

## BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

|                          |   |               |
|--------------------------|---|---------------|
| In the Matter of:        | ) |               |
|                          | ) |               |
| Opinion requested by:    | ) | No. 77-036    |
| James F. Callanan, Harry | ) | April 5, 1978 |
| Sands and John L. Hill,  | ) |               |
| Members of the Board of  | ) |               |
| Funeral Directors and    | ) |               |
| Embalmers                | ) |               |

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BY THE COMMISSION: We have been asked the following question by Messrs. Callanan, Sands and Hill, Members of the Board of Funeral Directors and Embalmers:

Business and Professions Code Section 7601 establishes a State Board of Funeral Directors and Embalmers consisting of eight members. Three members must be licensed funeral directors or embalmers, and the remaining five are required to be public members. The Board regulates both funeral homes with embalming facilities, which comprise approximately 90-95% of the funeral establishments in California, and the remaining 5-10% of the funeral establishments which specialize in cremation funerals.<sup>1/</sup> Persons specializing in cremations, as well as those operating funeral homes with embalming facilities, must be licensed as funeral directors. However, all three of the current industry members of the Board are directors of funeral homes with embalming facilities, usually referred to as traditional funeral homes. In other words, the industry members are part of the 90-95% of the funeral industry.

A motion is coming before the Board of Funeral Directors and Embalmers to adopt a rule that would require all funeral directors to obtain the consent of next of kin

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<sup>1/</sup> We refer to this portion of the industry as cremators. These cremation establishments either arrange for cremations or actually perform the cremations.

prior to embalming a body. A body which is not preserved by either embalming or refrigeration begins to deteriorate within approximately 24 hours of death. Consequently, if the rule is adopted, funeral establishments will need to have refrigeration equipment in case consent for embalming cannot be obtained from a deceased person's next of kin within 24 hours of death.

We have been advised that most of the traditional funeral establishments in California do not have adequate refrigeration equipment and, if the motion passes, will choose to purchase equipment. The specific cost will vary from establishment to establishment, depending on the type of equipment purchased, the size of the mortuary, and the nature of its clientele. We have been advised that the costs will range from \$1,000 to \$24,000 for most members of the industry.

The 5-10% of the funeral establishments in California which specialize in cremation funerals already have refrigeration equipment and will not have to purchase additional equipment.

The question before us is whether the industry members of the Funeral Board are required to disqualify themselves from consideration of this matter pursuant to the conflict of interest provisions of the Political Reform Act, Government Code Sections 87100, et seq.

#### CONCLUSION

Pursuant to 2 Cal. Adm. Code Section 18703(d), the industry members of the Funeral Board are not required to disqualify themselves from consideration of the motion to require consent of next of kin before embalming. This conclusion is based on a finding that the funeral industry constitutes "a significant segment of the public," and, consequently, the effect of the decision will not be distinguishable from its effect on the public generally. Government Code Section 87103.

#### ANALYSIS

The relevant statutory provisions are Government Code Sections 87100 and 87103,<sup>2/</sup> which provide in relevant part:

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<sup>2/</sup> All statutory references are to the Government Code unless otherwise noted.

No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

Section 87100.

An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on:

(a) Any business entity in which the public official has a direct or indirect investment worth more than one thousand dollars (\$1,000);

...

(c) Any source of income, other than loans by a commercial lending institution in the regular course of business, aggregating two hundred fifty dollars (\$250) or more in value received by or promised to the public official within twelve months prior to the time when the decision is made; ....

Section 87103.

Members of the Funeral Board are public officials (Section 82048), and the three industry members have investments in and receive income from funeral establishments. For the purpose of this opinion, we assume that the proposed rule before the Funeral Board will foreseeably and materially affect the financial interests of the industry members in question. The only remaining question, therefore, is whether the impact of the decision on the Board members will be "distinguishable from its effect on the public generally."

Subsections (c) and (d) of 2 Cal. Adm. Code Section 18703 provide that an industry, trade or profession constitutes a significant segment of the public with respect to any board which, pursuant to a statutory mandate, is composed in whole or in part of representatives of an industry, trade or

profession.<sup>3/</sup> Since three of the Board members are required to be licensed funeral directors, the funeral industry is tantamount to the "public generally" for purposes of determining whether such persons must be disqualified from participating in Funeral Board matters. Before we turn to an analysis of the specific facts of this case, a brief discussion of the administrative history of subsections (c) and (d) of 2 Cal. Adm. Code Section 18703 is appropriate.

The subsections were adopted in an effort to reconcile the conflict of interest provisions of the Political Reform Act with other statutes which require certain boards to include as members persons who represent the industry, trade or profession which the board oversees. The Commission was persuaded that when the legislative body which creates a regulatory board determines that industry views and expertise should be represented on the board, the Political Reform Act should not be interpreted to prevent industry members from participating in board decisions affecting the industry. Consequently, we believe that each industry board member should be allowed to vote on industry matters unless the

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<sup>3/</sup> 2 Cal. Adm. Code Section 18703 provides, in part:

A ... financial effect ... is distinguishable from its effect on the public generally unless the decision will affect the official's interest in substantially the same manner as it will affect all members of the public or a significant segment of the public. Except as provided herein, an industry, trade or profession does not constitute a significant segment of the general public.

...

(c) An industry, trade or profession constitutes a significant segment of the public if the statute, ordinance or other provision of law which creates or authorizes the creation of the official's agency or office contains a finding and declaration, including an express reference to Section 87103 of the Government Code, [as provided herein]....

(d) Through January 1, 1979, an industry, trade or profession constitutes a significant segment of the public if the statute, ordinance or other provision of law which creates or authorizes the creation of the official's agency contains a requirement or express authorization that members of that industry, trade or profession hold such office....

decision in question would directly and peculiarly affect the members' financial interests in a manner different from its effect on all other members of the industry. For example, a member would be prohibited from participating in a disciplinary proceeding against his establishment or in the awarding of a research grant to himself or his establishment. However, policy decisions which affect all or some members of the industry should not trigger disqualification. Accordingly, we believe that the effect of a decision will be indistinguishable from its effect on the public generally (the industry) whenever the decision does not peculiarly and directly affect the official's interest in a manner different from all other members of the industry.

This decision is based upon the fact that subsection (d) of 2 Cal. Adm. Code Section 18703 specifically envisioned that members of industries, trades or professions should be able, in certain circumstances, to make and participate in the making of decisions in situations where they would otherwise be disqualified from so doing. Such a conclusion was necessary, the Commission believed at the time it adopted the regulation, if the disqualification requirement of the Act was to be interpreted harmoniously with the various statutes providing for industry representation on certain boards.<sup>4/</sup>

Turning to the specific facts of this case, we note that the decision in question involves a broad policy determination; that is, whether or not funeral directors should be required to obtain consent from the next of kin prior to embalming. This is a decision, as stated earlier, which will affect virtually all members of the funeral industry. It is by no means a decision which will directly and peculiarly affect an interest of any industry board member in a manner different from other funeral directors. To the contrary, the effect on each industry board member will be similar to the effect on most members of the funeral industry. Therefore, we conclude that the three industry board members are

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<sup>4/</sup> The interpretation adopted in this opinion would be applicable to an industry, trade or profession that is deemed a "significant segment of the general public" under subsection (c) of the regulation for the same reasons. We do not here consider whether it would be applicable to an industry, trade or profession deemed a "significant segment" under subsections (a) or (b). Nothing in this opinion bears on the regulation as applied in situations not covered by any of the exceptions contained in subsections (a) through (d).

not disqualified from making, participating in the making, or using their official positions to influence any decision regarding the proposed rule to require consent prior to embalming.

In passing, we observe that if a cremator were a member of the Funeral Board, he or she also would not be disqualified from participating in the decision in question. The fact that cremators are far outnumbered by traditional funeral directors is not significant in determining whether disqualification is triggered pursuant to 2 Cal. Adm. Code Sections 18703(c) and (d). Cremators, like traditional funeral directors, are members of the funeral industry, and therefore can make, participate in the making, or use their official position to influence decisions before the Funeral Board unless the decisions directly and peculiarly affect their financial interests in a manner different from the effect of the decisions on other cremators and traditional funeral directors.

Approved by the Commission on April 5, 1978.  
Concurring: Lapan, McAndrews and Remcho. Commissioners Lowenstein and Quinn dissented.



Commissioner

COMMISSIONER QUINN DISSENTING: I dissent from the majority opinion which allows the three industry members of the Board of Funeral Directors and Embalmers to vote on the embalming rule despite the fact their financial interests differ from those of other practitioners in their industry.

In 1975 the Commission attempted to reconcile the prohibition on public officials voting on a matter where a financial conflict exists with the legislative mandate that a percentage of the persons sitting on certain regulatory boards have a financial interest in the industry being regulated. The result, 2 Cal. Adm. Code Section 18703(c) and (d), permits voting by industry board members where the financial impact on these members is the same as that on all other members of the industry.

One may argue that such uniform impact is rare, and thus the industry members are more often than not prohibited from voting. If so, that is a function of the language used to permit this participation by industry board members; that the industry itself is the "public generally" of Section 87101. It is clear under the Act that a decision must have a uniform impact on the "public generally" before an otherwise disqualified official can vote on it, and our regulation allowing industry participation on these boards presumes uniform industry-wide impact before voting is allowed.

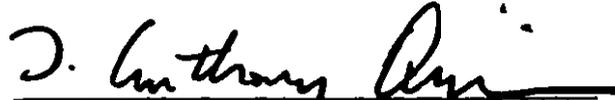
The majority shatters this concept. There is little doubt that, given the nature of the funeral industry, the embalming rule is intended to have a different impact on different elements, and, specifically, on the traditional funeral directors including the three industry board members.

There is no question of the antagonism between the traditional directors and the so-called cremators, nor is there doubt that the proponents of the rule in question intend to financially disadvantage the traditional directors by this rule. It is impossible to believe the three industry board members can vote on this rule without concern about the financial well-being of their segment of the industry. The Act does not concern itself with internal industry disputes, but with voting by public officials where their own financial interests are at stake. This seems a classic case of exactly that.

By permitting the industry members to vote, the majority is saying that the Act is to be applied differently to them simply because they sit as industry members on these regulatory boards. For other public officials to vote on matters where a personal financial interest is present, uniform impact on the public must be shown. Not so, however, for industry board members. They may vote even though we know that a conflict exists and they will be financially advantaged or disadvantaged differently from other members of their industry.

This is not applying 2 Cal. Adm. Code Section 18703 as the Commission intended it be applied when it was adopted. Indeed the majority ought to change the regulation rather than pretend this interpretation is consistent with it. The regulation is already under severe attack in the Consumers

Union case.<sup>1/</sup> This interpretation only further weakens it, and makes its ultimate survival, already precarious, that much more doubtful.

  
T. Anthony Quinn  
Commissioner

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<sup>1/</sup>When the Commission adopted 2 Cal. Adm. Code Section 18703, the regulation was challenged by Consumers Union in San Francisco Superior Court. Consumers Union of United States, Inc. v. FPPC, S.F. Civ. No. 705-856. The trial court decision invalidated the regulation. However, the decision has been stayed pending appeal. The case has been briefed and argued in the Court of Appeal and a decision is expected soon.

LOWENSTEIN, CHAIRMAN, DISSENTING:

I

The funeral industry, which is regulated by the State Board of Funeral Directors and Embalmers ("Funeral Board") is divided into two factions. One faction, consisting of only five to ten percent of the business establishments within the industry, engages in "direct disposal" (i.e., cremation) of corpses, generally with few or no "frills" and at a low cost. The remainder of the industry, the so-called "traditional" sector, while it may offer similar direct disposal services, concentrates on open-casket funerals which require embalming and are generally more expensive than direct disposal funerals.

In recent years heated controversy has been generated regarding the two types of funerals,<sup>1/</sup> both within and without

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<sup>1/</sup>Reference to two "types" of funeral is for the sake of convenience. Within each "type" there are many variations.

the industry.<sup>2/</sup> The direct disposal segment and its supporters contend that consumers, who are likely to be especially vulnerable when they deal with the funeral industry, are misled into purchasing far more expensive funerals from the "traditional" funeral directors than they need or want. The "traditional" directors and their supporters contend that the services they provide are what most consumers want and that the "traditional" open-casket funeral helps survivors cope with their grief.

Originally the Funeral Board regulated only the "traditional" segment of the industry, but in 1974 the Business and Professions Code was amended to extend the Funeral Board's jurisdiction to the "direct disposal" segment.<sup>3/</sup> The Funeral Board consists of eight members appointed by the Governor, three of whom must be industry representatives. Although the industry representatives could be appointed from either segment of the industry, in fact all three are "traditional" funeral directors.

One of the public members of the Funeral Board, Robert Treuhaft,<sup>4/</sup> has proposed a regulation that would prohibit a funeral director from embalming a corpse without first obtaining the written consent of a surviving relative or other authorized person. The Treuhaft proposal, if adopted, would have no direct effect on the "direct disposal" operators, because embalming is unnecessary for a cremation. The Treuhaft proposal would compel many "traditional" directors to purchase refrigerators to avoid decomposition of corpses when there is a delay in obtaining consent for embalming.

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<sup>2/</sup> See, e.g., J. Mitford, The American Way of Death (1963); Federal Trade Commission, Funeral Industry Practices (1975).

<sup>3/</sup> According to testimony before this Commission, the extension of the Funeral Board's jurisdiction was urged by the "traditional" directors and opposed by the "direct disposal" operators. Apparently the "direct disposal" operators feared the Funeral Board would be dominated by the "traditional" directors, who would use the powers of the Funeral Board to stifle competition from the "direct disposal" operators.

<sup>4/</sup> Treuhaft is regarded as an opponent of many of the practices of the "traditional" segment of the industry. He is the husband of Jessica Mitford and the dedicatee of her book, op. cit. n.2, at vi.

Mr. Treuhaft stated that the main purpose of his proposal is to assure that consumers are apprised of their options, including the inexpensive option of "direct disposition." He anticipates that the consent requirement will afford consumers a choice between types of funerals and that the result will be to divert a substantial amount of business from the "traditional" to the "direct disposition" sector. The question we must decide is whether the industry representatives on the Funeral Board, who are "traditional" funeral directors from whom business may be diverted if the Treuhaft proposal passes and succeeds, have such a conflict of interest that they should be disqualified from voting on the proposal.<sup>5/</sup> The majority concludes that under our regulation, the industry representatives are not disqualified because the effect the Treuhaft proposal would have on them would be indistinguishable from its "effect on the public generally." I believe the majority stretches our regulation beyond its intended purpose and, accordingly, I respectfully dissent.

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<sup>5/</sup> Whether such a diversion of business would in fact occur is somewhat speculative and was the subject of much controversy before the Commission. The question thus arises whether it is foreseeable that the adoption or rejection of the Treuhaft proposal will have a material effect on the industry representatives on the Funeral Board. The majority is able to assume without deciding that such an effect is foreseeable since its resolution of the "public generally" issue causes it to conclude that in any event disqualification of the industry representatives is not required. My resolution of the "public generally" issue forces me to confront the question of foreseeability. Although it is uncertain whether the Treuhaft proposal will have the effect its author contemplates, there can be no question that its purpose and its major thrust is to facilitate consumer choices for "direct disposition." This Commission has no expertise in the economics of the funeral industry. I do not believe we should lightly conclude that the likelihood of a regulation having its intended effect is so remote as to render that effect unforeseeable. Accordingly, I believe the industry representatives on the Funeral Board should be disqualified from voting on the Treuhaft proposal.

## II

Government Code Section 87100 requires public officials to disqualify themselves from governmental decisions in which they have a financial interest. The several elements which must be present for an official to have a financial interest are set forth in Government Code Section 87103.<sup>6/</sup> All the elements but one relate to the likelihood of bias on the part of the public official. The remaining element, that the effect of the governmental decision on the official's financial interest must be "distinguishable from its effect on the public generally," has been the most difficult to apply and the most controversial, because it permits an official to act notwithstanding that he has a financial interest that would ordinarily be regarded as creating an unacceptably high risk of bias. The Commission's task in construing the "public generally" clause is to secure the policies sought to be furthered by the clause without obstructing the Act's general goal of unbiased decision-making.

The main reason for the "public generally" clause in the case of nonelected officials<sup>7/</sup> is that an official's financial interest, if similar to that of a large enough segment of the public, may be congruent rather than in conflict with the "public" interest. An obvious example is a decision regarding the level of a general tax. Although the official is subject to the tax and is therefore likely to be "biased" in favor of a lower level, the interest in a lower level is so generally shared that we do not regard the official as having a conflict of interest.

In the case of the Funeral Board and other industry boards governed by 2 Cal. Adm. Code Section 18703(c) and (d), the Commission's regulation reflects in part an effort to interpret the Political Reform Act harmoniously with the various statutes providing for industry representation. More fundamentally, the regulation reflects our doubt that the Act was intended by implication to remove from the Legislature

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<sup>6/</sup> See generally, Tom Thorner, 1 FPPC Opinions 198, 202 (1975).

<sup>7/</sup> Additional considerations are applicable to elected officials. Whenever there is a question of an elected official being disqualified from a decision, the desire for impartiality must be weighed against the democratic interest in permitting the representative elected by the voters to act. See 2 Cal. Adm. Code Section 18703(a) and (b).

the option of providing for industry representation on regulatory boards. The Legislature's right to conclude that benefiting a particular industry will be in the public interest is not affected by the Act. If the Legislature provides for representation of an industry on a regulatory board as a means of furthering a legislatively-determined policy of advancing or protecting the interests of that industry, the subsequent actions of the industry representatives favorable to the industry reflect a congruence between their private interest and the "public" interest (as determined by the Legislature) in benefiting that industry.<sup>8/</sup> The Commission's regulation is thus consistent with the purposes of the Act, construes the Act harmoniously with other statutes and avoids a drastic restriction of the Legislature's options in structuring industry regulation. The regulation should be construed with these purposes in mind.

### III

The first paragraph of 2 Cal. Adm. Code Section 18703 provides that the effect of a governmental decision on an official's interest is distinguishable from its effect on the public generally "unless the decision will affect the official's interest in substantially the same manner as it will affect all members of a significant segment of the public." Under subsection (d), the funeral industry constitutes a "significant segment of the public" for purposes of this case. The regulation could be read to mean that the decision must affect every single member of the industry in the same way. The majority rejects this interpretation and I agree, because it would defeat the purposes of the regulation by virtually making a nullity of paragraphs (c) and (d). No matter how general an administrative action may be, rarely if ever will it have the same effect on every single member of the industry. The present case illustrates this point. The Treuhaft proposal will probably require most members of the "traditional" segment of the industry to purchase refrigerators for storing unembalmed corpses. In this regard the effects of the proposal are fairly described as general, notwithstanding that a few operators might already own refrigerators or for other reasons not need to buy them.

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<sup>8/</sup> This is not to suggest that industry representation is necessarily good policy. In recent years the practice has been subjected to serious criticism. E.g., T. J. Lowi, *The End of Liberalism* (1969), especially at 55 - 115. Our regulation neither endorses nor condemns industry representation, but leaves the decision in the Legislature.

This aspect of the Treuhaft proposal affects most industry members in the same manner and is more or less neutral as to the others. Surely this is precisely the type of generalized effect that was contemplated by 2 Cal. Adm. Code Section 18703(c) and (d). If we were to interpret our regulation so strictly that it did not include this type of effect, the regulation could almost never be invoked. If we assume, as we must, that the reasons for adopting the regulation were sound, such a strict construction would be pointless and improper.

If the regulation does not require the same effect on every single member of the industry, what does it require? Despairing of finding a middle ground, the majority goes to the opposite extreme of exempting industry representatives from disqualification in all cases except when the conflict of interest is specific to the individual, as in the case of an enforcement proceeding or a contract.<sup>9/</sup> This approach goes beyond what is necessary either to interpret the Political Reform Act harmoniously with other statutes or to preserve the Legislature's flexibility in structuring regulatory agencies, and therefore I believe it unnecessarily deprives the public of the impartial decision-making which the Act is intended to guarantee.

In my opinion there is a middle ground between, on the one hand, requiring every single member of the industry to be affected in the same manner and, on the other hand, virtually exempting industry board members from the disqualification requirements. It is one thing to say that a governmental decision that will have a common effect on some members of the industry and little or no effect on the remainder is sufficiently generalized that it is within our regulation. As discussed above, the Treuhaft proposal would come within this category if its effects were limited to requiring some

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<sup>9/</sup> Long before the passage of the Political Reform Act, the law contained adequate protections against such specific conflicts. E.g., Government Code Section 1090 (prohibits contracts in which an official is interested). The significant innovation in the Act was the recognition that a conflict of interest can be as great or greater in the case of government actions whose benefits and burdens are more diffuse but nonetheless real and significant, such as regulation, taxation, subsidies and planning. The majority opinion exempts industry representatives from disqualification in the case of all such conflicts.

operators to buy refrigerators.<sup>10/</sup> It is far less plausible however, to say that an effect is "general" when it will benefit one of two contending factions within the industry and correspondingly burden the other faction. This is precisely the type of effect Mr. Treuhaft intends by his proposal, which he believes will divert a share of the market from the "traditional" funeral to "direct disposition."

In my opinion a sound construction of our regulation does not justify treating a contending faction within an industry as a significant segment of the public. It is unlikely that many industries represented on government boards and commissions are as factionalized as the funeral industry, and even when they are, there is no reason to assume that the preponderance of issues coming before such boards will divide the industries along factional lines. Accordingly, the construction I propose will only occasionally affect the industry boards and therefore it retains the harmonious interpretation of the Political Reform Act with other statutes. Nor does my interpretation impair legislative flexibility in structuring industry regulation. If the Legislature provides for representation of an industry on a board and the industry as defined by the Legislature includes two competing factions, the Legislature cannot be presumed to have intended to benefit one of those factions at the expense of the other, since the Legislature has no assurance from which faction the industry representatives will be appointed. In the present case, for example, we can assume that by requiring three funeral industry representatives on the Funeral Board the Legislature intended to that extent to protect the funeral industry, but we cannot assume that it intended to benefit the "traditional" sector at the expense of the "direct disposition" sector or vice-versa, since the Governor<sup>11/</sup> is free to appoint members of the board from either faction.

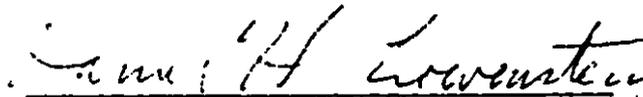
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<sup>10/</sup> It is true that a business benefits to some degree when additional costs are imposed on its competitors. However, as a practical matter, there is no reason to believe that the cost of refrigeration will be sufficient to benefit materially those operators who will not need to purchase a refrigerator.

<sup>11/</sup> Even if the Legislature anticipates that members will be appointed from a particular faction, it is questionable whether the Legislature may consistent with due process delegate authority to a board deliberately composed of members

(continued next page)

Since I do not believe that either the language of 2 Cal. Adm. Code Section 18703 or any of its purposes justifies the conclusion that the effect of the Treuhaft proposal on "traditional" funeral directors will be indistinguishable from the proposal's effect on the public generally, I would conclude that Mr. Callanan, Mr. Sands and Mr. Hill are disqualified from voting on the issue.

  
Daniel H. Lowenstein  
Chairman

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(footnote 11 continued)

with financial interests adverse to a portion of the industry subject to the jurisdiction of the board. Professor Bickel has commented:

On occasion, the alignment of interests may be such that the majority's interest runs counter to that of an individual member in quite striking fashion, ... as when chiropractors or faith healers are put under the governance of medical doctors, or producers of milk are subjected to regulation by consumers, or dealers by producers. To include a permanent minority in a constituency in which its natural enemy, so to speak, forms an equally permanent majority - having regard to the subject matter that is to be regulated - is rather hard, and no procedural device [i.e., a requirement of open hearings] will appreciably soften the blow.

A. Bickel, The Supreme Court and the Idea of Progress 155 (Yale Press ed. 1978; orig. pub. 1970).