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Michael E. Ornoff

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# EX PARTE COMMUNICATION IN INFORMAL RULEMAKING: JUDICIAL INTERVENTION IN ADMINISTRATIVE PROCEDURES

*Michael E. Orloff\**

## I. INTRODUCTION

Over the past several years, a controversy has arisen, particularly among different panels of the United States Court of Appeals for the District of Columbia Circuit, regarding the use of *ex parte* communications<sup>1</sup> in informal administrative rulemaking. Numerous theories for extending such a prohibition beyond the express language of the Administrative Procedures Act<sup>2</sup> have been advanced in recent judicial opinions.

The problem of *ex parte* influence upon administrative decision-making is not, however, of recent vintage. As early as 1958 the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce discovered that a presidential assistant had exerted influences upon the Federal Trade Commission. In the twelve year period following, at least seven other congressional investigations considered *ex parte* influences upon administrative agencies.<sup>3</sup>

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\* B.A., Randolph-Macon College, 1976; J.D., University of Richmond, 1980; Associate, Taylor, Hazen, Kauffman, Lipscomb & Smith, Richmond, Virginia.

1. Generally, *ex parte* communications or contacts refer to "[i]nterested attempts 'to influence any member of [a decision-making body] except by the recognized and public processes.'" *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959), (quoting *Massachusetts Bay Telecasters, Inc. v. FCC*, 261 F.2d 55, 66 (D.C. Cir. 1958)). The Administrative Procedures Act [hereinafter cited as APA] states that "'*ex parte* communication' means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given. . . ." 5 U.S.C. § 551 (14) (1976); H.R. REP. No. 1441, 94th Cong., 2d Sess. 29 (1976). *See also* Federal Communications Commission Rules of Practice and Procedure, Subpart H—*Ex Parte* Presentations, 47 C.F.R. § 1.1201(g) (1979).

2. 5 U.S.C. §§ 551-559 (1976) [hereinafter cited as APA].

3. 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 13.12, at 465 (1970 Supp.) [hereinafter cited as K. DAVIS I].

## II. *Sangamon Valley*: CONFLICTING PRIVATE CLAIMS TO A VALUABLE PRIVILEGE

The forerunner of judicial efforts to prohibit *ex parte* communications with agency decisionmakers was *Sangamon Valley Television Corp. v. United States*.<sup>4</sup> In that case, the District of Columbia Circuit reviewed the allocation of television channels by the Federal Communications Commission. Following an earlier review by that court and while on appeal before the Supreme Court, the existence of widespread *ex parte* contacts was discovered.<sup>5</sup>

Prior to commencement of the original proceedings before the FCC, all of the contending television companies had been given notice that the Commission would receive written comments on or before a designated date and that a reply comment period of fifteen days would follow. The notice further provided that "[n]o additional comments may be filed unless (1) specifically requested by the Commission or (2) good cause for filing such additional comments is established."<sup>6</sup> Nonetheless, widespread attempts were made to influence the Commissioners.<sup>7</sup>

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4. 269 F.2d 221 (D.C. Cir. 1959).

5. The court had earlier refused to grant relief to the petitioner who attacked the channel allocation as inconsistent with Section 307(b) of the Communications Act, 48 Stat. 1083 (1934), as amended by 47 U.S.C. § 307(b) (1952), which mandated "such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." The lower court had found nothing illegal in the Commission's decision. *Sangamon Valley Television Corp. v. United States*, 255 F.2d 191 (D.C. Cir. 1958) (per curiam). The Supreme Court, however, vacated the judgment and remanded the case because of alleged *ex parte* contacts with Commissioners discovered subsequent to the Court of Appeals decision and brought to the attention of the Court by the Solicitor General. *Sangamon Valley Television Corp. v. United States*, 358 U.S. 49 (1958) (per curiam).

6. 269 F.2d at 223. These practices regarding receipt of comments prior to a decision, together with an *ex parte* prohibition were adopted as part of the Commission's Procedural Practices and Rules on December 11, 1957. For the current rules on this subject, see 47 C.F.R. § 1.415 (1979).

7. This fact is poignantly suggested by the following:

Harry Tenenbaum, president of intervenor Signal Hill, admitted . . . that while the proceeding . . . was pending he spoke to [Commission] members individually 'in privacy in their offices, not while they were sitting in a body as the Commission', of his desire to have Channel 2. . . . He was 'in all the Commissioners' offices' and went 'from Commissioner to Commissioner'. He 'probably discussed' with every Commissioner his desire to have Channel 2. . . . [H]e had every Commissioner at one time or another as his luncheon guest, and . . . gave turkeys to every Commissioner in 1955 and in 1956.

The *Sangamon Valley* opinion, vacating the FCC's decision, appears at first glance to be a broad based condemnation of ex parte contacts of any kind regardless of the type of administrative action undertaken. This conclusion is due primarily to the court's rejection of the argument of the Commission and intervenors that the ex parte contacts did not invalidate the decision since channel allocations were rulemaking proceedings, governed by section 553, rather than adjudications governed by section 554, of the APA.<sup>8</sup> The court ultimately adopted the position maintained by the Department of Justice:

*[W]hatever the proceeding may be called it involved not only allocation of TV channels among communities but also resolution of conflicting private claims to a valuable privilege, and that basic fairness requires such a proceeding to be carried on in the open. . . . Accordingly the private approaches to the members of the Commission vitiated its action. . . .*<sup>9</sup>

The court opined that the purpose underlying the Commission's announced procedures was to prevent parties from making contentions off-the-record which were prohibited on-the-record, thereby insuring that only material of record would be considered in reaching the final decision.<sup>10</sup> Consequently, the channel allocation was vacated and remanded to the Commission with instructions to hold evidential hearings to determine the nature and scope of the improper contacts.

The significance of the court's *Sangamon Valley* opinion lies in its adoption of the "conflicting private claims to a valuable privilege" standard to trigger prohibitions against ex parte influence. As will be developed later in this comment, where this standard is

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. . . [S]even weeks after the cut-off date . . . for filing reply comments and ten days before the Commission decided the case, Tenenbaum sent each Commissioner a letter in which he contended and tried to prove that 'Channel 2, based in St. Louis, would reach 166,700 more homes in the state of Illinois than if it were based in Springfield, Illinois.'

269 F.2d at 223-24. See also *id.* at 224 n.3.

8. 5 U.S.C. §§ 553, 554 (1976).

9. 269 F.2d at 224 (emphasis added).

10. *Id.* at 225. The regulations subsequently adopted by the Commission expressly mandate a final decision based on comments and material of record. 47 C.F.R. § 1.425 (1979) (originally adopted as 47 C.F.R. § 1.218 (1958)).

met, the court will apply the prohibition regardless of the type of agency action<sup>11</sup> even in the face of express Congressional intent to the contrary.<sup>12</sup>

Two subsequent cases appear to clarify the extent to which the court was willing to apply an *ex parte* prohibition in other types of agency action. The first of these cases, *Courtaulds (Alabama) Inc. v. Dixon*,<sup>13</sup> involved the Federal Trade Commission's promulgation of rules under the Textile Fiber Products Identification Act.<sup>14</sup> Appellant sought to invalidate the rules because of *ex parte* material received by the Commission from producers of other fibers including appellant's competitors. The material received related to the proposed definition of rayon and to appellant's application for a separate generic name.<sup>15</sup>

In rejecting the challenge, the court noted that "[i]nterested parties, including appellant, were invited to present suggestions"<sup>16</sup> and that the Commission staff had conducted numerous conferences with interested and informed parties.<sup>17</sup> The court found no evidence that anything had been done in secret or that any interested party had received advantages not shared by all. Generally, the

11. Professor Davis has pointed out that *Sangamon Valley* "was primarily rulemaking and *incidentally adjudication*." 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 6:18, at 534 (2d ed. 1978) (emphasis added) [hereinafter cited as K. DAVIS II].

12. See notes 28-39 *infra* and accompanying text.

13. 294 F.2d 899 (D.C. Cir. 1961).

14. 15 U.S.C. §§ 70-70k (1960). The FTC had promulgated rules establishing generic names for manufactured fibers including rayon. Appellant unsuccessfully sought to have its new "cross-linked cellulosic fiber" designated under the generic name "lincron" rather than rayon. 294 F.2d at 900, 902.

15. *Id.* at 904 n.14.

16. *Id.* at 904.

17. In certain proceedings, contacts of this nature were condoned in the recommendations of the temporary Administrative Conference of the United States, 1961-62, which urged adoption of a prohibition against *ex parte* contacts in certain administrative actions. Professor Davis observes:

The recommendations do not apply to any administrative action other than on-the-record proceedings. They do not . . . affect informal adjudication. *Informality does and should mean ex parte contacts*. Parties must be free to persuade agency members and staff members, and persuasion includes influence and pressure. . . . In any rule making which is not done through [an on-the-record] proceeding, *ex parte contacts are usually affirmatively desirable, for they help the administrators to know what affected parties want*. . . . We want democratic influences on administration and the principal channel of such influences is *ex parte contacts*.

K. DAVIS I, *supra* note 3, § 13.12, at 467-68 (emphasis added).

court was greatly deferential toward the Commission's action for "it may have considered representations from many sources and then *rejected* whatever was deemed inapropos."<sup>18</sup>

The *Courtaulds* opinion, however, becomes significant by way of a footnote reference which distinguishes that case from *Sangamon Valley*. By showing what was not at issue in *Courtaulds*, the District of Columbia Circuit has apparently clarified the standard enunciated in the earlier case.

*[Sangamon Valley]* is completely distinguishable on its facts and in principle. The instant case in no way involves a license to be *available to only one competing applicant* nor is there a suggestion here of what 'competitors' are advantaged by the Commission's adoption of the broad generic category 'rayon.' Moreover, *the instant proceeding clearly was one of rule making*, both in form and in substance, and hence was not subject to all the restrictions applicable to a quasi-judicial hearing.<sup>19</sup>

Thus, *Courtaulds* would seem to suggest that the *Sangamon Valley* standard for triggering the ex parte prohibition is to be strictly construed. In the absence of a privilege sought by two or more interested parties to the exclusion of others, the prohibition seems inapplicable according to *Courtaulds*. That opinion seems to say more, however, for it appears that the greater the tendency of agency action to decide an issue between two or more parties, *i.e.*, where the action is more akin to an adjudication affecting only the rights of those parties before the agency, rather than a determination of regulations of general applicability, the greater will be the procedural protections afforded by the judiciary.<sup>20</sup> The rule of *Sangamon Valley*, therefore, seems all the more defined: regardless

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18. 294 F.2d at 904 (emphasis in original).

19. *Id.* at 904-05 n.16 (emphasis added).

20. "Professor Davis, in particular, has urged that the appropriate test should be the character of the factual issues involved: adjudicative or particularized factual issues should be resolved in adjudicatory proceedings; general or legislative facts should be resolved in a legislative type proceedings [*sic*]." Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 AD. L. REV. 377, 383 (1978).

Recall that the court in vacating the FCC's decision in *Sangamon Valley* stated that the ex parte contacts went "to the very core of the Commission's quasi-judicial powers. . . ." 269 F.2d at 224 (emphasis added).

of the form of agency action, if it involves competing private claims to a valuable privilege, *ex parte* communications are prohibited.

A year following *Courtaulds*, the District of Columbia Circuit decided *United Air Lines, Inc. v. Civil Aeronautics Board*.<sup>21</sup> That case reviewed the Civil Aeronautics Board's award of non-stop air service to a particular airline, a single competitor for an exclusive right. Clearly, the agency action was one of adjudication rather than rulemaking.<sup>22</sup>

Unlike the *Sangamon Valley* panel, the *United Air Lines* court affirmed the Board's decision, finding that the *ex parte* communications did not amount to a " 'corrupt tampering with the adjudicatory process itself.' "<sup>23</sup> The court distinguished the case from *Sangamon Valley* by reason of the fact that, in the latter case, *ex parte* communications were made directly to members of the deciding body *without the knowledge of other parties*. In the case before the court, although the airline had violated the Board's Principles of Practice by soliciting support from civic bodies, travel agents, the press, and members of Congress in the form of communications to the Board, most important communications were placed in the public file and *were available to other competing parties*.<sup>24</sup>

By judicial decision, then, the District of Columbia Circuit has established a prohibition against *ex parte* contacts with administrative decisionmakers. Thus, where allegations of *ex parte* contacts are made, the court first must determine whether the decision of the agency is one resolving "conflicting private claims to a valuable privilege." Assuming that standard is met, further analy-

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21. 309 F.2d 238 (D.C. Cir. 1962). The court had previously remanded the case to the Board for a determination of whether *ex parte* contacts so violated the Board's rules as to require its order to be vacated. After the Board had determined that no significant violation existed, a competing applicant for the non-stop air service route sought review in the court of appeals.

22. See K. DAVIS II, *supra* note 11, § 6:18, at 534.

23. 309 F.2d at 241 (quoting *WKAT, Inc. v. FCC*, 296 F.2d 375, 383 *cert. denied sub nom* *Public Serv. Television, Inc. v. FCC*, 368 U.S. 841 (1961)).

24. 309 F.2d at 241. It should also be noted that the court could not find that the Board's award of the route to the airline was without adequate support in the record. This factor is important in later cases, particularly *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). See notes 45-63 *infra* and accompanying text.

sis must find that the ex parte communications were conducted secretly, that is, without the knowledge of other parties in interest.

### III. CONGRESSIONAL ACTION: THE GOVERNMENT IN THE SUNSHINE ACT

The temporary Administrative Conference of the United States in 1962 made recommendations regarding ex parte communications. Although the conference found that a single, general prohibition applicable to all administrative agencies was not feasible, it did establish certain principles to guide agencies in establishing their own rules. The most significant of these principles was Recommendation No. 16:

The agency code should prohibit any person who is a party to, or an agent of a party to, or who intercedes in an on-the-record proceeding in any agency, from making an unauthorized ex parte communication about the proceeding to any agency member, hearing officer, or agency employee participating in the decision in the proceeding.<sup>25</sup>

Whether agency action was required to be made "on-the-record" would be determined by the Constitution, statute, agency rule, or agency order in particular cases. The prohibition would be effective from the time the agency gave notice that an on-the-record proceeding was to be held. The recommendation also provided that where ex parte communications were made, they were to be included in the public record so as to be subject to rebuttal.<sup>26</sup> Following the recommendation of the temporary Administrative Conference, several federal administrative agencies adopted rules prohibiting certain ex parte communications.<sup>27</sup>

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25. RECOMMENDATION No. 16, S. Doc. No. 24, 88th Cong., 1st Sess. 6 (1963), *quoted in* K. DAVIS I, *supra* note 3, § 13.12 at 467.

26. K. DAVIS I, *supra* note 3, § 13.12, at 467. The recommendation also provided for limited exceptions to the ex parte prohibition. These included: (1) communications regarding a matter which is authorized to be handled on an ex parte basis; (2) requests regarding the status of a proceeding; (3) communications which parties to the proceeding have agreed or which agency rules permit on an ex parte basis; (4) communications of general significance if the party offering the information cannot reasonably expect to know that it is material to issues being considered in on-the-record proceedings; and (5) communications made pursuant to agency rules which are promptly available to all interested parties. L. JAFFE & N. NATHANSON, *ADMINISTRATIVE LAW* 993-94 (3d ed. 1968).

27. Even after passage of the Government in the Sunshine Act amendments to the APA,



The Administrative Procedures Act, as originally enacted, contained no explicit ban on *ex parte* communications<sup>28</sup> other than a prohibition imposed upon the agency "employee who presides at the reception of evidence" in on-the-record proceedings.<sup>29</sup> In fact, the Attorney General's Manual on the APA, commenting on section 553, affirmatively supported the use of *ex parte* communications in informal rulemaking: "Such informal rule-making procedure may take a variety of forms: informal hearings (with or without a stenographed transcript), conferences, consultation with industry committees, submission of written views, or any combination of these."<sup>30</sup> Section 553 of the APA on its face, in its history,

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discussed in notes 32-39 *infra* and accompanying text, many federal agencies continue to maintain rules, regulations, and procedures for dealing with *ex parte* contacts. *See, e.g.*, CAB Procedural Regulations, Part 300—Rules of Conduct in Board Proceedings, 14 C.F.R. §§ 300.0-20 (1980); SEC Rules, Subpart F—Code of Behavior Governing *Ex Parte* Communications Between Persons Outside the Commission and Decisional Employees, 17 C.F.R. §§ 200.110-114 (1980); NLRB Rules and Regulations, Subpart P—*Ex Parte* Communications, 29 C.F.R. §§ 102.126-133 (1979); Federal Maritime Commission Rules of Practice and Procedure, 46 C.F.R. § 502.11(b) (1979); FCC Rules of Practice and Procedure, Subpart H—*Ex Parte* Presentations, 47 C.F.R. §§ 1.1201-1251 (1979); ICC General Rules and Regulations, 49 C.F.R. § 1000.735-19 (1979), and Rules of Practice and Procedure, 49 C.F.R. § 1100, Appendix C—*Ex Parte* Communications at 291-92 (1979).

28. Nathanson, *supra* note 20, at 389. Originally, formal adversarial hearings in rulemaking proceedings were required under sections 556 and 557 of the APA only when mandated by statute or by due process. Otherwise, the limited procedural requirements of section 553 were applicable in rulemaking proceedings. The requirements of that section were two-fold: (1) publication of general notice of rulemaking, and (2) an opportunity for interested persons to participate. Under section 553, the opportunity to participate is limited to the "submission of written data, views, or arguments with or without the opportunity for oral presentation." 5 U.S.C. § 553(c) (1976).

Conceivably this could have been interpreted to mean that all submissions, whether written or oral, were to be included in a public file to be available to the general public for inspection. There is, however, no affirmative support for this interpretation in the legislative history, nor was there any early practice by the agencies to conform with such an interpretation.

Nathanson, *supra* note 20, at 388. *See also* H. R. REP. No. 880, Part 2, 94th Cong., 2d Sess. 18 (1976).

29. 5 U.S.C. § 554(d) (1966).

30. Nathanson, *supra* note 20, at 389 (quoting UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURES ACT 31 (1947)). The Manual states further that:

[i]t is entirely clear, however, that section [553] does not require the formulation of rules upon the exclusive basis of any 'record' made in informal rule-making proceedings. . . . Accordingly, except in formal rule-making governed by sections [556 and 557], an agency is free to formulate rules upon the basis of materials in its files and the knowledge and experience of the agency, in addition to the materials adduced in

and in its interpretation, seems entirely consistent with the permissive use of *ex parte* communications.<sup>31</sup>

In 1976, Congress, recognizing the need for a statutory prohibition on *ex parte* contacts,<sup>32</sup> enacted the Government in the Sunshine Act.<sup>33</sup> Section 4 of the Act amended the APA by adding an explicit prohibition against *ex parte* communications.<sup>34</sup>

The prohibition enacted, however, both by its language and by Congressional intent, is limited to formal agency action. It is applicable only when an agency decision is "required by statute" to be made or determined "on the record after opportunity for an agency hearing."<sup>35</sup> As the Conference Committee Report noted, the *ex*

public rule-making proceedings.

Nathanson, *supra* note 20, at 389.

31. Nathanson, *supra* note 20, at 389.

32. Section 4 [of the Government in the Sunshine Act] would establish for the first time a definite, general statutory statement as to the limitations and procedures governing *ex parte* communications with respect to agency proceedings. At present, such limitations and procedures are governed by agency rules and by constitutional standards, neither of which have the clarity, uniformity, and general public availability of a statute.

H.R. REP. No. 880, Part 1, 94th Cong., 2d Sess. 19 (1976).

33. Pub. L. No. 409, § 4(b), 90 Stat. 1247 (1976) (codified as 5 U.S.C. § 551(14); Pub. L. No. 409, § 4(a), 90 Stat. 1246 (1976) (codified as 5 U.S.C. § 557(d)).

34. The Sunshine Act added the following language as subsection (d) of § 557:

(d)(1) In any agency proceeding which is subject to subsection (a) of this section [i.e. where sections 553 or 554 require a decision to be made 'on the record after opportunity for an agency hearing'], except to the extent required for the disposition of *ex parte* matters as authorized by law —

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an *ex parte* communication [as defined in 5 U.S.C. § 551(14)] relevant to the merits of the proceeding;

(B) no member of the body comprising the agency . . . who is or may reasonably be expected to be involved in the decisional process . . . shall make . . . to any interested person outside the agency an *ex parte* communication relevant to the merits of the proceeding.

5 U.S.C. § 557(d)(1)(A)-(B) (1976).

Section 557(d)(1)(C) requires that written *ex parte* communications, memoranda stating the substance of oral contacts, and all responses thereto be placed in the public record. When an *ex parte* communication is received, the agency may require the party making the communication "to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation." 5 U.S.C. § 557(d)(1)(D) (1976).

35. 5 U.S.C. §§ 557(a) and (d)(1), 556(a), 553(c), 554(a) (1976); H.R. REP. No. 880, Part 1,

parte prohibition of the Sunshine Act in no way prohibits "any communication with an agency decisionmaking official if not involving a formal adjudicatory proceeding (and a few formal rulemaking proceedings)."<sup>36</sup> Particularly noteworthy is the fact that, with one exception, none of the bills which eventually led to the adoption of the Sunshine Act would have prohibited ex parte communications in informal agency rulemaking under section 553 of the APA.<sup>37</sup> The Sunshine Act amendments to the APA were intended simply to clarify by statute the prohibition against ex parte contacts and were not intended to repeal or modify, but rather to supplement, the ex parte rules previously adopted by federal agencies.<sup>38</sup>

The history surrounding the development of legislative prohibitions of ex parte communications makes clear the fact that neither the temporary Administrative Conference in 1961-62 nor the Congress in 1976 intended to alter procedures employed by federal agencies in informal rulemaking. "Congress thus has clearly decided to restrict ex parte communications in 'on the record' proceedings and not in other proceedings, and what Congress has decided is clearly the governing law. . . ."<sup>39</sup>

#### IV. *Home Box Office*: CONGRESSIONAL INTENT DISREGARDED

The informal procedures employed by administrative agencies under section 553 of the APA have not been free from criticism. The basic complaint lies in the informality of the procedures, for parties feel they have been denied an effective voice due to the fact that their "opportunity to participate" is often limited to the submission of written comments. The complaint is founded upon the uncertainty as to whether their comments are read or considered. Participation is further undermined by the absence of a right to

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94th Cong., 2d Sess. 19 (1976).

36. H. R. REP. NO. 1441, 94th Cong., 2d Sess. 29 (1976). See also H. R. REP. NO. 880, Part 2, 94th Cong., 2d Sess. 18 (1976) stating that "informal rulemaking proceedings . . . will not be affected by the provision."

37. Nathanson, *supra* note 20, at 390.

38. H. R. REP. NO. 880, Part 2, 94th Cong., 2d Sess. 18 (1976).

39. K. DAVIS II, *supra* note 11, § 6:18, at 533. Davis cites *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977) as the one exception to the governing law; this case "may be momentarily the law of the D.C. Circuit." K. DAVIS II, *supra* note 11, § 6:18, at 533.

make oral presentations or to cross-examine opponents.<sup>40</sup>

Another complaint asserted is the lack of a requirement that agencies assemble a formal record.<sup>41</sup> Without a formalized record similar to that required in "on the record" rulemaking or agency adjudication, meaningful judicial review is circumvented, thereby making difficult any attack upon the accuracy of the agency's decision.<sup>42</sup>

The judiciary has responded to these criticisms through two opposite, yet concurrent, movements. On the one hand, courts have held that the procedures established by the APA are sufficient to protect the due process rights of the parties in informal agency proceedings and to provide an adequate record for judicial review.<sup>43</sup> On the other hand, some courts have imposed traditionally adjudicatory procedures upon the process of informal rulemaking.<sup>44</sup>

These competing viewpoints have come to clash in the area of *ex parte* contacts. Foremost among the cases imposing traditionally adjudicatory procedures upon agencies engaged in informal rulemaking has been the District of Columbia Circuit's opinion in *Home Box Office, Inc. v. Federal Communication Commission*.<sup>45</sup> That case involved the validity of rules promulgated pursuant to

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40. Comment, *Ex Parte Contacts in Informal Rule Making: The "Bread and Butter" of Administrative Procedure*, 27 EMORY L.J. 293, 295 (1978) [hereinafter cited as Comment, *Ex Parte Contacts*].

Absent a statute, usually the agency's organic law, requiring a decision "on the record after opportunity for an agency hearing," the determination of whether to hold oral arguments lies within the discretion of the agency. 5 U.S.C. §§ 553(c), 554(a) (1976). See e.g., *Illinois v. NRC*, 591 F.2d 12, 14 (7th Cir. 1979).

41. Section 553 rulemaking requires only that "[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c) (1976).

42. Comment, *Ex Parte Contacts*, *supra* note 40.

43. *Id.* For a more detailed discussion, see notes 101-115 *infra* and accompanying text.

44. Comment, *Ex Parte Contacts*, *supra* note 40, at 296. See also *Writers Guild of America, W., Inc. v. American Broadcasting Co.*, 609 F.2d 355, 365 n.10 (9th Cir. 1979).

45. 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). Factually, this case involved the promulgation of rules regulating the cable television industry with respect to programming policy similar to those previously imposed upon the subscription broadcast television industry. *Id.* at 19-25. Several petitioners had unsuccessfully sought reconsideration of the rules by the FCC on the ground that its decision was arbitrary and without adequate explanation. *Id.* at 22. Following the Commission's refusal, the petitioners sought review by the court of appeals.

section 303 of the Communications Act.<sup>46</sup> Because the Act did not specify procedural safeguards, the Commission employed informal rulemaking under section 553 of the APA.<sup>47</sup>

During the pendency of the proceedings before the Commission, a participant had alleged violations of the *ex parte* communications doctrine set out in *Sangamon Valley*. On review before the court of appeals, the Commission did not contest the allegation that "a number of participants . . . sought out individual commissioners or Commission employees for the purpose of discussing *ex parte* and in confidence the merits of the rules. . . . In fact, the Commission itself solicited such communications in its notices of proposed rulemaking. . . ." <sup>48</sup> In response to the court's *sua sponte* order, the Commission filed over sixty pages of documentation revealing widespread *ex parte* contacts by virtually every party before the court<sup>49</sup> as well as members of Congress, members of the trade press, and representatives of performing arts groups.<sup>50</sup>

The court's opinion, remanding the matter to the Commission, appears to be a blanket ban against *ex parte* contacts in any administrative proceeding. This condemnation is founded upon four basic reasons: (1) the need for effective judicial review, (2) the promotion of reasoned and fair decisionmaking, (3) the encouragement of public discussion through the adversarial exchange of views, and (4) the inconsistency of secrecy with fundamental notions of fairness implicit in due process and the ideal of reasoned decisionmaking on the merits.

The first reason for the court's ban was based upon the Supreme Court's decision in *Citizens to Preserve Overton Park, Inc. v.*

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46. 47 U.S.C. § 303 (1970).

47. 567 F.2d at 35. See K. DAVIS II, *supra* note 11, § 6:18, at 534.

48. 567 F.2d at 51-52 (italics in original). The Commission's Notice of Proposed Rule Making had stated that "[i]n reaching a decision in this matter, the Commission may take into account any other relevant information before it, in addition to the comments invited by this Notice." 35 F.C.C.2d 893, 899 *quoted in* 567 F.2d at 55 n.122, 61 (italics in original).

49. 567 F.2d at 52. Many of these contacts had occurred during the period between the close of oral argument and the adoption of the Commission's order at a time when the record should have been closed while the proposed rules were under consideration by the Commission. *Id.* at 53.

50. *Id.* at 52 n.109.

*Volpe*,<sup>51</sup> mandating that judicial review of agency actions was to be based upon "the full administrative record" that was before the agency at the time of the decision. Such record must disclose the representations made to the agency in order that relevant information supporting or rebutting them may be considered by a reviewing court.

This course is obviously foreclosed if communications are made to the agency in secret and the agency itself does not disclose the information presented. Moreover, where, as here, an agency justifies its actions by reference only to information in the public file while failing to disclose the substance of other relevant information that has been presented to it, a reviewing court cannot presume that the agency has acted properly . . . but must treat the agency's justifications as a fictional account of the actual decisionmaking process and must perforce find its actions arbitrary.<sup>52</sup>

A second basis for the court's ban is that a decision on the part of an agency to promulgate rules as a final event implies the assumption that "an act of reasoned judgment has occurred."<sup>53</sup> This assumption, stated the court, "contemplates the existence of a body of material—documents, comments, transcripts, and statements in various forms declaring agency expertise or policy—with reference to which such judgment was exercised."<sup>54</sup> The difficulty posed by the existence of *ex parte* communications lies in the fact that there is one administrative record for the public and a reviewing court and another for the Commission and those originating the *ex parte* communications. While recognizing that the Commission was engaged in informal rulemaking under section 553 of the APA, the court, characterizing it as the law of the past, rejected the notion that no administrative record is required in informal rulemaking.<sup>55</sup>

The court further condemned the use of *ex parte* contacts because they deprive the administrative process of the advantages of

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51. 401 U.S. 402, 420 (1971).

52. 567 F.2d at 54-55 (citations omitted).

53. *Id.* at 54.

54. *Id.*

55. *See id.* at 54 n.118. *See also* notes 41-43 *supra* and accompanying text.

adversarial dialogue. Even assuming that the *ex parte* communications were disclosed during the process of judicial review, the truth of what the Commission asserted it knew about the television industry would be difficult to determine. The court further noted that in other instances agencies had been ordered to disclose information in agency files or consultants' reports identified by the agency as relevant in order to permit adversarial comment. "This requirement not only allows adversarial critique of the agency but is perhaps one of the few ways that the public may be apprised of what the agency thinks it knows in its capacity as a repository of expert opinion."<sup>56</sup>

From a functional standpoint, the court noted, there is no difference between assertions of fact and expert opinion offered by the public and that generated internally. Both sources are subject to bias, inaccuracy, or incompleteness which adversarial comment would both illuminate and eliminate. "[T]he potential for bias in private presentations in rulemakings which resolve 'conflicting private claims to a valuable privilege,' . . . seems to us greater than in cases where we have reversed agencies for failure to disclose internal studies."<sup>57</sup>

Finally, the court concluded that *ex parte* contacts and the secrecy accompanying them were inconsistent with "fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law."<sup>58</sup> This inconsistency, the court stated, had been recognized in *Sangamon Valley*, and any ambiguity as to the applicability of that decision had been removed by recent congressional and presidential actions.<sup>59</sup>

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56. 567 F.2d at 55. See note 40 *supra* and accompanying text.

57. 567 F.2d at 55 (quoting *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959).

58. 567 F.2d at 56.

59. In support of this assertion, the court referred to the recently enacted Government in the Sunshine Act and Congress' declaration that it is "the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government." 567 F.2d at . . . 56 (quoting Pub. L. No. 94-409, § 2, 90 Stat. 1241 (1976)). Of particular interest is the fact that the court acknowledged that the Sunshine Act amendments to the APA pertain only to *formal* rulemaking and have no application to *informal* rulemaking under section 553. Notwithstanding the recognition of this crucial distinction, the court, earlier in its opinion, stated that the procedures in issue

The court, in concluding its *per curiam* opinion, recognized that "informal contacts between agencies and the public are the 'bread and butter' of the process of administration and are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness."<sup>60</sup> Thus, the gist of *Home Box Office* is that, once notice of proposed rulemaking is issued, any agency official who may reasonably expect to be involved in the decisional process should refuse to discuss matters relating to the merits with any interested party. Additionally, the court would require that any ex parte communications received after notice of agency action must be placed in the public file so that interested parties may comment.<sup>61</sup> Thus, the mischief which the court condemns is not so much the existence of ex parte influences but, rather, the secrecy surrounding them<sup>62</sup> for, as the court notes, the failure to publicly disclose their existence together with reliance upon them by the Commission reduces the elaborate public discussion in the

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were governed by section 553. See note 47 *supra* and accompanying text.

The court also referred to Exec. Order No. 11920, 12 WEEKLY COMP. OF PRES. DOC. 1040, 1041 (1976), prohibiting ex parte contacts with members of the White House staff regarding allocation of international air routes. The court noted that this prohibition was more on point than the Sunshine Act's since the President's actions under section 801 of the Federal Aviation Act, 49 U.S.C. § 1461 (Supp. V 1974), were "clearly not adjudication, nor even quasi-judicial." 567 F.2d at 57.

60. 567 F.2d at 57.

61. *Id.* While the opinion relies primarily upon *Sangamon Valley* and Executive Order No. 11920, the procedure which the court would require in *informal* rulemaking is substantially the same as that required in *formal* rulemaking under the Sunshine Act amendments to the APA. For example, § 557(d)(1)(C) provides in part:

(C) a member of the body comprising the agency . . . who receives . . . a communication prohibited by this subsection shall place on the public record of the proceeding:

- (i) all such written communications;
- (ii) memoranda stating the substance of all such oral communications; and
- (iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph[.]

5 U.S.C. § 557(d)(1)(C) (1976). The application of this subsection to informal rulemaking, however, is clearly contrary to congressional intent. See notes 35-39 *supra* and accompanying text.

62. This conclusion is further borne out by the fact that the court distinguished the case before it, as well as *Sangamon Valley*, from *Courtaulds*. In the latter case the court had found "no evidence that the Commission improperly did anything in *secret* or gave to any interested party *advantages not shared by all*." 567 F.2d at 56 n.124 (quoting *Courtaulds (Alabama) Inc. v. Dixon*, 294 F.2d 899, 904-05 (D.C. Cir. 1961) (*emphasis added*)). In both *Sangamon Valley* and *Home Box Office*, however, "the substance of the contacts [were] kept *secret*." 567 F.2d at 56 n.124 (*emphasis added*).



rulemaking proceedings to a "sham."<sup>63</sup>

### V. *Home Box Office*: ITS VIABILITY CRITICIZED

Judges, agency officials, and legal commentators have criticized *Home Box Office's* broad condemnation of *ex parte* communications. That decision is emblematic of one of the two concurrent movements which have emerged in reviewing the sufficiency of procedural protections under the APA; the opinion's critics generally represent the second, opposing trend. This second movement has generally held the provisions of the APA to be sufficient to protect the rights of interested parties in informal rulemaking.<sup>64</sup> Exemplary of this criticism is that of Judge MacKinnon, a member of the judicial panel which decided the case. In a concurring opinion specially filed, he had characterized the *per curiam* as "an excessively broad statement [including] *dictum* that would be interpreted to cover the entire universe of informal rulemaking."<sup>65</sup> Judge MacKinnon also criticized the court's excessive reliance upon *Overton Park*<sup>66</sup> since in that case there had been a statutory requirement that certain findings precede agency action thereby making the full administrative record essential to judicial review; no findings, however, were mandated by statute in the *Home Box Office* proceedings.<sup>67</sup> Furthermore, Judge MacKinnon points out that the Commission's notice of rulemaking, including the provision regarding consideration of "any other relevant information,"<sup>68</sup> signaled to the public the initiation of informal rulemaking pursuant to section 553(b) of the APA under which the Commission was not required to follow the procedures applicable to formal rulemaking or adjudications.<sup>69</sup>

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63. 567 F.2d at 54.

64. See notes 43-44 *supra* and accompanying text.

65. 567 F.2d at 62 (MacKinnon, J., concurring specially).

66. See note 51 *supra*.

67. Judge MacKinnon states that:

[t]o the extent that our *Per Curiam* opinion relies upon *Overton Park* to support its decision as to *ex parte* communications in this case, it is my view that it is exceeding the authority it cites because here there is no statutory requirement for specific findings nor are the regulations limited to the full administrative record.

567 F.2d at 62 (italics in original).

68. See note 48 *supra*.

69. 567 F.2d at 61-62.

The holding of the *per curiam* was correct, however, in Judge MacKinnon's view due to the fact that the rulemaking "involved *competitive interests of great monetary value* and conferred preferential advantages on vast segments of the broadcast industry to the detriment" of competitors.<sup>70</sup> Thus, the rulemaking was, in effect, an adjudication of the respective rights of the parties. For that reason, Judge MacKinnon would have reached the same result by applying the doctrine enunciated in *Sangamon Valley* rather than impose a prohibition on *ex parte* contacts as broad as that enunciated in the *per curiam*.<sup>71</sup>

Professor Davis has also been critical of *Home Box Office* generally for the same reason enunciated by Judge MacKinnon, namely, that the opinion goes beyond the narrow grounds necessary to reach its conclusion. Davis maintains that:

every reason the court gave in support of the prohibition would have been satisfied by a holding that such consultations and any other communications are permitted but must go into the public record so that (a) others may have a chance to reply, and (b) a reviewing court may know what the agency has considered.<sup>72</sup>

Furthermore, he contends that the court's reliance on *Sangamon Valley* was improper because that case involved "primarily rulemaking and incidentally adjudication." The *Home Box Office*

70. *Id.* at 62 (emphasis added).

71. In fact, many situations exist where such a rule would be inappropriate:

Informal written or oral consultation with affected parties or with advisory committees is the mainstay of rule-making procedure.

. . . .

The consultative process may take many forms. The administrator or staff member may talk over possible rules with selected parties, by telephone or in person, singly or in groups, by systematically and formally arranged conferences or interviews or in connection with fortuitous contacts occasioned by other business.

. . . .

The Attorney General's Committee generalized concerning conferences: "The practice . . . introduces an element of give-and-take . . . and affords an assurance to those in attendance that their evidence and points of view are known and will be considered. As a procedure for permitting private interests to participate . . . it is as definite and may be as adequate as a formal hearing."

567 F.2d at 62-63 n.2 (quoting K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.02, at 363-65 (1958)) (footnotes omitted).

72. K. DAVIS II, *supra* note 11, § 6:18, at 533-34.

case, on the other hand, was "entirely rulemaking."<sup>73</sup>

For this reason, Davis asserts that better authority existed upon which to resolve the case. First, there was the *United Air Lines*<sup>74</sup> case which Davis notes was an adjudication. In that case, the administrative decision was not invalidated since the ex parte communications had been placed in the public file. Davis asserts that "[i]f placing the communications in the public file is enough even in an adjudication, it should be enough in rulemaking."<sup>75</sup>

The court might also have relied upon *Courtaulds*<sup>76</sup> where the Commission had not given any party an advantage not shared by all. *Courtaulds* had relied upon *Van Curler Broadcasting Corp. v. United States*<sup>77</sup> which had found that ex parte contacts with the FCC during a general nation-wide rulemaking procedure were not improper. The *Home Box Office* opinion, however, did not mention *Van Curler* but, instead, distinguished *Courtaulds*.<sup>78</sup> Davis, however, maintains that, despite this fact, *Home Box Office* and *Courtaulds* "in their fundamental attitudes seem clearly irreconcilable."<sup>79</sup> Thus, if the *Home Box Office* panel had relied upon *Courtaulds*, it could have reached the same decision by finding that there was secrecy surrounding the ex parte contacts or that advantages were given to some, but not all, interested parties.

Davis also criticizes the court's characterization of the public hearings held by the Commission as a "sham." He points out that the court's failure was its reliance upon "patterns of adjudication" rather than "patterns of legislation to guide the legislative proce-

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73. *Id.* at 534. Davis notes that while *Sangamon Valley* dealt with allocation of television channels it also involved a resolution of claims to a *particular* license. Thus, with respect to the applications for the license there was an adjudication and hence the resolution of "competing private claims to a valuable privilege."

74. See notes 21-24 *supra* and accompanying text.

75. K. DAVIS II, *supra* note 11, § 6:18, at 535.

76. See notes 13-20 *supra* and accompanying text.

77. 236 F.2d 727 (D.C. Cir.), *cert. denied*, 352 U.S. 935 (1956).

78. *Courtaulds* was distinguished because the court had not found that anything had been done in secret nor had interested parties received advantages not shared by all. It was also distinguished by the fact that the agency "did not decide competing private claims to a valuable privilege." 567 F.2d at 56 n.124. See also *Rogers Communication Serv., Inc. v. FCC*, 593 F.2d 1225, 1233-34 (D.C. Cir. 1978).

79. K. DAVIS II, *supra* note 11, § 6:18, at 535.

ture of rulemaking."<sup>80</sup>

Thus, Davis' conclusion is that the result reached could have been based on much narrower grounds than those relied upon. While *Home Box Office* may be valid law in the District of Columbia Circuit, he notes that it is unlikely to derive much support in other jurisdictions or in the law of the future.<sup>81</sup>

## VI. *Action for Children's Television*: ANOTHER PANEL SPEAKS

Subsequent to *Home Box Office*, one commentator has argued that the prevention of unfairness to other interested parties in informal rulemaking could be achieved by means far short of those adopted in that opinion. Its objective could have been achieved either by "careful regard for the application of the *Sangamon* principle" or by requiring that ex parte communications dealing with the merits be placed in the public file.<sup>82</sup> These considerations suggested that a general ban on ex parte contacts is unnecessary. Furthermore, many commentators have argued that such a ban would be undesirable.<sup>83</sup>

Less than four months following the decision in *Home Box Office*, its shortcomings were made amply clear by a different panel of the Court of Appeals for the District of Columbia Circuit in *Action for Children's Television v. Federal Communications Commission* [hereinafter cited as *ACT*].<sup>84</sup> The court's opinion, in the words of one commentator, "carefully considers and explicitly rejects the general position taken . . . in *Home Box Office*."<sup>85</sup> Although factually the cases are distinguishable,<sup>86</sup> they are alike in

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80. *Id.* at 534. "If Congress considers a bill, . . . would the court call the public discussions a sham if lobbyists talk to some congressman before the votes are taken? Or is competition of the lobbyists with each other often the essence of democracy." *Id.*

81. *See id.* at 533, 537.

82. Nathanson, *supra* note 20, at 399-400.

83. *See, e.g., id.*, K. DAVIS II, *supra* note 11, § 6:18, at 537; Recommendation 77-3, 1977 REPORT OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (1978).

84. 564 F.2d 458 (D.C. Cir. 1977). Judge MacKinnon, who had filed a separate opinion concurring specially in *Home Box Office*, was the only member common to both panels.

85. Nathanson, *supra* note 20, at 400.

86. *Home Box Office* had considered the FCC's promulgation of rules, while *ACT* reviewed the Commission's decision not to promulgate rules. *Action for Children's Television* [hereinafter *Action*], a public-interest organization, had petitioned the Commission for adoption of numerous proposals to improve children's television. Following proper public

that they examine *ex parte* communications in the context of informal agency action.

In rejecting the *ex parte* contacts challenge to the Commission's decision not to promulgate certain regulations proposed by Action for Children's Television, the court stated that the petitioner's characterization of the Commission's action as an abuse of administrative process "misconceives the agency's role in, and the flexibility of, the informal rulemaking proceeding" through which the petitioner's proposals were explored.<sup>87</sup> Beyond the procedural requirements of the APA, the court stated, Congress had not specified any other method by which the Commission was to acquire and assess data relevant to its determination of the public interest.<sup>88</sup> The court recognized that, in this case, the Commission was engaged in a legislative determination where only limited procedural safeguards were required to permit meaningful public participation.

The procedures available . . . are correspondingly diverse. . . .No hearing is usually required, and generally no procedural uniformity is imposed. The more limited procedural safeguards in informal rulemaking are justified by its more wide-ranging functional emphasis on questions of law, policy and legislatively-conferred discretion rather than on the contested facts of an individual case.<sup>89</sup>

The court also pointed out that, under section 553 of the APA, the Commission was not limited to factual material within the public domain but could employ its own expertise or broader policy considerations not present in the record.<sup>90</sup>

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notice of inquiry and proposed rulemaking, and in the wake of strong public support for the proposals, the broadcast industry undertook limited self-regulation. For that reason, the Commission declined further consideration of Action's proposals. Action challenged this decision on grounds that the Commission had failed to solicit public comment on the industry's self-regulation which had been "negotiated behind the closed doors" of the Commission with the National Association of Broadcasters. 564 F.2d at 468.

87. *Id.* at 469.

88. *Id.* at 470 n.19.

89. *Id.* at 471 (citations omitted). The court's recognition of the APA as the limit of procedural protections is emblematic of the second movement, referred to earlier, that is currently developing in administrative law. See notes 40-44 *supra* and accompanying text.

90. The Commission's Notice of Proposed Rule Making in *Home Box Office* and its Notice of Inquiry and Proposed Rule Making in *ACT* are alike in that they provide for con-

In considering the *ex parte* contacts challenge, the *ACT* panel was not unmindful of *Home Box Office* "which painted a new perspective on *ex parte* contacts with a rather broad jurisprudential brush."<sup>91</sup> Although not overruling that decision, the court refused to apply its rule regarding *ex parte* communications<sup>92</sup> retroactively in *ACT*. The panel agreed that the *ex parte* contact prohibition mandated by *Home Box Office* "should not apply—as the opinion clearly would have it—to every case of informal rulemaking . . . as it constitutes a clear departure from established law. . . ."<sup>93</sup>

The court, in a footnote, pointed out that, if Congress had wanted to extend the *ex parte* prohibition to informal rulemaking, it had a perfect opportunity to do so with the passage of the Government in the Sunshine Act. More importantly, the court refers to the language of section 555(b) of the APA which "can reasonably be read as sanctioning *ex parte* contacts" if "consistent with 'the orderly conduct of public business.'"<sup>94</sup> While the *Home Box Office* panel had relied upon recent presidential and congressional actions to support an extension of the *Sangamon Valley* doctrine, the court here asserted that such reliance "is rendered nugatory by what Congress chose not to do."<sup>95</sup> Furthermore, the *ACT* case was distinguishable from *Sangamon Valley* because of the absence of competing private claims to a valuable privilege. *ACT* concerned a question of programming policy of general applicability which was beyond the scope of *Sangamon Valley*.<sup>96</sup> The court also noted the

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sideration of matters other than those in the public domain. Compare 35 F.C.C.2d 893, 899, quoted in 567 F.2d at 55 n.122, 61, with 28 F.C.C.2d 368, 372-73, quoted in 564 F.2d at 471 n.22.

91. 564 F.2d at 474.

92. See text accompanying note 61 *supra*.

93. 564 F.2d at 474.

94. *Id.* at 474-75 n.28. Section 555(b), which is applicable by § 555(a) to §§ 551-59, states in pertinent part: "So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue . . . in a proceeding, . . . or in connection with an agency function." 5 U.S.C. § 555(b) (1976).

95. 564 F.2d at 474-75 n.28.

96. The court looked to the *Home Box Office* opinion's reasoning in reaching this conclusion. A major problem which the *Home Box Office* panel confronted was the *Courtaulds* case, which it distinguished from both the case before it and *Sangamon Valley*. First, unlike *Courtaulds*, the substance of the *ex parte* contacts had been secret. Secondly, *Courtaulds* did not involve competing claims to a valuable privilege. "[T]hese bases for distinguishing *Courtaulds* from *Home Box Office* also distinguish [*ACT*] with the same and perhaps even

absence of any reference in *Home Box Office* to the *Van Curler*<sup>97</sup> case, which had supported the proposition that ex parte contacts do not per se vitiate informal rulemaking unless the administrative record demonstrates that they had been a material influence in the agency decision.<sup>98</sup>

The ACT panel also rejected *Home Box Office's* requirement of a "whole record" judicial review together with the notion that such review must be based on every informational input that may have been involved in the deliberative process. Such a requirement, the court held, would place tremendous burdens on an agency decisionmaker in making available such a record and could potentially be carried to the point of absurdity.<sup>99</sup>

As the court concluded, the problem was one of line-drawing. In consideration of that which Congress did not intend, this panel of the court drew that line at the point where rulemaking proceedings involve "competing claims to a valuable privilege." Thus, the ACT opinion merely reaffirms what *Sangamon Valley* had held almost twenty years earlier and rejects the extension of that rule to all informal rulemaking as *Home Box Office* would require.<sup>100</sup>

## VII. *Vermont Yankee*: GUIDING LIGHT OR DICTUM?

The decision in ACT, however, has not been the final word on ex parte contacts or procedural rights in informal rulemaking proceedings. Although not directly addressing the question of ex parte influence, the recent decision of the United States Supreme Court

greater force." 564 F.2d at 476. What is baffling, however, is the fact that the *Home Box Office* panel, after distinguishing *Courtaulds*, "effectively overrule[s]" that case by promulgating its broad ban on ex parte contacts. *Id.* at 476 n.29. See also 567 F.2d at 56 n.124, 57.

97. 236 F.2d 727 (D.C. Cir.), cert. denied, 352 U.S. 935 (1956).

98. 564 F.2d at 476.

99. Regarding the degree to which the "whole record" requirement could be carried to the absurd, the court states:

If we go as far as *Home Box Office* . . . , why not go further to require the decisionmaker to summarize and make available for public comment every status inquiry from a Congressman or any germane material—say a newspaper editorial—that he or she reads or their evening-hour ruminations? In the end, why not administer a lie-detector test to ascertain whether the required summary is an accurate and complete one?

564 F.2d at 477 (citation omitted).

100. *Id.*; *Hoffman-Laroche, Inc. v. Califano*, 453 F. Supp. 900, 904 (D.D.C. 1978).

in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,<sup>101</sup> reviewing rulemaking procedures under section 553 of the APA, has had some bearing on the issue in more recent cases.<sup>102</sup>

Even though the Atomic Energy Commission had employed all the procedures required by the APA, the Court of Appeals for the District of Columbia Circuit overturned the rules promulgated, and held that, in the absence of proper rulemaking procedures, the Commission must review the environmental impact of fuel reprocessing and disposal in individual licensing proceedings, *i.e.*, on a case-by-case basis.<sup>103</sup> Although the court had not dictated adherence to any specific procedures, it had discussed the need for more extensive procedural devices, particularly discovery and cross-examination which the Commission had denied. This, the court held, amounted *inter alia* to a deprivation of a meaningful opportunity to participate as guaranteed by due process.<sup>104</sup>

The Supreme Court, however, rejected the court of appeals decision, finding it contrary to both judicial holdings of over four decades and congressional determinations that administrative agencies are in a better position than federal courts or Congress

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101. 435 U.S. 519 (1978). The case involved the issuance of a license to operate a nuclear power plant and the promulgation of rules concerning the environmental effects associated with the uranium fuel cycle by the Atomic Energy Commission. The Natural Resources Defense Council challenged these rules on procedural grounds because of the Commission's decision that "the hearing [would] follow the legislative pattern, and no discovery or cross-examination [would] be utilized. . . . The hearing [would] be conducted as informally and as expeditiously as practicable, consistent with affording the participants a reasonable opportunity to present their positions." Notice of Hearing, 38 FED. REG. 49, 49-50 (1973).

Judicial review of the rulemaking was originally sought in the Court of Appeals for the District of Columbia Circuit. That court had framed the issue as "whether the procedures provided by the agency were sufficient to ventilate the issues." *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 547 F.2d 633, 643 (D.C. Cir. 1976).

102. Nathanson concludes that the opinion "may have far-reaching implications, not only for *ex parte* communications but also with respect to many other procedural problems arising in the course of informal rulemaking." Nathanson, *supra* note 20, at 406. Furthermore, if the opinion "is taken literally and given full scope, it is hard to see why it would not be equally applicable to the problem of *ex parte* communications in informal rulemaking." *Id.* at 407. *Accord*, *Citizens Assoc. of Georgetown v. Zoning Comm'n. of the District of Columbia*, 392 A.2d 1027 (D.C. 1978). *But see* K. DAVIS II, *supra* note 11, §§ 6:36 to :37.

103. 435 U.S. at 535.

104. *Id.* at 541-42.



"to design procedural rules adapted to the peculiarities of the . . . tasks of the agency involved."<sup>105</sup> The decision stands in remarkable contrast to the *Home Box Office* opinion's importation of traditionally adjudicatory procedures into informal rulemaking. In apparent agreement with the view that the APA sets out the maximum procedural rights required, the Court stated with respect to informal rulemaking under section 553 that

generally speaking this section of the Act established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. Agencies are free to grant additional procedural rights in the exercise of their discretion, *but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.*<sup>106</sup>

This mandate, however, is not absolute but is applicable "[a]bsent constitutional constraints or extremely compelling circumstances."<sup>107</sup>

One such exceptional circumstance to which the Court intimated is not unlike that considered in *Sangamon Valley*. The Court noted that, even though an agency is engaged in rulemaking proceedings, additional procedures beyond those compelled by the APA may be required if the agency is making a "quasi-judicial" determination exceptionally affecting a small number of persons in which each case is decided upon individual grounds.<sup>108</sup> This standard is substantially similar to that of *Sangamon Valley*, *i.e.*,

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105. *Id.* at 524-25. Perhaps the significance of *Vermont Yankee* is suggested by the Court's explanation of its grant of certiorari:

As we read the opinion of the Court of Appeals, its view that reviewing courts may in the absence of special circumstances justifying such a course of action impose additional procedural requirements on agency action raises questions of such significance in this area of the law as to warrant our granting certiorari and deciding the case. Since the vast majority of challenges to administrative agency action are brought to . . . the District of Columbia Circuit, the decision of that court in this case will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals.

*Id.* at 535-37 n.14.

106. *Id.* at 524 (citing *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973), and *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972)) (emphasis added).

107. 435 U.S. at 543.

108. *Id.* at 542. *See also* *United States v. Florida East Coast Ry.*, 410 U.S. at 242, 245; *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 446 (1915).

“competing private claims to a valuable privilege” which triggers a prohibition against ex parte communications.

The Court rejected the argument that section 553 of the APA established only the lower procedural bounds beyond which courts may routinely require additional safeguards when an agency addresses complex or technical factual issues or topics of great public import. Noting that the legislative history of the APA was clearly contrary to that position,<sup>109</sup> the Court referred to several compelling reasons dictating against court imposed procedures. First, judicial review of agency rulemaking would be totally unpredictable if courts review proceedings to determine whether the procedures employed were “perfectly tailored” to reach the result which the court feels is “best” or “correct.” Secondly, a court’s review of the procedures employed is based on the record actually produced at the rulemaking hearing rather than on the basis of information available to the agency at the time when the decision was made to tailor the procedural structure as it did. Finally, and as the Court states, “most importantly,” in informal rulemaking it cannot be assumed that additional procedures will result in a more adequate record; “informal rulemaking need not be based solely on the transcript of a hearing held before an agency.”<sup>110</sup> Any requirement mandating procedures beyond those of section 553, in effect, “compels the agency to conduct all rulemaking proceedings with the full panoply of procedural devices normally associated only with adjudicatory hearings.”<sup>111</sup>

The Supreme Court, then, has apparently condemned the importation of traditionally adjudicatory procedures into informal agency rulemaking. Whether *Vermont Yankee* will have any significant effect upon future judicial review of ex parte communications

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109. The Senate Report pertaining to § 553 as originally enacted asserts the following:

This subsection states . . . the minimum requirements of public rule making procedure short of statutory hearings. *Under it agencies might in addition confer with industry advisory committees, consult organizations, hold informal 'hearings,' and the like.* Considerations of practicality, necessity, and public interest . . . will naturally govern the agency’s determination of the extent to which public proceedings should go.

435 U.S. at 545 (quoting S. REP. No. 752, 79th Cong., 1st Sess. 14-15 (1945)) (emphasis added). *Accord*, H. R. REP. No. 1980, 79th Cong., 2d Sess. 9, 16-17 (1946).

110. 435 U.S. at 546-47.

111. *Id.* at 547.

is still open to question. One commentator has questioned whether the decision will have as far-reaching effects as the face of the opinion would seem to dictate.<sup>112</sup> The decision, however, has been given considerable deference by some courts.<sup>113</sup>

At least one decision has expressly rejected not only the ex parte prohibition of *Home Box Office* but also that of *ACT* based upon authority of *Vermont Yankee*. In *Citizens Association of Georgetown v. Zoning Commission of the District of Columbia*,<sup>114</sup> the District of Columbia Court of Appeals affirmed a zoning plan established by rulemaking proceedings which had been challenged because of ex parte influences. After distinguishing the case from *Sangamon Valley* and *Home Box Office* by reason of the absence of "competing claims to a valuable privilege," the court stated that "subsequent decisions have cast doubt on the continuing vitality of *Home Box Office*. . . . Furthermore, even the limited application of a judicial rule of procedure, such as that set forth in *Home Box Office* and *ACT*, to an administrative rulemaking is questionable"

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112. Davis asserts that the broad language of the opinion "was probably intended to be no broader than the problem before the Court," which was the application of adjudicatory procedures in informal rulemaking. He points out that the problem before the Court failed to bring into question as many as a dozen other issues including the problem of "what to do about ex parte communications in informal rulemaking, not mentioned by § 553." K. DAVIS II, *supra* note 11, § 6:36, at 609-10. *But see* B. MESINES, J. STEIN, & J. GRUFF, *ADMINISTRATIVE LAW* §§ 1.04[2], 18.05 (Cum. Supp. 1978).

In a later article, Davis severely criticizes the *Vermont Yankee* opinion. He notes that the Court, in reaching its conclusions, proceeds to do precisely that which it condemns, namely, to engage in the creation of what he calls "administrative common law." Davis, however, contends that the Court has itself created much administrative common law throughout the twentieth century and notes that *Vermont Yankee* is contrary to both the APA and its legislative history. Finally, Davis contends that the opinion will be rejected in the long run and that it already appears to be eroding in its effects. Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3.

113. *See, e.g.*, *Illinois v. NRC*, 591 F.2d 12 (7th Cir. 1979); *Hercules, Inc. v. EPA*, 44 Ad.L.2d 652 (D.C. Cir. 1978); *Energy Reserves Group, Inc. v. Department of Energy*, 589 F.2d 1082 (Temp. Emer. Ct. App. 1978). *See also* Comment, *Judicial Imposition of Rulemaking Procedures on Administrative Agencies: The Impact of Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc.*, 28 DEPAUL L. REV. 171 (1978).

114. 392 A.2d 1027 (D.C. 1978). The ex parte contacts in question included breakfast and lunch meetings with Commission members and the submission of complete drafts of zoning regulations and map amendments by land developers, none of which were placed in or summarized by the public file.

in the wake of *Vermont Yankee*.<sup>115</sup>

The United States Court of Appeals for the District of Columbia Circuit has confronted at least two cases involving ex parte communications since the decision in *Vermont Yankee*.<sup>116</sup> These decisions, unlike those previously considered in this comment, did not involve informal rulemaking under section 553 of the APA, nor did they involve a statutory mandate that "hearings on the record" be conducted pursuant to sections 556 and 557. In *United States Lines, Inc. v. Federal Maritime Commission*,<sup>117</sup> the court considered ex parte contacts in the context of a statutory requirement that the Commission conduct "hearings." Rejecting the argument that formal adjudicatory-type hearings were required under sections 556 and 557 of the APA since the Shipping Act mandated only a decision after "notice and hearing,"<sup>118</sup> the court nevertheless concluded that the ex parte contacts vitiated the agency decision. The court reasoned that since the public had a right to participate in the required hearing, the existence of ex parte contacts reduced the hearings to "nothing more than a sham" since the right "embraces . . . a reasonable opportunity to know the claims of the opposing party."<sup>119</sup> As in *Home Box Office*, the ex parte contacts were

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115. 392 A.2d at 1040-41. Evidently, the District of Columbia Court of Appeals would not extend the prohibition against ex parte contacts as far as the United States Court of Appeals for the District of Columbia Circuit did in *ACT* where an agency's informal rulemaking involved resolution of conflicting claims to a valuable privilege. Apparently, this court would go only so far as required by the District of Columbia APA, which is similar to the Federal APA.

116. *United States Lines, Inc. v. Federal Maritime Comm'n.*, 584 F.2d 519 (D.C. Cir. 1978); *National Small Shipments Traffic Conf., Inc. v. ICC*, 44 Ad. L.2d 975 (D.C. Cir. 1978).

117. 584 F.2d 519. The Federal Maritime Commission had granted an exemption from the antitrust laws for anti-competitive agreements among certain ocean carriers pursuant to section 15 of the Shipping Act of 1916, 46 U.S.C. § 814 (1970). Ex parte communications were received by the Commission from foreign governments but were not disclosed in the public record.

118. Noting that neither § 15 of the Shipping Act nor its legislative history provided for a hearing "on the record," the court stated that

[w]hile the exact phrase 'on the record' is not an absolute prerequisite to application of the formal hearing requirements, the Supreme Court has made clear that these provisions [sections 556 and 557 of the APA] do not apply unless Congress has clearly indicated that the 'hearing' required by statute must be a trial-type hearing on the record.

584 F.2d at 536. See also *Marketing Assistance Program, Inc., v. Bergland*, 562 F.2d 1305, 1309 (D.C. Cir. 1977).

119. 584 F.2d at 539.

found to stand between the court and effective judicial review which, regardless of the standard of review, requires the court to test the agency action against "the full administrative record that was before [the Commission] at the time [of the] decision."<sup>120</sup>

The court apparently circumvents *Vermont Yankee* by noting that the Supreme Court had remanded that case to the Court of Appeals for the purpose of conducting a "searching and careful" inquiry of the type mandated by *Overton Park* to determine agency compliance with the applicable standard of review. The court concluded that its prohibition of ex parte contacts in the case before it was not based upon a determination of "which procedures are 'best' or most likely to further some vague, undefined public good," but rather upon statutory requirements of a hearing and upon judicial review under the standard which Congress chose to impose.<sup>121</sup>

#### VIII. CONCLUSION

Whether the *Home Box Office* prohibition against ex parte communications in informal rulemaking will remain viable in the future is open to question. The very existence of such a broad proscription, at least within the District of Columbia Circuit, seems dependent upon the particular panel reviewing the agency action in question.<sup>122</sup>

Not only has another panel of the same court that decided *Home Box Office* been critical of its proscription, but the Administrative Conference of the United States has rejected its holding. In regard to ex parte contacts in section 553 rulemaking, the Conference has stated:

A general prohibition applicable to all agencies . . . is undesirable, because it would deprive agencies of the flexibility needed to fashion

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120. *Id.* at 541 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)).

121. 584 F.2d at 542-43 n.63.

122. Davis states that *Home Box Office* "may be momentarily the law of the D. C. Circuit because of the vote of two judges out of three." K. DAVIS II, *supra* note 11, § 6:18, at 533. Of the two judges, one was a district judge sitting by designation, the other was Circuit Judge Wright. 567 F.2d at 17. Of interest is Judge Wright's authorship of the *United States Lines* opinion, 584 F.2d at 522, and his absence from the *ACT* panel, 564 F.2d at 461.

rulemaking procedures appropriate to the issues involved, and would introduce a degree of formality that would, at least in most instances, result in procedures that are unduly complicated, slow and expensive, and, at the same time, perhaps not conducive to developing all relevant information.<sup>123</sup>

In view of the *ACT* decision and depending upon the applicability of *Vermont Yankee* to the ex parte contact issue, it is not likely that the law of the future will prohibit ex parte influences in the making of rules of general applicability. It is, however, likely that courts will require that significant contacts be included in the public record.<sup>124</sup>

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123. Recommendation 77-3, 1977 REPORT OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (1978).

124. See *id.*; K. DAVIS II, *supra* note 11, § 6:18, at 537.



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