Prejudgment: An Unavailable Challenge to Official Administrative Action

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PREJUDGMENT: AN UNAVAILABLE CHALLENGE TO OFFICIAL ADMINISTRATIVE ACTION

Charles H. Koch, Jr.*

Professor Davis urges that discretion, not tyranny, necessarily takes over where law ends. It is the quality and integrity of the men who exercise discretion, and not the structural framework in which it is exercised, which measures the fairness of administrative action; for no structural imperatives can assure justice and fairness nearly so well as institutionalized imperatives of honesty and integrity. Moreover, structure tends to stultify the administrative process and substantially interfere with the equitable nature of its operation.

Thus, discretion is the cornerstone of the administrative process and the working principle which is both its strongest point and its major point of controversy. One of the problems of the exercise of discretion is purity of motive. The exercise of discretion usually raises some question as to whether the action has been the result of a weighing of the equities in the particular situation or the result of preconceived notions or extraneous pressures.

Consequently, a pervasive question in review of administrative decision-making is the possibility of prejudgment. A challenge of prejudgment in an administrative decisionmaking is invariably available to a dissatisfied party. Unfortunately, such challenges, though rarely successful, do result in delay of agency action, often enough to encourage continued attempts. This article attempts to analyze and categorize the leading prejudgment decisions. Hopefully, through this analysis, agencies will learn to avoid charges of illegal prejudgment, and some prediction of the chances of success of various types of prejudgment challenges can be made, perhaps discouraging certain of the more frivolous challenges by the administrative law bar.

ANALYTICAL CATEGORIES

In order to better understand prejudgment, it is necessary to recognize the various forms it may take. The categories below are inferred from judicial decisions and commentators' remarks.

There are two major means of distinguishing prejudgment problems. First is the type of issue prejudged. The types of issues can be distinguished as (1) broad policy or legal theory, (2) general facts, or (3) specific facts.2

2Professor Davis distinguished facts as "legislative" and "adjudicative":

The cardinal distinction which more than any other governs the use of extra-record facts by courts and agencies is the distinction between legislative facts and adjudicative facts. When a court or an agency finds facts concerning the immediate parties—who did what, where, when, how and with what motive or intent—the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts. When a court or an agency develops law or policy, it is acting legislatively; the courts have created the common law through judicial legislation, and the facts which form the tribunal's legislative judgment are called legislative facts.

2 Davis, Administrative Law Treatise, §15.03 at 353. (Hereinafter cited as Davis.)

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The second major distinction involves the context in which the alleged prejudgment arises. Bias may arise either in the context of an institutional decisionmaking process (which may involve one or more individuals) or in a purely individual context. The context of the decisionmaking appears to be the key factor for the courts in determining whether alleged bias constitutes illegal prejudgment.

DISTINCTION ON THE BASIS OF THE TYPES OF ISSUES

A. Acceptance of Bias as to General Policy and Legal Theory

The most pervasive type of issue bias is the prejudgment of basic philosophical or legal issues raised in a proceeding. Everyone recognizes that decisionmakers at every level possess preconceptions which affect their interpretation of facts and direct their decisions. This sort of prejudgment is never considered as grounds for overturning a decision. Judge Frank may have said all that is necessary: "If . . . 'bias' and 'partiality' be defined to mean the total absence of preconception in the mind of the judge, then no one has ever had a fair trial and no one ever will."

Administrative agencies are created to fill the need for decisions based not on legalisms but on notions of how the system should work. Hence, policy bias—broad theory prejudgments—on the part of the members of an agency is more than permissible, it is imperative.

The propriety of broad theory or policy bias in administrative agencies is well established in the law. The Supreme Court in United States v. Morgan said, "[c]abinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case." Similarly in Texaco, Inc. v. FTC, the Circuit Court said, "[W]e do not expect a Trade Commissioner to be neutral on anti-monopoly policies." Obviously, bias as to an "underlying philosophy" does not concern the courts.

B. Permissible Understanding and Opinion of General Facts

The second type of issue bias relates to general facts. For the purpose of this analysis, general facts are to be considered any facts which apply generally to an industry or other recognizable class. The result of the synthesis of these general facts with broad policy orientation or theory is the establishment of a policy towards an industry or class. Indeed, broad policy and
general facts often become so clearly intertwined that they may be, in the final analysis, nearly indistinguishable.\(^8\)

Bias as to general facts at issue in an agency proceeding will not be grounds for a finding of illegal prejudgment. Professor Davis finds that "Prejudgment of general facts of the kind that merge with points of view concerning issues of law or policy is probably inevitable and cannot properly be deemed a ground for disqualification."\(^9\)

Indeed, the notion of expertise suggests an understanding of facts gained from experience combined with informed predispositions.\(^10\) According to former Federal Trade Commissioner Elman: "Agency members . . . are expected to be experts, bringing to each case a specialized knowledge formed by experience. Such knowledge and experience is not, and should not be, confined to the record of a particular case."\(^11\) When an agency pursues an investigation which will muster all relevant general facts and then weighs these facts objectively—influenced only by opinion as to broad policy or legal theory—in order to reach some general conclusions, then the administrative process is working at its optimum.\(^12\) Retrieving knowledge or opinions of general facts for use in a proceeding relating to a specific party will not constitute prejudgment.

A comparison of the holding in *Safeway Stores, Inc., et al. v. FTC*\(^13\) with the decision in *American Cyanamid Co. v. FTC*,\(^14\) two nearly identical factual situations, illustrates this point. In both cases, FTC Chairman Dixon had acted as Chief Counsel for congressional investigations of the respective industries before becoming Chairman of the FTC, and had in both cases asked hostile questions of industry witnesses. Yet, in *American Cyanamid*, but not in *Safeway Stores*, Chairman Dixon was disqualified. The Ninth Circuit in *Safeway Stores* distinguished the case before it from *American Cyanamid* on the basis of the depth of the Chairman's inquiry into specific facts which ultimately arose in the Commission's proceeding.\(^15\) The Court, in the case before it, refused " . . . to hold that, on the basis of the questions asked of Continental's president . . . prior to initiation of the present proceedings, and not including a statement of opinion as to an ultimate controverted issue which he would judge, a disinterested observer would have reason to believe that he had prejudged the dispute."\(^16\) (Emphasis added.) Previously, the Sixth Circuit in *American Cyanamid*, also, found that inquiry into the general issues would not have led to disqualification and specifically limited its holding by the qualifying statement that, "[w]e do not hold that the services of Mr. Dixon as counsel for the subcommittee, standing alone, necessarily would require disqualification. Our decision is

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\(^8\) When legislative facts are used for the creation of law or policy, the facts often merge with judgment in such a way that any attempted separation is both impossible and undesirable." 2 Davis, §15.03 at 355.

\(^9\) Davis, §12.01 at 144.


\(^13\) 366 F.2d 795 (9th Cir. 1966).

\(^14\) 363 F.2d 757 (6th Cir. 1966).

\(^15\) 366 F.2d at 802.

\(^16\) Id.
based upon the depth of the investigation and the questions and comments by Mr. Dixon. . . . Thus, previous contact with general facts, even where it might evidence some opinion as to such facts, does not constitute illegal prejudgment.

C. Judicial Sensitivity to Bias as to Specific Facts

An administrative agency must make its individual decisions based on the record in a particular proceeding. Whereas administrative officers may apply predetermined policy, or prior knowledge of general facts, they may not rely on determinations of specific facts reached or suggested outside the record of the individual proceeding. The guarantee of a hearing requires a practicable opportunity to persuade as well as to speak. Thus, the possibility of bias as to specific facts must be closely examined. A comparison of the holdings in Texaco, Inc. v. FTC, and Skelly Oil v. Federal Power Commission demonstrates judicial sensitivity to allegations of bias as to specific facts.

In Texaco, the FTC had issued complaints charging that Texaco had coerced its dealers into selling Goodrich tires, and that the underlying agreements between Texaco and Goodrich were unlawful. During the period of the hearing before the examiner, Chairman Dixon made a speech in which he named Texaco and Goodrich, among others, in close connection with a statement of practices alleged in the complaint.

While conceding the Commissioner’s right to hold certain views on general policy, the Court held that Chairman Dixon’s speech indicated that he had formed opinions about the specific issues of the case before hearing the appeal. It found that “. . . a disinterested reader of Chairman Dixon’s speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act.”

A different result on quite similar facts was reached by the Tenth Circuit in the Skelly case. There, the Federal Power Commission was to determine rates to be charged by a number of natural gas producers. The action was brought under section 5 of the Natural Gas Act which requires the Commission to find that a rate is “unjust, unreasonable, unduly discriminatory, or preferential,” before taking action. Prior to hearing before the Federal Power Commission, Commissioner Black made a speech in which he refuted the producers’ claim that competition, not regulation, should adjust rates. He stated, among other things, that the producers incorrectly urged the existence of competition and that “[the] producer’s plea that competition be given a free hand is simply another way of letting the pro-

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17635 F.2d at 768.
19Comment, Prejudice and the Administrative Progress, 59 N.W. L. Rev. 216, 216-17 (1964).
20336 F.2d 754 (D.C. Cir. 1964).
21375 F.2d 6 (10th Cir. 1967).
22Texaco, 336 F.2d at 759.
23See discussion in Part A, Acceptance of Bias as to General Policy and Legal Theory.
24Texaco, 336 F.2d at 760.
ducers fix the prices instead of the FPC."

The Court held that the Commissioner's statement did not require that he be disqualified. It relied on the fact that he had not appeared to prejudge the ultimate issue of a "just and reasonable rate." The Court went on to state:

In our opinion no basis for disqualification arises from the fact or assumption that a member of an administrative agency enters a proceeding with advance views on important economic matters in issue. (Emphasis added.)

Hence, the key factor which distinguishes this case from Texaco is that the FPC Commissioner's statements did not appear to prejudge specific facts in the proceeding but only general issues, i.e., "important economic matters."

Thus, it is not the "strong convictions" or "crystallized point of view" on questions of law, policy, or general facts which disqualify a decision-maker, but rather evidence of opinions with respect to specific facts in a particular case before the agency for determination.

THE KEY FACTOR: THE CONTEXT OF THE DECISIONMAKING

Despite the apparent judicial sensitivity to whether the issue alleged to be prejudged might relate to specific facts, it is the premise of this article that the key distinction is whether the bias is institutional or personal. Courts will not find illegal prejudgment where the spectre of bias arises in the context of an institutional process, whereas the charge will result in close scrutiny of the decision where personal bias is alleged.

The case most often cited in support of a prejudgment challenge is Amos Treat & Co. v. Securities and Exchange Commission. In that case, one member of the Commission who had participated in the decision to authorize a proceeding had been director of the bureau conducting the investigation at issue during the time that it had initiated an informal investigation. The Commissioner filed a statement that he was not prejudiced by his prior contact. However, the Court found that the statement evidenced involvement in the investigation.

The holding in Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966), also hinges on a distinction between specific facts and general facts. Although not a prejudgment case, it does give further indication of judicial sensitivity to possible improper influence on specific facts by considerations outside the record. Thus, although the Court held that the Congress has a right to advise as to the "sense of Congress" concerning the Commissioner's legislative function, it went on to state, "[h]owever, when [the congressional] investigation focuses directly and substantially upon the mental decisional processes of a Commission in a case which is pending before it, Congress is no longer intervening in the agency's legislative function, but rather, in its judicial function." Id. at 964. Thus, the Court distinguished influence on such things as policy statements and rules from influence on "adjudicative" facts, and found that the boundary had been passed in this particular congressional investigation.

The same circuit only a year later severely limited the Amos Treat doctrine. In SEC v. R.A. Holman, 323 F.2d 284 (D.C. Cir.), cert. denied, 375 U.S. 943 (1963), respondent sought to disqualify a Commissioner who had a position of responsibility on the staff but had not participated in the investigation. Presented with nearly the same fact situation, the Court limited Amos Treat to its particular facts. It stated that Amos Treat was an exceptional case and it found sufficient the Commissioner's affidavit that he did not participate in the investigation. See Maremont Corp. v. FTC, 431 F.2d 124, 128 (7th Cir. 1970).
case on the side of a party not participate in the decisionmaking.\textsuperscript{31} It found that the potential for prejudgment was too great where a Commissioner has been both the prosecutor and the judge. The Court concluded that "\ldots an administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness but with the very appearance of complete fairness."\textsuperscript{32}

The foundation case for the line of cases emanating from \textit{Amos Treat} appears to be \textit{Berkshire Employees Ass'n v. National Labor Relations Board}.\textsuperscript{33} In \textit{Berkshire}, a Board member had written a letter to a customer of the respondent which could be interpreted as soliciting his help in the union boycott. The Court recognized that an "administrative body" must perform certain duties which may prejudge issues in adjudication, but it found improper the above conduct of a member of the tribunal. The Court concluded that "\ldots if the circumstances alleged are proved Berkshire did not have a hearing before an impartial tribunal, but one in which one member of the body which made exceedingly important findings of fact had already thrown his weight on the other side."\textsuperscript{34}

The leading case permitting preconception in administrative proceedings is \textit{FTC v. Cement Institute}.\textsuperscript{35} The alleged prejudgment arose from an FTC Report to Congress on the cement industry which stated that the cement industry's multiple basing point system was price fixing. Petitioner charged that the FTC had engaged in investigation of facts outside the record of the adjudication, and had communicated to Congress certain conclusions which prejudged key issues in the adjudication. The Court held that it could not bar the whole Commission from hearing a factually related case because of expressed opinions formed as a result of its prior "official investigation." The Court based this holding on presumption of objectivity of the institution: "In the first place, the fact that the Commission had entertained such views as the result of its prior \textit{ex parte} investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of respondent's basing point practices."\textsuperscript{36} In further support of its holding, it argued that to hold otherwise would mean that by carrying out its investigatory function the Commission would immunize violators. "Thus experience acquired from their work as commissioners would be a handicap instead of an advantage."\textsuperscript{37} This experience is one of the Commission's valuable resources, and hence, good reason compelled the Court to uphold the Commission action.\textsuperscript{38}

\textsuperscript{31}Trans World Airlines v. CAB, 254 F.2d 90 (D.C. Cir. 1958).
\textsuperscript{32}Amos Treat, 306 F.2d at 267.
\textsuperscript{33}121 F.2d 235 (3d Cir. 1941).
\textsuperscript{34}Id. at 239.
\textsuperscript{35}333 U.S. 683 (1948).
\textsuperscript{36}Id. at 701.
\textsuperscript{37}Id. at 702.
\textsuperscript{38}Also, a simultaneous industrywide investigation will not disable the agency from proceeding in adjudication against one industry member. Lehigh Portland Cement v. FTC, 291 F. Supp. 628 (D.E. D.Va. 1968), \textit{aff'd per curiam} 416 F.2d 971 (4th Cir. 1969).
It could be argued that the Cement Institute is merely another case in which a court was willing to uphold the agency where only policy and general facts may have been prejudged. However, in Pangburn v. CAB, the First Circuit rejected a challenge based upon prejudgment of specific facts. The CAB started two proceedings to investigate an airline crash: one to investigate the crash and issue a public report, and another to determine whether to suspend the pilot’s license for failure in skill. Prior to the conclusion of the suspension proceeding, the Board found that the crash was the result of pilot error. The pilot argued, quite plausibly, that the Board’s public findings in the accident investigation prejudged the very issue in the adjudication. However, the court found for the Board:

[W]e cannot say that the mere fact that a tribunal has had contact with a particular factual complex in a prior hearing, or indeed has taken a public position on the facts, is enough to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing. Thus, the court had little trouble with a situation in which the various institutional functions of the agency force it into a position fraught with the potential for bias—even as to specific facts. It relied on the integrity of institutional decisionmakers to assure “fair play” and cited a case in which the Board had, indeed, reached two different opinions. The difference, then, between Berkshire and Amos Treat, and Cement Institute and Pangburn must be the nature of the decisionmaking. Thus, where individual bias either exists or appears to exist the administrative action has not been upheld, but where institutional bias is suggested by the facts the action has been affirmed.

A comparison of the first and second Cinderella cases demonstrates the efficacy of the institutional/personal distinction. In the first Cinderella case, the court explicitly relied on the institutional nature of alleged prejudicial action relating to a specific case. The District Court had held that the Commission could not issue “reason to believe” press releases in connection with the initiation of an adjudication. One of its conclusions was that, “[t]he Commission has the duty in a quasi-judicial proceeding to avoid prejudgment or giving the appearance of having prejudged the issues involved in such proceedings.”

The Court of Appeals specifically rejected this holding. It found that it was the duty of the Commission to inform consumers of any information it became aware of which indicated unfair or deceptive practices.
engaged in activities made unlawful by the Act which have resulted in the initiation of action by the Commission.\textsuperscript{45}

In the second \textit{Cinderella} case, Chairman Dixon made statements in a speech which indicated that he considered certain practices illegal but did not directly refer to the respondents. Typical of these statements is: "What about carrying ads that offer college educations in five weeks, . . . or becoming an airline’s hostess by attending a charm school?"\textsuperscript{46} Basically, the Chairman had merely done what the first \textit{Cinderella} case said the Commission had a duty to do: he was informing the public of questionable practices. Yet, the same Court chastised the individual agency member for his conduct.

In recognition of the institutional/personal distinction, the Court stated that its affirmation of the Commission’s power to issue factual press releases "does not give individual Commissioners license to prejudge cases or to make speeches which give the appearance that the case has been prejudged."\textsuperscript{47} Thus, the Court said:

There is a marked difference between the issuance of a press release which states that the \textit{Commission} has filed a complaint because it has 'reason to believe' that there have been violations, and statements by a \textit{Commissioner} after an appeal has been filed which give the appearance that he has already prejudged the case and that the ultimate determination of the merits will move in predestined grooves. While these two situations—Commission press releases and a Commissioner’s pre-decision public statements—are similar in appearance, they are obviously of a different order of merit.\textsuperscript{48} (Emphasis added.) Although an argument can be made that law of the second \textit{Cinderella} case is questionable,\textsuperscript{49} it has important doctrinal significance because of its explicit reliance on the institutional/individual distinction.\textsuperscript{50}

Nor is this doctrine limited to institutional decisions by a collegial body.\textsuperscript{51} Courts seem just as inclined to uphold an institutional decision of an individual decisionmaker reached in the performance of his duty. A factual situation similar to \textit{Amos Treat} was upheld in \textit{Eisler v. United States}.\textsuperscript{52} Eisler, an admitted communist, charged that the judge was biased because he had, as Assistant Attorney General, participated in anti-communist investigations. The Court held that illegal prejudgment must be based on personal bias and such bias did not arise from the facts alleged.\textsuperscript{53} Similarly, the

\textsuperscript{45}First \textit{Cinderella} at 1314.
\textsuperscript{46}Second \textit{Cinderella} at 590.
\textsuperscript{47}Id.
\textsuperscript{48}Id.
\textsuperscript{49}The primary thrust of the Court’s opinion, in fact, concerned the appearance of prejudgment rather than prejudgment itself. The holding may be explained by reference to the fact that other similar cases were few in number and had occurred several years in the past. This fact, along with the close proximity of the speech to the Court’s decision in the first \textit{Cinderella}, confirmed the Court’s view that "... the reasonable inference a disinterested observer would give these remarks would connect them inextricably with this case." Second \textit{Cinderella}, at 590 n.10. The Court seems to have stretched the appearance test to include an inference of prejudgment of specific facts rather than the orthodox application of the test to glean the appearance of a fair hearing or impartial mind.
\textsuperscript{50}The distinction was recently recognized in Kennebec Copper Corp. v. FTC, 467 F.2d 67 (10th Cir. 1972). In that case the Court said that a charge that correspondence from the Commission itself with Congress made a fair hearing impossible went to "the nature of the law itself" and could not be upheld. \textit{Id.} at 79. However, it did indicate that expressions by an individual Commissioner which evidenced prejudgment of controverted issues, although not found in this case, would lead to disqualification. \textit{Id.} at 80.
\textsuperscript{51}But see 2 \textit{DAVIS} §11.01.
\textsuperscript{52}170 F.2d 273 (D.C. Cir.), cert. dismissed, 338 U.S. 883 (1948).
\textsuperscript{53}Id. at 278.
Supreme Court in *United States v. Grinnell Corp. et al.* \(^{54}\) refused to disqualify Judge Wyzanski for preliminary findings in hearing statements which appeared contrary to the defendant's position. In doing so, it relied on the fact that the opinions were related to the Judge's institutional duties and hence were not the result of extraneous personal bias. \(^{55}\) Administrative agencies need meet no greater standard than judges, \(^{56}\) and hence, the holdings of these two cases apply equally as well to agency decisions. \(^{57}\)

Indeed, similar reliance on the institutionalized decisionmaker has been expressed with respect to individual administrative officers. In *National Labor Relations Board v. Donnelly Garment Co.*, \(^{58}\) the hearing examiner had excluded testimony in the initial hearing in the case. After a court held that the testimony should have been heard and returned the case to the agency, the same examiner, after hearing the testimony, found as he had before. In reliance on the integrity of the institutional decisionmaker, the Court upheld the examiner's decision and rejected the challenge of illegal prejudgment. In *MacKay v. McAlexander*, \(^{59}\) the same hearing officer who presided at the deportation hearing was held qualified to preside at the hearing on suspension of deportation. \(^{60}\) The Supreme Court, in *United States v. Morgan*, \(^{61}\) relied on the institutional nature of the individual administrative officer's decision. The case arose from a letter written by the Secretary of Agriculture to the *New York Times* strongly criticizing a court decision on a matter which was again before the Secretary. The potential for prejudgment was clear, but the Court upheld the Secretary's second decision. In so doing, the Court said: "[t]hat he not merely held, but expressed, strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty. . . ." \(^{62}\) The Court assumed that in reaching an institutional decision in performance of his duty he would do so impartially, i.e., the presumption of regularity in institutional decisions.

Accordingly, official administrative action will withstand challenges based on bias or the opportunity for bias so long as the decision is made in the context of an institutional function. This conclusion is not affected by whether the institutional decisionmaker is collegial or singular.

Two reasons are given for rejecting prejudgment challenges against an

\(^{54}\)384 U.S. 563 (1966).
\(^{55}\)Id. at 583.
\(^{56}\)e.g., NLRB v. Donnelly Garment Co., 330 U.S. 219, 236-37 (1947); FTC v. Cement Institute, 333 U.S. 683, 703 (1948).
\(^{57}\)Often cited in support of challenges of bias by administrative agencies is the decision in *In re Murchinson*, 349 U.S. 133 (1955). That case involved a trial judge who found two witnesses in contempt in open court for prior statements made in a grand jury. The Supreme Court held that the trial judge could not be the complainant, indicter, prosecutor and judge: "Having been a part of that [accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of these accused." *Id.* at 137. But where the facts were not as aggravated the Supreme Court refused to find bias in a contempt conviction by a trial judge. *Nilva v. United States*, 352 U.S. 385 (1957); Sacher et al. *v. United States*, 343 U.S. 1 (1952). Moreover, the very nature of the administrative process compels agencies to perform dual functions, and hence, the rationale of *Murchinson* seems totally inapplicable to administrative agencies.
\(^{58}\)330 U.S. 219 (1947).
\(^{59}\)268 F.2d 35 (9th Cir. 1959), cert. denied, 362 U.S. 961 (1960).
\(^{60}\)Id. at 39.
\(^{61}\)313 U.S. 409 (1941).
\(^{62}\)Id. at 421.
institutional decisionmaker. The major reason is judicial reliance on the integrity of institutional decisionmakers. The courts presume that institutional decisionmakers will fairly operate the multifaceted administrative systems which are often fraught with opportunities for improper bias. Thus, in Cement Institute, the Supreme Court said, "... the fact that the Commission has entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members are irrevocably closed on the subject. ..." In *Pangburn*, even though the Board had previously expressed an opinion on the specific issue raised in the adjudication, the Court found that the Board would not consider itself bound by that opinion but would feel free to reach a contradictory opinion in the adjudication. The second, and less important, reason for such decisions is the "rule of necessity." Hence, in *Pangburn*, after finding reason for placing its trust in the Board, the Court went on to say, "[i]f we were to accept petitioner's argument [that the accident investigation disqualified the Board from considering suspension], it would mean that because the Board obeyed the mandate of Section 701, it was thereupon constitutionally precluded from carrying out its responsibilities under Section 609.

Even though courts have gone quite far to uphold official agency action, they have on occasion indicated that their tolerance has some boundaries. In several cases, the courts have indicated a strong aversion to clear indications of actual prejudgment in official agency action. In *Gilligan, Will & Co. v. Securities and Exchange Commission*, the SEC had issued a press release three days after initiation of an adjudication announcing that it had found that the exact factual situation in issue in the adjudication was illegal (as opposed to announcing a "reason to believe"). While refusing to overturn the Commission's action, the Court said:

> ... the Commission's reputation for objectivity and impartiality is opened to challenge by the adoption of a procedure from which a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it. There would appear to be no such conflict between the Commission's duty to inform the public and its duty to prosecute as would necessitate the use of press releases of the kind here questioned [finding a violation].

Similarly, even though the Court in *Lehigh Portland Cement v. FTC* clearly upheld the FTC's right to consider the same issues in two different proceedings (citing *Pangburn*), it reserved the right of judicial review if it appeared, after the agency's action became final, that actual bias was present. In making this suggestion, the Court may have been merely enter-

63 e.g., Cement Institute, p. 223 *supra*.
433 U.S. at 701.
64 311 F.2d 349 (1st Cir. 1962).
65 *2 DAVIS §12.04; e.g., FTC v. Cement Institute, 333 U.S. at 701; Pangburn v. CAB, 311 F.2d 349 (1st Cir. 1962);
Loughran et al. v. FTC, 143 F.2d 431, 433 (8th Cir. 1944).
66 311 F.2d at 358.
68 *Id.* at 468-69.
70 *Supra*.
71 *Supra*.
72 291 F. Supp. at 633.
ing the narrow groove cut by the Court in *San Francisco Mining Exchange v. SEC.*

It may be that the Commission members in deciding this case on the merits, made use of the staff report and other information that may have been brought to their attention at the time they were called upon to determine if the proceeding should be instituted. However, absent any factual basis for believing that the Commission made such use of these materials, as is the case here, an inquiry into the state of mind of administrative adjudicators during the decisional process is wholly improper.\(^7\)

Thus, the potential exists that a court may, at least, entertain a challenge of prejudgment in official agency action upon the difficult and unlikely showing of actual bias. Otherwise, such challenges should no longer be seriously considered.

**Conclusion**

Insofar as predispositions may exist in the more highly charged fields in which administrative agencies operate, they are mainly the product of many factors of mind and experience, and have comparatively little relation to the administrative machinery. There is no simple way of eliminating them by mere change in the administrative structure. They can only be exorcised by wise and self-controlled men. The problem is inherently one of personnel and the traditions in which it is trained.\(^75\)

Courts faced with the problems of administrative prejudgment would seem to concur in the above finding of the Attorney General's Committee to Study Administrative Procedure. For, where the decision is institutionalized, the courts have relied on the integrity of the men involved to do "the right thing."

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\(^{73}\) 378 F.2d 162 (9th Cir. 1967).

\(^{74}\) *Id.* at 168.

\(^{75}\) *Final Report of the Attorney General's Committee on Administrative Procedure,* s. doc. no. 8, 77th Cong., 1st Sess. at 59 (1941).