In re Rollins Environmental Services: The Disqualification of an Administrative Agency Decision Maker

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In re Rollins Environmental Services: The Disqualification of an Administrative Agency Decision Maker

On August 5, 1985, the Secretary of the Louisiana Department of Environmental Quality personally investigated a complaint against a hazardous waste disposal facility operated by Rollins Environmental Services, Inc. On the basis of that investigation, the Secretary issued a compliance order. Rollins requested a hearing on the compliance order, and then moved for the recusal of the Secretary from any participation in the hearing, on the basis of several of her public statements, including: "I intend to use every legal means at my disposal to close this facility and keep it closed," and "It is our opinion that Rollins should not be given any more time to demonstrate it is a good neighbor. They have been given enough time." The Louisiana Supreme Court held that

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1. The compliance order directed Rollins to submit a plan to the Department of Environmental Quality within thirty days from the issuance of the order. The plan was to outline the timetables and steps Rollins would take to cease the receipt or disposal of hazardous waste at the facility within six months from the date the plan would be submitted. In re Rollins Environmental Services, 481 So. 2d 113 (La. 1985).

2. The hearing was requested pursuant to La. R.S. 30:1072(A) (Supp. 1987).

3. The Secretary had named a hearing officer to take evidence and make findings of fact, but had reserved to herself the determination of any penalty assessment. Moreover, the Secretary had the right to review any decision by the hearing officer pursuant to La. R.S. 30:1066.1(D) (Supp. 1987). Rollins, 481 So. 2d at 114, 117.

4. The following statements were quoted in Rollins:
   - August 7, 1985: "I can't conscionably do anything else [i.e., close down ROLLINS] .... They have been given enough time already. I intend to use every legal means at my disposal to close this facility and keep it closed."
   - August 9, 1985: "[E]ven [sic] if the company came in tomorrow and said it would turn the site into a state-of-the-art facility that could be run perfectly in compliance, I wouldn't give them any more time."
   - August 20, 1985: "We can't continue to give ROLLINS [sic] more and more time to experiment with new technology," and further "[W]e [sic] have given them enough time. Now it's time for them to find other places to carry on their business."
   - August 26, 1985: "Our position is that the facility is going to be closed, and we're going to use every legal means to close it."
   - September 6, 1985: "I'm still moving toward closure. The State [sic] intends to use every means to close the plant .... I'm not backing down at all. If anything, I'm strengthening the State's [sic] case."
   - September 26, 1985: "We do not intend for the incinerator to remain open as a commercial incinerator. We have no intention to allow the incinerator to remain open while the rest of the facility closes. It is our intention to treat this problem as a sitewide problem to close the entire facility .... " Rollins, 481 So. 2d at 115-16 & n.8.

5. Id. (August 7, 1985 statement).

6. Id. (August 6, 1985 statement).
the Secretary's statements evidenced a "disqualifying bias" which amounted to a prejudgment of the adjudicative facts at issue and ordered that the Secretary be recused from further participation in the adjudicative proceedings against Rollins. *In re Rollins Environmental Services*, 481 So. 2d 113 (La. 1985).

This note evaluates the Louisiana Supreme Court's decision in *Rollins* in two separate sections. The first analyzes the court's conclusion of disqualifying prejudgment on the part of the Secretary. The second criticizes a brief, conclusory determination by the court that the combination of investigative and adjudicative functions in the Secretary did not alone require recusal from her decision making role.

**Disqualifying Prejudgment**

The due process clauses of both the United States and Louisiana Constitutions guarantee the right to an unbiased and impartial decision maker in adjudications. The proposition that a fair trial in a fair tribunal is a basic requirement of due process has been extended by the United States Supreme Court to adjudications by administrative agencies. The Louisiana Supreme Court has likewise recognized the requirement of due process in administrative adjudications:

> The essential guarantee of the Due Process Clause is [a] fundamentally fair procedure for the individual in the resolution of the factual and legal basis for government actions which deprive him of life, liberty or property. Therefore, there must be some type of neutral and detached decision maker, be it judge, hearing officer or agency.

The statutory basis for recusal of the Secretary in *Rollins* was Louisiana Revised Statutes (La. R.S.) 49:960(B). That section, a part of the Louisiana Administrative Procedure Act, provides for the withdrawal or disqualification of an agency member from any adjudication in which he cannot accord a fair and impartial hearing or consider-

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The Rollins court found that the provisions of this statute are grounded in due process. This finding, along with the court's authoritative use of cases decided on due process grounds, indicates that the provisions of the statute are to be applied to comply with jurisprudentially established standards of due process.

The bias that the supreme court found in Rollins has been called both "prejudgment" and "actual" bias. For the purposes of this note, these labels simply address a situation where it is found that a decision maker has prejudged the facts pertaining to a particular adjudication, as evidenced by that person's prior statements or actions.

Using Professor Davis' Administrative Law Treatise as authority, the Rollins court made an initial distinction concerning the nature of the prejudgment, a distinction which several other courts have also found important. Prejudgment or a point of view about a matter of law, policy, or legislative fact, even if publicly expressed, is not a sufficient ground for disqualification; however, public expression of prejudgment of adjudicative facts does require disqualification.

In support of this general rule, some authorities advance the position that, quite the opposite of being grounds for disqualification, a pre-

12. La. R.S. 49:960(B) (Supp. 1987) provides, in pertinent part:
A subordinate deciding officer or agency member shall withdraw from any adjudicative proceeding in which he cannot accord a fair and impartial hearing or consideration. Any party may request the disqualification of a subordinate deciding officer or agency member, on the ground of his inability to give a fair and impartial hearing . . . .
17. Adjudicative facts have been described as "those to which the law is applied in the process of adjudication," while legislative facts "help the tribunal determine the content of law and of policy." K. Davis, Administrative Law Text 296 (3d ed. 1972) [hereinafter Davis Text].
18. Rollins, 481 So. 2d at 120.
judgment or point of view concerning a matter of law or policy is desirable for one serving in a judicial capacity, particularly an administrative agency official.\textsuperscript{19} Professor Davis asks rhetorically: "Do not the best of judges have unalterable convictions on some questions that are at the heart of particular decisions?"\textsuperscript{20} He adds, somewhat tongue-in-cheek: "In creating new administrative law, judges cannot be and should not purport to be objective or neutral. Like the writer of this treatise, they should have the right biases!"\textsuperscript{21}

A preconceived point of view concerning a matter of law or policy is acceptable particularly in the case of an administrative agency official acting as a judge. The wisdom behind allowing such preconceptions goes to the heart of a major reason for the existence of administrative agencies, that such agencies were created to implement the policies and laws of the body delegating the authority to the agency. A logical extension of this purpose is that "[a]gency decisionmakers are appointed precisely to implement statutory programs, and so inevitably have some policy preconceptions."\textsuperscript{22}

An appropriate example of where such policy preconceptions or biases are desirable is the office of the Secretary of the Louisiana Department of Environmental Quality. The Louisiana Environmental Quality Act begins with a declaration that the maintenance of a healthful and safe environment is a matter of critical state concern.\textsuperscript{23} It then creates the Department of Environmental Quality, as "the primary agency in the state concerned with environmental protection and regulation."\textsuperscript{24} The Act further provides that this agency is to be headed by a secretary\textsuperscript{25}

\textsuperscript{19.} Maloney, Disqualification of Administrative Law Judges in California, 16 U.S.F. L. Rev. 229, 245 (1982) [hereinafter Maloney]; Note, Disqualification of Administrative Officials for Bias, 13 Vand. L. Rev. 712, 721 (1960). See also Laird v. Tatum, 409 U.S. 824, 93 S. Ct. 7 (1972), in which Justice Rehnquist remarked: "Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." 409 U.S. at 835, 93 S. Ct. at 14.
\textsuperscript{20.} 3 K. Davis, Administrative Law Treatise 375 (2d ed. 1980) [hereinafter Davis Treatise].
\textsuperscript{21.} Id. at 382.
\textsuperscript{22.} \textit{Lead Indus. Ass'n, Inc.}, 647 F.2d at 1179.
\textsuperscript{23.} La. R.S. 30:1052(1) (Supp. 1987). That statute further provides:
   \[(2)\text{ It is necessary and desirable for the protection of the public welfare and property of the people of Louisiana that there be maintained at all times, both now and in the future, clean air and water resources, preservation of the scenic beauty and ecological regimen of certain free flowing streams, and strictly enforced programs for the safe and sanitary disposal of solid waste, for the management of hazardous waste, for the control of hazards due to natural and man-made radiation, considering sound policies regarding employment and economic development in Louisiana.}\]
\textsuperscript{25.} La. R.S. 30:1061(B) (Supp. 1987).
having, among other powers and duties, the duty to adopt regulations “for the protection of the environment” and to “exercise all incidental powers necessary or proper to carry out the purposes of this Chapter.” Thus, the Secretary of the Department of Environmental Quality should have certain policy preconceptions, among them the notion that environmental matters are of critical concern to the state.

The *Rollins* court never explicitly classified the Secretary’s statements as pertaining to policy, law, or adjudicative facts. Nevertheless, the outcome demonstrates that the court did not find that the statements pertained to law or policy. The court apparently inferred that the statements evidenced prejudgment of adjudicative facts: the Secretary stated that she intended to close the facility, which could not be done unless violations were found; therefore, the Secretary had prejudged the adjudicative fact of violation.

A comparison of the Secretary’s statements in *Rollins* to statements characterized in other cases as involving preconceptions of law or policy reveals a distinction regarding the nature of the references to the party under investigation. While the statements in these other cases do not identify any particular entity, the statements in *Rollins* all refer specifically to the party to the adjudication, Rollins Environmental. Courts will be much less likely to characterize such specific statements as statements of agency “policy” than statements which are broad and which identify no particular entity. However, an element of specificity in a public statement is not an automatic indicator that the statement merits disqualification. Noncommittal, nonadversary press releases referring to a specific party are not evidence of disqualifying prejudgment.

After distinguishing between prejudgment of policy and adjudicative fact, the *Rollins* court used a “disinterested observer” test to determine whether there had been, in fact, a prejudgment. This test inquires whether a disinterested observer may conclude that the decision maker has in some measure adjudged the facts of a particular case in advance of hearing it. Although the disinterested observer test has been used by

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28. See *Rollins*, 481 So. 2d at 121.
29. See supra note 4.
32. *Rollins*, 481 So. 2d at 121.
some courts, instances of its explicit application are rare, perhaps because courts find it unnecessary after finding that the statements in question pertained to policy or law.

The application of the disinterested observer test is best illustrated in *Texaco v. Federal Trade Commission*, a case where disqualifying prejudgment was found. The Federal Trade Commission (FTC) issued a complaint against the Texas Company (Texaco) and B.F. Goodrich, charging that a contract between the two companies implemented unfair methods of competition in interstate commerce. Prior to a hearing before the Commission, Chairman Paul Rand Dixon made a speech before the National Congress of Petroleum Retailers, in which he stated:

"We at the Commission are well aware of the practices which plague you and we have challenged their legality in many important cases.

You know the practices - price fixing, price discrimination, and overriding commissions on [tires, batteries, and accessories].

You know the companies - Atlantic, Texas, Pure, Shell, Sun, Standard of Indiana, American, Goodyear, Goodrich, and Firestone."

In reviewing the Commission's decision, which was adverse to Texaco and Goodrich, the court considered the propriety of Chairman Dixon's participation in that decision, and concluded that "a disinterested reader of Chairman Dixon's speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act." A comparison of the statements made by the Secretary in *Rollins* with the statements made by the Chairman in the *Texaco* case and with statements which were found in other cases to evidence a disqualifying bias shows the propriety of the decision in *Rollins*. The statements in *Rollins* alluded even more specifically and exclusively to the party being

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35. 336 F.2d 754 (D.C. Cir. 1964).

36. Id. at 759, quoting a press release issued by the Commission which quoted the Chairman's speech.

37. Id. at 760.

38. See supra note 4.

charged than did the statements found to evidence disqualifying bias in these other cases. The additional factors of repetition and apparent sharp adversity of the Secretary's statements add support to the court's conclusion of disqualifying prejudgment. Furthermore, the Secretary's statements were made in conclusive language, indicative of a final decision. If the Secretary had spoken in terms of alleged violations, or indicated that the Department had reason to believe that violations had occurred, the jurisprudence indicates that the result as to the issue of prejudgment would have been different. The statements neither hinted at possible violations nor dealt in undirected innuendos; the implications of conclusions that violations had occurred were direct and unmistakable. A disinterested observer of the statements in Rollins would probably not only conclude that the Secretary had in some measure prejudged the facts, but that the Secretary had totally prejudged the facts.

In an exhibition of awareness of human nature, the Rollins court noted a substantial problem with public statements which manifest prejudgment of adjudicative facts. After publicly making such statements, a decision maker is not likely to reach a different conclusion at a hearing, even if the evidence introduced at the hearing warrants a change of position. The court's concern with such an "entrenched position" is understandable. A decision maker would have to be of exceptional character to decide contrarily to a position stated strongly in public numerous times, considering the loss of credibility and respect such a decision would likely entail.

After making the distinction between prejudgment of adjudicative facts and preconceptions of law, policy, or legislative facts, and then determining by way of the disinterested observer test that there had been prejudgment, the court concluded that "the secretary's statements evidence a disqualifying bias which requires that she be recused from any decision making role with regard to the charges against Rollins Environmental Services, Inc." Even though the propriety of this conclusion is amply supported by the necessity of protecting Rollins' due process rights, one cannot help but question the adequacy of the test utilized by the Rollins court as a means of proving the presence of disqualifying prejudice. Would the Secretary have prejudged the facts any less if she had made no statements to the press? Despite the inadequacy of the

40. See Cinderella, 425 F.2d at 589-90. But see Belsinger v. District of Columbia, 295 F. Supp. 159 (D.D.C.), rev'd on other grounds, 436 F.2d 214 (D.C. Cir. 1969), where specific references were allowed when the conduct of the party claiming prejudgment was described as "alleged."
41. See Belsinger, 295 F. Supp at 162; Cinderella, 425 F.2d at 590.
42. Rollins, 481 So. 2d at 121.
43. Cinderella, 425 F.2d at 590.
44. Rollins, 481 So. 2d at 121.
test, however, due process considerations demand that such statements should not be ignored merely because some other decision makers may be prejudging facts and simply not commenting on their position, if for no other reason than that it is important to maintain the appearance of complete fairness.45

Combination of Functions

In contrast to a situation where disqualification of an agency decision maker is granted on the basis of statements or other actions evidencing prejudgment of adjudicative facts, parties have often sought disqualification on the grounds of "institutional bias,"46 "inherent bias,"47 or "structural bias."48 Parties and courts using these labels are all addressing a situation in which due process arguably requires that the official, by the very nature of the combination of functions he performs, should not be allowed to decide an adjudication. Professor Davis abbreviates this idea neatly, writing that "[j]udging should be separated from functions that are incompatible with judging."49

The Rollins court cited Withrow v. Larkin50 as authority for its conclusion that the Secretary's prior investigative function in the matter did not alone require recusal.51 An important case for its holdings on the issue of due process limits on combined functions in an administrative agency, Withrow exemplifies the United States Supreme Court's tolerance of systems of combined functions.52 The Withrow court began its analysis of this issue by conceding that a "'fair trial in a fair tribunal is a basic requirement of due process,'"53 and that this requirement applies to adjudications of administrative agencies.54 After identifying two situations

45. Rollins, 481 So. 2d at 119. See also, Offutt v. United States, 348 U.S. 11, 14, 75 S. Ct. 11, 13 (1954); Brown, 539 F.2d at 469-70; Cinderella, 425 F.2d at 591.
46. Wolkenstein v. Reville, 694 F.2d 35, 42 (2d Cir. 1982).
48. Porter County, 606 F.2d at 1371.
49. Davis Treatise, supra note 20, at 340.
51. Rollins, 481 So. 2d at 121.
52. Professor Davis states in his 1980 treatise that "[a]lthough at least eleven Supreme Court opinions have dealt with problems about separation of functions, the Court has never held a system of combined functions to be a violation of due process." Davis Treatise, supra note 20, at 343.
“in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable,”55 the Court laid down a rule reflecting its attitude toward combinations of functions: “The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators . . . .”56 The Court further noted that “[w]ithout 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.’”57

Citing Withrow, the Rollins court characterized the Secretary’s prior investigatory involvement in the matter as “mere exposure to the evidence.”58 A comparison of the relevant facts of the two cases suggests, however, that the use of Withrow as authority for this proposition was not appropriate. The Secretary’s prior involvement in the matter far exceeded “mere exposure to the evidence.”

In Withrow, an examining board composed of practicing physicians held an investigative hearing to determine whether a physician, Dr. Larkin, had engaged in certain proscribed acts. At this investigative hearing, the board heard several witnesses on the issues. The board subsequently sent Dr. Larkin a notice of a contested hearing at which the board would determine whether his license should be suspended. Dr. Larkin protested, arguing that this would deprive him of his due process rights to a neutral and detached decision maker. Characterizing the board’s involvement in the matter as “mere exposure to evidence,”59 the Supreme Court held that the board could constitutionally make the decision concerning the license suspension at the contested hearing notwithstanding the combination of its functions.60

Although the Rollins court made no comprehensive findings of the degree of the Secretary’s involvement in the matter, the following facts can be gleaned from the opinion. Upon receiving a complaint, the Secretary personally investigated the facility site.61 Based on the con-

55. Withrow, 421 U.S. at 47, 95 S. Ct. at 1464. The Court cited situations in which the adjudicator has a pecuniary interest in the outcome and cases in which he has been the target of personal abuse or criticism from the party before him.
56. Id. at 47, 95 S. Ct. at 1464.
57. Id. at 55, 95 S. Ct. at 1468, quoting United States v. Morgan, 313 U.S. 409, 421, 61 S. Ct. 999, 1004 (1941).
58. Rollins, 481 So. 2d at 121.
60. Id. at 57, 95 S. Ct. at 1469.
61. Rollins, 481 So. 2d at 115.
ditions allegedly found at the facility (black smoke emissions, malfunctioning equipment, and general confusion), the Secretary ordered an immediate shut down of the incinerator and issued a Compliance Order. The Secretary was then to determine any penalty assessment at a hearing on the Compliance Order. Also, she was to have the right to review any decision reached at the hearing, at which time she would have had the right to either remand the matter, render a contrary decision on the record of the hearing, or hold a new hearing and render her own decision or order. Presumably basing its decision on this combination of functions in the Secretary in this matter, the court concluded that "[the Secretary's] investigatory function with regard to Rollins (mere exposure to the evidence) would not alone require recusal." In determining whether disqualification is appropriate, the nature and extent of the prior involvement of the decision maker in the matter should be examined. Persons with significant personal adversary involvement in a particular case are more likely to be disqualified from an adjudicative position in that case. The decision making body in Withrow sat in a somewhat impartial role at an investigative hearing at which specific facts gathered by others were presented. This "investigative" function exercised by the board in that case was very similar to that exercised by a judge at a probable cause hearing, and may reasonably be labelled "mere exposure to evidence." On the other hand, the Secretary in Rollins personally investigated the site and gathered facts in a much more adversarial role. If the Secretary had been allowed to exercise an adjudicative function along with such an investigative function in the same matter, the situation would have been more analogous to allowing a police officer to judge at trial the same facts which he had gathered in his role as investigator. Thus, the Rollins court's characterization of the Secretary's investigatory function as "mere exposure to the evidence," along with its citation to Withrow for that proposition, is highly questionable. It fails to consider the context in which the "mere exposure" statement of Withrow was made.

Citing Withrow, some courts have upheld combinations of investigative and adjudicative functions, while others have extended Withrow.
to apply to almost any combination of functions. However, along with the nature and extent of the decision maker's prior involvement in the matter, significant distinctions exist between the facts of Withrow and the facts of Rollins which the Rollins court failed to consider.

Rollins differs from Withrow and most other cases allowing combinations of functions in that Rollins involved a combination of functions in a single individual. The combination of functions upheld in Withrow was in a board. Combinations of functions have also been upheld in the Federal Trade Commission, the Washington State Medical Disciplinary Board, and the Rhode Island Commission for Human Rights among others.

A footnote in the Withrow opinion distinguished three earlier cases in which decision makers were disqualified. These cases all had one factual feature in common: unlike Withrow, which allowed a combination of functions in an examining board, they all involved a combination of functions in one individual. The United States Sixth Circuit Court of Appeals, in American Cyanamid Co. v. Federal Trade Commission, disqualified the Chairman of the Federal Trade Commission from an adjudicatory proceeding because he had previously served actively on a Senate Subcommittee which had conducted an investigation into many of the same legal and factual issues that were before the Commission. In Trans World Airlines v. Civil Aeronautics Board, a C.A.B. member's participation in an adjudication was found improper because he had signed a brief in behalf of a party to the proceedings prior to becoming a member of the Board. Finally, in Amos Treat & Co. v. Securities & Exchange Commission, it was found violative of due process for a member of the Commission to participate in an adjudication when he had supervised the initiation and conduct of the investigation prior to becoming a Commissioner. The Amos Treat court stated:

We are unable to accept the view that a member of an investigative or prosecuting staff may initiate an investigation, weigh
its results, perhaps then recommend the filing of charges, and thereafter become a member of that commission or agency, participate in adjudicatory proceedings, join in commission or agency rulings and ultimately pass upon the possible amenability of the respondents to the administrative orders of the commission or agency. So to hold, in our view, would be tantamount to that denial of administrative due process against which both the Congress and the courts have inveighed.  

Professor Davis has questioned the validity of the Amos Treat case. However, he has also recognized that "the principle which opposes the combination of functions has to do with individuals, not with large and complex organizations." While criticizing what he characterized as an "unsound . . . broadside condemnation" of combinations of functions within an organization (the FTC), Davis distinguished between such a combination and a combination of functions in an individual:

For an individual to serve as both advocate and judge in the same case is obviously improper, because "A man who has buried himself in one side of an issue is disabled from bringing to his [sic] decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions." Cases decided since Withrow have also found a combination of functions in one individual to violate due process. Although upholding the constitutionality of a combination of functions in an institution, other cases have, either in dicta or as a point of distinction, observed generally that a combination in an individual is improper.

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78. Id. at 266-67.
79. Davis Treatise, supra note 20, at 346. The Amos Treat and Trans World cases have also been criticized by Professor Asimow on the grounds of lack of depth of analysis. However, Professor Asimow recognized that these cases nevertheless "suggest that the government's interest in resisting disqualification of single members of multimember agencies, on the basis of adversary activity occurring before they became agency heads, may be less than compelling." Asimow, supra note 66, at 787.
80. Davis Text, supra note 17, at 254.
81. Id. at 254-55.
82. Id., quoting S. Doc. No. 8, 77th Cong., 1st Sess., at 56 (1941).
83. See, e.g., Commonwealth Dep't of Ins. v. American Bankers Ins. Co., 478 Pa. 532, 387 A.2d 449 (1978); Dussia v. Barger, 466 Pa. 152, 351 A.2d 667 (1975); Huber Pontiac, Inc. v. Allphin, 431 F. Supp. 1168 (S.D. Ill. 1977), vacated on other grounds, 585 F.2d 817 (7th Cir. 1978). See also deKoevend v. Board of Educ., 688 P.2d 219 (Colo. 1984), holding that the mere presence of two individuals, who had personally been involved in the earlier process of the case, during the deliberative process violated the plaintiff's due process right to a fair and impartial determination by the board.
84. See, e.g., Kennecott Copper Corp. v. Federal Trade Comm'n, 467 F.2d 67, 79 (10th Cir. 1972), cert. denied, 416 U.S. 909, 94 S. Ct. 1617 (1974) (distinguishing Amos
However, the reported decisions are not in unanimous agreement on the issue of a combination of functions in an individual. Some cases have allowed such a combination. *Morris v. City of Danville,*\(^8\) involved a city manager's performance of a variety of functions. The city manager initiated investigation of the city's chief of police, concluded preliminarily to terminate the chief's employment on the basis of the investigation, and then allowed the chief an opportunity to refute the basis of the termination at a hearing at which the city manager was to be the decision maker. The United States Fourth Circuit Court of Appeals concluded that procedural due process was not denied "solely by virtue of the prior participation of the ultimate decisionmaker . . . in the administrative process leading to [the chief's] final discharge."\(^8\)

In spite of those few cases upholding a combination of functions in an individual, strong policy reasons support invalidating such a combination when the individual has had significant prior involvement in the matter in a personal, adversarial nature. Foremost among these reasons is the desire for a decision maker who is "neutral and detached."\(^7\) Even though this goal is to some extent in conflict with the desire that an administrative agency official have certain biases and preconceptions concerning policy and law,\(^8\) a compromise between the two should be sought. An idea which seems to achieve a just compromise is that "an individual who tries to win for one side should not participate in judging . . . . The law of the subject would be much improved if . . . a statute provided simply that any individual with a will to win for one side may not participate in judging."\(^8\)

When one agency official charged with the duty of enforcing a law personally investigates a scene for the purpose of discovering statutory violations, one can easily see how that person may carry into an adjudication a psychological predisposition toward victory, a "will to win." If, on the other hand, such an investigator is not allowed to participate in decision making, and instead another person is charged as decision maker, there is sufficient insulation from the discovery of the facts so that the new decision maker should not have the same "will to win," but rather can maintain the desired qualities of "neutrality and detach-

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\(^8\) *Treat); Gashgai v. Board of Registration in Medicine, 390 A.2d 1080, 1082 n.1 (Me. 1978); La Petite Auberge, 419 A.2d at 284; Consumer Protection, 304 Md. at 761-63, 501 A.2d at 64-65; State Dental Council & Examining Bd. v. Pollock, 457 Pa. 264, 318 A.2d 910 (1974).

\(^8\) Id. at 1041 (4th Cir. 1984).

\(^8\) Id. at 1049. See also Estrin v. Moss, 221 Tenn. 657, 430 S.W.2d 345 (1968), appeal dismissed, 393 U.S. 318, 89 S. Ct. 554 (1969).

\(^8\) Wilson, 479 So. 2d at 901.

\(^8\) See text accompanying supra notes 19-27.

\(^9\) Davis Treatise, supra note 20, at 340.
Such a combination of functions within an agency, but not in a single person, allows a sufficient degree of fairness to comport with due process. At the same time, an agency may perform in a manner consistent with one reason that agencies were created: to have a body making decisions with knowledge and expertise of the relevant subject matter.

The appearance of fairness also supports invalidation of a combination of adjudicative and other functions in one individual who was personally involved in the matter at prior stages. Citing *Amos Treat & Co. v. Securities & Exchange Commission*, the *Rollins* court, in its "prejudgment" analysis, stated that "there must also be in connection with the hearing the appearance of . . . fairness." Yet the court did not consider the appearance of fairness in its conclusion that the Secretary's investigative function in the matter did not of itself require recusal. The reason for requiring the appearance of fairness in a hearing is to maintain public confidence in the administrative agency and the administrative system. Does a sequence of events where one official personally investigates the scene of a possible statutory violation, issues a compliance order on the basis of what is found, and then is a decision maker on those facts, have an appearance of fairness? Only to an unrealistic observer could such a scenario appear just and equitable.

The nature of the administrative proceeding should also be considered in deciding the validity of a combination of functions. Professor Asimow advocates strict separation of functions characteristic of a criminal law model in accusatory proceedings, such as those considering the imposition of a penalty or the revocation of a license. "In such cases, an agency rightly tolerates substantial inefficiencies in the interest of fairness and the appearance of fairness." The hearing in *Rollins* was to be such an accusatory proceeding.

Although the United States Supreme Court upheld a combination of functions in *Withrow v. Larkin*, the Court did not intend that every combination be allowed; indeed, the growth, variety, and complexity of the administrative processes have made any one solution highly un-

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91. *Rollins*, 481 So. 2d at 119 (emphasis in original).


93. Asimow, supra note 66, at 791-92. Professor Asimow distinguishes between accusatory proceedings, rulemaking of general applicability, and nonaccusatory decision-making.

94. Id. at 792.

95. Id. at 783.
likely.\textsuperscript{96} Realizing that some combinations of functions would reach unconstitutional limits, the Supreme Court provided a test. A contention that a certain combination of functions is unconstitutional must “over-\textsuperscript{97}come a presumption of honesty and integrity in those serving as ad-\textsuperscript{98}judicators.” One challenging a combination of functions must convince a court 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.”\textsuperscript{99} Furthermore, the Supreme Court pro-\textsuperscript{100}vided that a court may determine “from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high.”\textsuperscript{101} The determination of a trial court in this respect is entitled to deference.

The particular combination of functions in the Secretary in the \textit{Rollins} case presents one of those situations to which the Court in \textit{Withrow} alluded, where there is posed “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.” The combination in the Secretary of investigative and adjudicative functions actually exercised in this matter, along with her statutory powers and duties, should have disqualified the Secretary as a decision maker even if she had made no public statements.

The Louisiana Legislature has granted extensive powers and duties to the Secretary of the Department of Environmental Quality.\textsuperscript{102} Among other things, the Secretary has the power of rulemaking “for the pro-\textsuperscript{103}tection of the environment,”\textsuperscript{104} the power to grant or deny permits or licenses,\textsuperscript{105} the power to conduct meetings, hearings, inquiries, and in-\textsuperscript{106}vestigations,\textsuperscript{107} and the power to issue cease and desist orders.\textsuperscript{108} More
broadly, the Secretary has the power to "issue such orders or determinations as may be necessary to effectuate the purpose of this Chapter," and the authority to "exercise all incidental powers necessary or proper to carry out the purposes of this Chapter." The "purposes of the Chapter" are, in essence, the "maintenance of a healthful and safe environment," to be accomplished by providing policies and implementing programs designed to "preserve, protect, and enhance the quality of the environment in Louisiana." In other words, the Secretary has been granted the authority to exercise all necessary or proper incidental powers in order to protect the Louisiana environment.

Furthermore, in 1986, the legislature created the additional duty that "[the] secretary shall act as the primary public trustee of the environment." Even before the 1986 act, the Louisiana Supreme Court articulated the existence of a public trust of the environment vested in the Environmental Control Commission (ECC), a forerunner of the present Department of Environmental Quality, by virtue of the Louisiana Constitution. In *Save Ourselves v. Louisiana Environmental Control Commission*, Justice Dennis wrote:

> Since the ECC, in effect, has been designated to act as the primary public trustee of natural resources and the environment in protecting them from hazardous waste pollution, it necessarily follows that the agency must act with diligence, fairness and faithfulness to protect this particular public interest in the resources.

In making an observation of the duty imposed by the role of public trustee, the court noted further that "the commission's role as the representative of the public interest does not permit it to act as an umpire passively calling balls and strikes for adversaries appearing before it; the rights of the public must receive active and affirmative protection at the hands of the commission." It has even been suggested that the

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106. Id.
109. Id.
112. La. Const. art. IX, § 1 provides:

> The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.

113. 452 So. 2d 1152 (La. 1984).
114. Id. at 1157.
115. Id.
public trust doctrine “furnishes environmental litigants with a judicially enforceable right” enabling citizens of Louisiana to sue the environmental agency for the breach of its duty as public trustee.\textsuperscript{116} Thus, the overall message to the Secretary from the legislature and even the supreme court is clear: “Your duty is to use your powers to protect the environment.”

These statutory and jurisprudential powers and duties of the Secretary should not alone disqualify her from acting as a decision maker. As noted earlier, administrators should be “biased” as to matters of policy and law.\textsuperscript{117} In this case, that bias favors the protection of the environment; in all cases, the Withrow presumption of “honesty and integrity”\textsuperscript{118} of decision makers serves to protect such valid biases. However, the extent of the Secretary’s bias toward protection of the environment is relevant to the disqualification issue. When one considers the extent of such a bias in the case of the Secretary as mandated statutorily and jurisprudentially, in conjunction with the extent and personal nature of functions actually exercised by the Secretary in the Rollins matter,\textsuperscript{119} one must conclude that “under a realistic appraisal of psychological tendencies and human weakness,”\textsuperscript{120} there existed a very substantial risk of actual bias or prejudgment.

Despite the troubling language of Rollins signalling acceptance of the combination of functions in the Secretary, courts faced with a combination of functions issue should recognize the continued vitality of the notion of certain combinations as grounds for disqualification of an administrative agency decision maker from an adjudication. The general tendency of the United States Supreme Court toward tolerance of combinations in cases such as Withrow does not preclude recusal on such grounds, nor does it prevent a broader construction of the state constitution to afford greater protection than the federal minimum standards of due process.\textsuperscript{121} The language by the court in Rollins on this issue also might be limited as mere dictum, unnecessary to the holding since disqualification was ordered on prejudgment grounds as a result of the Secretary’s statements.


\textsuperscript{117} See text accompanying supra notes 19-27.

\textsuperscript{118} Withrow, 421 U.S. at 47, 95 S. Ct. at 1464.

\textsuperscript{119} See text accompanying supra notes 64-67.

\textsuperscript{120} Withrow, 421 U.S. at 47, 95 S. Ct. at 1464.

\textsuperscript{121} State v. Hernandez, 410 So. 2d 1381, 1385 (La. 1982); Guidry v. Roberts, 335 So. 2d 438, 448 (La. 1976).
Instead of piecemeal adjudication, legislation would offer a preferable solution to the problem of combinations of functions. Although the Louisiana Legislature has granted substantial powers to the Secretary, it has also implicitly recognized the inherent dangers present when an individual exercises a combination of functions. Louisiana Revised Statutes 49:960(A) provides in essence that agency decision makers shall not directly or indirectly communicate, in connection with any issue, with any person engaged in the performance of investigative, prosecuting, or advocating functions. In this statute, the Legislature has prohibited mere communication of a decision maker with one who has performed another function; a fortiori, the performance of these functions by the same individual should be prohibited. Furthermore, if one accepts the premise that the Louisiana Administrative Procedure Act (of which Revised Statute 49:960 is a part) should be viewed as a “legislative determination of the contours of minimal procedural due process,” then an extension of the above reasoning is that a combination of adjudicative and other functions in an individual is violative of due process.

The Louisiana Legislature should clarify its position by enacting a provision prohibiting significant personal prior involvement of an adversary nature in an accusatory proceeding by a decision maker. Such a provision would be consistent with the common arrangement of administrative agencies. Until legislative clarification is provided, courts should restrict combinations of functions such as those found in Rollins by disqualification of decision makers on due process grounds.

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122. Louisiana Revised Statutes 49:960(A) (Supp. 1987) provides: 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 findings of fact and conclusions of law in case of adjudication noticed and docketed for hearing shall not communicate, directly or indirectly, in connection with any issue of fact or law, with any party or his representative, or with any officer, employee, or agent engaged in the performance of investigative, prosecuting, or advocating functions, except upon notice and opportunity for all parties to participate.


124. Davis Text, supra note 17, at 258.