FTC Rulemaking: The Standard for Disqualification of a Biased Commissioner Comment.

Sara Greenwood Hogan

Follow this and additional works at: https://commons.stmarytx.edu/thestmaryslawjournal

Part of the Securities Law Commons
I. INTRODUCTION

Since its creation in 1914, the Federal Trade Commission (FTC)\(^1\) has developed into a powerful force for consumer protection in the area of trade and commerce.\(^2\) As is true of many federal regulatory agencies, the
FTC may pursue its statutory mandate through case by case adjudication of alleged violations of the Federal Trade Commission Act or by promulgation of industry-wide rules defining unlawful behavior. Formerly, the FTC relied almost exclusively on cease and desist orders to enjoin individual violations of the Act. The past decade, however, has witnessed a broad expansion in the use of rulemaking to correct perceived abuses on a wider scale. Congress indicated its approval of the increased utilization of rulemaking in the passage of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975 (Magnuson-Moss Act).


4. See H.R. REP. No. 93-1107, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7702, 7713; 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6:39 (2d ed. 1978); Nelson, The Politicization of FTC Rulemaking, 8 CONN. L. REV. 413, 417 (1976). Adjudicative proceedings are initiated by the issuance of a complaint and notice of hearing when the FTC has reason to believe a violation has occurred. See 16 C.F.R. § 3.11 (1980). The party may be given an opportunity to settle by consent or informal agreement at the discretion of the administrative law judge (formerly known as hearing examiner) assigned to the case. See id. § 3.25. Failure to settle results in a formal complaint and trial-type hearing. An initial decision is rendered by the administrative law judge and it becomes the decision of the Commission unless a timely appeal is perfected. See id. § 3.46. Review of a cease and desist order may be obtained before the five-member Commission. See id. § 3.52. Judicial review is available upon filing a petition in an appropriate court of appeals within sixty days of the Commission's order. See 15 U.S.C. § 45(c) (1976).


Similarly, the judiciary has recognized the advantages of rulemaking over adjudication for the purpose of expediting general policy development.7

Under the Administrative Procedure Act (APA),8 basic procedural requirements are established for rulemaking and adjudicative proceedings conducted by federal administrative agencies.9 Rulemaking according to the Magnuson-Moss Act supplements the informal notice-and-comment provisions of the APA with adversary procedures reserved for adjudication.

---

7. See, e.g., National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 690-91 (D.C. Cir. 1973) (rulemaking more expeditious and efficient and more likely to insure compliance because rules more specific in scope), cert. denied, 415 U.S. 951 (1974); Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1014 (D.C. Cir. 1971) (rulemaking provides interested persons opportunity to submit their views on the subject); American Airlines, Inc. v. CAB, 359 F.2d 624, 629 (D.C. Cir. 1966) (en banc) (adjudicative proceedings not well suited for general policy making). Rulemaking permits the determination of a common issue in a single proceeding as opposed to adjudication in which the same problem may be frequently litigated. See Fuchs, Development And Diversification In Administrative Rule Making, 72 Nw. U.L. Rev. 83, 94 (1977).

8. See Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (current version at 5 U.S.C. § 551 (1976)). Compare 5 U.S.C. § 553 (1976) (rulemaking) with id. § 554 (adjudications). Informal rulemaking requires only that the agency publish a notice of proposed rulemaking and allow interested persons an opportunity to submit written comments for consideration (notice-and-comment). See id. § 553(b)-(c). Formal rulemaking is mandated when the agency statute provides for rules "to be made on the record after opportunity for an agency hearing . . . ." Id. § 553(c). The procedure followed in a formal rulemaking context is identical to that used for an agency adjudication. Compare id. § 553(c) (formal rulemaking follows procedures set out in sections 556-557) with id. § 554(c)(2) (adjudications utilize procedures for hearing and decision contained in sections 556-557). Various adversary procedures are afforded the participants including the right to present oral or documentary evidence, submit rebuttal evidence, and cross-examine as required for a full and true disclosure of the facts. See id. § 556(d). The decision must be based upon material facts in the record. See id. § 556(e). Judicial review is conducted according to the substantial evidence standard. See id. § 706(2)(E).
tion and formal rulemaking. Such "hybrid" proceedings have developed out of concern for safeguarding the due process rights of the parties at interest when specific factual issues as well as policy considerations must be resolved in the context of informal rulemaking.

Since 1975, the Federal Trade Commission has carried out its consumer protection mandate with particular vigor. Trade regulation rules have been proposed in response to commercial acts and practices believed to be deceptive, false, or unfair within the meaning of the Federal Trade Commission Act. A recent example of a major undertaking of the FTC in the rulemaking area is the children's advertising proceeding which initially included among its proposals a total ban on all televised advertising aimed at children. Due to their concern with the expansive rulemaking authority of the FTC and other administrative agencies, both Congress and the judiciary have imposed adversary measures upon informal rulemaking to insure fair consideration of the factual basis of a proposed rule.


13. See id. at 43-44. Subjects of proposed rules included prescription drugs, funeral practices, used cars, food advertising, credit practices, health spas, children's advertising, and games of chance. See id. at 43-44.


16. See Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1263 (D.C. Cir. 1973) (adversary procedure necessary to test evidentiary basis of rates established by FPC); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 631 (D.C. Cir. 1973) (cross-examination required in EPA proceeding involving resolution of specific technical issues); 15 U.S.C. § 57a(c)(1)(B)
Although a great deal of attention has been directed towards the far-reaching effects of agency rules and the concomitant need for procedural safeguards, the problem of bias exhibited by a Commissioner in a rule-making context had not been addressed until recently. In Association of National Advertisers, Inc. v. FTC, the United States Court of Appeals for the District of Columbia considered for the first time whether interested parties to an FTC rulemaking proceeding are entitled to the impartial tribunal guaranteed for agency adjudications. Distinguishing between the two forms of administrative action and the due process safeguards applicable to each, the court concluded a more rigorous standard for disqualification was necessary when the rulemaking function is involved.

This comment will discuss standards for disqualification of FTC Commissioners in the context of adjudicatory and rulemaking proceedings. The decision in Association of National Advertisers will be evaluated with respect to prior judicial and statutory developments in administrative law. In conclusion, the Federal Trade Commission Improvements Act of 1980 will be examined in relation to the problem of bias and continuing difficulties with agency accountability.

II. The Cinderella Standard: Grounds for Disqualification in Adjudicative Proceedings

Due process requires that administrative adjudications be conducted in a fair and impartial manner because of their quasi-judicial nature. Bias


19. See id. at 1158; cf. Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970) (due process requires disqualification of administrative adjudicator who has prejudged facts of case before hearing it); 5 U.S.C. § 556(b) (1976) (biased employee may be disqualified from participating in agency adjudication or formal hearing under the APA).


22. See, e.g., Withrow v. Larkin, 421 U.S. 35, 46 (1975); Amos Treat & Co. v. SEC, 306
or prejudice on the part of a Commissioner or other employee participating in a formal agency hearing is grounds for disqualification under section 556 of the Administrative Procedure Act. According to FTC policy, a request for disqualification is initially left to the discretion of the individual Commissioner charged. If the request is refused, the motion must be certified to the full Commission for determination of its validity.

In Cinderella Career and Finishing Schools, Inc. v. FTC, the District of Columbia Court of Appeals held that FTC Chairman Dixon should have excused himself from the Commission's review of the hearing examiner's decision. Cinderella Schools had been charged with false, misleading, and deceptive advertising relative to its courses of instruction. While the appeal was pending, Dixon made a public speech which the court said indicated he had prejudged the facts of the case. Noting that

F.2d 260, 264 (D.C. Cir. 1962); Berkshire-Employees Ass'n of Berkshire Knitting Mills v. NLRB, 121 F.2d 235, 238 (3d Cir. 1941).

23. See 5 U.S.C. § 556(b) (1976). Allegations of personal bias or other disqualifying interests are determined by the agency upon the filing in good faith of a timely and sufficient affidavit. See id. The decision on the merit becomes part of the record of the case. See id.; cf. 28 U.S.C. § 144 (1976) (procedure for disqualifying federal judge). A federal judge will be disqualified whenever a party to a district court proceeding files a timely and sufficient affidavit alleging personal bias or prejudice against him or on behalf of the opposing party. See id. § 144. Provided the affidavit states facts legally sufficient to support disqualification, the judge must excuse himself. See Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 155, 158-59 (E.D. Pa. 1974); Comment, Administrative Bias: An Update, 82 DICK. L. REV. 671, 672 (1978). Federal judges are, therefore, more readily disqualified than administrators acting in an adjudicative capacity since there is no requirement of a decision on the truth of the facts alleged. See United States v. Townsend, 478 F.2d 1072, 1073 (3d Cir. 1973); Comment, Administrative Bias: An Update, 82 DICK. L. REV. 671, 672 (1978). Compare 28 U.S.C. § 144 (1976) (federal judge shall be disqualified upon filing of timely and sufficient affidavit stating personal bias or prejudice) with 5 U.S.C. § 556(b)(3) (1976) (agency shall determine issue presented by timely and sufficient affidavit of personal bias or disqualification of employee participating in formal hearing). Administrative bias is usually manifested as interest, personal bias, prejudgment, and/or legislative interference. See Comment, Administrative Bias: An Update, 82 DICK. L. REV. 671, 674-86 (1978).


27. See id. at 590-91.

28. See id. at 584 n.1.

29. See id. at 590. Included in the Commission's complaint were allegations that Cinderella Schools made false representations in advertising courses qualifying students to become airline stewardesses and compete in beauty contests. See id. at 584 n.1. In the speech
an administrative hearing must be fair both in fact and appearance, the court stated that the test for disqualification is whether "a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." Similarly, the FTC may issue factual press releases notifying the public of suspected violations of the FTC Act. Due process is denied, however, when a Commissioner engages in public speech or conduct intimating prejudgment of the facts of a pending complaint. Accordingly, the Cinderella standard guarantees a fair tribunal when the Commission acts as a trier of fact in adjudicating the liability of individuals charged with unlawful conduct.

There is no comparable standard dealing with the manifestation of bias or interest in a rulemaking proceeding under the provisions of either the APA or the FTC Act. Informal rulemaking traditionally has been ac-

at issue, Dixon criticized newspapers for "carrying ads that offer college educations in five weeks . . . or becoming an airline's hostess by attending a charm school . . . ." He concluded, "their advertising managers are saavy enough to smell deception when the odor is strong enough." Id. at 590.

30. See id. at 591; Amos Treat & Co. v. SEC, 306 F.2d 260, 263 (D.C. Cir. 1962); In re Murchinson, 349 U.S. 133, 136 (1955) (due process requires absence of actual bias and probability of unfairness from judicial proceeding).

31. Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir. 1959)); accord, Safeway Stores, Inc. v. FTC, 366 F.2d 795, 802 (9th Cir. 1966) (disinterested observer standard applicable to statements made by FTC Chairman in previous capacity as chief counsel to Senate subcommittee); Texaco, Inc. v. FTC, 336 F.2d 754, 760 (D.C. Cir. 1964) (public speech indicated prejudgment that Texaco guilty of price fixing as charged).

32. See FTC v. Cement Inst., 333 U.S. 683, 703 (1948) (Commissioners not disqualified by previous expression of opinion that pricing system at issue was illegal); American Cyanamid Co. v. FTC, 363 F.2d 757, 764 (6th Cir. 1966) (Commissioners may express views on laws they enforce).

33. See Cinderella Career & Finishing Schools, Inc. v. FTC, 404 F.2d 1308, 1314 (D.C. Cir. 1968); Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir. 1959).

34. See, e.g., Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970) (prejudgment found when Chairman in speech on deceptive advertising referred to Cinderella's advertisements); American Cyanamid Co. v. FTC, 363 F.2d 757, 767 (6th Cir. 1966) (Chairman's previous participation in Senate subcommittee investigation involved determination of same facts involved in FTC order); Texaco, Inc. v. FTC, 336 F.2d 754, 760 (D.C. Cir. 1964) (in public speech Chairman discussed prohibited practices specifically mentioning overriding commissions received by Texaco).


corded less procedural protection than litigation because it involves the resolution of broad policy questions rather than specific disputed facts.

FTC rulemaking, however, combines informal rulemaking with adversary procedures to insure that interested parties have the opportunity to challenge the factual basis of a trade regulation rule defining specific acts or practices violative of the Act. Since the Commissioner participating in rulemaking by the FTC is increasingly called upon to decide disputed factual issues, the question arises whether the prejudgment standard articulated in Cinderella is applicable to hybrid rulemaking as well as adjudication.

III. Association of National Advertisers: The "Unalterably Closed Mind" Standard

In 1978, in response to petitions from several consumer organizations, the FTC instituted a major trade rule proceeding to propose certain restrictions upon television advertising directed toward children. Citing dental health risks connected with consumption of sugared food products as the impetus for the proceeding, the Commission invited public comment on the advisability of a rule banning all televised children's adver-
To expedite rulemaking, the FTC announced it would conduct an informal legislative-type hearing followed by an adversary hearing to resolve any disputed issues of material fact.45

Prior to the initial hearing, the Association of National Advertisers and other interested parties moved to disqualify FTC Chairman Pertschuk from the rulemaking proceeding.46 They alleged his public statements indicated he had prejudged specific factual issues involved in determining whether advertising to children was an unfair or deceptive practice.47 Although the petition was denied by the FTC,48 the United States District Court for the District of Columbia on appeal held the Cinderella standard applicable to rulemaking and enjoined Pertschuk from further participation in the proceeding.49 The court noted FTC rulemaking was of a hybrid nature with both legislative and adjudicative elements.50 Since the proceeding was not confined to general policy considerations, but contemplated the resolution of disputed factual issues, in the court's view, pre-

44. See id. at 17,969-70. One of the issues designated for comment in the Notice of Proposed Rulemaking was whether television advertising directed to, or seen by, young children was unfair and/or deceptive because of their inability to evaluate it. See id. at 17,969. Additionally, the issue was raised whether restrictions on children's advertising would be constitutionally permissible in view of the First Amendment protection of commercial speech. See id. at 17,970; cf. Virginia State Bd. of Pharmacy v. Citizen's Consumer Council, Inc., 425 U.S. 748, 771 (1976) (state may not suppress commercial speech which is truthful and not misleading).


46. See Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1155 (D.C. Cir. 1979), cert. denied, 100 S. Ct. 3011 (1980). Other interested parties who joined in the petition were the American Association of Advertising Agencies, the American Advertising Foundation, the Toy Manufacturers of America, Inc., and the Kellogg Company. See id. at 1155.

47. See id. at 1155. In various public statements, Pertschuk referred to "the evils we see in children's advertising," "the moral myopia of children's advertising," and the "unfairness of advertising aimed at children." He also accused advertisers of "manipulation" of children's attitudes and "exploitation" of the child's trust. See id. at 1189. In a speech to the Action for Children's Television Research Conference on November 8, 1977, Pertschuk stated, "[o]nly a ban on the advertising of those products directed towards the young child can remedy their inherent defect . . . ." Id. at 1190.

48. See id. at 1155 (Pertschuk not participating). Pertschuk previously had declined to remove himself, stating disqualification standards for rulemaking and adjudication were not the same. See id. at 1155.


50. See id. at 997.

judgment of the factual basis of the final rule would amount to a denial of
due process.\textsuperscript{52} Chairman Pertschuk's "conclusory statements of fact" and
"emotional use of derogatory terms and characterizations" with respect to
children's advertising were deemed a more compelling show of bias than
was necessary to warrant disqualification under \textit{Cinderella}.\textsuperscript{53}

The District of Columbia Court of Appeals reversed, holding the \textit{Cinderella}
standard was intended only to guarantee an impartial decisionmaker in an adjudicative hearing.\textsuperscript{54} According to the court's reason-
ing, adversary procedures supplementing the basic notice-and-comment
requirements of informal rulemaking do not obliterate the distinction be-
tween adjudication and rulemaking.\textsuperscript{55} Although FTC rulemaking may re-
quire the resolution of certain factual issues, as in an adjudicative hear-
ing,\textsuperscript{56} the court noted that the former are usually of a general type related
to a future course of conduct as opposed to the past conduct of specific parties.\textsuperscript{57} Due to the policy component of rulemaking, the court recog-
nized it may be impossible to achieve factual accuracy in the formulation
of trade regulation rules.\textsuperscript{58} Parties affected by rulemaking, therefore,
should not be entitled to the same degree of due process as those whose

\begin{itemize}
\item \textbf{U.S. Code Cong. & Ad. News} 7702, 7727-28 (FTC rulemaking may involve resolution of factual as well as policy issues).
\item \textit{52. See Association of Nat'l Advertisers, Inc. v. FTC, 460 F. Supp. 996, 997-98 (D.D.C. 1978), rev'd, 627 F.2d 1151 (D.C. Cir. 1979), cert. denied, 100 S. Ct. 3011 (1980).}
\item \textit{53. See id. at 998.}
\item \textit{54. See Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1174-75 (D.C. Cir. 1979), cert. denied, 100 S. Ct. 3011 (1980). "The \textit{Cinderella} view of a neutral and detached adjudicator is simply an inapposite role model for an administrator who must translate broad statutory commands into concrete social policies." Id. at 1168-69.}
\item \textit{55. See id. at 1160 (characterization of FTC rulemaking as "hybrid" ignores the dichotomy between rulemaking and adjudication established by APA); Hercules, Inc. v. EPA, 598 F.2d 91, 118 (D.C. Cir. 1978) (promulgation of policy-based standards of general applicability constitutes rulemaking, regardless of the procedures utilized).}
\item \textit{56. See Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1162 (D.C. Cir. 1979) (rulemaking involves legislative facts which need not be developed in evidentiary hearings); 15 U.S.C. § 57a(c)(1)(B) (1976) (opportunity for cross-examination and rebuttal when disputed issues of material fact involved in FTC rulemaking).}
\item \textit{57. Compare Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1162 (D.C. Cir. 1979) (legislative facts assist administrators in determining law and future direction of policy), cert. denied, 100 S. Ct. 3011 (1980) with 2 K. Davis, \textit{Administrative Law Treatise} § 15:03, at 353 (1st ed. 1958) (as between immediate parties, adjudicative facts concern who did what, when, where, how, and why).}
\item \textit{58. See Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1162 (D.C. Cir. 1979) (since administrative judgment involved in promoting rule, complete factual support may not be possible), cert. denied, 100 S. Ct. 3011 (1980); American Airlines, Inc. v. CAB, 359 F.2d 624, 633 (D.C. Cir. 1966) (en banc) (issues involving legislative facts may be incapable of decisive resolution by testimony).}
\end{itemize}
past conduct may be found unlawful in an agency adjudication. In conclusion, the court reasoned the policy aspects and prospective effect of rulemaking rendered the Cinderella factual prejudgment standard inapplicable. Instead, a Commissioner should be disqualified only when there has been a clear and convincing showing that the individual has an "unalterably closed mind" on matters critical to the disposition of the rulemaking proceeding. Classifying Chairman Pertschuk's statements as merely "discussion and perhaps advocacy" of legal theories supporting the FTC's jurisdiction over children's advertising, the court declined to order his disqualification.

Dissenting in part, Judge MacKinnon asserted the "unalterably closed mind" standard would afford too much protection for a biased decisionmaker, thereby impairing the public's interest in a fair hearing. Additionally, he criticized the majority for simplistically identifying all agency action as either rulemaking or adjudication without considering the special status of hybrid rulemaking under the FTC. In MacKinnon's view, Congress intended to provide access to a fair and impartial decisionmaker in enacting the rulemaking provisions of the Magnuson-Moss Act. Judge MacKinnon favored disqualification upon proof by a preponderance of the evidence that "substantial bias or prejudgment of any critical fact" precluded fair consideration of the rule in question.

59. Compare Withrow v. Larkin, 421 U.S. 35, 46 (1975) (due process requires fair trial in fair tribunal for agency adjudications) and Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB, 121 F.2d 236, 238 (3d Cir. 1941) (when administrator acts as trier of fact in agency adjudication, he must maintain complete impartiality) with United States v. Florida E. Coast Ry., 410 U.S. 224, 246 (1972) (oral hearings not mandated when agency formulates a legislative-type judgment for prospective application) and Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (no due process right to hearing for individual affected by legislative-type administrative action). But cf. Williams, "Hybrid Rulemaking" Under The Administrative Procedure Act: A Legal And Empirical Analysis, 42 U. Cm. L. Rev. 401, 409 n.28 (1975) (despite future effect, rules may penalize past investments far more than fine levied in adjudicatory context).

60. See Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1168 (D.C. Cir. 1979), cert. denied, 100 S. Ct. 3011 (1980).

61. See id. at 1170.

62. See id. at 1174. Shortly after the decision was rendered, Pertschuk voluntarily withdrew from the proceedings because of his concern that continued participation would become the focal point of proposed legislation to prohibit the FTC from issuing a children's advertising rule. See Wall St. J., Jan. 8, 1980, at 18, col. 2.


64. See id. at 1184 (MacKinnon, J., dissenting in part and concurring in part).

65. See id. at 1189 (MacKinnon, J., dissenting in part and concurring in part).

66. See id. at 1197 (MacKinnon, J., dissenting in part and concurring in part). MacKinnon thought disqualification virtually impossible under the majority standard. See id. at
IV. The Influence of Vermont Yankee

For many years, the United States Court of Appeals for the District of Columbia has led the development of the "common law of administrative procedure."67 In the interest of fairness to parties affected by administrative action, the D.C. circuit has expanded what it considered to be the minimum requirements of the APA.68 By contrast, the Supreme Court has adhered to a strict interpretation of the APA to encourage agency resort to the more expeditious rulemaking proceeding.70 Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.71 provided an opportunity for the Supreme Court to chaste the District of Columbia Court of Appeals for exceeding its judicial function by requiring the agencies to follow rulemaking procedures not authorized in the APA or the applicable statute.72

The Vermont Yankee holding may have influenced the outcome in Association of National Advertisers in which the D.C. circuit opted for

1196-97 (MacKinnon, J., dissenting in part and concurring in part).
68. See, e.g., O'Donnell v. Shaffer, 491 F.2d 59, 62 (D.C. Cir. 1974) (cross-examination may be required in FAA rulemaking to satisfy basic considerations of fairness); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 631 (D.C. Cir. 1973) (reasonable cross-examination may be required to ventilate adequately the issues in EPA hearing); American Airlines, Inc. v. CAB, 359 F.2d 624, 632 (D.C. Cir. 1966) (en banc) (CAB's provision for oral comment in rulemaking proceeding insured fair hearing).
69. See United States v. Florida E. Coast Ry., 410 U.S. 224, 238 (1973) (ICC not required to provide trial-type hearing in rate-making proceeding when informal APA provisions sufficient to satisfy "hearing" requirement in ICC statute); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 757 (1972) (provision for "hearing" in Interstate Commerce Act did not require adjudicatory hearing under APA when promulgating car service rules).
72. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 549 (1978) (court should not be allowed to impose own idea of which procedures best further public good). The Supreme Court asserted section 553 of the APA established the "maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." See id. at 524; 5 U.S.C. § 553 (1976). But cf. 1 K. Davis, Administrative Law Treatise § 6:37, at 611 (2d ed. 1978) (Vermont Yankee generalization not reliable guide for future role of courts in rulemaking area since opinion too broad and without supporting authority).
promoting informal rulemaking in lieu of extending the *Cinderella* standard without statutory authorization. Had it been so inclined, however, the District of Columbia Court of Appeals might have found the *Cinderella* standard applicable under the "constitutional constraints" exception to *Vermont Yankee*. For example, the District of Columbia District Court in its review of *Association of National Advertisers* based its order of disqualification upon a denial of due process. In the alternative, the court of appeals might have followed the rationale that Congressional adoption of certain adjudicative procedures for *FTC* rulemaking manifested an intention that the disqualification standard for agency adjudications should apply.

V. EROSION OF THE STRICT RULEMAKING-ADJUDICATION DICHTOMY

The holding in *Association of National Advertisers* relies upon the premise that administrative rulemaking and adjudication are mutually exclusive functions. Following the court's reasoning, the distinctive roles of the administrator in each proceeding necessitate different standards for disqualification. In response to the court's conclusion, it may be ar-

---

73. *See Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1166 (D.C. Cir. 1979) (rulemaking permits more efficient allocation of resources, faster action, and more specific notice to industries of scope of prohibited activities), *cert. denied*, 100 S. Ct. 3011 (1980).


78. *See Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1160-61 (D.C. Cir. 1979) (administrative action under APA is either adjudication or rulemaking), *cert. denied*, 100 S. Ct. 3011 (1980).

79. *See id.* at 1168-69. In his role as an adjudicator, the administrator must be "neutral
gued that statutory and judicial developments since the enactment of the APA in 1946 have blurred the once clear dividing line between adjudication and informal rulemaking.80

The addition of trial-type procedures to the informal requirements of the APA has been the principal cause behind the erosion of the APA formula for agency rulemaking.81 In contrast to informal rulemaking under the APA, the hybrid model utilized by the FTC contemplates a more extensive consideration of rulemaking proposals; greater disclosure of the factual as well as policy basis for a rule; and participation by interested persons in defining crucial matters in dispute for resolution by adversary procedures.82 Although mere inclusion of adjudicative procedures does not transform rulemaking into adjudication, the FTC model has assumed somewhat of an adversary cast by design.83 In the interest of fairness to those parties whose activities may be directly and significantly affected by a proposed rule, the Magnuson-Moss Act authorizes cross-examination when appropriate to substantiate the factual basis of the rule.84

and detached." See id. at 1168; Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970). As a policymaker, however, the administrator must engage freely in discussion of the important issues coming before him. See Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1169 (D.C. Cir. 1979), cert. denied, 100 S. Ct. 3011 (1980).

80. See, e.g., International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 629-31 (D.C. Cir. 1973) (court required EPA to provide opportunity for cross-examination at hearing although EPA statute did not so authorize); Home Box Office, Inc. v. FCC, 567 F.2d 9, 56-57 (D.C. Cir. 1977) (court prohibited ex parte contacts between private parties and administrators involved in rulemaking proceeding although APA prohibition applicable only to formal agency proceedings); 15 U.S.C. § 57a(c)(1) (1976) (FTC Act provides some trial-type procedures for informal rulemaking).


84. See, e.g., H.R. REP. No. 93-1107, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7702, 7727 (informal rulemaking procedures inadequate protection for rights of parties when factual basis of rule in dispute); Administrative Conference of the United States, 1979 Report 42 (1980) (cross-examination contributes to more effective and meaningful rules by testing factual assumptions behind proposal); Kestenbaum, Rulemak-
Additionally, the Magnuson-Moss Act adopts the substantial evidence standard for judicial review of trade regulation rules which the APA reserves for adjudications. As a result, courts are requiring a developed rulemaking record to substantiate the factual conclusions upon which the rule is based.

Inclusion of these essentially adversary procedures within informal rulemaking provisions produces at least two effects which are antithetical to the traditional view of rulemaking. First, they impair the advantages of efficiency and expediency informal APA rulemaking possesses over adjudication. Secondly, to a certain extent factual accuracy has become necessary to satisfy substantial evidence review, notwithstanding the policy aspects of rulemaking.

One area in which the distinction between administrative adjudication and rulemaking has been virtually eliminated is in the treatment of ex parte contacts. Private communications between an adjudicator and an interested party have traditionally been banned in order to protect the guarantee of a neutral and unbiased tribunal. In the context of rule-making Beyond APA: Criteria For Trial-Type Procedures And The FTC Improvement Act, 44 Geo. Wash. L. Rev. 679, 689 (1976) (broad authority of FTC necessitates additional procedural requirements to insure fairness in rulemaking). But cf. Williams, "Hybrid Rulemaking" Under The Administrative Procedure Act: A Legal And Empirical Analysis, 42 U. Chi. L. Rev. 401, 407 (1975) (factual accuracy may not be desirable in rulemaking because of value issues involved).


86. See, e.g., American Public Gas Ass'n v. FPC, 498 F.2d 718, 725 (D.C. Cir. 1974) (natural gas rates established in FPC rulemaking proceeding were supported by substantial evidence in record as a whole); Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1259 (D.C. Cir. 1973) (transportation rates established by FPC not supported by substantial evidence in the record when decision based on facts not available to interested parties); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 649 (D.C. Cir. 1973) (court remanded to agency for further proceedings when reliability of EPA methodology not indicated in record); cf. Wright, The Courts And The Rulemaking Process: The Limits of Judicial Review, 59 Cornell L. Rev. 375, 380-81 (1974) (public interest not promoted by administrators who fail to consider relevant facts and reasonable contentions of parties to rulemaking proceeding).


90. See, e.g., Boyer, Alternatives To Administrative Trial-Type Hearings For Resolving Complex Scientific, Economic, and Social Issues, 71 Mich. L. Rev. 111, 123 (1972);
making, however, ex parte contacts have been invited as a means of soliciting public opinion on relevant questions of policy. Home Box Office, Inc. v. FCC extended the ban on ex parte communications to rulemaking proceedings.

Fairness to the parties involved was again the impetus behind the decision of the District of Columbia Court of Appeals in Home Box Office. Undisclosed communications were deemed to foreclose the opportunity for response by opposing parties whose interests might be prejudiced thereby. Additionally, they may permit the administrator(s) to formulate rules on the basis of nonpublic information while advancing a different policy rationale in the rulemaking record. In the court’s opinion


91. See Nathanson, Report To The Select Committee On Ex Parte Communications In Informal Rulemaking Proceedings, 30 Ad. L. Rev. 377, 389 (1978) (informed APA rulemaking consistent with advantageous use of ex parte communications); cf. 1 C.F.R. § 305.77-3 (1980) (Administrative Conference of the United States recommendations) (informed rulemaking benefits from administrative access to information and opinions); 27 DePaul L. Rev. 489, 494-96 (1977) (ex parte communications important in enabling free flow of facts and ideas between agency rulemakers and interested parties).


93. See id. at 57. Following publication of a notice of proposed rulemaking, agency officials or employees expecting to participate in the decision-making process will be barred from related discussions with interested private persons, their attorneys, or agents. See id. at 57. All communications received after the notice is published must be documented and placed in the public file to permit access and comment from interested parties. See id. at 57.

94. See Home Box Office, Inc. v. FCC, 567 F.2d 9, 56 (D.C. Cir. 1977) (fairness and reasoned decision-making inconsistent with secrecy); Nathanson, Report To The Select Committee On Ex Parte Communications In Informal Rulemaking Proceedings, 30 Ad. L. Rev. 377, 395 (1978) (parties may be deprived of right to fair hearing); 1979 Wisc. L. Rev. 314, 332 n.93 (1979) (fairness requires rulemaking be “informed, reasoned, and candid”).

95. See, e.g., United States Lines, Inc. v. Federal Maritime Comm’n, 584 F.2d 519, 540 (D.C. Cir. 1978) (right to comment on questions concerning public interest is not meaningful when agency does not reveal relevant issues and positions); Home Box Office, Inc. v. FCC, 567 F.2d 9, 54 (D.C. Cir. 1977) (representations made in secret communications with agency cannot be supported nor refuted by participants in rulemaking proceedings); 27 DePaul L. Rev. 489, 500 (1977) (public cannot rebut or contribute to undisclosed information or reasoning).

96. See United States Lines, Inc. v. Federal Maritime Comm’n, 584 F.2d 519, 541 (D.C. Cir. 1978) (rationale set forth in agency decision questionable when ex parte communications essential to decision reached); Home Box Office, Inc. v. FCC, 567 F.2d 9, 54 (D.C. Cir. 1977) (ex parte communications may result in one administrative record for the public and reviewing court and another for the agency); Nathanson, Report To The Select Committee On Ex Parte Communications In Informal Rulemaking Proceedings, 30 Ad. L. Rev. 377, 394 (1978) (agency conclusion may be based on ex parte communications rather than ratio-
some prohibitions on ex parte contacts in rulemaking proceedings are warranted to safeguard the due process rights of the parties and facilitate judicial review of the agency decision.97

Development of hybrid rulemaking and the extension of the ban on undisclosed ex parte contacts suggest that administrative rulemaking is becoming more like adjudication on a wider scale. By subjecting rulemaking to increasing procedural protections, some advantages of the informal notice-and-comment model created by the APA are lost.98 Reasoned decision making and fairness to the parties is promoted, however, by the imposition of adversary procedures in the rulemaking context.99 Consequently, the ability of the administrator to "translate broad statutory commands into concrete social policies"100 through informal rulemaking has been circumscribed by the perceived need to support the factual basis of the rule by substantial evidence in the rulemaking record and eschew reliance on undisclosed ex parte communications. The "unalterably closed mind" standard articulated in Association of National Advertisers seemingly is based upon the broader, arguably outmoded view of the administrator's rulemaking role.101

VI. THE FEDERAL TRADE COMMISSION IMPROVEMENTS ACT OF 1980

Congressional dissatisfaction with the regulatory zeal of the FTC was evidenced by the passage of the Federal Trade Commission Improvements Act of 1980.102 Criticism was directed at the broad exercise of rulemaking authority to restrict advertising that was neither false nor de-
ceptive but simply unfair in the FTC's view. The children's advertising proceeding was singled out as an example of the extent of the rulemaking power and the resulting potential for abuse.

Accordingly, the Act imposes certain restrictions upon the authority of the FTC in order to improve agency accountability. Section 11(a)(1) of the Improvements Act withdraws from the FTC the ability to prescribe rules prohibiting commercial advertising practices it deems to be unfair. The immediate effect of the foregoing provision is to restrict the children's advertising proceeding to the proposal of rules based upon deception or falsity rather than unfairness.

Congressional supervision of the rulemaking process was established in two major respects. First, an advance notice of proposed rulemaking must be published in the Federal Register and submitted to the appropriate House and Senate committees. Following a period for response from interested parties, but prior to the actual hearings, the FTC will be required to publish the text of the proposed rule including alternatives. Secondly, all final rules must be submitted to Congress for review and are subject to a legislative veto in the event of disapproval.


110. See id. § 21 (new provision). The constitutionality of the legislative veto is in
In the 1980 Improvements Act, Congress clearly sought to restrain what it perceived to be the “virtually unbounded” authority of the FTC in the area of substantive rulemaking. As in 1975, additional procedures have been engrafted onto the basic structure of informal rulemaking to safeguard the rights of individuals affected by the pervasive regulatory presence of the FTC. The decision in Association of National Advertisers contemplates only rare instances in which bias will disqualify a Commissioner from a rulemaking proceeding. Although the new Act does not address the issue of bias in rulemaking specifically, the elimination of the unfairness standard and provisions for Congressional supervision render more difficult the development of a binding trade rule influenced by a Commissioner’s bias for or against an interested party.

VII. CONCLUSION

Given the new predominance of rulemaking as the preferred form of administrative action, concern with Commissioner bias is likely to recur. Unlike the legislature, the FTC is not subject to political control in the exercise of its rulemaking power. In the interest of “principled decision-making,” additional safeguards have been added to the process of agency rulemaking. As a result, the new FTC model of rulemaking differs from the traditional APA model in requiring greater participation and factual accuracy.

Accordingly, the standard for disqualification from a rulemaking proceeding of the FTC should not invariably be higher than that which is applicable to adjudications. Fairness to affected parties may in some instances require more protection than the “unalterably closed mind” standard. See H.R. Rep. No. 96-917, 96th Cong., 2d Sess. 27, reprinted in [1980] U.S. Code Cong. & Ad. News 2309, 2321.


113. Compare Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (power of vote is only protection against general statutes with adverse effect on persons or property) with Mayton, The Legislative Resolution Of The Rulemaking Versus Adjudication Problem In Agency Rulemaking, 1980 Duke L.J. 103, 107 n.20 (1980) (administrative agencies not subject to direct political control).


dard can afford. In these cases, perhaps the standard can be tailored to the factual issues and parties involved. Alternatively, the FTC Improvements Act of 1980 may reduce the potential for internal bias by subjecting the Commission to greater controls in the exercise of its rulemaking authority. Ultimate solutions should seek to preserve the FTC's role in consumer protection while ensuring that rules are formulated in a fair and informed manner befitting the public interest.

116. See Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1196-97 (D.C. Cir. 1979) (MacKinnon, J., dissenting in part and concurring in part) (majority standard imposes "a practically impossible impediment" to disqualification for bias), cert. denied, 100 S. Ct. 3011 (1980). MacKinnon suggests a test based on a showing by the preponderance of the evidence that the administrator was unable to participate fairly in rulemaking because of "substantial bias or prejudgment of any critical fact that must be resolved...." See id. at 1197 (MacKinnon, J., dissenting in part and concurring in part).
