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Essay

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

Andrew F. Popper¹

That agency decision makers 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, before the extreme step is taken to exclude a decision maker from those responsibilities delegated to them by Congress.² This essay criticizes *Zen Magnets v. Consumer Product Safety Commission*³ (*Zen*), a Colorado Federal District Court opinion that

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² *Cheney v. United States Dist. Court*, 541 U.S. 913 (2004) (Justice Scalia's Memorandum Order clarifying 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) (agency decision makers are entitled to a presumption of honesty and integrity).

³ *Zen Magnets v. CPSC*, No. 17-cv-02645-RBJ, 2018 WL 2938326 (D. Colo. June 12, 2018), 2018 U.S. Dist. LEXIS 97904; Case history: *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 841 F.3d 1141, 2016 U.S. App. LEXIS 21000 (10th Cir., Nov. 22, 2016) (finding the record in the *Zen* adjudication insufficient to determine whether CPSC met the substantial evidence test required to uphold their determination).

failed to follow the well-worn path that requires a presumption of honesty, integrity, and good faith⁴ for administrative actors.

Zen is a judicial review of a Consumer Product Safety Commission (CPSC) determination⁵ that certain small rare-earth magnets *Zen* produced constituted a “substantial product hazard”⁶ capable of causing internal bleeding and death.⁷ After acknowledging that the fact-finding and substantive conclusions made by the CPSC were supported by substantial evidence, the court shifted gears. Instead of concentrating on the alleged risk and necessity of a recall the agency deemed necessary to protect consumers, the court fixated on a comment made

⁴ *Withrow v. Larkin*, 421 U.S. 35, 47-48 (1975) (agency decision makers should be accorded a presumption of integrity and good faith).

⁵ *In the Matter of Zen Magnets, LLC.*, Final Decision and Order, CPSC, C.P.S.C. 12-2 (2017), available at: https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/163--2017-10-26%20Final%20Decision%20and%20Order.pdf?Tme8u5fRF2.29_B.i4Ix7pPwb_whKng2

⁶ 15 U.S.C. 2064(a)(1)(a substantial product hazard determination is the predicate for a product recall, 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. . . .”).

⁷ 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.

by CPSC Commissioner Robert Adler in a rulemaking,⁸ an entirely separate proceeding.⁹ That comment, the court found, required a remand to CPSC, nullified the recall, and excluded Commissioner Adler from further participation in this case.¹⁰ Commissioner Adler's words, the court held, reflected an "irrevocably closed mind"¹¹ compromising Zen's due process right to an impartial decision maker. This action presumptively put the public at risk and denied

⁸ 15 U.S.C. 2064(a)(2) (prior to the issuance of a rule specifying needed warnings or changes to a product, the CPSC must show the product is unreasonably unsafe, a very different standard than "substantial product hazard").

⁹ 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. *Marine Shale Processors, Inc. v. U.S. Env'tl. Prot. Agency*, 81 F.3d 1371, 1385 (5th Cir. 1996) (a prior conclusion in one setting does not prevent a decision maker from making a subsequent fair and impartial determination based on all evidence).

¹⁰ 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, *supra* note 5. It is not intended as a comment, criticism, or recommendation regarding prior, pending, or subsequent litigation involving Zen Magnets.

¹¹ *Id.* at *37 ("[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.")

Commissioner Adler, a fair-minded and distinguished agency official, the right and responsibility to participate in this important case.

As a preliminary matter, the standard "irrevocably closed mind" is rarely used to judge an agency official in an enforcement action or adjudication similar to the *Zen* case. It is more commonly to assess bias in rulemaking.¹² Further, in those instances where that standard is used, the term is not "irrevocably closed mind" but rather "unalterably closed mind."¹³ 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.¹⁴ 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.¹⁵ The first was

¹² *Ass'n of Nat'l Advertisers v. Fed. Trade Comm'n*, 627 F.2d 1151, 1168-70 (D.C. Cir. 1979).

¹³ *C & W Fish Co. v. Fox, Jr.*, 931 F.2d 1556, 1564 (D.C. Cir. 1991); *Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth.*, 685 F.2d 547, 564 (D.C. Cir. 1982); *Ass'n of Nat. Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151 (D.C. Cir. 1979).

¹⁴ *Withrow*, at 47 (agency actors in an adjudicatory role are entitled to a "heavy presumption of honesty and integrity....").

¹⁵ Robert R. Kuehn, "Bias in Environmental Agency Decision Making," 45 *Env'tl. L.* 957, 990 (2015) ("having decided the same or a similar case against a party does not disqualify an

the 2012 enforcement action¹⁶ alleging that Zen's rare earth magnets were a substantial product hazard¹⁷ and should be recalled.¹⁸ The second was a CPSC rulemaking, also initiated in 2012, finalized in October 2014, going into effect in April 2015,¹⁹ and remanded back to the agency in 2016. That rule, if finalized, would be applicable to Zen's magnets as well as any other company producing a similar product. It was during the course of an open meeting discussing that

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 decision maker still has an open mind and considers all evidence presented.”).

¹⁶ In the Matter of Zen Magnets, LLC., Final Decision and Order, CPSC, C.P.S.C. 12-2 (2017), available at:

https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/163--2017-10-26%20Final%20Decision%20and%20Order.pdf?Tme8u5fRF2.29_B.i4Ix7pPwb_whKng2.

¹⁷ 15 U.S. Code § 2064(a)(1) (CPSC has the power to compel a product recall only when it finds the presence of a substantial product hazard).

¹⁸ Zen Magnets, LLC; Complaint, 77 Fed. Reg. 47,823 (Aug. 10, 2012).

¹⁹ Final Rule: Safety Standard for Magnet Sets, 79 Fed. Reg. 59,962 (Oct. 3, 2014) (to be codified at 16 C.F.R. pt. 1240); Matthew Howsare and Shawn Skolky, *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, COHN, FERRIS, GLOVSKY, AND POPEO (June 14, 2018), <https://www.mintz.com/insights-center/viewpoints/2171/2018-06-cpsc-zen-magnets-mandatory-recall-reversed-mixed-district>.

proposed rule,²⁰ 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.²¹

The following clarification of this statement, also a matter of public record, was ignored and unquestioned by the court:²² “I repeat what I said at the staff briefing; each proceeding carries different factual elements and different standards of proof, but each provides all parties

²⁰ *Supra* note 9; 5 U.S.C. 553(c).

²¹ *See Zen Magnets*, 2018 WL 2938326 at *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.” Similarly, “[we] doubt that even well-written warnings would substantially reduce the incidence of magnet ingestions.” See Notice of Proposed Rulemaking, 77 Fed. Reg. 53781, 53794 (September 4, 2012)).

²² *Zen Magnets v. CPSC*, No. 17-cv-02645-RBJ, 2018 WL 2938326 at *14 (D. Colo. June 12, 2018).

with the entire set of due process²³ rights. . . .”²⁴ 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.²⁵ In fact, the court actually found that the CPSC had given Zen a chance to “provide unique evidence and testimony . . . to dissuade the Commission,” and that the Commissioners’ minds were not “irrevocably closed,” and that there had been “no violation of Due Process.”²⁶

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

²³ *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (one of many cases finding that the due process clause, referenced by Commissioner Adler, presupposes a fair and impartial tribunal).

²⁴ Statement of Commissioner Robert Adler on the Consumer Product Safety Commission Approval of Publication of A Final Rule on Certain High-Powered Magnet Sets (September 29, 2014) submitted and part of the public record in this case in “Affidavit” CPSC Docket No. 12-2 by Shihan Qu (Mat 16, 2016).

²⁵ Hearing Transcripts, at 71 and again at 81, display a concern for the evidence and invited Zen’s counsel to proffer evidence to support the proposition that the product in question was safe – hardly the kind of thing one would do if they had an irrevocably closed mind.

²⁶ *Zen Magnets v. CPSC*, No. 17-cv-02645-RBJ, 2018 WL 2938326 (D. Colo. June 12, 2018), 2018 U.S. Dist. LEXIS 97904, slip op, 35-36.

[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.”²⁷

Ignoring the public record, the District Court launched into a critique of Commissioner Adler, labeling him inflexible, close-minded, and unwilling and unable to assess evidence in the enforcement action – all unsubstantiated findings²⁸ based on a momentary “appearance of bias,” supposition, and presumption.²⁹ That standard is simply wrong.³⁰ Allowing a court to remove a

²⁷ *Zen Magnets v. CPSC*, No. 17–cv–02645–RBJ, 2018 WL 2938326 at *14 (D. Colo. June 12, 2018).

²⁸ *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 decision maker from making a fair and impartial determination in an adjudication).

²⁹ *Id.*

³⁰ 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*, 336 F.3 1112, 1115 (9th Cir. 2003), the court discussed the general rule of recusal for ALJs found at

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.³¹ Accordingly, real evidence, e.g., reliance on thoroughly discredited testimony and/or ignoring irrefutable evidence, not reference to one offhand comment in a separate proceeding, is mandated.³²

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. When it comes to rulemaking, the Commission must determine that a product presents an unreasonable risk of injury. When it comes to adjudicating that a product presents a substantial product hazard, 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.”³³ The fact that Commissioner Adler opined in *a rulemaking* that high-powered magnets present a risk of injury to the public notwithstanding a

20 C.F.R. Sec. 404.940 holding that “*nothing in this regulation mandates recusal for the mere appearance of impropriety.*” [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.”)

³¹ *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).

³² *Andrews v. Agricultural Labor Relations Board*, 623 P. 2d 151, 158 (Cal. 1981).

³³ 15 U.S.C. § 2064(a)(1).

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.

Commissioner Adler has been a Commissioner at CPSC for the last decade. 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-finding³⁴) cannot and must not be the basis to conclude he is committed to anything other than fairness in the decision-making process.³⁵

Beyond the wholly inappropriate psychoanalysis implicit in the challenge to 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

³⁴ Notice of Proposed Rulemaking, 77 Fed. Reg. 53781, 53794, 59975 (September 4, 2012) detailing finding by the CPSC staff that the danger these product present simply cannot be ameliorated by a warning. See *supra*, note 18 (explaining that Commissioner Adler's conclusion was amply documented in the CPSC record).

³⁵ *United States v. Morgan*, 313 U.S. 409, 421 (1941) (agency decision makers "are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. . . ."; *In re J.P. Linahan, Inc.*, 138 F.2d 650, 651 (2nd Cir. 1943). (per Jerome Frank) (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.")).

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."³⁶ [emphasis added] 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 FTC Chairman Paul Rand Dixon should have recused himself from a case because of a rash of public statements indicative prejudgment.³⁷ The *Cinderella School* court pointed out that "individual Commissioners [do not have] license to prejudge cases or to make speeches which give the appearance that the case has been prejudged."³⁸ However, this was not the first time Chairman Dixon had been chastised³⁹ and his comments were made as part of a "campaign" replete with press releases.

³⁶ *F.T.C. v. Cement Institute*, 333 U.S. 683, 702-703 (1948).

³⁷ *Cinderella Career & Finishing Schools, Inc. v. F.T.C.*, 425 F.2d 583, 584–85 (D.C. Cir. 1970).

³⁸ *Id.* at 590.

³⁹ *Id.* ("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

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

As noted earlier, the legal standard to assess bias on which *Zen* relies is "irrevocably closed mind," while the more common term is "unalterably closed mind." Given that the stakes for the entire system of administrative justice couldn't 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,"⁴⁰ a review of the best available evidence, not supposition readily refuted by actions and public pledges.

In *Association of National Advertisers v. FTC*, the DC Circuit held that an "agency member could be disqualified from proceeding only where there was *clear and convincing*

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.").

⁴⁰ *Ass'n of Nat. Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151 (D.C. Cir. 1979).

showing that he had an unalterably closed mind in matters critical to disposition of the rulemaking”⁴¹ [emphasis added]. 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 rulemaking] ‘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.”⁴²[emphasis added]. In *Mississippi Commission on Environmental Quality v. EPA*, the court reaffirmed that standard, relying on the *Air Transport Association of America*.⁴³ The *Air Transport* court found that this most consequential determination had to be based on evidence that the decision maker has “an ‘unalterably closed mind’ and [is] ‘unwilling or unable’ to rationally consider arguments.”(citations omitted).”⁴⁴ The opposite appears to have happened in *Zen* which reflects a rush to judgment that was unfair, unjustified, and dangerous.

⁴¹ *Id.*

⁴² *C & W Fish Co. v. Fox, Jr.*, 931 F.2d 1556, 1564 (D.C. Cir. 1991).

⁴³ *Air Transport Association of America, Inc. v. National Mediation Board*, 663 F.3d 476, 398 U.S. App. D.C. 314 (D.C. Cir. 2011).

⁴⁴ *Mississippi Comm'n on Env'tl. Quality v. E.P.A.*, 790 F.3d 138, 183 (D.C. Cir. 2015) citing *Air Transport Association of America, Inc. v. National Mediation Board*, 663 F.3d 476, 487 (D.C. Cir. 2011).

Relying on *C & W Fish Co., Inc. v. Fox*,⁴⁵ the *Mississippi Commission* case held that a statement a rulemaking is hardly clear and convincing evidence of bad faith in an adjudication. “[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.”⁴⁶ 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.” (citation omitted).⁴⁷ That essential caution was absent in *Zen*. The threshold finding for “unalterably closed mind” is high: clear and convincing evidence.⁴⁸ 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 decision maker is so egregious that it taints or colors irrevocably the proceeding in which the behavior takes place. Since 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,

⁴⁵ *Mississippi Comm'n on Env'tl. Quality v. E.P.A.*, 790 F.3d 138, 183 (D.C. Cir. 2015), quoting *C & W Fish Co., Inc. v. Fox*, 931 F.2d 1556, 1564 (D.C.Cir.1991) (internal quotation marks omitted).

⁴⁶ *Id.* at 183–84.

⁴⁷ *Id.* at 184.

⁴⁸ *Organized Fishermen of Fla., Inc. v. Franklin*, 846 F. Supp. 1569, 1574 (S.D. Fla. 1994).

“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.”⁴⁹ 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 enforcement 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 placing 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 U.S.*, 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 prejudgment [such] that the practice must be forbidden if the guarantee of

⁴⁹ *C & W Fish Co. v. Fox, Jr.*, 931 F.2d 1556, 1564 (D.C. Cir. 1991) *Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth.*, 685 F.2d 547, 564 (D.C. Cir. 1982).

due process is to be [fulfilled].”⁵⁰ *Zen* does not begin to meet this test.⁵¹ Commissioner Adler’s statement and unblemished record do not meet this test.

Conclusion

The ramifications and downstream hazards of sanctioning decision makers 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, 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 decision makers. 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-

⁵⁰ *Hasie v. Office of Comptroller of Currency of U.S.*, 633 F.3d 361, 367–68 (5th Cir. 2011).

⁵¹ *Withrow v. Larkin*, 421 U.S. 35, 47, (1975) (before excluding a decision maker, there must be evidence of “actual bias or prejudgment” so egregious “that the practice must be forbidden if the guarantee of due process is to be adequately implemented.”).

intended but deeply problematic cases. The *Zen* opinion, in the final analysis, is itself irrevocably tainted.