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## Addressing Bias in Administrative Environmental Decisions

Robert R. Kuehn

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# Addressing Bias in Administrative Environmental Decisions<sup>v</sup>

By Robert R. Kuehn\*

*Allegations of bias in administrative environmental decisions are common and seemingly increasing because of the significant economic and political interests in many disputes. From high profile national oil spills to local land use matters, parties to environmental proceedings allege conflicts of interest, favoritism, prejudgment of outcomes, comingling of prosecutorial and adjudicatory functions, ex parte communications, and improper political influence.*

*Where bias occurs, it can significantly impact the implementation and enforcement of environmental laws. Biased proceedings can undermine the goals of environmental laws by causing prejudiced decisions not grounded in law or fact, ultimately harming public health and the environment. The mere perception of unfair proceedings can undermine the credibility of environmental agencies and erode support for and compliance with environmental programs.*

*Despite the prevalence of allegations of bias and their impacts, there has been no systematic effort to address the types of improprieties that arise in environmental proceedings and the application of legal rules governing bias in those proceedings. This Article addresses that gap through both a doctrinal and empirical examination. It examines the basic principles governing fairness in administrative proceedings and illustrates how environmental cases have dealt with allegations of biased decision makers. It then provides the results of the first comprehensive empirical study of cases dealing with bias in environmental proceedings, finding that while courts do not often find agency decisions unlawful on grounds of bias, claims have increased over the last four decades and, in some types of cases, have reasonable rates of success. The Article concludes with observations on addressing bias and suggests reforms that would provide greater fairness in the handling of potential bias issues.*

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## I. INTRODUCTION

When the British Petroleum (BP) Deepwater Horizon drilling rig began leaking oil into the Gulf of Mexico, attention turned to the cozy relationship between BP and officials at the Minerals Management Service (MMS) charged with developing and enforcing environmental and safety regulations for oil operations on federal lands. Inspector General reports revealed that MMS employees had been accepting free gifts from oil and gas firms, many of whom employed their family members and personal friends, and engaging in sexual relationships with industry officials.<sup>1</sup> It was common practice for the regulatory agency, which referred to the oil companies as “clients” and “customers,” to waive environmental reviews and rubber stamp industry-proposed standards as

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<sup>¶</sup> Originally published in *Environmental Law*, a publication of the Environmental Law Review of the Lewis & Clark Law School. See Robert R. Kuehn, *Bias in Environmental Agency Decision Making*, 45 ENVTL. L. 957 (2015). At the request of the author, the article is reprinted with an altered title: *Addressing Bias in Administrative Environmental Decisions*. Reprinted with the permission of the publisher, the Lewis & Clark Law School Environmental Law Review, and author, Robert R. Kuehn.

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<sup>1</sup> OFFICE OF INSPECTOR GENERAL, U.S. DEPT. OF INTERIOR, INVESTIGATIVE REPORT: ISLAND OPERATING COMPANY ET AA (2010), available at [http://abcnews.go.com/images/Politics/MMS\\_inspector\\_general\\_report\\_pdf](http://abcnews.go.com/images/Politics/MMS_inspector_general_report_pdf); OFFICE OF INSPECTOR GENERAL, U.S. DEPT. OF INTERIOR, INVESTIGATIVE REPORT: MMS OIL MARKETING GROUP—LAKEWOOD (2008), available at [http://www.taxpayer.net/user\\_uploads/file/Energy/OilandGas/IG\\_Report\\_MMSoil\\_8-19-08.pdf](http://www.taxpayer.net/user_uploads/file/Energy/OilandGas/IG_Report_MMSoil_8-19-08.pdf).

satisfying the federal requirements.<sup>2</sup> One cause of this institutional failure was the conflict created by combining regulatory and revenue-collection functions within the same agency, which is alleged to have created bias within the MMS toward oil industry projects and requests.<sup>3</sup>

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<sup>2</sup> Juliet Eilperin & Scott Higham, *How the Minerals Management Service's Partnership with Industry Led to Failure*, WASH. POST, Aug. 24, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/24/AR2010082406754.html> (last visited Nov. 21, 2015).

<sup>3</sup> See *Interior Department: A Culture of Managerial Irresponsibility and Lack of Accountability?: Hearing Before the Subcomm. on Energy and Resource of the H. Comm. on Government Reform*, 109th Cong. (Sept. 13, 2006) (testimony of the Hon. Earl E. Devaney, Inspector Gen. for the Dep't of the Interior) (observing the routine nature of ethics failures at the Department of Interior "taking the form of appearances of impropriety, favoritism and bias"); Peter Jan Honigsberg, *Conflict of Interest That Led to the Gulf Oil Disaster*, 41 ENVTL. L. REP. 10414, 10416 (2011). When the Fukushima Daiichi nuclear power plant began emitting radiation after it was severely damaged by an earthquake, reports surfaced about the collusive relationship in Japan between the nuclear power industry and government regulators. As with the oil and gas industry in the United States, the agency in Japan charged with regulating nuclear power is part of the ministry charged with promoting the use of nuclear power. Norimitsu Onishi & Ken Belson, *Culture of Complicity Tied to Stricken Nuclear Plant*, N.Y. TIMES, Apr. 27, 2011, at A1. In the aftermath of the Deepwater Horizon disaster, the Department of Interior restructured agency operations to separate Outer Continental Shelf safety and enforcement offices from leasing and revenue collecting functions. Press Release, U.S. Dep't of Interior, Salazar Launches Safety and Environmental Protection Reforms to Toughen Oversight of Offshore Oil and Gas Operations (May 11, 2010), available at <http://www.doi.gov/news/pressreleases/Salazar-Launches-Safety-and-Environmental-Protection-Reforms-to-Toughen-Oversight-of-Offshore-Oil-and-Gas-Operations.cfm>; U.S. DEPT. OF INTERIOR, SECRETARY OF THE INTERIOR, ORDER NO. 3299, ESTABLISHMENT OF THE BUREAU OF OCEAN ENERGY MANAGEMENT, THE BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT, AND THE OFFICE OF NATURAL RESOURCES REVENUE (2010). The agency also issued conflict of interest and recusal rules to address potential conflicts of interest arising from oil industry employment of an employee's family or personal friend. Memorandum from Michael R. Bromwich, Dir., Bureau of Ocean Energy Mgmt., Regulation & Enforcement (BOEMRE), to all BOEMRE Dist. Emp. (Aug. 30, 2010) [hereinafter BOEMRE Memo], available at

In the licensing proceeding for the Yucca Mountain radioactive waste disposal facility, parties alleged that some Nuclear Regulatory Commissioners prejudged whether the Department of Energy could legally withdraw its licensing application. Two counties in the proceeding moved for their recusal based on statements during congressional confirmation hearings that they would not “second guess” the Department of Energy’s decision to abandon the project.<sup>4</sup> What looked to the parties like an obvious case where a reasonable person would harbor doubts about the impartiality of the decision maker was, nevertheless, viewed by the commissioners as an impartial commitment not to question the basis for a party’s actions.<sup>5</sup>

More recently, critics of the proposed 1,700 mile Keystone XL oil pipeline allege that the environmental review process has been tainted by State Department favoritism toward the company that plans to build the pipeline and by a financial conflict of interest in the company hired to develop an important environmental impact statement.<sup>6</sup> Responding to a request from members of Congress, the

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[http://www.bsee.gov/uploadedFiles/BSEE/About\\_BSEE/BSEEHHistory/References/Recusalmemo0830.pdf](http://www.bsee.gov/uploadedFiles/BSEE/About_BSEE/BSEEHHistory/References/Recusalmemo0830.pdf).

<sup>4</sup> State of Washington’s Motion for Recusal/Disqualification at 1-2, U.S. Dept. of Energy (High-Level Waste Repository), No. 63-001-HLW (Nuclear Regulatory Comm’n July 9, 2010), available at <http://pbadupws.nrc.gov/docs/ML1019/ML101900622.pdf>.

<sup>5</sup> U.S. Dept. of Energy (High-Level Waste Repository), No. 63-001-HLW (Nuclear Regulatory Comm’n Aug. 11, 2010) (denying motion for recusal), available at <http://pbadupws.nrc.gov/docs/ML1325/ML13252A418.pdf>; see also Steve Tetreault, *Nuclear Panel Members Reject Calls to Recuse Selves from Yucca Vote*, LAS VEGAS REV. J., Aug. 12, 2010, <http://www.reviewjournal.com/news/yucca-mountain/nuclear-panel-members-reject-calls-recuse-selves-yucca-vote> (last visited Nov. 21, 2015) (discussing decision on the motion).

<sup>6</sup> Elizabeth Rosenthal & Dan Frosch, *Pipeline Review is Faced with Question of Conflict*, N.Y. TIMES, Oct. 8, 2011, at A11 (explaining that the contractor hired to analyze environmental impacts of the TransCanada pipeline was recommended by TransCanada, had worked on previous projects with the company, and referred to TransCanada as a customer in marketing materials); see also Elisabeth Rosenthal, *Cozy U.S. Tie to Builder Is Seen By Resisters of Pipeline Project*, N.Y. TIMES, Oct. 4, 2011, at A1 (highlighting State Department e-mails that demonstrate coordination between TransCanada and Department officials).

State Department's Office of Inspector General conducted an investigation finding neither evidence of improper influence, nor a relationship between the pipeline proponent and the environmental impact statement contractor, nor bias by the Department toward the pipeline company.<sup>7</sup>

Similar issues of bias repeatedly occur in state agency environmental decisions. An agency director mentioned to public officials that a pending landfill permit application seemed like a "political hot potato," implying that it could be denied for that reason.<sup>8</sup> In another case, a member of a county board was quoted in a newspaper as saying, prior to a hearing on a landfill siting application, that residents in the area "have had enough of landfills."<sup>9</sup> The heads of state environmental agencies have repeatedly faced calls for their disqualification based on possible conflicts of interest.<sup>10</sup> Governors, with the power to appoint and dismiss agency decision makers, are often aggressive proponents or opponents of projects and have not hesitated to express their opinions, often in

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<sup>7</sup> OFFICE OF AUDITS, U.S. DEPT. OF STATE AND THE BROAD. BD. OF GOVERNORS OFFICE OF INSPECTOR GEN., SPECIAL REVIEW OF THE KEYSTONE XL PIPELINE PERMIT PROCESS 1-3 (2012), available at <https://oig.state.gov/system/files/183864.pdf>; see also *Advocacy Groups Want New Review of Keystone Impacts, Seek Investigation*, 210 DAILY ENV'T REP. (BNA), at A-6 (Oct. 31, 2011) (reporting on similar request by environmental advocates).

<sup>8</sup> *In re American Waste and Pollution Control Co.*, 581 So.2d 738, 741 (La. Ct. App. 1991).

<sup>9</sup> *A.R.F. Landfill, Inc. v. Pollution Control Bd.*, 528 N.E. 2d 390, 393 (Ill. App. Ct. 1988) (internal quotation marks omitted).

<sup>10</sup> EPA Reviewing Petition Seeking Recusal of Florida Official from Water Permitting, 103 DAILY ENV'T REP. (BNA), at A-5 (May 27, 2011); Tony Reaves, *EPA Looks Into Potential Conflict of Interest with DEP Commissioner*, SUN J. (Lewiston, Me.), Mar. 19, 2011, <http://go.galegroup.com/ps/i.do?id=GALE%7CA251841312&v=2.1&u=lcc&it=r&p=STND&&authCount=1> (last visited Nov. 21, 2015); see also News Release, Public Employees for Environmental Responsibility, DEP Clean Water Consultant Also Works for Polluters (Aug. 23, 2005), <http://www.peer.org/news/news-releases/2005/08/23/dep-clean-water-consultant-also-works-for-polluters> (last visited Nov. 21, 2015) (alleging conflict due to a consultant who was an advising agency manager).

very strong terms, on how ongoing disputes regarding those projects should be resolved by state agency officials.<sup>11</sup>

Indicative of the confusing outcomes of many of the court cases dealing with allegations of impropriety in environmental proceedings, the “political hot potato” reference was deemed sufficient evidence of partiality to force the recusal of the agency official.<sup>12</sup> Yet, declaring that there are already enough landfills in the area of a proposed landfill was held not to indicate to a disinterested observer that the decision maker had in some measure adjudged the merits of the case in advance of the landfill siting hearing.<sup>13</sup>

Beyond the reported instances, perceptions of bias in environmental proceedings are widespread.<sup>14</sup> Where bias occurs, it can have significant impacts on the implementation and enforcement of environmental laws. Biased proceedings—by prejudicing the outcome and leading to decisions that are not based on the facts or law—can undermine the goals of environmental laws, harming both

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<sup>11</sup> See, e.g., *Hammond v. Baldwin*, 866 F.2d 172, 174 (6th Cir. 1989) (reviewing pledge by state to use its regulatory powers to assist approval of proposed factory); *Entergy Ark., Inc. v. Nebraska*, 46 F. Supp. 2d 977, 990–92 (D. Neb. 1999) (reviewing evidence that the Governor had influenced state officials charged with making decisions on controversial permits); Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J.L. & POLY 33, 55–60 (2000) (detailing efforts of the governor and his representatives to prevent citizens from interfering in the state’s process for permitting of a controversial petrochemical plant).

<sup>12</sup> *American Waste*, 581 So.2d at 741–42.

<sup>13</sup> *A.R.F. Landfill, Inc.*, 528 N.E. 2d at 394–95.

<sup>14</sup> See, e.g., Jerry L. Anderson & Erin Sass, *Is the Wheel Unbalanced? A Study of Bias on Zoning Boards*, 36 URB. LAW. 447, 448 (2004) (“[T]here is a widespread perception that zoning boards are often biased.”); Charlie Savage, *Sex, Drug Use and Graft Cited in Interior Department*, N.Y. TIMES, Sept. 11, 2008, at A1 (quoting U.S. Department of Interior lawyer: “the fix [of the agency decision-making process] is in throughout—this is tainted from the beginning, that is totally improper”); Mike Taugher, *Decision on Splittail Raises Suspicions*, CONTRA COSTA TIMES, May, 20, 2007 (reporting on improper actions of political appointee who participated in decision affecting her own property and gave preferential treatment to certain parties); JONATHAN LASH, *A SEASON OF SPOILS* (1984) (chronicling numerous conflicts of interest and biased decisions by federal environmental agency officials).



public health and the environment. Biased processes also interfere with the ability of citizens and regulated entities to obtain a fair hearing and, ultimately, justice. The mere perception of unfair proceedings can undermine the credibility of, and confidence in, environmental agencies and erode support for, and compliance with, environmental programs.<sup>15</sup> Conversely, “enhancing the perceived fairness of the rulemaking process itself can increase the level of voluntary compliance with environmental regulations.”<sup>16</sup>

Yet, environmental decision makers are under substantial, and seemingly increasing, economic and political pressure to favor certain sides in environmental controversies.<sup>17</sup> Consequently, court cases dealing with allegations of improper agency bias in environmental proceedings, a fraction of the instances of environmental agency misconduct alleged to have occurred, are not uncommon.<sup>18</sup> Indeed, administrative law treatises and articles often use cases from environmental agencies to illustrate legal principles dealing with issues of due process and lack of agency impartiality.<sup>19</sup>

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<sup>15</sup> See generally Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 663–64 (2007) (finding that people are more likely to defer to decisions when viewed as fair, and that a neutral decision maker is a critical factor in whether a process is judged as fair); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 96 YALE L.J. 455, 483 (1986) (noting the importance of the appearance of fairness in adjudicatory proceedings).

<sup>16</sup> Jeffrey Rachlinski, *Perceptions of Fairness in Environmental Regulation*, in STRATEGIES FOR ENVIRONMENTAL ENFORCEMENT 339, 341 (Barton H. Thompson Jr. ed., 1995).

<sup>17</sup> See, e.g., David Heath, *How Politics Derailed EPA Science on Arsenic, Endangering Public Health*, CTR. FOR PUB. INTEGRITY, June 28, 2014, <http://www.publicintegrity.org/2014/06/28/15000/how-politics-derailed-epa-science-arsenic-endangering-public-health> (last visited Nov. 21, 2015) (discussing how the Environmental Protection Agency (EPA) was aware of the negative effects of arsenic on public health but failed to take action due to political pressures from Congress).

<sup>18</sup> See *infra* Part III.

<sup>19</sup> See, e.g., AM. BAR ASS’N, SECTION OF ADMIN. LAW AND REGULATORY PRACTICE, A GUIDE TO FEDERAL AGENCY ADJUDICATION 238 (Michael Asimow ed., 2003) (indexing sections discussing integrity in environmental agency decision making); Michael A. Bosh, *The “God Squad” Proves Mortal: Ex Parte Contacts and the White House After Portland Audubon Society*, 51 WASH. & LEE L. REV. 1029 (1994); Stephen Breyer, Vermont

In spite of this prevalence, there has been no systematic effort in the academic literature to address the types of improprieties that arise in environmental proceedings and how legal rules governing bias have been applied in environmental proceedings. This Article addresses that gap, taking both a doctrinal and empirical approach. Part II of the Article lays out the basic legal principles that govern fairness in administrative proceedings and illustrates how environmental cases have dealt with allegations of improper agency proceedings. Part III provides the results of the first empirical study of court cases dealing with allegations of bias in environmental proceedings, concluding that while courts do not often find agency decisions unlawful on grounds of bias, reported claims of bias have increased over the last four decades and, in some types of cases, enjoy a reasonable level of success. Finally, Part IV offers observations on addressing bias in environmental agency proceedings and suggests some reforms that would provide greater fairness in the handling of potential bias issues.

## II. FAIRNESS IN ADMINISTRATIVE LAW

“Bias,” as used herein, encompasses a number of improper actions by or towards an agency that might affect the fairness, impartiality, or integrity of the agency’s decision making. Therefore, bias goes beyond predisposition toward a party and includes matters such as conflicts of interest, ex parte communications, separation of agency functions, and inappropriate efforts to influence an agency decision. By focusing on what some have termed the “integrity of the decision making process,”<sup>20</sup> however, this Article does not address hidden cognitive biases or heuristics that also might influence the

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*Yankee and the Courts’ Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833 (1978); CHARLES H. KOCH, ADMIN. LAW & PRACTICE § 6 (3d ed. 2010) (discussing environmental decisions in chapter on integrity in the administrative process); RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 7.6, 9.8 (5th ed. 2010) (discussing environmental decision in sections on improper agency conduct in adjudications and rulemaking).

<sup>20</sup> See A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 19, § 7.01, at 98.

decisions of an agency employee or official and tilt a decision in a certain direction.<sup>21</sup>

*A. Doctrinal Bases for Requiring an Unbiased Decision Maker*

The issue of administrative fairness has been described as “one of the most complex aspects of administrative practice,”<sup>22</sup> and determining if what appears to be a biased government decision unlawfully taints the outcome is a function of characterizing the legal basis for the allegation, the type of proceeding involved, and the type of bias alleged.

Not all governmental decisions made in a biased manner are unlawful. To be impermissible, the biased action must be prohibited by the Due Process Clause, a provision in the underlying substantive statute, an administrative procedure act, regulations implementing the underlying statute, or government codes policing the conduct of the agency or board.

The Due Process Clause requires some type of hearing before the government can deprive a person of life, liberty, or property.<sup>23</sup> In analyzing a government decision under the Due Process Clause, three limitations are relevant. First, the requirement for procedural due process only applies to “individualized fact-based deprivations” and not to “policy-based deprivations.”<sup>24</sup> Thus, when a government decision applies to a class of individuals or entities, rather than to

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<sup>21</sup> See, e.g., SCOTT PLOTUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 109–88 (1993) (discussing the heuristics used by decision makers and the biases that can result from these processes); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 *CORNELL L. REV.* 777 (2001) (reporting the results of a survey showing that cognitive illusions influence the decision-making processes of judges and produce systematic errors in judgment).

<sup>22</sup> RICHARD J. PIERCE, JR., ET AL., *ADMINISTRATIVE LAW AND PROCESS* 455 (3rd ed. 1999) (referring to the issue as “decider neutrality”).

<sup>23</sup> U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law.”).

<sup>24</sup> PIERCE, *supra* note 19, § 9.2, at 737; see also *A GUIDE TO FEDERAL AGENCY ADJUDICATION*, *supra* note 19, § 2.06, at 25 (“Due process does not apply when courts characterize agency action as quasi-legislative rather than adjudicative. In general, quasi-legislative action is applicable to a class of persons, while adjudication is targeted at specific persons.”).

an individual's person or property, the right to procedural due process does not apply.<sup>25</sup> Second, "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."<sup>26</sup> Although courts have moved away from the "right-privilege" distinction by extending due process protection to the denial of government benefits and entitlements, a party claiming a due process right to procedural fairness must still demonstrate that it possesses a liberty or property interest at risk in the proceeding.<sup>27</sup> Finally, where protected interests are implicated by an individualized government action, some kind of hearing is due.<sup>28</sup>

Determining what that hearing must entail involves a balancing of interests under the three-part framework set forth by the Supreme Court in *Mathews v. Eldridge*.<sup>29</sup> At the very least, "an unbiased tribunal is a necessary element in every case where a hearing is

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<sup>25</sup> Compare *Londoner v. Denver*, 210 U.S. 373 (1908) (holding that because the tax assessment board determined whether, in what amount, and upon whom a property tax should be levied, the taxpayer had a due process right for an opportunity to be heard), with *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224 (1973) (holding that because the agency's rule did not single out a particular railroad for special consideration, there was no due process right for an oral evidentiary hearing).

<sup>26</sup> *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972).

<sup>27</sup> See *id.* at 570 ("[T]he range of interests protected by procedural due process is not infinite."); *id.* at 571-72, 577 ("[P]roperty interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. . . . [But] a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it."); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (holding that welfare benefits are property interests).

<sup>28</sup> *Roth*, 408 U.S. at 569-70.

<sup>29</sup> 424 U.S. 319, 334-35 (1976) ("[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

required.”<sup>30</sup> This constitutional guarantee requires not simply an absence of actual bias but also is implicated where “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.”<sup>31</sup> Courts note the heightened importance of an impartial decision maker in administrative adjudications where many of the procedural safeguards traditionally found in judicial proceedings are relaxed.<sup>32</sup>

The statute under which the government agency or official is acting also may establish requirements for making a fair decision, though the legislature cannot establish procedures below the minimum required by the Due Process Clause.<sup>33</sup> For example, the legislature may impose conflict of interest restrictions or recusal

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<sup>30</sup> Henry J. Friendly, “*Some Kind of Hearing*,” 123 U. PA. L. REV. 1267, 1279 (1975) (listing an unbiased tribunal as the most important element of a fair hearing). The Court asserts that it has jealously guarded the requirement of a neutral decision maker to preserve “both the appearance and reality of fairness, ‘generating the feeling, so important to a popular government, that justice has been done . . . .’” *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951)); *see also* *Clements v. Airport Auth. of Washoe Cty.*, 69 F.3d 321, 333 (9th Cir. 1995) (“A biased proceeding is not a procedurally adequate one. At a minimum, Due Process requires a hearing before an impartial tribunal.”); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 477 (1986) (arguing that “the use of an ‘independent’ adjudicator is a *sine qua non* of procedural due process”); PIERCE, *supra* note 19, § 9.8, at 846 (“Due process requires a neutral, or unbiased, adjudicatory decision-maker.”).

<sup>31</sup> *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *see also In re Murchison*, 349 U.S. 133, 136 (1955) (stating that an absence of bias is a necessity for due process).

<sup>32</sup> *See, e.g., Hummel v. Heckler*, 736 F.2d 91, 93 (3rd Cir. 1984) (“Indeed, the absence in the administrative process of procedural safeguards normally available in judicial proceedings has been recognized as a reason for even stricter application of the requirement that administrative adjudicators be impartial.”); *Nat’l Labor Relations Bd. v. Phelps*, 136 F.2d 562, 563 (5th Cir. 1943); *Reid v. N.M. Bd. of Exam’is in Optometry*, 589 P.2d 198, 200 (N.M. 1979).

<sup>33</sup> *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (holding that cancellation of welfare benefits without a pretermination hearing, as opposed to the post-termination hearing required by statute, violated due process).

requirements on government employees and elected officials.<sup>34</sup> In fact, as a way to help avoid biased decisions, a number of federal statutes impose financial disclosure and conflict of interest prohibitions on government officials.<sup>35</sup>

Administrative procedure acts are another important source of rights to an unbiased agency proceeding. The federal Administrative Procedure Act (APA)<sup>36</sup> contains provisions that help ensure adjudications are conducted in an impartial manner, prohibit ex parte communications, and prevent someone engaged in investigative or prosecutorial functions from participating in the decision on the same matter.<sup>37</sup> State administrative procedure acts contain similar safeguards.<sup>38</sup>

An agency also may create rights to an unbiased decision maker through regulations setting forth the process by which decisions must be made.<sup>39</sup> Thus, some agencies have developed regulations guarding

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<sup>34</sup> See *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (recognizing that, absent constitutional constraints or extremely compelling circumstances, Congress should be free to fashion its own decision-making procedures); *Marcello v. Bonds*, 349 U.S. 302, 309-10 (1955) (recognizing Congress's right to establish administrative hearing procedures); *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2349 (2011) (rejecting a constitutional challenge to a Nevada conflict of interest statute that prohibits a public officer from voting on or advocating for the passage of a matter in which the official might have a conflict of interest).

<sup>35</sup> See, e.g., Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1314(i) (2012) (prohibiting any person who received a significant portion of his or her income from a Clean Water Act permit holder or applicant from serving as a member of the state board or body that approves permit applications); Clean Air Act, 42 U.S.C. § 7428(a) (2012) (requiring disclosure of conflicts of interest by members of Clean Air Act state boards or bodies that approve permits or enforcement orders).

<sup>36</sup> 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

<sup>37</sup> *Id.* §§ 554(d), 556(b), 557(d)(1).

<sup>38</sup> See MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 9, 13 (1961); MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 4-202(b), 4-213 to 4-214 (1981); MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 402(b)-(c), 408 (2010).

<sup>39</sup> See *Vermont Yankee*, 435 U.S. at 543 (stating that agencies should

against conflicts of interest and prejudgment of the outcome of a proceeding.<sup>40</sup> Other agency regulations govern the behavior of administrative law judges and their duty to act fairly, impartially, and without any interest in the parties or outcome.<sup>41</sup>

Finally, some government ethics codes prohibit government employees and officials from taking part in decisions in which they may appear to be partial. For example, 18 U.S.C. § 208 makes it a crime for an officer or employee of the executive branch to participate personally and substantially in a decision in which the person or her family has a financial interest.<sup>42</sup> Similarly, Executive Order 12,731 and federal regulations set forth provisions “to ensure that an employee takes appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties.”<sup>43</sup>

### *B. Impermissible Bias as a Function of Type of Proceeding*

In no government proceeding must a decision maker be free of all bias; indeed, no person can be totally free of biases, particularly towards issues of policy.<sup>44</sup> Rather, a decision maker or proceeding

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be free to fashion their own rules of procedure, provided they comport with constitutional constraints).

<sup>40</sup> See, e.g., 40 C.F.R. §§ 1506.1(a)(2), 1506.5(c) (2013) (Providing that agencies cannot eliminate reasonable alternatives before reaching a final decision, and should avoid any conflicts of interest in preparing environmental impact statements, under the National Environmental Policy Act of 1969, 42 U.S.C. §§4321–4370h (2012)); 40 C.F.R. § 233.4 (2013) (imposing procedural safeguards on agencies administering the Clean Water Act).

<sup>41</sup> See, e.g., 40 C.F.R. §§ 22.4(a)(2), 22.4(d) (2000) (describing the powers and duties of EPA’s Environmental Appeals Board); 40 C.F.R. §§ 164.40(a), 164.40(c) (1992) (identifying qualification and conduct standards for EPA administrative law judges).

<sup>42</sup> 18 U.S.C. § 208(a) (2012).

<sup>43</sup> 5 C.F.R. § 2635.501(a) (1997); Exec. Order 12,731, 55 Fed. Reg. 42,547 (Oct. 17, 1990).

<sup>44</sup> See *In re J.P. Linahan, Inc.*, 138 F.2d 650, 651–52 (2nd Cir. 1943). In *J.P. Linahan*, the court explained:

If, however, “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

may not be impermissibly biased.<sup>45</sup> Determining what bias is legally impermissible depends in large measure on whether the proceeding adjudicates disputed facts or aims to set policy or general requirements.<sup>46</sup>

Under administrative law, agency actions generally result in either a “rule” or an “order.” A rule, under the APA, is an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization or procedures of an agency.<sup>47</sup> An order is defined as the final disposition of an agency in a matter other than a rule, including licensing.<sup>48</sup> “Adjudication” is the agency process for formulation of an order, which generally resolves particular rights

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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. Without acquired “slants,” preconceptions, life could not go on. Every habit constitutes a pre-judgment; were those pre-judgments which we call habits absent in any person, were he obliged to treat every event as an unprecedented crisis presenting a wholly new problem he would go mad. Interests, points of view, preferences, are the essence of living.

*Id.* See also *infra* notes 160-161 and accompanying text.

<sup>45</sup> See PIERCE, *supra* note 19, § 9.2, at 455–56.

<sup>46</sup> *Id.* at 457–58.

<sup>47</sup> 5 U.S.C. § 551(4) (2012). State administrative procedure acts similarly define an agency rule, although limiting them to statements of general applicability. See MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1(7) (1961); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1-102(10) (1981); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 102(30) (2010).

<sup>48</sup> 5 U.S.C. § 551(6). Where they define the term, state administrative procedure acts define order more affirmatively as an agency action that determines rights, duties, privileges, immunities, or other interests of a specific person or persons. See MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1-102(5) (1981); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 102(23) (2010).



and duties.<sup>49</sup> “[A]djudication is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful . . . . Or, it may involve the determination of a person’s right to benefits under existing law.”<sup>50</sup>

In environmental matters, permits; land use decisions applied to particular pieces of property; and sanctions for violating statutes, regulations, and permits are handled through adjudications by either agencies or legislative bodies acting in an administrative or quasi-judicial capacity.<sup>51</sup> As noted above, it is the individualized determinations addressed in adjudications that are protected by due process; policy decisions handled in rulemaking proceedings are generally not protected.<sup>52</sup>

Because agencies and boards adjudicate millions of matters each year, federal and state administrative procedure acts have divided

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<sup>49</sup> See 5 U.S.C. § 551(7); see also Am. Bar Ass’n, Section of Admin. Law and Regulatory Practice, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 17, 18, 22–25 (2002) [hereinafter *ABA Blackletter Statement*]; MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 102(1) (2010) (defining adjudication more specifically as “the process for determining facts or applying law pursuant to which an agency formulates and issues an order”).

<sup>50</sup> ATTORNEY GENERALS MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14-15 (1947).

<sup>51</sup> PIERCE, *supra* note 19, § 3.7, at 74; *Id.* § 6.4, at 279; see also *People v. Village of Lisle*, 781 N.E.2d 223, 233–34 (Ill. Sup. Ct. 2002) (holding that a legislative body acts administratively when it rules on applications for permits).

<sup>52</sup> See *supra* notes 24–25 and accompanying text. “The distinction between individualized deprivations, that are protected by procedural due process, and policy-based deprivations of the interests of a class, that are not protected by procedural due process, is central to an understanding of the U.S. legal system. At least as a first approximation, it underlies both the distinction between legislation and judicial trial and the distinction between rulemaking and adjudication.” PIERCE, *supra* note 19, §9.2, at 737. The Supreme Court has noted, however, that a in a rulemaking proceeding where “an agency is making a ‘quasi-judicial’ determination by which a very small number of persons are ‘exceptionally affected . . . upon individual grounds’ . . . additional procedures may be required in order to afford the aggrieved individuals due process [rights].” *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 542 (1978).

proceedings into “formal” and “informal” adjudications as a way to define the extent of the procedures required. Under the APA, the procedural requirements for formal adjudication apply when the adjudication is required by statute “to be determined on the record after opportunity for an agency hearing.”<sup>53</sup> Where Congress has not employed the particular words “on the record,” courts disagree over whether an agency must employ formal adjudication procedures; the Supreme Court has not addressed the issue.<sup>54</sup> The trigger for a formal adjudicative hearing under state administrative procedure acts is defined by a statute other than the administrative procedure act, not by the particular use of the term “on the record.”<sup>55</sup>

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<sup>53</sup> 5 U.S.C. § 554(a) (2012).

<sup>54</sup> Compare *U.S. Steel Corp. v. Train*, 556 F.2d 822, 833–34 (7th Cir. 1977) (holding that statute requiring agency to provide an “opportunity for public hearing” required the procedural safeguards of formal adjudication set forth in the APA), with *Chemical Waste Mgmt. v. U.S. Env’tl. Prot. Agency*, 873 F.2d 1477, 1480–83 (D.C. Cir. 1989) (holding that a requirement to provide a “public hearing” does not require agency to provide a formal adjudication process), and *Dominion Energy Brayton Point v. Johnson*, 443 F.3d 12, 14–19 (1st Cir. 2006) (holding that, although the statute required an “opportunity for public hearing,” formal adjudication was not required because the statute did not require that the hearing be “on the record”). See also A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 19, § 3.01, at 30-31 (observing that the methodology used by courts to determine if formal adjudication is required where the statute does not use the words “on the record” is not clear and that present case law supports several different approaches); KOCH, *supra* note 19, §5.13[2] at 15–16 (“When the statute calls for adjudication the magic words ‘on the record’ may not be necessary to establish the formal adjudication requirement.”). As one commentator explained: “The Supreme Court has not yet addressed the question whether a statutory requirement of a ‘hearing’ used in the adjudicatory context, means an ‘on the record’ hearing, including an oral evidentiary hearing. The Court has issued numerous opinions, however, that suggest the Court would hold that the requirement of a ‘hearing’ can be satisfied by an informal written exchange of views in most adjudicatory contexts.” PIERCE, *supra* note 19, § 8.2, at 712.

<sup>55</sup> See MODEL STATE ADMINISTRATIVE PROCEDURE ACT §1(2) (1961) (defining “contested case” as a proceeding in which legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-201 (1981) (requiring a

Where an agency proceeding is deemed formal adjudication, the required process mirrors many aspects of a judicial proceeding, including an oral evidentiary hearing, requirements for an impartial decision maker, a ban on ex parte communications, and separation of the decision maker from investigative and prosecutorial functions on the same matter.<sup>56</sup>

“Informal adjudication” is not formally defined but refers to the agency process for issuing an order when a formal adjudication is not required.<sup>57</sup> It is estimated that 90%–95% of all agency decisions are made through informal adjudication.<sup>58</sup> These include the vast majority of permit and licensing proceedings, as well as agency compliance and remedial orders to address violations of statutes and regulations.<sup>59</sup>

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formal adjudicative hearing for formulating and issuing an order unless otherwise provided by another statute); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 401 (2010) (requiring a formal adjudication in a “contested case,” defined as an adjudication in which an opportunity for an evidentiary hearing is required by a federal or state constitution or statute).

<sup>56</sup> 5 U.S.C. §§ 554(d), 556(b), 557(d) (2012). More generally, sections 554 through 557 of the APA set forth the processes for formal adjudications.

<sup>57</sup> See *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 361–62 n.37 (D.C. Cir. 1981) (“The APA itself does not use the term ‘informal adjudication.’ Informal adjudication is a residual category including all agency actions that are not rulemaking and that need not be conducted through ‘on the record’ hearings.”); see also Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 739 n.1 (1976) (“The term ‘informal adjudication’ has no commonly accepted meaning . . . [but] does not mean rulemaking, either formal or informal.”).

<sup>58</sup> Verkuil, *supra* note 57, at 741; Ronald J. Krotoszynski, Jr., *Taming the Tail That Wags the Dog: Ex Post and Ex Ante Constraints on Informal Adjudication*, 56 ADMIN. L. REV. 1057, 1058 n.7 (2004).

<sup>59</sup> See, e.g., *Everett v. United States*, 158 F.3d 1364, 1368 (D.C. Cir. 1998) (upholding use of informal adjudication to resolve dispute over an application for a special use permit); *City of West Chicago v. U.S. Nuclear Regulatory Commn.*, 701 F.2d 632, 643–45 (7th Cir. 1983) (upholding use of informal adjudication in licensing proceeding); *Chemical Waste Mgmt. v. U.S. Evtl. Prot. Agency*, 873 F.2d 1477, 1479–80 (D.C. Cir. 1989) (holding that informal adjudication can be used to issue a corrective action order).

The APA imposes few mandates on informal adjudications, generally only requiring a right to appear in some fashion with counsel, prompt notice of the denial of any written application or request, and some brief statement of the grounds for any denial.<sup>60</sup> Significantly, informal adjudications under the APA are not required to include procedures to protect against agency bias.<sup>61</sup> Informal adjudications under state administrative procedure acts similarly do not directly address bias.<sup>62</sup>

Where adjudication may result in a deprivation of a person's liberty or property interest, due process would apply and require an impartial decision maker, though under *Mathews v. Eldridge*, the procedures to protect those interests in many situations could be minimal.<sup>63</sup> Agencies are free to devise additional procedural

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<sup>60</sup> 5 U.S.C. § 555 (2012). Section 558 of the APA provides additional procedures for the withdrawal, suspension, revocation, or annulment of a license, including notice in writing of the facts or conduct that warrant the agency action and an opportunity to demonstrate or achieve compliance. 5 U.S.C. § 558(c) (2012).

<sup>61</sup> See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990) (explaining that the minimal requirements for informal adjudication are set forth in 5 U.S.C. § 555); *ABA Blackletter Statement*, *supra* note 49, at 30 (observing that informal adjudication may include ex parte contacts and active involvement by the decision maker in the investigation and prosecution of the case).

<sup>62</sup> See MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 9–13 (1961) (setting forth procedures only for contested cases); MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 2-104(2), 4-401 to 4-403, 4-502 to 4-506 (1981) (setting forth procedures for adjudicative hearings and requiring the adoption of some rules of practice for informal proceedings but not requiring provisions addressing bias); MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 102(27), 401–19 (2010) (referencing informal agency processes and requiring that the agency publish a list of all informal procedures available, but only specifying requirements for contested cases).

<sup>63</sup> See *supra* notes 30–32 and accompanying text. “Administrative decisionmakers do not bear all the badges of independence that characterize an Article III judge, but they are held to the same standard of impartial decisionmaking.” *Barry v. Bowen*, 825 F.2d 1324, 1330 (9th Cir. 1987) (citing *Schweiker v. McClure*, 456 U.S. 188, 195 (1982), which held that “due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities”).

safeguards to protect against bias.<sup>64</sup> However, under *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* (Vermont Yankee),<sup>65</sup> “[a]bsent constitutional constraints or extremely compelling circumstances” reviewing courts cannot compel federal administrative agencies to provide procedures beyond those required by the underlying statute or the APA.<sup>66</sup>

Agency rulemaking procedures provide few protections against biased decision makers. As noted, the APA defines a “rule” as an agency statement of general or particular applicability and future effect designed to describe the organizational procedures of an agency or implement, interpret, or prescribe law or policy.<sup>67</sup> “Rulemaking” is simply the process for formulating, amending, or repealing a rule.<sup>68</sup> As explained in the Attorney General’s Manual:

The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent’s past conduct. Typically, the issues relate not to evidentiary facts, as to which the veracity and demeanor of witnesses would be important, but rather to the policy-making conclusions to be drawn from the facts.<sup>69</sup>

Thus, rules differ from orders because they usually apply to a class, rather than a named person or entity; regulate future conduct; and involve the consideration of legislative rather than adjudicative facts.

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<sup>64</sup> *ABA Blackletter Statement*, *supra* note 49, at 29 (“More detailed procedures for informal adjudication [beyond sections 555 and 558 of the APA] are typically found in particular agency statutes and agency rules . . .”).

<sup>65</sup> 435 U.S. 519 (1978).

<sup>66</sup> *Id.* at 543–48.

<sup>67</sup> *See supra* note 47 and accompanying text. State administrative procedure acts define a rule only to mean a statement of general, not particular, applicability. *See* MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1(7) (1961); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 102(30) (2010).

<sup>68</sup> 5 U.S.C. § 551(5) (2012).

<sup>69</sup> ATTORNEY GENERALS MANUAL, *supra* note 50, at 14.

Although not common, a rule may apply to a single person or entity, provided it exhibits the other characteristics of a rule.<sup>70</sup>

As with adjudications, the APA establishes “formal” and “informal” rulemaking proceedings.<sup>71</sup> Under the APA, when rules are required by a statute to be made “on the record after opportunity for an agency hearing,”<sup>72</sup> the procedures for formal rulemaking apply, including the right to present evidence and cross-examine witnesses.<sup>73</sup> This also includes the right to a hearing “conducted in an impartial manner” and restrictions on *ex parte* communications.<sup>74</sup> The Supreme Court has held that a statutory right to a “hearing,” rather than to a hearing “on the record,” is not sufficient to compel formal rulemaking procedures.<sup>75</sup> Formal rulemaking, with its trial-type procedures, accordingly, is an infrequent method of issuing agency rules.<sup>76</sup>

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<sup>70</sup> See, e.g., *Hercules, Inc. v. U.S. Env'tl. Prot. Agency*, 598 F.2d 91, 118 (D.C. Cir. 1978) (holding that the fact only one company manufactured the chemical subject to the rule did not mandate the use of adjudicatory procedures as many other entities are affected by the standards); *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301, 1306 (10th Cir. 1973) (“The fact that Anaconda alone is involved is not conclusive on the question as to whether the hearing should be adjudicatory, for there are many other interested parties and groups who are affected and are entitled to be heard.”).

<sup>71</sup> 1 UNITED STATES GENERAL ACCOUNTING OFFICE, OFFICE OF THE GENERAL COUNSEL, PRINCIPALS OF FEDERAL APPROPRIATIONS LAW 3-4 (3d ed. 2004).

<sup>72</sup> 5 U.S.C. § 553(c) (2012).

<sup>73</sup> *Id.* §§ 556–557. Unlike the APA, state administrative procedure acts do not distinguish between formal and informal rulemaking, instead only establishing procedures for informal rulemaking but sometimes mandating oral proceedings on a proposed rule where interested persons may present oral argument and data. See MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 3 (1961); MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 3-101–117 (1981); MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 301–18 (2010).

<sup>74</sup> See 5 U.S.C. §§ 556(b), 557(d) (2012).

<sup>75</sup> *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 240 (1973).

<sup>76</sup> JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 59 (4th ed. 2006) (“Formal rulemaking always has been the exception rather than the norm, and it is used infrequently today.”).

Informal rulemaking is the process used to develop almost all rules and requires minimal procedural steps. Known as notice-and-comment rulemaking, informal rulemaking under section 553 of the APA must simply provide general notice of the proposed rule, give interested persons an opportunity to participate through written submissions with or without accompanying oral presentations, and provide a concise general statement of the final rule's basis and purpose.<sup>77</sup> Even these minimal notice procedures are not required for interpretative rules; general statements of policy; rules of agency organization, procedure, or practice; or when good cause makes the notice and comment procedures impracticable, unnecessary, or contrary to the public interest.<sup>78</sup>

The APA's informal rulemaking provisions impose no requirements for an impartial proceeding or neutral decision maker, reflecting the quasi-legislative nature of the process, and the fact that promulgated rules will generally have a prospective effect and apply to a class of situations, rather than any specific individual.<sup>79</sup> Congress or agencies may provide additional procedural rights for certain rulemaking proceedings, including requirements for the handling of ex parte communications.<sup>80</sup> In addition, because rulemaking does not address individual rights, due process ordinarily does not require

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<sup>77</sup> 5 U.S.C. § 553 (2012).

<sup>78</sup> *Id.* § 553(b).

<sup>79</sup> See *ABA Blackletter Statement*, *supra* note 49, at 31 (explaining purpose and scope of informal rulemaking); PIERCE, *supra* note 19, § 7.6, at 478 (discussing efforts to compel agencies to adopt procedures to protect against ex parte communications); *Sierra Club v. Costle*, 657 F.2d 298, 396–409 (D.C. Cir. 1981) (rejecting claim that post comment period communications invalidated rule and recognizing the legitimacy and value of such contacts during rulemaking). Similarly, state administrative procedure acts do not address bias in agency rulemaking. See MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 13 (1961) (applying restrictions on ex parte consultations only to contested cases); MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 4-202, 213, 214 (1981) (applying provisions to avoid bias only to adjudicative hearings); MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 402, 408 (2010).

<sup>80</sup> LUBBERS, *supra* note 76, at 341–42 (providing examples from the Department of Transportation, EPA, and the Federal Emergency Management Agency); PIERCE, *supra* note 19, § 7.7, at 650–52 (identifying additional procedures required by Congress in some statutes, including the Toxic Substances Control Act and Clean Air Act).

more procedural protection in informal rulemaking than that provided by Congress.<sup>81</sup> Courts, therefore, cannot require additional procedural steps.<sup>82</sup>

### C. *A Taxonomy of Agency Bias*

The right of a party to an unprejudiced decision maker is both a feature of due process and set out in parts of administrative procedure acts.<sup>83</sup> Yet determining if there is a requirement for fairness and whether a decision maker or the proceeding was sufficiently unbiased often requires demarcating one type of bias from another.<sup>84</sup> Courts have identified at least six categories of impropriety that can negatively affect the integrity of the decision-making process.<sup>85</sup>

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<sup>81</sup> *Vermont Yankee*, 435 U.S. 519, 542 (1978) (“In prior opinions we have intimated that even in a rulemaking proceeding when an agency is making a ‘quasi-judicial’ determination by which a very small number of persons are ‘exceptionally affected, in each case upon individual grounds,’ in some circumstances additional procedures may be required in order to afford the aggrieved individuals due process.” (citing *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 242–45 (1973))).

<sup>82</sup> *Id.* at 543 (“Absent constitutional constraints or extremely compelling circumstances the ‘administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.’” (citing *Fed. Comm’n Comm’n v. Schreiber*, 381 U.S. 279, 290 (1965) (quoting *Fed. Comm’n Comm’n v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940)))).

<sup>83</sup> PIERCE, *supra* note 19, § 9.8, at 846; 5 U.S.C. § 556(b) (2012); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-202(b) (1981); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 402(c) (2010); *cf.* MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 13 (1961) (addressing only *ex parte* communications).

<sup>84</sup> PIERCE, *supra* note 19, § 9.8, at 847.

<sup>85</sup> Professor Richard Pierce ascribes five meanings in administrative law to the term ‘bias’: 1) prejudgment or point of view about a question of law or policy; 2) prejudgment about legislative facts that help answer a question of law or policy; 3) advance knowledge of adjudicatory facts; 4) personal prejudice toward a person; and 5) standing to gain or lose by a decision. *Id.* § 9.8, at 847; *see also id.* § 9.9, at 882–85 (observing that due process and the APA may also require separation of functions to ensure an unbiased proceeding). Professor Asimow observes that the integrity of agency decision making in adjudications is addressed in four administrative



## 1. Conflict of Interest

A conflict of interest between the official's responsibilities to the public and his or her personal interest where the decision maker stands to gain or lose from the outcome is a source of potential bias.<sup>86</sup> A conflicting interest has been defined as arising "when the public official has an interest not shared in common with the other members of the public."<sup>87</sup> In effect, there is a conflict between the private interest of the decision maker and the responsibilities that go with the decision maker's official position. The result is a decision influenced, or potentially influenced, by the self-interest of the

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law doctrines: 1) bias, which includes personal animus, pecuniary bias, and prejudgment of facts; 2) ex parte communications; 3) legislative interference; and 4) separation of functions. A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 19, at 97–98. The American Bar Association explains that the integrity of the decision-making process may be tainted when the decision maker has: a pecuniary or other personal interest in the case; prejudged the facts against a party; developed personal animus against a party, witness, counsel, or group to which they belong; engaged in ex parte communications with an interested person; been subject to legislative interference or pressure; or engaged in an adversary function in the same case. *ABA Blackletter Statement*, *supra* note 49, at 22-24. Judge Judith Meierhenry divides bias claims into four categories: 1) prejudgment of issues; 2) personal prejudice toward a party; 3) conflict of interest and ex parte communications; and 4) appearance of impropriety. Judith K. Meierhenry, *The Due Process Right to an Unbiased Adjudicator in Administrative Proceedings*, 36 S.D. L. REV. 551, 555 (1991). Professor Mark Cordes characterizes bias and conflicts of interest in zoning decisions as encompassing financial conflicts, associational conflicts, prejudgment and bias, ex parte contacts, and campaign contributions. Mark Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisions*, 65 N.D. L. REV. 161, 163 (1989).

<sup>86</sup> See *In re Murchison*, 349 U.S. 133, 136 (1955) ("[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."). See National Conference of State Legislatures, *Conflict of Interest Definitions*, <http://www.ncsl.org/legislatures-elections/ethicshome/50-state-table-conflict-of-interest-definitions.aspx> (last visited Nov. 21, 2015) (providing a list and examples of conflict of interest statutes and ordinances for government officials and employees).

<sup>87</sup> *Wyzykowski v. Rizas*, 626 A.2d 406, 413 (N.J. 1993) (internal citation omitted).

decision maker and not based on an impartial consideration of the facts and law.

A number of Supreme Court cases relate to financial conflicts of interest by government officials. In *Tumey v. Ohio*,<sup>88</sup> a mayor was allowed to retain as compensation part of the fines he assessed against defendants in his municipal court, yet received no compensation if the defendant was not convicted.<sup>89</sup> The Court set out the test for determining if a decision maker's interest in the outcome should be disqualifying: whether the procedure "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."<sup>90</sup> In a later case, *Ward v. Village of Monroeville*,<sup>91</sup> the Court found that even though a mayor's compensation was not directly related to the outcome of a case, because up to one half of the village's revenues came from the fines, forfeitures, costs, and fees imposed by the mayor on convicted defendants in his traffic court, the possible temptation to generate city revenue created too much potential for partisan decision making.<sup>92</sup> In cases involving a financial interest in the outcome, courts do not require proof of actual prejudice but only a showing that there is a possible temptation for the decision maker not to act impartially between the competing parties or interests.<sup>93</sup>

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<sup>88</sup> 273 U.S. 510 (1927).

<sup>89</sup> *Id.* at 520.

<sup>90</sup> *Id.* at 532.

<sup>91</sup> 409 U.S. 57 (1972).

<sup>92</sup> *Id.* at 60; *see also* *United Church of the Med. Ctr. v. Med. Ctr. Comm'n*, 689 F.2d 693, 699–700 (7th Cir. 1982) (holding that an improper pecuniary interest can be present even if the interest is only an indirect outgrowth of a public official's desire to protect or enhance public funds and will not inure to the personal benefit of the official). *But see* *Dugan v. Ohio*, 277 U.S. 61, 65 (1928) (finding no violation of due process where the judge's salary was paid out of a fund to which fines were contributed where the fund was a general fund for the city and the judge received a fixed salary not dependent on whether he convicts in any case or not).

<sup>93</sup> *Tumey*, 273 U.S. at 532; *see also* *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824–25 (1986) (holding that because the judge's interest in the case was direct, personal, substantial, and pecuniary, the Court

Although these cases involved judicial proceedings, this pecuniary interest rule is applied to administrative proceedings.<sup>94</sup> In *Gibson v. Berryhill*, the Court held that a state board of optometry composed solely of independent optometrists was disqualified from deciding if other optometrists employed by a company, and therefore not independent, were aiding and abetting a corporation in the illegal practice of optometry.<sup>95</sup> The Court determined that if the board were to find the practice illegal, then the individual members of the board would inherit the business of these company optometrists, stating that “those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.”<sup>96</sup> In contrast, where a majority of the members of an optometry board had to be members of a specific optometry organization, the Court found that a general economic, rather than a personal pecuniary, interest by

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was not required to decide whether in fact the judge was influenced by this interest). If a court finds that a member of a board or commission was biased and should have recused or been disqualified but was not, the decision is usually reversed, even where the vote of the biased member was not necessary for the majority’s decision. A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 19, at 105; *accord* KOCH, *supra* note 19, § 6:10[2](c)(vi).

<sup>92</sup> <sup>94</sup> See *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (“It has also come to be the prevailing

view that “[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.” (quoting K. DAVIS, ADMINISTRATIVE LAW TEXT, § 12.04, at 250 (1972)); *accord* MFS Secs. Corp. v. Sec. Exch. Comm’n, 380 F.2d 611, 617–18 (2d Cir. 2004) (stating that the prohibition on personal bias is applicable to administrative agencies in much the same way as applied to courts).

<sup>95</sup> *Gibson*, 411 U.S. at 576–79.

<sup>96</sup> *Id.* at 579. See also *Yamaha Motor Corp. v. Riney*, 21 F.3d 793, 798 (8th Cir. 1994) (finding that a commissioner who owned a competing motorcycle dealership had a disqualifying pecuniary interest in judging whether a competing motorcycle company had violated the law); *United Church of the Med. Ctr.*, 689 F.2d at 699–700 (finding that where the commission determined whether property should revert to it for nonuse or disuse created a disqualifying financial stake in outcome); *Hass v. Cnty. of San Bernardino*, 45 P.3d 280, 289 (Cal. 2002) (holding that when plaintiffs or prosecutors are free to choose their judge and the judge’s income depends on the number of cases handled the judge has a disqualifying financial interest).

agency decision makers in the subject they regulate—common with members of appointed boards and commissions at the state and local level—did not deny regulated optometrists their right to a fair and impartial hearing.<sup>97</sup> Similarly, where the prosecutor performed no judicial or quasi-judicial function, no government official stood to profit economically from vigorous enforcement, and the enforcing agency was not financially dependent on maintaining a high level of penalties, the possibility of pecuniary bias was too remote to prohibit the agency's practice of keeping part of the civil penalties it collected.<sup>98</sup>

The significant financial interests at stake in many environmental disputes have made allegations of financial conflicts of interest not uncommon and have resulted in a number of instances where there was a sufficient pecuniary interest to disqualify the decision maker. Land use decisions, in particular, have been problematic where the value of the decision maker's own property would be directly enhanced or reduced by the adjudicated decision.<sup>99</sup> So too, where an

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<sup>97</sup> *Friedman v. Rogers*, 440 U.S. 1, 18 (1979). "*Friedman* stands for the principle that a general economic interest in the subject matter is insufficient to disqualify a decision-maker." *PIERCE*, *supra* note 19, § 9.8, at 855.

<sup>98</sup> *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 247-51 (1980); *see also* *Van Harken v. City of Chicago*, 103 F.3d 1346, 1353 (7th Cir. 1997) ("[T]he mere fact that an administrative or adjudicative body derives a financial benefit from fines or penalties that it imposes is not in general a violation of due process, though in exceptional cases . . . it may be." (internal citation omitted)).

<sup>99</sup> *See, e.g.*, *Leverett v. Town of Limon*, 567 F. Supp. 471, 474-75 (D. Colo. 1983) (finding disqualifying interest where official was also landowner's neighbor and a plaintiff in nuisance suit against landowner); *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 1172 (1996) (holding that council member, although only a renter, had disqualifying interest where proposed project would directly hinder his ocean view); *Kovalik v. Planning and Zoning Comm'n*, 234 A.2d 838 (Conn. 1967) (holding that commission chair was disqualified from acting because of ownership of substantial amount of land affected by proposed zoning change); *Springwood Dev. Partners, L.P. v. Bd. of Supervisors*, 985 A.2d 298, 305-06 (Pa. Commw. Ct. 2009) (enjoining board member from participating in land-development decision where member's property values would be harmed and member was involved in litigation opposing development). The ABA's "Model Statute on Local Land Use Process" requires recusal where a decision maker has a direct or

official has an ownership interest in a party to the environmental proceeding the official is disqualified.<sup>100</sup> Applying the “possible temptation to the average man as a judge” test to less direct pecuniary benefits, such as where a relative’s land might increase in value from the adjudication or where the decision maker’s property was part of a large group of affected properties, has not resulted in disqualification.<sup>101</sup>

Current or potential future employment also raises conflict of interest concerns. Where a decision maker’s current employer or company would benefit directly from the decision or where the decision maker is seeking employment or a contract from a party, the potential for partiality is too great and disqualification is required.<sup>102</sup>

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indirect financial interest in the subject property; is related by blood, adoption, or marriage to the person who owns the property; or resides or owns property within 500 feet of the property. AM. BAR ASSN., MODEL STATUTE ON LOCAL LAND USE PROCESS §§ 204(3), 207(8) (2008).

<sup>100</sup> See, e.g., *Zehring v. City of Bellevue*, 663 P.2d 823, 828–29 (Wash. 1983) (holding planning commissioner’s participation in decision on company’s application violated appearance of fairness doctrine because he had committed to purchasing stock in the company).

<sup>101</sup> See, e.g., *Harrington v. N.Y. State Adirondack Park Agency*, 24 Misc. 3d 550, 558 (N.Y. Sup. Ct. 2009) (finding agency attorney’s family members’ ownership of land near property was insufficient to demonstrate bias); *Levitt & Sons, Inc. v. Kane*, 285 A.2d 917, 922 (Pa. Commw. Ct. 1972) (holding decision maker’s ownership of land in area considered for rezoning was not disqualifying without showing of immediate and direct private interest).

<sup>102</sup> See, e.g., *In re Bergen Cty. Utils. Auth.*, 553 A.2d 849, 853 (N.J. Super. Ct. App. Div. 1989) (finding commissioner should have recused himself from organization’s case when he had been approached by the organization regarding a vacant management position); *Hayden v. City of Port Townsend*, 622 P.2d 1291, 1294 (Wash. Ct. App. 1981) (disqualifying board member from voting and participating in hearings where member’s employer would substantially benefit from rezoning); *N.Y. Pub. Interest Research Grp., Inc. v. Williams*, 127 A.D.2d 512, 513 (N.Y. App. Div. 1987) (finding administrative law judge disqualified where applicant was client of judge’s company); *City of Hobart Common Council v. Behavioral Inst. of Ind., LLC*, 785 N.E.2d 238, 253–54 (Ind. Ct. App. 2003) (disqualifying councilwoman who was at-will employee of school system that sought to influence her vote); *Sohocki v. Colorado Air Quality Control Comm’n*, 12 P.3d 274, 278 (Colo. App. 2000) (holding commissioner should have disclosed she was seeking employment with applicant

In contrast, an employment relationship between an official's family member and a party is not necessarily disqualifying, particularly if the family member is not working on the matter under consideration.<sup>103</sup> In addition to general government employee conflict of interest prohibitions, a number of environmental statutes mandate that decision makers disclose potential conflicts of interest in a pending matter and refrain from participating in any decision relating to that matter.<sup>104</sup> Recently, a number of state environmental officials have faced conflict of interest charges because of prior work relationships.<sup>105</sup>

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agency); *Wyzykowski v. Rizas*, 626 A.2d 406, 414-15 (N.J. 1993) (holding that building official who holds salaried position appointed by mayor is disqualified from reviewing mayor's application to develop property as it would constitute voting on a matter that benefits one's employer).

<sup>103</sup> *See, e.g., Petrick v. Planning Bd.*, 671 A.2d 140, 143-44 (N.J. Super. Ct. App. Div. 1996) (finding interest too attenuated to merit disqualification where commissioner's wife occasionally worked for applicant); *People United to Save Homes v. Dep't of Env'tl. Prot.*, 789 A.2d 319, 333 n.21 (Pa. Commw. Ct. 2001) (noting that wife's position as attorney representing applicant's sister company failed to establish interest that would require decision maker's recusal). *But cf. BOEMRE Memo, supra* note 3 (stating that federal agency employees must notify supervisor and request recusal where official duty relates to company who employs family or personal friend).

<sup>104</sup> Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1314(i)(D) (2012) (establishing the state permit program disclosure requirements); 40 C.F.R. § 233.4 (2014) (describing what constitutes a conflict of interest under the Clean Water Act Section 404 state program); 40 C.F.R. § 123.25(c) (2014) (providing that Clean Water Act National Pollutant Discharge Elimination System programs shall ensure that no board or board member in charge of permit approval has received income from a permit applicant in the previous two years); Clean Air Act, 42 U.S.C. § 7428 (2012) (establishing state air board disclosure requirements).

<sup>105</sup> *EPA Reviewing Petition Seeking Recusal of Florida Official from Water Permitting*, 103 DAILY ENVT. REP. (BNA) at A-5 (May 27, 2011); Reaves, *supra* note 10; *see also* Press Release, Public Employees for Environmental Responsibility, DEP Clean Water Consultant Also Works for Polluters (Aug. 23, 2005), [http://www.peer.org/news/news\\_id.php?row\\_id=578](http://www.peer.org/news/news_id.php?row_id=578) (last visited Nov. 21, 2015) (alleging conflict because of dual role of consultant who was advising agency managers).

Courts have struggled with the due process implications of an environmental board or agency holding a pecuniary interest in the matter pending before it. A series of cases involving the U.S. Forest Service have addressed concerns over the potential conflict arising from the Service's budgeting process, which allows the agency to keep a percentage of the funds it realizes from authorizing timber sales.<sup>106</sup> Both the Sixth and Ninth Circuits have noted that this financial interest predisposes the Forest Service toward certain timber proposals.<sup>107</sup> The Sixth Circuit has stated that the Service's budgeting process may result in decisions "made, not because they are in the best interest of the American people but because they benefit the Forest Service's fiscal interest."<sup>108</sup> The Ninth Circuit has similarly found that the Service's substantial financial interest in timber harvesting can make it "more interested in harvesting timber than in complying with our environmental laws."<sup>109</sup> Although these appellate decisions were reversed on other grounds, courts continue to note the Forest Service's apparent conflict of interest and the conflict's effect on the agency's duty to objectively evaluate timber proposals.<sup>110</sup>

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<sup>106</sup> See, e.g., *Sierra Club v. Thomas*, 105 F.3d 248, 251 (6th Cir. 1997) (finding conflict of interest in budgeting process whereby Service keeps percentage of timber sales and receives higher congressional subsidy when employing expensive techniques such as clearcutting), *vacated on other grounds sub nom.*, *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 739 (1998).

<sup>107</sup> See *id.*; *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1178 (9th Cir. 2006), *abrogated by* *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

<sup>108</sup> *Sierra Club v. Thomas*, 105 F.3d at 251.

<sup>109</sup> *Earth Island Inst.*, 442 F.3d at 1178 (finding Ninth Circuit used an overly lenient standard for preliminary injunction).

<sup>110</sup> See *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1026 (9th Cir. 2009) (Noonan, J., concurring) ("Could an umpire call balls and strikes objectively if he were paid for the strikes he called?"); *Sierra Club v. Bosworth*, 465 F. Supp. 2d 931, 941 (N.D. Cal. 2006) ("[T]he Forest Service's interest in harvesting timber has trampled the applicable environmental laws."). See also Austin D. Saylor, *The Quick and the Dead: Earth Island v. Forest Service and the Risk of Forest Service Financial Bias in Post-Fire Logging Adjudications*, 37 ENVTL. L. 847 (2007) (discussing financial incentives that cast doubt on the Forest Service's capacity to act neutrally).

The financial interest of the government authority in the underlying property was directly at issue in *E & E Hauling, Inc. v. Pollution Control Board*,<sup>111</sup> where the county board that reviewed the landfill siting application owned the proposed landfill property through another district run by the board and would receive \$30,000 per month in revenue from its operation.<sup>112</sup> The Illinois Supreme Court was persuaded that the legislature, in giving local authorities the power to approve landfill locations within their jurisdiction, found nothing fundamentally unfair about a local authority passing judgment on property it owned.<sup>113</sup> The court also did not find the \$30,000 per month a sufficient temptation for the county board not to accord the other parties their due process of law when compared to the authority's \$163.5 million total annual budget.<sup>114</sup> A later Illinois appellate court similarly held that it was not fundamentally unfair for a landfill site approval decision to be made by the same public body that had recently purchased forty acres of land and spent large sums of public funds for the purpose of constructing that landfill, basing its decision not on the U.S. Supreme Court's "possible temptation" test but simply deferring to the legislature's decision to vest responsibility for landfill siting decisions with local authorities.<sup>115</sup>

An extreme example of agency pecuniary bias involved the Puerto Rico Environmental Quality Board (EQB). The EQB proposed a fine of seventy- six million dollars against Esso Standard Oil for fuel leaks from underground storage tanks at one of its service stations.<sup>116</sup> The fine exceeded any previous fine levied by the EQB by 5,000 times, represented twice the EQB's annual budget, and would be placed into a discretionary account administered by the EQB and disbursed by its chairman.<sup>117</sup> Esso sought a permanent injunction against the fine, arguing that the EQB's

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<sup>111</sup> 481 N.E.2d 664 (Ill. 1985).

<sup>112</sup> *Id.* at 665.

<sup>113</sup> *Id.* at 668.

<sup>114</sup> *Id.* at 667.

<sup>115</sup> *Concerned Adjoining Owners v. Pollution Control Bd.*, 680 N.E.2d 810, 816 (Ill. App. Ct. 1997).

<sup>116</sup> *Esso Standard Oil Co. v. Cotto*, 389 F.3d 212, 213–14 (1st Cir. 2004).

<sup>117</sup> *Id.*



institutional interest in imposing the hefty fine denied the company its due process of law.<sup>118</sup> The court agreed, holding that although members of the EQB may not stand to gain personally, the potential benefit to the EQB's budget—especially where the EQB had complete discretion over the use of the seventy-six million—made the possibility of temptation and appearance of bias infecting the proceeding undeniable.<sup>119</sup>

Mechanisms whereby the adjudicator of an environmental dispute is funded directly by one party also may raise possible temptations to decision makers and undercut the neutrality required by due process.<sup>120</sup> In contrast, where a board's institutional interest in funds that might result from its decision is minimized by a statute that strictly limits how much the board would receive and how it must be expended, the relationship of the board to the funds is too remote to support a finding of institutional bias.<sup>121</sup>

The slanted composition of environmental boards or commissions raises questions about institutional bias. Local land use boards, in particular, are often made up of persons involved in buying, selling, or developing real estate who, although perhaps not having a personal or financial stake in the particular piece of property at issue, favor such development and minimize health, safety, or welfare concerns.<sup>122</sup> Some state laws seek to obtain a balance of views on

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<sup>118</sup> *Esso Standard Oil Co. v. López-Freytes*, 467 F. Supp. 2d 156, 158 (D.P.R. 2006).

<sup>119</sup> *Esso Standard Oil Co. v. López-Freytes*, 522 F.3d 136, 146–47 (1st Cir. 2008) (affirming district court's order permanently enjoining defendants from imposing fine).

<sup>120</sup> *See, e.g., Jaeger v. Cellco Pship*, No. 3:09CV567 (SRU), 2010 WL 965730, at \*12–14 (D. Conn. Mar. 16, 2010) (noting serious due process concerns where council adjudicating siting of cellular towers receives all revenues directly from cellular industry), *aff'd*, 402 F. App'x 645 (2d Cir. 2010); *Southwest Energy Corp. v. Ill. Pollution Control Bd.*, 655 N.E.2d 304, 312 (Ill. App. Ct. 1995) (holding fee agreement whereby private party directly paid hearing officer inherently biased the proceeding).

<sup>121</sup> *Mallinckrodt LLC v. Littell*, 616 F. Supp. 2d 128, 144–47 (D. Me. 2009) (observing that the board would receive its statutorily allowed annual appropriation regardless of whether the party was ordered by the board to pay into a board fund).

<sup>122</sup> *See, e.g., Anderson & Sass, supra* note 14, at 466 (finding that “a significant percentage of zoning board members arguably have an occupational bias in favor of development”).

environmental boards.<sup>123</sup> However, legislative efforts to address such institutional bias, particularly at the local level, are generally rare,<sup>124</sup> and successful legal challenges to the composition of environmental boards are also seemingly rare.<sup>125</sup>

A number of cases have addressed allegations that the contractor preparing an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA)<sup>126</sup> had a disqualifying conflict of interest.<sup>127</sup> NEPA regulations require that contractors execute a disclosure statement specifying that they have no financial or other interest in the outcome of the project,<sup>128</sup> interpreted to mean an agreement, enforceable promise, or guarantee of any future work

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<sup>123</sup> See, e.g., MO. REV. STAT. § 644.021.1 (2014) (requiring that of seven members of the Clean Water Commission, two shall be knowledgeable about the needs of agriculture, industry, or mining; one shall be knowledgeable about the needs of publicly-owned wastewater treatment works; and four shall represent the public); 1970 PA. LAWS 275, § 471 (requiring that the Environmental Quality Board consist of eleven members from state agencies or commissions, four from the General Assembly, and five from the Citizens Advisory Council).

<sup>124</sup> Anderson & Sass, *supra* note 14, at 451, 453.

<sup>125</sup> See, e.g., *id.* at 454 (“There are no common law restrictions regarding institutional bias, and even direct bias tests reach only the most egregious cases of conflict of interest.”); *Humane Soc’y v. N.J. State Fish & Game Council*, 362 A.2d 20, 27 (N.J. 1976) (applying the rational basis test to a challenge to the statutory membership of a state council that excluded plaintiff, and holding that “[o]pening the Council’s membership to persons with differing philosophies might reflect the art of public relations, but it is not a constitutional necessity”). *But see Bayside Timber Co., Inc., v. Bd. of Supervisors*, 97 Cal. Rptr. 431, 438 (Cal. Ct. App. 1971) (holding that delegation of rulemaking power to forest practice committee of private timber interests with a pecuniary interest subject matter, coupled with lack of standards to prevent abuse, was unconstitutional).

<sup>126</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012).

<sup>127</sup> See, e.g., *Colo. Rail Passenger Ass’n v. Fed. Transit Admin.*, 843 F. Supp. 2d 1150 (D. Colo. 2011); *N. Crawfish Frog (Rana Areolata Circulosa) v. Fed. Highway Admin.*, 859 F.Supp. 1503 (D. Kan. 1994); *Sierra Club v. Marsh*, 714 F. Supp. 539 (D. Me. 1989).

<sup>128</sup> 40 C.F.R. § 1506.5(c) (2011).

on the project.<sup>129</sup> Courts draw a distinction between contractors hired to prepare an EIS and those who merely participate by producing background papers used by preparers of an EIS, finding NEPA's conflict-of-interest regulations apply only to actual preparers.<sup>130</sup> Where a conflict of interest exists, "[the contractor] should be disqualified from preparing the EIS, to preserve the objectivity and integrity of the NEPA process."<sup>131</sup>

Despite this direction, courts repeatedly excuse the failure to execute the disclosure statement, and even excuse clear instances of a conflict of interest under the regulations, focusing not on the conflict but on whether the breach compromised the objectivity and integrity of the NEPA process.<sup>132</sup> They rationalize that any error was harmless, holding that the degree of oversight exercised by the agency over the contractor was sufficient to cure the conflict or failure to file the required disclosure form.<sup>133</sup>

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<sup>129</sup> *Ass'ns Working for Aurora's Residential Env't (AWARE) v. Colo. Dep't of Transp.*, 153 F.3d 1122, 1128 (10th Cir. 1998); *see also* Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations ("Forty Questions"), 46 Fed. Reg. 18026, 18031 (Mar. 23, 1981) (defining interests requiring disclosure to include "any financial benefit such as a promise of future construction or design work on the project, as well as indirect benefits the consultant is aware of (e.g., if the project would aid proposals sponsored by the firm's other clients)").

<sup>130</sup> *Sierra Club v. Marsh*, 714 F. Supp. 539, 552 (D. Me. 1989); *see also* Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34263, 34266 (July 28, 1983) (codified at 40 C.F.R. pt. 1500) (stating § 1506.5(c) does not apply when lead agency prepares EIS based on information from "a contractor hired . . . to do . . . studies necessary to provide sufficient information to the lead agency to prepare an EIS").

<sup>131</sup> Forty Questions, 46 Fed. Reg. at 18031.

<sup>132</sup> *See, e.g., Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 202 (D.C. Cir. 1991) (finding Federal Aviation Administration violated Council on Environmental Quality regulations by not picking contractor itself, but the "error did not compromise the 'objectivity and integrity of the [NEPA] process'" and allowing after-the-fact filing of disclosure statement to remedy failure to file (alteration in original)); *Valley Cty. Pres. Comm'n v. Mineta*, 246 F. Supp. 2d 1163, 1174–75 (D.N.M. 2002) (finding "objectivity and integrity of the NEPA process" uncompromised where contractor who prepared EIS also had contract to work on final design and construction of project).

<sup>133</sup> *See, e.g., AWARE*, 153 F.3d at 1128-29 ("[T]he degree of oversight exercised by defendants . . . is sufficient to cure any defect

## 2. Personal Animus or Favoritism

Personal prejudice by a decision maker toward a party, witness, or attorney is what is most often thought of as bias.<sup>134</sup> In those instances, a statement, action, or relationship is believed to evidence personal animus against or improper favoritism toward a party, thereby interfering with the neutrality required by the law.<sup>135</sup> As one commentator observed, “[t]here is little doubt that a close association or relationship with an interested party will often have a greater impact on a decision than many pecuniary interests.”<sup>136</sup>

Illustrative is *Stivers v. Pierce*,<sup>137</sup> where an applicant for a private investigator license successfully alleged that a soured business relationship between the applicant and a licensing board member resulted in a review that was inconsistent with the requirement that the license application be determined by an impartial decision maker.<sup>138</sup> Employment relationships can also raise

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arising from [the contractor's expectation of future work].”); *Life of the Land v. Brinegar*, 485 F.2d 460, 467–68 (9th Cir. 1973); *Valley Cmty. Pres. Comm’n*, 246 F. Supp. 2d at 1176.

<sup>134</sup> BLACKS LAW DICTIONARY 162 (6th ed. 1990) (“As used in law regarding disqualification of judge, [bias] refers to mental attitude or disposition of the judge toward a party to the litigation, and not to any views that he may entertain regarding the subject matter involved.”).

<sup>135</sup> See *ABA Blackletter Statement*, supra note 49, at 22. This parallels the disqualification of judges where they have a “personal bias or prejudice concerning a party.” 28 U.S.C. § 455(b)(1) (2012). “Impermissible personal bias includes: (1) bias against an individual based on a prior hostile unofficial relationship with the individual; (2) bias against an individual based on the individual’s personal characteristics (e.g., race, religion, or ethnic origin); and (3) bias toward an individual based on a prior unofficial positive relationship with the individual (e.g., a close friendship or an amorous relationship).” 2 PAUL R. VERKUIL ET AL., *THE FED. ADMIN. JUDICIARY, ADMIN. CONFERENCE OF THE U.S., RECOMMENDATIONS AND REPORTS* 971 (1992).

<sup>136</sup> Cordes, supra note 85, at 205.

<sup>137</sup> 71 F.3d 732 (9th Cir. 1995).

<sup>138</sup> *Id.* at 744; see also *Withrow v. Larkin*, 421 U.S. 35, 47 n.15 (1975) (noting that decision maker should be disqualified where the target of personal abuse or criticism from a party); *Hall v. Marion School Dist. No. 2*, 31 F.3d 183, 191 (4th Cir. 1994) (holding that a

problems, as when a person is asked to pass judgment on a decision made by a peer or already approved by the decision maker's boss.<sup>139</sup> To be disqualifying, the personal bias generally must arise in an adjudication and "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."<sup>140</sup> Remarks from decision makers during the course of a proceeding, even if disapproving or hostile to a party or cause, do not ordinarily support a bias or partiality challenge unless "they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible."<sup>141</sup>

Allegations of bias must overcome the strong presumption of honesty and integrity that attaches to the decisions of public officials when acting in an adjudicative capacity. As the Supreme Court explained, government administrators "are assumed to be men of

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board member's hostility toward a school teacher demonstrated that the board was not a neutral and detached arbiter). *But see* *Aetna Life Ins. v. Lavoie*, 475 U.S. 813, 820-21 (1986) (holding that allegations of bias or prejudice based on a judge's general hostility towards insurance companies was insufficient to establish a constitutional violation).

<sup>139</sup> See *Johnson v. U.S. Dep't of Agric.*, 734 F.2d 774, 782-83 (11th Cir. 1984). *But cf.* *Amundsen v. Chi. Park Dist.*, 218 F.3d 712, 716 (7th Cir. 2000) (holding the mere fact that the administrative hearing officer was hired and paid for by an agency party is insufficient to establish actual bias and overcome the presumption of honesty and integrity in adjudicators).

<sup>140</sup> *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) (holding that any adverse attitudes were based on the judge's study of the depositions and briefs); see also *Bowens v. N.C. Dep't. of Human Res.*, 710 F.2d 1015, 1020 (4th Cir. 1983) ("An individual is not disqualified, however, because he has formed opinions about a case based on his or her participation in it."); *PIERCE*, *supra* note 19, § 9.8, at 865 ("To be disqualifying, personal bias usually must have a prior unofficial source."); *VERKUIL*, *supra* note 135.

<sup>141</sup> *Liteky v. United States*, 510 U.S. 540, 555-56 (1994) ("Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after being confirmed as federal judges, sometimes display." (emphasis in original)); see also *Nat'l Labor Relations Bd. v. Pittsburgh S.S. Co.*, 337 U.S. 656, 659-60 (1949) (holding that a hearing officer's total rejection of the view of one party cannot of itself impugn the integrity of the trier of fact). *But see* *Ventura v. Shalala*, 55 F.3d 900, 902-04 (3d Cir. 1995) (finding that an administrative law judge's coercive, intimidating, and irrelevant questioning of a claimant and his representative violated claimant's right to a full and fair hearing).

conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.”<sup>142</sup> Consequently, those alleging bias in an administrative proceeding generally have a “difficult burden of persuasion to . . . overcome a presumption of honesty and integrity in those serving as adjudicators.”<sup>143</sup> The presumption, nonetheless, “is not to shield . . . action from a thorough, probing, in-depth review”<sup>144</sup> and can be overcome by showing actual bias or “an unacceptable probability of actual bias.”<sup>145</sup> Although a party generally may not inquire into the mental processes of government decision makers, where there is a “strong showing of bad faith or improper behavior,” a party may be entitled to discovery outside the administrative record and examine government personnel.<sup>146</sup>

Environmental decisions, particularly those dealing with local matters, often involve personal and professional relationships between the decision maker and the parties, giving rise to allegations of bias for or against a party. In particular, the so-called “revolving door” movement of employees between government and regulated

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<sup>142</sup> *United States v. Morgan*, 313 U.S. 409, 421 (1941). *But cf.* *Haas v. Cnty. of San Bernardino*, 45 P.3d 280, 286 (Cal. 2002) (explaining that “while adjudicators challenged for reasons other than financial interest have in effect been afforded a presumption of impartiality . . . adjudicators challenged for financial interests have not”).

<sup>143</sup> *Withrow*, 421 U.S. at 47.

<sup>144</sup> *United States Lines, Inc. v. Fed. Mar. Comm’n*, 584 F.2d 519, 526 (D.C. Cir. 1978) (alteration in original) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971)).

<sup>145</sup> *United States v. Oregon*, 44 F.3d 758, 772 (9th Cir. 1994). In *Withrow*, the Court explained that the presumption of impartiality can be overcome by a finding of actual bias or a showing that the probability of actual bias on the part of the decisionmaker “is too high to be constitutionally tolerable.” 421 U.S. at 47; *see also* *Hall v. Marion School Dist. No. 2*, 31 F.3d 183, 192 (4th Cir. 1994).

<sup>146</sup> *Citizens to Preserve Overton Park*, 401 U.S. at 420; *see* *Nat’l Audubon Soc’y v. Hoffman*, 132 F.3d 7, 14–16 (2d Cir. 1997) (finding an insufficient showing of bad faith to permit extra record evidence that agency used environmental assessment as a post hoc tool to justify a decision already made); *Sokaogon Chippewa Cmty. v. Babbitt*, 961 F. Supp. 1276, 1279–81, 1286 (W.D. Wis. 1997) (allowing extra-record discovery to determine if improper political pressure may have influenced agency decision making).

industries can create a perception in environmental disputes that a government decision maker may be favoring a former employer.<sup>147</sup> Nevertheless, without some additional evidence suggesting bias, courts have not found past employment relationships sufficient to overcome the presumption that government employees perform their functions without bias.<sup>148</sup>

In local land use matters, it is not unusual for a decision maker to belong to an organization participating in the proceeding. Some courts have found that in a contentious matter a decision maker's membership in an organization might be grounds for disqualification, reasoning that pressures of loyalty to the organization, conscious or not, would have a tendency to influence the official's vote.<sup>149</sup> Others hold that membership alone is not disqualifying,<sup>150</sup> though a more active role in an organization as a director, or a leadership role as an

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<sup>147</sup> C. Boyden Gray, *Congressional Abdication: Delegation Without Detail and Without Waiver*, 36 HARV. L. & POLY REV. 41, 49-50 (2013) (discussing the problem of the "revolving door").

<sup>148</sup> See, e.g., *Alabama v. U.S. Env'tl. Prot. Agency*, 911 F.2d 499, 506 (11th Cir. 1990) (finding no bias where party employs former agency officials); *West Virginia v. Ohio Hazardous Waste Facility Approval Bd.*, 502 N.E.2d 625, 630 (Ohio 1986) (finding hearing examiner's former employment by party insufficient to overcome presumption of integrity); *Teledyne Wah Chang Albany v. Energy Facility Siting Council*, 692 P.2d 86, 99 (Or. 1984) ("Prior employment six years earlier, without more, is insufficient to establish actual bias.").

<sup>149</sup> See, e.g., *Million Bucks, Inc. v. Borough of Seaside Park Zoning Bd. of Adjustment*, No. L- 162108, 2009 WL 3762702, \*9 (N.J. Super. Ct. App. Div. Nov. 10, 2009) (holding that "mere membership" in activist organization merits disqualification because of "potential for a division of loyalties" and showing of actual bias not required); *Zell v. Borough of Roseland*, 125 A.2d 890, 893 (N.J. Super. Ct. App. Div. 1956) (interpreting statute requiring disqualification for a direct or indirect personal or financial interest in a matter as meaning that all members of a nonpecuniary organization have the same relative interest as stockholders have in a corporation and therefore are disqualified to act as a member of the governing body on matters where the organization has a direct interest).

<sup>150</sup> See, e.g., *Ctr. Square Ass'n, Inc. v. Corning*, 105 Misc.2d 6, 13 (N.Y. Sup. Ct. 1980) (holding that board chairman's membership in association seeking relief did not merit disqualification).

individual in opposing a different project by a party, is problematic.<sup>151</sup>

Personal or business relationships have at times required recusal on contested environmental matters. Some statutes define what relationships are impermissible; others more generally direct a government officer or employee to avoid participating in a decision where a direct or indirect personal relationship “might reasonably be expected to impair [the person’s] objectivity or independence of judgment.”<sup>152</sup> Even in the absence of a statute, matters involving a relative or a person with whom a decision maker has a particularly close relationship can impair the required objectivity.<sup>153</sup> A business relationship with a party or its representative, again not uncommon in local environmental matters, may not be disqualifying if the business matter is not related to the underlying proceeding.<sup>154</sup>

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<sup>151</sup> See, e.g., MONT. CODE ANN. § 2-2-121(5) (2013) (“A public officer . . . may not participate in a proceeding when an organization . . . of which the public officer . . . is an officer or director is: (a) involved . . .; or (b) attempting to influence [the proceeding].”); Ripley Cty. Bd. of Zoning Appeals v. Rumpke of Ind., Inc., 663 N.E.2d 198, 209–10 (Ind. Ct. App. 1996) (disqualifying board member who had led effort against another landfill owned by party and expressed desire to run party out of the county); Danis Clarkco Landfill Co. v. Trs. of German Twp., 1997 U.S. Dist. LEXIS 21081, at \*40–42 (S.D. Ohio Apr. 16, 1997) (emphasizing board member’s active participation and leadership role in organization as rationale for finding partiality); cf. Columbia Gorge United—Protecting People & Prop. v. Yeutter, 1990 WL 357613, \*3, \*10 (D. Or. 1990) (holding commissioners not disqualified where they were former board members and founders of activist organization, even where they did not resign until after proceeding began).

<sup>152</sup> See, e.g., N.J. STAT. ANN. § 40A:9-22.5(d) (West 2014); See also N.M. STAT. ANN. § 21-211(A)(2)(a) (West 2010).

<sup>153</sup> See, e.g., Los Chavez Cmty. Ass’n v. Valencia Cty., 277 P.3d 475, 483 (N.M. Ct. App. 2012) (holding, on case law, state constitution, and due process grounds, that commissioner should have recused herself from voting on first cousin’s rezoning application).

<sup>154</sup> See, e.g., Furtney v. Simsbury Zoning Comm’n, 271 A.2d 319, 323 (Conn. 1970) (holding that commissioner’s position at bank used by applicant did not merit disqualification where bank was not financing the proposed project and commissioner never dealt with applicant); Anderson v. Zoning Comm’n of Norwalk, 253 A.2d 16, 20 (Conn. 1968) (finding no need for recusal where law firm



Outright hostility toward a party or its representative is not permitted. In one matter involving an application for a controversial air permit, an agency decision maker wrongly instructed agency staff to meet with only one side to the dispute and to treat the other side's position as adversarial to that of the agency.<sup>155</sup> Impermissible animus has also been found where an agency employee distributed an email demeaning a party's counsel and motives while favoring the interests of his personal friends on the other side of the dispute,<sup>156</sup> as well as where a party had a pending lawsuit against a decision maker on a related matter.<sup>157</sup> On the other hand, courts repeatedly reject claims that efforts by hearing officers in environmental adjudications to

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representing applicants also represented commissioner's company); *see generally* Hughes v. Monmouth Univ., 925 A.2d 741, 744 (N.J. Super. Ct. App. Div. 2007) (holding no disqualification necessary where board members were alumni of university applicant, attended university events, and had alumni children who had received merit-based tuition credit).

<sup>155</sup> St. James Citizens for Jobs & the Env't v. La. Dep't of Env'tl. Quality, No. 448,928 (La. 19th Jud. Dist. Ct. Aug. 31, 1998) (copy on file with author), *vacated on jurisdictional grounds sub nom. In re Shintech*, 734 So. 2d 772 (La. Ct. App. 1999). Compare this demonstrated hostility to the situation in *Dirt, Inc. v. Mobile County Commission* in which the court held that the mere presence of an applicant's "political enemy" on the relevant decision-making boards—without evidence of outright hostility—did not violate due process, although it "may not have been entirely proper." 739 F.2d 1562, 1566 (11th Cir. 1984).

<sup>156</sup> N. Cal. River Watch v. City of Healdsburg, 2004 WL 201502, at \*15–16 (N.D. Cal. 2004) (holding that derogatory and unprofessional tone of email showed bias and decision based on animus and favoritism rather than analysis).

<sup>157</sup> Springwood Dev. Partners, L.P. v. Bd. of Supervisors, 985 A.2d 298, 306 (Pa. Commw. Ct. 2009) (disqualifying decision maker because "the lawsuit concerned his actions with respect to [the proposal] at issue before the Board"); Lake Garda Improvement Ass'n v. Town Plan and Zoning Comm'n, 199 A.2d 162, 163–64 (Conn. 1964) (holding that pending legal action against party is sufficient to warrant disqualification of commission member); *cf.* Bluff Neighborhood Ass'n v. City of Albuquerque, 50 P.3d 182, 194 (N.M. Ct. App. 2002) (holding disqualification of commissioner unnecessary where member of organization before council had previously intervened in unrelated lawsuit in which commissioner was a party).

control the hearing or clarify testimony constitute impermissible partiality.<sup>158</sup>

### 3. Prejudgment of Facts, Law, or Policy

Prejudgment of a matter prior to the close of the evidence or proceeding may also constitute decision-maker bias, particularly in an adjudication. Courts are careful to distinguish, however, between a decision maker who has prejudged facts that are at issue in an adjudication (the “adjudicative facts” of who, what, when, where, how, and why) and prejudgment of the underlying law or policy—including the general “legislative facts” upon which a decision would be based.<sup>159</sup>

Preconceptions as to matters of law or policy are not a basis to disqualify a decision maker or invalidate a decision. As Judge Jerome Frank explained, while “there can be no fair trial before a judge lacking in impartiality and disinterestedness . . . [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.”<sup>160</sup> Thus, an agency decision maker, often appointed

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<sup>158</sup> See, e.g., *Lloyd A. Fry Roofing Co. v. Pollution Control Bd.*, 314 N.E.2d 350, 358–59 (Ill. App. Ct. 1974) (holding that striking of testimony and introduction of evidence by hearing officer showed conscientious effort to develop record, not bias); *Scheble v. Mo. Clean Water Comm’n*, 734 S.W.2d 541, 563 (Mo. Ct. App. 1987) (holding that hearing examiner may interrupt witnesses for clarification but must avoid helping party establish proof); *In re Rattee*, 761 A.2d 1076, 1082 (N.H. 2000) (finding hearing officer’s cross-examination of witnesses permissible); *Colonias Dev. Council v. Rhino Env’tl. Servs., Inc.*, 81 P.3d 580, 589 (N.M. Ct. App. 2003) (finding no bias in hearing officer’s warning against “turn[ing] the proceedings into a rally” where the statement was simply an effort to establish decorum); *Davis v. Wood*, 427 A.2d 332, 337 (R.I. 1981) (holding that hearing officer may question and interrupt witnesses in effort to conduct hearing in orderly and expeditious fashion).

<sup>159</sup> See KOCH, *supra* note 19, § 1.2, at 7–8 (discussing the differences between adjudicative and legislative facts).

<sup>160</sup> *In re J.P. Linahan, Inc.*, 138 F.2d 650, 651 (2nd Cir. 1943). Former Chief Justice Rehnquist expressed a similar view in rejecting a motion to disqualify himself from a case because of his previously expressed views on the general subject of the case:

because of existing views on a subject, is not “disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not ‘capable of judging a particular controversy fairly on the basis of its own circumstances.’”<sup>161</sup> It is also not improper for an agency adjudicator in the performance of their statutory role to have a general familiarity with the legal and factual issues involved in a case before judging the matter.<sup>162</sup>

Nevertheless, prejudgment of the specific facts of a pending contested case is prohibited. In *Texaco, Inc. v. Federal Trade Commission*,<sup>163</sup> the commission chairman gave a speech, prior to submission of an unfair competition complaint to the commission for decision, which used the respondents as an example of a company that had violated the law.<sup>164</sup> The court held that by appearing to have

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Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

Laird v. Tatum, 409 U.S. 824, 835 (1972).

<sup>161</sup> Hortonville Joint School Dist. v. Hortonville Educ. Ass’n., 426 U.S. 482, 493 (1976) (quoting United States v. Morgan, 313 U.S. 409, 421 (1941)). The Court has held that it would not violate due process “for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law,” noting that no stronger rule would apply to an agency adjudicator. Fed. Trade Comm’n v. Cement Inst., 333 U.S. 683, 702–03 (1948).

<sup>162</sup> Hortonville Joint School Dist., 426 U.S. at 493; *see also* Faultless Div. v. Sec’y of Labor, 674 F.2d 1177, 1183 (7th Cir. 1982) (explaining that familiarity with legal or factual issues alone does not demonstrate that an adjudicator is predisposed to bias).

<sup>163</sup> 336 F.2d 754 (D.C. Cir. 1964).

<sup>164</sup> *Id.* at 759–60, 764.

adjudged the specific facts as well as the law of the case in advance of hearing the evidence, the chairman denied respondents their due process; the court then invalidated the commission's decision.<sup>165</sup> By contrast, a speech by a federal official did not require disqualification where the commissioner was simply stating views on important economic matters at issue and not prejudging the ultimate issue in the dispute.<sup>166</sup> The often stated test from *Cinderella Career & Finishing School v. Federal Trade Commission*<sup>167</sup> is whether "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."<sup>168</sup>

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<sup>165</sup> *Id.* at 759–60, 763; *see also* *Valley v. Rapides Parish School Bd.*, 118 F.3d 1047, 1050, 1053 (5th Cir. 1997) (finding no abuse of discretion by district court in granting preliminary injunction enjoining board from terminating superintendent); *American Cyanamid Co. v. Fed. Trade Comm'n*, 363 F.2d 757, 767–68 (6th Cir. 1966) (finding that chairman's previous involvement with facts of case while counsel to Senate subcommittee disqualified him from participating in hearing).

<sup>166</sup> *Skelly Oil Co. v. Federal Power Comm'n*, 375 F.2d 6, 17–18 (10th Cir. 1967) ("In our opinion no basis for disqualification arises from the fact or assumption that a member of an administrative agency enters a proceeding with advance views on important economic matters in issue."). An agency is permitted to issue a press release indicating that it has reason to believe a respondent has engaged in unlawful activities without later having to recuse from adjudicating those charges. *Fed. Trade Comm'n v. Cinderella Career & Finishing School, Inc.*, 404 F.2d 1308, 1314–15 (D.C. Cir. 1968); *see also* *Kennecott Copper Corp. v. Fed. Trade Comm'n*, 467 F.2d 67, 80 (10th Cir. 1972) (holding that statements about what was in a complaint, without commenting or editorializing about the case, do not show prejudice)

<sup>167</sup> 425 F.2d 583 (D.C. Cir. 1970).

<sup>168</sup> *Id.* at 591 (alteration in original) (quoting *Gilligan, Will & Co. v. Sec. Exch. Comm'n*, 267 F.2d 461, 469 (2d Cir. 1959)); *accord* *Antoniou v. Sec. Exch. Comm'n*, 877 F.2d 721, 725 (8th Cir. 1989). A few courts have ignored the *Cinderella Career & Finishing School* test and instead required a showing that the decision maker's mind was "irrevocably closed." *See, e.g.,* *Madison River R.V. Ltd. v. Town of Ennis*, 994 P.2d 1098, 1100 (Mont. 2000) (stating unequivocally that "[t]o prevail on a claim of prejudice or bias against an administrative decision maker, a petitioner must show that the decision maker had an 'irrevocably closed' mind on the subject under investigation or adjudication"). This phrase was used in passing by the Court in *Federal Trade Commission*

Evidence of prejudgment generally must be displayed outside of and prior to the initiation of the adjudicative proceeding.<sup>169</sup> In addition, having decided the same or a similar case against a party does not disqualify an administrative law judge from later deciding the case on remand or rehearing.<sup>170</sup>

The standard for disqualification in rulemaking proceedings is significantly more stringent and requires “a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding.”<sup>171</sup> The rationale for treating rulemaking prejudgment claims differently is that, unlike an adjudicator, an administrator seeking to translate broad statutory commands into concrete regulations must be allowed to engage in debate and discussion, and even express opinions, about the policy matters behind a possible rule.<sup>172</sup> As one commentator observed: “A

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*v. Cement Institute* to address allegations that the commission had fixed views about price fixing or whether certain types of conduct were unlawful. 333 U.S. 683, 700-01 (1948). However, the Court used the phrase to refer to a decision maker’s views about legislative facts, not the contested facts that are the subject of an adjudication. Thus, the “irrevocably closed mind” test is properly applied to a rulemaking proceeding, not an adjudication. *Ass’n of Natl Advertisers v. Fed. Trade Comm’n*, 627 F.2d 1151, 1168-70 (D.C. Cir. 1979).

<sup>169</sup> See MICHAEL ASIMOW, ARTHUR EARL BONFIELD & RONALD M. LEVIN, *STATE AND FEDERAL ADMINISTRATIVE LAW* 129 (2d ed. 1998) (observing that most prejudgment cases arise from unguarded statements made out of the decision maker’s statutory role); WILLIAM F. FOX, *UNDERSTANDING ADMINISTRATIVE LAW* 231 (5th ed. 2008) (observing that predecisional bias arises mainly from remarks outside of the hearing); *Cioffoletti v. Planning & Zoning Comm’n*, 552 A.2d 796, 802 (Conn. 1989) (noting that decisive question in prejudgment case was whether decision maker had made up mind prior to the public hearing).

<sup>170</sup> *Natl Labor Relations Bd. v. Donnelly Garment Co.*, 330 U.S. 219, 236-37 (1947) (finding no reason for disqualifying examiners from rehearing a case because they ruled strongly against a party in the first hearing).

<sup>171</sup> *Ass’n of Natl Advertisers*, 627 F.2d at 1170; *accord* *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1210 (D.C. Cir. 1981) (observing that “[j]udicial review of rulemaking, unlike the ABA Canon of [Judicial] Ethics, does not attack the mere appearance of impropriety”).

<sup>172</sup> *Ass’n of Natl Advertisers*, 627 F.2d at 1168-69, 1173 (noting that the court “never intended the *Cinderella* rule to apply to a rulemaking procedure such as the one under review”); *see also* LUBBERS,

rulemaking decision rarely, if ever, can be infected with impermissible bias because rules rarely depend on agency resolutions of disputed issues of adjudicative fact. Rather, most rules depend entirely on resolution of issues of law, policy, and legislative fact.”<sup>173</sup>

Allegations of prejudgment in environmental matters are not uncommon. Many prejudgment problems result from the challenges faced by local elected officials when required to act at different times as legislators or adjudicators.<sup>174</sup> In their legislative role, and especially in the context of communicating with constituents and publicly expressing their views on matters of policy, pre-hearing opinions on controversial environmental issues are to be expected.<sup>175</sup> Nonetheless, when that elected official then acts in a quasi-judicial role and adjudicates a dispute over that same matter, “the requirements of due process attach, and the proceeding must be fair,

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*supra* note 76, at 372–74 (stating that the disqualification standard applicable to adjudication is inappropriate for rulemaking because an agency official must engage in debate and discussion about the policy to be effective); Peter L. Strauss, *Disqualifications of Decisional Officials in Rulemaking*, 80 COLUM. L. REV. 990, 993–94 (1980) (acknowledging that while tentativeness during discussions and judgments antecedent to a proposal may be important, such actions do not disqualify the official).

<sup>173</sup> PIERCE, *supra* note 19, § 9.8, at 877.

<sup>174</sup> See Strauss, *supra* note 172, at 993 (noting the “significant structural differences between rulemaking and adjudication,” and explaining that the expertise required to carry out policymaking decisions can cause agency administrators to appear biased; however, none of the administrators discussed were disqualified as adjudicators after being accused of unlawful bias.)

<sup>175</sup> See, e.g., *City of Farmers Branch v. Hawnco, Inc.*, 435 S.W.2d 288, 291-92 (Tex. Civ. App. 1968) (holding that campaign promises did not disqualify local officials from performing zoning-related legislative duties when in office); *Kramer v. Bd. of Adjustment, Sea Girt*, 212 A.2d 153, 158-61 (N.J. 1965) (finding campaign statement that mayor had “realistic attitude” toward hotel proposal was simply the view of a public official on a matter of deep concern to community and did not indicate that mayor had prejudged the merits of the hotel’s variance application); *Municipalities—Administrative Law—Disqualification of Legislator in Quasi-Judicial Proceeding*, 82 Md. Op. At’y Gen. 94, 97 (Oct. 2, 1997) (“A legislator generally is free to make up his or her mind about an issue long before the vote and . . . is also free to say what he or she wishes, as part of the legislative process”).

open, and impartial,”<sup>176</sup> which precludes prejudgment of the law and facts in dispute.

This distinction between an official’s legislative and adjudicative roles can be tricky in land use cases. When the focus of the local governing body shifts from the legislative adoption of a zoning ordinance to a determination about the application of an ordinance or rule to a particular tract of land, the proceeding becomes quasi-judicial in nature.<sup>177</sup> Frustration with the legal problems that flow from these different roles led the Illinois legislature, after a number of courts found improper prejudgment statements by local officials, to amend its waste facility siting statute to allow the legislature to express opinions on an issue related to that body’s site approval process without being precluded from later voting on that contested matter.<sup>178</sup>

Even in the absence of a statute authorizing expressions of opinion on contested matters, general views on environmental issues or methods should not be regarded as sufficient evidence that the official has prejudged the adjudicative facts of a particular proposal or dispute. Thus, a stated view on a particular policy matter (e.g., landfills are undesirable) does not indicate that the official cannot fairly adjudge the facts and law on a related matter (e.g., whether this landfill proposal fits the criteria for approval).<sup>179</sup> Also, having

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<sup>176</sup> *Tri-Cty. Concerned Citizens, Inc. v. Bd. of County Comm’rs*, 95 P.3d 1012, 1018 (Kan. Ct. App. 2004).

<sup>177</sup> *Golden v. City of Overland Park*, 584 P.2d 130, 135 (Kan. 1978) (“When . . . the focus shifts from the entire city to one specific tract of land for which a zoning change is urged, the function becomes more quasi-judicial than legislative.”). *But see* DANIEL MANDELKER ET AL., *PLANNING & CONTROL OF LAND DEVELOPMENT: CASES & MATERIALS* 609 (8th ed. 2011) (observing that several courts do not view rezoning map amendments as quasi-judicial).

<sup>178</sup> 415 ILL. COMP. STAT. ANN. 5/39.2(d) (2012); *Sw. Energy Corp. v. Ill. Pollution Control Bd.*, 655 N.E.2d 304, 309 (Ill. App. Ct. 1995) (explaining basis for legislative change). Illinois law provides that the governing body of a county or municipality shall approve or disapprove of the proposed location of a pollution control facility within its jurisdiction.

<sup>179</sup> *See, e.g., Cioffoletti v. Planning & Zoning Comm’n*, 552 A.2d 796, 801–02 (Conn. 1989) (holding that, in absence of proof that commissioners actually decided matter prior to hearing, comments simply showed permissible “opinion concerning the proper development of their

advance knowledge of certain facts in dispute is not grounds for disqualifying a decision maker, provided that person had not made a prior judgment about the outcome of the matter or a prior commitment to disputed facts.<sup>180</sup> Even a statement of tentative conclusions based on evidence submitted prior to a hearing is permitted, provided the decision maker still has an open mind and considers all evidence presented.<sup>181</sup> An earlier position on environmental issues in the present matter also need not be disqualifying.<sup>182</sup> Moreover, a plaintiff must show that the prejudgment was displayed prior to the hearing, not based on

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communities” (quoting *Furtney v. Zoning Comm’n*, 271 A.2d 319, 323 (1970)); *New Eng. Power Co. v. Goulding*, 486 F. Supp. 18, 21 (D.D.C. 1979) (finding administrator’s anti-nuclear-power platform in earlier campaign for different office insufficient to overcome presumption of good faith accorded decision maker); *Waste Mgmt. of Ill., Inc. v. Pollution Control Bd.*, 530 N.E.2d 682, 696 (Ill. App. Ct. 1988) (holding that board members’ public expressions of opposition to landfills and support for recycling did not demonstrate prejudgment of landfill siting application); *Cent. Platte Nat. Res. Dist. v. Wyoming*, 513 N.W.2d 847, 866 (Neb. 1994) (holding that general bias in favor of instream flows would not show disqualifying prejudgment of ideal flow level for particular river).

<sup>180</sup> *Withrow v. Larkin*, 421 U.S. 35, 55 (1975) (“The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing.”); *accord Hortonville Joint School Dist. v. Hortonville Educ. Ass’n*, 426 U.S. 482, 493 (1976) (“Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker.”).

<sup>181</sup> *See, e.g., Wagner v. Jackson Cty. Bd. of Zoning Adjustment*, 857 S.W.2d 285, 289 (Mo. Ct. App. 1993) (holding that reaching tentative conclusion prior to hearing based on familiarity with facts does not necessitate disqualification when decision maker’s mind is “open to change based upon the evidence presented at the hearing”).

<sup>182</sup> *See, e.g., City of Alma v. United States*, 744 F. Supp. 1546, 1561 (S.D. Ga. 1990) (holding that EPA administrator’s prior expressions of opposition to project while in different agency role did not overcome presumption of good faith); *Marine Shale Processors, Inc. v. U.S. Env’tl. Prot. Agency*, 81 F.3d 1371, 1385 (5th Cir. 1996) (holding that official’s prior conclusion based on some evidence did not prevent him from fairly deciding the issue later based on all evidence).



questioning during the hearing.<sup>183</sup> Thus, an environmental official's statement, upon witnessing black smoke and malfunctioning equipment in an incinerator control room, that she would "use every legal means at my disposal to close this facility and keep it closed," disqualified her from later reviewing an administrative hearing officer's determination of the legality of a compliance order and penalty assessment against the facility.<sup>184</sup> Surprisingly, even a passing observation that a landfill permit application seemed "like a political hot potato," which led some listeners to believe that the official had already decided to deny the pending application, was deemed sufficient evidence to disqualify the official.<sup>185</sup>

In contrast, a statement that the residents around a proposed landfill site "have had enough of landfills," attributed to a board member in a newspaper article prior to the landfill application hearing, was not viewed as sufficient evidence of prejudgment to overcome the presumption that administrative officials are fair.<sup>186</sup>

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<sup>183</sup> See, e.g., *C & W Fish Co., Inc. v. Fox*, 931 F.2d 1556, 1564 & n.15 (D.C. Cir. 1991) (declining to infer prejudgment from adjudicator's decision, instead requiring something outside the record indicating prejudgment (relying on *Migliorini v. Director, Office of Workers' Comp. Programs*, 898 F.2d 1292, 1294 (7th Cir. 1990)); *Cioffoletti v. Planning & Zoning Comm'n*, 552 A.2d 796, 802 (Conn. 1989) (ruling that plaintiff could not prove prejudgment based solely on comments made during hearing); *Siesta Hills Neighborhood Ass'n v. City of Albuquerque*, 954 P.2d 102, 108–09 (N.M. App. 1992) (finding no improper prejudgment where planning and zoning commission member did not state opinion until after hearing presentation of plaintiff's arguments).

<sup>184</sup> *In re Rollins*, 481 So. 2d 113, 121 (La. 1985) ("The secretary's statements have made it extremely difficult for her to change her position even in the event that evidence adduced at the hearing should warrant it."); see also *Nasha L.L.C. v. City of L.A.*, 125 Cal. App. 4th 470, 484 (2004) (holding that clearly advocating position against project in newsletter article prior to hearing "gave rise to an unacceptable probability of actual bias" requiring recusal); *Mun. Servs. Corp. v. State*, 483 N.W.2d 560, 562, 564 (N.D. 1992) (ruling that hearing officer's statement of firm opposition to permitting landfill prior to hearing constituted precommitment to adjudicative facts).

<sup>185</sup> *In re American Waste & Pollution Control Co.*, 581 So. 2d 738, 741–42 (La. Ct. App. 1991).

<sup>186</sup> *A.R.F. Landfill, Inc. v. Pollution Control Bd.*, 528 N.E.2d 390, 393–95 (Ill. Ct. App. 1988) (noting that newspaper article was not supported by other evidence to verify alleged statements); see also *State Water Res.*

Similarly, a statement by the president of the board that the alleged waste disposal violations under review were “pretty blatant” was viewed as simply an explanation that the seriousness of the case caused the board to conduct the hearing in a certain manner.<sup>187</sup>

These competing results indicate that the outcome of a prejudgment allegation in an environmental adjudication is often hard to predict. This uncertainty results in part from whether the court relies on an appearance of fairness standard or requires proof of actual bias, how strongly the court applies the presumption of honesty and integrity in those serving as adjudicators, whether the statement is treated as expressing views about issues or processes rather than about the particular facts under review, and whether the objecting party has provided concrete evidence of prejudgment rather than asking a court to imply that the adjudicator was biased toward the matter under dispute.<sup>188</sup>

Successfully challenging an official’s participation in an environmental rulemaking proceeding on prejudgment grounds is even more unlikely. An Environmental Protection Agency (EPA) official’s prior role in advocating for a more stringent lead air quality standard while with an environmental organization was not deemed clear and convincing evidence of an unalterably closed mind.<sup>189</sup>

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Control Bd. Cases, 136 Cal. App. 4th 674, 841 (2006) (requiring those challenging impartiality of adjudicator to “set forth concrete facts demonstrating bias or prejudice”).

<sup>187</sup> *In re Fiorillo Bros. of N.J., Inc.*, 577 A.2d 1316, 1322 (N.J. Super. Ct. App. Div. 1990). As in *A.R.F. Landfill*, this statement was in the form of a quote in a newspaper article.

<sup>188</sup> *Compare* *Organized Fishermen of Fla., Inc. v. Franklin*, 846 F. Supp. 1569, 1575 (S.D. Fla. 1994) (finding inference from actions of decision maker insufficient to establish convincing evidence of prejudgment), *with* *Charlotte Cty. v. IMC-Phosphates Co.*, 824 So. 2d 298, 300–01 (Fla. Dist. Ct. App. 2002) (inferring prejudgment from agency official’s actions where official, tasked with final adjudicative review of the administrative law judge’s 117-page order, announced decision to approve on same day he received order).

<sup>189</sup> *Lead Indus. Ass’n, Inc. v. U.S. Env’tl. Prot. Agency*, 647 F.2d 1130, 1172, 1179–80 (D.C. Cir. 1980) (relying on the *Ass’n of Nat’l Advertisers* prejudgment test for rulemaking); *see also* *Iowa Farm Bureau Fed’n v. Env’tl. Prot. Comm’n*, 850 N.W.2d 403, 421–22 (Iowa 2014) (holding that a commission member’s advocacy prior to

Similarly, a federal official's outspoken support for a drift gillnet ban prior to his appointment to a federal agency did not disqualify him from issuing a new regulation banning some drift gillnets.<sup>190</sup>

If predicting the outcomes of allegations of prejudgment of the facts are uncertain, it is clear that a decision maker's predisposition toward environmental issues or policy, even to the point of being accurately labeled as "anti-environment" or "anti-landfill," is not grounds for disqualification. Decision makers may have a clear pre-hearing ideological or political bent toward environmental issues, perhaps much to the disappointment of parties appearing before them in an adjudication.<sup>191</sup>

NEPA cases raise a particular set of prejudgment issues.<sup>192</sup> One concern is that agencies often have an institutional bias in favor of a project and prejudge the outcome of the environmental review process.<sup>193</sup> Although NEPA requires agencies to objectively evaluate proposals, the test applied by courts is "good faith objectivity," not subjective impartiality.<sup>194</sup> Indeed, courts have observed that NEPA assumes that an agency will inevitably be

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appointment on the rulemaking matter did not disqualify her from voting on the final rule).

<sup>190</sup> *C & W Fish Co., Inc. v. Fox*, 931 F.2d 1556, 1564–65 (D.C. Cir. 1991).

<sup>191</sup> *See, e.g., In re Me. Clean Fuels, Inc.*, 310 A.2d 736, 750-51 (Me. 1973) (holding that composition of environmental commission may include persons with preconceived policy views, provided the statutory qualifications for holding position are not arbitrary and appointment complies with them); *PIERCE, supra* note 19, § 9.8, at 871 ("A previously announced position on a disputed issue of law, policy, or legislative fact does not disqualify a decisionmaker.").

<sup>192</sup> *See generally* DANIEL R. MANDELKER, *NEPA LAW & LITIGATION* §§ 8:58, 10:46 (2d ed. 2011) ("The question of agency bias, predetermination and prior commitment permeates judicial review of the adequacy of impact statements.").

<sup>193</sup> *Id.*

<sup>194</sup> *Envtl. Def. Fund, Inc. v. Corps of Engrs of U.S. Army*, 470 F.2d 289, 296 (8th Cir. 1972) [hereinafter *EDF I*]; *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 712 (10th Cir. 2010); *Nat'l Audubon Soc'y v. Dept. of Navy*, 422 F.3d 174, 198 (4th Cir. 2005); *Carolina Env'tl. Study Grp. v. United States*, 510 F.2d 796, 801 (D.C. Cir. 1975); *Env'tl. Def. Fund, Inc. v. Corps of Engrs of U.S. Army*, 492 F.2d 1123, 1129 (5th Cir. 1974) [hereinafter *EDF II*]; *Life of the Land v. Brinegar*, 485 F.2d 460, 467 (9th Cir. 1973).

biased in favor of a project it is promoting and that the required NEPA environmental analysis is intended to help address this inherent bias.<sup>195</sup> As one court explained: “[I]t is possible for federal officials and federal employees to comply in good faith with [NEPA] even though they personally oppose its philosophy, are ‘anti-environmentalists’, and have unshakable, preconceived attitudes and opinions as to the ‘rightness’ of the project under consideration.”<sup>196</sup>

Thus, statements or actions by the agency preparing an environmental impact statement that promote the project, show a clear preferred alternative, or express confidence that the project will be approved, while perhaps demonstrating subjective partiality, do not prove lack of good faith objectivity.<sup>197</sup> Lack of objective good faith has been shown, however, by the agency’s failure to follow NEPA’s procedural provisions, such as by misrepresenting facts, not

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<sup>195</sup> *EDF I*, 470 F.2d at 295; *Residents in Protest—I-35E v. Dole*, 583 F. Supp. 653, 661–62 (D. Minn. 1984).

<sup>196</sup> *EDF I*, 470 F.2d at 296 (alteration in original) (quoting *Envtl. Def. Fund, Inc. v. Corps of Eng’rs of U.S. Army*, 342 F. Supp. 1211, 1223 (E.D. Ark. 1972)).

<sup>197</sup> See, e.g., *Carolina Env’tl. Study Grp.*, 510 F.2d at 801 (holding that agency’s statutorily-prescribed responsibility to promote atomic energy did not show lack of good faith objectivity in approval of license for nuclear reactors); *Fayetteville Area Chamber of Commerce v. Volpe*, 515 F.2d 1021, 1026 (4th Cir. 1975) (holding that state official’s initial, pre-EIS location decision for highway did not show lack of good faith objectivity in his department’s participation in EIS); *EDF II*, 492 F.2d at 1129 (holding that agency documents conveying confidence that project would be approved did not necessarily establish lack of good faith objectivity of subsequent agency studies); *Conservation Law Found. v. Fed. Highway Admin.*, 630 F. Supp. 2d 183, 202 (D.N.H. 2007) (holding that agency’s initial view that highway expansion was best alternative provided no evidence of bad faith in its analysis of rail alternative); *Australians for Animals v. Evans*, 301 F. Supp. 2d 1114, 1127 (N.D. Cal. 2004) (holding that agency’s public statement in support of project under consideration did not prove bad faith in decision to approve project); *Nashvillians Against I-440 v. Lewis*, 524 F. Supp. 962, 986–87 (M.D. Tenn. 1981) (holding fact that agency completed plan for highway prior to preparation of EIS insufficient to prove lack of objective good faith).

acknowledging conflicts created by the proposal, and failing to identify and consider feasible alternatives.<sup>198</sup>

A second NEPA prejudgment issue is whether the agency committed itself, through an agreement or expenditure of resources, to a certain outcome before the conclusion of the study process. NEPA regulations require that the environmental review process be used to assess environmental impacts, not rationalize decisions already made.<sup>199</sup> Hence, unlawful predetermination occurs when an agency “irreversibly and irretrievably commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, *before* the agency has completed that environmental analysis.”<sup>200</sup>

For example, where the contractor hired to prepare the environmental analysis was contractually obligated to develop a “finding of no significant impact” (FONSI) and the agency committed to having it signed by a set date, the court found unlawful predetermination of the outcome of the NEPA analysis.<sup>201</sup> Entering

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<sup>198</sup> See, e.g., *Int’l Snowmobile Mfrs. Ass’n v. Norton*, 340 F. Supp. 2d 1249, 1261 (D. Wyo. 2004) (holding that official’s definitive, public statements prior to completion of final EIS showed EIS was merely “*pro forma* compliance” with NEPA to validate prejudged political conclusion); *Cedar-Riverside Env’tl. Def. Fund v. Hills*, 422 F. Supp. 294, 322–23 (D. Minn. 1976) (finding lack of good faith objectivity where EIS contained significant misrepresentations of fact favoring proposal, showed biased selection of evidence, and failed to evaluate or even acknowledge alternatives). See generally *Env’tl. Def. Fund, Inc. v. Corps of Engrs of U.S. Army*, 342 F. Supp. 1211, 1214 (E.D. Ark. 1972) (finding good faith where the EIS was not “consciously slanted or biased” and defendants had not “consciously or intentionally made any misrepresentations” or “intentionally withheld any pertinent information required by the NEPA”); WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW* 868–69 (2d ed. 1994) (observing that bad faith is usually reserved for flagrant violations of NEPA’s procedural provisions).

<sup>199</sup> 40 C.F.R. § 1502.2(f)-(g) (2014); 40 C.F.R. § 1502.5 (2014).

<sup>200</sup> *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 714 (10th Cir. 2010) (emphasis in original); see also *Conner v. Burford*, 848 F.2d 1441, 1451 (9th Cir. 1988) (holding that issuance of oil and gas development leases without stipulations constitutes irretrievable commitment because it fails to reserve right to prevent development activity if deemed environmentally harmful).

<sup>201</sup> *Davis v. Mineta*, 302 F.3d 1104, 1112 (10th Cir. 2002) (“The decision whether to prepare a FONSI should be based on the [environmental

into a contract to support a project before considering the environmental consequences through the NEPA process also was considered an irretrievable commitment, not simply a stated preference for a preferred course of action.<sup>202</sup> In contrast, spending limited resources to pre-mark trees for harvesting was not considered such an irreversible and irretrievable commitment of resources to foreclose other alternative actions.<sup>203</sup>

#### 4. Separation of Functions

Issues of bias may occur where prosecutorial and adjudicatory functions are combined in the same person, creating the possibility of a partial adjudicator. The federal APA prohibits an agency employee engaged in investigative or prosecutorial functions in an agency adjudication from participating or advising in the decision on that or a factually-related case.<sup>204</sup> This separation of functions requirement,

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analysis], of course, not the other way around.”).

<sup>202</sup> *Metcalf v. Daley*, 214 F.3d 1135, 1143–44 (9th Cir. 2000); *see also Conner*, 848 F.2d at 1451 (finding that issuance of leases without reserving right to prevent activity constitutes precommitment); *Save the Yaak Comm. v. Block*, 840 F.2d 714, 718–19 (9th Cir. 1988) (finding irretrievable commitment in award of contracts and commencement of construction prior to preparation of environmental analysis); *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 229–30 (D.D.C. 2003) (issuing permits prior to environmental analysis amounted to waiver of right to prevent activity within scope and duration of permits); *cf. Friends of Se.’s Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir. 1998) (holding that agency’s preparation of tentative schedule for fulfillment of long-term contract did not constitute irretrievable commitment because retained right to prevent activity).

<sup>203</sup> *Wildwest Inst. v. Bull*, 547 F.3d 1162, 1169 (9th Cir. 2008) (“Forest Service’s expenditure of \$208,000 to pre-mark trees was clearly not so substantial an investment that it limited [the choice of reasonable alternatives.]”); *Headwaters v. Forsgren*, 219 F. Supp. 2d 1121, 1129 (D. Or. 2002); *see also Burkholder v. Wykle*, 268 F. Supp. 2d 835, 845 (N.D. Ohio 2002) (finding no irreversible commitment of federal resources prior to FONSI because only state funds were committed, not federal).

<sup>204</sup> 5 U.S.C. § 554(d) (2012). Section 554(d) also protects administrative law judges from the effects of commingling functions by prohibiting the judge from being responsible to or subject to the

sometimes framed as a prohibition against improper commingling of functions, reflects concerns that a prosecutor or investigator, if allowed to serve as the decision maker, might be tempted to rely on facts not in the record or to feel partial toward the prosecution.<sup>205</sup> State administrative procedure statutes similarly preclude a person who has served as an investigator, prosecutor, or advocate in an adjudicative proceeding from serving as a presiding officer in the same proceeding.<sup>206</sup>

As stated in the APA, this restriction further prohibits “advising” on a decision.<sup>207</sup> Thus, an agency officer or employee who has served in an investigative or prosecutorial function becomes unavailable not only to decide that matter, but also to consult or advise others making the decision, unless those views are presented as a witness or counsel to a party in the public proceedings.<sup>208</sup>

The APA’s separation of functions requirement only applies to formal adjudications, not to other types of agency proceedings.<sup>209</sup> It also does not apply to the agency itself, which can combine

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supervision or direction of someone engaged in the performance of investigative or prosecuting functions.

<sup>205</sup> A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 19, § 120, at 120 n.74. As Justice Brennan observed: “In a sense the combination of functions violates the ancient tenet of Anglo- American justice that No man shall be a judge in his own cause.” *In re Larsen*, 86 A.2d 430, 435 (N.J. Super. Ct. App. Div. 1952) (Brennan, J., concurring).

<sup>206</sup> See MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-214 (1981); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 402(b) (2010).

<sup>207</sup> 5 U.S.C. § 557 (2012).

<sup>208</sup> ATTORNEY GENERALS MANUAL, *supra* note 50, at 57; see also A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 19, § 7.0632, at 123 (citing *Greene v. Babbitt*, 943 F. Supp. 1278, 1285– 86 (W.D. Wash. 1996)). Instead, agency decision makers must consult with staff members who have not performed investigative or prosecuting functions in that or a factually-related case, or organize staff assignments so that the staff members it desires to consult are free of investigative and prosecuting functions. ATTORNEY GENERALS MANUAL, *supra* note 50, at 56–57.

<sup>209</sup> 5 U.S.C. § 554(a) (2012) (stating that section 554 applies to “every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing”); see also *United Steelworkers v. Marshall*, 647 F.2d 1189, 1213–14 (D.C. Cir. 1981) (finding no basis in APA to require separation of functions in rulemaking). See *supra* notes 53–59 and accompanying text for a discussion of the distinction between formal and informal adjudication.

functions, or to a member or members of the body that comprise the agency.<sup>210</sup> In addition, the separation of functions requirement “does not preclude agency decisionmakers from taking part in a determination to launch an investigation or issue a complaint, or similar preliminary decision, and later serving as a decisionmaker in the same case.”<sup>211</sup> A decision maker is not permitted, however, to review his or her own initial decision.<sup>212</sup>

In matters where the APA’s requirements do not apply, due process may still require separation of functions.<sup>213</sup> Generally, unconstitutional bias is not created by combining investigative,

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<sup>210</sup> 5 U.S.C. § 554(d)(C) (2012); *see also* PIERCE, *supra* note 19, § 9.9, at 888 (“The APA does not require separation of functions at the highest level of the agency, i.e., the cabinet officer, administrator, or collegial body that has overall responsibility for the agency.”) The restriction also does not apply “in determining applications for initial licenses.” 5 U.S.C. § 554(d)(A) (2012).

<sup>211</sup> *ABA Blackletter Statement*, *supra* note 49, at 24–25; *see* *Withrow v. Larkin*, 421 U.S. 35, 55 (1975) (“The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing.”); *Simpson v. Office of Thrift Supervision*, 29 F.3d 1418, 1424–25 (9th Cir. 1994) (finding no due process violation where the director of the Office of Thrift Supervision both commences proceedings by issuing notices of charges and makes the final administrative determination); *Morris v. City of Danville*, 744 F.2d 1041, 1045–46 (4th Cir. 1984) (holding that official who gave employee notice of his proposed termination was not disqualified from later participating in hearings on that termination).

<sup>212</sup> *See Withrow*, 421 U.S. at 58 n.25 (observing that *Morrissey v. Brewer*, 408 U.S. 471 (1972), “held that when review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review”); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (“We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review.”).

<sup>213</sup> A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 19, § 7.062, at 121; *see also* *Walker v. City of Berkeley*, 951 F.2d 182, 185 (9th Cir. 1991) (finding due process violation “in allowing the same *person* to serve both as decisionmaker and as advocate for the party that benefited from the decision” (emphasis in original)).



prosecutorial, and adjudicatory functions in the same agency.<sup>214</sup> Yet, combining those duties in the same person on the same case is “inherently suspect” and does raise due process concerns.<sup>215</sup> Nevertheless, to succeed on a due process challenge the party must show evidence of bias or an intolerably high risk of unfairness from combining functions in a single government employee, and overcome a presumption of honesty and integrity in those who serve as adjudicators.<sup>216</sup>

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<sup>214</sup> In *Withrow v. Larkin*, the Court observed that while the combination of investigative and adjudicative functions alone does not constitute a due process violation, that “does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high.” *Withrow*, 421 U.S. at 58. Professor Pierce notes that “[t]he Supreme Court has never held a system of combined functions to be a violation of due process, and it has upheld several such systems.” PIERCE, *supra* note 19, § 9.9, at 892. However, some state courts have found that commingling prosecutorial and adjudicative functions in a single administrative board does violate state due process guarantees. See, e.g., *Lyness v. State Bd. of Med.*, 605 A.2d 1204, 1210 (Pa. 1992) (“[W]here the very entity or individuals involved in the decision to prosecute are ‘significantly involved in the adjudicatory phase of the proceeding, a violation of due process occurs.” (quoting *Commonwealth Dept. of Ins. v. Am. Bankers Ins.*, 387 A.2d 449, 456 (Pa. 1978))).

<sup>215</sup> See KOCH, *supra* note 19, § 6:11[1](a), at 382 (“Allowing the *same person* to serve both as a decisionmaker and as an advocate for a party is inherently suspect.”); *Sheldon v. Sec. Exch. Commn.*, 45 F.3d 1515, 1519 (11th Cir. 1995) (observing that “[a]n agency may combine investigative, adversarial, and adjudicative functions as long as no employees serve in dual roles”); *Beer Garden, Inc. v. N. Y. State Liquor Auth.*, 590 N.E.2d 1193, 1198–99 (N.Y. 1992) (holding that even if someone appeared as counsel for the prosecution in form only, that person cannot later adjudicate that same dispute).

<sup>216</sup> *Withrow*, 421 U.S. at 47, 55, 57. The court in *In re Seidman* rejected the argument that bias is inherent in a process that allows a single person to act as prosecutor, investigator, and adjudicator, holding that “actual bias or a likelihood of bias must appear if an otherwise valid administrative sanction is to be overturned because of a denial of due process.” 37 F.3d 911, 925 (3rd Cir. 1994). However, the Pennsylvania Supreme Court has held that the mere potential for bias and appearance of nonobjectivity from commingling is sufficient to create a fatal due process defect under the Pennsylvania Constitution. *Lyness*, 605 A.2d at 1210; see also *Allen v. State Bd. of Dentistry*, 543

Environmental adjudications reflect the general rule that a combination of prosecutorial and adjudicative functions in the same person is incompatible with due process, such as where the person prosecuting a case on behalf of a public body is also a member of the decision-making body or advisor to it on the same matter.<sup>217</sup> Problems have repeatedly arisen when an attorney represents the government in a proceeding and simultaneously advises the decision-making tribunal in that same proceeding. Thus, a city solicitor improperly represented the town in a zoning application dispute while also acting as legal advisor to the zoning board hearing the matter.<sup>218</sup> This prohibition does not extend, however, where a person is acting as an advisor to a board in one matter while acting in a prosecutorial capacity before the board in an unrelated matter, reflecting the APA's prohibition of commingling of functions only in "a factually related case."<sup>219</sup>

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So.2d 908, 915 (La. 1989) (using an appearance of complete fairness standard to determine if commingling prosecutorial and adjudicative functions denied due process); *Beer Garden, Inc.*, 590 N.E.2d at 1198 (rejecting argument that mere appearance of impropriety was not sufficient to require recusal).

<sup>217</sup> See, e.g., *FR & S, Inc. v. Commonwealth Dept. of Env. Res.*, 537 A.2d 957, 964 (Pa. Commw. Ct. 1988) ("[T]he commingling of functions constitutes a deprivation of due process."); see generally *In re Water Use Permit Applications*, 9 P.3d 409, 432–34 (Haw. 2000) (holding that a person may not sit in judgment of legal claims and factual representations the person or his agency has advanced as a party).

<sup>218</sup> *Horn v. Twp. of Hilltown*, 337 A.2d 858, 860 (Pa. 1975); see also *Kerr-McGee Nuclear Corp. v. N.M. Env'tl. Improvement Bd.*, 637 P.2d 38, 46 (N.M. Ct. App. 1981) (holding that the board should not have looked to a division that prepared regulations for legal guidance during a hearing on those regulations); *In re Wash. Cty. Cease, Inc.*, 473 N.Y.S.2d 610, 615 (App. Div. 1984) (holding that commissioner should recuse himself from deciding whether to approve an application when he also serves as applicant's general counsel).

<sup>219</sup> *Morongo Band of Mission Indians v. State Water Res. Control Bd.*, 199 P.3d 1142, 1147–49 (Cal. 2009) (rejecting view that board members would naturally give greater weight to arguments of someone who acted as their own legal adviser, albeit in an unrelated matter).

Agency officials are allowed to initiate an environmental enforcement action or issue a draft permit without being disqualified from later reviewing that decision in light of more complete information.<sup>220</sup> Courts are divided, however, on whether the separation of functions doctrine prohibits an attorney in an ongoing agency enforcement action from advising agency officials on how related permit matters should be resolved.<sup>221</sup>

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<sup>220</sup> See, e.g., *Marine Shale Processors, Inc. v. U.S. Env'tl. Prot. Agency*, 81 F.3d 1371, 1385 (5th Cir. 1996) (holding that participation of decision maker who earlier referred applicant's facility to EPA's enforcement arm and made initial determination against applicant did not violate due process); *Marathon Oil v. U.S. Env'tl. Prot. Agency*, 564 F.2d 1253, 1265 (9th Cir. 1977) (finding that review of permits after hearings before administrative law judge by same official who initially issued draft permits did not violate due process). However, as noted above, review of an agency decision must be made by someone other than the person who made the decision under review. See *supra* note 211; see also *Due Process and Administrative Hearings*, 1991-1992 Mich. Op. Atty. Gen. 6742 (Dec. 4, 1992), available at <http://www.ag.state.mi.us/opinion/datafiles/1990s/op06742.htm> ([D]ue process requires that a member . . . refrain from participating in the review of any decision in which the member has previously participated as a member of the county zoning commission.”).

<sup>221</sup> Compare *Bethlehem Steel Corp. v. U.S. Env'tl. Prot. Agency*, 638 F.2d 994, 1010 (7th Cir. 1980) (vacating EPA's disapproval of issuance of compliance order to company because attorneys engaged in enforcement action against company advised on the disapproval, casting a shadow over the appearance of fairness), with *Marine Shale Processors*, 81 F.3d at 1385-86 (finding no violation of due process where attorney in enforcement action against company drafted justifications for denial of permit to same company, because she merely articulated thoughts and decisions of others), and *United States v. Keystone Sanitation Co., Inc.*, 1996 WL 33410105, \*1 (M.D. Pa. Aug. 27, 1996) (finding no violation of due process in commingling of investigatory, prosecutory, and adjudicatory functions in EPA staff members conducting remedy selection and enforcement actions relating to Superfund site, noting that no case law supported claim that constitutional separation-of-functions requirement applies in informal adjudication). See also *Env'tl. Def. Fund, Inc. v. U.S. Env'tl. Prot. Agency*, 510 F.2d 1292, 1305 (D.C. Cir. 1975) (holding that enforcement staff in pesticide cancellation proceeding could advise officials on decision to bring suspension proceeding because there was no allegation of communication regarding final decision in either proceeding).

Where different persons within a government office or agency assume the conflicting roles, courts have not found an improper commingling, provided the person making the decision or advising the decision-making body is free to act independently of the interests of the agency.<sup>222</sup> In some environmental agencies, separation of functions is achieved by creating a separate adjudicatory office with hearing officers and their legal advisors outside the control of the parties appearing before them.<sup>223</sup> Others rely on attorneys within agency legal counsel offices who are not connected to the underlying case. This latter practice was upheld in *V-1 Oil Company v. Department of Environmental Quality*, where the Utah Supreme Court found that the duty of loyalty that a staff attorney might have toward the agency did not prevent that person from presiding at a hearing to decide if a company had violated underground storage tank regulations.<sup>224</sup> The court reasoned that the attorney was segregated from the agency's investigative and prosecutorial activities related to underground storage tank enforcement and that his duty of loyalty to the agency required him to act impartially.<sup>225</sup> Other cases have similarly held that agency attorneys may preside over hearings in which other attorneys from the same agency perform prosecuting or investigative functions, provided that the attorneys serving as presiding officers have no prior connection with the

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<sup>222</sup> See *FR & S, Inc.*, 537 A.2d at 964 ("Where there is not an identity of persons in the two conflicting roles, the test is whether the relationship is one in which influence over the decision-maker's vote is likely."). The California Supreme Court has held that it does not violate due process for an attorney to prosecute a matter before the State Water Resources Control Board while simultaneously serving as an advisor to the board on an unrelated matter. *Morongo Band of Mission Indians*, 199 P.3d at 1146 (explaining that "any tendency for the agency adjudicator to favor an agency attorney acting as prosecutor because of that attorney's concurrent advisory role in an unrelated matter is too slight and speculative to achieve constitutional significance").

<sup>223</sup> *V-1 Oil Co. v. Dept. of Env'tl. Quality*, 939 P.2d 1192, 1202 (Utah 1997).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 1202-03; accord *Mallinckrodt LLC v. Littell*, 616 F. Supp. 2d 128, 141-43 (D. Me. 2009) (holding that different assistant attorneys general could simultaneously represent a state agency and the board reviewing the agency's order).

case.<sup>226</sup> This tolerance for separate roles for employees of the same government body may not hold where a party's counsel and the attorney advising the hearing tribunal are from the same law firm, as the practical considerations allowing a public agency to use its staff legal counsel are not present when the government body is hiring outside counsel and can find representation free of any potential conflict.<sup>227</sup>

## 5. Ex Parte Communications

Ex parte communications occur when a person interested in the outcome of a proceeding makes an off-the-record communication to a decision maker regarding the merits of the proceeding without prior notice to other parties.<sup>228</sup> The one-sided communications create potential bias by communicating facts or views on a contested issue outside the proper channel, thereby excluding other interested parties

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<sup>226</sup> See, e.g., *Chem. Waste Mgmt., Inc. v. U.S. Env'tl. Prot. Agency*, 873 F.2d 1477, 1484 (D.C. Cir. 1989) (upholding EPA regulations that "allow agency attorneys to serve as Presiding Officers, provided only that they have 'had no prior connection with the case'" (quoting 40 C.F.R. § 24.09 (1988)); *United Cement Co. v. Safe Air for the Env't, Inc.*, 558 So. 2d 840, 842-43 (Miss. 1990) (holding the fact that the hearing officer and attorney representing the party were both special assistant attorneys general assigned to the environment section did not alone overcome the presumption of impartiality); *In re Fiorillo Bros. of N.J., Inc.*, 577 A.2d 1316, 1321 (N.J. Super. Ct. App. Div. 1990) (finding no impropriety in the fact that the advisor to the board and the prosecutor before the board were both deputy attorneys general, provided that the connection did not compromise the attorneys' independent judgment or result in actual bias).

<sup>227</sup> See *Sultanik v. Bd. of Supervisors of Worcester Twp.*, 488 A.2d 1197, 1201-02 (Pa. Commw. Ct. 1985) (holding that because the township hired the attorney to play an adversary role, other attorneys from the same firm were barred from serving in adjudicative capacity).

<sup>228</sup> APA, 5 U.S.C. § 551(14) (2012) ("[E]x parte communication' means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.").

from effectively participating or responding to the arguments or information.<sup>229</sup>

The federal APA precludes *ex parte* communications, but only in formal adjudications and formal rulemaking. Under section 557(d)(1), an interested person outside the agency is prohibited from making or knowingly causing to be made an *ex parte* communication relevant to the merits to a decision maker or government employee involved in the decision process.<sup>230</sup> Similarly, a decision maker or employee involved in the decision process is not allowed to make an *ex parte* communication to any interested person outside the agency.<sup>231</sup> State administrative procedure acts contain similar prohibitions.<sup>232</sup>

As the ban on *ex parte* communications only addresses communications with persons outside the agency, agency employees and officials are free to communicate with each other, provided they do not run afoul of the separation of functions doctrine.<sup>233</sup> Even

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<sup>229</sup> See *Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth. (PATCO)*, 685 F.2d 547, 563 (D.C. Cir. 1982); A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 19, § 7.042, at 107.

<sup>230</sup> 5 U.S.C. § 557(d)(1)(A) (2012). The prohibition starts when the agency designates, but no later than when the proceeding is noticed for a hearing. *Id.* § 557(d)(1)(E); see also *In re Arnold*, 984 A.2d 1, 8-9 (Pa. Commw. Ct. 2009) (prohibiting *ex parte* communications only after commencement of the hearing).

<sup>231</sup> 5 U.S.C. § 557(d)(1)(B) (2012). An off-the-record communication with or by the decision maker's staff is also prohibited. See *Price Bros. Co. v. Phila. Gear Corp.*, 649 F.2d 416, 419 (6th Cir. 1981) ("It need hardly be mentioned that what a judge cannot do in person he may not do by proxy.").

<sup>232</sup> See MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 13 (1961); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-213 (1981); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 408 (2010).

<sup>233</sup> *Burke v. Bd. of Governors of Fed. Reserve Sys.*, 940 F.2d 1360, 1368 (10th Cir. 1991) (holding that the *ex parte* restriction in formal adjudicative proceedings does not apply to intra-agency contact); KOCH, *supra* note 19, at 321-22. *But cf.* 5 U.S.C. § 554(d)(1) (2012) (prohibiting a hearing officer in a formal adjudication from consulting "a person or party on a fact in issue, unless on notice and opportunity for all parties to participate"); Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts—Except When They're Not*, 59 ADMIN. L. REV. 79, 106-07 (2007) (arguing that *ex parte* rules effectively apply to all communications of

where *ex parte* restrictions do apply, only communications that could affect the outcome or decision in a contested case are prohibited, not inquiries about procedural matters, requests for status reports, or background discussions about an industry.<sup>234</sup> Also, the communication must be from an “interested person,” defined as someone with an interest in the proceeding greater than the general interest of the public.<sup>235</sup> Agencies are not prohibited from having other contacts or general discussions about matters of common interest with interested parties.<sup>236</sup> Nor does the APA prohibit

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fact with an administrative law judge, including to agency attorneys trying a matter before that decision maker).

<sup>234</sup> H.R. REP. NO. 94-880, pt 1, at 19 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2183, 2202. The House Report provides that:

The phrase [*ex parte*] . . . excludes procedural inquiries, such as requests for status reports, which will not have an effect on the way the case is decided. It excludes general background discussions about an entire industry which do not directly relate to specific agency adjudication involving a member of that industry, or to formal rulemaking involving the industry as a whole. It is not the intent of this provision to cut an agency off from access to general information about an industry that an agency needs to exercise its regulatory responsibilities. So long as the communication containing such data does not discuss the specific merits of a pending adjudication it is not prohibited by this section.

*Id.* See also *La. Ass’n of Indep. Producers and Royalty Owners v. Fed. Energy Regulatory Comm’n*, 958 F.2d 1101, 1112 (D.C. Cir. 1992); *PATCO*, 685 F.2d at 563–64 (D.C. Cir. 1982); *Elec. Powe Ass’n v. Fed. Energy Regulatory Comm’n*, 391 F.3d 1255, 1259 (D.C. Cir. 2004) (holding that the key to determining if an *ex parte* communication is prohibited is “whether there is a possibility that the communication could affect the agency’s decision in a contested on-the-record proceeding.”),

<sup>235</sup> *PATCO*, 685 F.2d at 562 (“The term [interested person] includes, but is not limited to, parties, competitors, public officials, and nonprofit or public interest organizations and associations with a special interest in the matter regulated. The term does not include a member of the public at large who makes a casual or general expression of opinion about a pending proceeding.” (citing H.R. REP. NO. 94-880(I), at 19–20 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2183, 2202)).

<sup>236</sup> See *La. Ass’n of Indep. Producers*, 958 F.2d at 1112.

agencies from having ex parte communications in informal adjudications or informal rulemaking.<sup>237</sup>

Where there has been a prohibited communication, an agency decision is not void, but voidable by a reviewing court.<sup>238</sup> Usually, the agency addresses the unfairness by placing the contents of the ex parte communication in the record of the proceeding. The legislative history of the APA indicates that a communication would not be considered ex parte if it were placed in the public record or docket of the proceeding when it was made or if all the parties to the proceeding had advance notice of the communication.<sup>239</sup> However, a proceeding may be set aside if “the agency’s decision[]making process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect.”<sup>240</sup> In *PATCO*, the court set forth the factors to be considered in deciding whether to vacate a voidable agency proceeding:

[T]he gravity of the ex parte communications; whether the contacts may have influenced the agency’s ultimate decision; whether the party making the improper contacts benefited from the agency’s

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<sup>237</sup> A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 19, § 7.049, at 114 (“The APA adjudication provisions do not apply to informal adjudication.”); LUBBERS, *supra* note 76, at 335 (“The APA places no restriction on ex parte communications made in informal rulemaking.”); *see also* *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981) (“Oral face-to-face discussions [during informal rulemaking proceedings] are not prohibited anywhere, anytime, in the Act”).

<sup>238</sup> *PATCO*, 685 F.2d at 564–65; *Sw. Sunsites, Inc. v. Fed. Trade Comm’n*, 785 F.2d 1431, 1436 (9th Cir. 1986).

<sup>239</sup> H.R. REP. NO. 94-880(I), pt 2, at 20 (1976), *reprinted in* 1976 U.S.C.A.N. 2183, 2203; A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 19, § 7.0433, at 110 n.39; *see also* APA, U.S.C. § 557(d)(1)(C) (2012) (requiring that upon receipt of a prohibited communication, the agency shall place the written communication, or a memoranda stating the substance of oral communications, in the public record of the proceeding).

<sup>240</sup> *PATCO*, 685 F.2d at 564. The APA authorizes an agency to require a party that has knowingly made an ex parte communication to show cause why the party’s claim or interest in the proceeding should not be dismissed, denied, or disregarded. 5 U.S.C. § 557(d)(1)(D) (2012).



ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose.<sup>241</sup>

“If the ex parte contacts are of such severity that an agency decision-maker should have disqualified himself, vacation of the agency decision and remand to an impartial tribunal is mandatory.”<sup>242</sup>

Even in proceedings that are not covered by the APA's restriction, due process rights may prohibit ex parte communications. In *Sierra Club v. Costle*,<sup>243</sup> the court explained that “[w]here agency action resembles judicial action, where it involves formal rulemaking, adjudication, or quasi- adjudication among ‘conflicting private claims to a valuable privilege,’ the insulation of the decisionmaker from ex parte contacts is justified by basic notions of due process to the parties involved.”<sup>244</sup> However, the court noted that where the agency action involves informal rulemaking, “the concept of ex parte contacts is of more questionable utility.”<sup>245</sup> Nonetheless,

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<sup>241</sup> *PATCO*, 685 F.2d. at 565.

<sup>242</sup> *Id.* at 565 n.33.

<sup>243</sup> 657 F.2d 298 (D.C. Cir. 1981).

<sup>244</sup> *Id.* at 400 (quoting *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1978)); *see also* *Appeal of Pub. Serv. Co. of N.H.*, 454 A.2d 435, 441–43 (N.H. 1982) (holding that even in the absence of procedures by the legislature, due process requires commission members to refrain from ex parte communications when they act in an adjudicative capacity); *PIERCE*, *supra* note 19, § 8.4, at 715 (opining that an ex parte communication may violate due process in narrow circumstances).

<sup>245</sup> *Sierra Club*, 657 F.2d at 400; *see also* *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1215 n.28 (D.C. Cir. 1980) (“As a *general* rule, due process probably imposes no constraints on informal rulemaking beyond those imposed by statute.”); *LUBBERS*, *supra* note 76, at 339 (“Thus, neither the APA nor the case law establish a broad ban on off-the-record communications in rulemaking”). Although the D.C. Circuit's earlier decision in *Home Box Office, Inc. v. Fed. Comm'n's Comm'n*, 567 F.2d 9, 57 (D.C. Cir. 1977), suggested a broad prohibition on ex parte contacts in rulemaking proceedings, the *Sierra Club* case and later comments by the court in *United Steelworkers* and *Air Transportation*

ex parte communications in rulemaking are problematic where they deny the court a complete record for judicial review, since an agency's final rule must be supported by its public record.<sup>246</sup>

Agencies are free to adopt rules applying ex parte restrictions to other proceedings, such as informal adjudication or rulemaking, as a number have.<sup>247</sup> Even if a statute only calls for a hearing, an agency may be required to inform parties of, or provide an opportunity to respond to, ex parte communications during the proceeding so that parties are afforded an opportunity for meaningful participation.<sup>248</sup>

Ex parte violations are among the most common bias allegations in environmental proceedings. Whether the type of environmental proceeding is subject to a legislative prohibition on ex parte contacts is a frequent threshold question. A number of significant environmental cases make clear that the APA's strictures on ex parte

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*Ass'n of America v. Federal Aviation Administration*, 169 F.3d 1, 7 n.5 (D.C. Cir. 1999), subsequently limited that case.

<sup>246</sup> See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971) (requiring agency to provide full administrative record before the agency at the time the decision was made); *Home Box Office*, 567 F.2d at 54 (describing as "intolerable" the possibility that there is one administrative record for the public and the court and another for the agency). As explained in *U.S. Lines v. Federal Maritime Commission*, undocumented ex parte contacts "foreclose effective judicial review of the agency's final decision according to the arbitrary and capricious standard of the Administrative Procedure Act. Under this standard the reviewing court must test the actions of the FMC for arbitrariness or inconsistency with delegated authority against the full administrative record that was before the [agency official] at the time he made his decision." 584 F.2d 519, 541 (D.C. Cir. 1978) (quoting *Citizens to Preserve Overton Park*, 401 U.S. at 420).

<sup>247</sup> See LUBBERS, *supra* note 76, at 341-43 (describing agency practices); See, e.g., 16 C.F.R. § 4.7 (2014) (Federal Trade Commission); 18 C.F.R. § 385.2201 (2014) (Federal Energy Regulatory Commission); 47 C.F.R. § 1.1200-1.1216 (2014) (Federal Communication Commission).

<sup>248</sup> See *U.S. Lines*, 584 F.2d at 540-41 (holding that even though the proceeding was quasi-adjudicatory and not governed by the APA's prohibition on ex parte communications, the communications denied the participants their right to the hearing required by the underlying statute).

communications do not apply to informal rulemaking proceedings.<sup>249</sup> Yet, the treatment of ex parte communications in environmental permits or other project approvals through informal processes is less clear. Where the proposal is contested, there is a recognition that ex parte communications may give rise to due process concerns, but those off-record communications are treated more leniently than in the formal adjudication process.<sup>250</sup>

An interesting development in environmental cases is the application of the prohibition on ex parte communications to officials outside the agency but still within the executive branch. In *Portland Audubon Society v. Endangered Species Commission*,<sup>251</sup> the court determined that the APA's term "interested person outside the agency" includes the President, thus holding that the President and his staff were not free to attempt to influence the decision-making process of a federal committee through private meetings at the White House.<sup>252</sup> This rationale applies to off-the-record conversations

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<sup>249</sup> See, e.g., *Sierra Club*, 657 F.2d at 401 ("Regardless of this court's views on the need to restrict all post-comment contacts in the informal rulemaking context, however, it is clear to us that Congress has decided not to do so . . ."); *Hercules, Inc. v. U.S. Env'tl. Prot. Agency*, 598 F.2d 91, 124–25 (D.C. Cir. 1978) (noting that APA section prohibiting intra-agency ex parte contacts—5 U.S.C. § 554(d)—does not extend to rulemaking proceedings); *Parravano v. Babbitt*, 837 F. Supp. 1034, 1048 (N.D. Cal. 1993) (stating that 5 U.S.C. § 557(d)(1), prohibiting ex parte contacts, only applies to adjudications and formal rulemaking proceedings).

<sup>250</sup> See, e.g., *No Oilport! v. Carter*, 520 F. Supp. 334, 345, 371 (W.D. Wash. 1981) (characterizing informal agency action as "non-adjudicatory, non-rulemaking," outside reach of APA, and subject to "more lenient standard than is applicable to agency adjudication"); *Worman Enters., Inc. v. Boone Cty. Solid Waste Mgmt. Dist.*, 805 N.E.2d 369, 375–76 (Ind. 2004) (finding application of strict ex parte rules improper because local officials played a hybrid legislative- adjudicatory role in permitting process); *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188–89 (2d Cir. 1984) (holding that, because the EPA was not performing an adjudicatory function in awarding sewage treatment grants, ex parte contacts between agency administrators and public officials were not proscribed).

<sup>251</sup> 984 F.2d 1534 (9th Cir. 1993).

<sup>252</sup> *Id.* at 1546; see also *PATCO*, 685 F.2d 547, 562 (D.C. Cir. 1982) (holding that "interested person" includes public officials with special interest in an agency proceeding greater than that of the general public).

between state agency decision makers and governors.<sup>253</sup> Interested parties may communicate off-the-record with agency employees who are not decision makers, with some state courts suggesting, contrary to the federal APA, that ex parte contacts may even be permitted with experts who advise the board if those experts do not vote or otherwise bind the decision maker.<sup>254</sup>

Even where an ex parte communication is not prohibited by statute or rule, the decision-making body may still be required by statute to place the substance of the communication in the administrative record and provide parties an opportunity to comment, which generally ameliorates an improper communication.<sup>255</sup> In *Mall*

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<sup>253</sup> See *Champlin's Realty Assocs. v. Tikoian*, 989 A.2d 427, 441 (R.I. 2010) (holding that governor's sharing opinion on application with decision maker off the record violated prohibition of ex parte contacts).

<sup>254</sup> See, e.g., *Fairview Area Citizens Taskforce v. Ill. Pollution Control Bd.*, 555 N.E.2d 1178, 1181-82 (Ill. App. Ct. 1990) (holding that board's expert advisor's ex parte contacts with applicant and alleged predisposition were not relevant because advisor did not have a vote); *Forelaws on Bd. v. Energy Facility Siting Council*, 760 P.2d 212, 227-28 (Or. 1988) (finding agency auditor's communication with party did not constitute prohibited ex parte contact because auditor was an expert witness, not a decision maker, and noting that the communication was simultaneously served on other parties); *In re SDDS, Inc.*, 472 N.W.2d 502, 511 (S.D. 1991) (holding in contested permit proceeding where agency acts in role of advocate rather than decision maker, that agency may have ex parte contacts with other parties). *But see* *Coal. Advocating a Safe Env't v. Tex. Water Commn.*, 798 S.W.2d 639, 642-43 (Tex. App. 1990) (holding that where agency served as party rather than decision maker but decision-making commission was bound by statute to adopt findings of agency absent its own independent review, ex parte contacts between agency and party were prohibited because agency's findings may bind commission to particular decision). The federal APA is clear that the ex parte restrictions extend beyond the actual decision makers to any "employee who is or may reasonably be expected to be *involved* in the decisional process of the proceeding." 5 U.S.C. § 557(d)(1)(A)-(B) (2012) (emphasis added).

<sup>255</sup> See, e.g., *Sierra Club v. Costle* 657 F.2d 298, 397 (D.C. Cir. 1991) (citing 42 U.S.C. § 7607(d)(4)(B)(i) to find that documents that become available after proposed rule is published, and which decision maker deems of central relevance, must be placed in record as soon as possible and reopening of comment period may be required); *Mauna Kea Power Co., Inc. v. Bd. of Land & Natural*

*Properties, Inc. v. Marsh*,<sup>256</sup> the agency was authorized to seek the views of the governor on the proposed activity, but was required to provide the parties an opportunity to respond to the governor's views.<sup>257</sup> Courts have prescribed a similar process when comments are submitted to an agency after the close of the public comment period.<sup>258</sup>

Although federal courts in environmental cases have followed the approach of the court in *PATCO* and chosen an equitable weighing of prejudice over a mechanical rule on whether the unlawful *ex parte* communication merits vacating the decision,<sup>259</sup> courts in at least one state have placed the burden on the agency to demonstrate that the improper communication did not result in prejudice to a party.<sup>260</sup> Once a party demonstrates that an improper *ex parte* communication

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Res., 874 P.2d 1084, 1087 (Haw. 1994) (holding that an agency's improper consultation of outside sources in making decision can be cured by further proceedings affording parties an opportunity to cross-examine and rebut).

<sup>256</sup> 672 F. Supp. 561 (D. Mass. 1987).

<sup>257</sup> *Id.* at 574–75; *see generally* N.C. Env'tl. Policy Inst. v. U.S. Env'tl. Prot. Agency, 881 F.2d 1250, 1257 (4th Cir. 1989) (discussing APA requirement that *ex parte* communications occurring in connection with adjudicatory hearings must be placed in record).

<sup>258</sup> *See, e.g.*, Air Pollution Control Dist. v. U.S. Env'tl. Prot. Agency, 739 F.2d 1071, 1081 (6th Cir. 1984) (holding that decision-making process was not tainted by acceptance of data after close of comment period because EPA placed data in record and conducted two additional comment periods); *See Mauna Kea*, 874 P.2d at 1087 (holding that further proceedings could cure agency's consideration of comments received after close of comment period).

<sup>259</sup> *See supra* notes 219–220; *see also* Power Auth. of N.Y. v. Fed. Energy Regulatory Comm'n, 743 F.2d 93, 110 (2d Cir. 1984) (weighing whether the communications posed "a serious likelihood of affecting the agency's ability to act fairly and impartially in the matter before it" (citing *Gulf Oil Corp. v. Fed. Power Comm'n*, 563 F.2d 588, 611–12 (3d Cir. 1977))); *E & E Hauling, Inc. v. Pollution Control Bd.*, 451 N.E.2d 555, 571–72 (Ill. App. Ct. 1983) (adopting the *PATCO* approach, weighing whether *ex parte* contacts "irrevocably tainted" decision-making process).

<sup>260</sup> *See Martone v. Lensink*, 541 A.2d 488, 491 (Conn. 1988) ("[O]nce a violation of the statute [prohibiting *ex parte* communications in contested administrative proceedings] has been proved by the party seeking relief, the burden shifts to the agency to prove that no prejudice has resulted from the prohibited *ex parte* communication.").

occurred, a presumption of prejudice arises, which may be rebutted by showing that the ex parte communication was not received or considered by the local agency and, therefore, did not affect the final decision.<sup>261</sup>

Where an agency fails to cure the unlawful ex parte communication by documenting the contact in the record and allowing affected parties to comment, the usual remedy is to remand the case to the agency and provide an opportunity for the parties to review and address the communications.<sup>262</sup> Nonetheless, *Greene v. Babbitt* teaches that where an environmental agency repeatedly violates a party's right to an impartial, fair process, a court may "put an end to the matter by using its equitable powers to fashion an appropriate remedy."<sup>263</sup>

## 6. Improper Political Influence

Improper influence on decision makers by political figures raises bias concerns distinct from the prohibition on ex parte communications. Elected officials are expected to play an important role in the policy decisions of government agencies, boards, and commissions, as those decisions should reflect the preferences of the legislative and executive branches and operate within the confines of constitutional limits and statutory directives.<sup>264</sup> But in proceedings

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<sup>261</sup> *Id.* at 492–93; *see also* *Blaker v. Planning & Zoning Comm'n*, 562 A.2d 1093, 1097–98 (Conn. 1989) (applying presumption-of-prejudice rule articulated in *Martone* to land use cases); *Dlugokecki v. Inland Wetlands & Watercourses Comm'n*, 2008 WL 588707, at \*8 (Conn. Super. Ct. 2008) (setting aside decision because commission failed to provide evidence demonstrating plaintiff was not prejudiced by ex parte communication).

<sup>262</sup> *See, e.g., Monongahela Power Co. v. Marsh*, 699 F. Supp. 324, 327–28 (D.D.C. 1988) (finding uncured ex parte contacts and remanding matter for new proceeding to provide opportunity for adversarial comment based on complete record); *Greene v. Babbitt*, 943 F. Supp. 1278, 1287 (W.D. Wash. 1996) ("In most cases where a litigant successfully challenges an agency's action, the appropriate remedy is to remand the proceeding.").

<sup>263</sup> *Greene*, 943 F. Supp. at 1288.

<sup>264</sup> *See* Richard J. Pierce, *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 486 (1990); *see generally* Peter L. Strauss,

covered by rules on ex parte communications, legislators, elected officials, and even government employees at other agencies are “outside the agency” and subject to APA restrictions on ex parte contacts, as noted above.<sup>265</sup> The APA’s legislative history warns, though, that the effort to avoid improper outside influences on decision makers should not be imposed so stringently as to prohibit legislative oversight of agencies or routine inquiries by members of Congress.<sup>266</sup> Likewise, it is not improper for senior executive branch officials to exercise oversight of agencies and to communicate on matters of policy.<sup>267</sup>

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*Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007); *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1368 (D.C. Cir. 1985) (“There seems to us nothing either extraordinary or unlawful in the fact that a federal agency opens an inquiry into a matter which the President believes should be inquired into. Indeed, we had thought the system is supposed to work that way.”); *Sec. Exch. Comm’n v. Wheeling- Pittsburgh Steel Corp.*, 648 F.2d 118, 126 (3d Cir. 1981) (observing that “members of Congress are requested to, and do in fact, intrude, in varying degrees, in administrative proceedings”); *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 315 (D.C. Cir. 1988) (noting that an agency acts permissibly when its policy decision accords with the President’s wishes or directive and does not disregard its statutory mandate).

<sup>265</sup> See *supra* notes 250–251 and accompanying text; see also APA, 5 U.S.C. § 556(d)(1)(A)–(B) (2012) (applying ex parte communication restrictions to any “interested person outside the agency”). The term “interested person” covers members of the legislative and executive branches. A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 19, § 7.0431, at 108; Roland M. Frye, Jr., *Restricted Communications at the United States Nuclear Regulatory Commission*, 59 ADMIN. L. REV. 315, 360 nn.191–193 (2007) (noting that courts and scholars treat White House communications in adjudicatory or quasi-adjudicatory proceedings like other ex parte communications).

<sup>266</sup> A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 19, § 7.0433, at 110 n. 40; H.R. REP. NO. 94-880(I), at 21 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2183, 2203. See also 5 U.S.C. § 551(14) (2012) (excluding “requests for status” reports from the definition of ex parte communication); *Id.* § 557(d)(1)(A)–(B) (2012) (prohibiting only ex parte communications “relevant to the merits of the proceeding”); *Id.* § 557(d)(2) (2012) (“This subsection does not constitute authority to withhold information from Congress.”).

<sup>267</sup> A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 19, § 7.0431, at 108 n.33. Professor Peter Strauss concludes “that in ordinary

Nevertheless, where a decision maker is acting in a quasi-judicial role by adjudicating disputed facts and not simply making policy choices, the use of political power or official position to influence that decision may deny parties their rights to due process.<sup>268</sup> Even where the merits of a proceeding are not discussed, a procedural inquiry from a political official in a position with influence over the decision maker may be deemed an effort to influence an agency decision.<sup>269</sup> Thus, an administrative adjudication may be “invalid if based in whole or in part on the pressures emanating from [Congress].”<sup>270</sup> The test is whether “extraneous pressure intruded into the calculus of considerations” such that the decision

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administrative law contexts, where Congress has assigned a function to a named agency subject to its oversight and the discipline of judicial review, the President's role—like that of the Congress and the courts— is that of overseer and not decider.” Strauss, *supra* note 264, at 704-05.

<sup>268</sup> *ABA Blackletter Statement*, *supra* note 49, at 24; A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 19, § 7.051, at 115; *see ATX, Inc. v. U.S. Dept. of Transp.*, 41 F.3d 1522, 1527 (D.C. Cir. 1994); *Pillsbury Co. v. Fed. Trade Comm'n*, 354 F.2d 952, 963 (5th Cir. 1966).

<sup>269</sup> *Pillsbury Co.*, 354 F.2d at 962-63 (finding a Senator's questions regarding the ability of the FTC Commissioner to speed up the adjudicatory process to be “an improper intrusion into the adjudicatory processes”). One court observed the limited role legislators should have in influencing agency decisions, even in the more open rulemaking context:

An agency has an obligation to consider the comments of legislators, of course, but on the same footing as it would those of other commenters; such comments may have, as Justice Frankfurter said in a different context, “power to persuade, if lacking power to control.”

*Hazardous Waste Treatment Council v. U.S. Env'tl. Prot. Agency*, 886 F.2d 355, 365 (D.C. Cir. 1989) (quoting *Skidmore v Swift & Co.*, 323 U.S. 134, 140 (1944)). *See also* *Sec. Exch. Comm'n v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 126 (3rd Cir. 1981) (noting that the duty of an agency is to give congressional comments “only as much deference as they deserve on the merits”).

<sup>270</sup> *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971); *see ATX, Inc.*, 41 F.3d at 1527.



maker “took into account ‘considerations that Congress could not have intended to make relevant.’”<sup>271</sup>

*Pillsbury Co. v. Federal Trade Commission* illustrates this concern. In that case, a congressional committee subjected members of the Federal Trade Commission to a searching examination and criticism of decisions in a pending adjudication.<sup>272</sup> The court applied a “mere appearance of bias” standard and held that when a legislative investigation focuses directly and substantially on the mental process of a decision maker in a pending adjudicative case, Congress is not merely engaged in appropriate legislative oversight but is interfering in the agency’s judicial function and denying the parties their right to a proceeding “free from powerful external influences.”<sup>273</sup> The court concluded that the denial of procedural due process was so significant that the decision had to be vacated and the case remanded to preserve the integrity of the administrative process.<sup>274</sup> In contrast, in *ATX, Inc. v. U.S. Department of Transportation*,<sup>275</sup> members of Congress and the chairman of the committee with oversight of the department vigorously expressed their opposition to an application of ATX for operation of a new airline.<sup>276</sup> The court found, however, that these nonthreatening legislative actions did not target agency decision makers and were not shown to have affected the outcome on the merits.<sup>277</sup>

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<sup>271</sup> *D.C. Fed’n of Civic Ass’ns*, 459 F.2d at 1246-47 (quoting *U.S. ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950)); accord *DCP Farms v. Yeutter*, 957 F.2d 1183, 1188 (5th Cir. 1992).

<sup>272</sup> *Pillsbury Co.*, 354 F.2d at 964.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 964–65.

<sup>275</sup> 41 F.3d 1522 (D.C. Cir. 1994).

<sup>276</sup> *Id.* at 1527.

<sup>277</sup> *Id.* at 1529-30 (finding the nexus between the pressure exerted by the legislators and the agency decision makers too tenuous to conclude that political influence entered into the decision maker’s “calculus of consideration”). The court did find evidence that congressional letters influenced the agency to set the application for a hearing but concluded that the court was only concerned about influences shaping the agency’s decision on the merits. *Id.* at 1528; see also *Peter Kiewit Sons’ Co. v. U.S. Army Corps of Eng’rs*, 714 F.2d 163, 170 (D.C. Cir. 1983) (finding no violation where there was no evidence the decision was influenced by congressional pressure); *Koniag, Inc. v. Andrus*, 580 F.2d 601, 610 (D.C.

Interference is most likely to be found unlawful where it likely influenced the decision, concerned disputed issues of fact rather than of law or policy, and served no legitimate purpose such as oversight of legislation or agency administration.<sup>278</sup> The timing of such interference is also relevant; interference before the hearing phase is less likely to improperly influence the merits of the agency's decision than interference during or after.<sup>279</sup>

Although courts have held that improper influence in adjudications can violate due process requirements, "courts have not found congressional contacts in informal rulemaking to be improper," at least as a denial of procedural due process.<sup>280</sup> Even in cases of adjudication, Professor Asimow warns that "courts must tread lightly in this area because Congressional interference may be a form of legislative oversight."<sup>281</sup> As one court explained about a controversial environmental rulemaking proceeding, "administrative

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Cir. 1978) (finding no impermissible congressional interference where none of the persons called before the subcommittee was a decision maker on the matter).

<sup>278</sup> *ABA Blackletter Statement, supra* note 49, at 24. One court described the test as whether "the communications posed a serious likelihood of affecting the agency's ability to act fairly and impartially in the matter before it. In resolving that issue, one must look to the nature of the communications and particularly to whether they contain factual matter or other information outside of the record, which the parties did not have an opportunity to rebut." *Power Auth. of N.Y. v. Fed. Energy Regulatory Comm'n*, 743 F.2d 93, 110 (2d Cir. 1984).

<sup>279</sup> *See DCP Farms v. Yeutter*, 957 F.2d 1183, 1187 (5th Cir. 1992) (holding that due process rights were not violated by pressure from a congressman because the contact occurred well before any proceeding that could be considered judicial or quasi-judicial).

<sup>280</sup> LUBBERS, *supra* note 76, at 349-50. "[I]t seems fairly well settled that, in informal proceedings, courts will tolerate or even endorse congressional contacts, so long as these contacts do not undermine the agency's adherence to the substantive law." Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 MICH. L. REV. 1, 47 (1996); *see also DCP Farms*, 957 F.2d at 1187-88 (holding that actual bias standard, rather than more stringent mere appearance of bias standard, applies to allegations of political interference where the agency proceeding is not judicial or quasi-judicial).

<sup>281</sup> A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 19, § 7.051, at 115-16.

agencies are expected to balance Congressional pressure with the pressures emanating from all other sources. To hold otherwise would deprive the agencies of legitimate sources of information and call into question the validity of nearly every controversial rulemaking.”<sup>282</sup>

The political nature of many environmental disputes makes them particularly susceptible to efforts by elected officials to improperly influence agency decision makers. The expressions of opposition made by state and local legislators to EPA regarding a pending sewage treatment plant grant decision in *Town of Orangetown v. Ruckelshaus*<sup>283</sup> are typical of efforts to influence agency decisions. Echoing the standard in *Sierra Club v. Costle*, the court explained that to support plaintiff’s claim of improper political influence by these legislators, “there must be some showing that the political pressure was intended to and did cause the agency’s action to be influenced by factors not relevant under the controlling statute.”<sup>284</sup> Looking at the communications, the court found that because they related to a relevant factor in EPA’s decision, the elected officials were not precluded from bringing those factors, and their opinions about them, to the agency’s attention.<sup>285</sup>

The court did find impermissible interference in *Esso Standard Oil Co. v. López-Freytes*.<sup>286</sup> Upset with the pace of an enforcement action by the environmental quality board to address a gasoline spill, the Puerto Rico Senate issued a report directing a government integrity agency to determine which officials on the board were responsible for delays in penalizing the company and to refer those officials to prosecutors to determine if any crime was committed.<sup>287</sup> The court held that disqualification of the board members, who require Senate consent, was necessary because of a

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<sup>282</sup> *Sierra Club v. Costle*, 657 F.2d 298, 409-10 (D.C. Cir. 1981); *see also* *Envtl. Def. Fund, Inc. v. Blum*, 458 F. Supp. 650, 662–63 (D.D.C. 1978) (noting that the congressional communications were not in a formal adversarial context but in informal rulemaking where Congress has given agencies broad discretionary powers).

<sup>283</sup> 740 F.2d 185 (2d Cir. 1984).

<sup>284</sup> *Id.* at 188 (citing *Sierra Club*, 657 F.2d at 409).

<sup>285</sup> *Id.* at 188–89.

<sup>286</sup> 522 F.3d 136 (1st Cir. 2008).

<sup>287</sup> *Id.* at 148.

clear threat of prosecution and pressure on them to impose an unduly heavy fine against the company.<sup>288</sup>

Even where lacking such a clear threat, efforts of a powerful legislator to influence an environmental decision maker outside the normal hearing process may compromise the appearance of impartiality and merit setting aside an agency decision. In *Koniag, Inc. v. Andrus*,<sup>289</sup> a letter from a congressman with oversight of the Department of Interior, claiming that the agency was acting improperly on a pending disputed matter, was held to have compromised the required appearance of impartiality and prejudiced the proceeding.<sup>290</sup> Similarly, in *Jarrott v. Scrivener*,<sup>291</sup> highly placed government officials made clear through ex parte contacts with zoning commission board members that a favorable decision on a pending matter “would be pleasing, and an unfavorable decision displeasing, to persons in very high governmental brackets.”<sup>292</sup> The court held that although there was no explicit threat or command or promise of reward, the pressures were nevertheless real as the board members, two of whom were subordinate government employees, knew that they would incur displeasure with powerful government officials if they did not act accordingly. Although the board members denied being influenced by these contacts, the court found no basis to doubt that the contacts had deprived the plaintiffs of a fair and impartial hearing.<sup>293</sup>

Yet, a political figure’s involvement in an indirect way or without any implicit threat may not support a finding of impermissible

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<sup>288</sup> *Id.*

<sup>289</sup> 580 F.2d 601 (D.C. Cir. 1978).

<sup>290</sup> *Id.* at 610-11. The letter was sent after a hearing held by the congressman where he probed critically into details of matters under consideration and expressed his displeasure with some of the agency’s initial determinations. *Koniag, Inc. v. Kleppe*, 405 F. Supp. 1360, 1371-72 (D.D.C. 1975), *aff’d sub nom.* *Koniag, Inc. v. Andrus*, 580 F.3d at 610.

<sup>291</sup> 225 F. Supp. 827 (D.D.C. 1964).

<sup>292</sup> *Id.* at 834.

<sup>293</sup> *Id.* at 834, 836. The court noted that none of the contacts were recorded in the public file, thus denying the opposition an opportunity to minimize their impact upon the board.

pressure. In *Mallinckrodt LLC v. Littell*,<sup>294</sup> a company ordered by a state agency to clean up a former manufacturing facility alleged that the governor's office had improper influence over an environmental appeals board considering his announced preferred remedy.<sup>295</sup> The court noted that, unlike in *Esso Standard Oil*, there was no allegation that the governor had made any threat against or had any contact with the board.<sup>296</sup> The court further found that although the board members are appointed by the governor, they are unpaid volunteers and there was no reason they would fear adverse action by the governor if they did not act in his favor.<sup>297</sup> Similarly, a governor's public criticism of a commission's preliminary decision on instream flow standards did not constitute the type of direct, focused interference that would violate due process.<sup>298</sup>

A concept related to interference in some states is disqualification due to duress. Duress occurs in the administrative context "when the decision maker is improperly pressured to serve an interest other than that of 'the voters, taxpayers, members of the general public, justice, and due process.'"<sup>299</sup> This can occur when an elected official with power over the decision makers appears on behalf of a private party, such as when the official represents someone before a zoning board over which the official has appointment powers.<sup>300</sup> However, where the elected official is appearing on

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<sup>294</sup> 616 F. Supp. 2d 128 (D. Me. 2009).

<sup>295</sup> *Id.* at 148–50.

<sup>296</sup> *Id.* at 148.

<sup>297</sup> *Id.* at 148 n.14. In *Smith-Berch, Inc. v. Baltimore County*, 68 F. Supp. 2d 602, 628–29 (D. Md. 1999), the court held that the mere fact that a hearing commissioner was aware that public officials, including the official who appointed him to the position, had taken a public stance against a party on a zoning matter was not sufficient evidence to support a finding of unconstitutional bias by the commissioner.

<sup>298</sup> *In re Water Use Permit Applications*, 9 P.3d 409, 435–37 (Haw. 2000). The court noted, but did not give weight to, the fact that the governor appointed all the commissioners. *Id.* at 436.

<sup>299</sup> *Hughes v. Almena Twp.*, 771 N.W.2d 453, 469 (Mich. Ct. App. 2009) (quoting *Barkey v. Nick*, 161 N.W.2d 445, 447 (Mich. Ct. App. 1968)).

<sup>300</sup> *See, e.g., Abrahamson v. Wendell*, 256 N.W.2d 612, 615 (Mich. Ct. App. 1977); *Place v. Bd. of Adjustment*, 200 A.2d 601, 605 (N.J. 1964). As explained in *Abrahamson*, "as a matter of law, the appearance by the

behalf of the municipality's interest rather than representing or pursuing a private or personal interest, duress has not been found as the official is not encouraging board members "to serve an interest other than that which they were bound to serve."<sup>301</sup>

A final issue in ensuring a fair and impartial process for resolving environmental disputes arises where the government is seeking approval for or promoting its project. In this situation, the pressure on the decision makers to favor the state's interests may be so great as to create a potential conflict between their personal interest in the outcome and their duty to be impartial.<sup>302</sup> This is especially present where the decision makers are state employees.<sup>303</sup> As a general matter, "the fact that an application is made by an employing unit of government does not in and of itself constitute impermissible bias."<sup>304</sup>

The issue of institutional or promotional bias was addressed in *Hammond v. Baldwin*,<sup>305</sup> where landowners challenged a state wastewater permit issued in connection with a new manufacturing facility.<sup>306</sup> Plaintiffs alleged that the state's heavy promotion of the facility, including financial guarantees and a contractual pledge to

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supervisor before the body over which he had appointive powers, at least in part, must be deemed an imposition of duress on the members of the zoning board of appeals and, as a result, the action of the board is void." 256 N.W.2d at 615.

<sup>301</sup> *Dep't of Transp. v. Kochville Twp.*, 682 N.W.2d 553, 556 (Mich. Ct. App. 2004); *accord Hughes*, 771 N.W.2d at 459. The Delaware Supreme Court held that where an elected official with the power to approve and remove board members made clear he was appearing solely in his individual capacity as a property owner and not representing anyone or stating the views of the town, the official's participation in the hearing did not constitute duress. *Rehoboth Art League v. Henlopen Acres*, 991 A.2d 1163, 1166–67 (Del. 2010).

<sup>302</sup> *Cty. of Lancaster v. Mecklenburg Cty.*, 434 S.E.2d 604, 614 (N.C. 1993).

<sup>303</sup> *Id.* at 611.

<sup>304</sup> *Id.* at 614–15; *see generally* *Carolina Env'tl. Study Grp. v. United States*, 510 F.2d 796, 801 (D.C. Cir. 1975) (holding that the fact an agency has displayed a promotional bias toward a matter does not mean it could not fairly consider an application).

<sup>305</sup> 866 F.2d 172 (6th Cir. 1989).

<sup>306</sup> *Id.* at 172.

use its best efforts to expedite review of permits and resolution of lawsuits relating to the facility, made any administrative proceeding by the state's environmental agency biased.<sup>307</sup> The court explained that while the administrative process required the appearance of fairness and did not require plaintiffs to prove actual partiality, "bias must be more than a general tendency of an administrative agency to serve the executive under which it derives its authority."<sup>308</sup> Finding no personal pecuniary interest on the part of state officials who would preside over the permit proceeding and noting no irregularities in the administrative process, the court held that it would not disqualify the government agency from decision making when there is only an alleged general bias in favor of the state's interests or policies.<sup>309</sup>

Institutional bias also arose in Louisiana, where an environmental agency's statements and actions in favor of a proposed petrochemical plant and hostility toward residents who opposed the plant was coupled with the governor's heavy-handed promotion of the project and campaign to drive the residents' attorneys off the case.<sup>310</sup> A court found that the agency's actions in instructing staff not to meet with citizens opposed to the plant and to regard their position as adversarial to that of the agency merited an evidentiary hearing on the apparent lack of impartiality and fairness.<sup>311</sup> In another instance

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<sup>307</sup> *Id.* at 173.

<sup>308</sup> *Id.* at 176.

<sup>309</sup> *Id.* at 177.

<sup>310</sup> See Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J.L. & POLY 33, 55-60 (2000) (detailing the governor's attacks on plant opponents and efforts to drive Tulane law clinic off of the case). The governor had pledged to Shintech "to bring [the] project to a speedy, profitable and mutually beneficial fruition," and agency staff were instructed "to be sure to do everything we can to prevent [environmentalists and local residents] from tying up the permit application process." *Id.* at 42 (second alteration in original); see also LOUISIANA ENVTL. ACTION NETWORK, BIAS BY THE STATE IN THE SHINTECH PERMITTING CONTROVERSY (1998) (on file with author) (listing forty examples of statements or actions by state officials favoring the permit applicant and prejudicing local residents).

<sup>311</sup> *St. James Citizens for Jobs & the Env't v. La. Dep't of Env'tl. Quality*, No. 448928 (19th La. Dist. Ct. Aug. 31, 1998) (copy on file with author),

of pervasive state government bias, a governor's campaign promise to kill a radioactive waste disposal site and questionable behavior by his subordinates to carry out this promise indicated an absence of a good faith effort by the state to provide a fair permitting process.<sup>312</sup>

### III. EMPIRICAL STUDY OF BIAS IN ENVIRONMENTAL PROCEEDINGS

The discussion above illustrates the large body of cases addressing allegations of bias in environmental proceedings and the array of doctrinal bases for such claims. The significant number of cases has led commentators to opine about the prevalence of bias in environmental decisions and the difficulty of prevailing on such claims.<sup>313</sup> However, there appears to be little data supporting these opinions. The only reported study examined solely whether there was biased membership among Iowa zoning boards toward certain occupations.<sup>314</sup> While the study found that a significant percentage of zoning board members had occupations that favored development interests,<sup>315</sup> it did not document whether this occupational tilt resulted in allegations or findings of bias in particular cases.

To address this lack of data and better understand the bias issues arising in environmental decision making and how courts resolve

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*vacated on jurisdictional grounds sub nom. In re Shintech*, 734 So. 2d 772 (La. Ct. App. 1999).

<sup>312</sup> *Entergy Ark., Inc. v. Nebraska*, 46 F. Supp. 2d 977, 990–92, 994–95 (D. Neb. 1999) (characterizing the state's decision to deny the license application as political rather than a good faith regulatory decision).

<sup>313</sup> *See, e.g., Anderson & Sass, supra* note 14, at 449 (“[T]here are indications that ethics allegations against zoning board members are increasing.”); Patricia E. Salkin, *Avoiding Ethics Traps in Land Use Decisionmaking*, SH018 ALI-ABA 535 (Westlaw 2002) (observing a trend for parties to lodge ethics allegations against planning and zoning boards); FOX, *supra* note 169, at 231 (describing it as “rare” when a decision maker is disqualified because of bias and observing “anyone seeking to overturn an agency action because of bias of any kind will encounter one of the most difficult fights in the book”).

<sup>314</sup> *Anderson & Sass, supra* note 14, at 462–68.

<sup>315</sup> *Id.* at 466–67. The survey also found that while zoning boards in small towns in Iowa were fairly representative of a cross-section of the community, there was a pronounced bias toward the “professional/technical/managerial” class in cities. *Id.* at 464.



allegations of unlawful bias, I undertook an empirical study of court decisions addressing bias in environmental agency, board, or commission decision making.

### A. Study Design and Methods

Records from environmental agency, board, and commission proceedings that would identify allegations of bias in the decision-making process are not readily available, at least not in a systematic and comprehensive way across federal, state, and local governments. Therefore, the study focused on court opinions reported in the Westlaw database for the “environmental law” practice area. Within the Westlaw environmental law topic are databases containing federal environmental cases<sup>316</sup> and state environmental cases.<sup>317</sup> The study focused on court decisions after 1970, the historical start of federal environmental law, and was calibrated to exclude cases that had common words like “bias” and “prejudice” but were irrelevant to the issue of bias or prejudice by the decision maker.<sup>318</sup> The final search terms returned over 9,000 cases.<sup>319</sup>

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<sup>316</sup> WESTLAW, WESTLAW DATABASE LIST: ENVIRONMENTAL LAW DATABASES (2007), *available at* [http://www.ibrarian.net/navon/paper/Environmental\\_Law\\_Databases\\_Westlaw\\_Database\\_List.pdf?paperid=10074744](http://www.ibrarian.net/navon/paper/Environmental_Law_Databases_Westlaw_Database_List.pdf?paperid=10074744). The database includes “[c]ases from the U.S. Supreme Court, courts of appeals, district courts, bankruptcy courts, Court of Federal Claims, Tax Court, military courts, and related federal and territorial courts that relate to environmental protection and conservation.” *Id.* at 2. The database includes all cases published in West’s National Reporter System as well as some opinions that are not scheduled to be published by West. To determine the best approach for locating relevant cases within those databases, a preliminary search using both Westlaw key numbers and a series of search terms relevant to bias indicated that using search terms provides more relevant cases than using the Westlaw key number search approach.

<sup>317</sup> *Id.* at 5. The database includes “[c]ases from the state courts of all 50 states and the District of Columbia that relate to environmental protection and conservation.” *Id.* State cases are primarily from appellate courts, although trial court opinions from a few states are included in the database.

<sup>318</sup> For example, “% ‘ex parte young” excluded all references to the *Ex Parte Young* case, “% ‘prejudgment interest” excluded all references to the award or denial of prejudgment interest, and “% (dismiss! den! /3

Due to the significant number of irrelevant cases included in the search results, all cases were screened before they were coded.<sup>320</sup> To be coded for allegations of bias, cases had to involve an environmental issue. This resulted in the exclusion of cases dealing with the Occupational Safety and Health Administration, utility ratemaking, and employment discrimination in environmental agencies. The study included cases that dealt with zoning and land use, although these cases appear underrepresented in the databases.<sup>321</sup> The study included all cases involving challenges under NEPA, regardless of whether or not the NEPA issue involved an environmental agency.

A second criterion was whether the allegation of bias arose from agency or board action during the processes that led to a decision on

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prejud!)” excluded references to cases dismissed or denied with or without prejudice.

<sup>319</sup> The search terms were: BIAS! UNBIAS! PREJUD! PREDISPOS! “EX PARTE” IMPARTIAL! (CONFLICT /2 INTEREST) FAVORITISM! (SEPARAT! /3 FUNCTIONS) NEUTRAL DISQUALIF! (FINANC! PECUNIAR! /2 INTEREST) “UNALTERABLY CLOSED” & da(aft 1970) % “EX PARTE YOUNG” % “PREJUDGMENT INTEREST” % (DISMISS! DEN! /3 PREJUD!). The searches yielded 5,471 federal and 3,986 state cases as of July 3, 2014.

<sup>320</sup> The environmental databases contained many cases unrelated to environmental protection or conservation, contrary to the database’s definition. For example, one of the first cases in the results of the search in the federal environmental cases database was *Camreta v. Greene*, 563 U.S. 692 (2011), a civil rights action against a state child protective services caseworker and deputy sheriff. *Id.* No headnote for that case relates to environmental law, although the opinion does cite two prominent environmental law decisions on the case or controversy requirement in Article III. The degree of non-environmental cases inexplicably placed in the federal environmental cases database is illustrated by the fact that only two of the first ten cases resulting from the search terms could reasonably be characterized as related to the environment or conservation.

<sup>321</sup> The underreporting of land use opinions in the environmental law cases database is demonstrated by a related search in the real property topical database. Using the search terms “(“conditional use” zoning variance) & bias! prejud!” in the real property database of state cases returned over 10,000 documents, many times more land use-related cases than resulted from the use of similar terms in the environmental law database of state cases.

a rule, permit, or order. Where the issue of bias arose in an agency's study or sampling technique, rather than in its process for making the decision, the case was excluded, as were cases alleging a fear of future bias.<sup>322</sup> In the end, 161 federal and 220 state cases were coded to determine relationships between twelve aspects of the case and the outcome on the bias claim.<sup>323</sup>

### B. Study Results

The study confirmed that a party is unlikely to prevail in court on a claim that an environmental agency's decision making process was biased, but also indicated that challenges brought in federal trial courts and the doctrinal bases of prejudgment of the issues and unauthorized ex parte contacts enjoy much higher rates of success.

Overall, courts found in favor of the party claiming bias in 14.1% of the cases, or about a one in seven rate of success.<sup>324</sup> Plaintiffs prevailed in federal courts in 15.7% of cases; in state courts, 13.0% of cases. There does not appear to be any published report on success rates in administrative law cases alleging procedural errors in the decisions of government agencies, although there are a number of studies that show higher success rates for litigants in other types of environmental cases.<sup>325</sup> Yet most cases settle, and plaintiffs are "far more likely" to recover via settlement than a trial.<sup>326</sup>

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<sup>322</sup> Cases alleging biased study or sampling techniques do not necessarily show an agency's bias toward one party since it is the method of the study or sampling technique that is alleged to bias the result, not the decision maker itself. This excluded category does not include allegations that an EIS was performed in a biased manner.

<sup>323</sup> In addition to basic information about the case, the coded data included the central environmental issue(s) in the case, the type of administrative proceeding, type of bias alleged, and doctrinal basis for the court's ruling on the bias claim.

<sup>324</sup> Courts made a factual finding of bias in 2% more cases—raising the instances where a court found improper bias to 16.0%—but excused that bias because the plaintiff had waived the right to raise the issue or the bias error was judged to be harmless.

<sup>325</sup> See, e.g., Peter A. Appel, *Wilderness and the Courts*, 29 STAN. ENVTL. L.J. 62, 113 (2010) (finding plaintiffs seeking more wilderness protection win 52.0% of cases against the government while those seeking less protection win 13.6%); Shorna R. Broussard & Bianca D. Whitaker,

The success rate has fallen over time. In the 1970s, plaintiffs prevailed in 27.0% of reported cases; during the decade of the 2000s in 12.4%; in the latest ten-year period from 2004–2013 in only 10.5%. It is not known if this drop is due to agencies doing a better job of avoiding bias, courts showing increased deference to agency claims of neutrality, stronger claims settling before judgment, or some other factor.

The type of reviewing court can significantly affect the likelihood of prevailing. While appellate courts found unlawful bias in only 12.5% of the cases, trial courts found for the complaining party 18.3% of the time, a success rate almost 50% higher.

The difference in outcomes between trial and appellate decisions is most pronounced in federal court. A majority of federal bias cases (55%) are heard by district courts, and federal district courts find bias

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*The Magna Charta of Environmental Legislation: A Historical Look at 30 Years of NEPA–Forest Service Litigation*, 11 FOREST POLY & ECON. 134, 136–37 (2009) (finding that NEPA plaintiffs won 20% of district court and 26% of court of appeals cases against the Forest Service); Christopher M. Schroeder & Robert L. Glicksman, *Chevron, State Farm, and EPA in the Courts of Appeals During the 1990s*, 31 ENVTL. L. REP. 10371, 10372 (2001) (finding EPA prevailed in 67%, and was reversed in 21%, of appellate cases during 1990s); A.M. ALDEN & P.V. ELLEFSON, NATURAL RESOURCE AND ENVIRONMENTAL LITIGATION IN THE FEDERAL COURTS: A REVIEW OF PARTIES, STATUTES AND CIRCUITS INVOLVED 12 (1997) (finding success rates of 68% for government plaintiffs, 60% for industry, and 45% for individuals and certain public interests). For win rates in non-jury cases, see Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEG. STUD. 861, 886–88 (2007) (finding plaintiffs' motions for summary judgment granted in 29%–36% of cases; defendants' in 40%–49%); Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEG. STUD. 659, 682–83 (2004) (finding plaintiffs prevailed in 19.5% of employment discrimination judge trials); see also Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals*, 36 AM. J. POL. SCI. 235, 241 (1992) (finding individuals won 12.5% of appeals, business won 22.6%, state and local governments won 41.2%, and the federal government won 58.2%).

<sup>326</sup> Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL STUD. 111, 113 (2009).

at twice the rate of federal courts of appeals (20.2% vs. 10.1%). At the state level, trial courts handle just 10% of bias cases and, unlike in the federal system, plaintiffs are somewhat more successful in appellate than trial courts (13.3% vs. 10.0%).

To determine why there is a significantly lower rate of success in federal appellate courts, I investigated whether cases appealed directly from the agency or board to an appellate court were more likely to prevail than cases where the appellate court was reviewing an initial bias determination by a trial court, surmising that the lower success rate in appellate courts might be due to the difficulty of getting a case reversed on appeal. However, the success rate of federal cases appealed directly from an agency or board to an appellate court were comparable to the rates when the appellate court reviewed an initial trial court decision (10.7% vs. 9.5%). Perhaps there is some unmeasured difference between the cases brought in a trial court and those directly appealed to an appellate court that the survey did not reveal. In any event, the greatest likelihood of succeeding on a contested bias claim (one in five) is before a federal trial court.

The rates of success between different levels of government decision makers are minimal. Looking at federal, state, and local government decision makers, bias claims against federal and state decision makers (15.1% and 14.8%) are the most likely to succeed and those against local officials the least (12.5%). More instances of unlawful bias might be expected at the local level, since local officials, who are often volunteers rather than trained government employees, might be less familiar with rules prescribing bias. Local officials also might have greater familiarity with, and a greater potential for a disqualifying connection to, the interests of a local party. Additionally or alternatively, perhaps the lesser amount of local level bias is explained by courts taking account of the local context and holding local decision makers to lower standards. Furthermore, differences in the lawyering for the complaining parties on these more localized, and perhaps less economically significant, environmental matters could explain the lower rates of successful bias claims against local officials.

The survey compared decisions made by executive branch agencies; non-executive branch elected boards or commissions; and non-executive branch, non-elected boards or commissions. Plaintiffs have higher rates of success in cases brought against executive

branch agencies than against non-executive boards or commissions (16.0% vs. 11.8%), even though agency officials are paid employees who are presumed to have, or at least could be provided with, more training and experience in making bias-free decisions than those on boards or commissions, which often consist of unpaid volunteers with little professional assistance.<sup>327</sup> Perhaps this difference reflects more tolerance by judges toward possible mistakes by appointed or elected officials in combination with a higher standard of expected behavior, either by statute or the courts, for paid government employees.

Some argue that elected officials may be particularly susceptible to bias, because their positions often require them to assume the dual roles of a legislator and a quasi-judge, each with differing expectations about neutrality.<sup>328</sup> However, cases against elected officials on non-executive branch boards or commissions had a slightly lower success rate than against non-elected officials on similar boards or commissions (11.1% to 12.1%). The data suggest that elected officials are handling their dual roles better than feared or that other factors are confounding the result (e.g., courts holding elected officials to a lower standard because of their need to respond to constituent concerns).

Among types of plaintiffs or appellants, not-for-profit environmental or community organizations bring the greatest number of cases (42%) and have a success rate (14.3%) consistent with the overall average. For-profit entities (i.e., businesses) are the next most active group of challengers, bringing 27% of all cases, yet succeeding the least of any type of plaintiff (10.9%). The greatest success (27.3%) is achieved by not-for-profit business associations, although the number of cases brought is quite small—only 3% of all cases. Individuals bring about 18% of cases and succeed in only 11.9%. Although it is interesting that plaintiffs representing business non-profits enjoy the greatest success, without a qualitative analysis of cases it is not possible to determine if this is due in some way to choosing battles wisely and fighting them well (i.e., with skilled,

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<sup>327</sup> See A. Dan Tarlock, *Challenging Biased Zoning Board Decisions*, ZONING & PLAN. L. REP., Feb. 1987, at 97, 98, 102 (discussing how local elected and appointed lay bodies are prone to bias).

<sup>328</sup> See, e.g., Cordes, *supra* note 85, at 196.

expensive litigators), to more sympathetic treatment from courts, or to some other factor.

Plaintiffs enjoy their greatest success when challenging bias arising in formal adjudications (16.5%) and least when the underlying proceeding can be characterized as informal adjudication (12.9%), not surprising given the greater procedural rights afforded parties in formal adjudications.

The most prevalent litigated bias claims are prejudgment of facts, prohibited ex parte contacts, and pecuniary conflicts of interest. Nonetheless, claims alleging prejudgment of facts, along with personal animus, are the least likely to prevail (less than 10%). Although not measured in the survey, prejudgment of fact claims appeared to often fail due to a lack of admissible evidence (e.g., newspaper articles) and a willingness of courts to accept a decision maker's assertion that he or she had not prejudged a contested matter.<sup>329</sup> Plaintiffs are most likely to prevail when alleging that the decision makers prejudged the issue (28.6%), were improperly influenced by government officials (20.0%), or engaged in prohibited ex parte contacts (16.0%), although the numbers of decisions involving prejudgment of issues and improper influence were small.

Federal bias claims arise most often under NEPA (over 60% of all cases) followed by land use cases (over 23%). The most common bases on which NEPA decisions are challenged are prejudgment of facts (i.e., precommitment to an outcome) and pecuniary conflicts of interest (i.e., where the NEPA contractor has a stake in the outcome of the analysis). NEPA cases have a lower success rate (13.2%) than most federal cases. However, in a number of NEPA cases courts were willing to overlook the showing of bias, holding that the agency cured the conflict of interest problem through oversight of the environmental impact statement contractor or that the error was harmless.<sup>330</sup>

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<sup>329</sup> In denying a motion to disqualify an environmental chairman for comments showing favoritism, a hearing officer explained: "If a guy says he thinks he can be fair, you have to go with that." *Chairman Will Hear Landfill Plea*, ARGUS LEADER (Sioux Falls, S.D.), Nov. 20, 1990, at 6C.

<sup>330</sup> See *EDF II*, 492 F.2d 1123, 1129 (5th Cir. 1974) (stating that if an agency complies in "good faith" with environmental requirements (e.g. an EIS) then the agency's actions may be viable even with the presence of bias); see also *Sierra Club v. Fed. Highway Admin.*, 715 F. Supp. 2d 721, 733

No type of environmental case enjoys a particularly high rate of success compared to the overall rate for plaintiffs. In state courts, bias claims are most likely to arise in zoning and land use cases, constituting over 40% of all bias cases; cases involving waste matters (e.g., landfills) are the next most prevalent at over 18%. Both have above average rates of success—18.6% for zoning/land use; 19.6% for waste.

The most common legal bases for court decisions are the requirements in the agency's or board's underlying statute (39% of cases), such as NEPA, and due process (31%), although due process claims have a low success rate (12.3%). Claims based on requirements in a state or federal administrative procedure act have the highest success rate (20.5%).

Significantly more cases allege bias by decision makers before or outside of a hearing (72%) than during or in a hearing. But allegations of bias displayed during or in the proceeding are more likely to prevail (18.1%) than those displayed before or outside (12.1%), perhaps because of the difficulty of proving the biased action or statement when it is not in the proceeding's record.

An unexpected observation was how often plaintiffs prevailed when the case only presented a bias claim—without referencing a related environmental claim somewhere in the decision—and how rarely they prevailed if the court held that the plaintiff's other legal ground(s) for challenging the agency's decision was insufficient. Where the court's decision only mentioned a bias claim in the case, plaintiffs prevailed 50.0% of the time, or three times higher than the overall success rate. Similarly, where the court reversed the agency's decision on other grounds and also ruled on the bias claim, plaintiffs prevailed 47.6% of the time. By contrast, when the court upheld the agency's decision on some other ground that had been contested (70% of cases), plaintiffs prevailed only 1.6% of the time. In these last two instances, the bias claim strongly follows the resolution of the other issues in the case. Yet, where the court focuses solely on the bias claim, the result is not subject to the influential guiding force from the merits of plaintiff's other claims in the case.

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(S.D. Tex. 2010), *aff'd*, 435 F. App'x 368 (5th Cir. 2011) (stating that "diligently" following NEPA regulations may evidence "good faith objectivity").



It is possible that in some of these cases courts simply neglected to mention non-bias claims in the decision. If the results are not significantly skewed by possible selection bias by the court, one interpretation of the data is that if a court otherwise believes that the agency's decision comports with law, it is exceedingly difficult to prevail on a claim of bias. On the other hand, if the court believes the agency's decision is flawed in other respects and must be remedied, there is a reasonable likelihood of prevailing on a related bias claim. The differences also could result from flawed or underdeveloped bias claims often being lumped in, with little additional effort or focus, with weak non-bias claims. It could also be that where the evidence of bias is strongest, some plaintiffs choose to only pursue that claim. The survey did not include a qualitative analysis of the strength of claims or quality of lawyering that might clarify the reasons for such dramatic differences in outcome.

While this empirical study provides insight into how courts resolve bias claims, it has limitations. Not all court cases, particularly not all trial court decisions, end up in the Westlaw database, although it does include a significant number of decisions that are otherwise not published in the federal or state reporter system. Conversely, due to the significant over inclusion of non-environmental cases in the Westlaw environmental cases database, it is not possible to determine whether the database reliably includes all relevant environmental cases.<sup>331</sup>

The study is also limited by only including allegations of bias that were filed in a court. Many participants who believe they have been victims of bias in an environmental agency proceeding likely do not bring those claims in court, perhaps because they do not have the resources or time necessary to bring an appeal or choose not to raise the bias claim in the appeal. Parties may even decide not to raise an issue of bias at the time of the agency proceeding, a necessity to

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<sup>331</sup> A Westlaw representative informed us that inclusion in the environmental database is based on West's Key Number System of classification. Nonetheless, there are many cases in the database with no environmental key numbers. As noted above, one of the first cases returned in the search was a civil rights lawsuit with no environmental law implications.

avoid waiving the issue for appeal, for fear of antagonizing the decision maker.<sup>332</sup>

Conversely, for litigants already challenging an agency or board decision, there may be little reason not to include a claim of bias, however well based in law or fact. Bias claims often appeared to be underdeveloped and, perhaps, alleged primarily to color the court's view of other issues in the case. The result can be a summary court dismissal with little discussion or rationale and may misrepresent the likelihood of prevailing on well-founded claims.

The survey is also limited to cases where the allegations resulted in a contested ruling. Most civil cases settle,<sup>333</sup> and there is no reason to believe that environmental bias lawsuits are any different. This survey says nothing about the outcomes in cases that settled before a published decision on the merits of the plaintiffs' claims. If, as true in other civil matters,<sup>334</sup> plaintiffs in bias cases prevail more frequently in settlement than they do at trial, then the success rate for claims of bias in environmental decision making could be substantially higher than revealed in this study.

For all these reasons, the study does not reveal, and likely understates, the prevalence of bias allegations within agencies, and instead only illustrates the prevalence of bias that results in a reported court decision.

#### IV. CONCLUSION

If the empirical survey shows the difficulties of prevailing on a claim of bias, the extensive jurisprudence arising from environmental bias disputes and the continuing stories in the press about alleged

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<sup>332</sup> See FOX, *supra* note 169, at 231 (“Recall the adage: ‘He who shoots at the king should aim carefully.’ Charging a judge with bias and not winning a disqualification on that point will guarantee you a very uncomfortable hearing.”).

<sup>333</sup> See, e.g., Eisenberg & Lanvers, *supra* note 326, at 111 (finding settlement rates of 67% for civil litigation in two U.S. District Courts and little support for claims of settlement rates over 90%).

<sup>334</sup> See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 525 (2004) (reporting that “plaintiffs prevailed in settlement more frequently than they did at trial—with a single exception . . . when an individual plaintiff faced a corporate defendant”).

environmental bias reinforce the perceived saliency of the problem and the potential benefits of greater government attention to the issue. The rationales courts use to resolve allegations of bias, where clearly articulated, are often contradictory. On the one hand, courts rejecting claims of bias often rely on the “difficult burden of persuasion” necessary to “overcome a presumption of honesty and integrity in those serving as adjudicators.”<sup>335</sup> In most instances, this means that the plaintiff needs direct, on-the-record proof of bias, rejecting inferences from circumstantial evidence of bias or remarks reported by the media. Reflecting this strong presumption in more colloquial terms, a hearing officer denied a motion to disqualify with the explanation: “If a guy says he thinks he can be fair, you have to go with that.”<sup>336</sup>

Yet less deferential courts ask whether a disinterested observer might conclude that the agency or decision maker has in some way prejudged a matter or, in some decisions, rely on the appearance of impropriety standard used with the disqualification of judges.<sup>337</sup>

Whether related or not to these competing rationales, the frequency of reported bias cases has not declined over time. The number of reported decisions per year more than doubled from the 1970s to the 1980s, climbed again in the 1990s, and remained at the same pace in the 2000s. Throughout the four decades, prejudgment of facts was the most frequently litigated issue (in 40% of all cases), followed by *ex parte* communication (19%), pecuniary conflict of interest (17%), and personal conflict of interest (12%) claims.

If the primary purpose of rules against bias is to obtain an accurate decision on the merits not skewed on the facts or law by the bias, then perhaps the survey’s finding of the low likelihood of

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<sup>335</sup> *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

<sup>336</sup> *Chairman Will Hear Landfill Plea*, *supra* note 329.

<sup>337</sup> *See, e.g., Cinderella Career & Finishing Sch., Inc. v. Fed. Trade Commn.*, 425 F.2d 583, 590 (D.C. Cir. 1970) (explaining the danger of decision makers becoming entrenched in a position if they prejudge an issue publicly); *Pillsbury Co. v. Fed. Trade Commn.*, 354 F.2d 952, 964 (5th Cir. 1966) (stating the “right to the appearance of impartiality” is equal in importance to the right to a fair trial); *see also Org. to Preserve Agric. Lands v. Adams Cty.*, 913 P.2d 793, 805 (Wash. 1996) (stating that quasi-judicial hearings must give “the appearance of fairness and impartiality”); *In re Rollins Envtl. Servs.*, 481 So. 2d 113, 119 (La. 1985) (requiring adjudicatory hearings to have the “appearance of complete fairness”).

winning on bias where the underlying substantive legal claim fails is not troubling. In those cases, the court may believe that any bias was harmless since the legal merits of the environmental decision itself, however muddled the decision making process, are valid. Of course where the bias prevents a full presentation or open-minded consideration of conflicting positions or evidence, a reviewing court cannot have confidence that bias did not influence the agency's decision on the merits.

And particularly where the concern is not just about the substance of the project but also about a fair process and the perception of fairness, the continuing frequency of bias allegations is reason to consider if decision makers should do more to avoid actions that give rise to bias claims.

A striking feature of this review is how often outwardly manageable issues of bias continue to arise. Since rules against ex parte contacts in adjudicated proceedings are well established, it is difficult to understand why those claims continue to arise so frequently, unless decision makers are either insufficiently trained or indifferent to the rules. Similarly, while the prohibitions on prejudgment of facts and pre-commitment of resources in NEPA analyses have been well established for decades, parties continue to complain about lack of compliance with these restrictions.

The survey's findings that the greatest likelihood of success is when challenging decisions made by paid executive branch personnel and the most frequently raised claims are those where some public employee or official has indicated a view on the merits in advance of the proceeding suggest that steps could be taken to avoid or minimize bias. One modest step is increased training for decision makers in the restrictions on their decision-making process.<sup>338</sup> This would help avoid, for example, the frequent occurrence of off-the-record communications and premature expressions of opinion.<sup>339</sup>

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<sup>338</sup> Professor Patricia Salkin has developed a land use ethics checklist to be used annually with municipal board members in order to avoid potential bias problems. Salkin, *supra* note 313.

<sup>339</sup> Even Supreme Court judges seem to have difficulty holding their opinions on cases until after they are heard. *See, e.g., Emma Margolin, Calls Increase for Ginsburg to Recuse Herself in Same-Sex Marriage Case*, MSNBC, Feb. 16, 2015, <http://www.msnbc.com/msnbc/calls-increase-ginsburg-recuse-herself>

Requiring decision makers to state at the beginning of a proceeding any prior knowledge or contacts about the matter and the nature of any financial or personal connection to the parties or issues would reinforce the importance of avoiding conflicts of interest and allow the public to learn of, and the parties and other decision makers to discuss, possible disqualifying biases.<sup>340</sup> Permitting the parties to then voir dire the decision makers would provide “a valuable means of discovering individual prejudices—perhaps hidden to all, including the holder—and of emphasizing to the board the importance of conducting a fair and impartial hearing.”<sup>341</sup>

A more significant step would address the fact that some well-founded bias allegations fail for lack of sufficient proof and move courts beyond simply deferring to an agency or decision maker’s claim of neutrality by shifting the burden of proof. In some areas of law, particularly discrimination cases but also in some environmental matters, once a plaintiff makes a prima facie showing of its claim, the burden shifts to the other side to put forth evidence of lawful behavior or motive.<sup>342</sup> Because in bias cases off-the-record information is often given little or no weight by the courts, and discovery into the mental processes of an agency decision maker is severely restricted,<sup>343</sup> allegations of bias are often dismissed for lack

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same-sex-marriage-case (last visited Nov. 21, 2015) (noting out-of-court statements by Justices Ginsburg and Scalia on issues relating to pending case).

<sup>340</sup> See, e.g., VA. CODE ANN. § 15.2-2287.1 (2015) (requiring disclosures by land use board members of business, financial, employee-employer, agent-principal, or attorney-client relationships with interested parties); WASH. REV. CODE § 42.36.060 (2015) (requiring decision makers in quasi-judicial proceedings to publicly announce the content of any ex parte communications and to provide parties the right to rebut the substance of those communications).

<sup>341</sup> *Ririe v. Bd. of Trs.*, 674 P.2d 214, 223 (Wyo. 1983).

<sup>342</sup> See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000).

<sup>343</sup> See *United States v. Morgan*, 313 U.S. 409, 422 (1941) (holding that “it was not the function of the court to probe the mental processes of the Secretary” in action challenging agency order); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (stating that where the agency issues administrative findings “there must be a strong showing of bad faith or improper behavior”

of direct evidence. As it is the decision-making body and not the parties who often control information indicating bias, well-founded claims fail simply because of the difficulty of gaining access to credible, admissible evidence. Requiring the decision maker to respond to a prima facie showing of bias with evidence to rebut the claimant's evidence would help the court avoid the risk of error that may be created by the claimant's lack of access to relevant information about the agency's actions, particularly in claims based on *ex parte* communications and prejudgment of the facts.

Reform of governmental practices relating to bias in environmental decision making would come with a price—increased training costs, time, and money. Subjecting decision makers to greater scrutiny of their personal and professional ties may discourage talented persons from participating on unpaid boards and provide fodder for more non-meritorious claims. Loosening the evidentiary burden on a claimant would likely increase the burdens on decision makers and courts.

These efficiency considerations are not insurmountable. Research supports the notion that people “rebel against a system that does not comport with their notions of procedural justice.”<sup>344</sup> Hence, the result of more effort to avoid bias and its perception may be reduced attacks on environmental decisions, not just on the issue of bias but also on the underlying substantive issues. But enhanced efforts to avoid bias first require a discussion about the incidence of improper bias and how courts treat those claims. The doctrinal and empirical analysis presented herein hopefully can inform that debate and help make environmental decisions both more substantively and procedurally just.

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before a party may inquire into the mental processes of the decision maker).

<sup>344</sup> Rachlinski, *supra* note 16, at 354.