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Ronald D. Rotunda

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Cover Page Footnote

Member of the New York and Washington, D.C. bars; A.B., Harvard College, 1967; J.D., Harvard Law School, 1970; Associated with the firm of Wilmer, Cutler & Pickering, Washington, D.C. The author acknowledges the assistance of Professor M. Cappelletti of the University of Florence, Italy, in providing translations of many of the foreign sources.

THE COMBINATION OF FUNCTIONS IN ADMINISTRATIVE ACTIONS: AN EXAMINATION OF EUROPEAN ALTERNATIVES

RONALD D. ROTUNDA*

I. INTRODUCTION

COMMENTATORS have often discussed, and sometimes lamented, the problem of the bias of public administrators¹ who rule what has rightly been called the Fourth Branch of Government. This bias can manifest itself in more than one form. For instance, some public bureaucrats become biased because they do not—and cannot—keep a judicial aloofness from the industries they regulate. An important natural (but not necessary) consequence of this organizational arrangement is that the regulators—wined, dined, and perhaps promised future employment by the regulated—yield to temptation and become captured by the people they are supposed to control.² Economic or personal interest in the outcome of the dispute causes the regulators to become hopelessly biased and, consequently, they can no longer objectively regulate.³

An administrator may also be biased in the sense that he has prejudged the law, perhaps by deciding a similar case. To have thought out a problem, to be well-informed, to understand and favor the enforcement of the policy underlying a given law is admittedly a certain kind of bias, but it is not unwelcome.⁴ The executive *should* desire an adminis-

* Member of the New York and Washington, D.C. bars; A.B., Harvard College, 1967; J.D., Harvard Law School, 1970; Associated with the firm of Wilmer, Cutler & Pickering, Washington, D.C.

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1. See, e.g., L. Kohlmeier, Jr., *The Regulators: Watchdog Agencies and the Public Interest* 69-82 (1969); S. Rosenblum, *How to Get into TV: The Federal Communications Commission and Miami's Channel 10*, in *The Uses of Power: 7 Cases in American Politics* 173 (A. Westin ed. 1962).

2. See Rosenblum, *supra* note 1, at 173, 196, 219-21.

3. But see *DePauw Univ. v. Brunk*, 53 F.2d 647 (W.D. Mo. 1931), *aff'd* on other grounds, 285 U.S. 527 (1932) (probate judge may decide whether estate is taxable, determine the amount of the tax, and receive 2½% of the tax as compensation for his services). See also *Tennessee Fertilizer Co. v. McFall*, 128 Tenn. 645, 163 S.W. 806 (1913).

4. See *Skelly Oil Co. v. FPC*, 375 F.2d 6, 18 (10th Cir. 1967), *aff'd* in part, *rev'd* in part on other grounds, *sub nom. Peruvian Basin Area Rate Cases*, 390 U.S. 747 (1968); *cf. Safeway Stores v. FTC*, 366 F.2d 795, 801 (9th Cir. 1966); Elman, *A Note on Administrative Adjudication*, 74 *Yale L.J.* 652, 653 (1965) ("agency members have a more active and affirmative commitment to achieving the goals and effectuating the policies declared by Congress . . ."). But *cf. Air Transport Ass'n v. Hernandez*, 264 F. Supp. 227 (D.D.C. 1967).

trator who is biased in favor of effective enforcement since "[i]t is a *sine qua non* of a good administration that it believe in the rightness and worth of the laws which it is enforcing and that it be prepared to bring to the task zeal and astuteness in finding out and making effective those purposes."⁵

There is, however, a third type of bias which is equally important. Regulators may become dangerously biased as a function of the institutional arrangement of the agency in which they work. When the public bureaucrat combines within himself the role of both prosecutor and judge, he runs the risk that, if he is not captured by the people he is supposed to control, he may well be captured by his own thinking. Unlike the bias of prejudgment of the law which promotes effective administrative enforcement, this third type of bias has little to do with effectiveness. And, unlike the bias caused by an economic or personal interest on the part of the administrator, this third type of bias is more difficult to control and hence more dangerous because it produces a conflict of intellectual interests which flow from a biased mind. It is this type of bias—the bias caused by the basic institutional arrangement of an agency which allows a combination of functions—that is the focus of this article.

II. AMERICAN CONSTITUTIONAL GUARANTEES AGAINST INSTITUTIONAL BIAS CAUSED BY A COMBINATION OF FUNCTIONS

The extent to which an administrator can combine in himself the functions of prosecutor and judge, like most interesting constitutional questions, is not clearly answerable. In deportation cases, for example, the Supreme Court has been very generous in allowing the combination of functions. At first the Court was more reluctant and required that adjudication and prosecution be separated, on the ground that section 5 of the Administrative Procedure Act (APA) forbade a combination of such functions.⁶ In *Wong Yang Sung v. McGrath*,⁷ a deportation hearing was held before an immigration inspector. Under regulations in force at

5. Jaffe, *The Reform of Administrative Procedure*, 2 Pub. Ad. Rev. 141, 149 (1942); accord, 2 K. Davis, *Administrative Law Treatise* § 12.01, at 130-33 (1958) [hereinafter cited as Davis]. Unfortunately, administrators often develop biases in favor of more and more regulation, whether or not increased regulation would effectuate the purposes of the law. See generally L. Jaffe, *Judicial Control of Administrative Action* 14-16 (1965) (case study of the ICC).

6. E.g., *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); see *Administrative Procedure Act*, ch. 324, § 5, 60 Stat. 237, 240 (1946). That part of section 5 forbidding combination of functions is now APA § 5(d), 5 U.S.C. § 554(d) (1970). Section 5(d) reads in part: "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to Section 557 of this title, except as witness or counsel in public proceedings." *Id.*

7. 339 U.S. 33 (1950).

that time, the presiding inspector could not be the one who had investigated the case before him. However, the presiding inspector could and did investigate similar cases. During one day an inspector might be hearing cases investigated by a colleague and on the following day bring his own investigation of a case before the same colleague whose case he had passed on the day before.⁸ Moreover, it could even become the duty of the examining inspector to lodge an additional charge against the alien and proceed to hear his own accusation in like manner.⁹ The Court held that section 5 of the APA, which prohibited such practices, applied. Although this decision was grounded in a technical interpretation of the APA—whether the APA exempted deportation hearings held before immigration inspectors—the Court seemed to speak in constitutional terms:

It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.¹⁰

Only five years later, in *Marcello v. Bonds*,¹¹ the same Supreme Court substantially reversed itself. Congress had reestablished the procedures condemned in *Wong Yang Sung* but now explicitly removed these procedures from the requirements of section 5 of the APA,¹² thus opening the door to possible bias. Furthermore, the hearing officers were now supervised by the district directors who were also responsible for all investigatory activities within their districts. The petitioner objected that statutorily such supervision should be subject to section 5, and that constitutionally the supervision and other procedures were a violation of due process. The Supreme Court, however, held that there was no violation of the APA or of due process.¹³ This holding has since been extended so that it is now also proper for the hearing officer to examine witnesses and present evidence in support of the charge against the defendant.¹⁴

In addition to the law allowing the combination of functions in depor-

8. This practice in state proceedings was upheld in, e.g., *Marrano Constr. Co. v. New York Comm'n for Human Rights*, 45 Misc. 2d 1081, 259 N.Y.S.2d 4 (Sup. Ct. 1965).

9. 339 U.S. at 46, citing federal regulations in effect at that time.

10. *Id.* at 50-51.

11. 349 U.S. 302 (1955).

12. 8 U.S.C. § 1252(b) (1970) states: "[The procedure of this act] shall be the sole and exclusive procedure for determining the deportability of an alien under this section."

13. 349 U.S. at 311. The dissent objected on statutory grounds. *Id.* at 315-19 (dissenting opinion). Justice Black, in his dissent, also strongly suggested that such a procedure was a violation of due process: "The idea of letting a prosecutor judge the very case he prosecutes or supervise and control the job of the judge before whom his case is presented is wholly inconsistent with our concepts of justice." *Id.* at 318.

14. *Roccaforte v. Mulcahey*, 169 F. Supp. 360, 364 (D. Mass.), *aff'd per curiam*, 262 F.2d 957 (1st Cir. 1958).

tation cases, there is also a body of case law permitting a similar combination in the operations of the Federal Trade Commission (FTC).¹⁵ Section 6 of the Federal Trade Commission Act also imposes on the FTC the duty to make special reports to Congress.¹⁶ In *FTC v. Cement Institute*¹⁷ a series of reports claiming that the basing point system of pricing and its variations produced certain results in the economy which amounted to unfair competition had been issued by the FTC pursuant to section 6. Although the FTC had concentrated its report on the steel industry's use of the basing point system, it stated that it regarded the cement industry as similar to steel. Subsequently, the FTC charged the Marquette Cement Manufacturing Company with engaging in unfair methods of competition through use of the basing point system. Marquette claimed bias on the part of the FTC Commissioners because, it alleged, they had prejudged the facts. The FTC denied bias and the Seventh Circuit Court of Appeals affirmed,¹⁸ largely because of what is known as the Rule of Necessity. Thus, where the only agency authorized to act in a controversy is allegedly biased, the agency nonetheless has jurisdiction to act since the alternative is nonenforcement of the law, and the FTC is "the only tribunal clothed with the power and charged with the responsibility of protecting the public against unfair methods of competition and price discrimination."¹⁹

The Supreme Court affirmed,²⁰ partly because of the Rule of Necessity but also because the FTC's publication of its conclusions regarding the basing point system was not a sufficient showing of bias, even though its conclusions were published before the litigation began:

In the first place, the fact that the Commission had entertained such views as the result of its *prior ex parte investigations* did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practice. . . .

Moreover, Marquette's position, if sustained, would to a large extent defeat the congressional purposes which prompted passage of the Trade Commission Act.²¹

Professor Davis admits that the preconceived views of the FTC were not only ideas about law and policy, but also about *facts*. Yet he agrees

15. The FTC is generally responsible for regulating business in interstate commerce in order to prevent unfair methods of competition. Federal Trade Commission Act, § 5, 15 U.S.C. § 45 (1970).

16. Federal Trade Commission Act, § 6(f), 15 U.S.C. § 46(f) (1970).

17. 333 U.S. 683 (1948).

18. *Marquette Cement Mfg. Co. v. FTC*, 147 F.2d 589 (7th Cir. 1945), *aff'd sub nom. FTC v. Cement Institute*, 333 U.S. 683 (1948).

19. 147 F.2d at 594.

20. *FTC v. Cement Institute*, 333 U.S. 683 (1948).

21. *Id.* at 701 (emphasis added).

with the decision of the Supreme Court, not for the reasons that it gives but because the facts that were prejudged were legislative facts, not adjudicative facts.²² Professor Davis defines "legislative facts" as facts which do not usually concern the immediate parties but which are general facts. On the other hand "adjudicative facts" are the kind which go to a jury—they "usually answer the questions of who did what, where, when, how, why, with what motive or intent . . .".²³ Professor Davis argues that the agency should be required to hold a hearing for the determination of adjudicative facts but not for legislative facts. Even accepting this last proposition as correct,²⁴ one must still be willing to accept his argument that the facts in *Cement Institute* were legislative, a proposition which is not without doubt.²⁵ Even then, while the difference between legislative and adjudicative facts forms a satisfactory test to determine when due process requires a hearing, it makes little sense to carry this proposition to different areas of administrative law without qualification. Surely if all the circumstances of a case indicate that an administrator, in his role as a prosecutor or advocate, had been deeply involved in the investigation of the facts of a particular problem, it would not be desirable for him to sit in judgment on that case even though the facts were labeled as "legislative" ones.²⁶ One is still left with the possibility that the prior *ex parte* investigation might have intellectually biased the administrator. Such intellectual bias could very well have been present in the *Cement Institute* case where it would have at the very least been embarrassing for the Federal Trade Commissioners to have publicly repudiated their prior report. Despite these words of caution it may still, for other reasons, be sound policy to allow the agency to adjudicate in such circumstances (assuming that the facts were legislative ones). It would likewise be sound policy for the court to exercise an especially close review of the agency's findings. Yet such a close review is presently not the practice in the federal courts.²⁷

The distinction between legislative and adjudicative facts cannot explain the holding in *Pangburn v. CAB*.²⁸ After an airline crash the Civil

22. 2 Davis § 12.01, at 145 n.53.

23. 1 Davis § 7.02, at 413.

24. Compare *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) with *Londoner v. Denver*, 210 U.S. 373 (1908).

25. Professor Davis admits as much. See Davis § 12.01, at 434 (Supp. 1970).

26. See *American Cyanamid Co. v. FTC*, 363 F.2d 757, 768 (6th Cir. 1966), which does not base its decision disqualifying the FTC Chairman on the difference between legislative and adjudicative facts.

27. European courts do give this close review. See notes 88-107 *infra* and accompanying text.

28. 311 F.2d 349 (1st Cir. 1962).

Aeronautics Board (CAB) investigated the accident and determined that its cause was misjudgment on the part of the pilot. The CAB also issued public reports to this effect. At the same time the administrator of the CAB initiated proceedings against the pilot in order to determine if his license should be suspended. The trial examiner's hearing came to the conclusion that the accident was the pilot's fault. The public report of the CAB's investigation preceded the decision of the trial examiner by two days.²⁹ The pilot then appealed the finding of the trial examiner to the full board of the CAB, which duly affirmed the suspension order and rejected the pilot's argument that it had prejudged the case.³⁰ On appeal, the First Circuit Court of Appeals, citing *FTC v. Cement Institute*,³¹ stated that the combination of investigative and judicial functions of the full board of the CAB did not violate due process.³² It was apparently irrelevant to the First Circuit that the members of the CAB who had publicly committed themselves through the published report to the conclusion that the pilot was guilty even before the hearing on his suspension was completed were the same men who reviewed the suspension order.

*Amos Treat & Co. v. SEC*³³ illustrates a tendency different from *Pangburn*. When Manuel F. Cohen was Director of the Division of Corporation Finance of the Securities and Exchange Commission, his department filed charges against Amos Treat for wilful violations of the Securities Exchange Act. Mr. Cohen was later promoted to be an SEC Commissioner and participated in an SEC ruling deemed critical by Amos Treat.³⁴ When Amos Treat moved that the SEC discontinue the revocation proceeding on the grounds that Mr. Cohen's participation violated section 5(c) of the Administrative Procedure Act,³⁵ the SEC held that

29. *Id.* at 351.

30. *Id.*

31. 333 U.S. 683 (1948).

32. 311 F.2d at 356. See also *Dean Foods Co.*, 20 Ad. L.2d 403 (FTC 1966). The Commission denied a motion that the FTC dismiss the complaint because FTC counsel, when applying to the court of appeals for a preliminary injunction, made statements inconsistent with an impartial judicial attitude on the part of the FTC. Commissioner Elman, dissenting, argued that the FTC had not met *Dean Foods'* argument that the FTC had prejudged the factual issues of the case: "[C]ounsel for the Commission . . . were insensitive or indifferent to these considerations [demanding impartiality] in presenting the Commission's position before the Court of Appeals." *Id.* at 427 (dissenting opinion).

33. 306 F.2d 260 (D.C. Cir. 1962).

34. *Id.* at 262.

35. Section 5(c) has since been renumbered 5(d). It now reads:

"(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

section 5(c) did not apply because it explicitly excepted the agency or a member or members of the body comprising the agency.³⁶ Mr. Cohen, as an SEC Commissioner, was a member of the body comprising the agency.

On appeal the District of Columbia Circuit Court of Appeals not only held that section 5(c) *did* apply to prevent Mr. Cohen's participation but also held that it was unable to accept the view that a member of an investigative or prosecutorial staff may initiate an investigation, weigh its results, and perhaps then recommend the filing of charges, and then subsequently become a member of the commission or agency, participate in adjudicatory proceedings, join in commission or agency rulings, and ultimately pass upon the possible liability of the respondents.³⁷ Significantly, the court added that "[o]nly thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirements of due process."³⁸ Subsequent cases have, however, narrowed the effectiveness of *Amos Treat*.³⁹

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency. An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency." Administrative Procedure Act, § 5(d), 5 U.S.C. § 554(d) (1970).

36. 306 F.2d at 263.

37. *Id.* at 266.

38. *Id.* at 267.

39. The same circuit a year later partially retreated from this ruling when it refused to enjoin administrative proceedings on the ground that two commissioners should be disqualified because of their prior SEC staff service related to the issues in the proceedings. The court distinguished *Amos Treat* because, unlike that case, the SEC now denied the previous participation of the commissioners. The denial was considered crucial:

"[A]dministrative proceedings cannot be stopped to allow for excursions in the courts with prolonged evidentiary hearings; the time for that in a proper case is when an aggrieved litigant seeks judicial review of agency action having preserved the point of claimed disqualification in the administrative hearing." *SEC v. R.A. Holman & Co.*, 323 F.2d 284, 287 (D.C. Cir.), cert. denied, 375 U.S. 943 (1963). While this ruling is understandable, a subsequent holding of the Second Circuit Court of Appeals which involved the same parties has perhaps narrowed the effect of *Amos Treat* too much. There the court held that when the challenged commissioner denies by formal sworn statement his participation as a prosecutor in the case before him, there is no ground for complaint if the administrative trial examiner refuses to issue subpoenas to the challenged commissioner, several SEC staff members, and a former

State courts are more likely to echo the theme of the federal courts found in *Pangburn* and its progeny. For example, the Supreme Court of Wisconsin has held that when a member of the Board of Regents of State Colleges, acting as counsel for the prosecution (who brought charges to remove a tenured teacher) is presenting evidence and entering objections to evidence offered in behalf of the defendant-teacher, and when the same person also presides as judge at the same hearing, there is no per se violation of due process. It is only when the above combination of functions is added to additional serious objections that there are enough defects to constitute a denial of a fair hearing.⁴⁰

Though the Wisconsin court did not discuss the Rule of Necessity, state courts usually invoke that doctrine to justify a combination of functions that encourages bias.⁴¹ Thus in *Sharkey v. Thurston*,⁴² the New York Court of Appeals unanimously upheld an administrative procedure under which the mayor filed charges, conducted the hearing, and then removed some city functionaries. The Rule of Necessity, which alone justified the result in *Sharkey*, was discussed at length in *Brinkley v. Hassig*:⁴³

If an administrative tribunal may on its own initiative investigate, file a complaint, and then try the charge so preferred, due process is not denied here because one or more members of the board aided in the investigation.

. . . .

Assuming such preconceived prejudice, what is the answer? The statute provides but one tribunal with power to revoke a doctor's license, just as the Supreme Court of Kansas is the only body with power to disbar a lawyer. . . .

From the very necessity of the case has grown the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises. If the law provides for a substitution of personnel on a board or court, or if another tribunal exists

commissioner in order to gather testimony about the alleged participation of the challenged commissioner in the investigation. *R.A. Holman & Co. v. SEC*, 366 F.2d 446, 452-54 (2d Cir. 1966). While courts are properly reluctant to allow fishing expeditions by counsel merely upon allegation of impropriety, the court should allow them when counsel has good reason to believe that something is indeed amiss.

40. *State v. McPhee*, 6 Wis. 2d 190, 211, 94 N.W.2d 711, 722 (1959).

41. E.g., *Rose v. State Bd. of Registration*, 397 S.W.2d 570 (Mo. 1965); *State v. City of Livingston*, 144 Mont. 248, 395 P.2d 971 (1964) (semble); *Sharkey v. Thurston*, 268 N.Y. 123, 196 N.E. 766 (1935); *Emerson v. Hughes*, 117 Vt. 270, 90 A.2d 910 (1952).

42. 268 N.Y. 123, 196 N.E. 766 (1935).

43. 83 F.2d 351 (10th Cir. 1936). In *Brinkley*, the president of the board revoking a doctor's license was also secretary of the medical society in which capacity he was the intermediary through whom all complaints were cleared. Another member of the board, after listening to testimony for three days said he was ready to vote. "The president told him that no vote could be cast until all the testimony was in. The impatient member assented, and resumed his task." *Id.* at 356. The court said that "doubtless all [members of the board] were in fact prejudiced." *Id.*

to which resort may be had, a disqualified member may not act. But where no such provision is made, the law cannot be nullified or the doors to justice barred because of prejudice or disqualification of a member of a court or an administrative tribunal.⁴⁴

Although the combination of functions in administrative actions raises a definite possibility of bias, it should not be concluded that all administrative hearings and proceedings are unfair. Often there are no procedural irregularities in an administrative hearing, and regulations, if not the Constitution, forbid certain procedural irregularities.⁴⁵ Likewise, some courts refuse to follow the Rule of Necessity.⁴⁶ In practice American administrative hearings are often unbiased in fact. However, it can generally be said that there is no constitutional guarantee against the institutional bias caused by combining prosecutorial, investigative, and adjudicative functions in the same body of men.⁴⁷

III. TRIAL EXAMINERS AND THE ADMINISTRATIVE PROCEDURE ACT

Because of the fear of possible bias there have often been outcries against the combination of functions in American administrative actions. As a response to these often justified criticisms, the Attorney General's Committee on Administrative Procedure in 1941 recommended certain reforms in the administrative process.⁴⁸ The Committee majority did not propose complete separation of functions; rather it proposed internal separation of some functions.⁴⁹ Within the same agency, divisions separate from each other were to handle prosecution and adjudication.⁵⁰ And, perhaps most importantly, the Report proposed that the trial examiners in each agency be independent.⁵¹ The trial examiner "in the first flush of the New Deal was apt to be very much a part of the agency organization and to share enthusiastically in its plans for the future. He acted on occa-

44. *Id.* at 357.

45. E.g., the provision that an SEC Commissioner "should disqualify himself in the event he obtained knowledge prior to becoming a member [of the Commission] of the facts at issue before him in a quasi-judicial proceeding . . ." 17 C.F.R. § 200.60 (1971).

46. "It would then be manifestly unfair to require respondent to submit himself to a hearing before the committee, which had at least tentatively prejudged the matter as evidenced by the charges which it had brought against respondent." *Abrams v. Jones*, 35 Idaho 532, 546, 207 P. 724, 727 (1922). See also *Glass v. State Highway Comm'r*, 370 Mich. 482, 122 N.W.2d 651 (1963).

47. 2 Davis § 1302, at 181.

48. Attorney Gen. Comm. on Administrative Procedure, Final Report (1941).

49. *Id.* at 208. The dissent to this report recommended complete external separation. "So long as both investigators and prosecutors, on the one hand, and hearing and deciding officers, on the other, are subject to the same superior authority, there is an inevitable commingling of all these functions." *Id.* at 209.

50. *Id.* at 55.

51. *Id.*

sion with the zeal of Dufarge and his Madame."⁵² The trial examiner, under the Administrative Procedure Act, is qualified by the Civil Service Commission, an agency independent of any of the operating agencies. Moreover, the trial examiner is free from removal by the operating agency; he conducts the initial hearing but engages in no other function.⁵³

Although section 8(a) of the APA states that the agency shall have "all the powers which it would have in making the initial decision,"⁵⁴ the independence of the trial examiner is still relevant. The examiner's reports must now be made and served in circumstances in which they were not required before the enactment of the APA. His reports also become a part of the record with the result that the agency is in some cases relieved of responsibility for exercising its independent judgment on the evidence.⁵⁵

However, it is easy to exaggerate the new found independence and importance of the trial examiner. First, practically all cases decided by the trial examiner are reviewed by the administrative agency, either because a party appeals or because the agency calls the case up for review.⁵⁶ Secondly, the power of the agency to review the trial examiner is broad. Only in deciding questions of fact does the trial examiner demand any respect, and even in such circumstances the agency need not give the examiner as much respect as a judge must give to the jury on matters of demeanor or credibility.⁵⁷

A third factor which limits the role of the trial examiner is the Civil Service regulations. Ideally the examiner should be independent of all unhealthy influences of the agency for which he works. However, the Civil Service regulations governing the examiner's relation to the agency undermine this goal. These regulations allow: (1) the classification of the hearing examiners of any given agency into different grades;⁵⁸ (2) the promotion of the hearing examiners to higher grades upon recommendation of the agency;⁵⁹ (3) agency choice as to how a vacancy may be filled (by promotion from within the agency or otherwise);⁶⁰ (4) the

52. Jaffe, *The American Administrative Procedure Act*, 1956 Pub. L. 218, 218-19.

53. *Id.* at 226-27.

54. 5 U.S.C. § 557(b) (1970).

55. 2 Davis § 10.03, at 15.

56. *Id.*

57. E.g., *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955) (error for circuit court to require that examiner's findings based on demeanor not be overruled by Board without "a very substantial preponderance in the testimony as recorded" since the standard is not that strict); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (examiner's findings may be reversed by the NLRB even when not clearly erroneous). A similar rule applies in the majority of state courts. 2 Davis § 10.03, at 17-18.

58. 5 C.F.R. § 34.10 (1961).

59. *Id.* § 34.4.

60. *Id.* § 34.3.

assignment of examiners *not in a mechanical rotation*⁶¹ but with regard to the so-called difficulty of the cases or competence of the particular examiners;⁶² and (5) the reduction of the number of examiners under circumstances similar to the reduction in work force of other federal employees, notwithstanding a statutory provision that examiners may only be removed for good cause as established by the Civil Service Commission.⁶³ In *Ramspeck v. Federal Trial Examiners Conference*,⁶⁴ a divided Supreme Court upheld these challenged regulations, concluding that they did not violate any provisions of the APA. Justice Black, joined by Justices Frankfurter and Douglas—an unusual trinity—issued a strong dissent.⁶⁵ The legislative history of the act showed that the purpose of the legislation was to elevate the trial examiners to “very nearly the equivalent of judges even though operating within the Federal system of administrative justice,”⁶⁶ but the regulations upheld by the Court, the dissent noted, went a long way toward frustrating the examiners’ independence. Justice Black argued that the ruling with respect to the assignment of cases by administrative heads was especially unfortunate:

A central objective [of the Administrative Procedure Act] was to prevent agency heads from using powers over assignments to influence cases. Unlimited discretion in assignment would lead to subservient examiners, it was thought. But the effect of the Civil Service classifications is to restore the unlimited discretion existing before passage of the Administrative Procedure Act.⁶⁷

The last factor restricting the trial examiner’s importance is that section 5(d) of the Administrative Procedure Act by its terms does not apply to certain circumstances.⁶⁸ These circumstances include proceedings to procure initial licenses, any rule-making, and the setting of future rates of a regulated industry. The purpose of these exceptions was to strike a

61. But cf. notes 92-97 *infra* and accompanying text (the Italian and German concepts of the “lawful judge”).

62. 5 C.F.R. § 34.12 (1961). Not only on the administrative level but also on the judicial level there is no requirement of a strict rotation of judges between cases. See Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542, 563-64 (1969).

63. 5 C.F.R. § 34.15 (1961).

64. 345 U.S. 128 (1953).

65. *Id.* at 143 (dissenting opinion).

66. S. Doc. No. 82, 82d Cong., 1st Sess. 9 (1951).

67. 345 U.S. at 145. The constitutions and case law of several European countries explicitly disallow the nonmechanical rotation of administrative judges. See text accompanying notes 79-107 *infra*.

68. The section does not apply “(A) in determining applications for initial licenses; (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or (C) to the agency or a member or members of the body comprising the agency.” 5 U.S.C. § 554(d) (1970).

compromise between those forces which desired complete separation of functions and those that did not by only requiring the hearing examiner to be an independent observer when the proceedings are strongly accusatory. Unfortunately these exceptions to section 5(d) allow some unseemly activity to occur. For example, because proceedings involving the setting of future rates are not included within the procedural guarantees of section 5(d), the following activity described by an Interstate Commerce Commissioner has occurred:

A majority [of the ICC Commissioners] had decided the case in a certain way. Now, counsel for the Commission who had tried the case spent 2 or 3 hours in two or three different periods of time in the privacy of the Commission chambers, in executive session, and argued that the majority's decision was wrong, that it could not be defended on appeal, and even suggested that the decision could not be written logically or intelligently.⁶⁹

Following the exceptions of section 5(d), the Seventh Circuit Court of Appeals has held, in *Wilson & Co. v. United States*,⁷⁰ that there is no statutory provision barring lawyers of the Federal Communications Commission who were advocates and counsel of record at the FCC hearing from *ex parte* participation in the decisional process when the hearing involves setting rates for the future.⁷¹

Professor Davis apparently⁷² disapproves of *Wilson*. Yet he does not object to the combination of functions in administrative rule-making. He seems to be arguing that deciding rates for an entire industry is more adjudicative than legislative, while deciding future rules (other than rates) is more legislative than adjudicative. He defends this distinction—allowing the combination of functions for so-called “real” rule-making—by pointing out that when an agency uses the adjudicative process to make rules there is no need for the administrators to avoid a combination of functions because they are fulfilling a legislative task, *i.e.*, they are not making decisions, they are making rules. Professor Davis then argues

69. Hearings on S. 658 Before the House Comm. on Interstate Commerce and Foreign Commerce, 82d Cong., 1st Sess. 146 (1951). See also *id.*, at 164.

70. 335 F.2d 788 (7th Cir. 1964), cert. denied, 380 U.S. 951 (1965).

71. *Id.* at 796-97. The Food and Drug Administration follows much the same procedure. Cf. *American Telephone & Telegraph Co.*, 2 F.C.C.2d 142, 157 (1965) (Loevinger, Comm'r, dissenting). What the Seventh Circuit allowed would be unconstitutional in many European countries. See, e.g., *Alessandro v. The Consiglio Di Prefettura of Sassari*, 11 Giur. Cost. 879 (1966) (Corte Costituzionale). See generally Levine, *Separation of Functions in FDA Administrative Proceedings*, 23 Food Drug Cosm. L.J. 132 (1968).

72. Professor Davis has said that the case was “ill-considered” and not in line with many Supreme Court opinions. Davis § 13.00, at 454 (Supp. 1970). However, he has also said that *Wilson* was “clearly sound as to the APA” and is in line with several Supreme Court decisions. *Id.* § 13.02, at 458.

that we should permit this combination of functions because, after all, we permit legislators to advocate laws (rules), advise their fellow lawmakers on the formulation and scope of these laws, and also vote on these same laws.⁷³

Though Professor Davis has correctly summarized the present state of the law, he is wrong in his attempt to justify it. He has emphasized the wrong distinctions. It is true, of course, that legislators can and should be both advocates and judges of the laws on which they vote. It is not even necessary for legislators to grant a hearing or build a record before they vote on the merits of a bill.⁷⁴ Administrators, however, should not have the same type of power and discretion that lawmakers have. Administrators are not popularly elected and hence much less subject to popular control. Equally important, administrators have in some circumstances more power than lawmakers. For example, while Congress may not constitutionally enact a bill of attainder, a prime function of regulatory agencies is to adjudicate facts and make decisions concerning only the parties immediately before them.

Given this special brand of administrative power, it is important to have special controls on its exercise. Thus, the mere fact that Congress need not build a record or hold hearings to support its factual findings should not exempt agencies from such requirements. Congressmen, in deciding the fate of various pieces of legislation, are often the recipients of *ex parte* communications, yet Professor Davis would admittedly feel uneasy in allowing commissioners to be subject to the same range of *ex parte* communications, even in formal rule-making activities.⁷⁵ Similarly, when agencies use the adjudicative form to make a rule, the unfairness inherent in permitting a combination of functions is not lessened by arguing that Congress could have done this. Neither is the unfairness lessened by arguing, as Professor Davis does,⁷⁶ that the commissioners could have entirely avoided the problem by using the legislative procedures of section 4 of the APA⁷⁷ to fulfill the legislative task of making rules. Having chosen the adjudicative model, the commissioners should follow the expected procedures of that model. If the procedures prove too burdensome the answer is not to drop the procedural guarantees and keep the facade of adjudicative fairness. Rather, the rule-making procedures should be altered and perhaps made less adjudicative.⁷⁸

73. Id. § 13.00, at 444-45.

74. See, e.g., *Palladio, Inc. v. Diamond*, 321 F. Supp. 630, 633 (S.D.N.Y. 1970).

75. See generally Davis § 13.12 (Supp. 1970).

76. Id. § 13.00, at 445.

77. 5 U.S.C. § 553 (1970).

78. Cf. Elman, A Note on Administrative Adjudication, 74 Yale L.J. 652, 653-54 (1965).

IV. FOREIGN LAW AS A MEANS OF EVALUATING THE COMBINATION OF FUNCTIONS IN AMERICAN AGENCIES

The United States has a much wider range of agencies than most, if not all, European countries. America has, of course, the typical claims agencies, such as the Social Security Agency and the Veterans Administration. But the areas that in the United States are regulated by the Federal Communications Commission, the Interstate Commerce Commission, the Federal Trade Commission, and similar agencies are often left in Europe to private initiative or are completely taken over by governmental nationalization. However, despite the fact that there are no precise European analogues to the typical American regulatory agency, European experience and concepts of procedural fairness can still prove useful.

One of the first lessons one should learn is that although some things may be done very differently abroad, they still may be done successfully. In the United States it is often an accepted and unchallenged postulate that the combination of prosecutorial, legislative, and judicial functions is the norm. Thus, when it was proposed to internally separate the prosecutorial and judicial branches of the National Labor Relations Board because of attacks on its bias, Senator Benton was astounded:

The Taft-Hartley Act introduced a new concept into the sphere of Government management by creating a double-headed monstrosity for the administration of a single statute. Such a concept is contrary to every principle of sound administration, whether in Government or in private industry.⁷⁹

In Europe, however, the "double-headed monstrosity" is not so monstrous.

A. *Italy*

In Italy the power to initiate proceedings is usually given to a body different from the deciding body.⁸⁰ Just as the prosecutorial functions are separated from judicial acts, the initiation of a piece of administrative action is separated from the action itself.⁸¹ This separation of powers not only works administratively, but, as far as can be determined, it works well.⁸²

79. 96 Cong. Rec. 6871 (1950). The Taft-Hartley Act, *inter alia*, required that the NLRB General Counsel be appointed directly by the President and not by the board members of the NLRB. Also, hearing examiners are to be independent of the NLRB legal staff. See 29 U.S.C. §§ 141-187 (1964), as amended, (Supp. V, 1970) (*passim*).

80. Miele, Cotzi & Falconi, *Italian Administrative Law*, 3 *Int'l & Comp. L.Q.* 421, 451 (1954).

81. *Id.*

82. See generally S. Galeotti, *The Judicial Control of Public Authorities in England and*

Italy divides its court system between judicial and administrative courts with each system reviewing a different type of administrative act. The basic line separating jurisdiction is the distinction between "rights" and "legitimate interests." When a person is directly protected by law, as when the state illegally and directly takes his property, his rights have been violated and an ordinary court has jurisdiction to hear his claim. If his property is taken indirectly—when a legitimate interest as opposed to a right is violated—he has suffered a loss over which the administrative courts have jurisdiction.⁸³ For example, when the state illegally closes a public street and a party's property loses much of its value, *i.e.*, there has been an indirect taking, or if the party was improperly excluded from the competitive bidding for a public contract, he has not suffered the loss of any right. However, he has lost a legitimate interest and he has a cause of action in the administrative courts. The ultimate authority on all questions of jurisdiction is the Corte di Cassazione, the highest civil court.⁸⁴

In addition to this separation of jurisdiction there is also the very important separation of functions. The Consiglio di Stato, the most important of the administrative courts, does not have any prosecutorial functions, and in exercising its judicial functions it shows a large amount of independence.⁸⁵ Though the councillors are appointed by the President,⁸⁶ they cannot be transferred without their consent; they need not retire until physically disabled; and they cannot be removed except for negligence or refusal to carry out their duties.

To further preserve and guarantee this separation of functions there is also a strong prohibition of any agency control over the administrative judges. In the United States the power of an agency to influence the cases assigned to its trial examiners was upheld in *Ramspeck v. Federal Trial Examiners Conference*.⁸⁷ In *Alessandro v. The Consiglio Di Prefet-*

in Italy (1954). Galeotti made an intensive study of Italian administrative law and reached this conclusion, though the system has its own short-comings in other respects and is admittedly not the ideal one. *Id.* at 237-49.

83. See generally M. Cappelletti, J. Merryman, & J. Perillo, *The Italian Legal System: An Introduction* 81-84 (1967); M. Cappelletti & J. Perillo, *Civil Procedure in Italy* (1965).

84. See M. Cappelletti, J. Merryman, & J. Perillo, *The Italian Legal System: An Introduction* 80-81 (1967).

85. *Id.* at 82-83.

86. Treves, *Judicial Review in Italian Administrative Law*, 26 *U. Chi. L. Rev.* 419, 427 (1959); M. Cappelletti, J. Merryman, & J. Perillo, *supra* note 83, at 82.

87. 345 U.S. 128 (1953).

tura of Sassari,⁸⁸ the Italian Constitutional Court examined the constitutionality of somewhat similar regulations surrounding the adjudicatory power of the Consigli di prefettura. The Consigli di prefettura have adjudicatory powers over government finance matters, including the power to initiate *ex officio* financial proceedings. The Italian high court noted that the financial liability proceeding of this body is an essential check on the administration of the local departments and on those who manage the funds of such departments.

When acting as a court this body is composed of the prefect (or his agent), who acts as the body's president, two officials of the prefecture belonging to the same branch of the civil service, the director of accounting of the same prefecture, and the state's provincial director of accounting. All of these members under the regulations are hierarchically dependent on the executive, who has the power to adopt measures affecting their careers, legal status, and transfers. Two of these officials, in addition, are directly responsible to the prefect-president, who prepares the reports on which their promotions were based. A third official is in a roughly similar state of dependence. The court also noted:

There is no statute which regulates the composition of the Consiglio di prefettura or the period of service of its members. Total or partial changes in the composition of this judicial organ, therefore, depend exclusively on the discretionary power of the central administration over the careers and transfers of the officials. Moreover, the manner and time of rotation of the two officials of the career prefectorate are similarly conditioned on the free choice exercised by the prefect in the organization and supervision of his subordinates.⁸⁹

These regulations, the court held, were a violation of the constitutional guarantee of judicial independence. Other regulations providing that proceedings against administrators could be initiated and conducted by the Consiglio di prefettura on its own initiative or on the initiative of the prefect-president, despite the fact that the administrative prosecuting functions were also performed by the same prefect, were also held unconstitutional as a violation of the principle of judicial impartiality.

In *Dantonia v. Tresso*,⁹⁰ the constitutional court proved that it had no intentions of wavering from the principle laid down in *Allessandro*. The court struck down the judicial competence of the *giunta provinciale amministrativa* (the Provincial Administrative Committees) because of the lack of independence of three of the five members of the giunta. These three were really officials of the executive. One was the prefect (or his

88. 11 Giur. Cost. 879 (1966) (Corte Costituzionale).

89. *Id.* at 885.

90. [1967] Giur. Ital. I 598 (Corte Costituzionale).

agent) and the other two were his subordinates, who were appointed by him each year in an "absolutely discretionary" manner. The rule in *Allesandro* also includes the case where the independence of the administrative judges is compromised, not by the executive, but by private professional associations.⁹¹

Added to these safeguards is the Italian constitutional guarantee of the "Natural Judge."⁹² The purpose of this protection is to prohibit any discretionary rotation of judges. The parties in any civil (and of course criminal) case are assured that no party or governmental agency shall have any influence in designating certain judges to hear or not hear certain cases.⁹³

B. Germany

Germany too has strict requirements to assure litigants their right to the independence of administrative judges⁹⁴ and to their "lawful judge."⁹⁵ In order to prevent *ad hoc* appointment of judges, court regulations must, insofar as is possible, determine in advance which court, which panel of that court, and which judges are to decide given cases.⁹⁶ Even a procedural defect in the determination of the date of trial will infect the decision with unconstitutionality if there is a causal relationship between the procedural defect and the decision, such as is the case where an incorrect determination of the date affects the composition of the trial court.⁹⁷ Such procedural protection is in stark contrast to *Ramspeck v. Federal*

91. *Calibeo v. Presidente Consiglio di Ministri*, [1963] Foro. Ital. I 11 (Corte Costituzionale).

92. Costituzionale art. 25 (1947) (Italy): "No one shall be denied the right to be tried by his natural and lawfully appointed judge." Translated in M. Cappelletti, J. Merryman, & J. Perillo, *The Italian Legal System: An Introduction* 286 (1967). See generally Pepe, 7 *Giur. Cost.* 959 (1962) (Corte Costituzionale).

93. However, a judge may be held to be "unfit" by the judicial organ, the Corte di Cassazione. Such an unfit judge is not a natural judge, Casoli, 8 *Giur. Cost.* 471 (1963) (Corte Costituzionale), and the case may be transferred to a different judge than the one originally established by law.

94. See generally Judgment of Nov. 9, 1955, 4 *Entscheidungen des Bundesverfassungsgerichts* (BVerfG) 331.

95. See Grundgesetz art. 101(1) (1949) (W. Ger.), which provides: "Extraordinary Courts shall be inadmissible. No one may be removed from the jurisdiction of his lawful judge."

96. See generally Judgment of March 24, 1964, 17 BVerfG 294.

97. Judgment of March 20, 1956, 4 BVerfG 412. It is, however, proper and is no violation of the right to the lawful judge for the court of appeal to select the court for remand, unless the court of appeal acts in an arbitrary manner. Judgment of Oct. 25, 1966, 20 BVerfG 336, 345-46.

Trial Examiners Conference,⁹⁸ which upheld the discretionary rotation of the administrative trial examiners.

Germany also has a system of administrative courts which are independent of the regular judiciary and of the executive.⁹⁹ Administrative acts either result in a benefit and grant a right, such as the right to have a driver's license, or impose a burden, such as induction into the army. All administrative acts must have a proper statutory basis, especially those acts which impose burdens. On application the administrative courts will set aside all those acts which lack such statutory authority.

As has been suggested, the problem of administrative bias caused by a combination of functions may be lessened by a separation of functions. Such a separation can be accomplished either by a separation into different agencies with one prosecuting and another (an administrative court) judging,¹⁰⁰ or by a separation of functions within a given agency. The Italian and German experiences prove that a great amount of separation is a realistic and fruitful goal. However, if this goal is not achieved, individual rights could still be afforded more protection than at present if the judicial court would exercise a policy of broader review in those cases in which the administrative act complained of was the product of a combination of functions. The French experience may prove useful in this respect. The scope of review of the Conseil d'Etat, the French administrative high court, is much broader than the average American review.¹⁰¹

C. France

France, like Italy and Germany, has two court systems—the regular judicial system and an administrative system which deals with the review of administrative actions. This division is so complete that whenever an administrative question is raised, even incidentally, in a judicial court the question must be decided by the administrative courts while the regular proceedings are stayed. The basic reason for this division is historical. The French revolutionaries, to prevent the courts from interfering with central reform (as the pre-revolutionary courts often had), enacted laws forbidding the judiciary from interfering with administrative officials in any matter. An individual harmed by an agency action, therefore, could only turn to the executive for relief. Napoleon then created the Conseil

98. 345 U.S. 128 (1953).

99. Jurisdictional problems between the courts are lessened by a complex series of rules.

100. See Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 *Yale L.J.* 931 (1960). Mr. Hector is a former member of the CAB.

101. See H. Abraham, *The Judicial Process* 272 (2d ed. 1968).

d'Etat, a body of experts who were to act as legal advisers to the government. Napoleon also referred petitions for relief from administrative actions to this body. A special division (*section du contentieux*) was created to handle these petitions, which, in the course of time, became a court, creating by case law a system of French administrative law. Lower courts have emerged and the Conseil d'Etat has become the court of last resort, with broad powers of review.¹⁰² Though the Conseil d'Etat is within the executive branch, it is an independent and strong control on administrative bodies. Belgium, Egypt, and Greece have developed their own Conseils d'Etat based on the French model.¹⁰³

The Conseil d'Etat has five basic grounds for review: (1) *L'Inexistence, i.e.*, the administrative act may lack an essential element and thus be simply non-existent and void *ab initio*; (2) *Incompetence, i.e.*, lack of authority, such as when a bureaucrat does not have authority from his superior; (3) *Violation de la loi, i.e.*, failure to carry out a nondiscretionary duty; (4) *Vice de forme, i.e.*, failure to follow a procedural rule; and (5) *Detournement de pouvoir, i.e.*, the use of the administrative powers for an improper purpose, a *subjective* inquiry into the motives of the agency and its members.¹⁰⁴

It is this last ground of review which, from the American perspective, is the broadest and the most unusual. If the administrator directs the taking of private property, allegedly for the proper purpose of setting up a public museum on the land, the Conseil d'Etat will set the order aside if the true purpose was to prevent another person (a stranger to the locality) from buying the land.¹⁰⁵ Under the authority of *detournement de pouvoir*, if the bureaucrat creates a job in order to place a friend in it, or if he removes a civil servant in order to appoint another to the opening, the orders will be quashed.¹⁰⁶ Similarly, when the Mayor of Vengeons

102. It is of interest to note that since the French Constitution of 1958, the Conseil d'Etat has broadened its review in order to limit executive power based on unconstitutional statutes. Thus it will go to extremes to interpret statutes so that they will conform to the Constitution and to so-called "General Principles." It will give damages to persons hurt by acts authorized by unconstitutional statutes. See M. Cappelletti, *Judicial Review in the Contemporary World* 18 (tent. ed. 1969).

103. R. David and H. de Vries, *The French Legal System* 40 (1958).

104. See generally H. Abraham, *The Judicial Process* 270-71 (2d ed. 1968); Auby, *The Abuse of Power in French Administrative Law*, 18 *Am. J. Comp. L.* 549 (1970); Horvath, *Rights of Man*, 4 *Am. J. Comp. L.* 539, 559-71 (1955).

105. *Ministre de l'Intérieur v. Boucher*, [1967] *Rec. Cons. d'Et.* 685, as noted in Auby, *supra* note 104, at 556.

106. See *Dame Michel*, [1964] *Rec. Cons. d'Et.* 403, as noted in Auby, *supra* note 104, at 556; *Demoiselle Soulier*, [1954] *Rec. Cons. d'Et.* 139.

argued that he was acting properly when he ruled that no dance hall could be open at certain hours without his special permission, the plaintiffs contesting the order were afforded the opportunity of alleging that the mayor was also a tavern owner and his establishment was the sole competitor of the dance halls. When the mayor denied this charge there was an investigation into his subjective motives. The court held that it had been established that the mayor was motivated by considerations which were not public in nature. Therefore his order was set aside.¹⁰⁷

In Italy the review of administrative actions is also broad enough to preclude any irregularity. Doctrines which are important in American administrative law, such as questions of fact, questions of law, mixed questions, the substantial evidence rule, jurisdictional facts, and errors on the face of the record have no meaning when the review is so broad.¹⁰⁸ Although American federal courts would not exercise such broad review of federal agencies, some state courts have held that the special case of a combination of functions requires a closer scrutiny to be exercised by the court on review. Thus the New Jersey courts have held that although the Rule of Necessity prevents a city attorney charged with misconduct from enjoining proceedings on the ground that the administrative judge was biased,¹⁰⁹ the court will make its own findings on appeal in order to protect the individual's rights to a fair hearing where "the record is utterly devoid of substantive testimony supporting defendant's findings of plaintiff's guilt of the charges made."¹¹⁰

V. CONCLUSION

The comparative approach proves that the extensive combination of functions so common and accepted in American administrative law is by no means the natural order of things. The institutional bias caused by such a combination of functions "shocks" the European judicial conscience and is often regarded as a violation of due process under continental constitutions.

The European experience also suggests several methods of reducing or eliminating the combination of functions. The most straight-forward

107. *Demoiselle Rault*, [1934] *Rec. Cons. d'Et.* 337; see *A. Von Merhen*, *The Civil Law System* 316-17 (1957).

108. *Treves*, *supra* note 86, at 432.

109. *Rinaldi v. Mongiello*, 4 N.J. Super. 7, 12, 66 A.2d 182, 184 (1949). The court stated: "[A] statutory agent may conduct the hearing, even though biased or prejudiced, when no hearing may otherwise be held"

110. *Rinaldi v. Mongiello*, 7 N.J. Super. 410, 413, 71 A.2d 398, 400 (1949), *aff'd per curiam*, 6 N.J. Super. 387, 71 A.2d 404 (1950); accord, *Board of Educ. v. Shockley*, 52 Del. 277, 156 A.2d 214 (1959).

and complete way of eliminating the problem would be to establish a separate administrative court, an American counterpart to the Conseil d'Etat. Such a proposal, however, evokes strong feelings,¹¹¹ and, because of the radical shift in American administrative law which would be required, would have little chance of being implemented.

European practice, however, suggests other ways to ameliorate the problem of a combination of functions. First, the judicial court should exercise a broad scope of review of the administrative tribunal's actions, similar to the *detournement de pouvoir* of the Conseil d'Etat, when the administrative act complained of was the product of a combination of functions.¹¹² By limiting a broad review to those cases where it is needed most, an acceptable compromise is struck between the French and American systems, which allows for procedural protections in this country without unduly interfering with agency expertise.

Secondly, within agencies there should be more reliance on trial examiners coupled with greater independence on their part. *Ramspeck v. Federal Trial Examiners Conference*¹¹³ should either be overruled by the courts or not followed by the agencies. Not only would a move in the direction of *Alessandro v. The Consiglio Di Prefettura of Sassari*¹¹⁴ make the trial examiner's hearing fairer, but it would free the agency heads, allowing them to spend more time on rule-making and on more significant policy issues.¹¹⁵

Finally, Congress should establish a Consumers' Advocate Agency.¹¹⁶ A prime reason for the combination of functions in many agencies, such as the FCC and the ICC, is that the staff members serving the agency heads are also supposed to be advocates for the consumer. The staff bureaucrats, in their role as the advocates of one interest (the consumers'), often have ex parte discussions with the administrators. This practice, which infects the entire decisional process,¹¹⁷ is not only inherently unfair, but also does not usually work to the benefit of the consumer. Those bureaucrats who have the ear of the commissioners must serve two masters: in

111. Compare Hector, Problems of the CAB and the Independent Regulatory Commissions, 69 Yale L.J. 931, 932 (1960) with Davis § 1.04-4, at 13 (Supp. 1970), and Kintner, The Current Ordeal of the Administrative Process: In Reply to Mr. Hector, 69 Yale L.J. 965, 967 (1960).

112. See notes 104-107 supra and accompanying text.

113. 345 U.S. 128 (1953).

114. 11 Giur. Cost. 879 (1966) (Corte Costituzionale).

115. Cf. Elman, A Note on Administrative Adjudication, 74 Yale L.J. 652, 654-55 (1965).

116. Implementation of this suggestion would also be a move toward reducing the combination of functions without actually establishing an administrative court.

117. Davis § 13.00 (Supp. 1970).

theory and in practice their role as advocate for the public is muted by their role as impartial aides to the commission. Since the so-called advocates of the consumer must also be judges and are not to take "preconceived" (*i.e.*, pro-consumer) positions, they are limited in the vigor of their advocacy and consequently in their effectiveness as protectors of the interests of the consumer.¹¹⁸

By creating a special, independent consumers' advocate, the combination of functions within one agency can be reduced. As the process becomes more truly adversarial, with the elimination of this type of *ex parte* communication, it becomes fairer to all concerned. And when the consumers obtain a full-time, *independent* advocate as well as a watchdog over the agencies, the administrative process will also become more effective.¹¹⁹

European practices show that these suggested reforms are consistent with effective administrative law. These remedies should also promote a fairer and more efficient administrative procedure.

118. *Id.* at 449-52.

119. Professor Davis proposes a complicated "solution" to this problem, *id.* at 455-56, but it does not go to the root of the problem because he would still have the agency staff members serve two masters, the agency and the consumer. However, it should be noted that Professor Davis suggests the plan only as a sample and not as a final model.