12.
Congressional Interventions Into Agency Decision-making

Introduction

Congressional committees frequently engage in oversight of the administrative bureaucracy. Such interventions involve varying degrees of intrusion into agency decision-making processes. On relatively rare occasions, these interventions have resulted in court actions challenging the congressional intercession as exertions of undue political influence on agency decision-makers, which violate the due process rights of participants in the proceedings in question and impugn the integrity of the agency decisional processes. Such challenges have arisen in the context of congressional intercessions into informal notice and comment rulemakings, ratemakings, informal decision-making, adjudications, and agency investigations that arguably would lead to an adjudicatory proceeding.

The courts, in balancing Congress's performance of its constitutional and statutory obligations to oversee the actions of agency officials against the rights of parties before agencies, have shown a decided preference for protecting congressional prerogatives. Where informal rulemaking or other forms of informal agency decision-making are involved, the courts will examine the nature and impact of the political pressure on the agency decision-maker, and will generally intervene only where that pressure has had the actual effect of forcing the consideration of factors that an agency's governing statutes exclude. Where agency adjudication is involved, courts apply a stricter standard, and a finding of an appearance of impropriety can be sufficient to taint the proceeding. But even here, courts generally decline to intervene unless the congressional pressure or influence is found to be directed at the ultimate decision-maker with respect to the merits of the proceeding, and does not involve legitimate oversight and investigative functions. Finally, where congressional intrusion into an agency's investigative process is involved the courts will intervene only if it is in fact shown that an inquiry was instituted and subpoenas issued because of congressional influence, the agency knew its process was being abused, that it knowingly did nothing to prevent such abuse, and that it rigorously pursued frivolous charges.[1]

In the final analysis, judicial deference in this area appears to reflect the pragmatic conclusion that maintenance of Congress's ability to communicate as freely as possible with the administrative bureaucracy is essential to sustaining public acceptance of the modern administrative state. As one commentator has explained with relevance today as great as it was when made:

1. With respect to judicial standards concerning the exertion of congressional influence, *see, e.g.,* 2 Richard J. Pierce, Jr., Administrative Law Treatise, , §. 9.8, 675-79 (4th ed. 2002) [hereinafter Pierce Treatise] (courts should "recognize[] the need to permit political oversight with respect to policy issues Congress has entrusted to agency decision-makers."); Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias In Agency Decision-making: Lessons from Chevron and Mistretta*, 57 U. of Chic. L. Rev. 481 (1990) [hereinafter *Political Control*]; Note, *Judicial Restrictions on Improper Influence in Administrative Decision-making: A Defense of the Pillsbury Doctrine*, 6 J. of Law and Politics 135 (1989) (calling for imposition of "appearance of impropriety" standard in any agency proceeding involving congressional intervention); Susan Low Bloch, *Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Regulation*, 76 Geo. L.J. 59 (1987) ("[M]embers of Congress should not be judicially constrained in their efforts to communicate with agencies" during the informal rulemaking process."); Archie Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 Yale L.J. 1360 (1980) ("The power of Congress to investigate the IRS is wide-ranging and may effectively be limited only by discretion and prudence."); Note, *Judicial Limitation of Congressional Influence on Administrative Agencies*, 73 Northwestern L. Rev. 931 (1979) ("When the source [of congressional influence] is an authorized committee investigation, no administrative proceeding should be invalidated unless administrative bias as to adjudicative facts can be discerned.").

> The legitimacy and acceptability of the administrative process depends on the perception of the public that the legislature has some sort of ultimate control over the agencies. It is through the Congress that the administrative system is accountable to the public. If members of Congress 'be corrupt, others may be chosen.' The public may not, however, directly remove agency officials. The public looks to its power to elect representatives as its input into the administrative process. The public will perceive restrictions on Congress's power to influence agency action as reducing the accountability of agency officials. This will negatively affect the legitimacy of agency actions, as well as seriously erode the notion of popular sovereignty. Even administrators, who may not perceive legislative intrusions into the administrative process as being particularly desirable, recognize congressional supervision as a necessary function in a democratic society. The nature of the government requires that the legislature maintain a careful supervision over agency action.[2]

A. Case Law Regarding Congressional Influence on Agency Decision-making

Challenges to an agency's decision based on allegations of improper congressional influence rest on two foundation cases: a 1966 decision of the Fifth Circuit Court of Appeals in *Pillsbury Co.* v. *Federal Trade Commission*[3] and a 1971 ruling of the District of Columbia Circuit Court of Appeals in *D.C. Federation of Civic Associations* v. *Volpe*.[4] A relative handful of judicial rulings since then have grappled with the same set of issues. The case law makes it clear that there are limits to congressional intercession. It is often far less clear whether those limits have been breached, however, because of the relative dearth of decisions and courts' reluctance to venture beyond the factual confines of the dispute.

In determining whether Congress had an improper influence on an agency's actions, courts consider: (1) the type of proceeding involved (e.g. formal adjudication, informal decision-making, informal rulemaking, and alleged abuse of agency investigatory powers); (2) any statutory factors relevant to that type of proceeding; (3) determining the actual impact of congressional pressure on the agency decision-maker; and (4) determining the remedies that may be available.

1. Key Early Rulings

a. Pillsbury Co. v. FTC (1966)

The seminal case challenging congressional intercession into agency adjudicatory or quasi-adjudicatory proceedings is the 1966 decision of the Court of Appeals for the Fifth Circuit in *Pillsbury Co. v. Federal Trade Commission,*[5] which held a Federal Trade Commission (FTC) divestiture order invalid because the commission's decisional process had been tainted by impermissible congressional influence. At issue was a Senate subcommittee's intense interrogation of the FTC chairman and several members of his staff on a key issue in an antitrust adjudication involving the Pillsbury Company, which was then pending before the FTC. At a subcommittee hearing, Senators expressed opinions on the issue and criticized the FTC for its interpretation of Section 7 of the Clayton Act in a previous interlocutory order in Pillsbury's favor.[6] The clear message of the Senate subcommittee's criticism was that the FTC should have ruled against Pillsbury.[7] In its subsequent final decision the commission ruled as the senators had suggested. The appeals court found the Senate inquiry to be an "improper intrusion into the adjudicatory process of the Commission." The court based its holding on the fact that the agency was acting in a judicial capacity. As a consequence, the private litigants had a "right to a fair trial" and the "appearance of impartiality" as part of the general guarantees of procedural due process when the agency is acting in a

2. Comment, *Judicial Limitation of Congressional Influence on Administrative Agencies*, 73 Northwestern L. Rev. 931, 941 (1979) (footnotes omitted).

3. Pillsbury Co. v. Fed. Trade Comm'n, 354 F.2d 952 (5th Cir. 1966).

4. D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied* 405 U.S. 1030 (1972). (McKinnon, J., concurring in part and dissenting in part).

5. 354 F.2d 952 (1966).

6. Earlier in the proceeding, the FTC had issued an interlocutory order announcing it would use the rule of reason rather than a per se rule to evaluate acquisitions under the Clayton Act, 15 U.S.C. § 18 (2016).

7. The committee chairman's questioning of the FTC chairman, as well as that of the committee members was hostile and pointed and expressed the strongly held view that the FTC should use the per se rule. Both the senators and the FTC chairman frequently referred to the facts of the Pillsbury case to illustrate their views. *See Pillsbury*, 354 F.2d at 955-62.

judicial or quasi-judicial capacity. The court emphasized the judicial nature of the function the agency was performing and the need to protect the integrity of that type of process. The court stated that it was proscribing the subcommittee's action because it cast doubt upon the "appearance of impartiality" of the decision-makers, and not because of any finding that the commission had *actually* been influenced:

> [W]hen [a congressional] 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...
>
> To subject an administrator to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him for reaching the "wrong" decision, as the Senate subcommittee did in this case, sacrifices the appearance of impartiality—the *sine qua non* of American judicial justice….[8]

b. D.C. Federation of Civic Associations v. Volpe (1972)

D.C. Federation of Civic Associations v. *Volpe,*[9] decided by the D.C. Circuit five years later, provides an apt counterpoint to *Pillsbury*. *D.C. Federation* also involved a claim of undue congressional influence, but not within the context of a judicial or quasi-judicial proceeding, or a formal or informal rulemaking. *D.C. Federation* involved the approval by the secretary of transportation of construction of the Three Sisters Bridge across the Potomac River. Two issues were presented: first, whether the secretary failed to comply with statutory requirements prior to approval of construction; and second, whether the secretary's determinations were tainted by extraneous pressures.

With regard to the first issue, a majority of the court found that in a number of critical respects the secretary had failed to comply with applicable statutory standards, which therefore required a remand for further agency determinations. Although this finding would have been sufficient to dispose of the case, Judge Bazelon chose to address the congressional intercession issue as well. The plaintiffs alleged that the secretary was influenced by the chairman of the House Appropriations subcommittee's threat to deny funds for the District's proposed subway system unless the bridge project was approved. Judge Bazelon stated that he was

> convinced that the impact of this is sufficient, standing alone, to invalidate the Secretary's action. Even if the Secretary had taken every formal step required by every applicable statutory provision, reversal would be required, in my opinion, because extraneous pressure intruded into the calculus of considerations on which the Secretary's decision was based.[10]

Judge Bazelon stated that another member of the panel concurred that

> the decision would be invalid if based in whole or in part on the pressures emanating from Representative Natcher. Judge Fahy agrees, and we therefore hold, that on remand the Secretary must make new determinations based strictly on the merits and completely without regard to any considerations not made relevant in the applicable statute.[11]

Judge Bazelon's opinion makes it clear that the court's standard—that extraneous congressional influences actually shown to

8. *Id.* at 964.

9. *D.C. Fed'n*, 459 F.2d 1231 (1971), *cert. denied* 405 U.S. 1030 (1972).

10. *D.C. Fed'n*, 459 F.2d at 1245-46.

11. *Id.*

have had an impact on an agency decision will taint such administrative action[12]—was crafted for the special administrative circumstances of the situation before it: where the decisional process was neither judicial nor legislative in nature.

> [T]he underlying problem cannot be illuminated by a simplistic effort to force the Secretary's action into a purely judicial or purely legislative mold. His decision was not "judicial" in that he was not required to base it solely on a formal record established at a public hearing. At the same time, it was not purely "legislative" since Congress had already established the boundaries within which his discretion could operate. But even though his action fell between these two conceptual extremes, it is still governed by principles that we had thought elementary and beyond dispute. If, in the course of reaching his decision, Secretary Volpe took into account "considerations that Congress could not have intended to make relevant," his action proceeded from an erroneous premise and his decision cannot stand...[13]

The court appeared to view undue influence cases as classifiable on a continuum. If a proceeding is one in which judicial or quasi-judicial functions are being exercised, then the highest standard of conduct is required, and a showing of interference with merely the "appearance of impartiality," without proof of actual partiality or other effect of the extraneous influences, is all that is necessary.[14] If the decision-making is "purely legislative" (policymaking) in nature, such as takes place in informal rulemaking, then the courts will be most deferential, even in the face of heavy extraneous pressures, to the political nature of the process. Finally, where a decisional process involves application of ascertainable legislative standards by an agency official in a situation that cannot be categorized as either judicial or legislative, i.e., informal decision-making, then a claim of impermissible interference will be sustained only on a showing of actual effect. The courts appear to have been guided by this suggested mode of analysis.

c. A Critique of Pillsbury and D.C. Federation

The rulings in *Pillsbury* and *D.C. Federation* have received surprisingly limited attention over the years, but what commentary there is has been generally critical, emphasizing both courts' failure to give proper weight to the values of the political process in such cases.[15] An influential 1990 article by Professor Richard J. Pierce, Jr., a leading administrative law scholar, reflects practical concerns raised by the decisions.[16] Pierce agrees that the *Pillsbury* court reached a defensible result in light of the circumstances presented: the contested issues of fact were at least arguably adjudicatory in nature rather than legislative and the intense interrogation could be viewed as pressure to resolve the facts against Pillsbury, thereby creating the appearance of impropriety. Pierce's concern, however, is that the Fifth Circuit did not decide the case on this narrow ground, but announced the far broader principle that "[w]hen [a congressional] investigation focuses directly and substantially upon the mental decisional processes of a Commission in a case before it, Congress is . . . intervening [impermissibly] in the agency's adjudicatory function."[17] Application of such a broadly stated prohibition in future cases, Pierce asserts, could result in findings attributable to congressional pressure without regard to the actual context of the congressional proceeding and "would constitute an unjustified judicial interference with the political process of policymaking."[18]

12. *Id.* (Bazelon, J.) (emphasizing he believed that under the circumstances of the case, the congressional threats involved were taken into account by the Secretary: "In my view, the District Court clearly and unambiguously found as a fact that the pressure exerted by Representative Natcher and others did have an impact on Secretary Volpe's decision to approve the bridge").

13. *Id.* at 1246-48 (footnotes omitted).

14. The court quite clearly accepted the *Pillsbury* doctrine. *See id*. at 1246 notes 75-78.

15. *See* commentaries listed in note 1, *supra*.

16. *Political Control*, *supra* note 1.

17. *Id.* at 500 (quoting *Pillsbury*).

18. *Id.*

> Whether to apply the rule of reason or a per se rule to acquisitions under the Clayton Act is purely a policy decision . . . Legislators should be free to express their views on this policy issue, and FTC commissioners should be free to change their minds and adopt those views. This is the political process functioning properly. It is of no consequence to the judiciary whether the FTC changes its policy because it is persuaded by the merits of the legislators' arguments, or because it fears that the legislature will retaliate . . . Similarly, the courts should not distinguish between policy decisions made through rulemaking and policy decisions developed in adjudicatory proceedings. To paraphrase Justice Holmes, judicial process values should trump political process values only when an agency has singled out an individual for adverse treatment.[19]

While finding *Pillsbury's* holding defensible, Professor Pierce deems *D.C. Federation* indefensible, "stand[ing] for the principle that two politically accountable branches cannot compromise their frequently differing policy preferences."[20] In Pierce's view, the case was about a political dispute over the allocation of transportation funds between the administering agency and the key congressional appropriating subcommittee. The secretary preferred seeing a subway built; the subcommittee (and Congress) wanted a bridge built. After a heated public dispute, they reached a political compromise whereby both projects would go forward. But the appeals court intervened, finding that the secretary's decisions, which were part of the political deal, were infected with impermissible bias as a result of legislative branch pressure. In the words of the court, "the impact of this pressure is sufficient, standing alone, to invalidate the Secretary's action."[21] In Professor Pierce's view,

> *D.C. Federation* is hard to explain in a democracy in which two politically accountable branches of government share the power to make policy. The agency was not adjudicating a dispute involving individual rights; nor was it resolving contested issues of adjudicative fact. Perhaps the case stands for the principle that the two politically accountable branches cannot compromise their frequently differing policy preferences. But if so, it is a singularly arrogant decision. The Constitution created a system of shared and coordinated policymaking by the two politically accountable branches… Our nation would be ungovernable in the absence of constant policy compromises between the executive and legislative branches.[22]

As will be seen in the following review of the undue influence case law since the decisions in *Pillsbury* and *D.C. Federation*, Professor Pierce's pragmatic views appear to have been influential.

2. Adjudicatory Rulings Since Pillsbury

Courts since *Pillsbury* have continued to recognize the vitality of that precedent, but only one court has actually overturned a quasi-judicial agency proceeding on grounds of undue political influence. The most recent judicial rulings have evinced a clear predilection to defer to congressional actions where they involve the legitimate exercise of legislative oversight and investigative functions.

a. Koniag v. Kleppe (1975)

In the only ruling of its kind since *Pillsbury*, a district court set aside adjudicatory decisions of the secretary of the interior with respect to the eligibility of several communities to receive land and money under the Alaska Native Claims Settlement Act (ANSCA), at least in part because it found improper congressional pressure exerted on the department and the secretary.[23] A congressional subcommittee held oversight hearings on the administration of the act while the proceedings in question were pending. The district court found that the hearings went substantially beyond the oversight function, as members "probed deeply" into the details of pending cases.

19. *Id.*

20. *Id.*

21. *D.C. Fed'n*, 459 F.2d at 1244.

22. *Political Control*, *supra* note 1, at 496-97; *see also Pierce Treatise*, *supra* note 1, at 676-78 (reiterating and updating his 1990 critique of *Pillsbury* and *D.C. Federation*).

23. Koniag v. Kleppe, 405 F. Supp. 1360 (D.D.C. 1975).

> The stated purpose of the hearings was to present a forum for discussing the implementation of the Act but in fact the Committee, through its chairman and staff members, probed deeply into details of contested cases then under consideration, indicating that there was 'more than meets the eye.' The entire rule-making process was re-examined, travel vouchers and other information were sought to probe the adequacy of the investigations made, all papers in the pending proceedings were demanded, the accuracy of data and procedures was questioned, and constantly the Committee interjected itself into aspects of the decision-making process.[24]

Two days before the secretary made his determination on the eligibility of the villages, the subcommittee chairman sent a letter to him requesting that he postpone his decision on the matter pending a review and opinion by the comptroller general as to whether "village eligibility and Native enrollment requirements of ANSCA have been misinterpreted in the regulations and that certain villages should not have been certified as eligible for land selections under ANSCA."[25] On these facts the district court vacated the secretary's eligibility decisions and reinstated the decisions initially rendered by the Bureau of Indian Affairs (BIA).

On appeal, the D.C. Circuit Court of Appeals disagreed in part with the lower court's application of the relevant law but not with its validity. With regard to the chairman's conduct of the hearings, the appeals court found fault with the district court's ruling because none of the agency officials subjected to the chairman's interrogations was an agency decision-maker, and

> even if [the court] assume[s] that the *Pillsbury* doctrine would reach advisors to the decision-maker, Mr. Brown [a close advisor to the Secretary who briefed him on the cases at the time he decided to approve the Board's recommended decisions] was not asked to prejudge any of the claims by characterizing their validity. [Citation omitted.] The worst cast that can be put upon the hearing is that Brown was present when the subcommittee expressed its belief that certain villages had made fraudulent claims and that the BIA decisions were in error. This is not enough.[26]

With regard to the chairman's letter, however, the court of appeals found "it compromised the appearance of the Secretary's impartiality," and thereby tainted the decision, citing *Pillsbury* approvingly. But rather than reinstate the BIA decisions, the appeals court remanded the matter to the secretary of the interior, since three and a half years had passed and a new secretary of a new administration had taken office, thus making possible a fair and dispassionate treatment of the matter.[27]

b. Gulf Oil Corporation v. FPC (1977)

Other than *Koniag,* reviewing courts have consistently upheld congressional intercessions into adjudicatory proceedings against undue political influence challenges. In *Gulf Oil Corporation v. FPC,*[28] for example, petitioners sought to overturn a Federal Power Commission (FPC) order requiring delivery of larger quantities of natural gas by Gulf Oil in adherence with a contract executed pursuant to a previous FPC order. In upholding the order, the appeals court rejected a claim that members and staff of the FPC had been subjected to improper interrogation and interference in the decision of the matter by the House Interstate and Foreign Commerce Committee's Subcommittee on Oversight and Investigations. The court conceded *Pillsbury's* relevance to such an adjudicatory proceeding but said that it had to be sensitive to the legislative importance of congressional committees in oversight and investigation and recognized that "their interest in the objective and efficient operation of regulatory agencies serves a legitimate and wholesome function with which we should not lightly interfere."[29]

Balancing the interests of integrity of an adjudicatory proceeding and congressional oversight, the court found determinative distinctions between *Pillsbury* and the case before it. First, the court found that the subcommittee was not

24. *Id.* at 1371.

25. *Id.*

26. Koniag, Inc., Uyak v. Andrus, 580 F.2d 601, 610 (D.C. 1978).

27. *Id.*

28. Gulf Oil Corp. v. Federal Power Comm'n., 563 F.2d 588 (3d Cir. 1977).

29. *Id.* at 610.

concerned with the merits of the agency's decision, as was the situation in *Pillsbury,* but "was directed at accelerating the disposition and enforcement of the FPC's compliance procedures."[30] Nor did the court find any effort to influence the commission in reaching any decision on the specific facts of the case or any factual prejudice. Any intrusions into the merits of the FPC's decision were found to be "incidental to the purpose of accelerating" the agency's disposition of the case. Those "incidental intrusions" were found not to have had serious influence on the agency because (1) the interrogation did not reflect the majority view of the subcommittee; (2) the agency did not accede to members' requests; and (3) the ultimate resolution of the issue was the same as it had been in proceedings concluded a year prior to the hearings in question.[31] The court thus concluded that the claim of prejudice could not be sustained under the facts and circumstances of the case.

c. Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers (1983)

In *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*,[32] an appeals court dealt with the effects of a senator's prior congressional investigations on the subject of debarment of government contractors convicted of bid-rigging and similar offenses, and his recommendations and status inquiries to agency officials contemporaneous with an ongoing debarment proceeding. The plaintiff, the subject of the debarment proceeding, claimed that the senator's persistence in the subject area, and his particular interest in his case, compromised the integrity of the administrative proceeding. The district court agreed. On appeal, the D.C. Circuit reversed.

The appeals court acknowledged that a judicial or quasi-judicial proceeding could be invalidated by the appearance of bias or pressure and that under that standard "pressure on the decision-maker alone, without proof or effect on the outcome, is sufficient to vacate a decision."[33] Thus, "[t]he test is whether 'extraneous factors intruded into the calculus of consideration' of the *individual* decision-maker."[34] In the case before it, the court found neither actual nor apparent congressional interference since the senator had never communicated directly with the ultimate decision-maker in the debarment, the assistant judge advocate general for civil law, nor was it shown that that official was even aware of the senator's communications.

d. State of California v. FERC (1992)

More recent appellate court rulings continue the trend of the courts declining to interfere with congressional attempts to influence quasi-adjudicatory proceedings, clearly emphasizing judicial recognition of the important constitutional role of oversight and investigation. In *State of California v. FERC*,[35] an applicant for a license to build a hydroelectric facility challenged the award of a conditioned license on the grounds that letters from the chairman of the House Energy and Commerce Committee unduly influenced the entire sequence of Federal Energy Regulatory Commission orders which resulted in the conditioned license.

In three letters to FERC, the chairman had complained that the agency had not followed a recently enacted dispute resolution procedure under the Federal Power Act.[36] In response to those complaints, FERC reopened dispute resolution negotiations with state and federal fish and wildlife agencies prior to the conclusion of the licensing process. The chairman also sent two letters to the agency urging it to review its two-decades-old interpretation of the Federal Land Policy and Management Act (FLPMA) as giving FERC exclusive jurisdiction over federal hydroelectric development. The chairman put forth a contrary view and requested and received support for that view in a report by the General Accounting Office (GAO). FERC, after initially rejecting the chairman's contention and reaffirming its long-held interpretation during the course of the licensing proceeding, reversed its course after receiving the GAO report.

30. *Id.* at 611.

31. *Id.*

32. Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers, 714 F.2d 163 (D.C. Cir. 1983).

33. *Id.* at 169.

34. *Id.* at 170 (emphasis by court).

35. State of California v. FERC, 966 F.2d 1541 (9th Cir. 1992).

36. Federal Power Act, 16 U.S.C. 803 (j) (1996)

The appeals court rejected both objections, holding that neither rose "to the level of undue congressional influence described in *Pillsbury* nor do they adversely affect the appearance of impartiality in this case."[37] FERC's decision to open the dispute resolution process after receipt of the chairman's letters was designed, the court found, to "correct a procedural problem" and "was based on its own independent analysis of the record in this proceeding, and was an effort to establish fair procedures to allow the parties and the Commission to investigate."[38] Since the negotiation requirements were so recent both the chairman "and the Commission were understandably concerned about getting off to a good start."[39] With respect to the successful urging that FERC change its long held interpretation of FLPMA, the court explained that *Pillsbury* was not implicated because "FERC gave a reasoned explanation for its reversal of its original interpretation of FLPMA, and this provides substance for its claim that it addressed and resolved the right-of-way issue under its own independent and detailed analysis of the issue."[40] The court concluded, "[i]n short, [the chairman's] letters, expressing his views on the 10(j) and FLPMA issues, do not constitute the type of intense and undue congressional influence that was present in *Pillsbury*."[41]

e. ATX, Inc. v. U.S. Department of Transportation (1994)

In *ATX, Inc. v. U.S. Department of Transportation*,[42] the appeals court upheld the Department of Transportation's (DOT's) denial of an application by ATX, Inc. to operate a new airline in Boston, Atlanta and Baltimore/Washington. The court found that DOT's denial was reasonable, and was not unduly influenced by vocal, hostile, and intense opposition of members of Congress to the ATX application.

Congressional opposition to ATX arose even prior to the filing of its application, based largely on the perceived reputation of Frank Lorenzo, its founder and majority owner, from his previous record managing a major airline. Twenty one members of Congress wrote the secretary of transportation urging him to deny ATX's application even before it had been filed, because of Lorenzo's alleged unfitness to own and operate an airline.[43] Most of the signatures on the letter were members of the House committee with jurisdiction over DOT, including the chairs of the full committee, the aviation subcommittee, and the oversight subcommittee.

After ATX filed its application, 125 House and Senate members wrote the secretary to declare their opposition. Two congressmen introduced legislation to prohibit Lorenzo from re-entering the airline industry.[44] The secretary responded by acknowledging receipt of the letters, refusing to comment on the merits, and putting the correspondence in a file for "contacts outside the record of the case."[45] During the hearing on ATX's application one of the congressional letter writers was allowed to testify as to his opposition. Ultimately the department rejected the application on the ground that ATX "lacked both managerial competence to operate an airline and a disposition to comply with regulatory requirements."[46]

In rejecting the undue influence challenge, the court acknowledged that the widespread and loud congressional opposition toward the applicant in this quasi-judicial proceeding required close judicial scrutiny to allay due process concerns with the alleged appearance of bias.

The court commented that the influence with which it was concerned is "when congressional influence shapes the determination of the merits." The court commented that the lengthy opinion supporting the decision based on the administrative record "was clear and open to scrutiny and [the] decision was fully supported by the record." The court also noted that the secretary of transportation "did not reverse the [Administrative Law Judge]'s recommendation nor was

37. 966 F.2d at 1552.

38. *State of Cal.*, 966 F.2d at 1541.

39. *Id.*

40. *Id.*

41. *Id.*

42. ATX, Inc. v. U.S. Dep't of Transp., 41 F.3d 1522 (D.C. Cir. 1994).

43. *Id.* at 1524.

44. *Id.* at 1525.

45. *Id.*

46. *Id.* at 1526.

the merits decision a close one on the record."[47] The testimony of the congressman at the hearing did not create "a fatal appearance of bias as it was based almost entirely on information already available to the ALJ, was void of threats, and was not relied on in any of the decisions, which were accompanied by extensive findings and reasons."[48] The court concluded:

> . . . Here, the nexus between the pressure exerted and the actual decision makers is so tenuous and the evidence so adequately establishes ATX's ineligibility for an airline certificate that we conclude political influence did not enter the decision maker's "calculus of consideration."[49]

f. ***Schaghticoke Tribal Nation v. Kempthorne (2010)***

The most recent ruling addressing claims of improper political influence in quasi-adjudicatory agency proceedings encapsulates the above-describe trend in judicial deference, in a dispute that was more intense and acrimonious than any of the others. *Schaghticoke Tribal Nation v. Kempthorne*[50] involved the Schaghitcoke Nation's (STN) 2002 petition to the Bureau of Indian Affairs (BIA) of the Department of the Interior (DOI) for "acknowledgement" under BIA rules that it is an Indian tribe legally eligible for various protections, services and benefits from the federal government (including exemption from state gambling laws). In January 2004, after an extended review process, the acting assistant secretary of DOI formally determined that the STN had met the legal criteria for acknowledgment, despite difficulties with respect to two of the criteria.[51]

There was an immediate negative and fierce reaction directed at DOI from Connecticut's governor, attorney general, and a majority of the state's congressional delegation. Throughout 2004 and 2005 elected officials, individuals, and spokespersons lobbied the interior secretary, the BIA, the White House and even the district court to reverse the determination. The House and Senate subcommittees that oversaw DOI held a number of hearings focused on the recognition decision, where lawmakers and witnesses called for legislative invalidation of the agency determination and the imposition of a moratorium on all BIA acknowledgement proceedings.[52]

Opponents of tribal recognition filed a request for reconsideration of the decision with the Interior Board of Indian Appeals (IBIA). In May 2005 the IBIA vacated the determination, and remanded the case to the BIA for further consideration. In October 2005, the Department of the Interior formally denied the STN's acknowledgement petition.[53]

The STN challenged the validity of the denial on the grounds that it was an impermissible product of undue political influence. The district court, relying heavily on the *Peter Kiewit* and *ATX* precedents, held that the determinative focus in a challenge to the integrity of an agency's adjudicative process is not on the political maelstrom that surrounds it, but whether the political pressure was intended to and actually did cause the responsible agency decision maker to be influenced by factors not relevant to the controlling statute.[54] Critical to that determination was the court's finding that in early 2005 the interior secretary had validly delegated to James Cason, the associate deputy secretary, some of the duties of the then-vacant position of assistant secretary for Indian affairs, including acknowledgement decisions. The court credited Cason's testimony, and that of others, that he was not privy to or influenced by the hearings or any of the ex parte communications that took place. The court concluded, "Here…the nexus between the pressure exerted and the actual decision-maker is tenuous at best, and the evidence adequately establishes STN's ineligibility for tribal recognition."[55] On appeal, the Second Circuit upheld the district court's decision, relying on similar reasoning.[56]

47. *ATX*, 41 F.3d at 1528-29 (emphasis in original).

48. *Id.* at 1529.

49. *Id.* at 1529, 1530; *see also*, Pierce Treatise, *supra* note 1 (discussing, with approval, the appeals court ruling in *ATX*).

50. Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389 (D. Conn. 2008), *aff'd* 587 F. 3d 132 (2d Cir. 2009), *cert. denied* 131 S. Ct. 127 (2010).

51. *Schaghticoke*, 587 F. Supp. at 401.

52. *Id.* at 402-04.

53. *Id.* at 404-06.

54. *Id.*

55. *Id.* at 410-11.

56. Schaghticoke Tribal Nation v. Kempthorne, 587 F. 3d 132 (2d. Cir. 2009).

3. Informal Decision-making Rulings since *D.C. Federation*

a. American Public Gas Association v. FPC (1978)

American Public Gas Association v. *FPC*[57] arose from a Federal Power Commission (FPC) ratemaking conducted pursuant to section 553 of the Administrative Procedure Act. The commission issued Opinion 770 in July 1976, and on rehearing, issued a revised version, Opinion 770-A, in November of the same year. In August 1976, while the rehearing was pending, Rep. John Moss, chairman of the Oversight Subcommittee of the House Interstate and Foreign Commerce Committee, summoned the commissioners to appear at a hearing. Chairman Moss subjected the commissioners to what the reviewing court described as an "intensive examination." Moss stated at the hearing that "I am most committed as an adversary. I find that I am outraged by Order 770. I find it very difficult to comprehend any standard of just and reasonableness in the decision...."

These expressions, coupled with what the court characterized as the subcommittee counsel's adversarial interrogation about particular factors in the cost analysis of Opinion No. 770, formed the basis of the claim of prejudice.[58]

In reaching the question whether the commission should be disqualified, the court related the facts of *Pillsbury* and described its holding at length.[59] However, despite this rhetorical obeisance to the spirit of *Pillsbury*, the court did not disqualify the agency, because the natural gas producers, though fully aware of all these facts, failed to ask the Commission to disqualify itself before the ratemaking was finalized. The court said that a party cannot, with knowledge of the alleged taint, stay silent in hopes of a favorable decision, and then, when the decision is unfavorable, seek its reversal on the ground of partiality: "A party, knowing of a ground for requesting disqualification, cannot be permitted to wait and decide whether he likes subsequent treatment that he receives."[60] But the court did not end its analysis there. The court went on to note that there is nothing to lead the court to find that actual influence affected Opinion No. 770-A; and the fact that insofar as any actions of the commissioners themselves are concerned no appearance of partiality is evident.[61]

In essence, then, the court's decision turned on its finding of no actual impact of the congressional intervention on the agency decision. Since the court earlier made clear it understood the differing standards applied by the *Pillsbury* and *D.C. Federation* rulings,[62] it would appear to have considered the proceeding closer in type or form to *D.C. Federation*.

b. Town of Orangetown v. Ruckelshaus (1984)

In *Town of Orangetown* v. *Ruckelshaus,*[63] the town sought to prevent the Environmental Protection Agency (EPA) and the New York State Department of Environmental Conservation (NYSDEC) from approving grants that would modernize an outmoded and overloaded sewage treatment plant. The town argued that improper political pressure by state and local officials on EPA caused EPA to reconsider and relax certain conditions on the grants that it had originally imposed. The Second Circuit held that in a non-adjudicatory proceeding involving the disbursement of funds, it had to be shown that "political pressure was intended and did cause the agency's action to be influenced by factors not relevant under the controlling statute."[64] Here, the court stated,

57. American Public Gas Ass'n v. Fed. Power Comm'n, 567 F.2d 1016 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978).

58. *APGN*, 567 F.2d at 1068. An interesting judicial handling of a taint situation may be seen in Aera Energy LLC v. Salazar, 642 F. 3d 212 (D.C. Cir. 2011). An initial final decision-maker in a quasi-adjudicatory proceeding admitted that he had been influenced by a political source. The agency ordered a new formal evidentiary hearing with a new final decision-maker. The appeals court held that the agency had acted properly and removed the political taint, which allowed the original decision refusing to extend a lease to stand.

59. *APGN*, 567 F.2d at 1069.

60. *Id.*

61. *Id.* at 1070.

62. *Compare* the discussion of *Pillsbury*, 567 F.2d at 1068, *with D.C. Fed'n*, 567 F.2d at 1069.

63. Town of Orangetown v. Ruckelshaus, 740 F.2d 185 (2d Cir. 1984).

64. *Id.* at 188.

> "The potential effect of the proposed grant on area development is one of the relevant factors for the EPA to consider . . . and elected officials should not be precluded from bringing those factors to administrators' attention. [citing *Sierra Club* v. *Costle*, discussed below] … Orangetown 'may not rest upon mere conclusory allegations' of improper political influence as a means of obtaining a trial."[65]

Since the EPA decision whether to impose conditions on the grants was not adjudicatory in nature but "an administrative one dealing with the disbursement of grant funds, and required no adversary proceeding," the appeals court concluded that the town did not have the status of a party and was not entitled to notice and opportunity to be heard.[66]

c. Chemung County v. Dole (1986)

Chemung County v. *Dole*[67] involved a protest over the award of a contract by the Federal Aviation Administration (FAA) to locate and build a flight service station. The contract was originally awarded to Elmira, New York (in Chemung County) but was rescinded and then awarded to Buffalo, New York. Chemung County claimed that political pressure brought on the FAA by two New York congressmen improperly affected the award. Adopting the rule announced in its *Town of Orangetown* ruling, the appeals court found no undue political influence, because the congressmen's actions were limited to meeting with a GAO investigator, and writing letters to the FAA urging it to comply with statutory contracting requirements.[68]

d. DCP Farms et al v. Yeutter (1992)

In *DCP Farms et al* v. *Yeutter*[69] the Fifth Circuit addressed the issue whether the denial of farm subsidy payments had been tainted by the intercession of a powerful congressman prior to commencement of a Department of Agriculture adjudication.

The subject of the adjudication was whether DCP Farms, an aggregation of 51 irrevocable agricultural trusts, was legally eligible to receive over a million dollars in farm subsidies despite a statutory provision limiting subsidies to $50,000 per "person." Before the proceeding began, the Department of Agriculture's inspector general (IG) issued a report on abuses of the farm subsidy program which highlighted DCP Farms as an example of "egregious violations of the $50,000 per person limit."[70] The report received considerable publicity and reached the attention of the jurisdictional subcommittee of the House Agriculture Committee. Staff of the subcommittee chairman met with department officials to discuss the issues raised by the IG report in late 1989. DCP Farms was specifically discussed.

In December 1989 the chairman wrote to the secretary of agriculture about the reports of abuses in the subsidy program, citing DCP Farms as an example. The chairman received assurance from the secretary that the DCP Farms case was under administrative review and that the department would "take a very aggressive position in dealing with this case."[71]

In June 1990 the Department of Agriculture issued a decision finding that DCP Farms had adopted schemes to evade the payment limitation provisions of the statute, and was ineligible to receive any subsidy payments for the 1989, 1990 and 1991 crop years. DCP Farms appealed and requested a hearing, which was set for December 12, 1990. Before the hearing date DCP Farms learned of the meeting with the chairman's staff and of the chairman's letter and successfully sued to enjoin the hearing on the ground, among others, that improper congressional interference denied them due process.[72] They contended that because the case involved an adjudication, *Pillsbury*'s "mere appearance of bias" standard governed.

65. *Id.*
66. *Id.* at 188-89.
67. Chemung County v. Dole, 804 F.2d 216 (2d Cir. 1986).
68. *Id.* at 222.
69. DCP Farms et al. v. Yeutter, 957 F.2d 1183 (5th Cir. 1992), *cert. denied,* 506 U.S. 953 (1992).
70. *DCP Farms*, 957 F.2d at 1186.
71. *Id.* at 1186.
72. *Id.* at 1186-87.

The Fifth Circuit rejected the argument in an opinion that recognized the need to permit political oversight with respect to policy issues Congress has entrusted to agency decision-makers. The appeals court first rejected the applicability of *Pillsbury* because "the contact here occurred well before any proceeding which could be considered judicial or quasi-judicial . . . There was no hearing on the merits of DCP Farms' application for farm subsidy payments because DCP Farms abandoned the administrative process for this litigation."[73] The court saw the dispute between DCP Farms and the department as part of a larger policy debate and rejected any connection between the preliminary processing of DCP Farms' application and the appeals hearing that would raise *Pillsbury* issues:

> In short, the congressional communication here was not aimed at the decision-making process of any quasi-judicial body…The dispute between the USDA and DCP Farms was part of a larger policy debate. Applying *Pillsbury's* stringent "mere appearance of bias" standard at this juncture of administrative process would erect no small barrier to Congressional oversight. It reflects an insular view of these administrative processes for which we find no warrant. We are unwilling to so dramatically restrict communications between Congress and the executive agencies over policy issues. Appearance of bias is not the standard.[74]

The court emphasized the need to protect the proper and effective workings of the political process:

> It would be unrealistic to require that agencies turn a deaf ear to comments from members of Congress. The agency's duty, so long as it is not acting in its quasi-judicial capacity, is simply to "give congressional comments only as much deference as they deserve on the merits" [*S.E.C. v. Wheeling-Pittsburgh Steel Corp.,* 648 F. 2d 118, 126 (3d Cir. 1981) (en banc)].
>
> …In particular, an agency's patient audience to a member of Congress will not by itself constitute the injection of an extraneous factor. Nor would a simple plea for more effective enforcement of a law be the injection of an improper factor. A truly extraneous factor must take into account "considerations that Congress could not have intended to make relevant," *D.C. Federation*, 459 F. 2d at 1247.
>
> Congressional "interference" and "political pressure" are loaded terms. We need not attempt a portrait of all their sinister possibilities, even if we were able to do so. We can make plain that the force of logic and ideas is not our concern. They carry their own force and exert their own pressure. In this practical sense they are not extraneous. That a congressman expresses the view that the law ought not sanction the use of fifty-one irrevocable trusts to gain $1.4 million in subsidies is not impermissible political "pressure." It certainly injects no extraneous factor. We find no due process right in these preliminary efforts to persuade the government to grant farm subsidies sufficient to exclude the political tugs of the different branches of government, and we see nothing more here. We reject the holding of the district court that DCP Farms could ignore the administrative procedure yet available to it and turn to the consequence of this bypass of remedies.[75]

4. Rulemaking Cases Since D.C. Federation

a. Texas Medical Association v. Mathews (1976)

In one of the first cases to be decided after *D.C. Federation*, a district court applied its principles to find an impermissible congressional intervention in an agency rulemaking proceeding. In *Texas Medical Association* v. *Mathews*,[76] the court considered plaintiff's contention that congressional pressure should invalidate a decision of the Department of Health, Education and Welfare (HEW) dividing Texas into nine Professional Standards Review Organizations (PSRO). The

73. *Id.* at 1187.

74. *Id.* at 1187-88.

75. *Id.* at 1188.

76. Texas Medical Association v. Mathews, 408 F. Supp. 303 (W.D. Tex. 1976).

department, after consulting with the plaintiff and several other interested groups, first announced it would form one statewide PSRO. But after a lengthy meeting with Sen. Wallace Bennett, and a senior staff member of the Senate Finance Committee (sponsor of the relevant legislation), a department official abruptly changed his mind and called for the division of Texas into nine PSROs.

The court noted that while it had no evidence as to what Sen. Bennett or the staffer may have said during the meeting, HEW was unable to adequately explain its sudden reversal of decision with regard to the number of PSROs so soon after the meeting.[77] Moreover, the court found "proof of a pattern of undue influence by the same congressional sources permeating HEW's entire administrative process relative to PSRO designation for Texas."[78] Applying *D.C. Federation's* principle that "agency action is invalid if based, even in part, on pressures emanating from Congressional sources,"[79] the court concluded that "the fact that an agency decision is a 'little pregnant' with pressures emanating from Congressional sources is enough to require invalidation of the agency action. Especially should this be the law where, as here, the invasive Congressional source has financial leverage on the involved agency."[80]

While *Mathews* is not inconsistent with *D.C. Federation*, the holdings in *U.S. ex rel Parco* v. *Morris* and *Sierra Club* v. *Costle*, discussed next, appear to reflect more accurately the nature and extent of the currently prevailing judicial deference to congressional attempts to influence policymaking in the rulemaking process.

b. United States ex rel Parco v. Morris (1977)

United States ex rel Parco v. *Morris*[81] involved a challenge by non-citizens eligible for deportation to the Immigration and Naturalization Service's rescission of a longstanding operating instruction which would have allowed them to extend the date of their voluntary departure. Plaintiffs contended that the change in policy was invalid because it was precipitated by the direct pressure applied by Rep. Peter Rodino, who was then chairman of the subcommittee responsible for overseeing administration of the immigration laws.

Despite the INS's concession that Rep. Rodino's request was the direct impetus for the change in policy, the district court rejected the plaintiffs' claims. The court distinguished *D.C. Federation* because that holding was based upon a "public and enforceable threat" by a congressman to withhold public funds for a particular purpose unless an agency official acceded to the congressman's wishes, and evidence that the official's decision was based in part on that pressure.[82] The court went on to note the importance of the nature of the proceeding in analysis of such cases.

> [*D.C. Federation*'s] analysis of this principle distinguishes sharply between agency action which is "judicial" or "quasi-judicial" and agency action which is "legislative." The former concept related to agency adjudication of a particular, individual case, or when it renders a decision on the record compiled in formal hearings; in such instance the consideration of extraneous pressuring influences undermines the fairness of the hearing accorded the adverse parties....On the other hand, when the agency action is purely "legislative," as in the informal rulemaking involved here, the decision "cannot be invalidated merely because the ... action was motivated by impermissible considerations" any more than can that of a legislature.[83]

77. *Texas Medical*, 408 F. Supp. at 312-13.

78. *Id.* at 310.

79. *Id.* at 306.

80. *Id.* at 313.

81. United States ex rel Parco v. Morris, 426 F. Supp. 976 (E.D. Pa. 1977).

82. *Id.* at 982.

83. *Id.* (internal citations omitted).

The court concluded that since plaintiffs did not claim that Rep. Rodino had interfered with the "quasi-judicial decision to deny them extended voluntary departure,"[84] but rather were attacking the motivation of the official in changing the agency's policy, they had to meet a more stringent standard of proof. The court ruled they had failed to do so.[85]

c. Sierra Club v. Costle (1981)

The seminal case in this line is *Sierra Club* v. *Costle*,[86] in which the Court of Appeals for the D.C. Circuit found no taint of a rulemaking proceeding by an agency's failure to docket post-comment period meetings with the Senate majority leader. The court concluded that it would not set aside a rulemaking simply on the grounds that political pressure had been exerted in the process. It ruled that there has to be a showing that "the content of the pressure on this [decision-maker] is designed to force him to decide upon factors not made relevant by Congress in the applicable statute" and also that the determination made "must be affected by those extraneous considerations."[87]

More particularly, the Sierra Club alleged that an "*ex parte* blitz" conducted after the comment period for an informal rulemaking had caused the Environmental Protection Agency (EPA) to back away from its support of a more stringent emission standard, and was therefore unlawful and prejudicial.[88] Post-comment period communications included a number of oral conversations and briefings between agency officials and private parties and other government officials, including the majority leader of the Senate and the president.

The appeals court noted that the statute in question there did not require the docketing of all post-comment period conversations and meetings. The court refused to apply a blanket rule requiring such docketing. To the contrary, where the nature of the rulemaking is general policymaking, the court expressed the view that "the concept of *ex parte* contacts is of more questionable utility." The court continued,

> Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives and upon whom their commands must fall. As judges we are insulated from these pressures because of the nature of the judicial process in which we participate; but we must refrain from the easy temptation to look askance at all face-to-face lobbying efforts, regardless of the forum in which they occur, merely because we see them as inappropriate in the judicial context.[89]

The court inferred from the statutory scheme that only oral comments "of central relevance to the rulemaking" should be placed in the record:

> [T]he statute itself vests EPA with discretion to decide whether "documents" are of central relevance and therefore must be placed in the docket; surely EPA can be given no less discretion in docketing oral communications concerning which the statute has no explicit requirements whatsoever. Furthermore, this court has already recognized that the relative significance of various communications to the outcome of the rule is a factor in determining whether their disclosure is required. A judicially imposed blanket requirement that all post-comment period oral communications be docketed would, on the other hand, contravene our limited powers of review, would stifle desirable experimentation in the area by Congress and the agencies, and is unnecessary for achieving the goal of an established, procedure-defined docket, *viz.*, to enable reviewing courts to fully evaluate the stated justification given by the agency for its final rule.[90]

84. *Id.*

85. *Parco*, 426 F. Supp. at 976 (The court ultimately declared the rescission invalid for failure to comply with the APA's rulemaking and publication requirements.); Freedom of Information Act, 5 U.S.C. 552 (a)(1), 553 (2000).

86. Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

87. *Id.* at 409.

88. *Id*. at 386.

89. *Id*. at 400-01 (footnotes omitted).

90. *Sierra Club*, 657 F.2d at 402-04 (footnotes omitted).

The appeals court concluded that none of the non-docketed post-comment meetings, including those with the Senate majority leader and the president, required docketing. It stated that before an administrative rulemaking could be overturned simply on the grounds of political pressure, it had to be shown that "the content of the pressure on the [decision-maker] is designed to force him to decide upon factors not made relevant by Congress in the applicable statute" and also that the determination made "must be affected by those extraneous considerations."[91] Although the meetings were called at the behest of the majority leader "in order to express 'strongly' his views"[92] on the subject of the rulemaking, it found that the agency made no commitments to him nor was there evidence that he used "extraneous" pressures to further his position. The court characterized the senator's efforts, since they were exerted in a rulemaking proceeding, as within the accepted boundaries of the political process.

> ... Americans rightly expect their elected representatives to voice their grievances and preferences concerning the administration of our laws. We believe it entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking, so long as individual Congressmen do not frustrate the intent of Congress as a whole as expressed in statute, nor undermine applicable rules of procedure. Where Congressmen keep their comments focused on the substance of the proposed rule—and we have no substantial evidence to cause us to believe Senator Byrd did not do so here—administrative agencies are expected to balance Congressional pressure with the pressures emanating from all other sources. To hold otherwise would deprive the agencies of legitimate sources of information and call into question the validity of nearly every controversial rulemaking.[93]

Similarly, with regard to a meeting involving the president, the court held that as long as there is factual support in the record for the agency's outcome, it does not matter that "but for" the presidential input it would have gone the other way.

> Of course, it is always possible that undisclosed Presidential prodding may direct an outcome that is factually based on the record, but different from the outcome that would have obtained in the absence of Presidential involvement...But we do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power.[94]

5. Rulings Respecting Congressional Influence on Agency Investigatory Process

a. SEC v. Wheeling-Pittsburgh Steel Corp. (1981)

On rare occasions the claim is made that an agency investigation has been instigated by congressional pressure or influence, and therefore tainted by the political intervention. Parties making this claim generally cite the appellate court ruling in *SEC* v. *Wheeling-Pittsburgh Steel Corp.*, and argue that it precludes any agency contact with members of Congress which would give the appearance that an agency is taking an enforcement action at the behest of a member or committee. [95]

However, *Wheeling Pittsburgh*'s holding is considerably narrower. The case involved the Securities and Exchange Commission's initiation of an informal investigation of Wheeling-Pittsburgh Steel Corporation after receiving a letter from a senator suggesting that Wheeling had violated Section 10(b) of the Securities Exchange Act of 1934. During the period of the initial informal investigation, there was considerable contact between the SEC staff attorney conducting the

91. *Id.* at 409.

92. *Id.*

93. *Id.* at 409-10 (footnote omitted).

94. *Id. See also,* New York v. Reilly, 969 F. 2d 1147 (D.C. Cir. 1992) ("The fact that EPA re-evaluated its conclusions in light of the advice of the President's Council on Competitiveness does not mean that EPA failed to exercise its own expertise in promulgating the final rule."). *But cf.* Portland Audubon Society v. Endangered Species Comm., 984 F. 2d 1534, 1541, 1545 (9th Cir. 1993) (finding that President's ex parte directions to the members of a statutory commission, whom he had appointed and were removal by him, to vote for a particular policy option violated the APA's *ex parte* prohibition because that decision was required to be made "on the record.").

95. SEC v. Wheeling-Pittsburgh Steel Corp., 482 F. Supp 555 (W.D. Pa. 1979), *vacated and remanded*, 648 F.2d 118 (3d Cir. 1981) (*en banc*)

investigation, the senator's office, and competitors of Wheeling who were allegedly colluding with the senator. The senator was also seeking to pass legislation that would prevent Wheeling from obtaining federal loan guarantees if it was under investigation by a federal agency.

Thereafter, the SEC ordered a formal investigation of the matter, and issued a subpoena *duces tecum* to Wheeling and its CEO. After the CEO refused to answer certain questions, the SEC sought enforcement of its subpoena. Wheeling argued that the subpoena was issued in bad faith and for the purpose of harassment; and that the investigation constituted an abuse of the SEC's investigatory power by competitors of Wheeling who were opposed to the grant of certain federal loan guarantees to Wheeling.

The district court refused to enforce the subpoena. Although it specifically rejected the claim of bad faith on the part of the agency, it concluded that, "under the totality of circumstances," enforcement would be an abuse of the court's process.[96] The court reached this conclusion because it believed that the SEC had allowed biased third parties to improperly influence the investigation process, although it conceded that the agency did not adopt the biased motives of the third parties.[97]

A panel of the Third Circuit reversed, concluding that a court could not refuse to enforce administrative subpoenas issued in good faith pursuit of a statutorily authorized purpose. The panel concluded that bias of third parties was irrelevant where the agency had proceeded in good faith and that to invalidate agency action on the basis of an abuse of process theory independent of the bad faith defense was improper.

The case was reargued before the Third Circuit *en banc*, which by a 6-4 vote remanded the case to the district court in light of its ruling that even in the absence of bad faith on the part of an agency, it would not enforce an administrative subpoena if it was issued because of congressional influence and it was shown that the agency knew its process was being abused, that it knowingly did nothing to prevent the abuse, and that it vigorously pursued the frivolous charges.[98] The *en banc* court stated:

> We do not doubt the usefulness to administrative agencies of information gained from third parties. Nor do we doubt that frequently the motivations of informants are less than altruistic. See *United States v. Cortese*, 614 F.2d 914 (3d Cir. 1980). But we cannot simply avert our eyes from the realities of the political world: members of Congress are requested to, and do in fact, intrude, in varying degrees, in administrative proceedings….
>
> The duty of the SEC, therefore is not to ignore information given to it by congressmen, but to "give congressional comments only as much deference as they deserve on the merits." *Id.* An administrative agency that undertakes an extensive investigation at the insistence of a powerful United States Senator "with no reasonable expectation" of proving a violation and then seeks federal court enforcement of its subpoena could be found to be using the judiciary for illicit purposes. We need not lend the process of the federal courts to aid such behavior.[99]

The appeals court made it clear that the bad faith defense need not be the sole basis for denial of enforcement, and that agency acquiescence in an abuse of its own process may lead to a finding of abuse of the court's process. The court distinguished between the two, noting that "bad faith connotes a conscious decision by an agency to pursue a groundless allegation," while "an agency may be found to be abusing the court's process if it vigorously pursued a charge because of the influence of a powerful third party without consciously and objectively evaluating the charge."[100]

The court also emphasized the point that it was improper for the district court to have taken into account the motivation of third parties in determining either bad faith or abuse of process. "This court has previously made clear that the proper

96. *SEC*, 482 F. Supp. at, 567.

97. *Id.* at 565-66.

98. *Wheeling-Pittsburgh*, 648 F.2d at 125 (3d Cir. 1981).

99. *Id.*, at 126 (footnotes omitted).

100. *Id.* at 125 n.9.

focus in a challenge to an administrative subpoena is motivation of the agency itself, not that of third parties," citing *United States v. Cortese*, 614 F.2d 914, 921 (3d Cir. 1980).[101] The requirement of a finding of "institutional" bad faith rather than that of an individual agent, or the refusal to allow attributing the motives of third parties to an agency, is well established.[102] The court concluded:

> At bottom, this case raises the question whether, based on objective factors, the SEC's decision to investigate reflected its independent determination, or whether that decision was the product of external influences. The reality of prosecutorial experience, that most investigations originate on the basis of tips, suggestions, or importunings of third parties, including commercial competitors, need hardly be noted….But beginning an informal investigation by collecting facts at the request of a third party, even one harboring ulterior motives is much different from entering an order directing a private formal investigation pursuant to 17 C.F.R. § 202.5 (1980), without an objective determination by the Commission and only because of political pressure. The respondents are not free from an informal investigation instigated by anyone, in or out of government. But they are entitled to a decision by the SEC itself, free from third-party political pressure, that a "likelihood" of a violation exists and that a private investigation should be ordered. See 17 C.F.R. § 205.2(a). The SEC order must be supported by an independent agency determination, not one dictated or pressured by external forces. If an allegation of improper influence and abdication of the agency's objective responsibilities is made, and supported by sufficient evidence to make it facially credible, respondents are entitled to examine the circumstances surrounding the SEC's private investigation order.[103]

The Third Circuit, while accepting the possibility of finding that political pressure can taint an investigative proceeding under a variety of theories, has imposed on a litigant the burden of establishing a substantial factual predicate to support such a determination. Showing that there was some contact between Congress and an agency regarding an enforcement proceeding does not suffice.

Wheeling-Pittsburgh does represent something of a liberalization in an area where court review of agency requests for enforcement of administrative subpoenas has traditionally been severely circumscribed and narrow.[104] Some courts appear to have rejected *Wheeling-Pittsburgh* and are adhering to the traditional standard of high deference to agency subpoena issuance decisions.[105] In any event, we are aware of no court that has utilized the *Wheeling-Pittsburgh* standard to refuse to enforce an administrative subpoena because of alleged undue congressional influence.

b. *United States* v. *Armada Petroleum Corp. (1982)*

Several courts have subsequently acknowledged the *Wheeling-Pittsburgh* rationale in cases involving the issuance of subpoenas by the Department of Energy to resellers of petroleum products who had refused to voluntarily supply documents in the course of a valid agency audit. In each case the defendant company claimed, *inter alia*, that the chairman of the Oversight and Investigations Subcommittee of the House Energy and Commerce Committee had exerted improper influence on the agency official making the decision to issue the subpoena. In each instance the courts rejected the

101. *Id.* at 127.

102. *See, e.g.*, United States v. LaSalle National Bank, 437 U.S. 298, 316 (1978); United States v. Target Advertising, Inc., 257 F.3d 348, 355 (4th Cir. 2001); Pickel v. United State, 746 F.2d 176, 184 (3d Cir. 1984); EEOC v. Michael Construction Co., 706 F.2d 244, 251 n. 7 (8th Cir. 1983); NLRB v. Interstate Dress Carriers, Inc., 610 F.2d 99, 112 (3d Cir. 1979).

103. *Wheeling-Pittsburgh*, 648 F.2d at 130 (1981).

104. *See, e.g.*, LaSalle National Bank, 437 U.S. at 316-17; United States v. Morton Salt Co., 338 U.S. 632, 652 (1950); City of Chicago v. United States, 396 U.S. 162, 165 (1969) (agency decisions to conduct investigations are committed entirely to agency discretion); Union Mechling Corp. v. United States, 566 F.2d 722, 724-25 (D.C. Cir. 1977), Dresser Industries Inc. v. United States, 596 F.2d 1231, 1235 n. 1 (5th Cir. 1979), *cert. denied,* 444 U.S. 1044 (1980).

105. *See*, *e.g.*, United States v. Aero Mayflower Transit Co., 831 F.2d 1142, 1146-47 (D.C. Cir. 1987) (a court only has discretion to conduct an evidentiary hearing in a subpoena enforcement case in the unlikely situation where the party opposing the subpoena has presented affidavit evidence that the agency "is acting without authority or where its purpose in harassment of citizens."); United States v. Teeven, 745 F.Supp. 220, 224-227 (D. Del. 1990) (discussing *Aero* and concluding that *Wheeling-Pittsburgh* is still controlling in Third Circuit).

claims.[106] In *United States* v. *Armada Petroleum Corp.*, for example, the court acknowledged *Wheeling-Pittsburgh's* holding that an agency may not order an investigation "because of political pressure to do so," but found that where, as in the case before it, "the Congressional involvement is directed not at the agency's decision on the merits but at accelerating the disposition and enforcement of the pertinent regulations, it has been held that such legislative conduct does not affect the fairness of the agency's proceedings and does not warrant setting aside its order."[107]

c. United States v. American Target Advertising, Inc. (2001)

In *United States v. American Target Advertising, Inc.*,[108] the most recent decision in which the target of an administrative investigation invoked *Wheeling-Pittsburgh* principles, the Fourth Circuit, rejected the defendant's claim that the issuance of an investigative subpoena was a tool of harassment and intimidation exercised by the agency (the U.S. Postal Service) at the behest of a senator. The court acknowledged that the senator "has demonstrated a fair degree of hostility toward" the defendant. But the appeals court reiterated that that was not enough. The appellant "must show that the party actually responsible for initiating the investigation, *i.e.*, the Postal Service, has done so in bad faith."[109] The court found no evidence of bad faith and rejected American Target's request for discovery before the district court, noting "that such discovery is prohibited in these types of summary enforcement proceedings absent 'extraordinary circumstances.'" The appeals court advised that in order to obtain discovery, the target must distinguish himself "from the class of the ordinary respondent, by citing special circumstances."[110] The Fourth Circuit concluded that it had not done so there, stating: "when presented with evidence of unlawful conduct, the Government is not bound to investigate only those potential wrongdoers who support its policies. Because American Target failed to distinguish itself from the ordinary disgruntled respondent, it is not entitled to discovery regarding the genesis of the Postal Service's inquiry."[111]

In sum, it would appear that the assertions with respect to the *Wheeling-Pittsburgh* precedent will be unavailing even in situations of aggressive congressional intercessions. That case does not establish an "appearance of partiality" standard with respect to congressional contacts. A high degree of proof is needed to demonstrate that the agency's motivation in continuing an investigation is solely in acquiescence to congressional influence and without any regard to the adequacy of the grounds of the allegations.

106. United States v. FRB Petroleum, Inc., 703 F.2d 528, 532 (Temp. Emer. Ct. App. 1983); United States v. Phoenix Petroleum, 571 F. Supp. 16, 20 (S.D. Tex 1982); United States v. Armada Petroleum Corp., 562 F.Supp. 43, 50-51 (S.D. Tex. 1982). *See also*, United States v. Merit Petroleum, Inc., 731 F.2d 901, 904 (Em. Appeals 1984).

107. *Id. See also* United States v. Hayes, 408 F.2d 932 (7th Cir.1969), *cert. denied*, 396 U.S. 835 (1969) (the fact that a House subcommittee had expressed an interest in an Internal Revenue Service investigation did not show that the investigation was conducted for an improper purpose).

108. United States v. Am. Target Advertising, Inc., 257 F.3d 348 (4th Cir. 2001).

109. *Id.* at 355.

110. *Id.*

111. *Id.* at 356. For an instance in which a court found that a party alleging undue political influence on an agency had made a sufficiently "strong showing" of improper influence to be entitled to extraordinary discovery and examination of agency personnel, *see* Sokaogan Chippewa Community v. Babbitt, 961 F.Supp. 1276, 1280-86 (W.D. Wisc. 1997). The court warned that plaintiffs still need "to show that the pressure was intended to and did cause the Department of Interior's actions to be influenced by factors not relevant under the controlling statute." 961 F.Supp. at 1286. After the court's ruling all proceedings in the matter were suspended during the pendency of an independent counsel investigation. At the conclusion of that investigation the government and the tribes settled and the undue influence issue was not pursued. *See* Sokaogon Chippewa Community v. Babbitt, 214 F.3d 941, 944-45 (7th Cir. 2000).