

10-10-2019

## An Irrevocably Tainted Opinion: *Zen's* Threat to Public Discourse

Andrew F. Popper

*American University Washington College of Law*, [apopper@wcl.american.edu](mailto:apopper@wcl.american.edu)

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/bclr>



Part of the [Administrative Law Commons](#), and the [Consumer Protection Law Commons](#)

---

### Recommended Citation

Andrew F. Popper, *An Irrevocably Tainted Opinion: Zen's Threat to Public Discourse*, 61 B.C. L. Rev. E.Supp. I.-1 (2020), <https://lawdigitalcommons.bc.edu/bclr/vol61/iss9/1>

This Essay is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# AN IRREVOCABLY TAINTED OPINION: ZEN'S THREAT TO PUBLIC DISCOURSE

ANDREW F. POPPER\*

**Abstract:** That agency decision-makers in enforcement actions must be objective, fair, and impartial is hardly debatable. It is equally obvious that a challenge to objectivity must be supported by actual evidence, not assumptions of prejudice or bias. This essay criticizes *Zen Magnets v. Consumer Product Safety Commission*, a judicial review of an enforcement action that failed to follow the well-worn path that requires a presumption of honesty, integrity, and good faith when assessing the objectivity of administrative decision-makers. The *Zen* court focused on one comment made by Consumer Product Safety Commission Chairman Robert Adler in a rulemaking, not even the enforcement action under review. That one comment, the court found, required a remand to the CPSC, nullified a product recall, and excluded Chairman Adler from further participation in that case. The decision may have put the public at risk by delaying any action by the CPSC on an allegedly dangerous product and denied Chairman Adler, a fair-minded and distinguished agency official, the right and responsibility to participate in an important case. *Zen* is predicated on an assumption of mistrust, the exact opposite assumption mandated by the Supreme Court. Were this approach to become the norm, it would chill the essential discourse between agency officials and the public, unnecessarily formalize agency process, and increase the likelihood of uninformed enforcement or regulation.

## ESSAY

That agency decisionmakers must be objective, fair, and impartial is hardly debatable. It is equally obvious that courts must support challenges to agency decisionmakers' objectivity with actual evidence, not assumptions of prejudice or bias, before taking the extreme step of excluding a decisionmaker from those responsibilities delegated to them by Congress.<sup>1</sup> This

---

© 2020, Andrew F. Popper. All rights reserved.

\* Andrew Popper is the Bronfman Professor of Law and Government at American University, Washington College of Law. This essay benefited greatly from the research and writing of Amy Lin, J.D., a 2018 graduate of the Washington College of Law.

<sup>1</sup> *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 913, 916–24 (2004) (clarifying, in Justice Scalia's Memorandum Order, that while comments or friendships may suggest prejudice or bias, the presumption due those in decision making roles is one of fairness and objectivity, not condemnation based on supposition); *Withrow v. Larkin*, 421 U.S. 35, 47–48 (1975) (asserting that agency decisionmakers are entitled to "a presumption of honesty and integrity").

essay criticizes *Zen Magnets v. Consumer Product Safety Commission*<sup>2</sup> (*Zen*), a Colorado Federal District Court opinion that failed to follow the well-worn path that requires a presumption of honesty, integrity, and good faith for administrative actors.<sup>3</sup>

*Zen* is a judicial review of a Consumer Product Safety Commission (CPSC) determination<sup>4</sup> that certain small rare-earth magnets that *Zen* produced constituted a “substantial product hazard”<sup>5</sup> capable of causing internal bleeding and death.<sup>6</sup> After acknowledging that CPSC’s fact-finding and substantive conclusions were supported by substantial evidence, the court shifted gears. Instead of concentrating on the alleged risk and necessity of a recall which the agency deemed necessary to protect consumers, the court fixated on a comment made by CPSC Commissioner Robert Adler in a rulemaking,<sup>7</sup> an entirely separate proceeding.<sup>8</sup> That comment, the court found, required a remand to CPSC, nullified the recall, and excluded Commissioner Adler from further participation in this case.<sup>9</sup> Commissioner Adler’s words, the court

---

<sup>2</sup> *Zen Magnets, LLC v. Consumer Prod. Safety Comm’n*, No. 17-02645, 2018 WL 2938326 (D. Colo. June 12, 2018). This case’s procedural history is complex. *Id.* at \*3–6. *Zen Magnets* challenged a 2012 Consumer Product Safety Commission (“CPSC”) rule that sought to set safety standards for magnet sets. *Id.* at \*3. The 10th Circuit, finding that the record in the *Zen* adjudication was insufficient to determine whether CPSC met the substantial evidence test required to uphold their determination, vacated the rule and remanded to the District of Colorado court. *Zen Magnets, LLC v. Consumer Prod. Safety Comm’n*, 841 F.3d 1141, 1152–55 (10th Cir. 2016).

<sup>3</sup> *Withrow*, 421 U.S. at 47–48 (finding that agency decisionmakers should be accorded a presumption of integrity and good faith).

<sup>4</sup> CONSUMER PROD. SAFETY COMM’N, *In re Zen Magnets, LLC, Final Decision & Order* (Oct. 26, 2017), [https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/163—2017-10-26%20Final%20Decision%20and%20Order.pdf?Tme8u5fRF2.29\\_B.i4Ix7pPwb\\_whKng2](https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/163—2017-10-26%20Final%20Decision%20and%20Order.pdf?Tme8u5fRF2.29_B.i4Ix7pPwb_whKng2) [<https://perma.cc/WK4P-XUDY>].

<sup>5</sup> Consumer Product Safety Act, 15 U.S.C. § 2064(a)(1), (c)(1) (2018) (“A substantial product hazard determination is the predicate for a product recall. It requires that the manufacturer or producer of the product in question receive an adjudicatory proceeding where substantial evidence must be presented that demonstrates “a substantial risk of injury to the public . . .”).

<sup>6</sup> *Final Decision & Order*, *supra* note 4, at 1–3. Author’s note: This essay in no way is intended to assess, judge, evaluate, or characterize the quality, worth, safety, value, or appropriate uses of *Zen*’s rare earth magnets.

<sup>7</sup> 15 U.S.C. § 2056(a) (requiring that prior to the issuance of a rule specifying needed warnings or changes to a product, the CPSC must show the product presents an unreasonable risk of injury, a very different standard than “substantial product hazard”).

<sup>8</sup> *See Zen Magnets*, 2018 WL 2938326, at \*9–15. That comment, made in a separate proceeding, should have been dispositive; instead, that critical fact was deemed of no real consequence to the *Zen* court. *See id.*; *see also* *Marine Shale Processors, Inc. v. U.S. Evtl. Prot. Agency*, 81 F.3d 1371, 1385 (5th Cir. 1996) (holding that a prior conclusion in one setting does not prevent a decisionmaker from making a subsequent fair and impartial determination based on the evidence).

<sup>9</sup> *See Zen Magnets*, 2018 WL 2938326, at \*9–15. This essay addresses exclusively the Colorado Federal District Court opinion, referenced in footnote 3, a decision that excluded Commissioner Robert Adler from participation in the CPSC/*Zen Magnets* proceeding. It is not intended as a comment, criticism, or recommendation regarding prior, pending, or subsequent litigation involving *Zen Magnets*.

held, reflected an “irrevocably closed mind”<sup>10</sup> compromising Zen’s due process right to an impartial decisionmaker. This action presumptively put the public at risk and denied Commissioner Adler, a fair-minded and distinguished agency official, the right and responsibility to participate in this important case.

As a preliminary matter, the “irrevocably closed mind” standard is rarely used to judge an agency official in an enforcement action or adjudication similar to the *Zen* case. It is more commonly used to assess bias in rulemaking.<sup>11</sup> Further, in those instances where that standard is used, the phrase is not “irrevocably closed mind” but rather “unalterably closed mind.”<sup>12</sup> More importantly, the core of the holding in *Zen* is predicated on an assumption of mistrust, the exact opposite assumption mandated by the Supreme Court.<sup>13</sup> Were this approach to become the norm, it would chill the essential discourse between agency officials and the public, unnecessarily formalize agency process, and increase the likelihood of uninformed enforcement or regulation.

*Zen* was the product of two separate regulatory actions, a fact practically ignored by the District Court and, in most instances, dispositive of the question of prejudgment.<sup>14</sup> The first was the 2012 enforcement action<sup>15</sup> alleging that Zen’s rare earth magnets were a “substantial product hazard”<sup>16</sup> and should be recalled.<sup>17</sup> The second was a CPSC rulemaking, also initiated in 2012, finalized in October 2014, going into effect in April 2015, and remanded back to the agency in 2016.<sup>18</sup> That rule, if finalized, would be applicable to

---

<sup>10</sup> *Id.* at \*12 (“[O]ne of the Commissioner’s statements demonstrated an irrevocably closed mind, or at the very least the reasonable appearance of having prejudged the key issues in Zen’s appeal.”)

<sup>11</sup> *Ass’n of Nat’l Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1168–70 (D.C. Cir. 1979).

<sup>12</sup> *C & W Fish Co. v. Fox, Jr.*, 931 F.2d 1556, 1564 (D.C. Cir. 1991); *Ass’n of Nat’l Advertisers, Inc.*, 627 F.2d at 1170; *see also* *Prof’l Air Traffic Controllers Org. v. Fed. Labor Relations Auth.*, 685 F.2d 547, 564 (D.C. Cir. 1982) (utilizing the standard of “the agency’s decision making process was irrevocably tainted so as to make the ultimate judgment of the agency unfair”).

<sup>13</sup> *Withrow*, 421 U.S. at 47 (citing that agency actors in an adjudicatory role are entitled to a “presumption of honesty and integrity”).

<sup>14</sup> *See* Robert R. Kuehn, *Bias in Environmental Agency Decision Making*, 45 ENVTL. L. 957, 985–86, 988 (2015) (“[H]aving 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 . . . . Even a statement of tentative conclusions based on evidence submitted prior to a hearing is permitted, provided the decisionmaker still has an open mind and considers all evidence presented.”).

<sup>15</sup> Final Decision & Order, *supra* note 4, at 4.

<sup>16</sup> 15 U.S.C. § 2064(a)(1), (c)(1) (CPSC has the power to compel a product recall only when it finds the presence of a substantial product hazard).

<sup>17</sup> Final Decision & Order, *supra* note 4, at 4; *In re Zen Magnets, LLC*, 77 Fed. Reg. 47,823, 47,825 (CPSC Aug. 10, 2012) (complaint).

<sup>18</sup> Final Rule: Safety Standard for Magnet Sets, 79 Fed. Reg. 59,961–62 (Oct. 3, 2014) (to be codified at 16 C.F.R. pt. 1240); Matthew Howsare et al., *CPSC’s Zen Magnets Mandatory Recall Reversed: A Mixed District Court Decision Gives Zen Magnets a New Life and the CPSC Favorable Precedent for Mandatory Recalls*, MINTZ, LEVIN, COHEN, FERRIS, GLOVSKY, AND POPEO

Zen's magnets as well as those of any other company producing a similar product. It was during the course of an open meeting discussing that proposed rule,<sup>19</sup> not the enforcement action that is the subject of the *Zen* case discussed herein, that Commissioner Adler made the following statement:

The conclusion that I reach is that if these magnet sets remain on the market irrespective of how strong the warnings on the boxes in which they're sold or how narrowly they are marketed to adults, children will continue to be at risk of debilitating harm or death from this product.<sup>20</sup>

The following elaboration of this statement by Commissioner Adler, also a matter of public record, was ignored and unquestioned by the court:<sup>21</sup>

I fully understand the difference between making a determination that a product presents an unreasonable risk of injury and should not be sold in the future versus a determination that a product currently being distributed presents a substantial product hazard and should be recalled from the market. The two determinations involve different facts, different policies and different law. And, in both cases the full panoply of due process rights applies to anyone affected by Commission action.

I particularly note the sharp differences in the law between the two findings: an "unreasonable risk" determination involves a careful balancing of the risk against the impact of a proposed rule on the product's price, utility, and availability. A "substantial product hazard" determination focuses almost exclusively on the risk of a product and imposes a much higher standard of proof than an "unreasonable risk" finding. This is so because a substantial product hazard determination seeks to remove an otherwise legal product from the marketplace due to its particularly hazardous nature whereas a safety standard never touches products currently in inventory or in distribution. Accordingly, it is entirely possible that a

---

(June 14, 2018), <https://www.mintz.com/insights-center/viewpoints/2171/2018-06-cpscs-zen-magnets-mandatory-recall-reversed-mixed-district> [<https://perma.cc/UWB3-YV4V>].

<sup>19</sup> *Zen Magnets*, 2018 WL 2938326, at \*12; see Administrative Procedure Act, 5 U.S.C. § 553(c) (2018).

<sup>20</sup> See *Zen Magnets*, 2018 WL 2938326, at \*11–12. Commissioner Adler's conclusion was based on extensive documentation of this point by CPSC technical staff in the agency's Notice of Proposed Rulemaking. According to CPSC staff, "[we] do not believe warnings will ever be effective in protecting children from this hidden hazard." Notice of Proposed Rulemaking, 77 Fed. Reg. 53,781, 53,782–94 (proposed Sept. 4, 2012) (to be codified at 40 C.F.R. pt. 1240). Similarly, "[we] doubt[] that even well-written warnings would substantially reduce the incidence of magnet ingestions." *Id.*

<sup>21</sup> *Zen Magnets*, 2018 WL 2938326, at \*9–15.

product found to present an unreasonable risk of injury might be completely exonerated as a substantial risk of injury.<sup>22</sup>

This declaration of a commitment to due process includes the obligation to assess evidence objectively in the enforcement action—and absolutely nothing from the record in that proceeding suggests any other behavior, interpretation, or state of mind.<sup>23</sup> In fact, the court actually found that the CPSC had given Zen a chance to “provide unique evidence and testimony . . . to dissuade the Commission . . .” Moreover, the court found that the Commissioners’ minds were not “irrevocably closed” and that there had been no violation of Due Process.<sup>24</sup>

Turning a blind eye to the best evidence of Commissioner Adler’s state of mind, the public record, the *Zen* court concluded the following:

[Commissioner Adler’s] view that warnings or marketing could not mitigate the risks associated with the magnets would have affected the outcome of the adjudication regardless of the legal standard applied . . . . Commissioner Adler’s statement [in the rulemaking] rendered Zen’s participation [in the adjudication] futile, since his mind was irrevocably closed on a key factual question of the efficacy of warnings or marketing.”<sup>25</sup>

Ignoring the public record, the District Court launched into an attack of Commissioner Adler, labeling him inflexible, close-minded, biased, unwilling and unable to assess evidence in the enforcement action, all predicated on what the court deems “a reasonable appearance that he had prejudged the key questions of fact and law . . . .”<sup>26</sup>

---

<sup>22</sup> CONSUMER PROD. SAFETY COMM’N, *Statement on the Final Rule for Magnet Sets* (Sept. 29, 2014), <https://www.cpsc.gov/about-cpsc/commissioner/robert-bob-s-adler/statements/statement-final-rule-magnet-sets> [<https://perma.cc/CV2W-534J>]. Case law supports Commissioner Adler’s reference to due process. *E.g.*, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (finding that the due process clause presupposes a fair and impartial tribunal).

<sup>23</sup> At the appellate hearing before the Commission, Commissioner Adler repeatedly invited Zen’s counsel to proffer evidence to support the proposition that the product in question was safe—hardly the kind of thing that one would do if one had an irrevocably closed mind. *See In re Zen Magnets, LLC*, CPSC No. 12-2, at 71, 81, (June 7, 2017) (transcript of hearing) (on file with author).

<sup>24</sup> *Zen Magnets*, 2018 WL 2938326, at \*11–12.

<sup>25</sup> *Id.* at \*14.

<sup>26</sup> *Id.* at \*13–15; *see Nat’l 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”); Peter L. Strauss, *Disqualifications of Decisional Officials in Rulemaking*, 80 COLUM. L. REV. 990, 993–94 (1980) (a statement of opinion in a rulemaking does not necessarily disqualify a decisionmaker from making a fair and impartial determination in an adjudication).

That standard is simply wrong.<sup>27</sup> Allowing a court to remove a sitting agency commissioner based on nothing but a subjective interpretation of an “appearance” is an invitation to judicial interference with agency action on a frightening scale.<sup>28</sup> Accordingly, real evidence of an administrative decisionmaker’s bias, for example, their reliance on thoroughly discredited testimony and/or neglect of irrefutable evidence, is mandated; reference to one offhand comment in a separate proceeding is insufficient.<sup>29</sup>

Among many other things, what makes the District Court’s analysis so disturbing is its failure to recognize that the standards for rulemaking and adjudication are significantly different at CPSC and almost all other administrative agencies. When it comes to rulemaking—which applies only to future production of a product and does not seek to remove goods already in the market—the Commission must determine that a product presents an “unreasonable risk of injury.”<sup>30</sup> When it comes to adjudicating that a product presents a substantial product hazard—which seeks to recall products already in commerce and therefore represents a much more intrusive impact in the market—the Commission has a substantially higher burden to meet. In the latter case, the Commission must also prove that the product’s unreasonable risk of injury “creates a substantial risk of injury to the public.”<sup>31</sup> The fact that Commissioner Adler opined in a *rulemaking* that high-powered magnets present a risk of injury to the public notwithstanding a warning printed on the package in which they are sold in no way led to or required a later finding that they presented a substantial product hazard in an adjudication.

---

<sup>27</sup> Even for administrative law judges who are in a role more closely resembling Article III judges, the “appearance” standard the *Zen* court used is incorrect. In *Bunnell v. Barnhart*, the court discussed the general rule of recusal for ALJs found at 20 C.F.R. Section 404.940 holding that “nothing in this regulation mandates recusal for the mere appearance of impropriety.” 336 F.3d 1112, 1115 (9th Cir. 2003) (emphasis added). Section 404.940 reads: “An administrative law judge shall not conduct a hearing if he or she is prejudiced or partial with respect to any party or has any interest in the matter pending for decision.” Disqualification of the Administrative Law Judge, 20 C.F.R. § 404.940 (2019).

<sup>28</sup> See *Weiner v. United States*, 357 U.S. 351, 356 (1957) (limiting removal power of the President so that commissioners can act without the “Damocles sword of removal” hanging over them).

<sup>29</sup> *Andrews v. Agricultural Labor Relations Bd.*, 623 P.2d 151, 157–58 (Cal. 1981).

<sup>30</sup> 15 U.S.C. § 2064(a)(1). In order to find that a product presents a “substantial product hazard,” the Commission must first find that a product fails “to comply with an applicable consumer product safety rule . . . which creates a substantial risk of injury to the public.” *Id.* In other words, before the Commission can find that a product presents a substantial product hazard, the agency must determine that it fails to comply with a CPSC safety standard—which means that the product has been found to present an unreasonable risk of injury. See *id.* §§ 2056(a), 2058(a). Only after such a determination is made can the Commission move to consider the additional, and more stringent, finding that the failure to comply with the safety standard “creates a substantial risk of injury to the public.” See *id.* § 2064(a).

<sup>31</sup> *Id.* § 2064(a)(1).

Commissioner Adler has been a Commissioner at CPSC for the last decade.<sup>32</sup> His is an unblemished record of fairness and objectivity, and one statement in a separate proceeding (that is, in fact, a summary of agency staff fact-finding)<sup>33</sup> cannot and must not be the basis to conclude he is committed to anything other than fairness in the decision-making process.<sup>34</sup>

Beyond the wholly inappropriate psychoanalysis implicit in the court's challenge to Commissioner Adler's honesty and integrity in *Zen*, there is a failure to recognize the import of such a finding or the legal background on which such an onerous conclusion rests. Suffice it to say that assumptions based on a sentence in a rulemaking, refuted subsequently in word and deed, do not meet any test contemplated for this most critical judgment of a committed and dedicated public servant. The District Court owed Commissioner Adler more.

The Supreme Court addressed succinctly this precise question decades ago in the *Cement Institute* case: “[No] decision of this Court would require us to hold that it would be a violation of procedural 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.”<sup>35</sup> There was no reason for the court in *Zen* to ignore this clear and binding instruction.

*Zen* is one of a small number of cases that have considered excluding a sitting commissioner from a critical decision making role. In *Cinderella Career & Finishing School v. FTC*, the court considered whether it was appropriate for FTC Chairman Paul Rand Dixon not to recuse himself from a case after he made a rash of public statements indicative of prejudgment.<sup>36</sup> The *Cinderella School* court pointed out that “individual Commissioners [do not have] license to prejudge cases or to make speeches which give the appear-

---

<sup>32</sup> CONSUMER PROD. SAFETY COMM'N, *Robert S. Adler*, <https://www.cpsc.gov/About-CPSC/Commissioners/Robert-Adler/> [<https://perma.cc/5HYP-T68C>]. Shortly before this article went to press, by a majority vote of all sitting commissioners, Commissioner Robert Adler was elevated to the position of Chairman of the United States Consumer Product Safety Commission. Todd Frankel, *Consumer Agency Elects New Chairman with a Surprise Choice*, WASH. POST (Sept. 13, 2019), <https://www.washingtonpost.com/business/2019/09/13/consumer-agency-elects-new-chairman-with-surprise-choice/?noredirect=on> [<https://perma.cc/L2GC-AN9D>].

<sup>33</sup> Notice of Proposed Rulemaking, 77 Fed. Reg. at 53,794 (detailing a finding by the CPSC staff that the danger these products present simply cannot be ameliorated by a warning); Final Decision & Order, *supra* note 4 (demonstrating that Commissioner Adler's conclusion was amply documented in the CPSC record).

<sup>34</sup> *United States v. Morgan*, 313 U.S. 409, 421 (1941) (remarking that agency decisionmakers “are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances”). Judge Jerome Frank once noted that “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.” *In re J.P. Linahan, Inc.*, 138 F.2d 650, 651 (2d Cir. 1943).

<sup>35</sup> *F.T.C. v. Cement Inst.*, 333 U.S. 683, 702–03 (1948) (emphasis added).

<sup>36</sup> *Cinderella Career & Finishing Sch., Inc. v. F.T.C.*, 425 F.2d 583, 584–85 (D.C. Cir. 1970).



ance that the case has been prejudged.”<sup>37</sup> However, this was not the first time Chairman Dixon had been chastised and his comments were made as part of a “campaign” replete with press releases.<sup>38</sup>

In contrast, in *Zen*, Commissioner Adler’s statements were not part of any campaign against an industry practice and were not evidence of a repetitive pattern reflecting prejudice. They were made on the record allowing refutation (as opposed to the press release used by Chairman Dixon) during a separate legal proceeding, and were not based on prejudice or bias. To the contrary, Adler’s statements that bothered the court were followed by remarks making clear Commissioner Adler’s acute and accurate sense of his responsibility to assess all facts objectively. Alas, the court ignored these later remarks.

As noted earlier, the legal standard to assess bias on which *Zen* relies is “irrevocably closed mind,” while the more common phrase is “unalterably closed mind.” Given that the stakes for the entire system of administrative justice could not be higher, wording matters. Was it fair to conclude that one who says on the public record that they are committed to due process and an objective assessment of fact has an unalterably—or irrevocably—closed mind? A conclusion of this magnitude cannot rest on assumptions or appearances. It must be predicated on “clear and convincing evidence,”<sup>39</sup> not supposition readily refuted by actions and public pledges.

In *Ass’n of National Advertisers v. FTC*, the DC Circuit held that an “agency member may be disqualified from such a proceeding only when there was *clear and convincing showing that he had an unalterably closed mind* on matters critical to disposition of the rulemaking . . . .”<sup>40</sup> This standard was not met in *Zen*.

*C & W Fish Co. v. Fox, Jr.* reaffirms *Association of National Advertisers*, finding that: “[A]n individual should be disqualified [in that case, a rule-making] ‘only when there has been a *clear and convincing* showing that . . . member has an unalterably closed mind on matters critical to the disposition of the proceeding.’”<sup>41</sup> In *Mississippi Commission on Environmental Quality v. EPA*, the court reaffirmed that standard, relying on *Air Transport Ass’n of*

---

<sup>37</sup> *Id.* at 590.

<sup>38</sup> *Id.* at 589–91 (“It is appalling to witness such insensitivity to the requirements of due process; it is even more remarkable to find ourselves once again confronted with a situation in which Mr. Dixon, pounding on the most convenient victim, has determined either to distort the holdings in the cited cases beyond all reasonable interpretation or to ignore them altogether. We are constrained to this harshness of language because of Mr. Dixon’s flagrant disregard of prior decisions.”).

<sup>39</sup> *Ass’n of Nat’l Advertisers, Inc.*, 627 F.2d at 1170–74, 1181.

<sup>40</sup> *Id.* at 1154 (emphasis added).

<sup>41</sup> *C & W Fish Co.*, 931 F.2d at 1564 (emphasis added).

*America, Inc. v. National Mediation Board*.<sup>42</sup> The *Air Transport* court found that this most consequential determination had to be based on evidence that the decisionmaker has “an ‘unalterably closed mind’ and [is] ‘unwilling or unable’ to rationally consider arguments.”<sup>43</sup> The opposite appears to have happened in *Zen* which reflects a rush to judgment that was unfair, unjustified, and dangerous.

Relying on *C & W Fish*, the *Mississippi Commission* case held that a statement made in a rulemaking is hardly clear and convincing evidence of bad faith in an adjudication.<sup>44</sup> “[A]n individual should be disqualified . . . only when there has been a clear and convincing showing that the . . . member has an unalterably closed mind on matters critical to the disposition of the proceeding.”<sup>45</sup> Sensitive to the chilling effect, the *Mississippi Commission* court cautioned: “We would eviscerate the proper evolution of policymaking were we to disqualify every administrator who has opinions on the correct course of his agency’s future actions.”<sup>46</sup> That essential caution was absent in *Zen*. The threshold finding for “unalterably closed mind” is high: clear and convincing evidence.<sup>47</sup> In *Zen*, the evidence in the *adjudication* is actually the opposite; a statement in a separate proceeding directly refuted by the declarant is simply not clear or convincing evidence of a closed mind.

Another legal standard used by courts to determine prejudgment is “irrevocable taint.” The question is whether the conduct of the decisionmaker is so egregious that it taints or colors irrevocably the proceeding in which the behavior takes place. Because the behavior in question did not happen in the adjudication, it is hard to see how that proceeding was tainted. That standard was central to the decision in *Air Traffic Controllers v. FLRA*, where the court considered “whether . . . 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>48</sup> One interaction, particularly in a public forum—and in a separate case—is just not enough.

It is neither logical nor fair to assume that a simple statement made in a rulemaking, based on staff findings, taints irrevocably a subsequent enforce-

---

<sup>42</sup> Miss. Comm’n on Env’tl. Quality v. E.P.A., 790 F.3d 138, 183 (D.C. Cir. 2015) (citing *Air Transport Ass’n of Am., Inc. v. Nat’l Mediation Bd.*, 663 F.3d 476 (D.C. Cir. 2011)).

<sup>43</sup> *Air Transport Ass’n*, 663 F.3d at 487 (citations omitted).

<sup>44</sup> Miss. Comm’n on Env’tl. Quality, 790 F.3d at 183–84; see *C & W Fish Co.*, 931 F.2d at 1564.

<sup>45</sup> Miss. Comm’n on Env’tl. Quality, 790 F.3d at 183–84 (quoting *C & W Fish Co., Inc.*, 931 F.2d at 1564 (internal quotation marks omitted)).

<sup>46</sup> *Id.* at 184 (citation omitted).

<sup>47</sup> *Organized Fishermen of Fla., Inc. v. Franklin*, 846 F. Supp. 1569, 1574 (S.D. Fla. 1994).

<sup>48</sup> *C & W Fish Co.*, 931 F.2d at 1564; *Prof’l Air Traffic Controllers Org. v. Fed. Labor Relations Auth.*, 685 F.2d 547, 564 (D.C. Cir. 1982).

ment action. A finding of this nature cannot be based on a “gotcha” moment, a comment dredged up from a public meeting in another proceeding. Too much is at stake. To compromise an entire regulatory action, presumptively place the public at risk, and tarnish the reputation of a distinguished public official on such a limited observation (hardly a finding of anything) is regrettable at best.

In *Hasie v. Office of Comptroller of Currency of United States*, the court found a challenge of this nature must “overcome a presumption of honesty and integrity [for] adjudicators,” and must “convince [the court] that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses . . . a risk of actual bias or prejudice [such] that the practice must be forbidden if the guarantee of due process is to be [fulfilled].”<sup>49</sup> *Zen* does not begin to meet this test.<sup>50</sup> Commissioner Adler’s statement and unblemished record do not meet this test.

#### CONCLUSION

The ramifications and downstream hazards of sanctioning decisionmakers are obvious and significant. Were *Zen* seen as the correct legal standard, it would undermine the system of administrative justice, erode public confidence in agency action, and demonize legions of committed and talented public servants who, in good faith, share their perspectives on matters agencies must address. The goal is to keep open channels of communication and encourage commentary and public discourse, not chill and suppress those vital means of governance.

Consider the language on which courts rely for the rare and solemn task of silencing a public official: *unalterably* closed mind or *irrevocable* taint. These are potent phrases meant to address the most obvious and egregious actions that compromise the vital task of objective assessment of fact. They require conduct that leaves no doubt that an agency actor has literally shut down any willingness to undertake their assigned task. Anything less than that would wrongfully impugn the character, honesty, and good faith efforts of scores of agency decisionmakers. If followed by other courts or agencies, *Zen* would threaten critical components of administrative justice. For that reason, *Zen* belongs on the precedential scrap heap of well-intended but deeply prob-

---

<sup>49</sup> *Hasie v. Office of Comptroller of Currency of United States*, 633 F.3d 361, 367–68 (5th Cir. 2011).

<sup>50</sup> See *Withrow*, 421 U.S. at 47 (stating that before excluding a decisionmaker, there must be evidence of “actual bias or prejudice” so egregious “that the practice must be forbidden if the guarantee of due process is to be adequately implemented”).

lematic cases. The *Zen* opinion, in the final analysis, is itself irrevocably tainted.

**Preferred Citation:** Andrew F. Popper, *An Irrevocably Tainted Opinion: Zen's Threat to Public Discourse*, 61 B.C.L. REV. E. SUPP. I.-I (2020).

The purpose of the *Boston College Law Review's Electronic Supplement* is to provide a platform to publish shorter and topical pieces—without the constraints usually imposed on content published in print journals—and, thereby, to give authors the opportunity to connect with a wider audience in a more timely manner.