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JUDICIAL CONTROL OF EX PARTE CONTACTS IN INFORMAL RULEMAKING PROCEEDINGS— *HOME BOX OFFICE V. FCC*

A Federal Communications Commission [1] administrator telephones an expert affiliated with an industry likely to be affected by a forthcoming agency regulation. The expert answers questions concerning data contained in the record which the administrator is reviewing prior to issuing the regulation. This ex parte[2] conversation is quickly forgotten when the Commission promulgates its rule. Subsequently, a party disliking the new rule learns of the phone call and brings it to the attention of the reviewing court. Is the newly promulgated rule valid? The United States Court of Appeals for the District of Columbia held in *Home Box Office v. FCC* [3] that the innocuous phone call would vitiate the agency's rule. In other words, any court confronted with this situation must strike the rule and remand the case to the agency.[4] This case focused consideration once again on one of the most difficult questions in administrative law: [5] whether an agency should permit ex parte communications in an informal rulemaking proceeding.[6]

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1. Hereinafter referred to as the FCC.

2. In this Note, the term "ex parte contacts" refers to oral or written statements by any party to a proceeding to anyone in a decision making position, without notice to the other parties. *See* Lovett, *Ex Parte and the FCC: The New Regulations*, 21 F. COMM. B.J. 54 (1967).

3. 567 F.2d 9 (D.C. Cir.), *cert. denied*, 98 S. Ct. 111 (1977) [hereinafter cited as *Home Box Office*].

4. The court may also require an outside examiner to hear testimony and collect data regarding the propriety of the conversations and memoranda communicated secretly. The court-appointed examiner could, in those situations, order the disqualification of a party or a commissioner if the communications were improper.

5. Ex parte contacts have been a problem for some time. In 1961, President Kennedy noted:

> This problem is one of the most complex in the entire field of government regulation. It involves the elimination of ex parte contacts when those contacts are unjust to other parties [or the public], while preserving the capacity of an agency to avail itself of information necessary to decision. Much of the difficulty stems from the broad range of agency activities—ranging from judicial type adjudication to wide-ranging regulation of entire industries.

Message of the President on Ethical Conduct in Government, H.R. Doc. No. 145, 87th Cong., 1st Sess. 6-7 (1961).

6. *See generally* GELLHORN & BYSE, ADMINISTRATIVE LAW CASES AND COMMENTS 1020-22 (6th ed. 1974). Today there exists a plethora of testimony alleging that because of the influence of Washington lobbyists, administrative agencies (1) ignore or gloss over the public interest, (2) merely mediate between the powerful interest groups while neglecting the weaker one, or (3) become "captured" by those very interests which they were supposed to regulate. Public suspicion of the agencies, already formidable, is compounded by the discovery of ex parte communication. Persons not privy to the ex parte sessions feel that they cannot know the

In 1972 the FCC initiated informal rulemaking[7] proceedings on the regulation[8] of Cablecast[9] and Subscription[10] broadcast television stations. In compliance with section 553 of the Administrative Procedure Act,[11] public notice[12] of the proposed rulemaking was given and

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underlying reasons for the agency's decision, that they are being left out of the rulemaking process, and that they are precluded from testing the sufficiency of evidence communicated ex parte.. *See, e.g.*, M. GREEN, THE OTHER GOVERNMENT 67-242 (1975). *See also* J. MICHAEL & R. FORT, WORKING ON THE SYSTEM 261 (1974). It was related here, for example, that a broadcast license applicant vaguely offered an FCC staff attorney a job while his application was pending. The authors maintained that this sense of "laxness" was typical. *Id.* at 262.

The *Home Box Office* court felt that the FCC glossed over the public interest in favor of mediating between the powerful broadcast industry and the less powerful cable television. *Home Box Office* at 53.

7. Rulemaking is the agency process for formulating, amending, or repealing a rule. Section 551(4) of the Administrative Procedures Act (hereinafter referred to as the APA) defines "rule" as:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . .

5 U.S.C. § 551(4) (1970).

Rulemaking is basically "formal" or "informal." It is informal if the procedural requirements of § 553 of the APA (5 U.S.C. § 553 (1970)) are applicable. *See* notes 22-35 and accompanying text *infra*.

8. The FCC began its informal rulemaking proceedings concerning the regulation of Cablecast and Subscription television stations because there was a fear of "syphoning." Officials and interested parties felt that both the Cablecast and Subscription television stations would, because of superior financing, be able to outbid the regular broadcasting channels for shows which would normally be shown on free television. *Home Box Office* at 28.

9. "As used herein pay cable (or just pay TV) is the service whereby nonbroadcast programming is distributed over cable television systems whose channels are also used to carry broadcast programming, and subscribers are charged an additional program or channel fee beyond the regular monthly fee for the system's broadcast signal carriage service." Petition for Certiorari at 3, n.2, Home Box Office, Inc. v. FCC.

10. "Subscription television is the service whereby programs are transmitted in scrambled form and can be received in intelligible form by the use of decoders for which subscribers are charged a fee." *Id.* at 4, n.3. The FCC's rules on the regulation of subscription television were affirmed by the *Home Box Office* court and will not be discussed in this Note. *Home Box Office* at 59-60.

11. 5 U.S.C. § 553 (1970). Section 553 reads in pertinent part:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
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> (1) a statement of the time, place, and nature of public rule making proceedings;
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> (2) reference to the legal authority under which the rule is proposed; and
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> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> . . .
>
> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the ruling [sic] making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the

comments were requested to be made within two weeks. At various times before, during, and after this defined period, almost all of the interested parties made ex parte contacts with various members and staff of the FCC.[13] Several of these contacts occurred during crucial periods of the decisionmaking process and ostensibly influenced the final result.[14] The FCC issued four rules regulating and limiting the programming of Cablecast and Subscription television stations.[15] The rules made no mention of the ex parte contacts or any information obtained privately.

Home Box Office Co. and others adversely affected successfully challenged the FCC action.[16] The court found that the rules violated

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> rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.
>
> . . .
>
> (e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

12. The Notice read:

> All interested persons are invited to file written comments on the rule making proposals on or before September 15, 1972 and reply comment on or before September 29, 1972. . . . In 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 899 (1972).

13. ABC television contacted members of Congress to pressure the FCC. The trade press reported that when word of the proposed rule leaked out, lobbyists of both Cable and Broadcast television rushed to the Commission to oppose different facets. After the close of oral argument, Broadcast interests met 18 times with Commission personnel, Cable interests met 9 times, and public interest intervenors not at all. *Home Box Office* at 53.

14. Brief of Amicus Curiae, Henry Geller, Home Box Office v. FCC 75-1280 (D.C. Cir. Mar. 27, 1977).

15. The rules promulgated by the FCC were:

> (1) The pay exhibition of feature films more than 3 but less than 10 years old shall be prohibited;
> (2) The pay exhibition of specific sports events (e.g., the World Series) which have been shown on broadcast television within the previous 5 years shall be prohibited;
> (3) The pay exhibition of more than the minimum number of non-specific sports events (i.e., regular season events) which had not been broadcast in any of the 5 preceding years shall be prohibited; and
> (4) The pay exhibition of all series programs (i.e., programs with interconnected plots) shall be prohibited.

47 C.F.R. § 76.225 (1975), as amended by Second Report and Order — F.C.C. 2d — 35 P&F RADIO REG. 2d 707 (1975).

16. The following parties were involved in related suits: (1) Home Box Office, (2) Metro Media, Inc., (3) Columbia Pictures Industries, Inc., (4) United Artists Corp. and Metro-Goldwyn-Mayer, Inc., (5) Motion Picture Association of America, (6) National Association of Broadcasters, (7) American Broadcasting Company, Inc., (8) CBS, Inc., (9) National Broadcasting Co.

Professional Baseball, American Broadcasting Co., CBS, Inc., and the National Citizens Committee for Broadcasting intervened in several of the suits.

the First Amendment,[17] exceeded the scope of FCC authority,[18] and were arbitrary and capricious.[19] However, an additional basis of decision, if not limited, could have greater precedential significance and greater impact on the operations of the FCC and other administrative agencies. Ex parte communications, according to the D.C. Circuit Court, violated fundamental notions of fairness and frustrated judicial review.[20] Accordingly, such contacts should be prohibited once notice of the proposed rulemaking is issued, and should be recorded and publicly reported if they do occur.[21] A concurring opinion supported the ban on ex parte contacts in this and other limited circumstances.

This Note will examine the court's decision on the subject of ex parte communications and will discuss its potential impact on the informal rulemaking process. It will include an explanation of informal rulemaking and the relative importance and dangers of ex parte contacts and an analysis of the court's opinion from the perspective of prior case law. Finally, this Note will point out inadequacies in the approaches offered by the *Home Box Office* decision and will suggest an alternative method of dealing with the ex parte contacts question.

IMPORTANCE OF EX PARTE CONTACTS

Prior to *Home Box Office,* agency treatment of ex parte contacts depended on whether the agency action was a rulemaking or an adjudication.[22] Ex parte contacts are prohibited in a formal agency

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17. The court held that the Commission's orders contravened the First Amendment because the anti-siphoning provisions regulated the content of what pay TV systems could present without a clear-cut showing that the regulations were necessary to protect the free speech rights of others. *Home Box Office* at 46-48. The court said that pay TV regulations must proceed under a different standard because the speech limitations present in the free TV electromagnetic system are not present in pay cable systems. *Id.* at 43-46.

18. The court held that the Commission's authority extended only to those matters reasonably ancillary to long-established (either judicially or legislatively recognized) goals of communications industry regulation. *Home Box Office,* at 28-30. *See* United States v. Midwest Video Corp., 406 U.S. 649, 667-68 (1972).

19. The court held that there was no evidence in the record justifying a need for regulation and therefore the rule should be vacated because even a perfectly reasonable regulation may be capricious if the problem to which it is appropriate does not exist. *Home Box Office,* at 34-40. *See* City of Chicago v. FPC, 458 F.2d 731, 742 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1074 (1972).

20. *Home Box Office* at 57.

21. *Id.*

22. The validity of trying to make absolute distinctions between adjudication and rulemaking has been called into question. *See* City of Chicago v. FPC, 458 F.2d 731, 738-39 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1074 (1972). Nevertheless, the distinction is useful analytically. *See* United States v. Florida East Coast Railway, 410 U.S. 224, 244 (1973), which is the best

adjudication.[23] Generally, in an agency adjudication trial-type procedures are used in a controversy over particular factual events.[24] In determining the truth of factual matters, the ban on ex parte contacts is one of the system's procedural safeguards designed to screen out undependable information.[25] Additionally, the prohibition on ex parte contacts serves to protect the system's perceived neutrality by avoiding the appearance of favoritism or bias which could be fostered by private communications between a decisionmaker and an interested party.[26]

On the other hand, ex parte contacts traditionally have been allowed in informal rulemaking because of the quasi-legislative nature

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authority for the distinction. *See also* Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1277-78 (1972).

23. 5 U.S.C. § 554 (1970). Adjudication is the process by which the agency formulates an order. *Id.* § 551(7). An order is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." *Id.* § 551(6). Such procedures include the taking of evidence, issuing subpoenaes, taking depositions, using transcripts which constitute the exclusive record, presenting cases or defenses by oral or documentary evidence, submitting rebuttal evidence and conducting cross-examination. *Id.* § 556. The record is required to include findings and conclusions, the reasons for them, and all material issues of fact, law, and discretion. *Id.* § 557. Private communications were expressly prohibited by § 557(d), an amendment contained in the Government in the Sunshine Act. Private communications in this setting are as out of place as are out-of-court statements made to the judge or jury by one of the parties to litigation. Morgan v. United States, 304 U.S. 1, 20 (1938).

It should be noted that adjudicatory procedures are also applicable to what is called "formal" rulemaking. This does not alter the essential dichotomy between § 553 and §§ 556-557 procedures, which are distinguished in the text as informal rulemaking versus adjudication.

24. *See Attorney General's Manual on the Administrative Procedure Act* 14 (1947, reprint 1973). Professor Davis believes that the crucial component in determining when trial-type procedures are appropriate is whether the facts are in dispute. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.01, at 411 (1958). If the facts concern "the parties and their activities, businesses, and properties" and involve "questions of who did what, where, when, how, why, with what motive or intent," then trial-type procedures are mandated. *Id.* at 413.

25. Koch, *Discovery in Rulemaking*, 1977 DUKE L.J. 295, 296 (1977): "The testimonial devices of the trial process . . . are purifiers." *Cf. Illinois Supreme Court Committee on Evidence* (1976) (unpublished manuscript on file, DePaul University College of Law Library). The majority report recoiled from advocating the use of prior inconsistent statements of witnesses as substantive proof in civil or criminal trials in part because of the "inherent unreliability" of the "ex parte, litigation motivated, interview statement." *Id.* at 9. The majority stated that "[w]e think it extremely desirable in the search for truth that today's ex parte statement must be transformed into tomorrow's open court testimony given under oath or affirmation and subject then to cross-examination before it is of substantive validity." *Id.* at 16. It is unnecessary to here consider the wisdom of the Committee's recommendations. It is useful, nevertheless, to point out that this evidences a typical concern over the reliability of material submitted ex parte. On the importance of accuracy in evaluating procedural systems, *see* Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111, 137-45 (1972).

26. Boyer, *supra* note 25, at 146-50; *see also* Peck, *Regulation and Control of Ex Parte Communications with Administrative Agencies*, 76 HARV. L. REV. 233, 255 (1962).

of the proceeding.[27] The issues at stake usually concern broad questions of policy to which particularized, objective facts are not determinative in making a decision.[28] While an adjudicatory action is designed to accurately apply legal sanctions to the prior conduct of the parties, an informal rulemaking action is designed as an investigatory process preceding the execution of a rule normally conceived for future effect.[29] The operation of a rule disadvantages persons only on the basis of their future relationship to a chosen government policy and not for objective reasons.[30]

Informal rulemaking has several advantages over formal adjudication.[31] First, greater clarity often is gained through focusing on issues of general applicability.[32] Second, rulemaking is fairer because it is prospective. Therefore, parties will be cognizant of the rules before their plans are developed.[33] Third, rulemaking is regarded as

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27. *See* Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 15 Administrative Conference of the United States (Aug. 4, 1977). Section 555(b) of the APA appears to authorize ex parte contacts:

> 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, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. . . .

5 U.S.C. § 555(b) (1970).

28. Boyer, *supra* note 25, at 148. Boyer quotes from Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1237-38 (1966), to the effect that judicialized procedures perpetuate the myth that the government rewards some and punishes others for objective reasons, whereas in reality the government allocates privilege and penalties in accordance with policy preferences that are not grounded on objective merits. *Id.* at n.137. Boyer also cites R. NOLL, REFORMING REGULATION 33 (1971), in which the author claims that general public distrust of the political system and a naive faith in non-political expert judgments combined to produce the independent regulatory agency.

In United States v. Morgan, 313 U.S. 409 (1941), Justice Frankfurter emphasized the judgment factor inherent in the Secretary of Agriculture's decision to set the rates which market agencies could charge for their services at the Kansas City stockyards when he stated:

> Doubts and difficulties incapable of exact resolution confront judgment . . . . [S]ince the Secretary is the guardian of the public interest, . . . [h]e must consider whether these [rates] represent services *which properly should be charged to the public.*

Id. at 415 (emphasis added).

29. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.02 (1958); Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637, 665 (1976); Koch, *supra* note 25, at 296. *See also Attorney General's Manual on the Administrative Procedure Act*, *supra* note 24, at 12-16.

30. *See* note 28 *supra*.

31. *See* Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 922-42 (1965). *See also* Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 375-78 (1974).

32. *Id.* It is more difficult to discover agency policy from reading previously decided cases than from reading a rule. Shapiro, *supra* note 31, at 940-41.

33. In an adjudication, on the other hand, the parties are subject to ad hoc determinations of the law which are clearly expressed for the first time at enforcement. Wright, *supra* note 31, at 376.

more democratic than adjudication because all interested parties may participate in the proceeding. Often the agency will solicit advice and information from those only remotely affected or those not otherwise able to contribute to an adjudication.[34] Finally, the informal rulemaking procedure more effectively utilizes expert testimony.[35]

These advantages[36] mainly flow from the fact that the agency is not merely a tribunal umpiring a dispute. Rather, it conducts each phase of the process itself. The responsibility to set priorities, schedule an agenda, frame the issues, and accumulate data rests primarily with the agency and not with the parties. Hence the procedures are more flexible, the data accumulated more wide-ranging, and the expertise collected within the agency can be quite formidable. In a trial or in trial-type proceedings, the parties themselves prepare the case based on the assumption that they are in a better position than the decisionmaker to know the operative facts. In an informal rulemaking proceeding, in contrast, the agency is presumed to be most familiar with all of the possible ramifications of a rule. However, the presumption of agency expertise will reflect reality only if facts and ideas flow freely between the agency and those who have detailed knowledge of the regulated activities and will be affected by proposed rules. Consequently, informal ex parte communications are very important to informal rulemaking actions.[37]

Ex parte contacts are also convenient because they are less burdensome to all the parties involved in informal rulemaking. Legislative proposals for the recordation or logging of ex parte contacts have been criticized as excessively burdensome to administrative agencies.[38] The costs to the agency would increase because of the ex-

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34. Wright, *supra* note 31, at 379. *See also* 1 K. DAVIS, *supra* note 24, at § 6.02.

35. Wright, *supra* note 31, at 376.

36. Other advantages offered by informal rulemaking include: (1) more flexibility in choosing procedures better suited for policy formation; (2) more opportunity to develop and articulate standards; (3) the increased size of the group enabled to seek judicial review; and (4) the less expensive procedures. *See* Shapiro, *supra* note 31, at 936-42.

37. 1 K. DAVIS, *supra* note 24, at § 6.02. Informal conferences may be more useful than a formal hearing. Professor Davis noted that:

> To a slothful administrator a hearing precedent to a regulation may be a God-given opportunity to avoid work and thought. He need only listen with impassively judicial countenance and then forget all he has heard. It is the conference with its give and take of ideas and information, with its possibilities of detailed exploration of minor points and hidden corners which stirs the mind to action.

Id. at 365.

38. Most of the proposed legislation concerning ex parte contacts has not covered informal rulemaking because of a general recognition that it was unwise to impose such a burden on the administrative agencies in informal rulemaking actions. *See* Note, *Ex Parte Contacts with the Federal Communications Commission*, 73 HARV. L. REV. 1173, 1184 (1959); Peck, *supra* note

pense of the recordation and because the agency would most likely resort to more expensive investigatory procedures.[39] The litigation generated over the accuracy of the summaries of the oral conversations would be an additional burden to all concerned.[40] Furthermore, recordation or logging requirements would impose undesirable delays on the agencies. At a time when regulatory agencies are under increasing attack for excessive delay,[41] the search for expediting procedures is more pressing.

Another reason for allowing ex parte contacts is their value in delicate negotiations, which often take place most effectively in private, face-to-face sessions.[42] Private sessions allow for the exploration of tentative and compromise positions which could not be explored

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26, at 251; Nathanson, *supra* note 27, at 17. Recently only one of several bills (S.260) in its original form forbade ex parte contacts in informal rulemaking, but this provision was dropped in the face of almost unanimously hostile testimony in the hearings. Nathanson, *supra* note 27, at 17. The little testimony offered to support a general ban on ex parte contacts was cited by the court. *Home Box Office*, at 57 n.128. However, as the court in Action for Children's Television v. FCC, 74-2006 (July 1, 1977) at 37 n.30, noted, Congress did not heed this testimony. The court also noted:

> That (Congress) . . . did not extend ex parte contact provisions of amended section 557 to section 553—even though such an extension was urged upon it during the hearings—is a sound indication that Congress still does not favor a per se prohibition or even a "logging" requirement in all such proceedings.

Id. at 31-32 n.28.

39. *Cf.* Wright, *supra* note 31, at 386-88. (The author cautions against the judicial imposition of trial-type procedures because of their tendency to force the agency to use the most time consuming procedures to insure that they will meet the requirements of judicial review.)

40. *See* Peck, *supra* note 26, at 255.

41. *See, e.g.*, SENATE COMM. ON GOVERNMENTAL AFFAIRS, 5 STUDY ON FEDERAL REGULATION—DELAY IN THE REGULATORY PROCESS (July 1977).

42. *See* Note, *Informal Bargaining Process: An Analysis of the SEC's Regulation of the New York Stock Exchange*, 80 YALE L.J. 811, 836-38 (1971) (hereinafter cited as *Informal Bargaining Process)*, which discusses the pros and cons of ex parte negotiations. The very informality of the negotiations engenders candor and aids in the development of agency expertise, although cover-ups are not in the public interest and an agency's duty is not to shield the regulated industry from public scrutiny. Additionally, use of informal negotiations gives the agency leverage with which to regulate in that the agency may threaten a stronger regulation than they intend. However, the use of sham goals may raise the specter of an agency not seeking the best solution to a problem. *See also* Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 451-54 (1975), who concludes that whether informal conferences are more effective off-the-record depends on the particular facts of the case. It is believed that generally the agency is in a better position than the courts to determine whether an ex parte negotiation is appropriate. *Compare* Koch, *supra* note 25, at 300-10, who advocates agency use of pre-hearing conferences to, *inter alia*, untangle complex controversies, facilitate consideration of a settlement, test tentative proposals, develop particularized procedures, and compel participants to disclose relevant information early enough for public comment. Koch contends, however, that generally pre-hearing conferences should be open to the public and on-the-record.

through the medium of public statements.[43] Private sessions also permit the parties involved to focus on the major issues, free from the distracting influence of collateral parties and issues.[44]

EX PARTE CONTACTS AND PROCEDURAL DUE PROCESS

Despite the importance of ex parte contacts to administrative agencies, their use has sometimes facilitated improper behavior.[45] At other times, the use of private communications by a regulated industry representative has contributed to the already formidable public

43. This is precisely what happened in Action for Children's Television v. FCC, 74-2006, (July 1, 1977). In *Action for Children's Television*, the FCC was faced with the question, *inter alia*, of whether to forbid commercial advertising during the broadcast of children's programs. The FCC negotiated with the Broadcast television representatives (behind the "closed doors" of the Chairman), who then adopted certain self-policing measures designed to mitigate the abuses with which the FCC was concerned. Because of these self-regulatory measures, the FCC forestalled any regulation of children's television programming. The broadcast television industry had previously refused to adopt such measures. *See also* Eisenberg, *supra* note 29, at 668. The author states that "[n]ormally each actor [in a rulemaking action] is willing to modify his position and each knows of the other's willingness. Therefore, such negotiation often proceeds by a series of reciprocal concessions. The timing and size of these concessions may be critical. . . ." *See also* Nathanson, *supra* note 27, at 27 n.21. Professor Nathanson believes that the *Home Box Office* court was especially concerned that the private communications represented evidence of a "concealed bargaining process." According to Nathanson, such a process, while not the most "engaging," is not an "unmitigated evil" to be stamped out on court discretion and has advantages similar to those outlined in the text. *See also* Williams, *supra* note 42, at 451-55.

44. Eisenberg, *supra* note 29, at 677. Nathanson, *supra* note 27, at 27 n.21. Ex parte contacts, in making communication between the regulators and the regulated easier, may enhance the belief that the administrator is accountable. For example, an industry leader may call the agency in order to apprise it of an impending problem. An agency would do well to heed these calls, for as Boyer, *supra* note 25, at 141, noted, "[a]gencies cannot risk offending or alienating their constituencies too deeply, for members of the constituencies can, at the least, make life difficult for the agency."

The administrator may also find the informal communications allowed in ex parte form to be helpful. For example, an administrator might call an industry expert for help in interpreting statistical information when that expert is the foremost authority on a particular matter and when no one within the agency has comparable abilities. The information thus exchanged is essential to the successful working of an agency. Interview with Charles A. Koch, Jr., Professor of Law, DePaul University College of Law and former member of the FTC, in Chicago (November 1, 1977). *See generally* K. DAVIS, *supra* note 29, at § 6.02.

45. Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970) (ex parte meetings followed by only a pro forma hearing resulted in improper and invalid airline fare rates); Massachusetts Bay Telecasters (MBT), Inc. v. FCC, 261 F.2d 55 (D.C. Cir. 1958) (in an FCC adjudication, a private conference between an interested party with a decision maker justified a court ordered hearing into the propriety of the action); WKAT, Inc. v. FCC, 258 F.2d 418 (D.C. Cir. 1958) (companion case to MBT with the same result); Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064 D. Col. (1976) (private threats uttered by the FCC chairman behind closed doors and not pursuant to the APA procedures forced the TV industry to institute a family viewing hour and were improper). *See generally* Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), for a short general history of the famous WHDH improper influence case.

suspicion of the agencies.[46] Many consider information derived from secret meetings to be suspect.[47] In addition, the public may suspect that agency personnel are unable, without the balance provided by opposing views, to withstand the persuasive advocacy offered by an industry representative.[48]

Originally, section 553 of the APA provided only minimal procedures to insure fairness in the informal rulemaking process. That section required that notice be given of a proposed rulemaking proceeding and that a comment period be set aside for input from all interested parties.[49] Eventually, however, these procedures alone proved to be inadequate, and with the "due process explosion,"[50] courts added some trial-type safeguards. Consequently, more extensive "hybrid" procedures, tailored to fit each particular agency action, are now used in addition to the relatively sparse provisions of section 553.[51]

As a result of this development, when an agency issues its Notice of Proposed Rulemaking, it must detail the facts and the reasoning prompting the agency action.[52] This explanation increases participation since the interested parties seeking to comment on the rule will know which material requires rebuttal or a different interpretational slant. When the agency adopts its rule, it must publish both the rule and an extensive explanation which must include the factual basis for

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46. *See* note 6 *supra*. *See also Informal Bargaining Process*, *supra* note 42, at 836, where it is noted that private negotiations may give rise to a belief that the agency is just a private club working for the regulated industry to the detriment of the public interest.

47. *See* note 25 *supra*.

48. PERTSCHUK, *The Lawyer-Lobbyist*, in VERDICTS ON LAWYERS 197 (R. Nader & M. Green eds. 1976).

49. *See* note 11 *supra*.

50. *See* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1975); Wright, *supra* note 31, at 378.

51. Hybrid rulemaking refers to the use of more procedures than the notice and comment minimum of § 553 but fewer than the full panoply of trial-type §§ 556-557 procedures. *See* Williams, *supra* note 42. *See* City of Chicago v. EPA, 458 F.2d 731, 744 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972) ("The ability to choose with relative freedom the procedure it will use to acquire relevant information gives the Commission power to realistically *tailor* the proceedings to fit the issues before it. . . ." (emphasis added)). The Administrative Conference recommended additional procedures in certain circumstances. For example, if the first notice contained only a general description of the subject matter, or if comments filed seriously conflicted with other data, a second cycle of notice and comment may be desirable. The agency might also, at various stages of the process, make its tentative views known. Administrative Conference of the United States, Recommendation 76-3, Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking, 1 C.F.R. § 305.76-3 (1977).

52. This fact was emphasized in the *Home Box Office* opinion when the court noted that "an agency proposing informal rulemaking has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible." *Home Box Office* at 36.

the rule, the inferences drawn, and the policy judgments made.[53] Finally, preenforcement judicial review provides aggrieved parties an opportunity to question or contradict the sufficiency of the agency's factual support and the rationality of the inferences drawn from those facts, or to assert that the policy judgments were capricious.[54]

The imposition of these procedures reflects a concern for the fairness of the administrative process. The procedures provide an opportunity for meaningful participation, an adequate revelation of the agency's reasoning, and the agency's justification for its action.[55] These procedures, however, have not expressly ruled out ex parte contacts in informal rulemaking.[56]

The *Home Box Office* decision is the first one to expose the dangers which ex parte contacts pose in due process terms.[57] The main

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53. *Compare* Survey, *Model Review of Informal Rulemaking: Recommendation 74-4 of the Administrative Conference of the United States,* 1975 DUKE L.J. 479, 491 (1975) *with* Auerbach, *Informal Rule-making: A Proposed Relationship Between Administrative Procedures & Judicial Review,* 72 NW. L. REV. 15, 23 (1977).

54. 5 U.S.C. § 706(2)(A) (1970). *See, e.g.,* Industrial Union Dept. v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974); Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972). *See also* Nathanson, *supra* note 27, at 22.

55. These components of due process were characterized as the formal aim of justification and the associational aims of revelation and participation in Michelman, *Formal and Associational Aims in Procedural Due Process,* in DUE PROCESS 126-71 (J. Pennock & J. Chapman eds. 1977). According to Michelman, the associational aims of due process attach value to the person being told why he is being treated in a particular fashion and to his participating in the making of the decision. This is important because he may wish to make political use of the information or to counter the effect of the decision in other ways, or to make personal use of the information if, for example, "it fills a potentially destructive gap in the individual's conception of himself." An opportunity to communicate with the decision maker is important because one may dissuade the decision maker from taking an action, or because of the intrinsic value of making an apt contribution to decisions affecting oneself.

The formal aim of justification inherent in due process is more readily understood for it concerns the necessity for the decision maker to have adequate reasons for taking an action. The accuracy of the factual premise for the decision is important to its justifiability. Whereas the agency's procedures for promulgating a rule primarily determine whether the associational aims are met, the courts during judicial review have an integral role in determining whether the agency has adequately justified its decision.

See Boyer, *supra* note 25, at 137-50, which sets forth 3 criteria to evaluate the merit of procedural systems: accuracy, efficiency and acceptability. The accuracy and acceptability components would seem to parallel Michelman's formal and associational aims. The efficiency component seems to be not included in Michelman's paradigm. However, it is axiomatic that any procedures which protect one interest "without regard to the overall efficacy of the rulemaking process will necessarily act to the detriment of other interest groups or perspectives, including the general 'public interest'." Koch, *supra* note 25, at 300.

56. The Government in the Sunshine Act, Pub. L. No. 94-709, 90 Stat. 1241 (Sept. 13, 1976), amended the APA to include a prohibition on ex parte contacts only in formal agency rulemaking or adjudication. 5 U.S.C. § 557(d) (1970).

57. Other courts have spoken of ex parte contacts in more general terms. *See, e.g.,* WKAT, Inc. v. FCC, 296 F.2d 375, 383 (D.C. Cir. 1961), *cert. denied sub nom.* Public Service Televi-

emphasis of the court was that private communications undermine the entire informal rulemaking process. The court felt that if the official administrative record did not reflect the true motivating influences on the administrator, then the procedure for notice and comment was a "sham."[58] Additionally, the court recognized the necessity for public input which it termed as reliable as the agency's own internal studies.[59] However, it is impossible for the public to comment on, rebut, or add to data or reasoning that remains undisclosed.[60] Insofar as the lack of communication and effective public participation prevented the agency from making an informed, reasoned decision, the court felt that the final rule was unjustifiable.[61]

PRIOR CASE LAW

The courts' task in judicial review of an agency's action is to balance the due process rights of the parties involved with the need of the agency for efficacious rulemaking. However, prior court decisions varied in regards to permitting ex parte contacts. Factors considered by courts were the similarities of an agency action to an adjudication;[62] the similarity of the privately communicated facts to those

sion, Inc. v. FCC, 368 U.S. 841 (1961) (ex parte influence "eat[s] at the very heart of our system of government—due process, fair play, open proceedings, unbiased, uninfluenced decisions."); Massachusetts Bay Telecasters v. FCC, 261 F.2d 55, 67 (D.C. Cir. 1958)("[i]mproper influence, if established, going to the very core of the Commission's quasi-judicial powers is certainly critical.").

Commentators also have been more general. For example, President Kennedy was concerned with ex parte contacts because "some of the most spectacular examples of official misconduct have involved ex parte communication. . . ." *See* Message of the President on Ethical Conduct in the Government, H.R. Doc. No. 145, 87th Cong., 1st Sess. 6-7 (1961). *See generally* Peck, *supra* note 26, in which the author notes that "an ex parte communication by one of several parties gives the appearance of an unequal and unjust administration of law and undermines the public confidence in governmental process." *Id.* at 255.

58. *Home Box Office* at 54.

59. *Id.* at 54-55. *See also Informal Bargaining Process*, *supra* note 42, at 832-33, which points out that little weight will be given to public comments if an industry-agency bargain has been struck.

60. *Home Box Office* at 54-55. *See also Informal Bargaining Process*, *supra* note 42, at 833, which notes that ex parte sessions may facilitate an industry-agency myopia. Hence, any divergent views offered by the public will be ignored.

61. *Home Box Office* at 58-59. *See also Informal Bargaining Process*, *supra* note 42, at 833, which contends that the use of ex parte sessions inhibits agency articulation of policy.

62. *See, e.g.*, Greater Boston Television Corp. v. FCC, 444 F.2d 841, 855-56 n.36 (1970) (court approvingly quoted the FCC to the effect that the ex parte contact at issue was an attack on the integrity of the Commission's adjudicatory processes); Sangamon Valley Television Corp. v. FCC, 269 F.2d 221 (D.C. Cir. 1959), *cert. denied*, 376 U.S. 915 (1964), *see* notes 67 & 68 and accompanying text *infra*; Massachusetts Bay Telecasters, Inc. v. FCC, 261 F.2d 55, 67 (D.C. Cir. 1958) ("Improper influence, if established, going to the very core of the Commission's quasi-judicial powers is certainly critical."); Jarrott v. Scrivener, 225 F. Supp. 827, 833

susceptible of being found through an adjudication;[63] and certain inchoate feelings that the proceeding was unfair.[64]

The seminal case in the area of ex parte contacts is *Sangamon Valley Television Corp. v. FCC.*[65] *Sangamon* involved an informal rulemaking action shifting a VHF channel from one city to another. The president of the company interested in obtaining the channel admitted making ex parte presentations to each commissioner.[66] Because these ex parte contacts had remained undisclosed, the Circuit Court for the District of Columbia vitiated the agency action and remanded the case for an evidentiary hearing as to the contacts.

The *Sangamon* court's holding rested upon three factors. The first was the similarity between an agency adjudication and agency action where "conflicting private claims to a valuable privilege" are involved.[67] *Sangamon*, for example, involved only a few parties competing with each other for the exclusive right to broadcast on a particular channel.[68] Given the adversity of the parties and the clear standards applicable to the proceeding the court felt that more stringent procedural safeguards were in order.

Secondly, the *Sangamon* court was influenced by the fact that the FCC had violated its own rules, which prohibited ex parte contacts after the close of the comment period. The court held that an agency action violative of its own rules could not stand.[69]

(D.D.C. 1964) (the zoning board "performs judicial functions within its narrow and specialized jurisdiction," making ex parte contacts improper).

63. *See, e.g.*, Van Curler Broadcasting Corp. v. United States, 236 F.2d 727, 730 (D.C. Cir.), *cert. denied*, 405 U.S. 1030 (1956) (ex parte presentations were in regard to a nationwide problem preceding the execution of a general rule of policy and hence not improper).

64. These cases are important because the court decided adversely to the agency only if there appeared to be substantive impropriety. District of Columbia Federation of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1246 (D.C. Cir. 1971) (reversal required because pressure exerted by Representative Natcher and others did have an impact on Secretary Volpe's decision). *See, e.g.*, Courtaulds (Ala.), Inc. v. Dixon, 294 F.2d 899, 904-05 (D.C. Cir. 1961) (despite ex parte contacts, "[w]e find no evidence that the Commission improperly did anything"); Ruppert v. Washington, 366 F. Supp. 686 (D.D.C. 1973) (judge permitted limited discovery into the ex parte contacts question and then determined that there was no impropriety).

65. 269 F.2d 221 (D.C. Cir. 1959), *cert. denied*, 376 U.S. 915 (1964).

66. *Id.* at 223-24.

67. *Id.* at 224.

68. *Id.*

69. *Id.* The FCC has a rule that when it proposed an allocation of TV channels there would be a cut-off date for all comments on that allocation. 47 C.F.R. § 1.213 (1958). By permitting ex parte contacts beyond that cut-off date, the FCC had violated that rule. *Id.* at 225.

This argument was also erroneously raised by the majority in *Home Box Office. Home Box Office*, at 55-56 n.122. The Notice of Proposed Rulemaking issued in *Home Box Office, supra* note 12, set no cut-off date for comments. And since *Sangamon*, it has been the policy of the FCC to permit comments whenever not specifically limited to some time period by the Notice of Rulemaking. Nathanson, *supra* note 27, at 2 n.2.

Finally, the ex parte communications included information involving the offending party's broadcasting capabilities, a factual issue traditionally determinable by adjudication. The court considered this private communication "critical" in reaching its decision since the opposing party could not rebut or test this fact, even though "[it contravened] the[ir] principal contention," because they did not and could not know that it had been made.[70]

ANALYSIS OF *HOME BOX OFFICE*

The *Sangamon* holding was limited to those instances where "conflicting claims to a valuable privilege" comprised the rulemaking action. Nevertheless, the *Home Box Office* court, which banned all ex parte contacts, contended that it was following the *Sangamon* approach as expanded by recent congressional and presidential actions. The court felt that the recently enacted Sunshine Act[71] represented congressional policy to prohibit agency secrecy. However, the court noted that "the Sunshine Act by its terms does not apply here."[72] The Sunshine Act only banned ex parte contacts from formal adjudicatory proceedings.[73] Thus, the court's reliance upon this Act to "clarify" the *Sangamon* decision was misplaced.

Additionally, the court relied upon a Presidential Order forbidding ex parte contacts between White House staff members and participants before the Civil Aeronautics Board. CAB proceedings are similar to adjudicatory proceedings[74] with the President having the right to review those decisions on either national defense or national security grounds.[75] The executive order allowed ex parte contacts when needed for reasons of defense or foreign policy, but forbade airline representatives from using ex parte sessions to bypass the CAB on matters which, by statute, were within the jurisdiction of the CAB, by arguing their cases in the White House.[76] The *Home Box Office* case did not present a situation where those making ex parte contacts were secretly bypassing the decisionmaker. Rather, those making the contacts were communicating with the decisionmaker. Thus, the un-

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70. 269 F.2d at 224.

71. Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (Sept. 13, 1976).

72. *Home Box Office* at 56 n.125.

73. *See* note 56 *supra*.

74. As Professor Nathanson points out, Presidential review of international air rate certifications takes place only after formal, on-the-record, adversary proceedings where the airlines have competed for those certifications before the CAB. Nathanson, *supra* note 27, at 32 n.28.

75. *See* Petition for Certiorari, *supra* note 9, at 41 n.50; Nathanson, *supra* note 27, at 32 n.28.

76. *Id.*

derlying rationale of the executive order is inapplicable to *Home Box Office*. Consequently, neither the Presidential Order nor the Sunshine Act is applicable to the informal rulemaking action of the FCC in *Home Box Office*.

The *Home Box Office* court also claimed to find support in the Supreme Court's opinion in *Citizens to Preserve Overton Park v. Volpe.*[77] In *Overton* the Court held that judicial review of administrative action was only effective if the court could examine all the information known to the administrator at the time the decision was made and that without a full administrative record, the Court could not presume that the administrator had acted fairly.[78] Because the

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77. 401 U.S. 402 (1971). In *Overton*, Secretary of Transportation Volpe had approved a highway route through a Memphis Public Park. A statute, Dept. of Transportation Act, 49 U.S.C. § 1653(b) (1970), allowed the approval of such routes only when no feasible alternative route existed. Secretary Volpe issued neither findings nor any statement that a feasible alternative route did not exist. The Supreme Court remanded the case to the district court to take testimony from certain administrators in order to determine whether the Secretary had complied with the statute.

The *Home Box Office* court cited *Overton* for the proposition that judicial review mandates additional procedural safeguards. *Home Box Office* at 54-55. Other court decisions have also required additional procedures in order to facilitate judicial review. *See, e.g.*, National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688, 701 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975) ("agency action will not be upheld where inadequacy of explanation frustrates review"); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393-94 (D.C. Cir. 1973) (holding that the agency should have, upon remand, responded to an analysis repudiating EPA test data in order for the court to be able to exercise effective judicial review); Pillai v. CAB, 485 F.2d 1088, 1030-31 n.34 (D.C. Cir. 1973) ("so long as we have the duty to review these orders of the CAB fixing international fares, then this appellate tribunal should be provided with an appropriate record on which review can be had"); Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1254 (D.C. Cir. 1973) ("an examination of the purposes and provisions of the substantive statute being administered may require [the imposition of more procedures] than the comparatively feeble [notice and comment] provisions of § 553."). In International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973), the court remanded to have the record supplemented in order for the court to determine if congressional objectives were achieved. The court contemplated that "in the interest of providing a reasoned decision, the remand proceeding will involve some opportunity for cross-examination." *Contra*, Phillips Petroleum Co. v. FPC, 475 F.2d 842, 852 (10th Cir.), *cert. denied sub nom.* Chevron Oil Co. v. FPC, 414 U.S. 1146 (1973) Congress intended to allow administrative agencies a broad latitude in adopting rulemaking procedures, (formal procedures are not required); Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968) (court cautioned administrators that the statutory requirement of a concise and general statement of support for a rule must be accomodated to the realities of judicial scrutiny).

78. 401 U.S. at 420. The Court stated that the Secretary's decision was entitled to a presumption of regularity, but that such a presumption could not shield his action "from a thorough, probing, in-depth review." *Id.* at 415. It should be noted that in the guise of an in-depth review, the Court found it necessary to take testimony from the administrators in order to determine whether they had complied with the statute, an action inconsistent with a presumption of regularity. Professor Davis has called the *Overton* Court's rejection of the presumptions of regularity "one of the most astonishing aspects of this astonishing decision." K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, § 11.00 at 317 (1976). For Davis' complete critical discussion of *Overton, see id.* at §§ 11.00, 16.00-1, 28.08, 28.16, 29.00, 29.01-1, 29.01-2, 29.01-3, 29.01-5, 29.01-7.

information exchanged ex parte in *Home Box Office* was not summarized on the record, the court found that it was unable to review the agency's action effectively.[79] Moreover, the court found that without a complete administrative record, it could not presume that the FCC had promulgated a fair rule.[80] Despite these superficial similarities, there are several reasons why the *Home Box Office* court should not have relied upon the *Overton* rationale.

Overton is distinguishable from *Home Box Office* in an important respect. In *Overton* a particularized finding was statutorily mandated and no statement of administrative findings was made.[81] The *Overton* opinion, read in context, held that the reviewing court must examine all of the information known to the administrator only when a statute specifically requires a certain finding and when the agency or administrator neglects to make it. Since no statute applicable to the FCC required specific findings in the *Home Box Office* case, and because the FCC in *Home Box Office* provided a statement of findings anyway, the court's reliance on *Overton* was inapposite.[82]

In addition, application of the *Overton* requirement of complete disclosure of information sources in all informal rulemaking actions would be impractical. An expansive reading of *Overton* to require recordation of "every informational input" into the deliberative process of the administrator could logically lead to a judicial inquiry encompassing, for example, newspaper and television stories and editorials, and might logically culminate with a requirement that the

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79. *Home Box Office* at 54.

80. *Id.* at 54-55. The court cited Professor Davis' view of *Overton* without mentioning that it was uniformly hostile.

81. The FCC in *Home Box Office* was required by § 553 of the APA to issue a statement of the basis and reasoning for the rule, but it was not required to determine anything so specific as that in *Overton*, in which Secretary Volpe had to determine that no feasible, alternative highway route existed.

82. *Home Box Office* at 62 (MacKinnon, J., concurring). Judge MacKinnon felt that the majority exceeded the authority offered by *Overton* for these reasons. *Id.* His view is bolstered by the Supreme Court's opinion in Camp v. Pitts, 411 U.S. 138 (1973). In *Camp*, the Supreme Court ruled on a decision by the Comptroller of the Currency to deny a national bank charter to parties interested in organizing a new bank in South Carolina. The Court held the *Overton* rationale inapplicable because in *Camp* "there was a contemporaneous explanation of the agency decision." *Id.* at 143. The Court held that the Comptroller's action should stand or fall based on his findings. Similarly, in *Home Box Office* the FCC provided a statement of findings which makes the case more analogous to *Camp* than to *Overton*.

Additionally, the *Overton* decision is inapplicable to *Home Box Office* because the proceeding in *Overton* was not subject to § 553 of the APA. *Overton* constituted informal administrative action instead of informal rulemaking. Action for Children's Television v. FCC, slip. op. No. 74-2006 at 36. Even if there was a need for the Court to impose procedural requirements because no statute imposed them, there was no comparable need in *Home Box Office* because Congress had clearly directed that they intended only the notice and comment provisions of § 553 to be applicable. *See* Auerbach, *supra* note 53, at 24-26.

administrator take a lie detector test to ensure that the proferred reasons for an action were truthful.[83] A more desirable approach would require full disclosure of informational sources only where the agency's action is under suspicion.[84]

Finally, the court's requirement of a complete record for informal rulemaking improperly identifies "the Court's role with that of the agency both in the development of policy and the resolution of factual issues."[85] If the purpose of informal rulemaking proceedings is education of the administrative agency and effective public participation in the proceedings, then engrafting a complete set of trial-type strictures onto the notice and comment procedure is dysfunctional. Judicial review has little to do with the purposes of the informal rulemaking process.[86] The courts should intervene only when a party's right to a fair hearing has been denied.[87] Generally, a party's right to a hearing exists only as it is accorded by statute.[88] The statute defining the nature of the hearing in the *Home Box Office* case, section 553, does not prohibit and may expressly permit ex parte contacts.[89] Furthermore, this statute facilitates the due process aims of the court.[90] Since the FCC complied with section 553, the mandatory prohibition on ex parte contacts imposed by the court seems inappropriate.[91]

One can also criticize the *Home Box Office* holding for its failure to comprehend the possible effects of its blanket prohibition against ex parte contacts. This ban would have a significant detrimental effect on

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83. *Action for Children's Television*, slip. op. at 36. *See* Catterall, *The State Corporation Commission of Virginia*, 48 VA. L. REV. 139, 145 (1962), for a similar argument.

84. The view of the *Action for Children's Television* court is that full disclosure of information sources should occur when the proceeding involves conflicting claim to a valuable privilege. *Id.* at 36-37. *But see* notes 103-17 and accompanying text *infra*.

85. Nathanson, *supra* note 27, at 19.

86. *Id.* at 32.

87. *Id.* at 21.

88. *Id.*

89. *See* note 27 *supra*.

90. *Informal Bargaining Process*, *supra* note 42, at 832-39. In a well reasoned Note, the author balances the value of ex parte contacts with the problems they engender and suggests only notice and comment provisions (coupled with hearings on issues of major importance) and a requirement for a written decision on any agreement made. These suggestions parallel § 553 of the APA.

91. Nathanson, *supra* note 27, at 25, 26. A ban might be desirable where there are "recurring divisions of interested parties," Final Report of the Attorney General's Committee on Administrative Procedure (1941), Sen. Doc. No. 8, 77th Cong., 1st Sess., at 109, where the "proceedings may be discredited by other parties in the course of private conversations" or where "the record evidence. . .[is] so evenly balanced that the administrator could find either way. . . ." Nathanson, *supra* note 27, at 25. However, these suggestions are directed to the agencies who are in a better position than the courts to determine the appropriate procedures.

administrative rulemaking, mandating cumbersome, stifling, and expensive procedures.[92] Additionally, although the ban reflects a valid concern for the due process rights of the parties and the public, it most likely will not accomplish its intended result. Private communications could still occur before the notice of proposed rulemaking is issued. One commentator has suggested that the ban as proposed by *Home Box Office* may merely force impatient administrators and regulated industry leaders to strike their secret bargain before the notice is issued, making the subsequent notice and comment procedures "even more of an empty shell than the Court itself seemed to feel might have resulted from the presence of ex parte communications."[93] Thus, the court may have unwittingly reduced the public participation that it was trying to foster.

ANALYSIS OF MACKINNON'S CONCURRENCE

Although the majority decision can be criticized as unwarranted in light of prior case law and unworkable pragmatically, the due process concerns raised by the court remain. In a concurring opinion, Judge MacKinnon supported the ban of ex parte contacts on the much narrower ground that the FCC had selectively disadvantaged competing business interests in a manner having a large monetary impact. Such treatment paralleled the FCC's choice between "conflicting claims to a valuable privilege" in *Sangamon*. MacKinnon felt that when an agency selectively treated such interests in an informal rulemaking, the due process concerns began to outweigh the informational needs of the agency.

Judge MacKinnon's approach, however significant,[94] has two flaws. First, he attempted to place the facts of *Home Box Office* in the same category as those in *Sangamon*. As discussed previously, the *Sangamon* case involved a proceeding which closely resembled an adjudication. The number of parties was small and the interests were sharply

92. *See* notes 37-44 and accompanying text *supra*.

93. Nathanson, *supra* note 27, at 31. Impatience with adjudicatory procedures encouraged the FCC and the FPC to turn to informal rulemaking procedures. A general ban on ex parte contacts would encourage the disposition of a particular action before the initial notice triggers the prohibition. *Id.*

It should be noted, though, that in Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970), the court was able to hold the Board's action invalid because secret meetings setting airline fare rates took place between Commission and airline industry personnel before the required notice and hearings required by the Federal Aviation Act took place.

94. MacKinnon's approach is especially significant because it was adopted by a different panel of the same court that decided *Home Box Office*. Action for Children's Television v. FCC. No. 74-2006, at 37-38 (July 1, 1977).

delineated. The proceedings in *Home Box Office*, however, more nearly resembled a legislative action. The proposed regulations were susceptible to negotiation and compromise.[95] The different coalitional possibilities, suggesting a polycentric controversy, contrast sharply with the bipolar controversy present in *Sangamon.*[96] In addition, *Home Box Office* was a nationwide controversy involving the allocation of many different privileges and penalties.

Judge MacKinnon's approach also fails for a number of reasons to protect against the abuses sometimes resulting from ex parte contacts without paralyzing the administrative agencies.[97] First, private communications may be necessary or helpful in situations covered by the MacKinnon approach. For example, if the number of parties were small and their interests adverse, the best solution could be to reach a compromise through negotiation. Such a course would be seriously hampered by the MacKinnon rule, however. Similarly, if the number of parties were large and their interests adverse, ex parte contacts may be the most convenient investigative mode. Also, the rule precluding private communications with an interested party because the nature of only one proceeding demands it may effect a "subjective chill" on other communications that are not related to the particular action mandating the ban.[98]

Second, due process concerns are still present in non-*Sangamon* proceedings. When an agency regulates only one major interest and ex parte contacts occur during a rulemaking proceeding, public suspicions as to the nature of the discussions and the merits of the resulting rule are still engendered.[99] In this type of situation, there is still

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95. First Report & Order, 52 F.C.C. 2d, Dockets No. 19554 & 18893, adopted March 20, 1975, released April 4, 1975, at ¶ 23-143.

96. *See* Boyer, *supra* note 25, at 117, where the author states that, "the polycentric issue is characterized by a large number of possible results and by the fact that many interests or groups will be affected by any solution adopted. . . . [Additionally,] the number of relevant variables is large. . . ."

97. Judge MacKinnon made no claim that the *Sangamon* test alone always will protect against administrative abuse. However, in light of Nathanson's statement that due regard for the *Sangamon* principle may be sufficient to protect a party's right to a fair hearing, and in light of the *Action for Children's Television* statement that the line requiring full disclosure should only be drawn in *Sangamon*-type situations, it is worthwhile to consider whether the *Sangamon* test offers a comprehensive strategy to deal with the problems ex parte contacts present in all informal rulemaking actions.

98. *See, e.g.*, Van Curler Broadcasting Corp. v. FCC, 236 F.2d 737 (D.C. Cir. 1956). In *Van Curler*, private communications between parties involved in a rulemaking action about another related matter gave rise to the ex parte issue in that litigation. The possibility of litigation may make a party think twice before conferring with the Agency even if it concerns another matter, restricting the flow of information.

99. The situation in Action for Children's Television v. FCC, No. 74-2006 (July 1, 1977), involved FCC regulation of only one major interest. Yet the public interest group was suspi-

the possibility of undue influence being placed on an administrator. Furthermore, ex parte contacts in every situation raise the doubt that the administrative record before the reviewing court will not adequately reflect the real findings.[100]

Third, the MacKinnon test is triggered only when a substantial interest is the subject of the rule.[101] The fact that there is a contest in itself indicates that the parties feel the interest at stake is important. Surely some degree of due process protection should attach when a modest interest is at stake. Yet in that situation the MacKinnon test offers no judicial protection whatsoever from the potentially detrimental effects of ex parte contacts.

A final difficulty with the MacKinnon approach is that it creates the possibility of diverting the reviewing court's focus from the value of the promulgated rules. Because of the MacKinnon test, those opposing the regulations promulgated after ex parte contacts have occurred will attempt to prove that the parties were diametrically opposed to one another and were competing over a substantial interest. Their efforts would lead to a delay in enacting the rule and much discussion over collateral procedural issues.[102]

Neither the majority nor the MacKinnon approach adequately recognize either the due process arguments against ex parte contacts or the agency's need for information gleaned ex parte. What is needed is an approach that will adequately recognize both considerations.

SUGGESTED ALTERNATIVE

In most cases, the balancing problem created by ex parte contacts in informal rulemaking can be resolved by simply subjecting the ad-

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cious of the secret meetings that took place between the FCC chairman and the television industry. Allegations of impropriety were made in the 1950's when famous New Deal lawyer Tommy Corcoran revealed that he had made ex parte approaches to several agency commissioners in a proceeding where the agency was regulating only one major interest. *See* Ablard, *Ex Parte Contacts with Federal Administrative Agencies*, 47 A.B.A.J. 473 (1961).

100. However, the fact that the reasons given may not reflect the true motivations or that they may be poorly articulated is a problem inherent in all decision making. Nathanson, *supra* note 27, at 20.

101. *Home Box Office* at 62 (MacKinnon, J., concurring).

102. *See* Peck, *supra* note 26, at 254-55. It could be noted that the *Sangamon* decision did not open the floodgates to much litigation on the collateral procedural issues. But this is probably due to the fact that not even the author of the *Sangamon* test, *amicus* Henry Geller, recognized the applicability of *Sangamon* to cases like *Home Box Office* and it was generally thought that *Sangamon* was limited to its facts. *Id.* at 241. *See also* Petition for Certiorari at 38 n.45, Home Box Office, Inc. v. FCC. Now that *Sangamon* has been used as the appropriate test in the *Home Box Office* concurrence and endorsed as the proper test in *Action for Children's Television*, slip op. at 37, it is more likely that such litigation will be generated.

ministrative record to a sufficiently rigorous standard of judicial review.[103] This approach would not completely ban ex parte contacts from informal rulemaking and consequently would keep open a very important source of information.[104] Rigorous review would minimize any unfairness created by private consultations by providing a strong incentive for the agency to reveal all facts and reasons which support the promulgated rule.[105] When the revealed evidence clearly sup-

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103. *See generally* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 29.00 (1976). The arbitrary and capricious test, applicable to informal rulemaking, is often seen as less demanding than the substantial evidence test applicable to agency adjudication. *See* 5 U.S.C. § 706(2)(E) (1970) (the substantial evidence test) and 5 U.S.C. § 706(2)(A) (1970) (arbitrary and capricious test). *See also* Note, *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard*, 84 YALE L.J. 1750 (1975), which proposes varying the amount of factual support required by the court to uphold a rule according to its availability and an analysis of the societal risks the regulation alleviates. For example, the "impossibility of certainty in identifying the effect of a pollutant on health would by itself rationalize reducing the level of proof required to the EPA. . . ." *Id.* at 1768. Professor Davis believes that the courts should review the factual basis of an agency record under the more rigorous substantial evidence test but when rules "consist primarily of an exercise of a legislative judgment not dependent on a factual foundation, the standard for review may be (the less rigorous) 'arbitrary and capricious test'." K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES at 663. The approach offered here is not primarily designed for the agencies but rather for the courts. It is believed that the agencies should have discretion to formulate their own procedures. Some, like the FCC, have taken into account the *Sangamon* decision and forbidden ex parte contacts in similar cases of informal rulemaking. Others may forbid ex parte contacts in informal rulemaking actions. Still others may follow the statutory requirements of § 553 and permit ex parte contacts.

104. The informal rulemaking record, according to Recommendation 74-4 of the Administrative Conference, should include:

(1) the notice of the proposed rulemaking and any documents referred to therein;
(2) the comments and other documents submitted by interested persons;
(3) transcripts of oral presentations made during the course of the rulemaking;
(4) "factual information" not included elsewhere that was "considered by the authority responsible for the promulgation of the rule or that is proffered by the agency as pertinent to the rule";
(5) reports of advisory committees; and,
(6) the agency's concise general statement or final order and any documents referred to therein.

See Model Review of Informal Rulemaking: Recommendation 74-4 of the Administrative Conference of the United States, supra note 53, at 491-92. Number (4) above removes the power of the agency to define its own record. *Id.* at 491 n.84. It is not clear whether this would mandate that any ex parte communication considered by the agency would have to be included in the record, because the administrator nearly always could contend that he or she did not consider the communication, and because of the *Action for Children's Television* opinion. *But see Home Box Office* at 57-58 n.130. Professor Davis contends that Recommendation 74-4 is fully supported by case law. K. DAVIS, *supra* note 103, at 669.

If the substance of the ex parte communication is disclosed in the agency findings, a party could challenge that information by petitioning for reconsideration. 5 U.S.C.§ 553(3) (1970). The *Home Box Office* requirement of disclosure before promulgation of the rule seems heavy-handed in light of this fact.

105. An interesting contrast of approaches as to how to compile a record for judicial review is offered by comparing Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38,

ports the promulgated rule and when the aggrieved parties are unable to adduce facts and reasons which clearly controvert the agency's decision, the rule could be upheld despite the possible influence of ex parte communications.[106] When, however, the revealed evidence does not clearly support the rule, the courts will be able to remand the case for supplemental action or vacate the rule.[107]

A supplemental approach would be necessary in a case such as *Home Box Office,* in which the agency seemingly changed its initial view on regulation immediately after private consultations with the parties who ultimately benefited most from the regulations.[108] This sort of situation creates a suspicion that the agency has abused its power, and no standard of rigorous judicial review will eradicate that suspicion.

The *Home Box Office* court decided that the occurrence of ex parte contacts raised an irrebuttable presumption that the agency acted improperly.[109] A preferred approach would have been for the court to

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78-85 (1975) with Auerbach, *Informal Rulemaking: A Proposed Relationship Between Administrative Procedures and Judicial Review,* 72 Nw. U.L. Rev. 15, 59-68 (1977).

Under Pedersen's proposal, the tentative rule and its explanation is placed in a central rulemaking docket along with the major studies and other facts the agency has used to frame it. When comments are received they are placed on that docket. In drafting the final rule the agency is to answer the contentions raised in each comment in the process of explaining its reasons for the final rule. Any fact or argument not originally publicized but used by the agency must first be placed on the docket for public comment. Thus a chronological record is formed logically illustrating the progress of the agency from tentative rule to the final rule.

Auerbach believes that the concept of on-the-record § 553 proceedings would "destroy the simplicity, feasibility, and efficiency once associated (with § 553 proceedings)." *Id.* at 60. Briefly, his proposal is to have a record formed from a formal on-the-record proceeding between a rule protestant and the agency. This would limit the size of the record as the agency would only have to respond to the issues raised by the protestant and would allow the agency to otherwise use § 553 procedures to educate themselves and allow for public participation.

106. *See* Nathanson, *supra* note 27, at 22.

107. The ex parte communications in *Home Box Office* left the reviewable record incomplete in *Home Box Office,* according to the court. *Home Box Office* at 57. Nevertheless, the court had no trouble striking down the FCC's action on the basis that the rules were arbitrary and capricious. *See* note 19 *supra.*

108. *Home Box Office* at 52-53, *quoting* from Brief of Amicus Curiae, Henry Geller, *supra* note 14. Action for Children's Television v. FCC, No. 74-2006 (July 1, 1977), presented a similar situation.

109. *Home Box Office* stated:

> 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, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, at 415, 419-420; *see* K. Davis, *supra* note 103 at § 11.00 at 317 (1976), but must treat the agency's justifications as a fictional account of the actual decision making process and must perforce find its actions arbitrary. . . .

Home Box Office at 54-55.

find a rebuttable presumption that an agency's action was improper if, but only if, the aggrieved party could make a threshold showing that ex parte contacts influenced the final form of the agency regulation.[110] The presumption would shift the burden to the agency to rebut it. Rebuttal could consist of proof that: (1) all the information contrary to the privately submitted information was considered;[111] (2) the information submitted privately did not concern or only remotely concerned the subject matter of the particular rules;[112] (3) the information submitted privately consisted completely of information already contained in the record; or (4) the aggrieved party had other opportunities to contradict the information received ex parte.[113]

The remedy imposed by prior courts usually has been to order disclosure and to allow comment on the substance of ex parte contacts.[114] That approach closely parallels the one here outlined. It allows for the disclosure of the substance of ex parte contacts when the commission's action is under suspicion. It also covers all informal rulemaking situations. Though it lacks the apparent simplicity of the "conflicting claims to a valuable privilege" test, it provides protection in instances left uncovered and more flexibility in situations covered by that test,[115] since ex parte contacts are not prohibited per se. For this reason, it is also more flexible than the *Home Box Office* majority opinion, while it provides due process protection against an agency action which subverts the prescribed informal rulemaking procedures.

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110. *Home Box Office* at 52 n.107. Professor Davis points out that even in a proceeding on the record, a party objecting to use of extra-record material cannot prevail without showing prejudice. K. DAVIS, *supra* note 103, § 29.01-6 at 674.

111. The *Action for Children's Television* court emphasized that "the agency in good faith examined all the relevant factors. . . ." *Action for Children's Television*, slip op. at 38.

112. *See, e.g.*, Van Curler Broadcasting Corp. v. FCC, 236 F.2d 727 (D.C. Cir. 1956), where a channel reassignment action was not vitiated by ex parte representations because they were in regard to "a general nation-wide rule-making proceeding to deal with [another different but related problem]." *Id.* at 730. *See also* Eastern Air Lines, Inc. v. CAB, 271 F.2d 752 (2d Cir. 1959), where ex parte information "was relevant to Board functions unconnected with the [proceedings at issue]." *Id.* at 758.

113. This list is not meant to be exhaustive.

114. Often, too, a separate evidentiary hearing was held as to whether the agency member or the party involved should be disqualified from further proceedings. This is what was done in *Home Box Office* at 58-59. *See also* Sangamon Valley Television Corp. v. FCC, 269 F.2d 221 (D.C. Cir. 1959); WKAT, Inc. v. FCC, 258 F.2d 418 (D.C. Cir. 1958).

115. This is especially true when the test is applied to cases like *Home Box Office* as per MacKinnon's concurrence.

This approach also allows the court and the agency to dispatch the proceeding more efficiently. The *Sangamon* remedy, as applied, delayed the FCC's action three years and finally resulted in the disqualification of neither the Commissioners nor the offending party. As one commentator noted, it seemed to be "a great and prolonged to-do about nothing." Peck, *supra* note 26, at 274.

Moreover, this solution encompasses and reconnects the prior case law regarding ex parte influence.[116] Even a subsequent case, *Action for Children's Television v. FCC,* which criticized the majority opinion and endorsed the concurring opinion, can be interpreted as consistent with this approach, for the *ACT* court emphasized "that the agency in good faith examined all the relevant factors raised during the comment stage, and comprehensively and rationally justified its decision."[117] In the *ACT* case the ex parte contacts consisted of a negotiating session which did materially influence the action (in this case the non-action) taken, but this statement can be interpreted as a conclusion that the Commission demonstrated that it provided due process to all affected, by considering all the relevant factors before deciding.

CONCLUSION

It is apparent that ex parte contacts have advantages as an investigative tool of administrative agencies. Private contacts are more convenient than formal meetings and are often useful when negotiating with affected parties. These same contacts, however, sometimes distort the informal rulemaking process, violating fundamental notions of due process.

The *Home Box Office* court balanced the due process concerns with the investigative advantages and imposed a blanket prohibition on ex parte contacts. This prohibition was an unwarranted departure from prior case law. It also will have severe detrimental effects on the administrative agencies and may even be self-defeating. The more limited approach taken in the concurring opinion is also inadequate.

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116. *See, e.g.,* Van Curler Broadcasting Corp. v. FCC, 236 F.2d 727 (D.C. Cir. 1956), where the presumption of impropriety was rebutted because the agency demonstrated that the ex parte contacts only remotely concerned the subject of the rulemaking. In Courtaulds (Ala.) v. Dixon, 294 F.2d 899 (D.C. Cir. 1961), the court was faced with the allegation that ex parte contacts had occurred in a rulemaking proceeding which eventually led to the promulgation of a rule establishing generic names for manufactured textile fibers. In rejecting the claim that these ex parte communications had violated due process, the court noted that there was "no evidence that the Commission improperly did anything in secret or gave to any interested party advantages not shared by all." *Id.* at 904-05. It would seem, therefore, that the aggrieved party could not make the threshold showing necessary to establish the presumption, under the suggested approach. In Sangamon Valley Television Corp. v. FCC, 269 F.2d 221 (D.C. Cir. 1959), *cert. denied,* 376 U.S. 915 (1964), under the suggested approach, the party would have met the threshold presumption of impropriety because the substance of the ex parte material was so crucial to the FCC's disposition of the case. But under this approach the agency would have been able, perhaps, to rebut it and then avoid the extensive delay which ultimately occurred.

117. *See* Action for Children's Television, slip op. at 38. Consequently, any presumption of impropriety was rebutted.

By banning ex parte contacts only when the proceeding is characterized by conflicting claims to a valuable privilege or selective agency treatment of interests of great monetary value, the approach prohibits ex parte contacts in situations where they would be useful and offers no procedural protection in other situations where it is needed.

A more useful approach would apply a rigorous standard of review toward agency action taken during informal rulemaking. This would provide an incentive for the disclosure of relevant information received privately. But for those instances where a party has been selectively disadvantaged by an administrative agency after the occurrence of ex parte communications, it would be wise to presume that the agency has acted unfairly. If the agency is then unable to allay the suspicion of impropriety or prejudice, their action should be remanded or stricken.

This approach is more flexible than either the majority or concurring opinions of *Home Box Office* because it does not per se prohibit ex parte contacts in every instance of informal rulemaking. However, it is also comprehensive enough to cover all informal rulemaking actions and enables the courts to protect the public or an individual from an abuse of administrative power. That protection is essential not only to protect a particular party's right to due process of law, but to maintain and safeguard the confidence of a democratic society in the legitimacy of the administrative agencies.

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