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THE "APPEARANCE OF FAIRNESS" VERSUS "ACTUAL UNFAIRNESS": WHICH STANDARD SHOULD THE ARKANSAS COURTS APPLY TO ADMINISTRATIVE AGENCIES?

Suzanne Antley*

I. INTRODUCTION

Administrative agencies, with their inherent combination of legislative, executive, and judicial functions, are in direct conflict with the separation of powers doctrine. This fact is well-recognized,¹ generally accepted,² and, in itself, is not necessarily disturbing.³ What

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1. The combination of functions in administrative agencies has been the subject of numerous publications. See, e.g., Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671 (1992); Ronald D. Rotunda, *The Combination of Functions in Administrative Actions: An Examination of European Alternatives*, 40 FORDHAM L. REV. 101 (1971); L. Scott Stafford, *Separation of Powers and Arkansas Administrative Agencies: Distinguishing Between Judicial Power and Legislative Power*, 7 U. ARK. LITTLE ROCK L.J. 279 (1984); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

2. The accepted status of the combination of functions in administrative agencies is illustrated by the following statement by Professor Stafford: "In one of the few cases in which the issue of combining executive and legislative powers in a single agency was even raised, the [Arkansas Supreme Court] seemed to view the phenomenon as an accomplished fact that could not be reversed." Stafford, *supra* note 1, at 280 n.6 (citing *Hickenbottom v. McCain*, 207 Ark. 485, 181 S.W.2d 226 (1944)). The primary reasons for such acceptance are expedience and practicality; administrative agencies are viewed as being necessary to the operation of government. See *infra* note 3 and accompanying text.

Nevertheless, in 1951, U.S. Supreme Court Justice Jackson lamented the proliferation of administrative agencies and the impact that they had been allowed to make on the separation of powers doctrine, for expediency's sake. See *Federal Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 487 (1951) (Jackson, J., dissenting). The same year, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1951), Justice Frankfurter admonished:

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Youngstown, 343 U.S. at 613 (citing *Myers v. United States*, 272 U.S. 52, 293 (1926)). The Arkansas Supreme Court has expressed the same view. See *infra* note 38 and accompanying text.

3. It has been suggested that the realities of modern government have decreased the practicality of a strict application of the separation of powers doctrine. See, e.g., Stafford, *supra* note 1, at 280.

is a matter of concern, however, is the loss in administrative agencies of the protection against unfairness that is provided by the separation of powers doctrine.

Concerns about this loss of protection have been voiced since the inception of the first administrative agencies.⁴ As a means of replacing the lost protection against unfairness in administrative agencies, both the Federal Administrative Procedure Act⁵ and the Arkansas Administrative Procedure Act⁶ were crafted to contain provisions⁷ to re-create a semblance of the separation of powers⁸ by requiring an internal separation of functions, prohibiting ex parte communications, and requiring the publication of any ex parte communications that take place.

However, certain administrative agencies in Arkansas are not subject to the provisions of the Arkansas Administrative Procedure Act and its safeguards.⁹ The Act expressly excepts from its governance the Public Service Commission, the State Highway Commission, the State Highway and Transportation Department,¹⁰ the Commission on Pollution Control and Ecology, the Contractors Licensing Board, the State Department of Health, the Arkansas Workers' Compensation Commission, the Arkansas Employment Security Department, and the Department of Veterans' Affairs.¹¹

The statute states that these agencies were excepted from the Act because the General Assembly had determined "that the existing laws governing those agencies provide adequate administrative procedures for those agencies."¹² Although these agencies do have their

4. The first administrative agency in the United States federal government was the Interstate Commerce Commission, established in 1887. 49 U.S.C. §§ 10521-11917 (1988). For examples of the specific concerns that have been voiced, see *infra* notes 92-93 and accompanying text.

5. 5 U.S.C. §§ 551-559 (1988).

6. ARK. CODE ANN. §§ 25-15-201 to -214 (Michie 1992).

7. See *infra* notes 95-101 and accompanying text.

8. This article assumes, for the sake of argument, that these provisions are actually effective in replacing the lost protections of the separation of powers doctrine and does not address the question of whether or not they are, in fact, effective.

9. See ARK. CODE ANN. § 25-15-202(1)(B)(Michie 1992).

10. The language of the statute refers to the State Transportation Commission. That commission was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency by 1987 Ark. Acts 572. Subsequently, 1989 Ark. Acts 67, § 23 and 1989 Ark. Acts 153, §§ 2-3 abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the State Highway and Transportation Department, respectively. See ARK. CODE ANN. § 23-2-202 (Michie Supp. 1993).

11. ARK. CODE ANN. § 25-15-202(1)(B)(Michie 1992).

12. *Id.*

own procedural laws and rules, as stated by the Administrative Procedure Act,¹³ the laws and rules of some of these agencies do not provide the same safeguards as are provided by the Administrative Procedure Act. Of particular concern are the laws and rules governing the Public Service Commission, the State Highway Commission, the State Highway and Transportation Department, the Department of Health, and the Workers' Compensation Commission. The comments contained in this article will focus collectively on the lack of protection against unfairness in those agencies.¹⁴ Throughout the course of this article, they will be referred to as "the Arkansas excepted agencies."

The laws and rules of none of the Arkansas excepted agencies¹⁵ require an internal separation of functions,¹⁶ none prohibit ex parte communications between agency advocates and agency decision-makers, and none require the publication of such internal ex parte communications.¹⁷ Yet the Arkansas excepted agencies not only per-

13. *Id.*

14. This article will not address the Contractors Licensing Board, because the laws governing procedures before the Contractors Licensing Board state that the Administrative Procedure Act will apply to such procedures. ARK. CODE ANN. § 17-22-409(d). This article will not address the Department of Veterans Affairs, because that agency does not perform a regulatory function, nor does it conduct adjudicative proceedings. This article will not address the Commission on Pollution Control and Ecology or the Employment Security Department, because those agencies achieve some measure of separation of powers protection through physical separation of decision-makers from advocates.

15. Regarding the Public Service Commission, see ARK. CODE ANN. §§ 23-1-101 to 23-18-529 (Michie 1987) and the Rules of Practice and Procedure of the Arkansas Public Service Commission. Regarding the Highway Commission and the Highway and Transportation Department, see ARK. CODE ANN. Titles 23 and 27 and the General Rules of Practice and Procedure of the Arkansas State Highway Commission. Regarding the Department of Health, see ARK. CODE ANN. §§ 20-7-101 to -206 and the Administrative Procedures for the Arkansas State Board of Health and the Arkansas Department of Health. Regarding the Workers' Compensation Commission, see ARK. CODE ANN. §§ 11-9-101 to -811 and the Arkansas Workers' Compensation Commission Laws and Rules of the Commission.

16. Some of the agencies have unwritten policies requiring an internal separation of functions, but these unwritten policies do not have the force of law and are not enforceable by any party.

17. The Rules of Practice and Procedure of the Arkansas Public Service Commission and the Administrative Procedures for the Arkansas State Board of Health and the Arkansas State Department of Health prohibit external ex parte communications, but they expressly allow internal ex parte communications. See Rule 1.06 of the Rules of Practice and Procedure of the Arkansas Public Service Commission and Section V of the Administrative Procedures for the Arkansas State Board of Health and the Arkansas State Department of Health. Rule 1.06 of the Rules of Practice and Procedure of the Arkansas Public Service Commission requires the publication of external ex parte communications, but not of internal ones. The

form a typical combination of administrative functions, they also hold quasi-judicial proceedings in which agency employees may appear before one another, with one agency employee acting as an advocate and the other as a judge.

The Arkansas excepted agencies, therefore, lack both the protection against unfairness that is provided by the separation of powers doctrine and the protection against unfairness that is provided by the Arkansas Administrative Procedure Act. Accordingly, the potential for unfairness in proceedings held before those agencies is heightened.

Some courts have supplied the otherwise lacking protection against unfairness in administrative agencies by applying an "appearance of fairness" standard in reviewing the proceedings of such agencies.¹⁸ The application of the "appearance of fairness" standard can lead to the overturn of an agency's decision upon a showing only that the combination of functions in the administrative agency appeared to be unfair.

The purpose of this article is to examine the protection against unfairness that is lacking in the Arkansas excepted agencies and to propose that the application of an "appearance of fairness" standard in challenges to those agencies' proceedings would serve as a means for providing the lacking protection. A policy of applying such a standard would instill in these agencies an incentive not only to avoid the appearance of unfairness, but also to take affirmative steps to ensure that their proceedings are, in fact, conducted fairly.

II. THE PROTECTION THAT IS LACKING

In order to determine precisely what protection against unfairness is lacking in the Arkansas excepted agencies, it is necessary to examine both the separation of powers doctrine and the provisions of the Arkansas Administrative Procedure Act, which serves as Arkansas's

Administrative Procedures for the Arkansas State Board of Health and the Arkansas State Department of Health do not require the publication of either type of ex parte communication. Although the Arkansas Administrative Procedure Act, ARK. CODE ANN. § 25-15-209 (Michie 1992), allows for internal ex parte communications, it requires the publication of both internal and external ex parte communications. See ARK. CODE ANN. § 25-15-208 (Michie Supp. 1993). It also requires a statement of the basis for all decisions. See ARK. CODE ANN. § 25-15-210 (Michie 1992). These corresponding requirements, which serve to temper the possible ill effects of the allowance of internal ex parte communications, are not provided for in the laws and rules governing the Public Service Commission, the Department of Health, or any of the other excepted Arkansas agencies.

18. See *infra* notes 113-21 and accompanying text.

replacement for separation of powers in administrative agencies. It is also helpful to review the analogous provisions of the Federal Administrative Procedure Act, which was enacted as a culminating response to initial concerns about combined functions in the first administrative agencies.

A. Separation of Powers

It is axiomatic that the United States government incorporates a policy of three separate branches of government: legislative, executive, and judicial.¹⁹ The Arkansas Constitution is even more explicit in its provision for separation of powers than is the United States Constitution.²⁰ In incorporating the doctrine, the framers of both constitutions had a purpose beyond the simple goal of keeping the branches of government separate.

1. *The Federalist*

*The Federalist*²¹ provides an enlightening starting point for obtaining insight into the purpose of the separation of powers doctrine and how that purpose should be effectuated. An examination of

19. The United States Constitution states:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. CONST. art. I, § 1.

The executive Power shall be vested in a President of the United States of America.

U.S. CONST. art. II, § 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. CONST. art. III, § 1. *See Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935) ("The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, . . . is hardly open to serious question.").

20. The Arkansas Constitution states:

The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to wit: Those which are legislative to one, those which are executive to another, and those which are judicial to another.

ARK. CONST. art. 4, § 1.

No person, or collection of persons, being one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

ARK. CONST. art. 4, § 2.

21. *The Federalist* was originally published in 1787 as a series of articles in various New York City newspapers for the purpose of explaining the newly drafted federal constitution and urging support for its ratification.

The Federalist indicates that the doctrine was intended to provide protection against the dangers that can result from the concentration of power in one person or one group of people. The author²² wrote: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."²³ "Tyranny" is a theoretically extreme idea for current times. But its first stage, unfairness, is not. The separation of powers doctrine's applicability to modern times, then, might more appropriately be expressed as a protection against unfairness.

The Federalist further reveals the framers' position that the protection against such unfairness must be built into the system; it must be self-executing:

[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachment of the others. The provision for defense must in this, as in all other cases, be made commensurate with the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other — that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the state.²⁴

In order for the built-in incentives to operate properly, according to *The Federalist*, there must be at least some overlap of the branches.

22. The articles were signed by "Publius" (a historical reference to Publius Valerius Publicola, who had led a revolt against the Tarquin kings of ancient Rome and had subsequently played a leading role in securing the liberties of the people). The authors were James Madison, John Jay, and Alexander Hamilton. Historians believe that James Madison wrote the sections addressing separation of powers (Nos. 47-51). William R. Brock, *Introduction* to HAMILTON, MADISON, AND JAY, *THE FEDERALIST* at ix-xxii (1992).

23. *THE FEDERALIST* No. 47, at 324 (James Madison)(Wesleyan Univ. Press ed., 1961).

24. *THE FEDERALIST* No. 51, at 349 (James Madison)(Wesleyan Univ. Press ed., 1961).

“[U]nless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.”²⁵ This interdependence is in essence the foundation of the system of checks and balances.²⁶

It may be concluded, then, from examining *The Federalist*, that under the framers' view of the separation of powers doctrine, the doctrine's goal of keeping the branches of government separate is not an end in itself, but rather is a means for achieving the goal of preventing the unfairness that can result from a concentration of all power in the same hands.²⁷ It is a means of preventing any one person or one group of people from being able to exercise power arbitrarily or unfairly. If that goal is not achieved by keeping the branches separate, it must be achieved by some other means.

How do the Arkansas excepted agencies fare using *The Federalist's* principles as a basis for analysis? The fact that these agencies blend

25. THE FEDERALIST No. 48, at 332 (James Madison)(Wesleyan Univ. Press ed., 1961).

26. To bolster this requirement of overlap, the author referred to the source of the separation of powers concept: Montesquieu. The author acknowledged that Montesquieu may not have invented the separation of powers concept, but pointed out that he was certainly responsible for bringing it to light. “If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind.” THE FEDERALIST No. 47, at 324 (James Madison)(Wesleyan Univ. Press ed., 1961).

Montesquieu, the author contended, considered the British Constitution to be the standard by which other systems of government should be measured; it is significant, then, that the British system allowed for some overlapping of the governmental branches. “On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other.” THE FEDERALIST No. 47, at 325 (James Madison)(Wesleyan Univ. Press ed., 1961).

After giving specific examples from the British system, the author concluded by stating:

From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying “There can be no liberty where the legislative and executive powers are united in the same person or body of magistrates,” . . . he did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.

THE FEDERALIST No. 47, at 325-26 (James Madison)(Wesleyan Univ. Press ed., 1961).

27. Professor Kenneth Davis, in his *Administrative Law Treatise*, takes the position that it is not *blended* powers that are dangerous, but, rather, *unchecked* powers. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.09 (1958).

the branches of government is not troubling; but, in order to satisfy *The Federalist's* standards, there must be some means of and incentive for the agencies, when acting in the capacity of one particular branch, to check and balance themselves. Do the laws and rules governing these agencies provide the administrative decision-makers with a "personal motive"²⁸ for resisting encroachment by advocates? Do the laws and rules provide them with a defense against such encroachments?²⁹ If so, is it a defense that is "commensurate with the danger of attack?"³⁰ Do these laws and rules provide the agencies with any ambition when acting in their judicial capacity that would counteract their ambition³¹ when acting in a legislative role? Without stricter ex parte communication requirements, they do not. Without a requirement to publish ex parte communications, they do not. Without a requirement of internal separation of functions, at least with regard to given cases, they do not. The decision-makers in these agencies, when acting in their judicial capacities, have no built-in incentive to resist the lobbyists who may appropriately approach them when they are acting in their capacity as legislators. If such lobbyists do approach these decision-makers when they are acting in their judicial capacity, the decision-makers have no built-in incentive to publish for other interested parties the contents of the communication that takes place.³² They have no built-in incentive against participating in a rulemaking proceeding that may directly affect a matter pending before them in their judicial capacity. They have no built-in incentive not to communicate with their staff outside the presence of other vitally interested parties, who are acting as advocates before them in a judicial matter, and who are often directly aligned with another party who may not communicate with the decision-makers.

Thus, we see that even under the considerably flexible approach to the separation of powers doctrine presented in *The Federalist*,

28. THE FEDERALIST No. 51, at 349 (James Madison)(Wesleyan Univ. Press ed., 1961).

29. *Id.*

30. *Id.*

31. *Id.*

32. However, the rules of the Public Service Commission require the publication of external ex parte communications. See Rule 1.06(b) of the Rules of Practice and Procedure of the Arkansas Public Service Commission. Notwithstanding the rule, lobbyists who want to influence the Public Service Commission may do so through the Commission's staff, which may engage in ex parte communications with the Commission without the Commission being required to publish such communications. The Commission's staff is often aligned with one litigant or another.

the Arkansas excepted agencies lack the essential protective component championed in that document: a means of checking and balancing.

2. *The Case Law*

Both the U.S. Supreme Court and the Arkansas Supreme Court have analyzed the separation of powers doctrine in a number of contexts with a variety of results.³³ Despite the diversity of facts and outcomes, the cases share one common theme: Governmental powers may be combined, but where they are, there must be a limiting factor that will serve to check and balance the combination. A review of some of the leading cases yields an enlightened analysis of the Arkansas excepted agencies.³⁴

a. Arkansas Cases

The Arkansas Supreme Court's separation of powers decisions have at times reflected a rather strict interpretation of the doctrine.³⁵ In those instances, the court's analysis has focused on the nature of the function at issue.³⁶ For example, in *Oates v. Rogers*,³⁷ the Arkansas Supreme Court addressed legislation that gave judges the power to appoint public officials. Act 137 of 1939 created an office of collector of taxes in certain counties and provided that the tax collector would be appointed by the circuit, chancery, and county

33. See *infra* notes 37-90 and accompanying text.

34. The separation of powers doctrine is directly impacted by the principles governing the proper delegation of powers. See, e.g., *Clinton v. Clinton*, 305 Ark. 585, 810 S.W.2d 923 (1991). It is also directly impacted by the "public rights" doctrine. See, e.g., *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 Howard) 272 (1856). The case law review that follows does not purport to analyze those issues. Rather, it purports only to highlight some of the leading cases from which general separation of powers principles and the courts' general policies can be ascertained.

35. As noted previously, the Arkansas Constitution provides more explicitly for separation of powers than does the U.S. Constitution. See *supra* note 20 and accompanying text. In addition to the more explicit expression of a separation of powers doctrine in the Arkansas Constitution, one explanation for the Arkansas Court's stricter results could be that most of the cases in which it has sustained the challenge have involved an encroachment upon the judicial branch. Traditionally, the court has accorded greater protection in such instances. In fact, the Arkansas Supreme Court recently noted: "It has been observed that while we may tolerate some blurring of lines between the legislative and executive department, this court has been very protective of the barrier surrounding the judicial department." *Spradlin v. Arkansas Ethics Comm'n*, 314 Ark. 108, 115, 858 S.W.2d 684, 687 (1993).

36. The court expressly rejected that approach, however, in *Arkansas Motor Carriers Ass'n v. Pritchett*, 303 Ark. 620, 798 S.W.2d 918 (1990); see *infra* note 52 and accompanying text.

37. 201 Ark. 335, 144 S.W.2d 457 (1940).

judges of those counties. The Arkansas Supreme Court held Act 137 unconstitutional on the ground that the delegation to judges of the responsibility of appointing the tax collector violated the principle of separation of powers, because that responsibility is not a judicial function. In so holding, the court stated a restrictive view of the separation of powers principle: "Our system, providing as it does for distinct separation of departments, did not in its inception contemplate a blending of authority; and overlapping must not be permitted now at the command of expediency or in response to the nod of convenience."³⁸

Similarly, in *Spradlin v. Arkansas Ethics Commission*,³⁹ the Arkansas Supreme Court considered legislation that gave nonjudicial duties to the judicial branch. There, the plaintiff filed an action in Pulaski County Circuit Court, challenging the constitutionality of The Standards of Conduct and Disclosure Act for Candidates and Political Campaigns,⁴⁰ which created the Arkansas Ethics Commission. Section 6 of the Act⁴¹ provided that the five members of the Commission would be appointed, one each by the Governor, the Attorney General, the Chief Justice of the Supreme Court, the Speaker of the House of Representatives, and the President *Pro Tempore* of the Senate. The plaintiff alleged that it would be an unconstitutional violation of the separation of powers doctrine for the chief justice to appoint a member of a commission that does not perform a judicial function. The circuit court granted summary judgment against the plaintiff. On appeal, the Arkansas Supreme Court reversed, sustaining the plaintiff's separation of powers challenge. The court stated: "We hold that by designating the Chief Justice of the Supreme Court to appoint one of the members of the Commission, that portion of the Act creating the Commission violates the separation of powers and is unconstitutional."⁴²

In *Federal Express Corp. v. Skelton*⁴³ the court addressed the constitutionality of legislation that attempted to interpret previous

38. *Oates*, 201 Ark. at 346, 144 S.W.2d at 458; see also *Hartwick v. Thorne*, 300 Ark. 502, 780 S.W.2d 531 (1989); *Yarbrough v. Yarbrough*, 295 Ark. 211, 748 S.W.2d 123 (1988); *Wells v. Purcell*, 267 Ark. 456, 592 S.W.2d 100 (1979); *Ex Parte Allis*, 12 Ark. 101, 7 Eng. 101 (1851); *Arkansas v. Hutt*, 2 Ark. 282 (1839); *Plunkett v. St. Francis Valley Lumber Co.*, 25 Ark. App. 195, 755 S.W.2d 240 (1988).

39. 314 Ark. 108, 858 S.W.2d 684 (1993).

40. ARK. CODE ANN. §§ 7-1-101 to -107 (Michie 1993).

41. ARK. CODE ANN. § 7-6-217 (Michie 1993).

42. *Spradlin*, 314 Ark. at 116, 858 S.W.2d at 688.

43. 265 Ark. 187, 578 S.W.2d 1 (1979).

legislation. In a predecessor case, *Skelton v. Federal Express Corp.*,⁴⁴ the court had found that an aircraft owned by Federal Express Corporation was taxable under the Arkansas Compensating Tax Act.⁴⁵ After remand, but before the lower court's entry of the new mandate conforming to the supreme court's decision, the legislature passed Act 1237 of 1975 (Extended Session), which amended the Arkansas Compensating Tax Act by exempting certain property, including aircraft, from taxation under the Act. The language of the new Act stated that the General Assembly had determined that "it was not the intent"⁴⁶ of the Arkansas Compensating Tax Act to impose taxes upon certain property such as aircraft.

The Commissioner of Revenues sought relief in the Pulaski County Chancery Court, alleging that the amending Act violated the separation of powers doctrine, in that it was an attempt by the legislature to interpret previous legislation, a function that should only be performed by the judicial branch. Both the chancery court and the Arkansas Supreme Court upheld that challenge. The Arkansas Supreme Court stated:

The relevant portions of [the Arkansas Compensating Tax Act] were interpreted by this Court in *Skelton v. Federal Express Corporation*, 259 Ark. 127, 531 S.W.2d 941 (1976). Sections 2 and 5 of Act 1237 is [sic] a clear attempt by the 1975 General Assembly to interpret a law enacted by the 1949 General Assembly after this Court has interpreted and applied that law. We think this violates the Separation of Powers principle. The legislature can prospectively change the tax laws of this state, within constitutional limitations, but it does not have the power or authority to retrospectively abrogate judicial pronouncements of the courts of this State by a legislative interpretation of the law. The 1975 legislature cannot state what the 1949 legislature intended when it enacted Act 487 of 1949; such interpretation falls exclusively within the province of the judicial branch. For the 1975 legislature to declare the intent of a prior legislature and make the declaration retroactive so as to affect an interpretation already rendered by the courts is an abuse of legislative power which violates the Separation of Powers Doctrine.⁴⁷

These strict applications of the separation of powers doctrine would seem to militate against the combined functions vested in

44. 259 Ark. 127, 531 S.W.2d 941 (1976).

45. ARK. CODE ANN. §§ 26-53-101 to -129 (Michie 1987).

46. 1975 Ark. Acts 1237, §§ 2, 5.

47. *Federal Express Corp.*, 265 Ark. at 199, 578 S.W.2d at 7-8 (citing *Sidway v. Lawson*, 58 Ark. 117, 23 S.W. 648 (1893)).

Arkansas's administrative agencies. However, the Arkansas Supreme Court has struck down separation of powers challenges to the creation of administrative agencies with combined functions.⁴⁸ These decisions striking the challenges illustrate, nevertheless, an implicit requirement that in situations where combined functions are allowed, some limiting factor, a check and balance, must be present.

In *Hickenbottom v. McCain*,⁴⁹ for example, the court addressed a challenge to Act 391 of 1941, which created the Employment Security Division as a part of the Department of Labor. The plaintiff challenged the constitutionality of the Act partially on the ground that it violated the separation of powers provisions of the Arkansas Constitution. The basis for the separation of powers argument appears to have been that the Act created a legislative agency under the supervision of an executive officer and gave the agency both legislative and "police" (executive) powers.⁵⁰ The challenger sought to enjoin enforcement of the Act. The Boone County Chancery Court dismissed the case for lack of jurisdiction. In affirming that dismissal, the Arkansas Supreme Court addressed the constitutional challenges, holding that the dual functions of the agency did not violate the separation of powers doctrine. The court's holding was based in part on its determination that, when legislative power is delegated, the delegation implicitly confers the power to do that which is deemed necessary to carry out the delegated legislative power. This essentially allowed the legislative branch to exercise executive powers in aid of legislation. The legislative branch's cross-over to the executive branch was limited in scope and purpose; the agency could only exercise executive powers that were actually necessary to perform its legislative powers. This requirement served to check and balance the challenged combination of functions.

48. See *infra* notes 49-54 and accompanying text. The results in these cases may have been reached "in response to the nod of convenience." *Oates v. Rogers*, 201 Ark. 335, 144 S.W.2d 457 (1940). Given the major role that administrative agencies play in Arkansas's government, it is not surprising that the court has found a way to circumvent the separation of powers doctrine, rather than invalidating the agencies.

49. 207 Ark. 485, 181 S.W.2d 226 (1944).

50. This challenge was not explicitly set forth in the court's opinion; however, in the analysis upon which the court based its decision, the court made reference to *Lucas v. Futrall*, 84 Ark. 540, 106 S.W. 667, 669 (1907), an earlier case in which such a challenge was expressed. See *Hickenbottom*, 207 Ark. at 492, 181 S.W.2d at 229. It should also be noted that the *Hickenbottom* court's analysis was largely directed at the other constitutional challenge that was raised, *i.e.*, that the legislation violated Article XIX, § 9 of the Arkansas Constitution.

The court dealt with a similar situation in *Arkansas Motor Carriers Ass'n v. Pritchett*.⁵¹ Act 67 of 1989 (First Extraordinary Session) abolished the Transportation Safety Agency and the Transportation Regulatory Board, which were arms of the legislature, and transferred their duties to the Arkansas Highway and Transportation Department and the Arkansas Highway Commission, arms of the executive branch. The Arkansas Motor Carriers Association challenged the Act on the ground that the exercise of legislative functions by agencies that are part of the executive branch would be a violation of the separation of powers doctrine.⁵² The court held that the scheme was not unconstitutional. After acknowledging the Constitution's explicit separation of powers requirement and the need to protect the interests of the affected branches, the court found that the legislature's interest was adequately protected by virtue of the fact that it could withdraw the power that it had delegated.⁵³ This power to withdraw the delegated power served to check and balance the challenged combination of functions.⁵⁴

These Arkansas separation of powers cases, as a body of law, teach that the court takes the separation of powers doctrine seriously, but that it will allow some blending of powers provided that some limiting factor, some means of check and balance, is present.

b. U.S. Supreme Court Cases

The lesson gleaned from a review of the Arkansas cases is essentially the same one ascertained from a review of the U.S. Supreme Court cases.⁵⁵ Such a review reveals the same common

51. 303 Ark. 620, 798 S.W.2d 918 (1990).

52. Interestingly, the court rejected the idea that the nature of the functions of the agency in question should be determinant in deciding a separation of powers challenge. *Arkansas Motor Carriers Ass'n*, 303 Ark. at 624-25, 798 S.W.2d at 920.

53. *Arkansas Motor Carriers Ass'n*, 303 Ark. at 625, 798 S.W.2d at 920. The court did not address protection of the executive branch's interest. If it had done so, the court's reasoning presumably would have been the same as its reasoning in addressing protection of the legislative branch's interest.

54. In accord with *Hickenbottom* and *Arkansas Motor Carriers Ass'n* are, among others, *Porter v. McCuen*, 310 Ark. 562, 839 S.W.2d 512 (1992); *Johnson v. Sunray Serv., Inc.*, 306 Ark. 497, 816 S.W.2d 582 (1991); *Clinton v. Clinton*, 305 Ark. 585, 810 S.W.2d 923 (1991); *Fireman's Ins. Co. v. Arkansas State Claims Comm'n*, 301 Ark. 451, 784 S.W.2d 771 (1990); *Swanberg v. Tart*, 300 Ark. 304, 778 S.W.2d 931 (1989).

55. It is important to note at the outset that the U.S. Supreme Court has not adhered to a strict test or set of rules in its separation of powers analyses. The Court claims to have explicitly declined to set out a strict test or set of rules in determining whether Article III courts' domain has been encroached upon. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) ("In determining

thread running through the Court's analyses, despite their differing results: The effect of the presence or absence of some limiting factor that would prevent the aggrandizement of one branch at the expense of another.⁵⁶ Where such limitations were present, the Court upheld the challenged scheme; where absent, the Court struck the challenged scheme.

In the Court's earliest separation of powers cases, its analyses, like some of the Arkansas Supreme Court's analyses,⁵⁷ were based on a determination of the nature of the functions that were affected. In *Myers v. United States*,⁵⁸ for example, the Court held that Congress's attempt to limit the President's power to remove an executive officer, a postmaster, would unconstitutionally interfere with the executive branch. Myers argued that removal of an executive officer required the advice and consent of the Senate. The Court refused to uphold Congress's limitation on the President's removal power because it concluded that the postmaster was an exclusively executive officer and that removal of such officers is within the President's executive domain.⁵⁹ Implicit in the Court's analysis was a determination that if the affected functions were fundamentally characteristic of the allegedly encroaching branch, then sufficient limitations were presumptively in place.

The Court gradually shifted its focus from the nature of the functions at issue to the nature of the encroachments at issue. In *Humphrey's Executor v. United States*,⁶⁰ decided less than a decade after *Myers*, the Court upheld Congress's limitation of the President's power to remove a Federal Trade Commissioner. The difference between the holdings hinged on the Court's conclusion that Federal Trade Commissioners, unlike the postmaster in *Myers*, are not "purely executive officers"⁶¹ because the Federal Trade Commission was created to carry out legislative and judicial, not executive, functions.

the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules."'). However, the Court has employed various "balancing tests" in some of its separation of powers analyses. See *infra* note 74 and accompanying text.

56. *Morrison v. Olson*, 487 U.S. 654, 688-91 (1988); *Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

57. See *supra* notes 37-47.

58. 272 U.S. 52 (1926).

59. Interestingly, the Court pointed out that the Senate has sufficient opportunity to check the President's power in the appointment phase.

60. 295 U.S. 602 (1935).

61. *Id.* at 627-28.

For purposes of an analysis of the Arkansas excepted agencies, the most significant part of the *Humphrey's Executor* decision was the Court's discussion of the dangers that would result from allowing the President unlimited removal power over officers who are not purely executive. To allow such unlimited removal power, the Court held, would be to give the President a "coercive influence"⁶² over the other branches of government. The Court said: "For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."⁶³

Drawing this observation into the context of a separation of powers analysis, the Court continued:

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. . . . The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers."⁶⁴

Humphrey's Executor teaches that the danger of allowing the executive branch unlimited removal power over officers serving functions for the other branches would be the lack of protection against the executive branch's enhanced ability to exercise a coercive influence over the other branches. What the Court upheld was, in fact, a limitation on the President's interference with the other branches.

In *Youngstown Sheet & Tube Co. v. Sawyer*,⁶⁵ where the Court struck down an act of the President as violative of the separation of powers doctrine, the Court addressed the danger of allowing encroachments to go unchecked. Justice Frankfurter stated: "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard

62. *Id.* at 630.

63. *Id.* at 629. *Accord*, *Bowsher v. Synar*, 478 U.S. 714 (1986).

64. 295 U.S. at 629-30.

65. 343 U.S. 579 (1952).

of the restrictions that fence in even the most disinterested assertion of authority.”⁶⁶

Justice Frankfurter’s language implies that *checked* disregard of boundaries might be permissible. The same implication may be drawn from language contained in Justice Jackson’s concurring opinion in *Youngstown*.⁶⁷ He wrote: “While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”⁶⁸

The Court made the same implication again in *Buckley v. Valeo*.⁶⁹ In *Buckley*, the Court invalidated a legislative scheme that allowed Congress to appoint members of the Federal Election Commission. Because the Commission’s most substantial role was the exercise of powers that were essentially executive in nature, the Court held that the legislative branch could not appoint its members. Nevertheless, the Court noted that bodies similar to the Commission, such as typical administrative agencies, can constitutionally exercise executive functions when those functions are part of Congress’s legislative function.⁷⁰ In that instance, the narrow scope of the exercise of those functions served as the “check.”

The implication drawn from *Youngstown* and *Buckley*, that checked disregard of governmental branch boundaries might be permissible, has been borne out in numerous Supreme Court separation of powers analyses since *Youngstown* in which the Court has upheld, due to the presence of limiting factors, a variety of encroachments that have been challenged on the basis of separation of powers.⁷¹

For example, in *Nixon v. Administrator of General Services*,⁷² the Court upheld, against a separation of powers challenge, Congress’s delegation to a lower executive officer the responsibility of regulating

66. 343 U.S. at 594; accord *Springer v. Philippine Islands*, 277 U.S. 189 (1928).

67. 343 U.S. at 634.

68. *Id.* at 635.

69. 424 U.S. 1 (1976).

70. *Id.* at 138; cf. *Arkansas Motor Carriers Ass’n v. Pritchett*, 303 Ark. 620, 798 S.W.2d 918 (1990); see *supra* note 52 and accompanying text.

71. See *infra* notes 72-82 and accompanying text. The decisions since *Youngstown* have also been increasingly influenced by the factors of convenience, pragmatism, and expediency. See, e.g., *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977); see *infra* note 72 and accompanying text.

A notable exception to the Court’s general trend of striking challenges based on the separation of powers argument is *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); see *infra* notes 83-90 and accompanying text.

72. 433 U.S. 425 (1977).

the disposition of presidential papers. In addressing the separation of powers issue, the Court stated:

[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which⁷³ it prevents the Executive Branch from accomplishing its constitutionally assigned functions. *United States v. Nixon*, 418 U.S., at 711-712, 41 L. Ed. 2d 1039, 94 S. Ct. 3090. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.⁷⁴

Having applied this balancing test, the Court upheld the challenged delegation. Even though the Act in question did diminish the President's power, the diminution was permissible because it was limited by leaving the power in the executive branch. Interestingly, the Court postulated that it would be impermissible to delegate the responsibility to the legislative branch.⁷⁵

In *Commodity Futures Trading Commission v. Schor*,⁷⁶ the U.S. Supreme Court entertained a challenge based on separation of powers to congressional legislation that allowed the Commodity Futures Trading Commission to hear pendent and ancillary state common law claims. The challengers argued that the scheme constituted an impermissible encroachment by the legislative branch into the judiciary by allowing a non-Article III tribunal to hear Article III claims. Bearing out Justice Frankfurter's implications from *Youngstown*,⁷⁷ the Court held that the scheme did not violate the separation of

73. Interestingly, the inquiry is not "whether," but "how much." In *Morrison v. Olson*, 437 U.S. 654 (1988), Justice Scalia queried in his dissenting opinion, "What are the standards to determine how the balance is to be struck, that is, how much removal of . . . power is too much?" *Id.* at 711 (Scalia, J., dissenting) [Footnote added by present author.].

74. 433 U.S. at 443. The quoted language appears to have all the attributes of a balancing test for separation of powers analysis; cf. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); see discussion *supra* note 55. The Court employed other versions of a "balancing test" in *Morrison v. Olson*, 487 U.S. 654 (1988), and in *Mistretta v. United States*, 488 U.S. 361 (1989). For a criticism of such tests, see Justice Scalia's dissenting opinion in *Morrison*, 487 U.S. at 711 (Scalia, J., dissenting). For a discussion of Justice Scalia's dissents in *Morrison* and *Mistretta*, see Price Marshall, "No Political Truth": *The Federalist and Justice Scalia on the Separation of Powers*, 12 U. ARK. LITTLE ROCK L.J. 245 (1989-90).

75. 433 U.S. at 444.

76. 478 U.S. 833 (1986).

77. See *supra* note 66 and accompanying text.

powers doctrine, largely because sufficient limitations were in place.⁷⁸ Among those noted by the Court were judicial review, the non-mandatory nature of the Commission's jurisdiction, the retention by Article III courts of jurisdiction, and the fact that all essential attributes of Article III power were left in the Article III courts.

The Court recently followed the *Youngstown* implication in *Morrison v. Olson*⁷⁹ and *Mistretta v. United States*,⁸⁰ by upholding legislative schemes that provided for some measure of encroachment by one governmental branch upon another⁸¹ because sufficient limiting factors were available.⁸²

A major departure from the Court's recent instances of striking separation of powers challenges is *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*⁸³ It explicitly illustrates the necessity of a limiting factor in the absence of actual separation. In *Northern Pipeline*, a corporation that had filed for reorganization under the Bankruptcy Code sued another corporation in bankruptcy court for breach of contract, breach of warranty, misrepresentation, and other offenses. The defendant corporation moved to dismiss the suit on the grounds that the Bankruptcy Act of 1978,⁸⁴ which gave the bankruptcy court jurisdiction over all civil proceedings arising under Title 11, was an unconstitutional encroachment by the legislative branch upon the judiciary, because, through it, Congress gave Article III jurisdiction to Article I courts. The plaintiff corporation argued that the grant of jurisdiction was permissible under a line of cases in which the Court had upheld the creation of "legislative" courts,⁸⁵

78. 478 U.S. at 852-57; cf. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); see *infra* notes 83-90 and accompanying text.

79. 487 U.S. 654 (1988).

80. 488 U.S. 361 (1989).

81. *Morrison* involved, among other issues, a challenge to various aspects of the Ethics in Government Act on the ground that it encroached upon the President's executive powers. *Mistretta* involved a challenge to the Sentencing Reform Act on the grounds that its creation of the Sentencing Commission and the roles given to the Commission impermissibly encroached upon the judiciary.

82. In *Morrison*, the Court gave weight to the narrow focus of the cross-over between branches, the fact that the nature of the functions at issue were characteristic of the branches by which they would be exercised under the challenged scheme, and the availability of judicial review. In *Mistretta*, the Court focused on the nature of the functions involved in the challenged scheme and gave weight to the fact that the essential attributes of the branches of government affected were neither undermined nor expanded.

83. 458 U.S. 50 (1982).

84. 28 U.S.C. §§ 1471-1482 (1982).

85. See, e.g., *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828) (stating that Congress may create legislative courts to exercise jurisdiction over geographical

specialized courts,⁸⁶ and courts that operate as adjuncts to Article III courts.⁸⁷ The Court rejected the argument, stating: "The flaw in appellants' analysis is that it provides no limiting principle."⁸⁸ The Court noted that, in the cases cited by the appellant, various built-in limitations had protected against unwarranted encroachment into Article III territory.⁸⁹ Among those limitations were: a specific and narrowly focused prescription of the manner in which the non-Article III courts are to exercise Article III functions; an express limitation of the non-Article III courts' functions so as to reserve in Article III courts "the essential attributes" of judicial power; the non-Article III courts' lack of power to enforce their decisions; the fact that the challenged scheme allowed the non-Article III courts to hear only cases referred to them by Article III courts; the fact that Article III courts had the ability to appoint and remove decision-makers in the non-Article III courts; and the ability of Article III courts to conduct a *de novo* review of the non-Article III courts' decisions.⁹⁰ Because no such limiting factors were available in the

areas in which no state operates as sovereign, *i.e.*, United States territories); *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857) (stating that Congress may create legislative courts to establish and exercise courts-martial); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855) (stating that Congress may create legislative courts to exercise jurisdiction over public rights).

86. *See, e.g.*, *Palmore v. United States*, 411 U.S. 389 (1973).

87. *See, e.g.*, *United States v. Raddatz*, 447 U.S. 667 (1980); *Crowell v. Benson*, 285 U.S. 22 (1932).

88. 458 U.S. at 73.

89. *Id.* at 80-81.

90. The judiciary's ability to conduct *de novo* review of state agencies' legislative and executive decisions has been held unconstitutional in Arkansas as a violation of the separation of powers doctrine (judicial encroachment upon the legislative and executive branches). *See, e.g.*, *Arkansas Comm'n on Pollution Control and Ecology v. Land Developers*, 284 Ark. 179, 680 S.W.2d 909 (1984); *Goodall v. Williams*, 271 Ark. 354, 609 S.W.2d 25 (1980); *Wenderoth v. City of Ft. Smith*, 251 Ark. 342, 472 S.W.2d 74 (1971). However, the Arkansas Supreme Court has expressly stated that the holding of those cases does not extend to the review of administrative agencies' adjudicatory decisions. *McCammon v. Boyer*, 285 Ark. 288, 686 S.W.2d 421 (1985). In fact, the *McCammon* court stated: "If *de novo* review of actions by administrative boards and commissions were not allowed, a board or commission might act arbitrarily or unreasonably or even conceal the real facts and thereby protect such acts from proper review." 285 Ark. at 293, 686 S.W.2d at 424. Nevertheless, the laws and rules governing the Arkansas excepted agencies (other than the Highway Commission) do not provide for *de novo* review of those agencies' adjudicatory decisions. In fact, judicial review of such decisions is limited. *See, e.g.*, ARK. CODE ANN. § 23-2-423(c)(4) (Michie Supp. 1993); Section V of the Administrative Procedures for the Arkansas State Board of Health and the Arkansas State Department of Health; ARK. CODE ANN. § 11-9-711(b)(4) (Michie 1987); *Arkansas State Bank Comm'n v. Bank of Marvell*, 304 Ark. 602, 804 S.W.2d 692 (1991). Procedures before the Highway Commission are subject to *de novo*

bankruptcy court, the Court sustained the separation of powers challenge.

The U.S. Supreme Court's decisions demonstrate a separation of powers jurisprudence like that described in *The Federalist* and employed by the Arkansas Supreme Court, which allows some blending of powers, but which, in the absence of actual separation of powers, requires some other limiting factor to provide checks and balances. That requirement gave rise to the administrative procedure acts.

B. The Administrative Procedure Acts: Substitute for Separation of Powers

Concern about the combination of functions in administrative agencies became apparent immediately upon proposal of the first agency, the Interstate Commerce Commission.⁹¹ In the Congressional debate over the creation of that agency, Representative Oates stated: "I believe it is absolutely unconstitutional and void, because to my mind it is a blending of the legislative, the judicial, and perhaps, the executive powers of the government in the same law."⁹² Similar concerns were still prevalent in 1937, when a special Congressional committee presented, upon request, a report to President Roosevelt on the subject of administrative agencies. The report is particularly reflective of traditional concerns about the combination of functions in administrative agencies. It stated:

The independent regulatory commissions create a confusing and difficult situation in the field of national administration. There is a conflict of principle involved in their make-up and functions. They suffer from an internal inconsistency, an unsoundness of basic theory.

...

The evils resulting from this confusion of principles are insidious and far-reaching. In the first place, governmental powers of great importance are being exercised under conditions of virtual irresponsibility. We speak of the "independent" regulatory commissions. It would be more accurate to call them the "irresponsible" regulatory commissions, for they are areas of unaccountability. It is not enough to point out that these

review. See ARK. CODE ANN. § 23-2-425 (Michie 1987); Arkansas Commerce Comm'n v. St. Louis S.W. Ry., 247 Ark. 1032, 448 S.W.2d 950 (1970). However, even those *de novo* reviews are limited in scope. See *Acme Brick Co. v. Missouri Pac. R.R.*, 307 Ark. 363, 821 S.W.2d 7 (1991).

91. See 49 U.S.C. §§ 10521-11917 (1988).

92. 18 CONG. REC. 848 (1886).

irresponsible commissions have of their own volition been honest and competent. Power without responsibility has no place in a government based on the theory of democratic control, for responsibility is the people's only weapon, their only insurance against abuse of power.

[T]he independent commission is obliged to carry on judicial functions under conditions which threaten the impartial performance of that judicial work. The discretionary work of the administrator is merged with that of the judge. Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible.

Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the commission, in the role of prosecutor, presented to itself.

The independent commission, in short, provides the proper working conditions neither for administration nor for adjudication. It fails to provide responsibility for the first; it does not provide complete independence for the second.⁹³

The concerns expressed in the report to President Roosevelt eventually culminated in the Federal Administrative Procedure Act⁹⁴ with its protective provisions.⁹⁵ The aim of those provisions was to achieve some measure of the protection against unfairness that had been lost when the governmental functions were combined. Their goal was to prevent situations that are unfair to the litigants who appear before the agencies.⁹⁶ For example, Section 554(d) of the Act prohibits any agency employee from performing more than one function in connection with a given case. Sections 554(d) and 557(d)(1) prohibit *ex parte* communications between those who perform investigative functions and those who perform decision-making functions. Section 557(d)(1)(C) requires the publication of the contents of any *ex parte* communication that takes place.

93. S. Doc. No. 118, 75th Cong., 1st Sess. (1937).

94. 5 U.S.C. §§ 551-559 (1988).

95. 5 U.S.C. §§ 554(d), 557(d)(1) (1988).

96. See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950); see also *Grolier v. Federal Trade Comm'n*, 615 F.2d 1215 (9th Cir. 1980).

The Arkansas Administrative Procedure Act⁹⁷ contains similar provisions,⁹⁸ also intended to provide safeguards against the unfairness that can result from the combination of functions in administrative agencies. The most important safeguards against such unfairness are the prohibition against *ex parte* communications,⁹⁹ the requirement that *ex parte* communications be published,¹⁰⁰ and the requirement that an agency's record reveal all bases for its decisions.¹⁰¹

97. ARK. CODE ANN. §§ 25-15-201 to -210 (Michie 1992 & Supp. 1993).

98. ARK. CODE ANN. §§ 25-15-208 to -210 (Michie 1992 & Supp. 1993). However, the Arkansas Administrative Procedure Act does not contain a provision prohibiting dual functions in a given case.

99. The prohibition against *ex parte* communications states:

(a) Unless required for the disposition of *ex parte* matters authorized by law, members or employees of an agency assigned to render a decision or to make final or proposed findings of fact or conclusions of law in any case of adjudication shall not communicate, directly or indirectly, in connection with any issue of fact with any person or party nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate.

(b) An agency member may:

(1) Communicate with other members of the agency; and

(2) Have the aid and advice of one (1) or more personal assistants.

ARK. CODE ANN. § 25-15-209 (Michie 1992). Although paragraph (b) is troubling, it is less so because of the provisions of ARK. CODE ANN. §§ 25-15-208(a)(5)(F), -210 (Michie 1992 & Supp. 1993), *see infra* notes 100-01, and because of the holding of Arkansas Alcoholic Beverage Control Div. v. Cox, 306 Ark. 82, 811 S.W.2d 305 (1991) (requiring *ex parte* communications to be placed in the record.).

100. The requirements of publication state:

(5) The record shall include:

...

(F) All staff memoranda or data submitted to the hearing officer or members of an agency in connection with their consideration of the case. ARK. CODE ANN. § 25-15-208(a)(5)(F) (Michie Supp. 1993).

101. The requirement that the bases for decisions be revealed states:

(a) When, in a case of adjudication, a majority of the officials of the agency who are to render the decision have not heard the case or read the record, the decisions, if adverse to a party other than the agency, shall not be made until a proposal for decision is served upon the parties and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision. The proposal for decision shall contain a statement of the reasons therefore and of each issue of fact or law necessary thereto, prepared by the person who conducted the hearing.

(b) (1) In every case of adjudication, a final decision or order shall be in writing or stated in the record.

(2) A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling

For the Arkansas agencies governed by the Act, these provisions arguably¹⁰² serve adequately to replace the lost protection of keeping the branches of government strictly separate. However, the agencies that are not governed by the Act do not have this replacement protection. The possibility of unfairness is therefore heightened in proceedings before those agencies. They have neither the protection of actual separation of functions, nor the protection of statutorily imposed internal separation of functions.¹⁰³ The only available safeguard against unfairness in those agencies' proceedings, then, may be the imposition of a strict standard by the appellate courts who review those agencies' proceedings.

III. THE "APPEARANCE OF FAIRNESS" STANDARD VERSUS "ACTUAL UNFAIRNESS" AND THE PRESUMPTION OF INTEGRITY

Most challenges to the combination of functions that exists in administrative agencies have been based on an argument that the combination of functions and attendant *ex parte* communications resulted in a violation of due process.¹⁰⁴ That is, the challengers have argued that the situation denied them a fair trial.¹⁰⁵ In addressing such challenges, the courts have generally applied either an "appearance of fairness" standard or an "actual unfairness" standard. Some courts have applied a hybrid of the two standards, which is based upon a presumption of the integrity of the decisionmakers. A review of some of the cases indicates that in the absence of other limiting factors, or checks and balances, an application of the "ap-

upon each proposed finding.

(c) Parties shall be served either personally or by mail with a copy of any decision or order.

ARK. CODE ANN. § 25-15-210 (Michie 1992).

102. See *supra* note 8.

103. Or even "parchment barriers." THE FEDERALIST No. 48, at 254 (James Madison)(Wesleyan Univ. Press ed., 1961).

104. See *infra* notes 106-21 and accompanying text.

105. In the context of such a challenge, the threshold question, of course, is whether the challenger is entitled to due process in an administrative proceeding. It is well-settled that administrative proceedings, even though quasi-judicial in nature, must comply with the requirements of due process. See, e.g., *Withrow v. Larkin*, 421 U.S. 35 (1975); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Amos Treat v. Securities & Exch. Comm'n*, 306 F.2d 260 (D.C. Cir. 1962); *Madden v. United States Assoc.*, 40 Ark. App. 143, 844 S.W.2d 374 (1992). The courts have, however, differentiated between rulemaking proceedings and adjudicative proceedings, as well as between cases involving private rights and those involving public rights, in ruling as to the type of process that was due. See *Hannah v. Larche*, 363 U.S. 420 (1960). But see *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959).

pearance of fairness" standard is the most appropriate means of supplying a check and balance. If administrative decision-makers are aware that a decision can be vacated by a finding that the proceeding involved an appearance of unfairness, they will have an incentive to avoid such appearances.

A. The Presumption of Integrity

A review of the standards employed by the courts in addressing due process challenges to the combination of functions in administrative agencies must begin with *Withrow v. Larkin*,¹⁰⁶ in which the United States Supreme Court held that a combination of functions in administrative agencies, in and of itself, does not violate due process. In that case, a U.S. district court issued an order enjoining the Wisconsin State Examining Board from holding proceedings to investigate a doctor's compliance with certain statutes and enjoining the board from suspending his license to practice medicine. One of the grounds for the injunction was that it would be a denial of due process for the Board to suspend the doctor's license at its own hearing on charges that arose from its own investigation. In other words, the Board could not act as both prosecutor and judge because combining those two functions would be unconstitutional.

On appeal, the U.S. Supreme Court reversed and remanded the case. The Court did not go so far as to apply an "actual unfairness" standard, which would have required a showing of *actual* bias on the part of the decisionmakers. In fact, the Court acknowledged its previous holding in *In Re Murchison*¹⁰⁷ that "justice must satisfy the appearance of justice."¹⁰⁸ However, the Court did create a difficult standard for establishing due process violations arising out of administrative agencies' combined functions. The Court held that one who contends that this combination "without more"¹⁰⁹ violates the Constitution has the difficult burden of overcoming "a presumption of honesty and integrity in those serving as adjudicators"¹¹⁰ and must show that "the probability of actual bias on the part of the judge or decisionmaker is too high to be

106. 421 U.S. 35 (1975).

107. 349 U.S. 133 (1955).

108. *Id.* at 136.

109. 421 U.S. at 58.

110. *Id.* at 47.

constitutionally tolerable.”¹¹¹ Numerous decisions have followed *Withrow* or have employed similar reasoning.¹¹²

B. The Appearance of Fairness Standard

Despite *Withrow* and its progeny, other courts have applied a less stringent “appearance of fairness” standard in determining whether an administrative agency’s combination of functions has violated the challenger’s due process rights. Those courts have required only a showing that the challenged proceedings *appeared* to be unfair. For example, in *Utica Packing Co. v. Block*,¹¹³ which involved the prosecution of a meat packing company, an administrative law judge in the Department of Agriculture rendered a decision that was unfavorable to the Department. Thereafter, the Secretary of Agriculture replaced the administrative law judge with a person who was not a lawyer and who had never performed adjudicatory or other legal work. A lawyer whose direct supervisor had been involved with the investigation and prosecution of the packing company and with the removal of the administrative law judge was appointed to assist the replacement judge. The Department then filed a motion for reconsideration. The new judge rendered a decision that was favorable to the Department and resulted in the revocation of a meat packing company’s entitlement to receive inspection service. On appeal, the packing company argued that the replacement of the judge with personnel who had previously been involved with the company’s prosecution, though indirectly, had resulted in a violation of the company’s due process right to a fair trial. The United States Court of Appeals for the Sixth Circuit agreed, stating: “The requirement of a fair trial before a fair tribunal . . . requires the appearance of fairness and the absence of a probability of outside influences on the adjudicator; it does not require proof of actual partiality.”¹¹⁴

111. *Id.*

112. See, e.g., *Kessler Food Mkt. v. NLRB*, 868 F.2d 881 (6th Cir. 1989); *Cobb v. Yeutter*, 889 F.2d 724 (6th Cir. 1989); *Hercules v. EPA*, 598 F.2d 91 (D.C. Cir. 1978); *Doe v. Hampton*, 566 F.2d 265 (D.C. Cir. 1977); *FTC v. Cinderella Career & Finishing Sch.*, 404 F.2d 1308 (D.C. Cir. 1968); *Pangburn v. Civil Aeronautics Bd.*, 311 F.2d 349 (1st Cir. 1962); *United States ex rel. Catalano v. Shaughnessy*, 197 F.2d 65 (2d Cir. 1952).

113. 781 F.2d 71 (6th Cir. 1986).

114. 781 F.2d at 77. The court also stated: “With regard to judicial decision-making, whether by court or agency, the appearance of bias or pressure may be no less objectionable than the reality.” *Id.* at 78 (quoting *D.C. Fed’n of Civic Ass’ns v. Volpe*, 459 F.2d 1231, 1246-47 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972)).

Interestingly, the *Utica* Court did not attempt to discredit the *Withrow* Court's strict standard; instead, it simply enlarged the standard by determining that *Withrow*'s category of cases in which "the probability of actual bias is too high to be constitutionally tolerable"¹¹⁵ includes fact situations that carry an appearance of unfairness.¹¹⁶

Another example of a court's application of the "appearance of fairness" standard is *Amos Treat & Co. v. Securities and Exchange Commission*.¹¹⁷ In that case, the Securities and Exchange Commission ordered a hearing on the issue of whether Amos Treat & Co.'s registration as a broker-dealer should be revoked for noncompliance with the Securities and Exchange Act.¹¹⁸ Amos Treat & Co. moved to discontinue the proceedings and to disqualify a member of the Commission on the grounds that he had participated in the investigatory process and had engaged in ex parte communications with the staff who was conducting the prosecution of the case. The motion was denied. On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed, stating:

It is not enough that here no corruption has been charged, indeed appellants expressly disclaim personal bias and prejudice. What must control is the policy . . . that the investigative as well as the prosecuting arm of the agency must be kept separate from

115. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

116. 781 F.2d at 77. The *Withrow* decision leaves several other avenues that could be used to avoid its strict standard. For example, the decision encourages other courts addressing the same issue to make their decisions based on the particular facts of the case, taking into consideration "local realities." 421 U.S. at 58. The decisions of the United States Court of Appeals for the Sixth Circuit reflect the varying results brought about by differences in particular facts. For example, compare *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966) with *Kessler Food Mkts. v. NLRB*, 868 F.2d 881 (6th Cir. 1989).

Also, the Court made a point of noting the protective impact of the Administrative Procedure Act, 421 U.S. at 52, implying that combined functions in administrative agencies could be challenged on the grounds of statutory violations, where such statutory protections are available, without resorting to a constitutional challenge. See *Grolier v. FTC*, 615 F.2d 1215 (9th Cir. 1980). The further implication of this point, of course, is that where such statutory protections are not available, such as in the Arkansas excepted agencies, constitutional principles are more susceptible to violation.

Finally, of particular import in an analysis of the Arkansas excepted agencies is the fact that the *Withrow* court distinguished the prior cases in which due process violations had been found. 421 U.S. at 50 n.16. Interestingly, each of the cases distinguished by the Court involved a situation similar to that which exists or can easily exist in the Arkansas excepted agencies.

117. 306 F.2d 260 (D.C. Cir. 1962).

118. 15 U.S.C. §§ 77a-77bbb (1988).

the decisional function.

....

[A]n administrative hearing . . . must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process.¹¹⁹

Similarly, in *American Cyanamid Co. v. Federal Trade Commission*,¹²⁰ the United States Court of Appeals for the Sixth Circuit held that a commissioner's participation in both the investigative and decision-making phases of a proceeding violated due process. In *American Cyanamid*, a drug company that was being prosecuted for violation of the Federal Trade Commission Act moved to disqualify one of the Federal Trade Commissioners from participating in the decision-making process in the case because he had served as counsel to the Senate subcommittee that had investigated the relevant facts and issues. The motions were denied, and the Commission entered an order that was unfavorable to the drug company. The United States Court of Appeals for the Sixth Circuit vacated the order and remanded for rehearing without the participation of the commissioner in question. In so holding, the court stated: "It is fundamental that both unfairness and the appearance of unfairness should be avoided. Wherever there may be a reasonable suspicion of unfairness, it is best to disqualify."¹²¹

C. Uncertainty in the Arkansas Standard

In addressing the issue of combined functions in administrative agencies, the Arkansas courts have employed both the "appearance of fairness" standard and the "actual unfairness" standard. Some of the recent decisions in which the courts have applied the "actual unfairness" standard reveal a judicial concern about the unchecked

119. 306 F.2d at 266-67.

120. 363 F.2d 757 (6th Cir. 1966).

121. *Id.* at 767 (citing Comment, *Prejudice and the Administrative Process*, 59 NW. U. L. REV. 216, 231 (1964); Robert N. Covington, *Disqualification of Administrative Officials for Bias*, 13 VAND. L. REV. 713, 727 (1960)).

Other cases in which violations of due process have been found to arise out of circumstances that resulted from a combination of functions in administrative agencies are *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *HBO v. FCC*, 567 F.2d 9 (D.C. Cir. 1977); *Cinderella Career & Finishing Sch. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970); *Camero v. United States*, 375 F.2d 777 (U.S. Ct. Cl. 1967); *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965); *Sangamon Valley Tel. Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959); *Trans World Airlines v. CAB*, 254 F.2d 90 (D.C. Cir. 1958); *King v. Caesar Rodney Sch. Dist.*, 380 F. Supp. 1112 (Del. 1974).

combination of functions in administrative agencies and portend the possibility of a shift toward favoring an "appearance of fairness" standard.

In *General Telephone Co. v. Arkansas Public Service Commission*,¹²² a telephone company petitioned the Public Service Commission for a rate increase. After the Commission granted an increase, the Commission's staff requested a rehearing of the order, and the Commission reduced the amount of the increase. The company appealed the reduction, arguing that the Commission's staff should not have standing as an adversarial party before the Commission to file a request for rehearing. The court rejected the argument, finding no evidence of actual bias as a result of the staff's participation as a party. However, the court said:

It is troublesome that an agency which is placed in a decision-making role can have its own staff before it as a party. Even if the internal operating procedures of the commission kept the commissioners totally isolated from their staff, and we assume that is not the case, we would find a serious appearance of impropriety in this situation. It is a little like a judge making his or her law clerk a party to a case even though the law clerk has a close association with the judge, is his or her employee, and has the judge's ear before and after the hearing. We have real doubts about this situation. . . .¹²³

The Arkansas Court of Appeals reached similar results regarding the staff's status as a party in *AEEC v. Arkansas Public Service Commission*¹²⁴ and in *Fowler v. Arkansas Public Service Commission*.¹²⁵

In *AEEC*, an association of large industrial customers of Arkansas Power & Light appealed from a Public Service Commission decision approving a settlement agreement that had the effect of restructuring certain aspects of AP&L's business, with a resulting impact on the members of the association. One of the bases for appeal was the contention by the association that the Commission's staff had participated in ex parte communications with AP&L regarding a settlement agreement, and that the participation of the staff as a party in the proceeding after such communications had the effect of denying the association due process. The court rejected the

122. 295 Ark. 595, 751 S.W.2d 1 (1988).

123. *Id.* at 601-02, 757 S.W.2d at 4.

124. 35 Ark. App. 47, 813 S.W.2d 263 (1991).

125. 31 Ark. App. 155, 790 S.W.2d 183 (1990).

contention on the grounds that the association had not established *actual* unfairness.¹²⁶

Similarly, the Arkansas Court of Appeals found no actual unfairness in *Fowler*. In that case, certain parties in a case pending before the Public Service Commission filed an objection with the Commission, seeking to have the Commission's staff disqualified from participation in the case while it was pending before the Commission. The Commission overruled the objection, and the parties appealed. The Commission's staff filed a motion to dismiss the appeal on the grounds that the order overruling the objection to the staff's participation was not a final, appealable order as required by Rule 2 of the Arkansas Rules of Appellate Procedure. The Arkansas Court of Appeals dismissed the appeal, noting that the appellants' rights had not actually been prejudiced at that stage of the proceedings. However, the concurring opinion pointed out that not only had the Arkansas Supreme Court "looked askance,"¹²⁷ in *General Telephone*, at the issue of the Public Service Commission's staff's participation in proceedings before the Commission,¹²⁸ but also that the issue of impropriety would likely arise again and that there may be cases in which the litigants' rights would be so affected by such matters as the staff's participation that the litigants should not be required to waste their time in proceedings before the Public Service Commission.¹²⁹ The concurring opinion cautioned that the court should remain "acutely aware"¹³⁰ of the "continuum of litigant's[sic] rights in Public Service Commission cases. . . ."¹³¹ Nevertheless, the concurring justice noted that the appellants' rights did not appear to be prejudiced at that stage of the case. This was, in essence, a holding (in concurrence with the majority) that there was no *actual* unfairness.

In contrast to the decisions in *General Telephone*, *AEEC*, and *Fowler*, the Arkansas Supreme Court has applied the "appearance of fairness" standard when it has approached the combination of functions issue from an ethical¹³² standpoint. For example, *Madden*

126. The court also noted that the contention was untimely because AEEC participated in the proceedings for four months before raising the claim and that the untimeliness alone would be enough to reject the claim.

127. 31 Ark. App. at 158, 790 S.W.2d at 184 (Rogers, J., concurring).

128. *Id.*

129. 31 Ark. App. at 159, 790 S.W.2d at 185 (Rogers, J., concurring).

130. *Id.* at 158, 790 S.W.2d at 185.

131. *Id.*

132. The Arkansas Code of Judicial Conduct implicitly applies to administrative decision-makers. The section of the Code entitled "Application of The Code of

*v. United States Ass'ns*¹³³ arose out of proceedings before the Arkansas Securities Department¹³⁴ to determine whether the appellees' securities registration and licenses should be revoked. During the course of the proceedings, the hearing officer who decided the case engaged in ex parte communications with the attorney for the Department and other members of the Department who were prosecuting the case. Subsequently, the Department entered a decision revoking the registration and licenses. On review of the case, the Pulaski County Circuit Court reversed the Department's decision, finding that the ex parte communications between the decision-maker and advocates had the effect of denying the appellees a fair trial. The Arkansas Court of Appeals affirmed, finding that the communication had not only violated the Arkansas Administrative Procedure Act, but also had violated the ethical principle of the "appearance of fairness." In support of its decision, the *Madden* court cited *Acme Brick Co. v. Missouri Pacific Railroad Co.*¹³⁵ *Acme* began as a proceeding before the Arkansas Highway Commission upon a petition by the Missouri Pacific Railroad Company to discontinue a spur track that provided service to the Acme Brick Company. The Commission granted the petition. Acme Brick Company then filed a motion for reconsideration and a motion to recuse based on the fact that the counsel for the railroad company was also representing the Commission on two pending matters.¹³⁶ The circuit court affirmed the Commission's

Judicial Conduct" provides: "Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including an officer such as a magistrate, court commissioner, special master, or referee, is a judge within the meaning of this Code. . . ." ARK. CODE OF JUDICIAL CONDUCT (1994).

Although the quoted language does not specify administrative judges as being within the Code's governance, the language certainly describes administrative judges. Moreover, the Arkansas Supreme Court has indicated that, although the Code of Judicial Conduct does not expressly state that administrative judges are subject to its provisions, such judges should, by analogy, be subject to the Code because they perform quasi-judicial functions. See *Acme Brick Co. v. Missouri Pac. R.R. Co.*, 307 Ark. 363, 368, 821 S.W.2d 7, 10 (1992); *International Paper Co. v. Wilson*, 34 Ark. App. 87, 805 S.W.2d 668 (1991); *First Am. Carriers, Inc. v. Kroger Co.*, 302 Ark. 86, 787 S.W.2d 669 (1990).

133. 40 Ark. App. 143, 844 S.W.2d 374 (1992).

134. The Arkansas Securities Department is governed by the Arkansas Administrative Procedure Act.

135. 307 Ark. 363, 821 S.W.2d 7 (1991).

136. This is a situation that can occur regularly in the Arkansas excepted agencies. For example, the staff of the Public Service Commission represents the Commission in appeals of the Commission's decisions to the Arkansas Court of Appeals, even though the staff not only appeared before the Commission as an advocate in the matter, but may also have taken a position contrary to the Commission's decision. See, e.g., *AT&T Communications, Inc. v. Arkansas Pub. Serv. Comm'n*, 40 Ark.

decision, but found that the commissioners should have recused. On appeal, Acme argued that the circuit court committed error in affirming the Commission's decision, because the dual representation violated the appearance of fairness standard. The Arkansas Supreme Court determined first that the appearance of fairness standard was the proper standard by which the situation should be judged. The court further found that the dual representation had violated the appearance of fairness standard. In making this finding, the court pointed out that the appearance of fairness standard is rooted in the Code of Judicial Conduct and applies to administrative agencies.¹³⁷ Nevertheless, the court affirmed the lower court's decision on the basis of the "rule of necessity," which holds that administrative decision-makers are not disqualified despite their bias where they alone have the authority to decide the case in question.¹³⁸ Because no procedure existed for the appointment of special commissioners to hear Acme's case, the court held, the commissioners were correct in not recusing.

Notably, the Arkansas cases in which the court has found a violation of the "appearance of fairness" standard have involved both Arkansas excepted agencies and agencies that are governed by the Administrative Procedure Act. Yet the court has appropriately applied the same ethical standards to both; ethical requirements¹³⁹.

App. 126, 843 S.W.2d 855 (1992)(Arkansas Public Service Commission Docket No. 90-209-U, In the Matter of Coinless Local Exchange Service By Means of Customer-Provided Coinless Telephones).

137. 307 Ark. at 368, 821 S.W.2d at 10; *accord* International Paper Co. v. Wilson, 34 Ark. App. 87, 805 S.W.2d 668 (1991); First Am. Carriers, Inc. v. Kroger Co., 302 Ark. 363, 821 S.W.2d 669 (1990); Arkansas Racing Comm'n v. Emprise Corp., 254 Ark. 975, 497 S.W.2d 34 (1973). Some federal courts have also recognized the ethical implications of administrative commingling. *See, e.g.*, *NLRB v. Tamper*, 522 F.2d 781, 789 (4th Cir. 1975); *Camero v. United States*, 375 F.2d 777 (Ct. Cl. 1967).

138. 307 Ark. at 369.

139. The unchecked combination of functions and ex parte communications in the Arkansas excepted agencies implicate both the Arkansas Code of Judicial Conduct and the Arkansas Rules of Professional Conduct for lawyers. The lack of protections in these agencies results in inherent violations of both codes. These built-in violations present ethical problems for the administrative decision-makers and for their staffs who appear before them as advocates.

More specifically, the lack of limitations in the Arkansas excepted agencies inherently violates at least three canons of the Code of Judicial Conduct: Canon 1—"A Judge Should Uphold the Integrity and Independence of the Judiciary;" Canon 2—"A Judge Should Avoid Impropriety and the Appearance of Impropriety In All of the Judge's Activities;" and Canon 3—"A Judge Should Perform the Duties of Judicial Office Impartially and Diligently." ARK. CODE OF JUDICIAL CONDUCT Canons 1-3 (1994). At least one of the rules of the Model Rules of

have transcended statutory ones. These cases bring into sharp focus the conflict between the requirements of the codes of ethics and the unimpeded commingling in the Arkansas excepted agencies. The ex parte communications in *Madden* were at least also prohibited by the laws governing the agency in that case.¹⁴⁰ In *Acme Brick*, by contrast, the laws of the agency did not prohibit the relationship between the agency and the appellees that the Court found to be unlawful.

The requirements of Arkansas's codes of ethics should be a minimum standard for those who are governed by the codes, including personnel in administrative agencies. Currently, the laws governing the Arkansas excepted agencies do not rise to that minimum level.

D. Which Standard Should the Arkansas Courts Apply?

All of the cases discussed above in which due process violations were found¹⁴¹ involved situations that are not prohibited and, in fact, do occur in the Arkansas excepted agencies. Employees of those agencies may perform dual functions on the same case. Moreover, while acting in one capacity, such as advocate, they may communicate with other agency employees who are acting in another capacity, such as decision-maker. If such a communication takes place, the decision-maker is not required to make the substance of that communication known to other interested parties. Some employees, such as the staff of the Public Service Commission, are employed at the pleasure of the decision-makers. Situations such as these have been held to violate due process by appearing to be unfair. Indeed, because of the absence of any protective provisions in these agencies, the probability of unfairness is heightened, thus rendering the situation subject to challenge even under the *Withrow* standard.¹⁴² Given these precedents, if the Arkansas courts are faced with the serious due process implications presented by such an appearance and probability of unfairness, the only way that the courts can avoid sustaining a challenge to proceedings conducted under these circumstances will be to presume the integrity of the decision-makers, as did the *Withrow* Court.

Professional Conduct for lawyers is also inherently violated by the lack of limitations: Rule 3.5—"A lawyer shall not (a) seek to influence a judge, juror, prospective juror or other official; or (b) communicate ex parte with such a person on the merits of the cause. . . ." ARK. RULES OF PROFESSIONAL CONDUCT RULE 3.5 (1994).

140. In other words, there would have been a basis for relief without resorting to ethical principles. See *Grolier, Inc. v. FTC*, 615 F.2d 1215 (9th Cir. 1980).

141. See *supra* notes 113-20, 133-35, and accompanying text.

142. See *supra* note 116 and accompanying text.

The *Withrow* Court stated: "Without a showing to the contrary, state administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'"¹⁴³ The Court further stated that challengers to combined functions should have to "convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."¹⁴⁴

The troubling aspect of the *Withrow* Court's presumption of integrity is that it is contrary to the fundamental premises upon which the separation of powers doctrine was founded. The presumption can therefore be used to avoid providing both the protections of the doctrine and any substitute protections, such as those included in the administrative procedure acts, thus allowing an unlimited concentration of powers in the hands of one person or group of people. This is the very situation that the separation of powers doctrine sought to avoid.¹⁴⁵

The Federalist indicates that James Madison and the other drafters of the United States Constitution may have engaged in the very type of "realistic appraisal" to which the *Withrow* Court referred.¹⁴⁶ In any event, Madison evidently had thought about "psychological tendencies and human weakness"¹⁴⁷ enough to be unwilling to presume inherent human fairness, for after describing a system of checks and balances, he wrote:

It may be a reflection on human nature, that such devices should be necessary to controul the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place oblige it to controul itself.

143. *Withrow v. Larkin*, 421 U.S. 35, 55 (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)); see also *Porter County Chapter v. Nuclear Regulatory Comm'n*, 606 F.2d 1363, 1371 (D.C. Cir. 1979); *Sexton v. Arkansas Supreme Court Comm. on Professional Conduct*, 299 Ark. 439, 446, 774 S.W.2d 114, 118 (1989).

144. 421 U.S. at 47.

145. See *supra* notes 23-24 and accompanying text.

146. 421 U.S. at 47.

147. *Id.*

A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.¹⁴⁸

Interestingly, our legal system has generally opted for Madison's approach to presumptions about human nature. We do not even presume the integrity of our most highly regarded federal judges. Stringent rules are in place to prevent them from doing the very things that are not prohibited in the Arkansas excepted agencies, with strict penalties for violation. To accord a higher regard for administrative judges and personnel is fallacious.

The U.S. Supreme Court's opinion in *In Re Murchison*,¹⁴⁹ the case that virtually every court, including the *Withrow* Court, has cited in addressing the combination of functions issue,¹⁵⁰ reflected a Madisonian reluctance about human nature, as well. In that case, the Court said:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14.¹⁵¹

The unchecked "circumstances and relationships"¹⁵² that exist in the Arkansas excepted agencies are the very type that would

148. THE FEDERALIST NO. 51, at 349 (James Madison) (Wesleyan Univ. Press ed., 1961).

149. 349 U.S. 133 (1955).

150. *Murchison* did not involve an administrative agency. It involved a state law that allowed the same judge to sit as a "one-man grand jury" and subsequently to preside over a contempt hearing which arose out of the grand jury proceedings.

151. 349 U.S. at 136.

152. *Id.*

"offer a temptation to the average man as a judge. . .not to hold the balance nice, clear and true"¹⁵³ in making adjudications. Moreover, the actual unfairness that occurs in a combined function setting often takes a subtle form, rarely appears patently on the record, and is virtually impossible to document. As one commentator queried in discussing an administrative agency situation in which both advocates and decision-makers report to the same person:

Might this not compromise the independence of one or another of these groups? Moreover, the agency staff might view itself as a group, thus generating loyalties and esprit de corps which transcend the barriers on an organizational chart. Can "isolated" parts of an organization hope to function neutrally when their members ride the same bus to work, work in adjoining offices, share coffee breaks and lunches, and move in the same social circles?¹⁵⁴

Indeed, it is precisely because of the human tendency to favor those with whom one has a relationship that special interest groups are willing to and do spend substantial amounts on lobbyists for the expressed purpose of developing relationships with members of the legislative and executive branches of government. When the legislative and executive functions are combined, without limitations, with the judicial function, these political forces can just as easily be used to influence a commissioner acting in a judicial capacity. To allow such influences to sway the judicial branch destroys all incentive¹⁵⁵ for imposing an internal separation of functions, and, more importantly, it undermines the underlying purpose for maintaining separateness as well. Not only does it weaken the public's confidence in the agencies' decisions,¹⁵⁶ but it initiates the process of aggrandizement. The tyranny feared by the founding fathers, although not accomplished "in a day,"¹⁵⁷ has begun, "however slowly."¹⁵⁸

If the courts simply presume the integrity of state agency commissioners, decision-makers, and advocates and turn a blind eye toward the subtle relationships that can influence them, either intentionally or unintentionally, and toward the political forces that are exerted upon them, neither actual fairness nor the appearance of fairness can be maintained.

153. *Id.*

154. BREYER & STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 731 (1979).

155. See *supra* note 24 and accompanying text.

156. See *FTC v. Atlantic Richfield Co.*, 567 F.2d 96, 102 (D.C. Cir. 1977).

157. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952).

158. *Id.*

The Arkansas Supreme Court expressed concern about the exertion of political influences on those who have combined functions in *Oates v. Rogers*,¹⁵⁹ the separation of powers case discussed previously.¹⁶⁰ The Court there said:

In most instances judges are — and in all cases they should be — free from political pressure and beyond the reach of partisan influence.

...

Common knowledge teaches, and experience informs us, that most people who apply for public office have the backing of influential friends, and are themselves prominently connected. Unfortunately we have not reached that ideal state where friend interested in friend will circumscribe his or her activity merely because the appointive power is judicial. Judges should not be subjected to these experiences.¹⁶¹

V. CONCLUSION

The judges in the Arkansas excepted agencies are subjected to those experiences, and the Arkansas Supreme Court has acknowledged as much.¹⁶² The court, in fact, has gone beyond the "suspicion" of unfairness against which the *American Cyanamid* court cautioned;¹⁶³ it has expressed an assumption that internal agency separations are not being maintained.¹⁶⁴ The unchecked combination of functions in the Arkansas excepted agencies not only presents potential due process problems with proceedings held under such circumstances, but also poses ethical problems for both administrative decision-makers and advocates. In the absence of doctrinal or statutory protection against such infirmities, the appellate courts can supply the lacking protection against the resulting possibility of unfairness by applying an "appearance of fairness" standard in addressing challenges to these agencies' proceedings. The application of such a standard will provide the Arkansas excepted agencies with incentive to take affirmative steps toward ensuring the fairness of their procedures.

159. 201 Ark. 335, 144 S.W.2d 457 (1940).

160. See *supra* note 37 and accompanying text.

161. 201 Ark. at 346, 144 S.W.2d at 462.

162. See *supra* note 123 and accompanying text.

163. *American Cyanamid Co. v. FTC*, 363 F.2d 767 (6th Cir. 1966).

164. *General Tel. Co. v. Arkansas Pub. Serv. Comm'n.*, 295 Ark. 595, 601-02, 757 S.W.2d 4 (1988).