINATION AND DIFFERENT ADJUDICATORY LEVELS

The combination of functions has been an outstanding feature of American administrative agencies since the Federal Trade Commission Act of 1914.[98] As a Senate critic described it during the debate on that statute, the proposed commission was being given "legislative, judicial, and executive powers . . . . [T]he powers of all three of the coordinate branches of the Government are proposed to be delegated to and vested in this commission."[99] In particular, the FTC-type agency combines the functions of investigator, prosecutor, and judge.[100] "The Federal Trade Commission investigates charges of business immorality, files a charge in its own name as plaintiff, and then decides whether the proof sustains the charges it has filed."[101] The same concentration of functions exists in many other agencies. Unlike a court, which occupies an arbitral position between two consenting parties, the agency may be both an interested party and a trier of the contentions advanced by its counsel at the hearing.[102]

Critics have contended that the combination of functions inevitably makes for bias in administrative agencies. As Justice Brennan put it when he was a state judge, "In a sense the combination of functions violates the ancient tenet of Anglo-American justice that 'No man shall be a judge in his own cause.'"[103] Despite this, it is settled that the combination of functions as such is not subject to legal attack. The leading case is now *Withrow v. Larkin.*[104] In that case the lower court had enjoined a state medical board from suspending a physician's license because the Board did not satisfy the procedural due process requirement of having an independent decision-maker rule on the

97. *Id.* at 1345.

98. 15 U.S.C. §46 (1988).

99. 3 BERNARD SCHWARTZ, THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY: A LEGISLATIVE HISTORY OF U.S. REGULATORY AGENCIES 1803 (1973) (quoting Senator Shields).

100. FTC v. Klesner, 280 U.S. 19, 27 (1929).

101. Brinkley v. Hassig, 83 F.2d 351, 357 (10th Cir. 1936).

102. American Eagle Fire Ins. Co. v. Jordan, 67 F. Supp. 76, 79 (D.D.C. 1946), *rev'd on other grounds*, 169 F.2d 281 (D.C. Cir. 1948).

103. *In re* Larsen, 86 A.2d 430, 435 (N.J. Super. Ct. App. Div. 1952).

104. 421 U.S. 35 (1975).

merits of the charges it had investigated.[105] The Supreme Court reversed.[106] The Court conceded that the combination issue was "substantial" and one with which legislators and others involved with the operation of agencies had properly been concerned.[107] However, that hardly supports "the bald proposition applied in this case by the District Court that agency members who participate in an investigation are disqualified from adjudicating."[108] On the contrary, there is no broad rule that agency members may not investigate, institute proceedings, and then adjudicate. "The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing."[109] More recently, the D.C. Circuit explained, "*Withrow*'s message [is] that a due process challenge directed broadly to combinations of purposes or functions in the modern administrative state 'assumes too much.'"[110] However, there is a distinction between combining functions in an agency and the exercise of inconsistent functions by the same person. For example, where an adjudicator refers charges against a police officer, he must recuse himself from sitting on the panel that adjudicates those charges.[111]

The same is true where the same person participates at different levels of the adjudicatory process. *Beer Garden, Inc. v. New York State Liquor Authority*,[112] a 1992 New York case, strikingly illustrates this point. The State Liquor Authority (SLA) had served a nightclub with notices of proceedings to revoke and suspend its license, charging various violations of the state's liquor law.[113] The notices were issued over the stamped signature of "Sharon L. Tillman, Counsel to the Authority."[114] An ALJ conducted hearings on the revocation and suspension proceedings.[115] The ALJ sustained the charges factually and, without recommendation as to penalty, referred the matter to the SLA (composed of five Commissioners) for final determination.[116] In

105. *Id.* at 42.
106. *Id.* at 59.
107. *Id.* at 51.
108. *Id.* at 52.
109. *Id.* at 55.
110. Blinder, Robinson & Co. v. SEC, 837 F.2d 1099, 1107 (D.C. Cir.), *cert. denied*, 488 U.S. 869 (1988).
111. Scalzi v. City of Altoona, 533 A.2d 1150 (Pa. Commw. Ct. 1987), *appeal denied*, 551 A.2d 218 (Pa. 1988).
112. 590 N.E.2d 1193 (N.Y. 1992).
113. *Id.* at 1194.
114. *Id.*
115. *Id.* at 1195.
116. *Id.*

the interim, Tillman left her position as Counsel to become an SLA Commissioner.[117] The Commissioners then voted to adopt the ALJ's findings, sustain the charges and, impose a penalty of revocation and a bond forfeiture.[118] Three of the five Commissioners, including Commissioner Tillman, concurred in the dispositions.[119] The New York court ruled that the SLA decision was invalid.[120] It stressed that the defect was not the combination of functions: "The challenge here is not to the dual investigatory/adjudicatory role of the agency. Rather it concerns an individual's participation, as advocate for the agency's position, in the very matter over which she is later required to pass impartial judgment."[121] The agency, as such, may investigate, prosecute, and adjudicate, but that does not mean that the same individuals within the agency may exercise both prosecutorial and judicial functions.[122] "Tillman's role as Beer Garden's 'prosecutor' in this case was inherently incompatible with her subsequent participation as its Judge. . . . That circumstance and fundamental fairness require that she recuse herself."[123]

However, under *National Advertisers*,[124] the same approach will not be followed in a rule-making proceeding. In a Ninth Circuit case, *Alaska Factory Trawler Association v. Baldridge*,[125] regulations were challenged because an agency official had participated both on the Council which proposed the regulations and in the Secretarial review process.[126] The Ninth Circuit stated,

> [u]nlike an adjudicative proceeding, participation by a single individual at two different levels of the rule-making process does not create a conflict of interest. The evidence on the record in the present case cannot support an inference that the Regional Director's mind was unalterably closed on the issue of the validity of [the regulations]. In consequence, plaintiffs' challenge in this regard must be denied.[127]

117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 1197.
121. *Id.* at 1198.
122. *Id.* at 1199.
123. *Id.*
124. *See supra* notes 12-37 and accompanying text.
125. 831 F.2d 1456 (9th Cir. 1987).
126. *Id.* at 1467.
127. *Id.*

On the contrary, the *Beer Garden* case shows that in adjudication the unalterably closed mind test is not applicable.[128] Participation by the same individual at different levels of the adjudicatory process invalidates the decision, even though the legislature has provided for a combination of the different functions involved in the agency itself.

To public lawyers today the principle just stated is an all but obvious aspect of the right to a fair adjudication, but the law has only recently become settled to that effect. Not long ago, the leading case on the matter was *Eisler v. United States*.[129] That case involved a motion to disqualify a judge in a prosecution of a noted Communist refusing to testify before the House Committee on Un-American Activities.[130] The defendant alleged that the judge had, as Special Assistant to the Attorney General, been legal adviser to the Federal Bureau of Investigation at the time it was investigating defendant. The defendant also claimed that "prior to his elevation to the bench the trial judge had been the active legal adviser to the investigator in the very investigation out of which the case arose."[131] The Court of Appeals held that the judge was correct in refusing to disqualify himself. "Impersonal prejudice resulting from a judge's background or experience is not . . . within the purview of the statute" providing for disqualification.[132]

Years ago I urged that *Eisler* should not be followed in cases involving administrative agencies.[133] Decisions such as that in the *Beer Garden* case show that the courts now follow this view, holding that an agency official who participates in the investigation or prosecution of the particular case should be disqualified from hearing or deciding.[134] Thus, an FTC member should have disqualified himself where he had previously participated in the case as Commission general counsel.[135] Similarly, a Civil Aeronautics Board member may not sit in a mail pay case when he had previously been Solicitor to the Postmaster General and had filed a brief in the case[136] and an FTC Administrative Law

128. *See supra* notes 112-23 and accompanying text.

129. 170 F.2d 273 (D.C. Cir.), *cert. granted*, 335 U.S. 857 (1948), *cert. dismissed*, 338 U.S. 883 (1949). After certiorari was granted and the case was argued, Eisler fled the country and the Court ordered certiorari to be dismissed.

130. *Id.* at 282.

131. *Id.*

132. *Id.* at 278.

133. BERNARD SCHWARTZ, ADMINISTRATIVE LAW 312 (1976).

134. Michigan Intra-State Motor Tariff Bureau, Inc. v. Public Serv. Comm'n, 504 N.W.2d 677, 682 (Mich. Ct. App. 1993), *appeal denied*, 519 N.W.2d 886 (Mich. 1994).

135. American Gen. Ins. Co. v. FTC, 589 F.2d 462 (9th Cir. 1979).

136. Trans World Airlines, Inc. v. Civil Aeronautics Bd., 254 F.2d 90, (D.C. Cir. 1958).

Judge may not sit if he was previously involved in the case as attorney-adviser to a Commissioner.[137] In administrative agencies at least, participation by the same person at different levels of the adjudicatory process is not permitted.

V. PREJUDGMENT — *CEMENT* VERSUS *CINDERELLA*

Bias in administrative law is narrower than bias in *Webster*. If freedom from bias is taken in the broad dictionary sense of absence of preconceptions,[138] no one can ever have a fair trial. As Judge Jerome Frank wrote in an oft-quoted opinion, "If . . . 'bias' and 'partiality' be defined to mean the total absence of preconceptions . . . then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions. . . . Every habit constitutes a prejudgment."[139] Plainly then, the judge or administrative adjudicator starts with inevitable preconceptions: "'a complete *tabula rasa* . . .' in the area of agency policy 'would be evidence of a lack of qualifications, not lack of bias.'"[140] But does such prejudgment constitute legal bias?

There are some types of prejudgment that give no difficulty, even though they may help to determine the decision before-hand. The accused in an armed robbery case may not have disqualified a judge who is known for strictness in such cases. Similarly, a member of the Federal Communications Commission known for having a vigorous policy against concentration of ownership in broadcasting is permitted to sit in cases involving that policy.[141] The same is true where a member of an agency had expressed views as a legislator on an issue later coming before him as an agency member,[142] or had expressed a view on the policy issue of whether deregulation of an industry would be beneficial.[143] In all of these cases, there may be a predilection toward the given decision but it is general in nature and does not prevent the agency members from deciding the particular case fairly.

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137. Grolier, Inc. v. FTC, 615 F.2d 1215 (9th Cir. 1980).

138. Bias is defined as "[a]n inclination, leaning, tendency, bent; a preponderating disposition or propensity; predisposition *towards*; predilection; prejudice." 1 OXFORD ENGLISH DICTIONARY 844 (1933) (emphasis in original).

139. *In re* J.P. Linahan, Inc., 138 F.2d 650, 651 (2d Cir. 1943).

140. Mattes v. United States, 721 F.2d 1125, 1132 (7th Cir. 1983).

141. *In re* Chronicle Broadcasting Co., 20 F.C.C.2d 33 (1969).

142. Citizens for a Better Env't v. Illinois Pollution Control Bd., 504 N.E.2d 166 (Ill. App. Ct. 1987).

143. Michigan Intra-State Motor Tariff Bureau, Inc. v. Public Serv. Comm'n, 504 N.W.2d 677, 682 (Mich. Ct. App. 1993), *appeal denied*, 519 N.W.2d 886 (Mich. 1994).

Much more difficult is the case where the adjudicator makes an advance commitment on the facts at issue in the adjudication. Formerly the leading case in such a situation was *Federal Trade Commission v. Cement Institute.*[144] The FTC is primarily an adjudicatory agency, but it also has power to conduct investigations into competitive practices and report their results to Congress and the President.[145] The FTC had conducted a full-scale investigation into the multiple basing point system of pricing which was then prevalent in heavy industry, including the cement industry.[146] The Commission reported the results of its investigation in reports to Congress and the President.[147] The reports concluded that the multiple basing point system was an illegal price-fixing restraint of trade.[148] Individual FTC members testified to the same effect before Congressional committee hearings on the FTC investigation.[149] The FTC then filed a complaint charging that the multiple basing point system of pricing in the cement industry was an unfair method of competition prohibited by the FTC Act.[150] While the proceedings were pending before the Commission, the cement companies moved to have the Commission disqualify itself on the ground of bias through prejudgment of the issues.[151]

The FTC denial of the motion was upheld by the Supreme Court.[152] The Commission's prejudgment did not mean an irrevocably closed mind.[153] The fact that the FTC had reached certain conclusions as the result of its ex parte investigation did not mean that the minds of its members were no longer open.[154] In contrast to the investigative stage, the companies were now legally authorized participants in the FTC hearing. They were free to rebut by evidence and arguments the conclusions that the Commission had previously reached.[155]

Was it realistic to assume that the FTC members could approach the issue of the basing point system with that cold neutrality of an impartial judge of which Burke speaks?[156] After an expensive and

144. 333 U.S. 683 (1948).
145. *Id.* at 700.
146. *Id.*
147. *Id.*
148. *Id.* at 702.
149. *Id.* at 700.
150. *Id.* at 688.
151. *Id.* at 700.
152. *Id.*
153. *Id.* at 701.
154. *Id.*
155. *Id.*
156. *See In re* J.P. Linahan, Inc., 138 F.2d 650, 652 n.4 (2d Cir. 1943) (citing KENNETH BURKE, PERMANENCE AND CHANGE 329 (1936)).

time-consuming investigation, the Commissioners had publicly announced their conclusion that the price system was illegal. Was there actually a chance that the cement companies could produce evidence and arguments to persuade the Commission to repudiate its conclusion?

What about cases where the member of an optometry board had stated prior to a license revocation hearing that "Dr. Reid would be losing his license"?[157] Or an environmental agency member had stated, "[i]f eight saints stand on their head, I still won't vote for [petitioner]"?[158] Or where an SEC member made a speech while a case was pending on an order permanently barring petitioner from employment in the securities business, which stated that petitioner "can be appropriately termed a violator" and that "his bar from association with a broker-dealer was made permanent"?[159]

In all these cases, *Cement Institute* would allow the adjudicator to sit. But *Cement Institute* is no longer followed, except in rule-making cases, even though it has never been overruled by the highest Court. This changed attitude toward *Cement Institute* prejudgment is shown in *1616 Second Avenue Restaurant, Inc. v. New York State Liquor Authority*.[160] This 1990 New York decision held that public statements made by the Chairman of the State Liquor Authority (SLA) concerning charges then pending in an SLA proceeding disqualified the Chairman from participating in the administrative review process.[161] Both the accused killer and the victim in the highly publicized so-called "preppie murder" case had been in petitioner restaurant shortly before the crime.[162] Petitioner had then been charged by the SLA with selling liquor to underage patrons.[163] Two of the charges were sustained after hearing by an ALJ.[164] Just before the hearing, the SLA Chairman testified before a legislative Committee.[165] His statement indicated that petitioner was guilty and "I am going to bring

157. Reid v. New Mexico Bd. of Examiners in Optometry, 589 P.2d 198 (N.M. 1979).

158. A.R.F. Landfill, Inc. v. Pollution Control Bd., 528 N.E.2d 390, 392, 394-95 (Ill. Ct. App.), *appeal denied*, 535 N.E.2d 398 (Ill. 1988).

159. Antoniu v. SEC, 877 F.2d 721, 723 (8th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990) (emphasis omitted).

160. 550 N.E.2d 910 (N.Y. 1990).

161. *Id.* at 911.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

[petitioner] to justice."[166] The Chairman refused to disqualify himself from sitting on review of the ALJ decision.[167]

In these circumstances, the Court ruled that the SLA decision must be annulled.[168] The Court distinguished prejudgment of the facts from prejudgment of a legal issue.[169] Here, the Chairman's

> testimony could only be regarded by a disinterested observer as evidencing [his] belief that petitioner had in fact violated the law regarding the sale of alcohol to minors and his commitment to establishing that fact in the SLA proceeding. . . . [T]hat impression lent an impermissible air of unfairness to the proceeding.[170]

Where an agency official evinces such prejudgment, he must disqualify himself. In such a case, "a disinterested observer may conclude that [he] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."[171]

Cinderella Career & Finishing Schools, Inc. v. FTC.[172] is now the leading case on the *Cement Institute* type of prejudgment, even though it was decided by a federal court of appeals, not the Supreme Court. In *Cinderella*, the FTC had charged that Cinderella made false representations in its advertising and engaged in deceptive practices in contravention of the FTC Act.[173] As an example, the Commission alleged that Cinderella advertised "courses in instruction which qualify students to become airline stewardesses" and that its graduates were "qualified to assume executive positions."[174] The hearing examiner ruled that the Commission had failed to prove that the acts and practices violated the FTC Act, and he dismissed the complaint.[175] Complaint counsel appealed to the Commission. While the appeal was pending before the Commission, the FTC Chairman gave a speech before a newspaper association in which he asked,

> [w]hat standards are maintained on advertising acceptance? . . . What about carrying ads that offer college educations in five weeks, . . . or becoming an airline's hostess by attending charm school? . . .

166. *Id.* at 913.
167. *Id.* at 910.
168. *Id.* at 914.
169. *Id.* at 912.
170. *Id.* at 913.
171. *Id.* at 912 (quoting Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), *cert. denied,* 361 U.S. 896 (1959)).
172. 425 F.2d 583 (D.C. Cir. 1970).
173. *Id.* at 584.
174. *Id.* at 584 n.1.
175. *Id.* at 584.

> Granted that newspapers are not in the advertising policing business, their advertising managers are savvy enough to smell deception when the odor is strong enough.[176]

Some months later, the Commission, with the Chairman participating, found that Cinderella neither awarded nor was capable of awarding academic degrees, and that it offered no course of instruction which would qualify students as airline stewardesses.[177] The Commission concluded that these and other representations were false and misleading in violation of the FTC Act.[178]

The D.C. Circuit Court vacated the FTC order and remanded to the Commission without participation of the Chairman.[179] The Chairman's speech gave the appearance that he had prejudged the case. "Conduct such as this may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion . . . after consideration of the record."[180] In effect, the Chairman had "give[n] the appearance that he ha[d] already prejudged the case and that the ultimate determination of the merits [would] move in predestined grooves."[181] Instead of *Cement Institute's* closed mind test, the D.C. Circuit stated that the test was 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."[182]

The *Cinderella* view of a "neutral and detached adjudicator"[183] is more consistent with the demands of fair procedure than the *Cement Institute* license for the adjudicator to sit unless it can be shown that he has an irrevocably closed mind. The *Cement Institute* test, like that in the [previously discussed *National Advertisers* case above], "impose[es] a practically impossible impediment . . . to a showing of bias, even when the decisionmaker has in fact made up his mind in advance of the hearing."[184] The *Cement Institute* fact-pattern shows that this is true. As asked above, was there really any chance for the cement companies to persuade the FTC to repudiate its already announced

176. *Id.* at 589-90 (emphasis omitted).
177. *Cf. id.* at 584.
178. *Id.*
179. *Id.* at 592.
180. *Id.* at 590.
181. *Id.*
182. *Id.* at 591 (quoting Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), *cert. denied,* 361 U.S. 896 (1959)).
183. Association of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1168 (D.C. Cir. 1979), *cert. denied,* 100 S.Ct. 3011 (1980).
184. *Id.* at 1196 (MacKinnon, J., dissenting in part and concurring in part).

conclusion that the companies' pricing system was illegal? "Since the Commission had made an extensive investigation and full study before making elaborate reports to Congress and to the President, . . . the probability of something in the nature of closed minds seems strong."[185]

Indeed, as the Davis and Pierce treatise concludes on *Cement Institute*, "as a practical matter, it makes proof of closed minds virtually impossible."[186] It is scarcely surprising then that no adjudicator has been "held disqualified on account of closed minds, because proof of closed minds is normally impossible and because an allegation of closed minds is likely to bring the response the Court gave in the *Cement Institute* case."[187] How can anyone prove that an adjudicator not only has prejudged the facts as well as the law of a particular case, but that his mind was irrevocable closed on the matter?

Cinderella has, however, now superseded *Cement Institute* as the governing standard. Not only did the *National Advertisers* court state the *Cinderella* test as the standard for disqualification in adjudications,[188] other federal courts have done so as well. For example, in *Antoniu v. SEC*,[189] the Eighth Circuit set aside an SEC order permanently barring petitioner from employment in the securities business because of an SEC commissioner's speech while the case was pending, in which he stated that petitioner "can be appropriately termed a violator" and that "his bar from association with a broker-dealer was made permanent."[190] The Eighth Circuit specifically adopted the *Cinderella* text as the governing standard.[191] The same has been true in some states. As discussed above, in *1616 Second Avenue*,[192] New York disqualified an administrative adjudicator under the *Cinderella* test.[193] Recent cases in other states also support the proposition that it is now *Cinderella*, not *Cement Institute*, that sets the standard for adjudicatory disqualification in prejudgment cases.[194]

185. 2 KENNETH CULP DAVIS & RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE § 9.8 at 84 (3d ed. 1994).
186. *Id.*
187. *Id.*
188. *National Advertisers*, 627 F.2d at 1158.
189. 877 F.2d 721 (8th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990).
190. *Id.* at 723.
191. *Id.* at 725; *see also* Committee of 100 on the Federal City v. Hodel, 777 F.2d 711, 721 (D.C. Cir. 1985); United Steelworkers v. Marshall, 647 F.2d 1189, 1209 (D.C. Cir. 1980).
192. 1616 Second Avenue Restaurant, Inc. v. New York State Liquor Authority, 550 N.E.2d 910 (N.Y. 1990).
193. *See supra* notes 160-71 and accompanying text.
194. *E.g.*, Havasu Heights Ranch and Dev. Corp. v. Desert Valley Wood Prod., Inc., 807 P.2d 1119, 1123 (Ariz. Ct. App. 1990); deKoevend v. Board of Educ. of West End Sch. Dist. RE-2, 688

VI. PRECEDENT OR "SPORT"?

Bias in administrative law is still not the same as bias in *Webster*. However, the recent jurisprudence discussed in this article has brought the two closer together. Most people would find it difficult to believe that they would get a fair trial before an adjudicator who has been on the other side at a prior stage of the case or who has publicly prejudged the issues in the case. Yet, not long ago, the adjudicator might not be disqualified in either case. The *Eisler* rule refused to disqualify the adjudicator even though he had been active adviser to the FBI while it was conducting the investigation that led to the criminal case in which the adjudicator sat.[195] The *Cement Institute* rule refused to disqualify the adjudicator who had prejudged the case unless it was proved that he had an irrevocably closed mind — something that, in practice, is impossible to prove.[196] Certainly, both situations would come within the dictionary definition of bias.

Under the recent cases discussed, they also now come within the concept of legal bias. *Eisler* has not been specifically repudiated.[197] All the same, at least in administrative agencies, participation by the same person at different levels of the adjudicatory process is not permitted by the recent cases. Similarly, *Cement Institute* has not been overruled or even modified by the Supreme Court. Yet its irrevocably closed mind test is no longer followed, except in rule-making proceedings. Instead, *Cinderella* is now the governing standard.[198] The test in prejudgment cases is now whether a disinterested observer might conclude that the administrative adjudicator has to some extent adjudged the facts as well as the law of a case before the agency decides it. Unlike the *Cement Institute* test, this standard, as *Cinderella* itself

P.2d 219, 228 (Colo. 1984); State Compensation Ins. Fund v. Fulkerson, 680 P.2d 1325, 1327 (Colo. Ct. App. 1984); Clisham v. Board of Police Comm'rs, 613 A.2d 254, 259 (Conn. 1992); E & E Hauling, Inc. v. Pollution Control Bd., 451 N.E.2d 555, 565 (Ill. App. Ct. 1983), *aff'd.*, 481 N.E.2d 664 (Ill. 1985); Butler v. Department of Pub. Safety and Corrections, 609 So.2d 790, 794 (La. 1992); *In re* Rollins Envtl Servs., Inc., 481 So.2d 113, 120 (La. 1985), *aff'd,* 481 N.E.2d 664 (1985); American Recovery Co. v. Department of Health and Mental Hygiene, 506 A.2d 1171, 1177 (Md. 1986); Consumer Protection Div. v. Consumer Publishing Co., 501 A.2d 48, 66 (Md. 1985); Winslow v. Holderness Planning Bd., 480 A.2d 114, 117 (N.H. 1984); Appeal of Lathrop, 444 A.2d 505, 507 (N.H. 1982); Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n, 844 S.W.2d 151, 165 (Tenn. Ct. App.), *appeal denied,* (1992).

195. *See supra* notes 129-32 and accompanying text.

196. *See supra* notes 144-55 and accompanying text.

197. One may question, however, whether *Eisler* would be followed in cases involving judges today. *But see* Carter v. Carter, 615 A.2d 197, 199 (D.C. 1992) (implying that *Eisler* is still good law in such cases).

198. *See supra* notes 188-94 and accompanying text.

shows, can be used to disqualify adjudicators who would come within both the dictionary and common perception of prejudice.

In conclusion, *Southwestern Bell Telephone Co. v. Oklahoma Corporation Commission* represents a step backwards, running counter to the trend to broaden the legal conception of bias. To hold that, in rate-making, there is no requirement of an impartial decision-maker is to turn back the administrative law clock by more than a century, since, as seen, the Supreme Court as early as 1884 indicated that rates must be fixed by an impartial tribunal.[199] One can only hope that the *Southwestern Bell* decision will prove to be *sui generis* — without value as a precedent. May we not go even further and treat the decision as what biologists call a "sport" — a genetic oddity defying explanation, but not signifying mutation?[200]

199. Spring Valley Water Works v. Schottler, 110 U.S. 347, 364 (1884).

200. *Cf.* Thomas Reed Powell, *The Remnant of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 757, 783 (1945).