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

Sara Greenwood Hogan

COMMENTS

FTC RULEMAKING: THE STANDARD FOR DISQUALIFICATION OF A BIASED COMMISSIONER

SARA GREENWOOD HOGAN

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

1. Federal Trade Commission Act, ch. 311, 38 Stat. 719 (1914) (current version at 15 U.S.C. §§ 41-58 (1976)). The FTC is composed of five Commissioners appointed by the President with Senate approval for seven year terms. No more than three Commissioners may be affiliated with the same political party. *See id.* 15 U.S.C. § 41.

2. *See* Kintner & Smith, *The Emergence Of The Federal Trade Commission As A Formidable Consumer Protection Agency*, 26 MERCER L. REV. 651, 652 (1975). The FTC is invested with the power to prohibit unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. *See* 15 U.S.C. § 45(a)(1) (1976). Under the original act, the FTC could proscribe only unfair methods of competition. *See* Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 719 (1914) (current version at 15 U.S.C. § 45(a)(1) (1976)). The Wheeler-Lea Act of 1938 extended the purview of the FTC to encompass unfair or deceptive acts or practices in commerce. *See* Wheeler-Lea Act, ch. 49, § 3, 52 Stat. 111 (1938) (amending 15 U.S.C. § 45(a) (1914)) (current version at 15 U.S.C. § 57a(1)(B) (1976)). This section was later held applicable to any unfair or deceptive act adversely af-

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.[3] Formerly, the FTC relied almost exclusively on cease and desist orders to enjoin individual violations of the Act.[4] The past decade, however, has witnessed a broad expansion in the use of rulemaking to correct perceived abuses on a wider scale.[5] 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).[6]

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fecting consumers regardless of the impact on competitors. *See* Sperry & Hutchinson Co. v. FTC, 405 U.S. 233, 244 (1972); Kintner & Smith, *The Emergence Of The Federal Trade Commission As A Formidable Consumer Protection Agency*, 26 MERCER L. REV. 651, 664 (1975).

3. *Compare* 15 U.S.C. § 45(b) (1976) (adjudication of complaints charging individuals with commission of proscribed acts or practices) *with id.* § 57a(a) (promulgation of interpretive rules, policy statements, and specific rules defining prohibited acts). Administrative agencies may utilize either rulemaking or adjudicatory proceedings at their discretion. *See* SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947).

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).

5. *See* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 698 (D.C. Cir. 1973) (confirming authority of FTC to prescribe substantive rules defining conduct prohibited by the Act), *cert. denied*, 415 U.S. 951 (1974). Prior to the decision in *National Petroleum Refiners*, the FTC had conducted some rulemaking proceedings pursuant to its authority to make rules and regulations as necessary to enforce the provisions of the Act. *See* Federal Trade Commission Act, ch. 311, § 6(g), 38 Stat. 719 (1914) (current version at 15 U.S.C. § 57a(a) (1976)); ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1979 REPORT 39 (1980). Its power to issue substantive, as opposed to interpretive, rules, however, had been uncertain. *See* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 678 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974); Nelson, *The Politicization of FTC Rulemaking*, 8 CONN. L. REV. 413, 417 n.13 (1976).

6. *See* Magnuson-Moss Warranty-Federal Trade Commission Improvements Act, Pub. L. No. 93-637, § 202(a), 88 Stat. 2193 (1975) (current version at 15 U.S.C. § 57a (1976)) (codifying substantive rulemaking authority of the FTC). Rulemaking is thought to be preferable to individual cease and desist orders for developing broad policy standards and reducing the expense and delay of repeated litigation. *See* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 690 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974); H.R. REP. No.

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 adjudica-

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93-1107, 93d Cong., 2d Sess. 1, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702, 7714. Trade regulation rule proceedings may be initiated by the Commission or in response to written petitions from interested persons. *See* 16 C.F.R. § 1.9 (1980). An initial notice of proposed rulemaking is published in the Federal Register and includes a description of the proposed rule and relevant issues; the reason for the rule stated with particularity; and an invitation to the public to comment and propose issues for consideration. *See id.* § 1.11. After reviewing written submissions, the FTC publishes a final notice designating issues to be investigated at an informal hearing. *See id.* § 1.12. The presiding officer shall conduct or permit cross-examination and presentation of rebuttal evidence on disputed issues of specific fact which cannot otherwise be fully disclosed and resolved. *See id.* § 1.13(d)(5). Upon review of the rulemaking record, the Commission may issue or decline to issue a rule. *See id.* § 1.14(a). A final rule must be accompanied by a Statement of Basis and Purpose and published in the Federal Register. *See id.* §§ 1.14(a), (c). Judicial review may be obtained in accordance with the substantial evidence standard. *See* 15 U.S.C. § 57a(e)(3)(A) (1976).

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)).

9. *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.[10] 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.[11]

Since 1975, the Federal Trade Commission has carried out its consumer protection mandate with particular vigor.[12] 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.[13] 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.[14] 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[15] upon informal rulemaking to insure fair consideration of the factual basis of a proposed rule.[16]

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10. *Compare* 15 U.S.C. § 57a(c) (1976) *with* 5 U.S.C. § 553(b)-(c) (1976). FTC rulemaking is designated "informal," but provides for a hearing at which interested parties have the right to present oral or written evidence (or both). *See* 15 U.S.C. § 57a(c)(1)(A) (1976). Additionally, if the Commission determines there are disputed issues of material fact which must be resolved, the right to cross-examine and present rebuttal is conferred as appropriate to insure a full and true disclosure of the issues. *See id.* § 57a(c)(1)(B). Cross-examination is contemplated only when there is a bona fide dispute as to issues involving facts material to the proposed rule. *See* H.R. REP. No. 93-1107, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702, 7728. Material facts are those denominated specific rather than legislative. *See* S. REP. No. 93-1408, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7755, 7765.

11. *See, e.g.*, International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 630-31 (D.C. Cir. 1973) (cross-examination necessary when general procedures inadequate to ventilate critical issues); H.R. REP. No. 93-1107, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702, 7727 (greater procedural safeguards necessary when fundamental factual premise of rule at issue); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6:38 (2d ed. 1978) (factual component of administrative policy making requires procedural protection).

12. *See* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1979 REPORT 43 (1980) (twenty rulemaking proceedings instituted between April, 1975 and April, 1979).

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.

14. *See* 43 Fed. Reg. 17967 (1978) (notice of proposed rulemaking).

15. *See* Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1262 (D.C. Cir. 1973) (cross-examination); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 649 (D.C. Cir. 1973) (cross-examination); 15 U.S.C. § 57a(c) (1976) (cross-examination, rebuttal, and substantial evidence standard for judicial review).

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 rulemaking context had not been addressed until recently.[17] In *Association of National Advertisers, Inc. v. FTC*,[18] 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.[19] 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.[20]

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.[21]

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.[22] Bias

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(1976) (informal hearing and opportunity for cross-examination required in FTC rulemaking when disputed issues of material fact must be resolved); Toxic Substances Control Act, Pub. L. No. 94-469, § 6, 90 Stat. 2020 (1976) (codified at 15 U.S.C. § 2605(c)(3) (1976)) (EPA rulemaking entails informal hearing and opportunity for cross-examination when disputed issues of material fact must be resolved).

17. *See* Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 3011 (1980); *cf.* Hobbs, *Legal Issues in Trade Regulation Rules*, 32 FOOD DRUG COSM. L.J. 414, 415-16 (1977) (FTC's role as advocate of proposed rule requires procedural safeguards lacking in informal rulemaking).

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

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).

20. *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).

21. *See* Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980) (amending 15 U.S.C. §§ 41-58).

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.[23] According to FTC policy, a request for disqualification is initially left to the discretion of the individual Commissioner charged.[24] If the request is refused, the motion must be certified to the full Commission for determination of its validity.[25]

In *Cinderella Career and Finishing Schools, Inc. v. FTC*,[26] 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.[27] Cinderella Schools had been charged with false, misleading, and deceptive advertising relative to its courses of instruction.[28] While the appeal was pending, Dixon made a public speech which the court said indicated he had prejudged the facts of the case.[29] Noting that

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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 merits 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).

24. *See In re* Standard Oil Co., 78 F.T.C. 1580, 1581 (1971); *In re* Kennecott Copper Corp., 78 F.T.C. 744, 930 (1971).

25. *See* 16 C.F.R. § 3.42(g)(2) (1980); *cf.* United States v. Townsend, 478 F.2d 1072, 1073 (3d Cir. 1973) (federal judge has no discretion in deciding truth of allegations in affidavit of disqualification).

26. *See* Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970).

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,[30] 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."[31] Commissioners may express viewpoints on legal or policy questions without subjecting themselves to the risk of disqualification.[32] Similarly, the FTC may issue factual press releases notifying the public of suspected violations of the FTC Act.[33] Due process is denied, however, when a Commissioner engages in public speech or conduct intimating prejudgment of the facts of a pending complaint.[34] 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.[35]

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.[36] Informal rulemaking traditionally has been ac-

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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); *cf. 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).

35. Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970); *accord,* Withrow v. Larkin, 421 U.S. 35, 46-47 (1975); American Cyanamid Co. v. FTC, 363 F.2d 757, 767 (6th Cir. 1966); Gilligan, Will & Co. v. SEC, 267 F.2d 461, 468-69 (2d Cir. 1959).

36. *See* Scalia, *Vermont Yankee: The APA, The D.C. Circuit, And The Supreme*

corded less procedural protection than litigation[37] because it involves the resolution of broad policy questions rather than specific disputed facts.[38] 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.[39] 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.[40]

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

In 1978, in response to petitions from several consumer organizations,[41] the FTC instituted a major trade rule proceeding to propose certain restrictions upon television advertising directed toward children.[42] Citing dental health risks connected with consumption of sugared food products as the impetus for the proceeding,[43] the Commission invited public comment on the advisability of a rule banning all televised children's adver-

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Court, 1978 SUP. CT. REV. 345, 408-09 n.255 (1979) (expression of bias or prejudice in rulemaking not specifically addressed by APA).

37. *See* United States v. Florida E. Coast Ry., 410 U.S. 224, 239 (1973) (type of hearing depends on whether rulemaking involved or adjudication of particular disputed facts); Hercules, Inc. v. EPA, 598 F.2d 91, 118 (D.C. Cir. 1978) (APA distinguishes between proceedings for promulgating policy-based rules and for adjudicating disputed facts in particular cases); American Airlines, Inc. v. CAB, 359 F.2d 624, 629 (D.C. Cir. 1966) (en banc) (rulemaking issues not dependent on resolution of evidentiary fact as to which veracity of witnesses is important).

38. *See* American Airlines, Inc. v. CAB, 359 F.2d 624, 629 (D.C. Cir. 1966) (rulemaking concerned with broad policy questions rather than review of individual conduct). *But cf.* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:2, at 7 (2d ed. 1978) (rulemaking often difficult to distinguish from adjudication).

39. *See* 15 U.S.C. § 57a(c)(1)(B) (1976) (cross-examination appropriate for full and true disclosure of disputed issues of material fact); H.R. REP. No. 93-1107, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702, 7727 (informal procedures of APA inadequate when fundamental factual premises of rule in dispute).

40. *See* Scalia, *Vermont Yankee: The APA, The D.C. Circuit, And The Supreme Court*, 1978 SUP. CT. REV. 345, 408-09 n.255 (1979) (difficult to determine what standard of conduct governs since FTC rulemaking has many characteristics of formal adjudication).

41. *See* 43 Fed. Reg. 17,967, 17,969 (1978) (Notice of Proposed Rulemaking). Petitions were received in April, 1977, from Action for Children's Television and the Center for Science in the Public Interest. In February, 1978, a third petition was submitted jointly by Consumers Union of America and Committee on Children's Television. *See id.* at 17,968 n.2.

42. *See id.* at 17,967.

43. *See id.* at 17,968.

tising.[44] 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,[51] in the court's view, pre-

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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).

45. *See* 43 Fed. Reg. 17,967-68 (1978); *cf.* 40 C.F.R. §§ 750.7-.8 (1980) (EPA employs same two-stage approach in rulemaking under the Toxic Substances Control Act); Comment, *Judicial Review Of Generic Rulemaking: The Experience Of The Nuclear Regulatory Commission*, 65 GEO. L.J. 1295, 1304-05 (1977) (NRC successfully employed similar procedure in rulemaking involving heavy emphasis on specific facts).

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.

49. *See* Association of Nat'l Advertisers, Inc. v. FTC, 460 F. Supp. 996, 999 (D.D.C. 1978), *rev'd*, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 3011 (1980).

50. *See id.* at 997.

51. *See id.* at 997; *cf.* H.R. REP. No. 93-1107, 93d Cong., 2d Sess., *reprinted in* [1974]

judgment of the factual basis of the final rule would amount to a denial of due process.[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 *Cinderella*.[53]

The District of Columbia Court of Appeals reversed, holding the *Cinderella* standard was intended only to guarantee an impartial decisionmaker in an adjudicative hearing.[54] According to the court's reasoning, adversary procedures supplementing the basic notice-and-comment requirements of informal rulemaking do not obliterate the distinction between adjudication and rulemaking.[55] Although FTC rulemaking may require the resolution of certain factual issues, as in an adjudicative hearing,[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.[57] Due to the policy component of rulemaking, the court recognized it may be impossible to achieve factual accuracy in the formulation of trade regulation rules.[58] Parties affected by rulemaking, therefore, should not be entitled to the same degree of due process as those whose

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U.S. CODE CONG. & AD. NEWS 7702, 7727-28 (FTC rulemaking may involve resolution of factual as well as policy issues).

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).

53. *See id.* at 998.

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 *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.

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).

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).

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, 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).

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).

past conduct may be found unlawful in an agency adjudication.[59] In conclusion, the court reasoned the policy aspects and prospective effect of rulemaking rendered the *Cinderella* factual prejudgment standard inapplicable.[60] 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.[61] 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.[62]

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.[63] 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.[64] 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.[65] 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.[66]

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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 235, 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. CHI. 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.

63. *See* Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1181 (D.C. Cir. 1979) (MacKinnon, J., dissenting in part and concurring in part), *cert. denied*, 100 S. Ct. 3011 (1980).

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[69] 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 chastize 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

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1196-97 (MacKinnon, J., dissenting in part and concurring in part).

67. *See* Scalia, *Vermont Yankee: The APA, The D.C. Circuit, And The Supreme Court*, 1978 SUP. CT. REV. 345, 368 (1979).

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).

70. *See* Scalia, *Vermont Yankee: The APA, The D.C. Circuit, And The Supreme Court*, 1978 SUP. CT. REV. 345, 381 (1979).

71. 435 U.S. 519 (1978). The court of appeals had invalidated a rule issued by the Atomic Energy Commission for failure to utilize hybrid procedures such as cross-examination to resolve the critical issue of nuclear waste disposal. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 541 (1978). There had been, however, full compliance with the informal rulemaking provisions of the APA. *See id.* at 541; 5 U.S.C. § 553 (1976).

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[73] in lieu of extending the *Cinderella* standard without statutory authorization.[74] 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*.[75] 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.[76] 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.[77]

V. Erosion of the Strict Rulemaking-Adjudication Dichotomy

The holding in *Association of National Advertisers* relies upon the premise that administrative rulemaking and adjudication are mutually exclusive functions.[78] Following the court's reasoning, the distinctive roles of the administrator in each proceeding necessitate different standards for disqualification.[79] In response to the court's conclusion, it may be ar-

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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).

74. *See id.* at 1167-68 (although FTC statute authorizes use of trial-type procedures in rulemaking, *Cinderella* standard not intended to apply); *cf.* Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970) (prejudgment of the facts is test for disqualification in adjudicative hearing).

75. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 543 (1978) (courts may impose additional procedures if warranted by constitutional constraints or compelling circumstances); 1 K. Davis, Administrative Law Treatise § 6:37-2, at 79-80 (2d ed. Supp. 1980) (*Vermont Yankee* does not prohibit due process additions to informal rulemaking provisions of APA).

76. *See* Association of Nat'l Advertisers, Inc. v. FTC, 460 F. Supp. 996, 999 (D.D.C. 1978), *rev'd,* 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied,* 100 S. Ct. 3011 (1980).

77. *See* Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1189 (D.C. Cir. 1979) (MacKinnon, J., dissenting in part and concurring in part) (Congress intended participants in Magnuson-Moss rulemaking be accorded fair and impartial consideration of their evidence), *cert. denied,* 100 S. Ct. 3011 (1980); *cf.* United States Lines, Inc. v. FMC, 584 F.2d 519, 539-40 (D.C. Cir. 1978) (statutory guarantee of public "hearing" justified court's prohibition on ex parte contacts to insure meaningful public participation). *But cf.* Scalia, *Vermont Yankee: The APA, The D.C. Circuit, And The Supreme Court,* 1978 Sup. Ct. Rev. 345, 392-93 (1979) (*Vermont Yankee* holding rejected idea that courts may determine what procedures are necessary to further Congress' statutory scheme).

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]

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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).

81. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6:9, at 481-85 (2d ed. 1978); Auerbach, *Informal Rule Making: A Proposed Relationship Between Administrative Procedures And Judicial Review*, 72 NW. U. L. REV. 15, 16 (1977); Kestenbaum, *Rulemaking Beyond APA: Criteria For Trial-Type Procedures And The FTC Improvement Act*, 44 GEO. WASH. L. REV. 679, 686-87 (1976).

82. *See* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1979 REPORT 40-42 (1980). *Compare* 15 U.S.C. § 57a(c)(1) (1976) (informal rulemaking under FTC Act entails right to hearing and opportunity for cross-examination and rebuttal on disputed issues of material fact) *with* 5 U.S.C. § 553 (1976) (informal rulemaking under APA affords opportunity to submit written data, views, or arguments with or without opportunity for oral presentation). For a discussion of the special requirements of FTC rulemaking surpassing those of the APA, see ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1979 REPORT 40-42 (1980).

83. *See* H.R. REP. No. 93-1107, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702, 7727-28; Hobbs, *Legal Issues in FTC Trade Regulation Rules*, 23 FOOD DRUG COSM. L.J. 414, 416 (1977).

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.[85] As a result, courts are requiring a developed rulemaking record to substantiate the factual conclusions upon which the rule is based.[86]

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.[87] Secondly, to a certain extent factual accuracy has become necessary to satisfy substantial evidence review, notwithstanding the policy aspects of rulemaking.[88]

One area in which the distinction between administrative adjudication and rulemaking has been virtually eliminated is in the treatment of ex parte contacts.[89] 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.[90] In the context of rule-

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ing 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).

85. *Compare* 15 U.S.C. § 57a(e) (1976) (FTC trade regulation rules reviewable under substantial evidence standard) *with* 5 U.S.C. § 706(2)(A) (1976) (administrative adjudications reviewable under substantial evidence standard) *and id.* § 706(2)(E) (rules promulgated under the APA's informal proceedings reviewable under arbitrary and capricious standard).

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).

87. *See* Auerbach, *Informal Rulemaking: A Proposed Relationship Between Administrative Procedures And Judicial Review*, 72 NW. U. L. REV. 15, 60 (1977).

88. *Cf.* American Airlines, Inc. v. CAB, 359 F.2d 624, 633 (D.C. Cir. 1966) (en banc) (legislative facts not decisively resolved by testimony).

89. *See* National Small Shipments Traffic Conf., Inc. v. ICC, 590 F.2d 345, 351 (D.C. Cir. 1978); United States Lines, Inc. v. Federal Maritime Comm'n, 584 F.2d 519, 539 (D.C. Cir. 1978); Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir. 1977).

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.[91] *Home Box Office, Inc. v. FCC*[92] extended the ban on ex parte communications to rulemaking proceedings.[93]

Fairness to the parties involved was again the impetus behind the decision of the District of Columbia Court of Appeals in *Home Box Office*.[94] Undisclosed communications were deemed to foreclose the opportunity for response by opposing parties whose interests might be prejudiced thereby.[95] 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.[96] In the court's opinion

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Peck, *Regulation And Control of Ex Parte Communications With Administrative Agencies*, 76 HARV. L. REV. 233, 239 (1962); 27 DEPAUL L. REV. 489, 493 (1977). The statutory prohibition on ex parte contacts in formal agency adjudications, however, is fairly recent. *See* Government in the Sunshine Act, Pub. L. No. 94-409, § 4a, 90 Stat. 124 (1976) (amending 5 U.S.C. § 557(d) (1976)).

91. *See* Nathanson, *Report To The Select Committee On Ex Parte Communications In Informal Rulemaking Proceedings*, 30 AD. L. REV. 377, 389 (1978) (informal 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) (informal 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).

92. *See* Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977).

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 can neither 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-

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nale developed in the record).

97. *See* National Small Shipments Traffic Conf., Inc. v. ICC, 590 F.2d 345, 351 (D.C. Cir. 1978); United States Lines, Inc. v. Federal Maritime Comm'n, 584 F.2d 519, 539-41 (D.C. Cir. 1978); Home Box Office, Inc. v. FCC, 567 F.2d 9, 56-57 (D.C. Cir. 1977); Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959).

98. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 546-47 (1977); Auerbach, *Informal Rulemaking: A Proposed Relationship Between Administrative Procedures And Judicial Review*, 72 Nw. U. L. Rev. 15, 60 (1977).

99. *See, e.g.*, Home Box Office, Inc. v. FCC, 567 F.2d 9, 56-57 (D.C. Cir. 1977); Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1260 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 649 (D.C. Cir. 1973).

100. Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1168-69 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 3011 (1980).

101. *See id.* at 1168-70; *cf.* Home Box Office, Inc. v. FCC, 567 F.2d 9, 56-57 (D.C. Cir. 1977) (agency rule must represent reasoned judgment based on supporting material); Administrative Conference of the United States, 1979 Report 43 (1980) (failure to consider principles behind hybrid rulemaking can adversely affect efficiency, acceptability, and quality of decisions).

102. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980) (effective date May 28, 1980).

ceptive but simply unfair in the FTC's view.[103] The children's advertising proceeding was singled out as an example of the extent of the rulemaking power and the resulting potential for abuse.[104]

Accordingly, the Act imposes certain restrictions upon the authority of the FTC in order to improve agency accountability.[105] 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.[106] 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.[107]

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.[108] 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.[109] Secondly, all final rules must be submitted to Congress for review and are subject to a legislative veto in the event of disapproval.[110]

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103. *See* S. REP. No. 96-500, 96th Cong., 2d Sess. 17, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2268, 2284. Chairman Pertschuk admitted a "vendetta" had been waged against certain industries in the past. *See id.* at 59, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2268, 2304 (additional views of Messrs. Schmitt, Goldwater, and Pressler).

104. *See id.* at 17, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2268, 2284-85 (unfairness doctrine is broad charter for restricting commercial advertising which FTC finds objectionable); *cf.* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1979 REPORT 45 (1980) (rules based on novel theories of unfairness or deception created confusion as to Commission's rationales).

105. *See* S. REP. No. 96-500, 96th Cong., 2d Sess. 18, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2268, 2285 (Congress intended FTC to reassume traditional function of identifying false and deceptive or misleading advertising).

106. *See* Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 11(a)(1), 94 Stat. 374 (1980) (amending 15 U.S.C. § 57a(a)(1) (1976)).

107. *See id.*; S. REP. No. 96-500, 96th Cong., 2d Sess. 3, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2268, 2270. Following the passage of the Improvements Act, the FTC instructed its staff to recommend alternatives to the unfairness rationale and to draft a new proposal for children's rulemaking by October 15, 1980. *See* TRADE REGULATION REPORTS, No. 444, at 4 (July 1, 1980) (children's advertising recommendations sought from FTC staff).

108. *See* Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 8, 94 Stat. 374 (1980) (amending 15 U.S.C. § 57a(b) (1976)). Such notice will contain a brief description of the area of inquiry, objectives sought, and possible alternatives and will invite comment from interested parties. A general notice of proposed rulemaking will follow. *See id.*

109. *See* Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 8, 94 Stat. 374 (1980) (amending 15 U.S.C. § 57a(b)(1) (1976)).

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.[111] 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.[112] 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.[113] In the interest of "principled decision-making," additional safeguards have been added to the process of agency rulemaking.[114] As a result, the new FTC model of rulemaking differs from the traditional APA model in requiring greater participation and factual accuracy.[115]

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" stan-

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doubt. *See* H.R. REP. No. 96-917, 96th Cong., 2d Sess. 27, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2309, 2321.

111. *See* S. REP. No. 96-500, 96th Cong., 2d Sess. 2, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2268, 2269.

112. *See id.* at 17, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2268, 2284; *cf.* Kestenbaum, *Rulemaking Beyond APA: Criteria For Trial-Type Procedures And The FTC Improvement Act*, 44 GEO. WASH. L. REV. 679, 689 (1976) (administrative agencies now affect rights throughout economy and society); Nelson, *The Politicization of FTC Rulemaking*, 8 CONN. L. REV. 413, 414 (1976) (additional procedures provide protection against administrative action contravening general will).

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).

114. O'Donnell v. Shaffer, 491 F.2d 59, 62 (D.C. Cir. 1974).

115. *See* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1979 REPORT 42-43 (1980).

dard can afford.[116] In these cases, perhaps the standard can be tailored to the factual issues and parties involved.[117] 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.[118]

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).

117. *Cf.* Action for Children's Television v. FCC, 564 F.2d 458, 475 (D.C. Cir. 1977) (supporting ban on ex parte communications when rulemaking involves "conflicting private claims to a valuable privilege"); Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1314 (1975) (procedures utilized in rulemaking should depend on interests involved, complexity of issues, and expected benefit to be achieved).

118. *See* Wright, *The Courts And The Rulemaking Process: The Limits Of Judicial Review*, 59 CORNELL L. REV. 375, 379 (1974).