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BIAS OF ADMINISTRATIVE OFFICERS

BY KENNETH CULP DAVIS*

1. *"An amorphous dummy unspotted by human emotions [is not] a becoming receptacle for judicial power."*

2. *"The people of this country will not permit the courts to declare a policy for them with respect to this subject."*

3. *"The judge or administrator applying indefinite statutory provisions ought to be something other than impartial referee and arbitrator."*

4. *"Bias from strong and sincere conviction as to public policy may operate as a more serious disqualification than pecuniary interest."*

The contrariety of views advanced in these quotations poses a central question: What sort of biases should be deemed incompatible with the exercise of judicial power? The first quotation, surprisingly enough, is from Mr. Justice McReynolds, who is saying not only that a judge who had strong anti-German feelings after the First World War was qualified to try Germans for espionage, but that a judge who lacked such emotions was not qualified: "A public officer who entertained no aversion towards disloyal German immigrants during the late war was simply unfit for his place."¹ The second quotation is from a unanimous report in 1914 of a Senate Committee concerning interpretation and enforcement of the antitrust laws.² The Committee carefully reviewed Supreme Court decisions, observed that "the court does not administer the law, but makes the law," and recommended estab-

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1. *Berger v. United States*, (1921) 225 U. S. 22, 43.

2. Sen. Rep. No. 1326, 62d Cong., 3d Sess. (1914), reprinted in 51 Cong. Rec. 11384.

lishment of a commission for administration of the antitrust laws. The third quotation is representative of many similar statements by commentators who believe that the right point of view or bias is indispensable to proper performance of judicial tasks.³ And the fourth expresses the much-criticized view of the British Committee on Ministers' Powers, the Sankey Committee.⁴

This paper is not so ambitious as to try to resolve the philosophical issue. Instead, the purpose is merely to summarize the prevailing law concerning bias of administrative officers who perform judicial functions, and to discuss some of the main reasons lying behind that law.

The Meaning of "Bias"

The term "bias" both in dictionaries and in legal usage has a multiplicity of meanings. It is often a synonym for prejudice, signifying fixed and unalterable conclusions not founded on reason or understanding, or a tendency to form final judgments in ignorance of essential facts, or an unwillingness to consider new evidence or new argument. Prejudices, inevitable though they may be in all human beings, are a mark of weakness. Another common meaning of "bias" is a tendency of thought in one direction on a controversial question. In this sense, most Americans have a bias for democratic methods, the pre-1937 Supreme Court was thought by many to have had a bias in favor of property interests, and the present Court seems to have a bias in favor of judicial self-restraint permitting government regulation of economic life. A judge may have a bias on a question of law because he decided the question in a previous judicial opinion. Everyone who thinks has biases in this sense; the judge who has the most biases in this sense may even be the best judge. A third kind of bias, often denominated "partiality," signifies an attitude for or against a party as distinguished from tendencies of thought concerning issues of law or policy, and is commonly regarded as a basis for disqualification. A fourth kind of bias is better called "interest." A judge who stands to gain or lose by a decision either way—because he owns stock in a corporation or is related to a party or is substantially affected as a taxpayer—has an interest of the kind that is generally considered a ground for disqualification.

3. Hyneman, *Administrative Adjudication*, (1936) 51 Pol. Sci. Q. 383, 516, 526.

4. Report of Committee on Ministers' Powers 78 (1932).

*Is a Crystallized Point of View A Basis
for Disqualification?*

This question probably would not deserve discussion were it not for the unusual view of the British Committee on Ministers' Powers that bias from strong and sincere conviction as to public policy should disqualify. The Committee explained: "The judge ought to be free to decide on purely judicial grounds and should not be directly or indirectly influenced by, or exposed to the influences of, either motives of self-interest or opinions about policy or any other considerations not relevant to the issue."⁵ This statement seems to be an anachronism springing from a nineteenth-century belief that law is found and not made, a belief that has now virtually disappeared. Today we have grown weary of the overquoted statement from Holmes that "the life of the law has not been logic but experience." Today we are often affirmatively anxious that our case law should reflect the policy views of the judges.⁶ Years ago Mr. Justice Holmes declared: "I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage."⁷ Mr. Justice Cardozo decries the pretense that "judges must lose respect and confidence by the reminder that they are subject to human limitations," and he points out that "the great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by."⁸ Yet the Committee on Ministers' Powers assumes that there is opposition between "purely judicial grounds" and "opinions about policy." And (through the word "other") the Committee even asserts that opinions about policy are not relevant to issues to be decided by judges.

Professor Jaffe has effectively answered the Committee's statement: "If emotionally determined values constituted a disqualification, judges would be under constant attack and judicial-constitutional law non-existent. Nor is this entirely a matter of necessary evil. Certain persons give thanks for the predispositions of Mr. Justice Butler and certain others looked upon Mr. Justice Holmes'

5. Ibid.

6. Jackson, *The Struggle for Judicial Supremacy* 311 (1941): "The ultimate function of the Supreme Court is nothing less than the arbitration between fundamental and ever-present rival forces or trends in our organized society."

7. Holmes, *The Path of the Law*, (1897) 10 Harv. L. Rev. 466.

8. Cardozo, *The Nature of the Judicial Process* 168 (1921).

prejudices in favor of free speech as the most precious of safeguards."⁹

The decisions, of course, reject the view of the Committee on Ministers' Powers. Outstanding is the *Fourth Morgan* case.¹⁰ After the *Second Morgan* case, the Secretary of Agriculture vigorously criticized the Court's decision in a letter to the New York Times. The market agencies charged that this letter disqualified the Secretary from reconsideration of the case after it was remanded to him. This contention was rather summarily rejected by the Supreme Court: "But, intrinsically, the letter did not require the Secretary's dignified denial of bias. That 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 in subsequent proceedings ordered by the Court."¹¹ The Court further observed that both cabinet officers and judges "may have an underlying philosophy in approaching a specific case."¹² Many other cases support the proposition that strong conviction on questions of law or policy does not disqualify.¹³ After all, a holding the other way would mean that a judge would be barred from deciding a case on the authority of his own previous decision.

9. Jaffe, *Investive and Investigation in Administrative Law*, (1939) 52 Harv. L. Rev. 1201, 1219.

10. *Morgan v. United States*, (1941) 313 U. S. 409.

11. 313 U. S. at 421.

12. *Ibid.*

13. In *Crowley-Milner & Co. v. Reid*, (1927) 239 Mich. 605, 215 N. W. 29, the court quoted with approval from *Tuttle v. Tuttle*, (1921) 48 N. D. 10, 27, 181 N. W. 898, 906: "The mere fact that a judge entertains, or even has expressed, an opinion upon some question of law, does not disqualify him on the ground of bias or prejudice."

Hudspeth v. State, (1933) 188 Ark. 323, 327, 67 S. W. 2d 191, 193: "The words bias and prejudice, as used in the law of the subject under consideration, refer to the mental attitude or disposition of the judge towards a party to the litigation, and not to any views that he may entertain regarding the subject matter involved." *Wisconsin Tel. Co. v. Public Serv. Com.*, (1939) 232 Wis. 274, 312, 287 N. W. 122, 141-42: "Bias and prejudice attributable to some feeling against the company is an entirely different thing than zeal in the discharge of a highly important public duty." See also *Pennsylvania Publications v. Pennsylvania P. U. C.*, (1943) 152 Pa. Super. 279, 298, 32 A. 2d 40, 49; *Oregon Shipbuilding Corp. v. NLRB*, (D. Ore. 1943) 49 F. Supp. 386, 388.

Some judicial statements of this general principle may go too far. In *Elder v. Camp*, (1942) 193 Ga. 320, 18 S. E. 2d 622, the court declared in the syllabus: "Alleged prejudice or bias of a judge, which is not based on an interest either pecuniary or relationship to a party within a prohibited degree, affords no legal ground for disqualification." If the judge shows personal animosity toward one of the parties, he should be disqualified.

See Frank, *Disqualification of Judges*, (1947) 56 Yale L. J. 605; Sedgwick, *Disqualification on the Ground of Bias as Applied to Administrative Tribunals*, (1945) 23 Can. B. Rev. 453; Note (1941) 51 Yale L. J. 169, on disqualification of judges; Note (1941) 41 Col. L. R. 1384, on disqualification of administrative officials.

In some circumstances, one in the position of the judge may even have taken a position not only on law and policy but also on facts, without becoming disqualified. Perhaps the best treatment of this question is that of the Supreme Court in *NLRB v. Donnelly Garment Co.*¹⁴ The examiner conducted a hearing, made many rulings adverse to the company, and filed a report finding unfair labor practices. The Board upheld the rulings, adopted the recommendations, and issued an order. A circuit court of appeals set aside the order on the ground that improper exclusion of evidence rendered the hearing unfair. The Board set the case for supplemental hearing before the same examiner. The company insisted the examiner had prejudged as valueless the evidence to be presented at the new hearing, and moved for a new examiner.¹⁵ The Board denied the application, the examiner ruled the same way, and the Board issued virtually the same order as before. The circuit court of appeals denied the Board's petition for enforcement, partly on the ground that the motion for a new examiner should have been granted.¹⁶ The Supreme Court unanimously held that under the rule of judicial administration (apart from statute) a judge is not disqualified from sitting in a retrial because he was reversed on earlier rulings, and that there is "no warrant for imposing upon administrative agencies a stiffer rule, whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing."¹⁷

The federal statute on disqualification of judges provides: "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has any personal bias

14. (1947) 330 U. S. 219. Cf. *Marquette Cement Mfg. Co. v. F. T. C.*, (C.C.A. 7th 1945) 147 F. 2d 589, (1945) 33 Geo. L. J. 311, holding Commission not disqualified by reason of previous belief in harmful economic effects of cement industry's multiple basing point price system.

15. The examiner made various statements, such as "No, I don't think it is of any value in the issues in this case, to parade these people on the stand." "I think I should tell you now that if there is any further testimony of that kind, you can put it in an offer of proof, because I don't think it is material to the issues here." See *Donnelly Garment Co. v. NLRB*, (C.C.A. 8th 1945) 151 F. 2d 854, 870.

16. The court said: "With all due respect to the Trial Examiner, who conducted himself with courtesy and patience under conditions which were not always tranquil, it is hard to believe that he could be entirely impartial in weighing evidence which he, sincerely, considered to be of no value or materiality." *Ibid.*

17. 330 U. S. at 236-37. Accord: *In re J. P. Linahan, Inc.*, (C.C.A. 2d 1943) 138 F. 2d 650 (special master); *Kolowich v. Wayne County*, (1933) 264 Mich. 668, 250 N. W. 875 (judge). Contra: *State v. Atterberry*, (1926) 134 S. C. 392, 133 S. E. 101 (judge).

or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated. . . ."¹⁸ The bias here concerns personal attitude toward parties, not views as to law and policy. Under this statute, it is held that an affidavit charging bias is properly ignored when it alleges "an impersonal prejudice," since the statute requires that the bias or prejudice be "personal."¹⁹

Ordinarily personal animosity, which disqualifies, is easy to distinguish from views on law and policy, which do not disqualify. A case in which this differentiation was difficult is *Berger v. United States*, from which the statement above quoted from Mr. Justice McReynolds is taken.²⁰ The trial judge in a prosecution for espionage after the First World War refused to disqualify himself even though an affidavit was filed by the defendants, who were Germans, alleging that the judge was "prejudiced and biased against said defendants because of their nativity." The judge had previously stated that "one must have a very judicial mind, indeed, not to be prejudiced against the German Americans in this country. . . . I know a safeblower . . . and as between him and this defendant, I prefer the safeblower." The Supreme Court held, six to three, that the judge was disqualified. The majority believed that the judge's statements evinced a personal prejudice against a class of which the defendants were members,²¹ thereby showing a prejudice against the defendants. The minority reasoned that personal bias was lacking, since it did not appear that the judge "had any acquaintance with any of the defendants."²²

Is a Crystallized Point of View Sometimes Positively Desirable?

This question is apposite for both judges and administrators who perform judicial functions. Even a superficial glance at American history will reveal that Presidents from Washington to Truman have taken into account basic philosophies on the central problems of the day in making judicial appointments. Theodore Roosevelt

18. 36 Stat. 1090 (1911), 28 U. S. C. § 25 (1940), Judicial Code § 21.

19. *Price v. Johnston*, (C.C.A. 9th 1942) 125 F. 2d 806, certiorari denied, (1942) 316 U. S. 677. Cf. *Scott v. Beams*, (C.C.A. 10th 1941) 122 F. 2d 777, 788.

20. (1921) 255 U. S. 22.

21. This is the interpretation given in *Ryan v. United States*, (C.C.A. 8th 1938) 99 F. 2d 864, 871, cert. den. (1939) 306 U. S. 635, rehearing den. (1939) 306 U. S. 668.

22. 255 U. S. at 41. Mr. Justice McReynolds asked: "If an admitted anarchist charged with murder should affirm an existing prejudice against himself and specify that the judge had made certain depreciatory remarks concerning all anarchists, what would be the result?"

was outspoken on this subject. In a passage quoted with approval by Mr. Justice Cardozo, he said: "The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions."²³ And Cardozo commented: "Roosevelt, who knew men, had no illusions on this score."²⁴

One of the prime purposes behind the creation of many administrative agencies has been to escape the bias of judges. By and large, with many exceptions, judges who have been influenced by legal training toward conservative thought and who have been accustomed as advocates at the bar to favoring interests of property tend to be biased in favor of protection of private rights against governmental interference. This is what Judge Learned Hand meant when he said in 1916: "The profession is still drawn, and so far as we can see will always be drawn, from the propertied class, but other classes have awakened to conscious control of their fate. . . . But the profession has not yet learned to adapt itself to the change; that most difficult of adjustments has not been made, an understanding of and sympathy with the purposes and ideals of those parts of the common society whose interests are discordant with its own."²⁵ This was the idea the Senate Committee was advancing in 1914 when it said that the people will not permit the courts to declare the basic antitrust policies, and that therefore a commission should be created to declare those policies.²⁶ Landis has pointed out the reasons which motivated Congress in creating the Federal Trade Commission instead of giving its powers of adjudication to the courts: "In the field of industrial regulation deep and enduring disappointments had already resulted from the judicial attitude toward railroad legislation and toward the Sherman Act. . . . [The courts] too frequently set at naught the public and political effort which had so hopefully expended itself in the passage of the statute."²⁷ Other writers have

23. Message to Congress, Dec. 8, 1908, 43 Cong. Rec. 21.

24. Cardozo, *The Nature of the Judicial Process* 173 (1921).

25. Learned Hand, *The Speech of Justice*, (1916) 29 Harv. L. Rev. 617, 619.

26. Sen. Rep. No. 1326, 62d Cong., 3d Sess. (1914), reprinted in 51 Cong. Rec. 11384.

27. Landis, *The Administrative Process* 96 (1938). Landis accordingly argues that trial examiners should have a "proper bias" toward the administrative point of view. *Id.* at 104. "To lodge a great, interpretative power

noted that "the creation of the more controversial of these agencies was brought about by an explicit fear of the bias of the judiciary,"²⁸ and that the power of interpretation must be vested in "persons who are not by their environment and their specialized training, or by the dictates of their technique, imbued with the idea that social legislation is pernicious."²⁹

Some years ago an American Bar Association committee, by way of condemnation of the administrative process, asserted: "Administration, with its ideal and function of getting things done, has, and from its ideal will have, a tendency to act from one side. An administrative agency is not unlikely to have been set up to get things done in the interest of one side which controls or has the favor of the executive for the time being."³⁰ This statement, if slightly modified to substitute the legislative for the executive, would be entirely accurate, as applied to many agencies. But is it a mark of weakness that an agency may have an assignment of carrying out policies declared through a democratic process? The view of the Bar Association's committee seems to be that law must be declared solely by judges whose decisions should be carefully kept unresponsive to democratic desires. Why should the people be denied the power to declare through their elected representatives the point of view which should control the interpretation and application of measures which are deliberately designed to change judge-made law?³¹

in the judiciary involved the risk that a policy, which initially was given to the administrative to formulate, might be thwarted at its most significant fulcrum by judgments antagonistic to its own." *Id.* at 97. Vanderbilt says the Landis view "runs counter to our experience over the centuries." See Vanderbilt, *The Place of the Administrative Tribunal in Our Legal System*, (1938) 24 A. B. A. J. 267, 272.

28. Feller, *Administrative Law Investigation Comes of Age*, (1941) 41 Col. L. Rev. 589.

29. Jennings, *Courts and Administrative Law—The Experience of English Housing Legislation*, (1936) 49 Harv. L. Rev. 426, 454. See also McGoldrick, Graubard, and Horowitz, *Finality of Administrative Determination in New York City Building Regulation*, (1942) 19 N. Y. U. L. Q. Rev. 109, 157-58: "Is not the interpretation of statutes a process undertaken not in the shadows of the reports and dictionaries but in the stress of competing social policy considerations? The meaning of a statutory phrase is not plucked from some mystical juristic heaven but is predominantly influenced, even dictated, by the end result that the judicial or the administrative lexicographer wishes to reach."

30. Report of the Special Committee on Administrative Law, (1938) 63 A. B. A. Rep. 331, 342.

31. An 1834 report to the French Chamber of Deputies contrasts courts' tendencies with administrative tendencies, the one emphasizing legal theories at the expense of the needs of practical administration and the other doing the opposite. The interesting fact is that the Council of State was *deliberately* set up so as to mix the biases—so as to secure a middle view. This was done by providing that a portion of the members of the Council should be

When Congress enacts a comprehensive statute enunciating new policies and creating a new agency, the commissioners might be chosen from those who agree with the new policies, from those who oppose it, or from those who are indifferent. Since the commissioners are to perform a judicial function, a superficial consideration might readily lead to a choice of the indifferent, who are relatively free from bias and may therefore be more likely to hold the scales of justice in even balance.³² But the task of the administrators is not merely to find simple adjudicative facts from disputed evidence; that task includes the assembling and interpretation of social and economic facts and the positive creation of a body of subsidiary law and policy designed to promote congressional objectives. If the people through their representatives are to have power not merely to change what is written on the statute books but to have those changes made effective through actual administration, then the ideal commissioners will be men whose sincere ideas of policy conform to the broad legislative intent. A Price Administrator ought not to be indifferent to the forces of inflation, a Trade Commissioner should not be neutral on anti-monopoly policies, and a Securities and Exchange Commissioner should not be apathetic about the need for governmental restrictions. Administrators who are unsympathetic toward the legislative program are very likely to thwart the democratic will;³³ the way to translate legislative policies into action is to secure administrators whose honest opinions—biases—are favorable to those policies. "It is a *sine qua non* of good administration that it believe in the rightness and worth of the laws it is enforcing and that it be prepared to bring to the task zeal and astuteness in finding out and making effective those purposes."³⁴

drawn from practical administration. See Rohkam and Pratt, *Studies in French Administrative Law* 19 (1947). A wise legislative body might conceivably choose one bias for one function, another for another function, and mixed biases for a third function, depending on substantive needs for the various functions.

32. Of course, this is not to suggest that the indifferent would be free from bias. On the contrary, as Judge Frank has said, "If . . . 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances, and which, therefore, by definition, are prejudices." See *In re J. P. Linahan, Inc.*, (C.C.A. 2d 1943) 138 F. 2d 650, 651.

33. The history of section 20 of the Clayton Act proves this. See Frankfurter and Greene, *The Labor Injunction* Ch. IV (1930).

34. Jaffe, *The Reform of Administrative Procedure*, (1942) 2 Pub. Ad. Rev. 141, 149.

This is far from saying that law should be administered by zealots or crusaders who lack perspective or stability. Judgment must of course be guided by intellectual perception, not by emotion; performance of judicial tasks necessarily calls for integrity, character, and ability. The administrator's belief in the cause he is furthering, even though that cause has won legislative approval, must not overpower the recognition of competing interests. Sincere conviction should not be so steadfast as to shut out inquiry and re-examination. Belief must not be so unyielding as to smother the contributions that alert practical administration may make to the molding and remolding of policy. And yet a dominant point of view or bias may appropriately color all activities, including even the fact-finding function.³⁵ Thoroughly conscientious men of strong conviction may sometimes interpret evidence to make findings which indifferent men would not make. The theoretically ideal administrator is one whose broad point of view is in general agreement with the policies he administers but who maintains sufficient balance to perceive and to avoid the degree of zeal which substantially impairs fair-mindedness.³⁶

Partiality as Shown by Conduct of Trial

A judge or other presiding officer at a trial may show partiality toward one side and hostility toward the other side which goes so far as to make a fair hearing impossible. The Supreme Court has held that "the bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case"³⁷ and that "it must be based upon facts antedating the trial, not those occurring during the trial."³⁸ This view has been followed recently by the lower courts.³⁹ But it is hardly surprising that the lower courts have frequently departed from this view, for partiality or

35. This is quite consistent with Professor Jaffe's observation: "Our tradition rightly interpreted is that the judge should be neutral toward the question of whether the specific defendant is guilty. It is a perversion of that tradition to demand that the judge be neutral toward the purposes of the law." *Ibid.*

36. See *Lumber Mut. Cas. Ins. Co. v. Locke*, (C.C.A. 2d 1932) 60 F. 2d 35, 38, holding that a deputy commissioner's premature expression of an opinion on the merits did not disqualify because he "did not indicate that his mind was not open to any proof."

37. The Court made this statement in *Berger v. United States*, (1921) 255 U. S. 22, 31, relying on *Ex parte American Steel Barrel Co.*, (1913) 230 U. S. 35.

38. 255 U. S. at 34.

39. *Ryan v. United States*, (C.C.A. 8th 1938) 99 F. 2d 864, cert. den. (1939) 306 U. S. 635, rehearing den. (1939) 306 U. S. 668; *Walker v. United States*, (C.C.A. 9th 1940) 116 F. 2d 458.

hostility when it goes far enough may obviously vitiate the fairness of a hearing, even in absence of specific reversible error.⁴⁰

The Circuit Courts of Appeals have passed upon hosts of contentions that trial examiners of the National Labor Relations Board have been guilty of this kind of bias.⁴¹ In many cases the courts have found the charges of bias unfounded: "The heat of the contest has, we think, led respondent to attribute bias because of the intensity of its own feeling."⁴² "This record discloses . . . exemplary fairness. . ."⁴³ "We are left with a strong impression that much of the conduct complained of was deliberately provoked by counsel for the company. . ."⁴⁴ "The offender against due and orderly trial procedure was in reality respondent's trial attorney, whose apparent desire from the outset of the hearing was to goad the examiner into unjudicial words or conduct."⁴⁵ These cases and others⁴⁶ of the same kind prove that charges against the Labor Board's examiners have often been quite unjust to the Board and its examiners.

In another group of Labor Board cases the courts have refused to reverse for undue bias, even though absence of bias was not clearly shown. One court found "sarcasm not appropriate to a judicial officer," but that "the conduct of the hearings was fair."⁴⁷ Another found the conduct of the hearing "justly subject to criticism," but not "so unfair as to constitute a denial of due process."⁴⁸

40. This statement is adequately supported by the cases discussed in this section, including especially *Inland Steel Co. v. NLRB*, (C.C.A. 7th 1940) 109 F. 2d 9, and *NLRB v. Phelps*, (C.C.A. 5th 1943) 136 F. 2d 562. The contrary view was expressed in *NLRB v. Air Associates, Inc.*, (C.C.A. 2d 1941) 121 F. 2d 586, 589, but this expression accompanies a finding of lack of bias, and even this court would probably reverse upon finding such conduct of the examiner as that shown in *NLRB v. Washington Dehydrated Food Co.*, (C.C.A. 9th 1941) 118 F. 2d 980. In *Ott v. Board of Registration*, (1931) 276 Mass. 566, 177 N. E. 542 an administrative order was set aside because of "an attitude . . . which was not fair and impartial," especially with respect to limiting cross-examination.

41. Some of the cases are discussed in Note (1941) 30 Geo. L. J. 54.

42. *NLRB v. Acme-Evans Co.*, (C.C.A. 7th 1942) 130 F. 2d 477, 482.

43. *Continental Box Co., Inc. v. NLRB*, (C.C.A. 5th 1940) 113 F. 2d 93, 96.

44. *NLRB v. Weirton Steel Co.*, (C.C.A. 3d 1943) 135 F. 2d 494, 497.

45. *NLRB v. Baldwin Locomotive Works*, (C.C.A. 3d 1942) 128 F. 2d 39, 45. A wealth of materials on this subject may be found in the opinion in which Judge Clark dissented on other grounds.

46. *NLRB v. Gallup American Coal Co.*, (C.C.A. 10th 1942) 131 F. 2d 554; *NLRB v. Remington Rand, Inc.*, (C.C.A. 2d 1938) 94 F. 2d 862; *NLRB v. Thompson Products, Inc.*, (C.C.A. 9th 1944) 141 F. 2d 794; *Bethlehem Steel Co. v. NLRB*, (App. D.C. 1941) 120 F. 2d 641; *NLRB v. Condenser Corp.*, (C.C.A. 3d 1942) 128 F. 2d 67, 79.

47. *NLRB v. Stackpole Carbon Co.*, (C.C.A. 3d 1939) 105 F. 2d 167.

48. *Cupples Co. Mfrs. v. NLRB*, (C.C.A. 8th 1939) 106 F. 2d 100.

In another case the court thought the conduct of the examiner "left much to be desired," and stated that "had this been a close case his conduct might have been sufficient cause for a denial of this petition."⁴⁹ In two cases⁵⁰ it was held that even if prejudice or partiality had been shown, still the courts would deny relief. The Court of Appeals for the Second Circuit held: "Even if bias against respondent was manifested in the examiner's intermediate report and recommendations, that bias became immaterial, since the Board ignored that report and relied solely and directly on the evidence in the record. . . . Even assuming, however, that it were proved, either by the record or otherwise, that the examiner was biased against respondent, we would find no reason, merely because of the fact, for upsetting the Board's order, since respondent does not assert that the examiner committed any error in the admission or exclusion of evidence, nor is there any indication that he conducted himself in a manner which either was likely to intimidate any of the witnesses or to prevent any of them from giving any relevant testimony as to what they believed to be the facts. . . ."⁵¹ This view is in direct conflict with that expressed in the Seventh Circuit⁵² and in one case in the Fifth Circuit,⁵³ although in another case in the Fifth Circuit, the court declared: "If the Board was in any way prejudiced, the Act provides no remedy before us. . . ."⁵⁴

In four cases⁵⁵ orders of the Labor Board have been held unenforceable because of undue bias of examiners. What is probably the highest standard is enunciated in the Fifth Circuit: "The rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have . . . been relaxed. . . . When the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding. . . . It taints and

49. *NLRB v. Western Cartridge Co.*, (C.C.A. 2d 1943) 138 F. 2d 551, cert. den. (1944) 321 U. S. 786.

50. *NLRB v. Air Associates, Inc.*, (C.C.A. 2d 1941) 121 F. 2d 586; *NLRB v. Tex-O-Kan Flour Mills Co.*, (C.C.A. 5th 1941) 122 F. 2d 433.

51. *NLRB v. Air Associates, Inc.*, (C.C.A. 2d 1941) 121 F. 2d 586, 588-89.

52. *Inland Steel Co. v. NLRB*, (C.C.A. 7th 1940) 109 F. 2d 9.

53. *NLRB v. Phelps*, (C.C.A. 5th 1943) 136 F. 2d 562.

54. *NLRB v. Tex-O-Kan Flour Mills Co.*, (C.C.A. 5th 1941) 122 F. 2d 433.

55. *Montgomery Ward & Co. v. NLRB*, (C.C.A. 8th 1939) 103 F. 2d 147; *Inland Steel Co. v. NLRB*, (C.C.A. 7th 1940) 109 F. 2d 9; *NLRB v. Washington Dehydrated Food Co.*, (C.C.A. 9th 1941) 118 F. 2d 980; *NLRB v. Phelps*, (C.C.A. 5th 1943) 136 F. 2d 562.

vitiates all of the proceedings. . . ."⁵⁶ In one of the four cases finding undue bias, the examiner's conduct probably would have been held improper by any court; he "was guilty of threatening, badgering, and arguing with the witnesses, making statements during the hearing contradictory of the true facts, cutting short cross-examination, and acting more in the role of a prosecutor than impartial examiner."⁵⁷

Interest

Most of the law concerning disqualification because of interest applies with equal force to judges and to administrative adjudicators. Professor Frank has recently provided a comprehensive survey of practices with respect to disqualification of judges; he shows, for instance, that a judge is not disqualified merely because an advocate is the judge's former partner.⁵⁸

One who stands to gain or lose personally by a decision either way is disqualified to participate in the exercise of judicial functions. The key decision is *Tumey v. Ohio*.⁵⁹ Those accused of violating the prohibition laws were tried before a Mayor who was allowed to retain, as his own compensation, costs assessed against defendants who were convicted, but received no such compensation from defendants who were not convicted. This system was held unconstitutional as a denial of due process of law: "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."⁶⁰ One might expect such an obvious proposition as this to find universal acceptance; yet it is said that the majority view is that in non-criminal cases it is due process to make an official's compensation depend on the decision he makes.⁶¹ In Indiana fees of justices of the peace are paid only when de-

56. *NLRB v. Phelps*, (C.C.A. 5th 1943) 136 F. 2d 562, 563-64. The examiner whose attitude the court found to be "not impartial but partial, not disinterested but partisan," is now the Board's General Counsel.

57. *NLRB v. Washington Dehydrated Food Co.*, (C.C.A. 9th 1941) 118 F. 2d 980, 996. The autocratic attitude of the examiner in this case is shown by his announcement: "I would like to advise counsel that the Trial Examiner is exceedingly loathe to permit further examination after he has examined the witness. . . ."

58. See Frank, *Disqualification of Judges*, (1947) 56 Yale L. J. 605.

59. (1927) 273 U. S. 510.

60. 273 U. S. at 532.

61. Note, *The Disqualification of Administrative Officials*, (1941) 41 Col. L. Rev. 1384, 1396.

defendants are found guilty but the validity of the system is upheld.⁶² A Tennessee system of compensating assessors in accordance with the value of the property assessed by them has been upheld in two cases.⁶³ Most surprising is *De Pauw University v. Brunk*,⁶⁴ upholding a system permitting a probate judge to determine whether an estate is taxable, to fix the amount of the tax and to receive two and one-half per cent of the tax for his compensation. The probate court, it was declared, "is an administrative tribunal. . . . While it is essential to due process of law in the usual judicial proceeding that the judge shall be disinterested and impartial, it is not essential to due process of law that an administrative officer shall be disinterested and impartial."⁶⁵ Despite this language, however, the best explanation of the case probably is that the kind of judicial review provided was likely to prevent injustice.⁶⁶ In addition, as in the Tennessee cases, the immediate result of invalidating the system would have been to permit the taxpayer before the court to escape what may have been an entirely fair tax. Much more likely to command support is the view of the Illinois court, which invalidated a system of paying an assessment commissioner two per cent of the amount collected, simply because: "The larger the assessment, the more compensation he would receive."⁶⁷

Many cases relating to the assessment or improvement or condemnation of property have dealt with the effect of the incidental ownership of some such property by the officials. Thus, in *Lent v. Tillson*,⁶⁸ the Supreme Court held that no federal question was raised by a municipal arrangement providing that the mayor, who owned property on the street, should serve as one of three members of a board to determine damages incurred by owners on account of the widening of the street, any aggrieved party being permitted to secure *de novo* judicial review. Some cases have been more strict in treating comparable questions.⁶⁹

62. *State v. Schelton*, (1933) 205 Ind. 416, 186 N. E. 772; *Harding v. Mimas*, (1934) 206 Ind. 661, 190 N. E. 862.

63. *State v. Tenn. Coal, I. & R. Co.*, (1895) 94 Tenn. 295, 29 S. W. 116; *Tennessee Fertilizer Co. v. McFall*, (1912) 128 Tenn. 645, 163 S. W. 806. In the first case the court relied in part on waiver resulting from lack of timely objection, and the second case was decided largely on authority of the first, although in the second case lack of timely objection was not mentioned.

64. (W.D. Mo. 1931) 53 F. 2d 647, *aff'd* on other grounds, (1932) 285 U. S. 527.

65. *Id.* at 651.

66. The court leaned heavily on this idea.

67. *Chase v. City of Evanston*, (1898) 172 Ill. 403, 50 N. E. 241.

68. (1891) 140 U. S. 316.

69. E.g., *Stahl v. Board of Ringgold Co.*, (1920) 187 Iowa 1342, 175

Another manifestation of pecuniary interest is that of the commissioner who is appointed for the purpose of representing the economic group of which he is a member. Here the notion is that the interest or bias is affirmatively desirable. Thus, the Railroad Retirement Board is made up of three members, one of whom, according to the statute, is to be recommended by the carriers, one to be recommended by the employees, and the third, the public representative, "shall not be in the employment of or be pecuniarily or otherwise interested in any employer or any organization of employees."⁷⁰ It has been suggested that "the tripartisan composition of the Board enables it to secure a higher degree of cooperation and confidence from the interested parties than could a board whose entire membership was drawn from outside the railroad industry."⁷¹ The National Railroad Adjustment Board is composed of eighteen representatives of carriers and eighteen representatives of railway labor unions, all thirty-six being in the employ of their principals and not government employees. The members of the Board are expected to be partisan. The same theory underlay the organization of such tribunals as the National Defense Mediation Board, the War Labor Board, and the Wage Stabilization Board.

Whether or not these bipartisan or tripartite tribunals are desirable for the performance of adjudicatory functions is a question which may not be answerable in definitive terms on the basis of experience. On an ideal plane, the advantages of adjudication by theoretically disinterested judges are readily apparent.⁷² The partisan system is regarded by many as appallingly inefficient in some respects. But when parties on both sides insist on having their representatives within the organization, it is hardly surprising that Congress sets up the agency accordingly. Of the National Railroad Adjustment Board, the Attorney General's Committee said that its bipartisan character "is a reflection of historical developments and that, with all of its imperfections, it may make for a more workable adjudicatory mechanism than could a plan constructed

N.W. 772; Appeal of McClure, (1890) 137 Pa. 590, 20 Atl. 711. Many cases of this kind are collected and discussed in Note (1941) 41 Col. L. Rev. 1384.

70. 50 Stat. 314 (1937), 45 U. S. C. § 228j (1940).

71. Monograph of the Attorney General's Committee, 76th Cong., 3d Sess., Sen. Doc. No. 186, Part 8, p. 7 (1940).

72. Report, Attorney General's Committee on Administrative Procedure 186 (1941) concerning the National Railroad Adjustment Board: "The opinion may . . . be expressed that a nonpartisan agency, if it could be brought into being by agreement among the various interests affected, would prove to be an instrumentality superior to the one now maintained. . . ." Cf. Gellhorn, Federal Administrative Proceedings 131-44 (1941).

more abstractly. . . . The Committee is not prepared to recommend that the Board be replaced by a new, nonpartisan tribunal until such time as the advantages of that type of organization are acknowledged by all parties concerned."⁷³

Whatever the relative merits of the partisan and nonpartisan systems, legislative bodies should clearly be free to make their own choice.⁷⁴ The Michigan Supreme Court has taken an unusual view.⁷⁵ A milk marketing board of five members was made up of two milk producers, one distributor, one consumer, and the commissioner of agriculture. The court held this system a denial of due process, on the ground that the pecuniary interests of a majority of the board prevented a fair hearing. The case is the more extreme because the order fixed minimum prices to be paid to all producers—clearly a legislative and in no sense a judicial action. The court relied on the discredited decision of *Carter v. Carter Coal Co.*,⁷⁶ holding unconstitutional a delegation to coal producers and miners of power to fix hours and wages. Closer to the main current of present opinion is the holding in *Miami Laundry Co. v. Florida Dry Cleaning & L. Board*,⁷⁷ approving a board composed of three members from the cleaning industry, three from the laundry industry, and one representing the public.

Somewhat more subtle than direct pecuniary interests are interests of other kinds that may be thought to come within the ancient injunction that "no man shall be a judge in his own cause." Just what is one's own cause is sometimes an elusive inquiry. In *Berkshire Employees Ass'n v. NLRB*,⁷⁸ it was held that the Board must consider evidence which "bears the possibility of interpretation that he [a member of the Board] was endeavoring to assist in a boycott on Berkshire's goods." The assumed major premise seems to be that one who is unofficially taking action on one side of a controversy is disqualified from adjudicating the controversy. Significantly, the court pointed out that the interest

73. *Id.* at 185-86.

74. In *Opp Cotton Mills, Inc. v. Administrator*, (1941) 312 U. S. 126 the Court approved an industry committee representing employers, employees, and the public. Recommendations by an industry committee could be approved or disapproved by the Administrator, but not modified.

75. *Johnson v. Michigan Milk Marketing Board*, (1940) 295 Mich. 644, 295 N. W. 346, 54 Harv. L. Rev. 872, 89 U. of P. L. Rev. 977. The note last cited says that of twenty existing milk control statutes, eight would be invalidated if the rule of the Michigan case were applied.

76. (1936) 298 U. S. 238.

77. (1938) 134 Fla. 1, 13, 183 So. 759, 764. The basis for the holding is: "All the act does is to prescribe certain qualifications for those appointed to it."

78. (C.C.A. 3d 1941) 121 F. 2d 235, 90 U. of Pa. L. Rev. 487.

charged "goes far beyond a general predilection either for or against labor organizations in general or one organization in particular."⁷⁹ Here we have an enunciation of the cardinal distinction: to have opinions—even feelings—about broad issues of the sort that divide political parties does not disqualify; but to align oneself with one side in a particular cause to be adjudicated may disqualify.

What, then, is the effect of campaigning for the administrative office, and making promises which are later fulfilled through administrative adjudication? In *Montana Power Co. v. Public Service Commission*⁸⁰ one of the three commissioners did not participate, so that the vote of Commissioner O'Connell was essential to support the rate order. The company contended, vaguely, that O'Connell "had already announced on several public occasions his opinion on the issues thereafter submitted to him." The court rejected the contention: "Irrespective of any opinion Commissioner O'Connell may have expressed against the power company . . . during the heat of a bitter political contest . . . the presumption is that, in a case being considered, the commission, of which O'Connell was one member, would act without bias or prejudice, and would be guided in rendering a decision solely by the evidence submitted."⁸¹ The court thus upheld the order without inquiring into the precise nature of the campaign promises. Except to the extent that the rule of necessity may justify this result, the decision may be of questionable soundness, because the court apparently recognized no distinction between statements of point of view and of general policies, and statements about a particular company or a particular rate.⁸²

The Rule of Necessity

In the *Montana Power Company* case the court bolstered its opinion with the observation: "The Public Service Commission is the only commission or body in the state that can act in cases of this character."⁸³ Most of the decisions that judges or

79. *Id.* at 238-39. The court also said: "Decisions affecting human beings, made by human beings, necessarily are colored by the sum total of the thoughts and emotions of those responsible for the decision."

80. (*D. Mont.* 1935) 12 F. Supp. 946.

81. *Id.* at 948.

82. In *Southern Pac. Co. v. Board of R. R. Com'rs*, (*N.D. Cal.* 1896) 78 F. 236, 260-61, the court summarily rejected a contention that one commissioner who joined in a rate order was "prejudiced" because of campaign pledges. See also *Georgia Continental Tel. Co. v. Georgia P. S. C.*, (*N.D. Ga.* 1934) 8 F. Supp. 434.

83. *Montana Power Co. v. Public Service Commission*, (*D. Mont.* 1935) 12 F. Supp. 946, 949.

administrators are not disqualified are in this manner reinforced with reliance on the ideas that the tribunal would have to act even if it were disqualified, for otherwise the organs of justice would be unavailable. Many cases recognize a clear reason for disqualification but nevertheless hold on the basis of the rule of necessity that the tribunal should act. Most prominent is *Evans v. Gore*,⁸⁴ now superseded on the constitutional question of taxation,⁸⁵ but still a reliable guide on the rule of necessity. The question was the validity of taxing income of federal judges, including that of the Justices of the Supreme Court. The rule of necessity was laid down: "Because of the individual relation of the members of this court to the question, thus broadly stated, we cannot but regret that its solution falls to us. . . . The plaintiff was entitled by law to invoke our decision . . . and there was no other appellate tribunal to which under the law he could go. . . . In this situation, the only course open to us is to consider and decide the cause,—a conclusion supported by precedents reaching back many years."⁸⁶

This doctrine is similarly applied to state judges and to federal and state administrators. Thus, a state court confronted with a case concerning a tax on the compensation of judges held that "the rule as to the disqualification of judges must yield if the right of appeal is to be preserved."⁸⁷ When the impartiality of the Federal Trade Commission was challenged, the court found no evidence to support the challenge and declared: "The Federal Trade Commission Act establishes the composition of the Commission and contains no provision for change of venue. The 'stern rule of necessity' required the Commission to act."⁸⁸ In another case a party sought to escape the rule of necessity by arguing that the Department of Justice and the courts had concurrent jurisdiction with the Trade Commission to enforce the Sherman and Clayton Acts, but the court rejected the contention by observing that the Commission is the only tribunal clothed with the power to protect the public against unfair methods of competition and price discrimination and that therefore the rule of necessity required the Commission to hear the case.⁸⁹ The same rule applies to state agencies,⁹⁰ although

84. (1920) 253 U. S. 245.

85. *O'Malley v. Woodrough*, (1939) 307 U. S. 277 refuses to follow *Evans v. Gore* on the tax question.

86. 253 U. S. at 247-48. Accord: *State v. Sage Stores*, (1943) 157 Kan. 622, 143 P. 2d 652, aff'd on other grounds, (1944) 323 U. S. 32.

87. *Gordy v. Dennis*, (1939) 176 Md. 106, 5 A. 2d 69.

88. *Loughran v. Federal Trade Commission*, (C.C.A. 8th 1944) 143 F. 2d 431, 433.

89. *Marquette Cement Co. v. Federal Trade Commission*, (C.C.A. 7th 1945) 147 F. 2d 589.

one exceptional decision has ignored it⁹¹ and another has seemingly rejected it.⁹²

Procedures of Asserting Disqualification—The Administrative Procedure Act

Under a federal statute applicable to district judges, the mere filing of a sufficient affidavit will compel the trial judge to disqualify himself, and the judge may not pass upon the truth or falsity of the charges made in the affidavit.⁹³ In the Supreme Court the uniform practice has been to leave questions of disqualification to individual Justices, the Court itself never passing on such questions.⁹⁴ Before the enactment of the Administrative Procedure Act, the method for disqualifying an administrative adjudicator was not clear, except for the general assumption that questions of disqualification could be raised on judicial review. The Communications Commission held in a prominent case that

90. *Brinkley v. Hassig*, (C.C.A. 10th 1936) 83 F. 2d 351; *Ison v. Western Vegetable Distributors*, (1936) 48 Ariz. 104, 59 P. 2d 649; *Zober v. Turner*, (1930) 106 N. J. L. 86, 148 A. 894. In *State ex inf. Barrett, ex rel. Bradshaw v. Hedrick*, (1922) 294 Mo. 21, 241 S. W. 402, the court relied on the rule of necessity even to the extent of refusing to discuss the question of bias.

In *Molloy v. Collins*, (1941) 66 R. I. 251, 18 A. 2d 639, the legislature authorized the mayor to remove an officer, if found guilty upon hearing before the mayor. The statute was passed after the mayor had repeatedly made charges against the officer. The court held the bias of the mayor was immaterial because the legislature knew of the bias when it empowered the mayor to act. The court said this result is based on the statute and not the rule of necessity.

In *Caminetti v. Pacific Mutual Life Ins. Co.*, (1943) 22 Cal. (2d) 344, 139 P. 2d 909, the rule of necessity was applied to an insurance commissioner to permit him to make contracts relating to a company in which he owned policies.

91. *Abrams v. Jones*, (1922) 35 Ida. 352, 207 P. 724. Inasmuch as the court first held that the commissioner had exceeded his statutory powers, and next held that failure to provide a bill of particulars nullified the administrative proceeding, the treatment of the bias question might be regarded by some as dictum.

92. *State ex rel. Miller v. Aldridge*, (1925) 212 Ala. 660, 103 So. 835, 39 A. L. R. 1470. The annotation, 39 A. L. R. 1476, contains a good collection of cases on the application of the rule of necessity to both judicial and administrative officers.

93. *Berger v. United States*, (1921) 255 U. S. 22. The statute does not apply to judges of circuit courts of appeals. *Millslagle v. Olson*, (C.C.A. 8th 1942) 128 F. 2d 1015.

94. Even Mr. Justice Jackson, protesting against a failure of Mr. Justice Black to disqualify himself, granted this: "No statute prescribes grounds upon which a Justice of this Court may be disqualified in any case. The Court itself has never undertaken by rule of Court or decision to formulate any uniform practice on the subject. Because of this lack of authoritative standards it appears always to have been considered the responsibility of each Justice to determine for himself the propriety of withdrawing in any particular circumstances." *Jewell Ridge Coal Corp. v. Local*, (1945) 325 U. S. 897.

the Commission could prevent one commissioner from participating, over the objection of that commissioner.⁹⁵ And a Circuit Court of Appeals held that an agency must hear evidence designed to disqualify a member of the National Labor Relations Board.⁹⁶ The Administrative Procedure Act provides: "The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case."⁹⁷ Unlike district judges, examiners and other officers participating in decisions are not forced to withdraw upon the mere filing of a sufficient affidavit; the truth of the charges must be established to force a disqualification of an administrative officer. The term "personal bias" is the same as the term used in the federal statute on disqualification of judges and is likely to be interpreted the same way—an "impersonal prejudice" is not enough.⁹⁸ The committee reports make clear that a presiding officer may still be active in assuring that all necessary evidence is adduced, that in an appropriate case a protest may be dismissed as insufficient on its face, and that the agency may itself hear argument or evidence on the protest or may designate an examiner to do so.⁹⁹ Nothing in the legislative history tends to indicate that the Act in any way changes the substantive law concerning grounds for disqualification.

95. *In the Matter of Segal and Smith*, (1937) 5 F. C. C. 3, 51 Harv. L. Rev. 1101.

96. *Berkshire Employees' Ass'n v. NLRB*, (C.C.A. 3d 1941) 121 F. 2d 235.

97. Sec. 7(a), 60 Stat. 241 (1946), 5 U. S. C. A. 1006(a) (Supp. 1946).

98. *Price v. Johnston*, (C.C.A. 9th 1942) 125 F. 2d 806, cert. den., (1924) 316 U. S. 677.

99. Sen. Doc. No. 248, 79th Cong., 2d Sess. 207, 269 (1946).