Congressional Intrusion into the Adjudicatory Process of An Administrative Agency

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NOTES

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During 1951 and 1952 the Pillsbury Company acquired two of its competitors. Shortly thereafter the Federal Trade Commission issued a complaint against Pillsbury alleging violation of section 7 of the Clayton Act, as amended by the Cellar-Kefauver Antimerger Act of 1950.[1] On an interlocutory appeal in 1953 the Commission held, *inter alia*, that the "rule of reason"[2] should be applied under section 7 instead of the "per se" doctrine[3] advocated by its counsel. Because the Government had made a prima facie showing under this test, the case was remanded to the hearing examiner to give Pillsbury an opportunity to introduce countervailing evidence. In 1955, subsequent to the interlocutory opinion, but long before the examiner had made his initial decision on the merits and the Commission had made its final decision, the chairman and several members of his staff appeared before a Senate subcommittee.[4] Questions were posed and comments made by Senator Kefauver, Senator Kilgore, and other members of the subcommittee in which they forcefully expressed their own opinions that congressional intent required application of the per se doctrine.[5] Subcommittee members spoke as if certain basic facts had been determined, even though these facts were still being litigated. During questioning by Senator Kefauver, Commission Chairman Howrey declared himself disqualified for the remainder of the litigation because of his reaction to the inquiry made into his mental processes relative to the case.

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[1] *Pillsbury* was a pioneer case under section 7, as amended.

[2] Under the rule of reason, an examination is made into all relevant factors in order to ascertain the probable economic consequences of the merger.

[3] Under the per se doctrine, illegality is established and no further proof need be introduced in support of the complaint where a showing is made that a company having a substantial share of the business has acquired the assets of competitors and that the resulting merged entity has a substantially larger share of the market than the acquiring company previously had.

[4] The persons present at the subcommittee hearings and the positions they then occupied were as follows: FTC Chairman, Edward F. Howrey, the only Commission member who disqualified himself during the hearings; Robert P. Secrest, a commissioner both at the time of the hearings in question and at the time of the Commission's final decision in 1960; Earl W. Kintner, General Counsel to the Commission at the time of the 1955 hearings, Chairman of the Commission at the time of the Commission's final decision and, in fact, author of the final *Pillsbury* decision; Joseph E. Sheehy, Director of the Bureau of Litigation at the time of the hearings, whose then assistant, Mr. William C. Kern, was a commissioner at the time of the final *Pillsbury* decision. See note 35 *infra*.

[5] The subcommittee evidently felt "that there was no need to carry on the long and complicated inquiry into all the surrounding matters reflecting on the conditions in the industry if the Commission should determine that there was a substantial acquisition . . . and that monopolies ought to be stopped quickly, and that Congress did not intend for the Commission to apply the 'rule of reason'." 354 F.2d at 956.

The Commission made its final decision in 1960, holding that Pillsbury's acquisitions violated section 7. Divesture of the acquired business was ordered, and Pillsbury appealed directly to the United States Court of Appeals for the Fifth Circuit.[6] *Held, reversed and remanded:* A searching examination of members of an administrative agency by a congressional subcommittee and response thereto by agency members as to how and why a decision should be reached in a case still pending, and criticism of the members for having reached the "wrong" decision in an interlocutory phase of the case constitutes an improper intrusion into the adjudicatory processes of the agency and a denial of due process to the defendant. *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966).

I. Due Process in Administrative Law

A basic requirement of due process is a fair trial in a fair tribunal.[7] The Supreme Court, recognizing that fairness requires an absence of actual bias,[8] has stated that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."[9] The existence of *ex parte* contacts may prevent a fair trial and constitute a violation of due process.[10] Rules have been established to prevent this type of contamination of adversary proceedings, *e.g.*, canon 17 of the *American Bar Association Canons of Judicial Ethics* prohibits judges

[6] This procedure is authorized by 15 U.S.C. §§ 21(c), 45(c) (1964).

[7] *In re* Murchison, 349 U.S. 133, 136 (1955); Offutt v. United States, 348 U.S. 11, 14 (1954); Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292, 304 (1937); Morgan v. United States, 298 U.S. 468, 480 (1936).

[8] 349 U.S. at 136.

[9] Tumey v. Ohio, 273 U.S. 510, 532 (1927).

[10] In a trial-type hearing, two or more parties present evidence which is subject to cross-examination and rebuttal, and from the record created, the tribunal reaches a decision. 1 Davis, Administrative Law § 7.01, at 407 (1958). "The key to a trial is opportunity of each party to know and to meet the evidence and the argument on the other side." *Ibid.* "In its more usual sense, *ex parte* means that an application is made by one party to a proceeding in the absence of the other." Black, Law Dictionary 662 (4th ed. 1951). *Pillsbury* involved *ex parte* contacts in the sense that Pillsbury was not required to be given notice of the congressional hearings concerning its case nor allowed to participate therein. See Peck, *Regulation and Control of Ex Parte Communications With Administrative Agencies*, 76 Harv. L. Rev. 233, 235 (1962), concerning the problem of what constitutes undesirable *ex parte* communications:

> Agency actions may be under consideration, of course, in what would be any of the three traditional branches of government. The lines of demarcation between those branches have an uncertain quality which renders it difficult to determine whether receipt of a communication should be condemned by standards comparable to those applied to judicial proceedings, or commended as the diligent action of a legislator or executive officer seeking to inform himself fully in order that he may better serve the public. The complications are increased by consideration of the relationship between the agencies and the legislature which created them and delegated powers to them. Likewise a source of ambiguity are the unresolved problems of the role of legislators as representatives and protectors of the interests of their constituents. Ephemeral as the harm of a communication may be in a particular proceeding, the overriding demand is that law not only be, but also appear to be, justly administered.

from allowing *ex parte* presentations except where provided by law. For governmental agencies the Federal Administrative Procedure Act[11] prohibits *ex parte* dealings concerning issues of fact on the part of presiding administrative officers. It has been proposed that a command, with content similar to canon 17, covering issues of law as well as fact, should be applied to all administrators because of the similarity between administrative and judicial adjudications.[12] The President's 1962 Administrative Conference urged each agency to adopt a formal code of behavior governing *ex parte* conduct.[13] The suggested code would define the persons engaged in the decision making process, draw the line between proper and improper communications with those persons at the commencement of a formal proceeding, and establish a procedure for disclosing in the record any improper communications.[14]

Courts generally look with greater disfavor upon applications to disqualify administrative officials than on applications to disqualify judges and jurors.[15] However, in a case involving bias on the part of the examiner, the Fifth Circuit has stated, "the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards have been relaxed."[16] Regardless of the approach, the hearing may not be vitiated even though contamination exists. By invoking the rule of necessity, courts often hold that judges or officers who are disqualified must nevertheless

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[11] Administrative Procedure Act, 60 Stat. 240 (1946), 5 U.S.C. § 1004(c) (1964).

[12] Note, *The Supreme Court, Congressional Investigations, and Influence Peddling*, 33 N.Y.U.L. REV. 796, 806-07 (1958).

[13] S. Doc. No. 24, 88th Cong., 1st Sess. 173-205 (1962). The stated purpose of Recommendation No. 16 is to protect the administrative process from improper influence.

[14] *Report of General Committee on Administrative Process*, 2 A.B.A. REP. 4, 5 (1965). Among the eight major independent regulatory agencies, five, *viz.*, the ICC, CAB, FTC, FPC, and SEC, have adopted a code along the lines of Recommendation No. 16; in early 1964, the FCC and FMC each proposed a rule patterned after Recommendation No. 16 but as yet have not promulgated a rule; the NLRB has as yet taken no action to implement Recommendation No. 16. The provisions of the codes adopted by the five agencies put agency personnel as well as outside parties and counsel on notice of the agency's intent to preserve the integrity of the record in a hearing where notice and a record is required.

[15] "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints." Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292, 304 (1937). See also Note, *The Disqualification of Administrative Officials*, 41 COLUM. L. REV. 1384, 1402 (1941). "The reason for this is plain—a desire to promote administrative efficiency." *Ibid.*

[16] NLRB v. Phelps, 136 F.2d 562, 564, 567 (5th Cir. 1943). An examiner appointed by the NLRB in a proceeding against the trustee in bankruptcy of a corporation secured a stipulation from the trustee for the purpose of instituting proceedings upon his own motion against the transferee of the bankrupt corporation's assets. The examiner made rash statements that witnesses disobeyed subpoenas to avoid testifying to the facts and otherwise exhibited a partial and partisan general attitude. The Board's order adopting the examiner's findings and recommendations was vacated. See Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292, 304 (1937); NLRB v. Washington Dehydrated Food Co., 118 F.2d 980 (9th Cir. 1941).

be allowed to make decisions when no provision has been made for a substitute tribunal.[17]

Disqualification for Bias and Interest "The concept of 'bias' has a multiplicity of meanings which shade into each other but which must nevertheless be distinguished if problems of disqualification of deciding officers are to be solved."[18] Bias in the sense of prejudgment of adjudicative facts or of a predetermined point of view about issues of law or policy is not necessarily a ground for disqualification.[19] On the other hand, substantial personal bias or prejudice—an attitude of favoritism or animosity toward a particular party—is ground for disqualification.[20] Also, when the first opinion concerning the adjudicative facts is not arrived at independently —for example where *ex parte* contacts are found to have existed as an influence, actual, or potential—further consideration of the claim of the party guilty of the *ex parte* maneuvering may be barred.[21]

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[17] Evans v. Gore, 253 U.S. 245, 247-48 (1920). The premise of the rule of necessity is that jurisdiction of a pending case cannot be declined or renounced where a party is entitled by law to invoke it and where there is no other tribunal to which under the law he can go. The doctrine applies equally to state judges and to federal and state administrative officers. 2 DAVIS, ADMINISTRATIVE LAW § 12.04, at 162 (1958). See FTC v. Cement Institute, 333 U.S. 683, 700-03 (1948); Loughran v. FTC, 143 F.2d 431, 433 (8th Cir. 1944). 2 DAVIS, ADMINISTRATIVE LAW § 12.06, at 170 (1958). "In invoking the rule of necessity, the courts should always determine whether in the circumstances the system of allowing decisions to be made by disqualified officers should be held to deny due process." *Ibid.*

[18] See 2 DAVIS, ADMINISTRATIVE LAW § 12.01, at 130 (1958); Note, *The Disqualification of Administrative Officials*, 41 COLUM. L. REV. 1348 (1941).

[19] It has been held that an examiner was not disqualified by having previously announced a position concerning an appraisal of particular facts which he had to appraise in an adjudication. NLRB v. Donnelly Garment Co., 330 U.S. 219 (1947). "Certainly it is not the rule of judicial administration that, statutory requirements apart . . . a judge is disqualified from sitting in a retrial because he was reversed on earlier rulings. We find no warrant for imposing upon administrative agencies a stiffer rule, whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing." *Id.* at 236-37. 2 DAVIS, ADMINISTRATIVE LAW § 12.01, at 131 (1958). For cases supporting the proposition that strong conviction on questions of law and policy does not disqualify, see SEC v. R. A. Holmes & Co., 323 F.2d 284 (D.C. Cir. 1963); Wisconsin Tel. Co. v. Public Serv. Comm'n, 287 N.W. 122 (1939); Hudspeth v. State, 67 S.W.2d 191 (1933). "Not only have the legislative creators of agencies often sought escape from the bias of judges but they have often sought a particular bias in administrators." 2 DAVIS, ADMINISTRATIVE LAW § 12.01, at 136 (1958). "The judge or administrator applying indefinite statutory provisions ought to be something other than an impartial referee and arbitrator." Hyneman, *Administrative Adjudication*, 51 POL. SCI. Q. 383, 516 (1936). "The theoretically ideal administrator is one whose broad point of view is in general agreement with the policies he administers but who maintains sufficient balance to perceive and to avoid the degree of zeal which substantially impairs fairmindedness." 2 DAVIS, ADMINISTRATIVE LAW § 12.01, at 138 (1958).

[20] 2 DAVIS, ADMINISTRATIVE LAW § 12.06, at 169 (1958). See Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962); Phillips v. SEC, 153 F.2d 27 (2d Cir. 1946). *But c.f.*, NLRB v. Pittsburg S.S. Co., 337 U.S. 656 (1921). The Court held that an examiner's finding witnesses for a company untrustworthy and those for a union reliable, without exception, was not sufficient grounds for impugning the integrity or competence of the examiner. Lower courts have quoted and followed the Supreme Court's language, but the holdings in some cases show that, depending on the circumstances, uniform rulings for one side may be the principal element in holding that an examiner should have been disqualified. See, Local 3, United Packinghouse Workers v. NLRB, 210 F.2d 325 (8th Cir.), *cert. denied*, 348 U.S. 822 (1954).

[21] In a case involving misconduct on the part of applicants to the FCC for a permit to construct a television station, it was stated that "surreptitious efforts to influence an official charged with the duty of deciding contested issues upon an open record in accord wih basic principles of

A direct and substantial pecuniary interest is ordinarily held to disqualify an officer from participation in an adjudication.[22] Other kinds of interest, although more subtle than direct pecuniary interests, may also come within the ancient injunction that "no man shall be a judge in his own cause."[23] Congressional control over tenure and salary of administrative officials inherently gives rise to this more subtle type of interest, as administrative adjudicators may stand to lose personally by deciding cases contrary to the "intent of Congress." Administrators may feel constrained to comply with their "bosses'" suggestions, just as politicians must comply with the wishes of their constituents if they desire to retain their position. Also, agency members may consider failure to cooperate with congressmen who are members of their parent committee, or who are on appropriations committees, detrimental to the agency itself. Such a belief might tend to create a "desire to please" for the sake of the agency on the part of properly zealous administrators.[24] Thus, attempts by congressmen

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our jurisprudence, eat at the very heart of our system of government—due process, fair play, open proceedings, unbiased, uninfluenced decision. He who engages in such efforts in a contest before an administrative agency is fortunate if he loses no more than the matter involved in that proceeding." WKAT, Inc. v. FCC, 296 F.2d 375, 383 (D.C. Cir. 1961). For more recent developments, see Camero v. United States, 345 F.2d 798 (Ct. Cl. 1965) (where the nature and degree of participation by the attorney representing the government in an advisory capacity before an Army grievance committee as to preparation of an opinion sent to the depot commander raised material issues of fact in relation to improper influence and precluded the granting of summary judgment); Jarrott v. Scrivener, 225 F. Supp. 827 (1964) (where three Board of Zoning Adjustment members of the District of Columbia, two of whom were subordinate government employees, were secretly informed that highly placed persons in government wanted the Board to grant a foreign government's application for exception to erect an embassy building in a residential zone, a fair hearing was denied and the favorable decision rendered void. A rehearing by a new board created for that purpose was ordered); SEC v. R. A. Holman & Co., 323 F.2d 284 (D.C. Cir. 1963) (where an underwriter could not enjoin proceedings pending before the SEC relating to the issuance and sale of stock by claiming the alleged disqualification of members of the Commission because of prior staff service. The underwriter was required to first exhaust its administrative remedies); Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962) (holding that federal courts had jurisdiction, on due process grounds, to entertain a registrant's action to enjoin the SEC from prosecuting a revocation proceeding due to the allegation that persons who had participated in the investigation or prosecution had later, as members of the Commission, participated in the decision); Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959) (private approaches to members of the FCC with respect to allocation of a television channel, a rule-making function, by parties interested therein vitiated Commission action). Even in these cases, however, if the litigants are not disqualified, the administrative body itself generally is allowed to rehear the case due to either the rule of necessity or a finding that the "minds of the Commissioners were not necessarily 'irrevocably closed'." See note 34 *infra*, and accompanying text.

[22] 2 DAVIS, ADMINISTRATIVE LAW § 12.03, at 154 (1958). In Tumey v. Ohio, 273 U.S. 510 (1927), it was held that where defendants accused of violating the prohibition laws were tried before an official (mayor) who was allowed to retain, as his own compensation, costs assessed against defendants who were convicted, but who received nothing if the defendants were not convicted, due process of law was violated. But it has been held not to violate due process for an administrative official to assess benefits and burdens in a case where he owns land to be assessed. Hibbon v. Smith, 191 U.S. 310 (1903); Lent v. Tillson, 140 U.S. 316 (1891).

[23] 2 DAVIS, ADMINISTRATIVE LAW § 12.03, at 159 (1958).

[24] On the other hand, the administrative agencies are established to aid in implementing congressional policies, and Congress has a duty to insure execution of the laws in accordance with its intent and purpose. See notes 19 *supra* and 36 *infra*.

to influence the decision of particular cases by off-the-record pressure generally have been condemned.[25] It has been stated that other practices, "such as questioning agency members in committee hearings as to their intentions in pending cases . . . ought equally to be condemned."[26]

II. PILLSBURY v. FTC

The controlling issue on appeal was whether agency participation in a congressional subcommittee hearing, in which the agency's handling of a pending case was criticized, constituted a denial of due process to the private litigant. Pillsbury's complaint did not relate, as did the complaint in *FTC v. Cement Institute*,[27] to a fixed point of view about issues of law and fact existing prior to institution of suit by the FTC. The complaint was that congressional probing and criticizing, during the pendency of the *Pillsbury* proceedings, tended to and did establish a prejudicial point of view toward their particular case.[28] The congressional hearings were held to constitute an improper intrusion into the adjudicatory processes of the Commission of such damaging character as to have required at least some of the members, in addition to the Chairman, to disqualify themselves.[29] When Congress intervenes in the agency's judicial function, it was stated, the courts become concerned about the right of private litigants to a fair trial and with their right to the appearance of impartiality which cannot be maintained unless those who exercise the judicial function are free from powerful external influence.[30] The Senate subcommittee's subjecting an administrator to a searching examination as to how and why he reached his decision and criticizing him for reaching the "wrong" decision was held to sacrifice the "appearance of impartiality" which was Pillsbury's constitutional right.[31]

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[25] FRIENDLY, FEDERAL ADMINISTRATIVE AGENCIES 168 (1962).

[26] *Id.* at 169.

[27] FTC v. Cement Institute, 333 U.S. 683 (1948).

[28] The court made it clear that "the alleged interference . . . was not alleged improper influence behind closed doors but was rather interference in the nature of questions and statements made by members of two Senate and House subcommittees having responsibility for legislation dealing with antitrust matters. . . ." 354 F.2d at 954, 955. See note 10 *supra*.

[29] See note 4 *supra*.

[30] The court at this point cited *In re* Murchison, 349 U.S. 133 (1955), which held that a defendant is denied due process if he is tried for contempt before the same judge who presided at the contempt hearing; and Accardi v. Shaugnessy, 347 U.S. 260 (1954), which held that dictation of the Board of Immigration Appeals' decision by the Attorney General would be a ground for judicial relief.

[31] The court stated that this sacrifice could not be offset by "some short-run notions regarding the congressional intent underlying an amendment to a statute, unfettered administration of which was committed by Congress to the Federal Trade Commission." Further, the court was not dissuaded by an argument that "such officials as members of the Federal Trade Commission are sufficiently aware of the realities of governmental, not to say 'political,' life as to be able to withstand such questioning. . . ." The court stated that it is "not so 'sophisticated' that it can shrug off such a procedural due process claim merely because the officials involved should be able to discount what is said and to disregard the force of the intrusion into the adjudicatory process." 354 F.2d at 964.

Cement[32] was cited to show the Supreme Court's reluctance to disqualify members of the FTC for bias or prejudice,[33] but it was distinguished because the affirmance there was based largely on grounds of necessity.[34] It was felt that the reasoning of *Cement* would apply in *Pillsbury* only if the alternative to affirming the order was a judgment prohibiting consideration and decision by the Commission for all time. The court then held that the Commission was not disqualified permanently to decide the case because passage of time and changes in personnel would insulate sufficiently the present commissioners from any outward affect from the 1955 congressional hearings.[35]

The court also exhibited a protective attitude toward the agency. While the propriety of a commission to set forth policy statements or interpretative rules pursuant to its legislative rulemaking power was conceded, it was considered improper for a congressional committee to seek statements of official position relative to a pending case and to berate the agency if, in the committee's opinion, it is failing to adhere to the "intent of Con-

[32] In *Cement*, the Commission, *prior to instituting suit*, had made reports to Congress expressing its opinion that the multiple basing-point delivered-price system was a violation of the Sherman Act. The Commission subsequently issued a cease and desist order prohibiting use of such a system in the selling of cement. The Court rejected the defendant's contention that the Commission was disqualified due to bias because it had prejudged the issues. FTC v. Cement Institute, 333 U.S. 683 (1948).

[33] The court commented that bias and prejudice is a somewhat different basis than that urged by Pillsbury. Actually, the ground for complaint was improper influence of the adjudicatory process via *ex parte* contacts. The objectional aspect of *ex parte* contacts is that they tend to give rise to disqualifying "bias or prejudice" or to "sacrifice the appearance of impartiality" as the court stated. This is especially true when a party with inherent power over the adjudicatory body is involved. See text accompanying notes 24 and 25 *supra*.

[34] 333 U.S. at 700. Strict necessity was not shown by the facts. The Supreme Court *assumed* that "such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigation." *Ibid.* The Court pointed out that the minds of the commissioners were not necessarily "irrevocably closed" and that "judges frequently try the same case more than once and decide identical issues each time although these issues involve questions both of law and fact," and that the "Commission cannot possibly be under stronger constitutional compulsion in this respect than a court." *Id.* at 703.

[35] See note 4 *supra*. The court observed that of the four commissioners who actually participated in the final 1960 *Pillsbury* decision, two, Secrest and Kintner, were "substantially exposed to whatever 'interference' was embodied in the hearings" and one, Kern, "was at least indirectly 'affected' by reason of his FTC status in 1955 as Secrest's assistant." The court drew an analogy with the generally accepted principle enunciated by the Supreme Court in United States v. Morgan, 313 U.S. 409 (1941), that the questioning of a judge as to his judicial process "would be destructive of judicial responsibility." *Id.* at 422. Of the remaining two commissioners in 1960 found to be free of any "outward effect" from the 1955 hearings, one, Commissioner Mills, did not participate in the final *Pillsbury* decision because he had not heard the oral argument, and the other, Commissioner Anderson, had no apparent connection with the 1955 hearings. Whether or not particular commissioners are "insulated" from disqualifying influence is apparently a matter of degree. The court easily could have gone beneath the surface and found these two commissioners "affected." It would then have been faced with the question of whether or not to apply the rule of necessity to uphold the Commission's decision despite the improper influence, or to reverse the decision if the interference constituted a violation of due process of law and to dismiss the action if no competent tribunal was available to retry the case. See note 17 *supra*. Actually, on remand, the fifteen-year-old case was dismissed because the FTC believed another round of evidence taking would be necessary even under the per se doctrine. Pillsbury Mills, Inc., 3 TRADE REG. REP. ¶ 17,484 (Final Order, March 28, 1966).

gress" in applying the often broad statutory standards from which the agencies derive their authority.[36] These investigatory methods were considered to raise serious policy questions as to the *de facto* independence of the federal regulatory agencies. The court was of the view that when an investigation focuses directly and substantially upon the mental decisional processes of an agency in a case which is pending before it, Congress is not intervening in the agency's legislative function, but in its judicial function.

III. Conclusion

The Fifth Circuit declared in *Pillsbury* that it was preserving the rights of litigants without adversely restricting the legitimate exercise of the investigative power of Congress. Congress has a duty to exercise continuous watchfulness over an administrative agency's execution of the laws,[37] and the agency has a "duty to make certain investigations at the instance of Congress" and to report its findings.[38] In fact, advising Congress of facts that may be in aid of legislation is "perhaps the most important single function performed by the Commission."[39] This function, however, must be performed without affecting a litigant's right to a fair hearing. Two means were available to the FTC to protect Pillsbury's right, *viz.*, refusal to participate in the inquiries, or self-disqualification of all "affected" members.[40] In the Pillsbury decision the court was forced to assume the

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[36] By 15 U.S.C. § 21 (1964), Congress commits unfettered administration of the Clayton Act to the Federal Trade Commission. However, The Legislative Reorganization Act of 1946 recognized the duty of congressional committees to "exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee." 60 Stat. 832 (1946), 2 U.S.C. § 190(d) (1964). See Newman & Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?*, 41 Calif. L. Rev. 565 (1953); Scher, *Congressional Committee Members as Independent Agency Overseers: A Case Study*, 54 Am. Pol. Sci. Rev. 911 (1960). Yet there are those who "take a rather dim view of committee pronouncements as to what agency policy should be, save when this is incident to proposals for amendatory legislation." Friendly, Federal Administrative Agencies 169 (1962).

> We take it to be established principle that the legislature's task is confined to (1) establishing policy standards, (2) prescribing the structure and procedure of the agency, and (3) appropriating the necessary funds. It then becomes the agency's responsibility to administer the statute within the policy standards set forth by the legislature, through the methods of procedure established by the legislature, with such funds as the legislature has allotted. In thus administering the act, the agency is to be free of legislative interference. Thus, we find that legislative oversight of the agency should be essentially directed to the need for altering standards, structure and procedure, or budget through legislation.

Congressional Oversight of Administrative Agencies, 5 Record of N.Y.C.B.A. 11 (1950). See generally Gellhorn & Byse, Administrative Law 978-81 (4th ed. 1960).

[37] See note 36 *supra*.

[38] Humphrey's Executor v. United States, 295 U.S. 602, 607 (1935).

[39] *Id.* at 608.

[40] The CAB has successfully refused to participate in congressional inquiries pertaining to a pending case. See *Hearings Before the House Committee on the Judiciary, Monopoly Problems in Regulated Industries*, 84 Cong., 2d Sess., serv. 22, pt. 1, vol. 2, at 1205 (1957).