CAMPBELL TAGGART ASSOCIATED BAKERIES, INC.

Docket 7938. Orders and Opinions

ORDER ESTABLISHING PROCEDURE ON INTERLOCUTORY APPEAL, FEBRUARY 19, 1963

The Commission, by its order of January 30, 1963, granted the request of complaint counsel for permission to file an interlocutory appeal from the ruling of the hearing examiner refusing to admit in evidence in this proceeding certain special reports obtained by the Commission pursuant to Section 6(b) of the Federal Trade Commission Act. On January 29, 1963, respondent filed an answer to complaint counsel's request which did not oppose the consideration of this appeal by the Commission, but which requested that: (1) the Commission disclose to respondent certain documents in its files which set forth or refer to clearance procedures or arrangements with the Bureau of the Budget with respect to the Federal Reports Act of 1942; (2) complete legal memoranda be filed by both parties on the basis of the official transcript containing the examiner's ruling; (3) respondent be permitted to file its answering brief within fifteen days after service of complaint counsel's brief; and (4) the Commission hear oral argument on the interlocutory appeal.

The Commission has considered respondent's motions and the reply thereto filed by complaint counsel, and has determined that a procedure should be established for the orderly presentation of this appeal to the Commission whereby: (1) the proceeding now pending before the hearing examiner will not be unnecessarily delayed; (2) both parties will have available to them, prior to the briefing on this appeal, a statement of the issues to be considered, the transcript of the proceeding before the hearing examiner containing the ruling from which this appeal is taken, and the relevant materials reflecting the Commission's previously-expressed administrative interpretation of the applicability of the Federal Reports Act of 1942 to the obtaining of special reports pursuant to Section 6(b) of the Federal Trade Commission Act; and (3) both parties will have full opportunity to present argument on this interlocutory appeal to the Commission. Accordingly,

It is ordered:

1. That to the extent that the hearing examiner's refusal to admit in evidence in this proceeding the special reports offered by complaint counsel was based on the Commission's alleged failure to secure clearance by the Bureau of the Budget for the obtaining of these reports, the hearing examiner shall set aside his previous ruling and shall admit said special reports in evidence, subject however to being stricken later if it should ultimately be determined that the

reports were improperly obtained, and that they are for this reason inadmissible in this proceeding; and that the hearing examiner shall proceed with the expeditious conduct of this proceeding.

2. That the following issues will be considered by the Commission on this appeal:

(a) Whether Commission orders requiring the filing of special reports pursuant to Section 6(b) of the Federal Trade Commission Act for the purpose of eliciting evidence or information concerning possible violations of law must be cleared in advance by the Bureau of the Budget under the provisions of the Federal Reports Act of 1942.

(b) If the Commission's orders for the filing of the special reports which are involved in this proceeding were not cleared in advance by the Bureau of the Budget, whether the absence of such clearance makes such special reports inadmissible in evidence in this adjudicative proceeding.

3. That the Secretary is hereby directed to:

(a) Prepare an affidavit setting forth in detail the Commission's prior practice relating to the submission to the Bureau of the Budget of Commission orders for the filing of special reports pursuant to Section 6(b) of the Federal Trade Commission Act for the purpose of eliciting information concerning possible violations of law;

(b) Secure from the files of the Commission all letters from the Commission to the Bureau of the Budget or other documents in which the Commission has previously expressed its administrative interpretation of the applicability of the Federal Reports Act of 1942 to the issuance of orders for special reports pursuant to Section 6(b) of the Federal Trade Commission Act for the purpose of eliciting information concerning possible violations of law; and

(c) File copies of such affidavit and documents in the record of this interlocutory appeal for service on both parties.

4. That complaint counsel's appeal brief shall be filed within twenty (20) days after service of the affidavit and documents referred to in paragraph 3 above, and that respondent's answering brief shall be filed within twenty (20) days after service of the appeal brief, and that this interlocutory appeal will thereafter be set down for oral argument before the Commission.

Commissioner MacIntyre agrees with that part of the order relating to validity of the 6(b) reports without Bureau of the Budget clearance, but disagrees with that part of the order which appears to authorize divulgence of facts without regard to the provisions of 6(f).

ORDER DENYING PETITION FOR STAY, FEBRUARY 21, 1963

Respondent, by petition filed January 29, 1963, requests a stay by the Commission "of all further enforcement and compliance" with the Commission's order of May 25, 1962, which directed respondent to file a Special Report pursuant to Section 6(b) of the Federal Trade Commission Act. Respondent has objected to the introduction in evidence in this proceeding of certain Special Reports filed by other companies on the grounds that the Commission failed to receive clearance from the Bureau of the Budget for the obtaining of such reports, as allegedly required by the Federal Reports Act of 1942, and this matter is now before the Commission on the interlocutory appeal by complaint counsel from the ruling of the hearing examiner sustaining this objection.

It appears, however, that respondent, on June 18, 1962, filed a Special Report pursuant to the Commission's order of May 25, 1962, and that at no time has it made any objection to that order. It further appears that no proceedings for enforcement of the Commission's order of May 25, 1962, are now pending. Accordingly,

It is ordered, That respondent's petition be, and it hereby is, denied.

ORDER DENYING MOTION TO DISCLOSE PARTICIPANTS IN COMMISSION ADJUDICATIONS, FEBRUARY 21, 1963

By its motion filed February 7, 1963, respondent has requested disclosure by the Commission of the identity of every Commissioner or other Commission official who has or will participate or advise in the Commission's order of January 30, 1963, granting complaint counsel's request for permission to file an interlocutory appeal, the motions filed by respondent on January 29, 1963, relating to such appeal, and the ultimate consideration of the appeal itself.

The Commission has considered the matters set forth in respondent's motion, the exhibit attached thereto and the answer of complaint counsel. In considering this motion the Commission notes that its Rules do not provide for the filing of answers to requests for permission to file interlocutory appeals, and that the answer to complaint counsel's request for such permission which was nevertheless filed by respondent on January 29, 1963, did not oppose consideration of this interlocutory appeal by the Commission. The Commission further notes that the issues raised by this interlocutory appeal do not require the adjudication of any factual issues but involve solely questions of its administrative interpretation and of the application of the Federal Reports Act of 1942. The fact that the Commission, in the exercise of its statutory duties, has necessarily

expressed a position on these questions clearly does not disqualify the Commission or any of its members from the consideration of these legal issues on this appeal. Cf. *FTC* v. *Cement Institute*, 333 U.S. 683, 700–703 [4 S.&D. 676, 690–692].

It may be stated, further, that no person engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding has or will participate or advise in the Commission's consideration of this interlocutory appeal or of any motions made in connection therewith. The consideration and decision of these matters will be made solely by the Commissioners with the advice, where appropriate, of their assistants. Respondent should not be in further need of assurances from the Commission that it does not intend to act with impropriety in this or any other adjudicative proceeding. The matters set forth in respondent's motion and in the exhibit attached thereto provide no indication of any impropriety on the part of the Commission in its consideration of these matters, and in the absence of any such indication, the Commission sees no reason to list the names of the persons who have or will participate or advise in the consideration of these matters. Accordingly,

It is ordered, That respondent's motion be, and it hereby is, denied.

ORDER CONSOLIDATING FOR THE PURPOSE OF HEARING MOTION TO VACATE ORDERS REQUIRING FILING OF SPECIAL REPORTS WITH PENDING INTERLOCUTORY APPEAL GRANTED ON JANUARY 30, 1963, MARCH 22, 1963

Respondent on March 12, 1963, filed a motion to vacate all of the orders requiring the filing of special reports pursuant to Section 6(b) of the Federal Trade Commission Act which were issued by the Commission pursuant to its resolution dated March 6, 1962, entitled "Resolution Directing a Special Report be Filed by Companies Producing, Selling and Distributing Bakery Products." Reserving and not deciding at this time the question as to the standing of respondent to challenge the validity of the Commission's orders and resolution,

It is ordered, That respondent's motion to vacate orders requiring the filing of special reports be, and it hereby is, consolidated with the pending interlocutory appeal granted by the Commission's order of January 30, 1963, and is subject to the procedure established by the Commission's order of February 19, 1963, entitled "ORDER ESTABLISHING PROCEDURE ON INTERLOCUTORY APPEAL."

It is further ordered, That

1. the time for filing complaint counsel's appeal brief in the interlocutory appeal, which shall include an answer to respondent's mo-

tion of March 12, 1963, be, and it hereby is, extended to April 1, 1963, and

2. the time for filing respondent's answering brief, which shall include a reply to complaint counsel's answer to the motion of March 12, 1963, be, and it hereby is, extended to April 22, 1963.

Order Denying Intervention But Granting Leave to File Amicus Curiae Memorandum, April 26, 1963

Upon consideration of the motion of the American Bakers Association filed April 17, 1963, for leave to intervene in this proceeding,

It is ordered, That the American Bakers Association be, and it hereby is, denied leave to intervene in this proceeding, but the Association be, and it hereby is, granted permission to file an *amicus curiae* memorandum, provided such memorandum does not exceed 10 pages in length and is filed on or before May 3, 1963.

Memorandum of Chairman Dixon in Regard to Respondent's Motion That He Be Disqualified, May 2, 1963

By motion supported by an affidavit of counsel, respondent has requested that I be disqualified from participating in the Commission's decisions in this proceeding, including the agency's ultimate review on the merits. In the alternative, respondent moves for an order instituting "a full evidentiary hearing for the purpose of determining upon a complete record" whether I should be disqualified.

It is alleged, in substance, that by reason of my prior position and duties as Counsel and Staff Director of the Antitrust and Monopoly Subcommittee (hereafter "Subcommittee"), Committee on the Judiciary of the United States Senate, I have prejudged certain issues of fact involved in the instant adjudicatory proceeding and am thus barred by Sections 5(c) and 7(a) of the Administrative Procedure Act, 5 U.S.C. Secs. 1004(c) and 1006(a), and by the "due process" clause of the United States Constitution, from participation in the Commission's decision herein.

Since the facts upon which respondent relies to establish my alleged disqualification are set forth in full in the public record of the Subcommittee's proceedings, including the published transcript of its hearings [1] and its report [2] thereon, the "full evidentiary hearing" proposed by respondent in its alternative motion is plainly

---

[1] "Study of Administered Prices in the Bread Industry," Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate, 86th Cong., 1st Sess., pursuant to S. Res. 57 (Part 12, 1959).

[2] S. Rep. No. 1923, 86th Cong., 2d Sess. (1960).

unnecessary.[3] There is no dispute that I was in fact Counsel and Staff Director of the Subcommittee from February 1957 until my appointment as Chairman of this Commission on March 16, 1961; that I actively participated in the Subcommittee's studies of a number of industries, including the baking industry; and that, in the course of the latter study, I interrogated witnesses (including one of respondent's officers) and offered documents on the subject of concentration and anticompetitive practices in the baking industry, including the competitive position and practices of this respondent. It is also true that some of this evidence touched upon some of the same factual matters that are in issue in the instant proceeding. Finally, as the transcript of the Subcommittee hearings plainly indicates, I did express on the record my opinion that some of the evidence received there should be forwarded to the Federal Trade Commission for its consideration in determining whether an investigation should be commenced by that agency.

From all this, and particularly from the phraseology in which I couched certain of my questions and comments to witnesses before the Subcommittee, respondent concludes that I displayed there "advocacy," "partiality," and "prejudgment" of certain of the issues involved here.

I

It seems to me that Section 5(c) of the Administrative Procedure Act, 5 U.S.C. 1004(c) (the "separation of functions" provision) is, by its very terms, wholly inapplicable to the situation involved here. The pertinent part of that provision reads as follows:

> No *officer, employee, or agent* engaged in the performance of investigative or prosecuting functions *for any agency in any case* shall in *that* or a factually related *case*, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not * * * be applicable in any manner to the agency or any member or members of the body comprising the agency. (Emphasis added.)

Assuming that I am not exempted from this provision by the last sentence (because I was not an agency "member" at the time I per-

---

[3] Section 7(a) of the Administrative Procedure Act, which is the statutory basis for respondent's demand here, does not require such a hearing in every case of alleged bias. "Some of the agencies have voiced concern that this provision would permit undue delay in the conduct of their proceedings because of unnecessary hearings or other procedure to determine whether affidavits of bias are well founded. The provision does not require hearings in every instance but simply requires such procedure, formal or otherwise, as would be necessary to establish the merits of the allegations of bias. If it is manifest that the charge is groundless, there may be prompt disposition of the matter. On the other hand, if the affidavit appears to have substance, it should be inquired into. In any event, whatever procedure the agency deems appropriate must be made a part of the record in the proceeding in which the affidavit is filed." *Attorney General's Manual on the Administrative Procedure Act* 133 (1947).

formed the allegedly disqualifying acts),[4] it seems to me that my work for the Subcommittee simply does not fall within either the letter or the spirit of the prohibition spelled out here. It should be noted at the outset that this provision does not purport to deal with *actual* bias or prejudice. Instead, it is a flat, statutory prohibition which rests on the *presumption* that certain kinds of activities, if pursued in certain circumstances, will produce a particular state of mind. That disqualifying state of mind, of course, is the advocate's "will to win," a viewpoint believed to be so fixed and unyielding that the statute assumes, without inquiry, that it will be carried onto the administrative bench. By the same token, however, the statute is carefully limited to those situations where, as reason and experience suggest, these activities are likely to produce in the individual a sense of "identification" with a "case" he regards as his own.

As I read Section 5(c), particularly the words emphasized above, an individual challenged thereunder can be disqualified only if, at the earlier period in question, he was (1) an "officer, employee, or agent" of an agency, (2) engaged in "the performance of investigative or prosecuting functions," (3) "for any agency," (4) "in any case." If he *then* attempts to participate in "the" decision "in that or a factually related case," he is disqualified.

Respondent apparently believes that my work on behalf of the Subcommittee was performed in a "case," and that the instant proceeding before this agency is a "factually related case." While the meaning of the term "factually related case" does not appear to have been authoritatively settled, it seems plain to me that this is an issue to be reached only *after* it has been demonstrated that the four requirements noted above have been met. That is, the question of whether the instant proceeding is the *same* case ("that" case) as the one allegedly investigated by the Senate Subcommittee, or one that is "factually related" to the Subcommittee's "case," cannot logically be reached until after it has been determined that there was, in fact, an earlier "case" of the character described in the statute. If there was no such "case," then there is nothing for the instant proceeding to be "factually related" to.

---

[4] "Members" of the agency are expressly exempted from Section 5(c)'s prohibition. The last sentence, quoted above, declares that: "This subjection shall not * * * be applicable in any manner to the agency or any member or members of the body comprising the agency." This means that, "if a member of the Interstate Commerce Commission actively participates in or directs the investigation of an adjudicatory case, he will not be precluded from participating with his colleagues in the decision of that case. Sen. Rep. p. 41 (Sen. Doc. p. 227)." *Attorney General's Manual on the Administrative Procedure Act* 58 (1947). It has been held, however, that this exempts agency members for investigative and prosecutive functions performed *after* becoming members (as where a commission reviews *ex parte* investigational files in order to determine whether a formal complaint should be issued), but not for such activities engaged in *before* their appointment. *Amos Treat & Co. v. Securities & Exchange Commission,* 306 F. 2d 260, 265, 266 (D.C. Cir. 1962).

Aside from the obvious fact that the Subcommittee's studies are not adversary proceedings,[5] have none of the characteristics of a "case" as that word is commonly understood,[6] and are therefore outside of the entire rationale of Section 5(c), the really conclusive factor here is that the prohibition of the statute can attach in the first place only if the "case" in question was an "agency" case. This is quite plain from the fact that it reaches only "the performance of investigative or prosecuting functions *for any agency* in any case" (emphasis added). And the word "agency" is defined in Section 2(a) of the Administrative Procedure Act to specifically exclude Congressional authorities:

"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States *other than Congress*, the courts, or the governments of the possessions, Territories, or the District of Columbia. * * * (Emphasis added.)

It can hardly be denied that the Senate Subcommittee for which I performed the functions pointed to by respondent is, in fact, an "authority" of Congress, and thus not an "agency" within the meaning of the Administrative Procedure Act. Hence, my work for the Subcommittee was not that of an "officer, employee, or agent" of an administrative "agency"; it was not performed "for" any such "agency"; and, as previously noted, it was not performed in the course of an agency "case."

II

Section 7(a) of the Administrative Procedure Act, unlike the "separation of functions" requirement of Section 5(c), goes beyond the question of "presumed" bias and presents, as its pertinent language plainly indicates, the more fundamental issue of whether the

[5] As I pointed out in my memorandum in *American Cyanamid Company, et al.*, Dkt. 7211 (Memorandum of Chairman Dixon in Regard to Respondents' Motions That He Be Disqualified, filed February 1, 1962) [60 F.T.C. 1881, 1882], "hearings before Congressional committees are *ex parte* and in no sense adversary in nature. Further, they cannot be said to be adjudicative, since they have as their sole purpose the amassing of facts in order that Congress may be adequately informed concerning the desirability or need for legislation. * * * It was my duty to assist in adducing all of the facts with respect to the subject being investigated and to refrain from presenting only one side of controversial subjects."

[6] Section 5 of the Administrative Procedure Act states that it is applicable, with certain exceptions not relevant here, to "every *case of adjudication* required by statute to be determined on the record after opportunity for an agency hearing * * *." (Emphasis added.) The reach of its various subsections, including 5(c), is of course similarly limited. "Section 5(c) applies only to the class of adjudicatory proceedings included within the scope of section 5, i.e., cases of adjudication required by statute to be determined after opportunity for an agency hearing, and then not falling within one of the six excepted situations listed at the opening of section 5." *Attorney General's Manual on the Administrative Procedure Act* 129 (1947). The word "adjudication" itself is defined by Section 2(d) of the statute as follows: " 'Adjudication' means agency process for the formulation of an order." Thus it would seem that Section 5(c)'s prohibition of adjudication by those officials who have performed investigative functions "for any agency in any *case*" (emphasis added) contemplates a situation in which the investigation is looking toward an adversary, adjudicatory proceeding by the agency.

administrator harbors *actual* bias or prejudice toward a particular party:

> 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. (Emphasis added.)

The standard laid down by this provision is quite similar to that set forth in the statute that governs the disqualification of federal judges:

> 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 or prejudice either against him or in favor of any opposite party to the suit, the judge shall proceed no further, but another judge shall be designated * * *.[7] (Emphasis added.)

The key word in both of these statutory provisions is the term "personal." Disqualification cannot be based on the kind of generalized, diffused, and thus "impersonal" prejudice that is inherent in the situation where the judge or administrator has a "preconceived" or "crystallized" point of view about issues of "law or policy." Davis, 2 *Administrative Law Treatise* 130, 131 (1958). Hence, it is not enough to show that the judge or administrator has previously expressed strong convictions as to the proper interpretation of the particular law the party in question is said to have violated. "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." [8]

Respondent couches its objections to my qualification here in terms designed to suggest that my questions and comments on the record in the Subcommittee's hearings reflected a personal conviction on my part that respondent had, in fact, engaged in certain practices. For example, respondent quotes my comment that the testimony of one of the Subcommittee's witnesses amounted to a "serious accusation" against respondent,[9] and that it should be passed on to the Federal Trade Commission. This indicated, however, nothing more than my

---

[7] 28 U.S.C. 25, 36 Stat. 1090 (1911). Perhaps the only notable distinction between this provision and Section 7(a) of the APA is that the judge must disqualify himself upon the mere filing of an affidavit that sufficiently *alleges* disqualifying facts, whereas 7(a), by requiring the agency to "determine" the matter, necessarily contemplates putting the affiant to his proof of the facts alleged, if challenged. See Davis, 2 *Administrative Law Treatise* 167 (1958). Here, as noted above, no such determination is necessary because the "facts" are already a matter of public record. Only their interpretation and legal effect are in issue.

[8] Jaffe, "The Reform of Administrative Procedure," 2 *Pub. Ad. Rev.* 141, 149 (1942). See also Davis, *op. cit. supra* at 137–138.

[9] See Hearings, note 1, *supra*, at p. 6461.

belief that the facts alleged by the witness, *if true*, might amount to a violation of law. Thus, my comment was simply an expression of my opinion on the *law*, not on the facts. Indeed, the very phrase relied upon by respondent—"serious accusation"—points up the fact that I was simply expressing my view that acts of the character described by the accusing witness might be a violation of law, not the view that respondent had in fact committed the acts charged by the witness. Every member of this Commission makes preliminary evaluations of a more serious character than this almost daily in the course of his duty to decide, on the basis of *ex parte* investigational files before him, whether there is "reason to believe" parties have committed acts that fall within the prohibitions of existing law, as each agency member understands it.[10] Unless we thought those investigational files amounted to "serious accusations" against the parties in question, we would be unjustified in issuing a formal complaint and thus instituting adjudicatory hearings to determine the truth or falsity of those "accusations."[11] Here, in suggesting the passing on to the Commission of the witness' accusation, I was recommending not the filing of a formal complaint, but only the commencement of an *investigation* by the Commission, a step that is preliminary to, and forms the basis of, its decision to issue a complaint and hold adjudicatory hearings.

Nor do I understand that such "personal" bias and prejudice can be automatically inferred from the particular phraseology in which an interrogator casts his questions to witnesses, or phrases his comments in response to answers given by witnesses. "It is elementary that the questions of a lawyer engaged in eliciting facts from a witness do not necessarily indicate his state of mind but are couched in terms best calculated to adduce the truth."[12] This is particularly true where, as here, the lawyer conducting the interrogation is not an "advocate" attempting to "build a case" for his own side, but is a neutral officer charged simply with the duty of searching out the truth. Where a lawyer is acting in such a role as this, penetrating questions and comments are no more indicative of bias and prejudice than the sharp queries and skeptical comments of judges who frequently participate in the questioning of witnesses. Indeed, judges not infrequently preside at proceedings they have themselves instituted (as in contempt cases), and the words in which they couch

---

[10] Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall issue its formal complaint when it "shall have reason to believe" that any party "has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be in the interest of the public. * * *"

[11] Unless the Commission so believed, it would be lacking the necessary conviction as to the "public interest" in the matter. *Ibid.*

[12] *American Cyanamid*, note 5, *supra*.

their "serious accusations" are seldom construed as an indication of "bias" or "prejudgment of the facts." [13]

There is, of course, a clear distinction between "adjudicative facts" and "legislative facts." [14] Prejudgment of the one disqualifies; prejudgment of the other does not. The latter principle derives from the well-established proposition, mentioned above, that "bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification." [15] Judges and administrators do not acquire strong convictions as to policies or the proper interpretation of law in a vacuum; they get them from experience, from contact with particular factual situations that, over the years, "merge" into their individual preconceptions about the law and policy.[16]

Factual experience that includes contact with some of the "facts" about a particular party does not disqualify if it is merely a part of the general, "legislative" facts that go to make up an individual's views as to law or policy. This principle seems to be firmly established by *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 700–703 (1948) [4 S.&D. 676, 690–692], and *Eisler* v. *United States*, 170 F. 2d 273, 277–278 (D.C. Cir. 1948), removed from docket, 338 U.S. 189 (1949).

The *Eisler* case appears to be squarely analogous to the instant situation. There an alien who described himself as a "German Communist" (although he had resided in the United States for seven years) had refused to testify before the Committee on Un-American Activities of the House of Representatives. He was subsequently

---

[13] See, e.g., *O'Malley* v. *United States*, 128 F. 2d 676 (8th Cir. 1942), *rev'd on other grounds*, 317 U.S. 412 (1943), where a district judge directed the United States District Attorney to commence contempt proceedings against several parties with this comment: "It is apparent from the statement of counsel upon both sides here that there is, in the evidence in this regard, ground for believing that there has been a very gross imposition and fraud perpetrated in and upon this court by at least Pendergast, O'Malley and McCormack and there may be others." The reviewing court said: "There was no prejudgment of guilt in any remarks the court made directing contempt proceedings to be commenced * * *. The complaint of prejudgment of 'factual issues' can not be sustained." 128 F. 2d at 680, 685.

[14] Davis, *op. cit. supra* at 145, n. 53.

[15] *Id.*, 131.

[16] "Prejudgment of facts about a party is probably to be distinguished from prejudgment of facts that bear upon questions of law or policy. 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. For instance, all nine Justices of the present Supreme Court probably have prejudged the 'fact' that labor strife in manufacturing affects interstate commerce if either the raw materials or the products cross state lines. In the Cement Institute case, the Federal Trade Commission had previously investigated the facts concerning the operation of multiple-basing-point systems, and its preconceived 'views' that such systems violated the Sherman Act were made up not only of ideas about law and policy *but also of factual information developed in the previous investigations.* Ideas about law and policy are probably inseparable from impressions of general facts on which those ideas rest, and preconceptions about such facts are no more a ground for disqualification than preconceptions about law and policy." *Id.*, at 144–145. (Emphasis added.)

indicted for contempt, and tried and convicted in the United States District Court for the District of Columbia. The defendant filed an affidavit of bias and prejudice, alleging that the presiding judge—Judge Holtzoff—should disqualify himself because of his—

> background as a Special Assistant to the Attorney General of the United States. Appellant alleged, upon information and belief, that the judge had, in that prior capacity, directly assisted Federal Bureau of Investigation inquiries into the activities of aliens and Communists, *including appellant.* It was further alleged that the judge was a close personal friend of the Director of the FBI, whom appellant characterizes as "violently anti-Communist." The affidavit also contained an assertion that the judge had, in connection with his previous duties, sponsored legislation providing for the deportation of alien Communists. 170 F. 2d at 278. (Emphasis added.)

The Court of Appeals agreed that the affidavit was insufficient on its face because it alleged only "impersonal" bias, not the kind of "personal" bias that can disqualify:

> Upon review of such an affidavit we do not hesitate to uphold the ruling of the court below that the affidavit should be stricken, for it does not establish bias and prejudice in the *personal* sense contemplated by the statute, *assuming truth in all the facts stated.* Prejudice, to require recusation, must be personal according to the terms of the statute, and *impersonal* prejudice resulting from a judge's background or experience is not, in our opinion, within the purview of the statute. *Ibid.* (Emphasis added.)

In view of the defendant's allegation that Judge Holtzoff had "directly assisted" in the FBI's investigation of aliens and Communists, "including appellant," and the reviewing court's comment that it was "assuming truth in all the facts stated," the holding of the case is plainly premised upon the assumption that the trial judge, in the course of his activities in connection with the investigation of aliens and Communists *in general*, had in fact participated in the investigation of that defendant *in particular.* Hence, any bias or prejudice acquired by the judge during the course of his investigation of Communists was of an impersonal nature directed toward *all* Communists, and not a personal bias aimed at any one of the particular Communists whom he happened to have investigated while studying them as a group.

The application of this principle in the field of administrative law is clearly illustrated by *Federal Trade Commission* v. *Cement Institute*, *supra*, 333 U.S. 683 (1948) [4 S.&D. 676]. There, one of the numerous respondents sought to disqualify all five members of the Federal Trade Commission on the ground that, as summarized by the Court, "the Commission had previously prejudged the issues, was 'prejudiced and biased against the Portland cement industry generally,' and that the industry and Marquette in particular could not receive a fair hearing from the Commission." *Id.*, 700 [4 S.&D. 690]. The factual basis for these charges was the fact that the Commission,

in written reports to the President and to Congress, and in testimony given by members of the Commission before Congressional committees, had made "it clear that long before the filing of this complaint the members of the Commission at that time, or at least some of them, were of the opinion that the operation of the multiple basing point system *as they had studied it* was the equivalent of a price fixing restraint of trade in violation of the Sherman Act. We therefore decide this contention, as did the Circuit Court of Appeals, on the assumption that such an opinion had been formed by the entire membership of the Commission *as a result of its prior official investigations*. But we also agree with that court's holding that this belief did not disqualify the Commission." *Ibid.* (Emphasis added.)

As this language of the Court makes clear, the Commission had not reached its "prejudgment" as to the illegality of the multiple basing point system by abstract reasoning. It had conducted an official investigation into the precise manner in which that system operated in, among others, the cement industry itself; hence, that investigation naturally covered the activities of Marquette, the particular respondent who moved for the Commission's disqualification in the subsequent adjudicatory proceeding. The facts, therefore, were quite analogous to the *Eisler* case, *supra*, and the instant matter, in that a specific respondent based his claim of bias and "prejudgment" on a group-wide investigation that touched upon his personal activities only because he happened to belong to the group.

In *Cement Institute*, *supra*, the Court observed first that the Commission's publicly expressed opinion as to the illegality of the pricing system it had found in the cement industry did not suggest that the minds of the five Commissioners were "irrevocably closed on the subject":

> In the first place, the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities. *Id.*, 701 [4 S.&D. 691].

Similarly, in the instant matter, respondent cannot reasonably believe that, in the comparatively casual contact I had with it during the Subcommittee's study of "administered prices" in the baking industry, I conceived for respondent alone (as contrasted with the baking industry in general) such a virulent "personal" animosity that my mind is "irrevocably closed on the subject" of its practices.

It will, like the respondents in *Cement Institute*, have every opportunity to present to the completely independent and unbiased hearing examiner [17] every scrap of evidence that it thinks will "[keep] these practices within the range of legally permissible business activities." If the Commission ultimately concludes that this record shows respondent has acted lawfully, the case will be dismissed and there will be no occasion to speculate on my alleged "bias." If, on the other hand, the Commission decides that the law has been violated and issues its administrative order to cease and desist, respondent will have an absolute, statutory right to test, in the courts, whether the agency's findings are "supported by evidence." [18]

The Court further noted in *Cement Institute*, *supra*, that Congress had not only made no provision for "substitute commissioners should any of its members disqualify," but had affirmatively expressed its desire that the commissioners should have the kind of "expertness" that comes from experience:

> Moreover, Marquette's position, if sustained, would to a large extent defeat the congressional purposes which prompted passage of the Trade Commission Act. Had the entire membership of the Commission disqualified in the proceedings against these respondents, this complaint could not have been acted upon by the Commission or by any other government agency. Congress has provided for no such contingency. It has not directed that the Commission disqualify itself under any circumstances, has not provided for substitute commissioners should any of its members disqualify, and has not authorized

---

[17] Respondent has not suggested that the hearing examiner before whom the case is presently being tried has been contacted by me, improperly or otherwise, or that I have tried to influence the examiner in any manner whatsoever.

[18] Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. 45(c), provides in part that any party "required by an order of the Commission to cease and desist * * * may obtain a review of such order" in the appropriate circuit court of appeals. "Upon such filing of the petition the court * * * shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission * * *. The findings of the Commission as to the facts, *if supported by evidence,* shall be conclusive." (Emphasis added.)

See *National Lawyers Guild* v. *Brownell,* 225 F. 2d 552 (D.C. Cir. 1955), *cert. denied* 351 U.S. 927 (1956), where the United States Attorney General, contemporaneously with the service on a national bar association of an order to show cause why it should not be designated a "subversive" organization, made the following statement in a public address: "It is because *the evidence shows* that the National Lawyers Guild is at present a Communist dominated and controlled organization fully committed to the Communist Party line that I have today served notice to it to show cause why it should not be designated on the Attorney General's list of subversive organizations." The Court, in response to a charge of prejudgment, first noted the Attorney General's affidavit "denying his prejudgment and explaining that the only determination thus far made by him is that the evidence warranted his proposal to designate, a preliminary and *ex parte* determination. He reaffirms under oath his intention 'to make an impartial final determination on the basis of the administrative record before me.'" The Court concluded: "We cannot assume in advance of a hearing that a responsible executive official of the Government will fail to carry out his manifest duty. Our conclusion on the point is that the plaintiffs must await the event rather than attempt to anticipate it. It is to be noted that in *Marcello, Accardi,* and *Cement Institute* the Supreme Court treated the developments at the administrative hearings as determinative of the issue of claimed prejudgment. Implicit in this treatment is the thought that decision upon alleged prejudgment must await the presentment of proof of effect." 225 F. 2d at 555. (Emphasis added.)

any other government agency to hold hearings, make findings, and issue cease and desist orders in proceedings against unfair trade practices. Yet if Marquette is right, the Commission, by making studies and filing reports in obedience to congressional command, completely immunized the practices investigated * * *.

There is no warrant in the Act for reaching a conclusion which would thus frustrate its purposes. If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another. See *Morgan* v. *United States*, 313 U.S. 409, 421. * * * Thus experience acquired from their work as commissioners would be a handicap instead of an advantage. Such was not the intendment of Congress. For Congress acted on a committeee report stating: "It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience." Report of Committee on Interstate Commerce, No. 597, June 13, 1914, 63d Cong., 2d Sess. 10–11. 333 U.S. at 701–702 [4 S.&D. 676, 691].

III

Respondent also relies upon the "due process" clause of the Constitution. It seems plain, however, that the APA, in those areas where it undertakes to set a standard of fairness, imposes one that is *higher* than that required by the Constitution alone. As the Supreme Court noted in *Cement Institute*, *supra*, in response to this same due process argument, "most matters relating to judicial disqualification [do] not rise to a constitutional level." 333 U.S. at 700 [4 S.&D. 690]. The Court also noted there that "the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court." *Id.*, 703 [4 S.&D. 692]. Since, as noted above, the facts relied upon here fall short of a showing of "prejudgment of the facts" under Section 7(a) of the APA, and would be equally or perhaps even more deficient if asserted against a Federal district judge under the statutory provision that governs such charges of disqualification, it would seem to follow *a fortiori* that these facts do not show the greater degree of unfairness or "prejudgment" that must appear before the matter can be said to have reached the "constitutional level."

IV

Finally, I would like to note that it is not my intention here to take refuge in the technical niceties of the law, or attempt to maintain my seat in this case in the face of the requirements of fairness. In common with most men, I desire not only to *be* fair, but to have my fairness made so obvious that the most superficial of critics will see and appreciate it. Hence, I am not indifferent to this respondent's suggestion that the "appearance" of fairness, if not the law, requires me to dis-

qualify myself. If this were the only case involved, I would forthwith yield to that suggestion, even though I am deeply persuaded that neither the letter nor the spirit of the law, nor any considerations of fairness impose any such duty upon me.

But this is not the only case that is involved. As noted above, during my work with the Subcommittee, I participated in its "investigation" of several of the largest and most economically significant industries in the nation, including steel, automobiles, milk, etc. The "facts" pertaining to the business practices of hundreds of firms, some of them among the largest of our great corporations, came to my attention in one way or another. All were treated in the same manner as this respondent. Therefore, if I am disqualified here, I could very well find myself disqualified in all cases this Commission might have, both now and in the future, against each of those hundreds of firms. I cannot lightly put aside such a substantial and significant part of the duties placed upon me by my oath of office. I do not believe that Congress, in expressly affirming the need for commissioners who had been informed by experience, *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 702 (1948) [4 S.&D. 676, 691], *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), intended that experience acquired from working as a legislative counsel should be a handicap.

I can assure this respondent that I have made no prejudgment of any of the facts involved in this case, and that, if the record compiled by the hearing examiner fails to prove by substantial evidence that the law has been violated, I shall vote with my fellow commissioners to dismiss the complaint. I know to a moral certainty that I have made no prejudgments in this case and that I harbor not the slightest shred of bias or prejudice against this respondent. I can do no more than repeat what I said in *American Cyanamid:*

> The respondents' motions are founded upon the assumption that I have prejudged the issues here involved, and I am incapable of rendering an impartial decision. Thus, what is here involved is the present state of my mind with respect to these issues. The state of a man's mind is by the nature of things known only to him and to his Maker. I have carefully and conscientiously considered the question here presented and have concluded, and hereby state, that I have not formed a definite opinion with respect to any of the material issues involved in this proceeding and honestly believe that I have a free and open mind with respect thereto, and I am fully capable of rendering a completely impartial decision based solely upon the facts contained in the record.[19]

I shall not withdraw from participation in this proceeding.

In view of the nature of the instant motion, I am not participating in the Commission's deliberations and decision upon it.

---

[19] Note 5, *supra*.

ORDER DENYING MOTION TO DISQUALIFY, MAY 7, 1963

Respondent has filed on March 28, 1963, a motion pursuant to Sections 5(c) and 7(a) of the Administrative Procedure Act for the disqualification of Chairman Paul Rand Dixon, *sua sponte*, or by order of the Commission, from participation in any action pertaining to the merits in this proceeding, and, in the alternative, for a hearing for the purpose of determining whether Chairman Dixon should be disqualified.

Chairman Dixon, by memorandum dated May 2, 1963, has stated that he has made no prejudgment of any of the facts involved in this case and that he has determined not to withdraw from participation in this proceeding.

Respondent's motion and supporting affidavit do not assert that Chairman Dixon has, as an officer, employee, or agent of the Commission, at any time been engaged in the performance of investigative or prosecuting functions for the Commission in this or any factually related case, and the Commission has therefore determined that respondent's motion is not within the scope of Section 5(c) of the Administrative Procedure Act. Insofar as respondent's motion is made pursuant to Section 7(a) of that Act, the Commission has previously set forth the considerations involved in dealing with such a motion: *American Cyanamid Company, et al.*, Docket 7211, Order Denying Motions to Disqualify, December 20, 1961 [59 F.T.C. 1488]. The Commission there stated:

> Section 7(a) of the Administrative Procedure Act clearly empowers the Commission to determine whether a presiding officer conducting a "hearing" on behalf of the Commission is subject to "personal bias or disqualification." It is less clear that it was meant to apply to participation of individual agency members in final or appellate determinations. The inquiry called for by a motion for disqualification is necessarily subjective in nature. It is extremely difficult and delicate for a tribunal to assume the responsibility of weighing, objectively, the ability of one of its own members to make an objective judgment in a case. Further, the existence of such a power to disqualify carries with it an inherent danger of abuse, as a potential instrument for suppression of dissent.
>
> Under the Commission's practice, disqualification is treated as a matter primarily for determination by the individual member concerned, resting within the exercise of his sound and responsible discretion. The Commission believes this practice to be proper and consistent with the law.

In the instant proceeding, no sufficient grounds for Commission action have been shown.

It is ordered, therefore, That respondent's motion be, and it hereby is, denied.

Commissioner Dixon not participating.

Order Denying Reconsideration of Refusal to Disqualify, May 10, 1963

On May 9, 1963, respondent filed a petition for reconsideration of the Commission's order of May 7, 1963, denying its motion to disqualify Chairman Dixon from participation in all Commission actions pertaining to the merits of this proceeding. The Commission finds nothing in the petition for reconsideration to justify vacation or modification of its order of May 7. The decision of the Court of Appeals for the District of Columbia Circuit in *Amos Treat & Co.* v. *Securities & Exchange Commission*, 306 F. 2d 260 (1962), is plainly distinguishable on its facts, and is not controlling here. Accordingly,

It is ordered, That respondent's petition for reconsideration be, and it hereby is, denied.

Commissioner Dixon not participating.