# 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.

#### Examples of 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.

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

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

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

#### How must the record be structured so that the court can review these proceedings?

## Disqualifying an Administrative Law Decisionmaker for Bias

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

### What does it take to show this?

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

### 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

### Did the court agree?

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

### Who was meddling in this FTC case?

### What the court was worried about?

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

### What was the court’s solution?

## What should Congress be able to do in hearings and for casework?

### 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?

# 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?