# Bias in Administrative Hearings

# Learning Objectives for this Module

## Learn the limits on challenging agency decisionmaking on bias.

## Learn how the Doctrine of Necessity reflects the problem of disqualifying agencies for bias.

## Learn the limits of congressional meddling in agency practice.

## Learn the allowable congressional casework.

# Reading Assignment

## Chapter 4 p to the end.

# Issues to be addressed

## What does a Right to an Impartial Judge Mean?

### How is the analysis different for agencies than for Article III courts?

### How is separation of functions meant to reduce bias?

### Exception to the Requirement of Separation of Functions for the Heads of Agencies

#### 554(d)

##### This subsection does not apply ... (C) to the agency or a member or members of the body comprising the agency.

#### The “agency” means the secretary in an agency with a single head.

#### The “body comprising the agency” is the commissioners or board members of an agency headed by a committee.

## The Problem of Proof of Bias

### We will see more about this in the chapter on judicial review

### The core problem is that you cannot judge bias by only looking at the record, but the courts are unwilling to allow discovery into the motives of the judges.

### It would be like getting to depose an Article III judge as part of the appeal of a summary judgment.

### Direct economic interest is about the only easy call.

#### Judges deciding fines that affect their salaries.

#### Judges with personal interests in the regulated parties.

##### DEQ judges who is a partner in the filling station with the leaking storage gas tank.

##### Judges who get a % of the fines assessed.

##### What about the DOT officials deciding on a recall for GM who owns a GM car?

## Withrow v. Larkin, 421 U.S. 35 (1975)

### State Board of Medical Examiners (BOME)

#### These boards usually combine functions.

##### Bias is a real issue in medical licensing boards, whose members may be competitors of the physicians they discipline. See [Patrick v. Burget, 486 U.S. 94 (1988)](http://biotech.law.lsu.edu/cases/antitrust/patrick.htm#BOME)

### The physician complained that the board both brought the charges again him and decided the case.

##### What is the significance of this being 1975?

##### What legal precedents would counsel have been looking at?

### Why did the court find that it was not necessary to separate them?

#### The Supreme Court reiterated the fundamental importance of the need for an unbiased decision maker, but it found that the mere combination of investigatory, prosecutorial, and adjudicatory functions in the same entity did not necessarily make the entity biased in adjudicating.

### A major issue in these proceedings is that the board members will rely on their own technical expertise rather than relying on expert testimony.

#### Why does this make keeping a good record of the proceedings so important in these cases?

#### Why would an independent ALJ be a particular problem for these cases?

## Disqualifying an Administrative Law Decisionmaker for Bias

### What is the United States Supreme Court standard?

#### “irrevocably closed mind”

### What does it take to show this?

#### The chair of the FTC, which was deciding an antitrust case against Texaco, gives a speech saying Texaco was a bad actor and would be held accountable.

##### What did the United States Supreme Court think of this? (Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964)?)

##### This is the only case, but we can assume that agency heads took notice.

#### Why does mean that the head of the EPA and other federal agencies needed to be circumspect in comments about BP?

#### Would generalized statements, such as the FCC chair deploring advertising to children, meet the standard?

### What is the Doctrine of Necessity?

## Kennecott Copper Corp. v. FTC, 467 F.2d 67 (10th Cir. 1972)

### Kennecott owned a small coal company, then bought a big one - Peabody

### FTC investigated this as an antitrust violation

#### A commissioner gave an interview and explained that the agency saw Kennecott as removing itself as a competitor.

#### Kennecott claimed this showed bias

### The court said no, but warned the agency to be more careful.

## Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966)

### Who was meddling in the FTC case?

#### What did Senator Kefauver say: [http://biotech.law.lsu.edu/cases/adlaw/Pillsbury.htm#Senator\_Kefauver](http://biotech.law.lsu.edu/cases/adlaw/Pillsbury.htm%23Senator_Kefauver)

### What the court was worried about:

#### However, when such an investigation focuses directly and substantially upon the mental decisional processes of a Commission in a case which is pending before it, Congress is no longer intervening in the agency's legislative function, but rather, in its judicial function. At this latter point, we become concerned with the right of private litigants to a fair trial and, equally important, with their right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences.

## The Pillsbury Ruling

### What happens if the court disqualifies the commission because of the intimidation in the Senate hearing?

### The court’s solution:

#### Although we conclude that the course of the questioning before the Senate subcommittee in June 1955 deprived the petitioner of the kind of hearing contemplated by the Supreme Court ... we are convinced that the Commission is not permanently disqualified to decide this case. We are convinced that the passage of time, coupled with the changes in personnel on the Commission, sufficiently insulate the present members from any outward effect from what occurred in 1955.

## What should Congress be able to do in Hearings and for Casework?

### Congressional case work – doing things for constituents such as checking on Social Security Benefits or trying to get bank regulators to lay off.

### What should be allowed and what would be forbidden under Pillsbury and what you know about due process?

### What if the president is meddling?

#### How does this change the issues?

#### Is he the decider?

# Evaluation Questions

## What are the expectations for technical expertise for Article III judges?

### How is expert evidence introduced in Article III trials?

### How are the expectations for ALJs different?

### How is this related to judicial deference to agency decisionmaking?

### How does expertise complicate bias issues?

## How does the nature of the regulatory process affect bias?

### What contacts do agencies have with regulated parties that Article III judges do not have with litigants?

### How does the ongoing nature of things such as environmental regulation affect the relationship between the agency and regulated parties?

### Why is bias a bigger problem in a small state agency proceeding than in a social security administration disability determination?

## What is the standard for disqualifying an administrative decisionmaker for bias?

### How will this be this harder or easier than disqualifying an Article III judge?

## Why is separation of functions a problem for agencies such as the FCC where decisions are made by the commissioners themselves?

### What does APA section 554(d) provide in these circumstances?

### Does this mean that there are no separation of function requirements in these hearings?

### What if the commissioners rely on case prosecutor to write their opinion?

## What happened in *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964) that allowed defendants to challenge the decisionmaker?

### How might this have affected the comments by the EPA Secretary about the BP spill?

### What if the EPA Secretary says that she thinks fracking poses real risks to the environment and should be limited?

#### Would this disqualify her making decisions in environmental adjudications?

### What is the Doctrine of Necessity and how does it drive the court’s broad acceptance of seeming bias by agency heads?

## What is congressional casework? (Think of examples.)

### What did the *Pillsbury* case tell us about the limits on Congressional meddling in adjudications?

### What does *Pillsbury* tell us about the allowable limits of congressional case work?