

may have to the aforesaid modification.

IN THE MATTER OF
BAKERS OF WASHINGTON, INC., ET AL.

Docket 8309. Order, Nov. 23, 1964

Order granting leave to respondent and complaint counsel to file briefs on additional testimony taken by hearing examiner.

ORDER GRANTING LEAVE TO FILE

Additional testimony having been received in this matter for the purpose of permitting respondent Continental Baking Company an opportunity to show the contrary of the facts officially noticed in the Commission's decision of February 28, 1964 [64 F.T.C. 1079, 1118]; and

That additional testimony having been certified to the Commission, together with the examiner's recommendation that the Commission affirm its earlier decision; and

Respondent Continental Baking Company having moved on October 19, 1964, for leave to file proposed findings, conclusions, and exceptions to the recommendation of the examiner, together with reasons therefor; and

The Commission having determined that respondent and complaint counsel should be permitted to file, for the consideration of the

Commission, proposed findings, conclusions, exceptions, and reasons on that additional testimony:

It is ordered, That respondent and Commission counsel may, within fifteen (15) days after service upon them of this order, file with the Commission proposed findings, conclusions, exceptions, and reasons, based on the testimony certified to the Commission on September 24, 1964, and limited to the question of whether such testimony shows the contrary of the facts heretofore noticed by the Commission.

It is further ordered, That, within ten (10) days after service of the respective proposed findings, conclusions, exceptions, and reasons respondent and Commission counsel may each file a reply thereto.

Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

THE PURE OIL COMPANY, NO. 6640

SUN OIL COMPANY, NO. 6641

TEXACO, INC.,* NO. 6898

STANDARD OIL COMPANY (INDIANA), NO. 7567

SHELL OIL COMPANY, NO. 8537

Memorandum, Oct. 29, 1964

Memorandum of chairman explaining the reasons why he is withdrawing from the above cited proceedings.

MEMORANDUM OF CHAIRMAN DIXON

For the reasons set forth below, I am withdrawing from participation in each of these five proceedings.

On July 25, 1961, I made a speech in Denver, Colorado, before the National Congress of Petroleum Retailers, a trade association composed largely of service station owners or operators. This important segment of the small business community¹ had long been deeply concerned with a number of supplier-practices alleged to be widespread in the industry, particularly price discrimination, resale price fixing, and TBA "commission" arrangements, all of which are said to pose a threat to the continued existence of the "independent" wholesalers,

*During the pendency of this proceeding respondent changed its name from The Texas Company to Texaco, Inc.

¹ The 1958 Census reported 187,875 service stations in the United States.

jobbers, and retailers. Complaints from this sector of the industry² had prompted the Federal Trade Commission to commence a number of investigations and formal, adjudicatory proceedings—including the five involved here. Since that business group was the particular sector of the public that had the most immediate and direct interest in these proceedings, I thought it appropriate—if not my duty—to report to its members on the Commission's efforts in their industry. In that speech, therefore, I mentioned a number of cases, including some that had already been decided by the Commission, and others that were still pending before it.

One of the pending cases was *Texas Co.*, Dkt. 6485 [62 F.T.C. 1172], involving a charge that Texaco, through its power over its dealers' leases and supplies, and for the purpose of securing a "commission" from B. F. Goodrich, had compelled them to handle B. F. Goodrich tires, batteries, and accessories (TBA) rather than permitting them to deal in TBA of their own choice, in violation of Section 5 of the Federal Trade Commission Act. The Commission found this practice established by the record and issued its final administrative order to cease and desist on April 15, 1963.³

Texaco appealed this decision. On July 30, 1964, the Court of Appeals for the District of Columbia handed down its ruling, setting aside the order and directing dismissal of the complaint. *Texaco, Inc. v. Federal Trade Commission*, and *B. F. Goodrich Co. v. Federal Trade Commission*, 336 F. 2d 754 (D.C. Cir. 1964). The court held that (1) the Commission's decision was not supported by the record, and that (2) certain of the words used by me in the 1961 Denver speech indicated that I "had in some measure decided in advance that Texaco had violated the Act."

Since Standard, Pure, Shell, and Sun were mentioned in the same sentence⁴ and thus in the same context as Texaco, the court's finding that I was thereby disqualified to hear the earlier Texaco case is directly applicable to each of these cases in which disqualification was requested. Accordingly, I shall not participate in the Commission's deliberations in or disposition of *Pure Oil Co.*, Dkt. 6640; *Sun Oil Co.*, Dkt. 6641; *Texas Co.*, Dkt. 6898; *Standard Oil Co. (Ind.)*, Dkt. 7567; and *Shell Oil Co.*, Dkt. 8537.

² "A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so." He may, however, "bring the matter to the Commission's attention and request it to file a complaint." *Federal Trade Commission v. Klesner*, 280 U.S. 19, 25 (1929). See also the Commission's Rules of Practice, Sec. 1.12.

³ Reported in CCH Trade Reg. Rep. (1961-1963 Transfer Binder), Par. 16,378.

⁴ "You know the practices—price fixing, price discrimination, and overriding commissions on TBA. You know the companies—Atlantic, Texas, Pure, Shell, Sun, Standard of Indiana, American, Goodyear, Goodrich, and Firestone. . . ."

A further word of explanation is necessary, however. On April 24, 1964, a few months prior to the decision in *Texaco*, the Court of Appeals for the Seventh Circuit considered the problem of TBA "commission" arrangements and concluded, on the basis of a substantially similar record, that the law had been violated. *Goodyear Tire & Rubber Co. v. Federal Trade Commission*, and *Atlantic Refining Co. v. Federal Trade Commission*, 331 F. 2d 394 (7th Cir. 1964). Although Atlantic was one of the firms I had mentioned in the speech in question,⁵ that company raised no question of prejudice either before the Commission or the court of appeals. Therefore, on the substantive question of the legality of these TBA "commission" arrangements, there now exists an apparent split in the circuit courts of appeals. The Commission, in an effort to secure a prompt and final resolution of this important issue, has joined Atlantic and Goodyear in requesting the United States Supreme Court to review that case. In addition, the Commission has requested the Solicitor General, and he has agreed, to ask the Supreme Court to review the *Texaco* case as well.

The Supreme Court will not be asked, however, to review in *Texaco* the subsidiary question of whether the court of appeals was correct in concluding that the speech in question established prejudgment on my part and thus required my disqualification. While the decision on that point has the effect of restricting somewhat public discussions between administrators and those affected by their public proceedings, this is a far less compelling consideration than the substantive issue raised in these two highly significant cases. It is the conviction of the Solicitor General—and I fully agree with him—that a question freighted with a public interest as large as this should be presented separately and clearly, uncomplicated by lengthy arguments addressed to the problem of discovering, from a three-year-old speech of mine, the openness, or lack of it, of my mind at that time.⁶

Two further observations must be made here, in view of the fact that the *Texaco* decision has prompted a flurry of disqualification motions in wholly different factual situations. First, that decision on the question of administrative disqualification was necessarily a very narrow one. The only issue before the court was the meaning of the

⁵ N. 4, *supra*.

⁶ This is not to say, however, that there is no substantial public interest in the question. As one commentator has noted, "every adjudicator has a positive duty to fulfill his adjudicative functions unless actually disqualified, and both the individual parties to a controversy and the public at large have a vested interest in such administrator's participation in the case involved. Consequently, while an administrator should scrupulously search his conscience to test his impartiality, it is almost as great a fault to employ self-disqualification too readily as too sparingly." Comment, "Prejudice and the Administrative Process," 59 *Northwestern Univ. L. Rev.* 216, 233-234 (May-June 1964).

precise words used in that single speech, and there will of course be no occasion, much less a practical necessity, for their repetition in the future. Thus the decision can have no relevance to the factual situations involved in the various other cases in which disqualification has been or may be sought.

Secondly, however, and with the profoundest deference to the court, I believe it my duty to note that, even with regard to the particularly narrow factual situation involved in *Texaco*, I think the court has been persuaded to accept what I can only regard as an unworkable concept of administrative "prejudgment." This view, if literally applied, would be a stringent one even for the judiciary itself to adhere to. *Eisler v. United States*, 170 F. 2d 273, 277-278 (D.C. Cir. 1948), removed from docket, 338 U.S. 189 (1949).⁷ For an administrator such as a member of the Federal Trade Commission, it would be—if literally construed—virtually impossible to follow.⁸ *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 700-703 (1948), affirming *Marquette Cement Mfg. Co. v. Federal Trade Commission*, 147 F. 2d 589, 592 (7th Cir. 1945). It apparently overrules the court's own earlier ruling in *National Lawyers Guild v. Brownell*, 225 F. 2d 552 (D.C. Cir. 1955), *cert. denied*, 351 U. S. 927 (1956).⁹

In *Marquette*, *supra*, the court of appeals had said: "It has been held that the bias or prejudice alleged must be 'personal,' and that *a mere prejudgment of the case is not sufficient*." 147 F. 2d 592 (emphasis added). Affirming, the Supreme Court declared that the test of administrative disqualification is whether "the minds of its [the Federal Trade Commission's] members were *irrevocably closed* on

⁷ See discussion of this case in *Campbell Taggart Associated Bakeries*, Dkt. 7938 (Memorandum of Chairman Dixon in Regard to Respondent's Motion that He be Disqualified) [62 F.T.C. 1494, 1498], CCH Trade Reg. Rep. (1961-1963 Transfer Binder), Par. 16,399, May 2, 1963.

⁸ See, e.g., *Campbell Taggart*, *supra*; *Lloyd A. Fry Roofing Co.*, Dkt. 7908 (Memorandum of Chairman Dixon) [65 F.T.C. 1317], 3 CCH Trade Reg. Rep., Par. 16,968, June 30, 1964; Law, "Disqualification of SEC Commissioners Appointed from the Staff: *Amos Treat*, *R. A. Holman*, and the Threat to Expertise," 49 *Cornell L.Q.* 257 (Winter 1964); Comment, "Prejudice and the Administrative Process," 59 *Northwestern Univ. L. Rev.* 216 (May-June 1964); Davis, 2 *Administrative Law Treatise* 130 (1958).

⁹ In that case, the United States Attorney General, contemporaneously with the service on a national bar association of an order to show cause why it should not be designated a "subversive" organization, made the following statement in a public speech:

"It is because *the evidence shows* that the National Lawyers Guild is *at present* a Communist dominated and controlled organization fully committed to the Communist Party line that I have today served notice to it to show cause why it should not be designated on the Attorney General's list of subversive organizations." [Emphasis added.]

The court, in response to a charge of prejudgment, first noted the Attorney General's affidavit "denying his prejudgment and explaining that the only determination thus far made by him is that the evidence warranted his proposal to designate, a preliminary and *ex parte* determination. He reaffirms under oath his intention 'to make an impartial final determination on the basis of the administrative record before me.'" 225 F. 2d at 555. See *Campbell Taggart*, *supra*, n. 18 [62 F.T.C. 1498, 1507].

the subject of the respondents' basing point practices." 333 U.S. at 701 (emphasis added). This is but recognition of the nature of the administrator's duties, and of the very purpose for which Congress, in creating the administrative agency, shaped its functions differently from those of a constitutional court. No member of the Federal Trade Commission goes into the agency's hearing room with a mind that is wholly "open" or blank on the subject before it. Section 5(a) (6) of the Federal Trade Commission Act, 15 U.S.C. 45(a) (6), provides that: "The Commission is hereby empowered and *directed* to prevent" various parties "from using unfair methods of competition in commerce. . . ." (Emphasis added.) Section 5(b) provides that: "Whenever the Commission shall have *reason to believe* that any such [party] has been or is using any unfair method of competition . . . and if it shall *appear to the Commission* that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve . . . a complaint stating its charges in that respect. . . . If upon such hearing the Commission shall be *of the opinion* that the method of competition . . . is prohibited by this Act, it shall . . . issue . . . an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice." (Emphasis added.) Thereafter, the party has an absolute statutory right of review in the appropriate court of appeals.¹⁰

This statutory scheme thus not only contemplates but affirmatively commands the administrator to have, before lodging formal charges of law violation, a certain degree of conviction on the issues raised; he must already have, if he is to comply with Congress' command, "reason to believe" the party charged has violated the statute and that the violation is of sufficient gravity to raise a public interest in the proceeding. How does a member of the Federal Trade Commission acquire such a pre-complaint "reason to believe"? He reviews investigative materials gathered by the agency's investigators under its various statutory powers. These investigative files generally include reports of interviews with prospective witnesses, together with documents and other materials collected in the investigation. If these files are found sufficiently persuasive by the individual commissioner—persuasive enough to produce in his mind a "reasonable belief" that the law has been violated and that the public interest requires a proceeding to stop it—he joins with his fellow commissioners in causing a formal complaint to be issued and adjudicatory hearings to be held. When these and other steps are completed by the staff, the matter comes back before the commissioner and his colleagues. This time,

¹⁰ On appeal, the "findings of the Commission as to the facts, if supported by evidence, shall be conclusive." Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. 45(c).

of course, he sits as an adjudicator. Now all of the evidence is in; the party charged has had a full opportunity to tell his side of the story, "to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities." *Cement Institute, supra*, 333 U.S. at 701.

At this point, of course, the individual commissioner is required to consider only the adjudicative record before him and decide, as the statute commands, whether he is then "of the opinion" that the law has in fact been violated. This deliberation is obviously broader and deeper than the one that preceded his earlier persuasion that there was "reason to believe" a violation had occurred. Whereas the first was an *ex parte* determination based solely upon the material reported to him by the agency's own staff, this final adjudication is enlightened by every consideration an adversary system can bring before him. Judicial review assures that, whatever may have been the basis for his initial "reason to believe" a violation of law had occurred, the final "opinion" thereon is fully supported—in the judgment of an impartial court—by the evidence formally received into the adjudicative record.

The point here is that, by the very nature of the administrative process, the administrator, unlike the judge in a constitutional court, can never come to his adjudicative task with a mind wholly devoid of factual information about the subject before him. The statutory scheme, as described above, positively *requires* him to entertain a provisional conviction on the subject before the charges are even lodged. Conviction or persuasion is obviously a matter of degree, progressing along a continuum from the lowest to the highest state. Investigative files, like formal adjudicative records, vary in strength and persuasiveness. The file in one case may be just sufficient to cause the individual commissioner to say to himself, "There's enough here to give me reason to believe this party has violated the law, but its persuasiveness doesn't go much beyond the minimum statutory requirement." Another file, on the other hand, might prompt the commissioner to say to himself, "This is one of the strongest cases of this type I've ever seen." Could it then be said that, while the commissioner was qualified to hear and participate in the final adjudication of the case in which he had started with a "weak" conviction, he had "prejudged" and was thus disqualified in the second case, the one that had more forcibly impressed him at the time the administrative complaint was issued?

Such a rule would surely be unworkable. Members of the Federal Trade Commission, by the very nature of their work, are intimately familiar with the most detailed features of many industries, of the

individual companies belonging to those industries, and even with the individual men that direct those particular industries and companies. Even when a firm comes before us for the first time, it is usually no stranger to us. An antitrust probe of Company A almost invariably gives us a great deal of information about what Company B and other competing firms in that industry are doing. And facts learned in one industry cannot help but influence the way one evaluates similar or related facts in a second industry.

Congress understood all of this when it fashioned its creature, the administrative agency. It was not in spite of this familiarity with the workings of industry, but because of it, that the legislature assigned the tasks involved here to this Commission rather than to an already overburdened judiciary believed to have neither the time nor the facilities for acquiring that special experience. "The work of this commission will be of a most exacting and difficult character, demanding persons who have experience in the problems to be met—that is, a proper knowledge of both the public requirements and the practical affairs of industry," with terms of service "long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience."¹¹ The Supreme Court recognized and gave full effect to this congressional objective when it held that the administrator is disqualified for "bias" only when his mind is "irrevocably closed" on a subject before it reaches him for adjudication. *Cement Institute, supra*, 333 U.S. at 702.¹²

In the *Texaco* case, therefore, there is no question but that the five commissioners¹³ that reviewed the *ex parte*, "extra-record" investigational files, and acquired from those files a pre-complaint conviction of sufficient firmness to satisfy the statutory "reason to believe" there had in fact been a violation of law, would have been immune to a challenge of "bias" or prejudgment. To say that the remarks quoted from my 1961 speech evidenced "prejudgment" of a higher degree

¹¹ Sen. Rep. No. 597, 63d Cong., 2d Sess. (1914), 10-11.

¹² See also *Lumber Mut. Casualty Ins. Co. of New York v. Locke*, 60 F. 2d 35 (2d Cir. 1932), where an administrator had written a letter stating, in substance, that, having investigated the matter in question to his full satisfaction, the formal hearing was a mere formality. The court said: "However tactless or undesirable such remarks may have been, they fell short of a statement that nothing that might be shown at such a hearing would change his mind. The Commissioner had already a great familiarity with the claimant's case, both by reason of his personal physical examination of Truppi and from records in his office. He doubtless regarded his investigation as full and sufficient. We think his remarks amounted to no more than saying that he felt confident that he was right. They did not indicate that his mind was not open to any proof, but only that when so full an examination had been made no matters affecting the result were likely to be developed." 60 F. 2d at 38 (emphasis added).

¹³ I was not one of those commissioners. The complaint in that proceeding was issued January 11, 1956, and I took office in 1961, some five years later.

than that *required* by statute of the five commissioners that issued the formal charges against Texaco is, in my view, to confuse form with substance. I knew far less about the case than those earlier commissioners. I had no convictions of any kind as to whether Texaco had in fact engaged in the conduct alleged in the complaint filed by my predecessors. The reference in my speech to the three business practices, seven oil companies, and three tire manufacturers was qualified by the statement that "Some of these cases are still pending before the Commission; some have been decided by the Commission and are in the courts on appeal." I thought it would be taken for granted that, insofar as my other remarks suggested the actual existence and illegality of the named practices, the references were to the already-decided cases, not to those still pending before the agency. The reference to the other proceedings—those still pending before the agency—was intended merely as a statement of the allegations in the complaints, not as a prejudgment of their merits.

Litigants before this and, apparently, other administrative agencies¹⁴ are now reading this and other recent decisions on this point as establishing a rule of strict "neutrality"—in the firmest judicial sense of that word—for administrators with adjudicative functions. While these arguments are ostensibly addressed to alleged prejudgments of factual issues, it is clear that their contentions go perilously close to a demand for administrators that are "neutral" toward the laws themselves. Not even judges are expected to carry their objectivity to the point of actual indifference toward the policies of the laws they administer. "Our tradition rightly interpreted is that the judge should be neutral toward the question of whether the specific defendant is guilty. It is a perversion of that tradition to demand that the judge be neutral toward the purposes of the law."¹⁵ The administrator, being under a duty not merely to adjudicate matters brought before him by a third-party prosecutor but to affirmatively seek out and halt infringements of particular laws,¹⁶ must necessarily be one "whose

¹⁴ See, e.g., Law, n. 8, *supra*, at 258.

¹⁵ Jaffe, "The Reform of Administrative Procedure," 2 *Pub. Ad. Rev.* 141, 149 (1942), quoted in Davis, 2 *Administrative Law Treatise* at 138, n. 28.

¹⁶ "In a sense, of course, a court represents the public interest in administering a statute, but it has no continuing duty to see that the law is enforced. It is the court's duty to decide cases as they come before it, but if no indictments or civil actions are brought, and the law becomes a dead letter, the court cannot be blamed. An administrative body, on the other hand, has a continuing responsibility for results. It must ferret out violations, initiate proceedings, and adopt whatever proper methods are necessary to enforce compliance with the law." Henderson, *The Federal Trade Commission* 91 (1924). See Section 5(a)(6) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(6), providing that the Commission "is hereby empowered and *directed*" [emphasis added] to "prevent" unfair methods of competition.

sincere ideas of policy conform to the broad legislative intent”¹⁷ if those laws are not to become a “dead letter” by sheer inertia.¹⁸

Thus no broad generalities can be read into the *Texaco* decision. To read it as meaning that administrators must be indifferent to the legislative policies they are charged with effectuating—that is, as judicial disapproval of the fact that the speech in question reflected concern over the violations of law already found in the industry and resolution in attempting to correct them—would be inconsistent with Congress’ express mandate “directing” this Commission to go forward and affirmatively “prevent” unfair competition. To interpret the decision as meaning that administrators must come to their adjudicative tasks with minds devoid of any factual information bearing on the question of whether the charges in their complaints are true, or as meaning that administrators must have no preconceived notions or opinions as to whether those charges are well founded, would be at odds with our statutory duty to issue such complaints only when we have “reason to believe” the law has been violated as alleged, a duty that necessarily assumes some degree of pre-complaint persuasion in the matter. Such an interpretation would also be contrary to the Supreme Court’s holding in *Cement Institute, supra*, that the test in such cases is not whether the administrator has made any “prejudgments”—it is taken for granted that he has—but whether that prejudgment has gone beyond the provisional stage to a point where it can be said that his mind is “irrevocably closed” on the questions before him.

The *Texaco* ruling on this point, therefore, is simply that the particular words quoted from my speech indicated to the court that my mind was, for some unspecified “personal” reason or reasons,¹⁹ “irrevocably closed” on the subject of Texaco’s business practices when the speech was delivered in April 1961 and remained in that state during the briefing and arguing of the case before us two years later, in April 1963.

¹⁷ Davis, n. 15, *supra*, at 137. See also Justice Frankfurter’s comment in *United States v. Morgan*, 313 U.S. 409, 421 (1941), in regard to a charge of bias against the Secretary of Agriculture: “That he not merely held, but expressed, strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings ordered by this Court. . . . Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. Nothing in this record disturbs such an assumption.”

¹⁸ Henderson, n. 16, *supra*.

¹⁹ Section 7(a) of the Administrative Procedure Act, like the comparable provision governing the disqualification of federal judges, 28 U.S.C. 25; 36 Stat. 1090 (1911), speaks only of “personal” bias or prejudice. See also Davis, n. 15, *supra*, at 167.

INTERLOCUTORY ORDERS, ETC.

1561

The Solicitor General of the United States has authorized me to say that, while he wishes to present the *Texaco* and *Atlantic* cases to the Supreme Court on the substantive questions alone, without the