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NOTES

Administrative Law—Bias—“No man shall judge his own cause”

“[W]hile ‘[a]n overspeaking judge is no well tuned cymbal’ neither is an amorphous dummy unspotted by human emotions a becoming receptacle for judicial power.”¹ These dissenting words of Mr. Justice McReynolds in *Berger v. United States*,² a classic in the field of judicial bias, vividly disclose the reality of, and perhaps the need for, some degree of bias on the part of any officer presiding at adjudicatory proceedings.³ Whether such bias violates the due process clause of the fifth amendment, however, depends upon both type and degree. Generally four types of bias are recognized in the field of administrative law:⁴

- (a) a preconceived point of view regarding issues of law or policy;
- (b) factual preconceptions concerning the parties in particular litigation;
- (c) partiality or personal prejudice;
- (d) identifiable interest.

A mere policy bias on the part of an administrative agency is usually considered within the bounds of due process. “While it is essential to due process of law in the usual judicial proceeding that the judge shall be disinterested and impartial, it is not essential to due process that an administrative officer shall be disinterested and impartial.”⁵ However, the historical precedent that one with a personal stake in a controversy should be deemed disqualified dates back to 1610 with the rule set forth in *Dr. Bonham’s Case*⁶ that “no man shall be a judge in his own cause.”⁷ This concept was applied in *Tumey v. Ohio*.⁸ The Court held a statute

¹ *Berger v. United States*, 255 U.S. 22, 43 (1921).

² 255 U.S. 22 (1921). A trial judge in a prosecution for espionage after World War I had refused to disqualify himself though admittedly prejudiced against German-Americans. The Supreme Court held him disqualified to judge fairly and impartially.

³ This view is not altogether unsupported by the judiciary. See generally B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168-173 (1921); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

⁴ 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 12.01-12.03 (1958).

⁵ *De Pauw Univ. v. Brund*, 53 F.2d 647, 651 (W.D. Mo. 1931), *aff’d on other grounds*, 285 U.S. 527 (1932).

⁶ 77 Eng. Rep. 638 (K.B. 1610).

⁷ *Id.* at 642.

⁸ 273 U.S. 510 (1927).

violative of due process, for it conferred upon the judge of a prohibition-era mayor's court authority to retain for himself only those costs levied against convicted parties. The Court stated: "That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule Nice questions, however, often arise as to what the degree or nature of the interest must be."⁹

Recently, in *Garvey v. Freeman*,¹⁰ the Tenth Circuit Court of Appeals summarily rejected an attack on the integrity of a rather bizarre commodity allotment scheme developed under the Agricultural Adjustment Act.¹¹ "Community Committees" elected by the voluntary participants in the 1965 federal wheat program determine the apportionment of the area's gross support allotment based upon an appraisal of the neighbors' farms' potential yield. Often, as in *Garvey*, small farmer representation predominates. A farmer's potential yield determines the issuance to him of marketing certificates upon which the subsidies are actually paid, and the cumulative sum of these yields as determined by the committee must total the "normal yield" for the county as set by the Secretary of Agriculture. Appeal from the determination of the Community Committee is to the County Committee, then the State Committee, with final determination resting with a designated Deputy Administrator of the Department of Agriculture.

Garvey, a large Colorado wheat grower, sought judicial review of subnormal yield quotas established for his five Kiowa County farms by the local Community Committee. For 1965, the Secretary had determined the Kiowa County normal per acre yield to be 19.5 bushels, one less than the 1964 appraisal. Yet the appraised yield on the Garvey Farms as found by the Community Committee was 18.6 bushels for 1964, and this was lowered in 1965 to an estimated average normal yield of 17.26 bushels per acre on the entire area of Garvey Farms—an appraisal 2.24 bushels per acre less than the countywide average. Garvey's request for redetermination was denied by the County Committee, and this denial was affirmed by the State Committee, stating that the "yields correctly reflected Garvey's productivity in relation to yields established for other similar farms."¹² While the State Committee twice visited Garvey Farms,

⁹ *Id.* at 522.

¹⁰ 397 F.2d 600 (10th Cir. 1968).

¹¹ 52 Stat. §§ 101-518 (1938), as amended 7 U.S.C. §§ 1281-1393 (1964).

¹² 397 F.2d at 608.

it failed to visit neighboring farms to which the Garvey production was being compared. Of course the benefit of the subnormal evaluation of Garvey Farm's efficiency inured directly to the benefit of all other Kiowa County farmers, including every member of the Community and County Committees. The court of appeals, though recognizing the probability of bias, dismissed the question:

It may well be that the County Committeemen and even the State Committeemen harbored a small farmer's prejudice against a big farmer and that this was reflected in their ultimate decisions. But, we cannot subjectively judge the minds of these committeemen or impugn their good intentions. . . .¹³

Precedent supporting the doctrine of disqualification by reason of interest and defining its scope is varied in time, territory, and subject matter. The two cases possibly most related to the *Garvey* situation are *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners*¹⁴ and *Johnson v. Michigan Milk Marketing Board*.¹⁵ In *State Board of Dry Cleaners* the California Supreme Court held unconstitutional a state statute creating a State Board of Dry Cleaners that was composed of six members of the dry cleaning industry and one member of the public and was empowered to fix prices and determine regulatory matters. In holding that the price-fixing provisions were unrelated to the public health, safety, morals or general welfare, the court went on to say that "[w]here the legislature attempts to delegate its powers to an administrative board made up of interested members of the industry, the majority of which can initiate regulatory action by the board in that industry, that delegation may well be brought into question."¹⁶ In *Johnson* the Michigan Supreme Court held that a majority of the members of the Milk Marketing Board, as producers and distributors, had a pecuniary interest in price-setting. This was held an unconstitutional denial of due process because matters submitted to the board could not be considered fairly.¹⁷

The issue in these and similar cases seems twofold. First, can the state validly regulate this industry or area of commerce in the exercise of its police power? Second, can such regulation be carried out by a board of

¹³ *Id.* at 612.

¹⁴ 40 Cal. 2d 436, 254 P.2d 29 (1953).

¹⁵ 295 Mich. 644, 295 N.W. 346 (1940).

¹⁶ 40 Cal. 2d at 449, 254 P.2d at 36.

¹⁷ See Note, 54 HARV. L. REV. 872 (1940); Note, 89 U. PENN. L. REV. 977 (1941).

interested members of the industry being regulated? North Carolina in the past has settled problems of interest of members of licensing boards, who under the subterfuge of public purpose were in a position to protect private interests and gain a monopoly over the occupation, by answering the first question in the negative, at least in the areas of tile contracting,¹⁸ dry cleaning,¹⁹ and photography.²⁰ Yet, the majority of all occupational licensing boards in North Carolina are composed of from three to five members, many, and sometimes all, of whom are required to be licensed members of the profession.²¹ The interest of members of the various boards would generally be considered too remote to disqualify them from quasi-judicial functions.²² Under the Michigan or California rule, however, delegation of such power to interested members of the occupation or industry "may well be brought into question."²³ Due process may require that our courts and administrative tribunals be not only virtuous, but also above suspicion.

Though the situation of *Garvey* is similar to *Johnson* and *State Board of Dry Cleaners*, the degree of pecuniary interest is far greater in *Garvey* due to the peculiar local nature of the control of the Community and County Committees. *Garvey* presents a situation in which the interest is perhaps as direct and substantial as in the zoning situations, in which courts generally disqualify members of zoning boards from voting on the re-classification of sections of real property when the member owns property within the district under consideration.²⁴ The same is true concerning drainage ditch²⁵ and condemnation proceedings.²⁶ In *Snipes v.*

¹⁸ *Roller v. Allan*, 245 N.C. 516, 96 S.E.2d 851 (1957).

¹⁹ *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940).

²⁰ *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949).

²¹ See, e.g., N.C. GEN. STAT. § 86-6 (barbers), § 88-13 (cosmetic art), § 89-4 (engineers), §§ 90-2 & 90-9 (physicians), § 90-22 (dentists), § 90-55 (pharmacists), § 90-116 (optometrists), § 90-130 (osteopaths), § 90-139 (chiropractors), § 90-180 (veterinarians), § 90-190 (chiropodists), § 90-203 (embalmers and funeral directors), § 90-238 (opticians), § 93-12 (certified public accountants), and § 93A-3 (real estate brokers) (1965).

²² See *State v. Warren*, 252 N.C. 690, 114 S.E.2d 660 (1960).

²³ *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners*, 40 Cal. 2d 436, 449, 254 P.2d 29, 36 (1953).

²⁴ See *Low v. Town of Madison*, 135 Conn. 1, 60 A.2d 774 (1948); *S&L Assoc. v. Township of Washington*, 35 N.J. 224, 172 A.2d 657 (1961); *Piggot v. Borough of Hopewell*, 22 N.J. Super. 106, 91 A.2d 667 (1952).

²⁵ See *Commissioners of Union Drainage Dist. No. 1 v. Smith*, 233 Ill. 417, 84 N.E. 376 (1908); *Stahl v. Board of Sup'rs of Ringgold County*, 187 Iowa 1342, 175 N.W. 772 (1920); *Jacobson v. Kanderjohi County*, 234 Minn. 296, 48 N.W.2d 441 (1951).

²⁶ *Ways v. Reading Parking Auth.*, 385 Pa. 592, 124 A.2d 92 (1956).

City of Winston,²⁷ the North Carolina Supreme Court held that the election by the board of aldermen of one of its own members as "Street Boss," an office with pay, at a meeting in which he was present and participating, was against public policy.²⁸ In *Kendall v. Stafford*,²⁹ the court refused to allow members of the county commissioners to raise their own salaries for reason of interest. The court said that the fixing of salaries should be left to popular vote.

The power of Congress to set up price control, parity and marketing programs in the area of wheat production is clear. Similarly, it is for Congress and the Department of Agriculture to establish the most efficient and workable administrative hierarchy and procedural rules to determine the individual rights of program members. Within this broad scope of Congressional power there exist certain limits, one created by the due process clause of the fifth amendment. Certainly a farmer is entitled to a fair hearing before an impartial tribunal acting in a quasi-judicial capacity determining adjudicative facts that will establish the farmer's share of the community or county allotment. In the context of the *Garvey* decision, it is at least arguable that the degree of *interest* held by the committee members should be grounds for disqualification under general administrative law concepts. The entire situation appears to be one in which, by the mere process of elimination in determining the normal yield of each individual farmer in the community, each member of the committee will in fact determine "his own cause."

DONALD W. STEPHENS

Admiralty—Obligations of Shipowners to Stevedore Contractors for Injuries to Longshoremen

If any boatman or young man of the beach shall undertake to load or unload any ship or vessel by the job or for a lump sum, they are bound to load and unload her well and diligently, and as quickly as they can. . . . And if . . . the boatman or young man abovesaid have to incur any expense or sustain any loss, the said merchants or the managing owner of the ship or vessel for the merchants is bound to

²⁷ 126 N.C. 374, 35 S.E. 610 (1900).

²⁸ For a similar case, see *State v. Thompson*, 193 Tenn. 395, 246 S.W.2d 59 (1952).

²⁹ 178 N.C. 461, 101 S.E. 15 (1919).