

**Rulemaking "Due Process":
An Inconclusive Dialogue***

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It is traditional in administrative law to distinguish broadly between rulemaking and adjudication. Most of the federal Administrative Procedure Act ("APA")¹ is structured around just such a distinction. In theory the distinction conforms to the two different tasks involved: the making of law and its application. Plainly, that theory has a rather tenuous connection with reality. There is no simple, clear-cut dichotomy between making law and applying it. Courts make law as much as legislatures do. The difference, of course, lies in how they do it. According to the classic model, adjudication makes law in the course of settling individual cases and problems as they arise. By contrast to such an ad hoc, case-by-case process, rulemaking involves a deliberate effort to create general law independent of any individual controversy, party, or circumstance. One might say that adjudication makes law at the margin of existing law while rulemaking is free to disregard the margin altogether. Such a statement is somewhat simplistic, for adjudicators may manipulate cases to make them purely vehicles for law-

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¹ 5 U.S.C. §§ 551-706 (1976).

making, while rulemakers make rules that are sometimes scarcely distinguishable from the adjudication of particular disputes.² Still, it is useful as a point of departure for considering agency procedures, and particularly for dealing with those problems of rulemaking that have received considerable judicial and scholarly attention.³

The legal issues involved in agency rulemaking have shifted noticeably in their focus over the short history of administrative law. With only modest oversimplification one can identify several phases in the legal evolution of administrative lawmaking. The main issue in the first phase was the delegation of lawmaking powers to agencies. Despite recurrent hints of vitality in the doctrine that broad delegations of legislative power to agencies are constitutionally circumscribed,⁴ this phase of administrative law passed into history along with the New Deal legislation that occasioned its brief life.⁵

The second major phase in the evolution of agency lawmaking followed logically, if somewhat belatedly, from the first. Granted that agencies could be, and were, given broad lawmaking powers, to what extent could such powers be implemented through the rulemaking process and what was the effect of doing so? One might suppose that such a basic question would have been raised and resolved earlier in the history of administrative law than it was in fact. Perhaps one reason for the delay is that until the 1960s most federal agencies were reluctant to use rulemaking processes⁶ and so

² See Note, *Due Process and Ex Parte Contacts in Informal Rulemaking*, 89 YALE L.J. 194, 203 (1979).

³ Much of the recent academic commentary on rulemaking is collected in DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 260 n.22 (1979). Earlier general treatments of the rulemaking process include Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965). Pertinent judicial opinion is fully noted in the above sources.

⁴ The hint is typically made to support a statutory construction of agency powers that avoids the constitutional implications that might be raised by a broader interpretation. See, e.g., *Industrial Union v. American Petroleum Inst.*, 100 S. Ct. 2844, 2866 (1980); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974).

⁵ See, e.g., *Yakus v. United States*, 321 U.S. 414 (1944) (upholding Emergency Price Control Act of 1942). The passing of the delegation doctrine as an issue of practical importance has not precluded a continued—even rejuvenated—scholarly debate over its merits. Compare Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969) with Wright, *Book Review*, 81 YALE L.J. 575 (1972).

⁶ A noteworthy exception was the FCC, which turned to the rulemaking process as a means of formulating substantive policy as early as the 1940s. See, e.g., *Columbia Broad-*

did not provoke any test of their power to do so. In any event it was not until 1956, in *United States v. Storer Broadcasting Co.*,⁷ that the Supreme Court expressly confirmed the power of an agency to employ rulemaking to determine issues of agency policy, and thereby to foreclose such issues from contest in adjudicatory hearings.

Curiously, *Storer* did not end the dispute over this use of rulemaking but seems only to have stimulated further litigation as other agencies began to follow the FCC's lead in using rulemaking extensively. There were unsettled questions regarding which agencies had how much power to employ rulemaking to determine policy issues. These and other questions were considered by the courts throughout the 1960s and early 1970s, in the course of which the lower courts or the Supreme Court affirmed the rulemaking power of numerous other federal agencies and applied the *Storer* precedent in different contexts.⁸

The latest phase in the development of agency rulemaking has involved more sophisticated issues. Procedural complexities have come to the forefront, especially those caused by the judicial and legislative blending of adjudicatory and rulemaking procedures into so-called hybrid rulemaking. As issues once decided by adjudication began to be determined in rulemaking, and as the scope of administrative power itself was expanded (as the result of increases in the numbers of agencies and their authority to act), stricter requirements of notice, record evidence, findings, and explanations of reasons were imposed.⁹ Some of the new require-

casting Sys., Inc. v. United States, 316 U.S. 407 (1942). The unwillingness of other agencies to follow suit was the subject of extensive criticism in the 1960s. See, e.g., H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* 145 (1962); McFarland, *Landis' Report: The Voice of One Crying in the Wilderness*, 47 VA. L. REV. 373, 433-36 (1961). This criticism, plus the Supreme Court's decisions in *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), and *FPC v. Texaco, Inc.*, 377 U.S. 33 (1964), probably influenced the eventual shift toward greater use of rulemaking. It is also probable that the shift was incidental to a more activist conception of the regulatory role. In any case, the trend itself is unmistakable, as can be seen from even a casual survey of the numerous judicial decisions throughout the 1960s and 1970s passing on the question of rulemaking power. See, e.g., cases cited note 8 *infra*.

⁷ 351 U.S. 192 (1956).

⁸ See, e.g., *FPC v. Texaco, Inc.*, 377 U.S. 33 (1964); *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974); *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966). Some things apparently are never so settled as to be beyond legal argument. As recently as 1978 the Supreme Court found it necessary to reject again a challenge to FCC rulemaking power that in substance was identical to the challenge the Court rejected 22 years earlier in *Storer*. See *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 793 (1978).

⁹ See DeLong, *supra* note 3, at 276-84.

ments were mandated by Congress.¹⁰ Others resulted from more vigorous scrutiny by the courts.¹¹ The Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,¹² however, barred the courts from adding new procedural requirements to those prescribed by Congress.¹³ Thus, except in extraordinary circumstances, responsibility for defining minimum federal rulemaking procedures now supposedly rests on Congress alone.

Thus the judicial examination and imposition of procedural requirements may have peaked, but it has raised questions about the basic character of agency rulemaking and of rulemaking "due process" that have yet to be answered. Although due process has always been a concern lurking in the background of rulemaking authority and rulemaking procedure, attention has not been sharply focused on the issue. This previous lack of concern may be explained by the existence of other safeguards. Agency rules are not self-enforcing,¹⁴ preenforcement judicial review is available,¹⁵ and the necessity of enforcing agency rules through adjudication provides those affected by rulemaking both with notice and with an opportunity to be heard by an impartial tribunal prior to the imposition of any sanction.¹⁶

However, a series of recent decisions in the District of Columbia Circuit has now placed the issue of "rulemaking due process" in sharp relief. *Home Box Office, Inc. v. FCC*,¹⁷ *Action for Children's Television v. FCC*,¹⁸ and *United Steelworkers v. Marshall*¹⁹ examined standards for ex parte contacts with agency

¹⁰ See, e.g., Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 57a (1976); Consumer Product Safety Act, 15 U.S.C. §§ 2056-2058 (1976).

¹¹ See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238 (D.C. Cir. 1973); *Walter Holm & Co. v. Hardin*, 449 F.2d 1009 (D.C. Cir. 1971).

¹² 435 U.S. 519 (1978).

¹³ The most notable set of congressional requirements is the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1976).

¹⁴ See *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 709 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974).

¹⁵ See *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

¹⁶ See, e.g., *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 709 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974); J. MASHAW & R. MERRILL, INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM 247-50 (1975).

¹⁷ 567 F.2d 9, 51-59 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977).

¹⁸ 564 F.2d 458, 474-75 (D.C. Cir. 1977).

¹⁹ No. 79-1048, slip op. at 17-45 (D.C. Cir. Aug. 15, 1980).

rulemakers.²⁰ *Association of National Advertisers, Inc. v. FTC*²¹ and *United Steelworkers* considered requirements of impartiality for agency rulemakers. In all of these cases an underlying assumption is that the rulemaking process is bounded by certain minimum requirements. It must provide fair play, an opportunity for the facts and arguments to be presented openly to the agency, and a reasoned decision in light of the record. As in all due process inquiries, the extremes of permitted and prohibited practices are relatively easy to classify. The problem lies in drawing intermediate lines and in articulating guiding principles.

We begin our analysis of this problem with a brief discussion of the principal decisions in order to provide a basis for subsequent discussion. The dialogue that follows explores the possible outlines of "rulemaking due process" in an attempt to develop a deeper understanding of the policies and principles involved. For the most part, the dialogue reflects actual debate between the two of us. Our dialogue is inconclusive because we simply could not agree on how the problem should be resolved. Indeed, neither of us is entirely sure he agrees completely with his own argument.

²⁰ Since *Home Box Office* and *Action for Children's Television*, the question of ex parte contacts in rulemaking has been dealt with in several cases with results that are, at best, confusing. See *United Steelworkers v. Marshall*, No. 79-1048 (D.C. Cir. Aug. 15, 1980) (ex parte contacts between agency staff and decision maker, and between outside consultant and agency staff, found not to be improper); *Hercules, Inc. v. EPA*, 598 F.2d 91 (D.C. Cir. 1978) (ex parte contacts between agency staff and decision maker, although a source of concern to court, found not to be improper); *United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519 (D.C. Cir. 1978) (ex parte contacts in rulemaking for which a "hearing" was prescribed found to be improper). The principal focus for our discussion will be *Home Box Office*. For commentary on the case and the issue, see Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 Ad. L. Rev. 377 (1978); Note, *supra* note 2. A special aspect of the problem is treated in Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980).

²¹ 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). Our discussion focuses mainly on *National Advertisers* because it presents a clear and fairly representative context for evaluating the issue. Several other recent decisions have dealt with the same issue, however. See *United Steelworkers v. Marshall*, No. 79-1048 (D.C. Cir. Aug. 15, 1980) (hybrid rulemaking to promulgate workplace safety standards not invalidated by Assistant Secretary of Labor's statements on the merits of the standard); *Assure Competitive Transp., Inc. v. ICC*, 45 Ad. L.2d 1134 (D.D.C. 1979) (general statements by Chairman of the ICC concerning deregulation of trucking not a basis for disqualifying him from participation in rulemaking). For a comprehensive treatment of *National Advertisers* and the problem of disqualification, see Strauss, *Disqualification of Decisional Officials in Rulemaking*, 80 COLUM. L. REV. 990 (1980).

I. THE JUDICIAL DECISIONS

We did at least agree on the essential facts of the cases that prompted our discussion. We can start with the impartiality problem raised by the *National Advertisers* case. In April 1978 the Federal Trade Commission initiated a rulemaking proceeding to consider rules restricting television advertising directed to, or seen by, audiences of which children constituted a significant proportion.²² This proceeding has been dubbed—in the style of *Variety* headlines—the “kid-vid” case. The FTC’s action was an outgrowth of staff recommendations prompted by petitions filed a year earlier by two “public interest” groups.²³ Shortly after the Commission gave notice of the proposed rulemaking, four trade associations of advertisers and toy manufacturers petitioned for recusal of FTC Chairman Michael Pertschuk on the ground that he had prejudged the issues. Their claim rested on several public statements by Chairman Pertschuk.²⁴ The petition was refused on the basis that

²² Children’s Advertising, 43 Fed. Reg. 17,967 (F.T.C. 1978). The notice of proposed rulemaking invited comment on:

the advisability and manner of implementation of a rule which would include the following three elements:

(a) Ban all televised advertising for any product which is directed to, or seen by, audiences composed of a significant proportion of children who are too young to understand the selling purpose of or otherwise comprehend or evaluate the advertising;

(b) Ban televised advertising for sugared food products directed to, or seen by, audiences composed of a significant proportion of older children, the consumption of which products poses the most serious dental health risks;

(c) Require televised advertising for sugared food products not included in Paragraph (b), which is directed to, or seen by, audiences composed of a significant proportion of older children, to be balanced by nutritional and/or health disclosures funded by advertisers.

Id. at 17,969.

²³ 627 F.2d at 1155 n.4.

²⁴ The statements are excerpted and analyzed at length in Judge MacKinnon’s dissenting opinion, *id.* at 1189-92. We note here only some of the more extreme examples. First in time was an interview on morning television’s Today Show, in which Chairman Pertschuk stated his “serious doubt as to whether any television advertising should be directed at a 3 or 4 or 5 year old, a preschooler . . . we have never treated children as commercial objects in our society.” Next, in a speech before a conference sponsored by Action for Children’s Television (“ACT”), the Chairman referred to the “moral myopia of children’s television advertising” and to the “exploitation” of children by advertisers who “manipulate children’s attitudes.” He went on to state that children could not protect themselves from being victimized, and then asked rhetorically, “why isn’t such advertising unfair within the meaning of the Federal Trade Commission Act?” emphasizing the need to protect children against “ads that threaten to cause imminent harm—harm which ranges from increasing tooth decay and malnutrition to injecting unconscionable stress into the parent-child relationship.” Following the ACT conference, the Chairman sent copies of his speech to FCC Chairman Charles Ferris, Senator Ted Stevens of Alaska, and *Washington Post* columnist

the Chairman's remarks concerned only the policy issues, not the parties in particular.²⁵ Judge Gesell of the District Court for the District of Columbia disagreed, however, and ordered Pertschuk's disqualification.²⁶ His decision relied on the standard laid down in *Cinderella Career & Finishing Schools, Inc. v. FTC*:²⁷ whether the decision maker had prejudged the facts as well as the law in a particular case.²⁸ He was not persuaded by the argument that a different standard should be applied because the *National Advertisers* case involved rulemaking, while *Cinderella* and its predecessors had involved adjudication.²⁹ Judge Gesell instead found that the

Coleman McCarthy, together with a note reiterating the FTC's intent to take action with respect to children's television advertising. Finally, he wrote FDA Commissioner Donald Kennedy stressing his "conviction . . . that one of the evils flowing from the unfairness of children's advertising is the resulting distortion of children's perception of nutritional values."

²⁵ See *id.* at 1155.

²⁶ Association of Nat'l Advertisers, Inc. v. FTC, 460 F. Supp. 996 (D.D.C. 1978). This was not the only challenge to the fairness of the kid-vid proceedings. In Association of Nat'l Advertisers, Inc. v. FTC, 617 F.2d 611 (D.C. Cir. 1979), the court held that interlocutory challenges to special procedural rules created for this proceeding were not ripe for review. The court did express its distress at the Commission's "unique steps" that gave "the impression that the proceeding itself is window dressing for the benefit of a court passing on a final trade regulation rule that was in stock long before its tentative models were displayed." *Id.* at 618.

²⁷ 425 F.2d 583 (D.C. Cir. 1970). In *Cinderella* the court ordered disqualification of FTC Chairman Paul Rand Dixon from an adjudication of a deceptive advertising complaint against a "career college and finishing school." The school was charged with making false claims that its courses would qualify students for various positions, such as executive and airline stewardess. While the case was before the full Commission, Chairman Dixon gave a speech condemning, as deceptive, newspaper ads "that offer college educations in five weeks" or promise the possibility of "becoming an airline's hostess by attending a charm school." See *id.* at 590. The court, in an opinion by Judge Tamm and joined by Judges MacKinnon and Robb, found the evidence of bias sufficient to compel disqualification.

²⁸ According to the *Cinderella* court, the test is whether "a disinterested observer may conclude that [the administrator] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Id.* at 591 (quoting Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), cert. denied, 361 U.S. 896 (1959)). The court also stressed that "an administrative hearing 'must be attended, not only with every element of fairness but with the very appearance of complete fairness.'" *Id.* (quoting Amos Treat & Co. v. SEC, 306 F.2d 260, 267 (D.C. Cir. 1962)).

²⁹ To support its test, the *Cinderella* court relied primarily on three decisions, see 425 F.2d at 591: *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), remanded on other grounds, 381 U.S. 739 (1965); *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C. Cir. 1962); *Gilligan, Will & Co. v. SEC*, 267 F.2d 461 (2d Cir.), cert. denied, 361 U.S. 896 (1959). In *Texaco*, the ground for disqualification was similar to the facts in *Cinderella*: a speech by FTC Chairman Dixon condemning practices, and companies, that were the subject of an FTC adjudicatory hearing. *Amos Treat* involved prior participation of an agency member in the investigative phase of a case. In *Gilligan*, the petitioners sought disqualification of the entire SEC on the basis of an agency press release. The press release, issued after commencement of

special character of FTC rulemaking, which is a legislatively mandated hybrid of adjudicatory and rulemaking procedures, justified use of the *Cinderella* standard.³⁰

The court of appeals reversed in a split decision.³¹ Writing for the majority, Judge Tamm, the author of *Cinderella*, concluded that the *Cinderella* standard of bias was applicable only to adjudications. That certain additional, adjudicatory-type procedures were required in FTC rulemaking proceedings did not change their basic "legislative" character; hence the standards of bias customarily applied to adjudication would be inappropriate.³² In rulemaking, the *National Advertisers* majority held, an agency member may be disqualified "only when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding."³³ On the facts, the majority was not convinced that Chairman Pert-

agency proceedings to revoke the license of petitioners for certain illegal acts, indicated that the petitioners had engaged in the conduct with which they were charged. The court expressed doubts in dicta about the propriety of the press release, but found that the petitioners had waived any objection by not raising it before the Commission. (In an earlier *Cinderella* case, *Cinderella Career & Finishing School v. FTC*, 404 F.2d 1308 (D.C. Cir. 1968), the court upheld the FTC's practice of issuing pretrial press releases that accurately summarized the facts and clearly stated that these were agency allegations only; the *Gilligan* dictum is distinguishable because the press release at issue there stated that the law had been violated.) On disqualification of agency members for bias in adjudication, see 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 12.01-.06 (1958) [hereinafter cited as DAVIS TREATISE]; K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES §§ 12.01-.05 (1976 & Supp. 1980) [hereinafter cited as DAVIS, LAW OF THE SEVENTIES].

³⁰ 460 F. Supp. at 997. Under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 57a (1976), the FTC is expressly authorized to promulgate trade regulation rules banning unfair or deceptive practices. This confirms a power previously based on the judicial interpretation of the original Federal Trade Commission Act in *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). The Act also imposed a number of procedural requirements in addition to those mandated by the APA. The most notable are: an informal hearing at which interested persons are entitled to present views by oral or written submissions, or both; a right to rebuttal and cross examination on disputed issues of material fact; a more extensive statement than usual of basis and purpose for each rule, including, *inter alia*, its economic impact; and judicial review under the substantial evidence test instead of the arbitrary and capricious test.

³¹ *Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

³² *Id.* at 1168-70. Judge Leventhal concurred. On the merits of the disqualification issue, he agreed with Judge Tamm about both the distinction between adjudication and rulemaking and the criteria applicable to the latter. However, he believed that in future cases judicial review of bias should await review of the merits of final agency action. *Id.* at 1175-81.

³³ *Id.* at 1170.

schuk's mind was closed.³⁴

In a vigorous dissent, Judge MacKinnon criticized the majority for not applying the *Cinderella* prejudgment standard and for substituting a new standard: in rulemaking, evidence of bias would not be disqualifying "unless it could surmount a fence that is horse high, pig tight and bull strong."³⁵ Like Judge Gesell, Judge MacKinnon found any rulemaking-adjudication distinction inapplicable to FTC rulemakings, given their hybrid character. He intimated that even in ordinary rulemaking, the majority's standard would be too permissive.³⁶ He specifically challenged Judge Tamm's assertion that agency rulemakers are equivalent to congressmen and are appropriately judged by a similar standard.³⁷ Finally, Judge MacKinnon would have found even the majority's standard to be violated by Chairman Pertschuk's conduct.³⁸

As far as we are aware, no other circuit has yet squarely addressed the question of the appropriate standard of rulemaker impartiality. Even in the District of Columbia Circuit the issue cannot be regarded as settled. In *United Steelworkers v. Marshall*,³⁹ a panel of Judges Wright, Robinson, and MacKinnon (the latter dissenting on other issues) was noncommittal on whether the *Cinder-*

³⁴ *Id.* at 1174. Judge Leventhal went so far as to suggest that Pertschuk's statements might not have been disqualifying even under the test applied to judges. *Id.* at 1177.

³⁵ *Id.* at 1188.

³⁶ *Id.* at 1194-96.

³⁷ *Id.* at 1192-94. Judge Tamm had relied on the following statement by one of us:

Although members of agencies such as the FCC certainly do perform significant judicial functions in deciding individual cases, they perform even more tasks of a legislative or an executive character. . . . Why then should the decisionmakers be stamped from a judicial cast? Insofar as the agency is delegated broad legislative powers and responsibilities, would it not be at least as appropriate to measure agency members against standards used to evaluate legislators?

Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 185-86 (1978), quoted in 627 F.2d at 1168. Judge MacKinnon characterized these views as "unprecedented" and objected that FTC commissioners could not be converted into the equivalent of congressmen by judicial decree, let alone academic opinion. *Id.* at 1192-94.

³⁸ 627 F.2d at 1197-98. After being vindicated by the court, Chairman Pertschuk recused himself from further participation in the proceeding so that the substantive issues involved in the proposed rulemaking could be decided without regard to the propriety of his participation. 946 ANTITRUST & TRADE REG. REP. (BNA) A-2 (Jan. 10, 1980). Subsequently, the FTC's rulemaking proceedings on children's television advertising were interrupted by congressional action that, among other things, eliminated the Commission's authority under the unfairness doctrine and limited FTC action in this instance to deceptive acts. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374; see H.R. REP. NO. 917, 96th Cong., 2d Sess. 31 (1980).

³⁹ No. 79-1048 (D.C. Cir. Aug. 15, 1980).

ella or *National Advertisers* standard should govern. The case involved a speech by an Assistant Secretary of Labor on the merits of an OSHA safety standard then pending in rulemaking. Because the speech was made *after* she gave her recommended decision to the Secretary of Labor, it was considered insufficient proof of bias even under the *Cinderella* standard.⁴⁰ Thus the court was not forced to choose between the standards.

The problem of *ex parte* contacts in rulemaking also has come to the fore in recent years. As with bias, the relevant standards for *ex parte* activities in adjudicatory cases have been fairly well established,⁴¹ but the traditional learning has been that those standards are inapplicable to notice-and-comment rulemaking, and that *ex parte* contacts are a proper element of the informal character of information gathering and opinion shaping in rulemaking.⁴² Unless rules are required to be made on the record,⁴³ the use of *ex-*

⁴⁰ *Id.*, slip op. at 22-23.

⁴¹ Until a series of episodes in the late 1950s, *ex parte* communication between agency decision makers and parties to agency proceedings was not a significant issue. Indeed, the first edition of Professor Davis's treatise contained no discussion of the issue prior to his 1970 supplement. See DAVIS TREATISE, *supra* note 29, § 13.12 (Supp. 1970). Several episodes in the late 1950s focused attention on the problem. See, e.g., *WKAT, Inc. v. FCC*, 258 F.2d 418 (D.C. Cir. 1958) (per curiam). In response, major federal regulatory agencies adopted specific regulations to restrict *ex parte* communications in cases conducted "on the record." See SELECTED REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, S. Doc. No. 24, 88th Cong., 1st Sess. 193-205 (1963); Peck, *Regulation and Control of Ex Parte Communications with Administrative Agencies*, 76 HARV. L. REV. 233 (1962). Congress considered proscribing *ex parte* contacts at that time. *Id.* at 234. Fifteen years later, Congress enacted certain restrictions in the Sunshine Act, Pub. L. No. 94-409, § 4, 90 Stat. 1246 (1976) (codified at 5 U.S.C. § 557(d) (1976)). These statutory restrictions essentially incorporate the rules that the major agencies adopted in the 1960s. Like those rules, the statute proscribes *ex parte* contacts only in on-the-record proceedings.

Although the rules proscribing *ex parte* contacts in adjudication are relatively straightforward, some ambiguities can arise in application. For example, the APA does not ban all *ex parte* communications but only those that are "relevant to the merits of the proceeding." 5 U.S.C. § 557(d)(1)(A) (1976). This language has been interpreted as permitting *ex parte* communications on matters of general regulatory policy that only tangentially affect restricted proceedings, except where there is an intent by the party to influence the official in the disposition of the restricted case. See *WHDH, Inc.*, 29 F.C.C. 205 (1960); Peck, *supra*, at 247-50. Obviously, this can cause some problems in distinguishing between permissible and impermissible communications. See, e.g., *Multivision Northwest, Inc.*, 10 RAD. REG. 2D (P & F) 641 (F.T.C. 1967) (communications on general policy issues that affected pending adjudicatory cases). To date, such line drawing does not appear to have presented a large problem. It remains to be seen whether the extension of the proscription on *ex parte* contacts to rulemaking will change this. See note 174 *infra*.

⁴² See, e.g., *Ex Parte Communications During Informal Rulemaking Proceedings*, 68 F.C.C.2d 804 (1978); Nathanson, *supra* note 20, at 380.

⁴³ See, e.g., *DeLong*, *supra* note 3, at 271-72; Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administra-*

trarecord information did not appear to present a due process or other concern until recently, any more than it would in the case of the legislative enactments that agency rulemaking supposedly resembles.

The only reported decision banning ex parte contacts in rulemaking before 1977 was *Sangamon Valley Television Corp. v. United States*.⁴⁴ The Federal Communications Commission had promulgated a rule reallocating a VHF television channel from Springfield, Illinois, to St. Louis, Missouri, and subsequently reallocating two UHF channels from St. Louis to Springfield.⁴⁵ Simultaneously, the FCC changed the license of a station operating on one of the UHF channels in St. Louis, in order to permit the station to operate on the reallocated VHF frequency. The reallocation was actively supported by the St. Louis licensee, which would have benefited greatly from operating on a technically superior frequency. By the same token, the change was strongly opposed by an applicant hoping to operate on the superior VHF channel in Springfield. On appeal, it was discovered that both the St. Louis licensee and the Springfield applicant had made numerous ex parte contacts with individual FCC commissioners after the period for written public comment was closed.⁴⁶ Holding these ex parte contacts improper, the court rejected the Commission's argument that such contacts were permissible in rulemaking: "[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 . . . basic fairness requires such a proceeding to be carried on in the open."⁴⁷

tive Procedure Act and Other Federal Statutes, 75 COLUM. L. REV. 721, 754-55 (1975).

⁴⁴ 269 F.2d 221 (D.C. Cir. 1959).

⁴⁵ The case was one in a series of so-called "deintermixture" cases in which the FCC sought to improve the economic status of UHF stations by allocating only UHF stations to particular markets, thereby eliminating the problem of competition from VHF stations, which had inherent technical advantages. For a brief discussion, see Robinson, *supra* note 3, at 532-35.

⁴⁶ 269 F.2d at 223-24. In addition, the St. Louis licensee wrote each commissioner a letter containing factual statements possibly material to the outcome, took each commissioner to lunch, and distributed turkeys to each. *Id.*

⁴⁷ *Id.* at 224. The court distinguished *Van Curler Broadcasting Corp. v. United States*, 236 F.2d 727 (D.C. Cir.) (en banc), *cert. denied*, 352 U.S. 935 (1956), an earlier allocation case in which ex parte contacts had been found proper, on the ground that *Van Curler* involved a "general nation-wide rule-making proceeding . . . [and] did not vitiate an assignment of a particular channel." 269 F.2d at 224 n.6. In an alternative holding, the court found the ex parte contacts to be violations of the agency's own rules inasmuch as they occurred after the time for public comment had expired. *Id.* at 225.

This apparently sweeping principle proved to be of limited significance. It found virtually no further judicial application for eighteen years, even though informal rulemaking increased substantially without any noticeable curbs on ex parte contacts.⁴⁸ But in 1977, in *Home Box Office*, the District of Columbia Circuit suddenly announced a general ban on ex parte contacts in all rulemaking proceedings.⁴⁹ The case involved revision of FCC rules restricting pay exhibition of programs on cable systems and broadcast stations. The rulemaking proceeding followed the general form prescribed by the Administrative Procedure Act,⁵⁰ with public notice and opportunity to file written comments. During the proceeding, the FCC imposed no restrictions on informal, ex parte contacts between commissioners, staff, regulated parties, and other public groups. Such contacts occurred throughout the proceeding, including extensive lobbying—primarily by cable and broadcast representatives—after formal oral argument had taken place and the record for public discussion had been closed.⁵¹

On appeal from the Commission's order adopting the revised

⁴⁸ In *Courtaulds (Ala.) Inc. v. Dixon*, 294 F.2d 899 (D.C. Cir. 1961), appellant relied on *Sangamon Valley* in challenging an FTC rulemaking proceeding in which ex parte communications were made by appellant's competitors. The court held *Sangamon Valley* inapplicable because there was no showing that competitors were specially advantaged by its rule; the court went on to suggest that *Sangamon Valley* was strictly limited to cases of quasi-judicial character. *Id.* at 904 n.16. In *Jarrott v. Scrivener*, 225 F. Supp. 827, 835 (D.D.C. 1964), *Sangamon Valley* was cited in support of a decision invalidating action by zoning authorities on the ground that ex parte contacts deprived appellants, who had challenged the zoning board's actions, of a fair hearing. It does not appear that the "hearing" to which appellants were entitled was a full, trial-type hearing, but the court did not address the adjudication-rulemaking distinction and treated *Sangamon Valley* as indistinguishable from other ex parte cases involving adjudicatory hearings. *Ruppert v. Washington*, 366 F. Supp. 686 (D.D.C. 1973), also involved ex parte contacts in a zoning action. Here, in contrast to *Jarrott*, the court recognized the essentially rulemaking character of the action. *Sangamon Valley* was cited but not applied because the contacts were not found to be improper. *Id.* at 690.

The FCC itself has had surprisingly little occasion to apply *Sangamon Valley*. Following that decision it altered its rules to recognize the principle for a certain class of rulemaking situations, but these rules were extremely limited in application. See *Clear Channel Broadcasting*, 18 F.C.C.2d 892 (1969), announcing application of rules to a rulemaking situation essentially identical to the situation in *Sangamon Valley*: a frequency allocation involving a conflict between two parties. Recently redrafted, the current FCC rules continue to ban ex parte contacts only in *Sangamon Valley*-type rulemaking. The rules require a public record to be made of ex parte communications in all cases, however. *Ex Parte Presentations*, 47 RAD. REG. 2D (P & F) 1213 (F.C.C. June 30, 1980).

⁴⁹ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977).

⁵⁰ 5 U.S.C. § 553 (1976).

⁵¹ See 567 F.2d at 52-54.

rules, a public interest group argued that the ex parte communications were improper, at least insofar as they occurred after the period for public comment supposedly had expired.⁵² The court agreed, but was not content simply to rule that the agency was required to adhere to the spirit of the "public comment" period. Instead, it seized the occasion as an opportunity to fashion a radical departure from prior understanding. The court announced a general rule, applicable to all informal agency rulemaking, and invalidated not only ex parte communications occurring after oral argument, but also all such communications after issuance of the public notice of proposed rulemaking.⁵³

Before the *Home Box Office* principle could be digested, the same court was asked to apply it to invalidate an FCC policy statement issued before the *Home Box Office* opinion. In *Action for Children's Television* ("ACT"), the court chose to follow a narrower path, and held that the ban on ex parte contacts should not be applied retroactively.⁵⁴ Moreover, dictum in the opinion repudiated the *Home Box Office* majority's ban on ex parte contacts in all rulemaking.⁵⁵ Instead, Judge Tamm's opinion for the unanimous panel endorsed the view expressed by Judge MacKinnon in his concurring opinion in *Home Box Office*.⁵⁶ That is, the ban on ex parte contacts should be limited to the presumably small class of

⁵² *Id.* at 53.

⁵³ *Id.* at 57. Although the decision purports to be the joint creation of the panel (composed of Chief Judge Wright, Judge MacKinnon, and District Judge Weigel (sitting by designation)), the opinion appears to be the product of Chief Judge Wright. At least it does not fully reflect the views of Judge MacKinnon, who filed a concurring opinion disagreeing with the portion of the per curiam opinion that banned ex parte communications in all rulemaking. He would have held ex parte contacts in informal rulemaking unlawful only when the rulemaking involves "competing private claims to a valuable privilege or selective treatment of competing businesses." In short, he would adhere to the principle of *Sangamon Valley*. *Id.* at 63-64. The court implicitly admitted that its holding was new law. *See id.* at 54. In consequence, it was forced to seek support from such eclectic authority as *Sangamon Valley* (which applied only to ex parte contacts after the period for public contacts, and had been quiescent for 18 years); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (which required judicial review to be based on the full administrative record before the agency at the time of the decision); the Sunshine Act, 5 U.S.C. § 557(d) (1976) (which banned ex parte contacts only in rulemaking required to be on the record); and Exec. Order No. 11,920, 3 C.F.R. 121 (1976 Compilation) (banning ex parte contacts with the White House by those seeking to influence presidential decisions on international air routes). These authorities provide tenuous support at best for such a sweeping rule.

⁵⁴ *Action for Children's Television v. FCC*, 564 F.2d 458, 474 (D.C. Cir. 1977).

⁵⁵ *Id.* at 477.

⁵⁶ *Id.* at 474. This approach is not surprising, given that Judge MacKinnon himself was a member of the ACT panel.

cases to which the *Sangamon Valley* principle would apply.⁵⁷

The law on this subject was not clarified by the recent decision of the same court in the *United Steelworkers* case.⁵⁸ In addition to the bias claim raised in that case, the rulemaking was allegedly invalid because of ex parte contacts with the decision maker. Two separate types of contact were challenged. The first involved contact between a key staff attorney, who participated actively in the rulemaking, and the Assistant Secretary of Labor who was responsible for making an initial decision on the rule—final authority resting with the Secretary of Labor. Chief Judge Wright, speaking for the court, held that these contacts were not improper. *Home Box Office* was distinguished as involving outside parties with a financial interest in the rule.⁵⁹ It appears that the emphasis must be placed on the words “financial interest” rather than “outside parties,” however, for the court went on to approve other ex parte contacts by outside consultants who, after participating in the rulemaking hearing, were hired to help evaluate the hearing record. Chief Judge Wright reasoned that outside consultants operate as the “functional equivalent of agency staff” and hence are not within the *Home Box Office* rule.⁶⁰ Because of these distinctions, the court found it unnecessary to resolve the scope of the ex parte contacts doctrine—specifically, whether to ban contacts between outside parties and decision makers in all rulemaking cases or only in those involving conflicting private claims to a valuable privilege.⁶¹

In the face of such confusing precedent, no one can confidently state what the law is on this question. The cases indicate that the District of Columbia Circuit itself is still undecided.⁶² The Supreme Court’s decision in *Vermont Yankee*, invalidating judicial

⁵⁷ *Id.* at 474, 477.

⁵⁸ *United Steelworkers v. Marshall*, No. 79-1048 (D.C. Cir. Aug. 15, 1980).

⁵⁹ *Id.*, slip op. at 32-33. In *Hercules, Inc. v. EPA*, 598 F.2d 91, 123-28 (D.C. Cir. 1978), the court (in an opinion by Judge Tamm, joined by Judges Bazelon and Robinson) allowed intraagency ex parte contacts even in a case of formal rulemaking on a record. The court relied on the nonretroactivity holding of *ACT* and a special provision in the relevant statutory scheme that justified contacts in this case. The court did express “uneasiness,” however, about contacts between staff advocates and decision makers. *Id.* at 127. *Cf.* *Katherine Gibbs School (Inc.) v. FTC*, 612 F.2d 658, 670 (2d Cir. 1979) (summarily rejecting a challenge to an FTC rule based on ex parte communications between the commissioners and an “allegedly biased staff”).

⁶⁰ *United Steel Workers*, slip op. at 40.

⁶¹ *Id.*

⁶² *See also* *Association of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1169 n.40 (D.C. Cir. 1980) (noting the confusion in the D.C. Circuit).

imposition of special procedures on agency rulemaking, compounds the uncertainty,⁶³ especially inasmuch as the decision itself has an unclear future.⁶⁴

II. THE BIAS PROBLEM

Publius

Perhaps the most remarkable thing about the appellate court's ruling in *National Advertisers*—that FTC Chairman Pertschuk had not prejudged the kid-vid issue—is that it is a case of first impression. The basic principle of impartiality has an ancient lineage; over three hundred years ago Lord Coke announced it as a settled principle of the common law and of natural justice that a person should not be a judge of his own cause.⁶⁵ Adherence to the same principle, expanded into a blanket requirement of impartiality, has been regarded as essential to due process in adjudication. As Justice Black put it:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. . . . [This] rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to

⁶³ Interestingly, however, there is no suggestion in any of the decisions that the ex parte question is affected by *Vermont Yankee*. In *United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, 541-42 (D.C. Cir. 1978), the court, in an opinion by Chief Judge Wright (joined by Judges McGowan and Robinson), relied heavily on *Home Box Office and Sangamon Valley* to invalidate an FMC proceeding, which the court described as "quasi adjudicatory" although it was not subject to the full hearing procedures of the APA, because of ex parte contacts. In holding the contacts to be inconsistent with the FMC's obligation to adjudicate the issues in a hearing, the court found its decision to be consistent with *Vermont Yankee*. *Id.* at 542 n.63. Dean Verkuil has suggested that *U.S. Lines* might survive *Vermont Yankee*, even though *Home Box Office* might not; the distinction he draws is that *U.S. Lines* involved a special case of informal adjudication for which the APA prescribes no procedures by contrast to informal rulemaking for which the APA does specify procedures. Verkuil, *supra* note 20, at 978. There is as yet no judicial indication that *Home Box Office* itself is viewed as an encroachment on *Vermont Yankee*, however.

⁶⁴ Compare Scalia, *Vermont Yankee: the APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345 with Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805 (1978).

⁶⁵ Dr. Bonham's Case, 8 Co. Rep. 113b, 118a, 77 Eng. Rep. 646, 652 (C.P. 1610).

perform its high function in the best way "justice must satisfy the appearance of justice."⁶⁶

Inasmuch as federal agencies have used rulemaking for over a generation (since the 1940s in the case of the FCC, for example),⁶⁷ there has been ample opportunity to consider whether impartiality should be required in rulemaking. The absence of any mention of such a principle in a judicial opinion until *National Advertisers* suggests to me that the courts have made an implicit judgment that impartiality of rulemakers is not a due process requirement.

Brutus

The absence of judicial discussion of administrative bias in rulemaking may simply be attributable to an absence of cases presenting the issue, and I wonder whether it is so remarkable that there were no earlier challenges. Rulemaking itself is relatively modern; more importantly, so is judicial activism in scrutinizing it. Furthermore, attention until now has been concentrated on the circumstances in which rulemaking could be used and on the procedures required.

The real mystery is not that the issue of bias in rulemaking has not arisen previously, but that the court refused to apply Lord Coke's principle when it did arise. Judge Tamm professed to hold open the possibility of disqualifying administrative rulemakers shown to have an "unalterably closed mind,"⁶⁸ but such a test, as a practical matter, virtually rules out disqualification for bias in rulemaking proceedings. The standard would permit disqualification only in truly egregious cases. In addition, the requirement that the bias be demonstrated by "clear and convincing evidence"⁶⁹ makes disqualification even less likely. Few, if any, agency administrators will be so careless as to provide evidence of obvious, egregious bias in their statements at public meetings or in written materials. Despite minimal inroads into agency "privacy" by the Freedom of Information Act,⁷⁰ the court's requirements are an

⁶⁶ *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offut v. United States*, 348 U.S. 11, 14 (1954)).

⁶⁷ See *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407 (1942).

⁶⁸ *Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1980).

⁶⁹ *Id.*

⁷⁰ 5 U.S.C. § 552 (1976). The Act allows access to statements adopted by an agency and to staff instructions, but not to the sort of informal or interoffice documents that would be helpful in establishing an individual administrator's bias. As a result, it would be virtually

overwhelming burden on anyone challenging an agency decision maker's impartiality. That is obvious given that neither cross-examination nor any other direct probing of an administrator's views is permitted.⁷¹

The crushing weight of this burden seems particularly clear on the facts of *National Advertisers*. Although I am inclined to agree with Judge MacKinnon that Chairman Pertschuk's speech to ACT and his television interview by themselves demonstrated disqualifying bias under the *Cinderella* standard,⁷² there is room for debate on that score. In such cases, it is often difficult to distinguish between the "crystallized point of view," which Professor Davis rightly tells us should not be disqualifying in adjudication⁷³ (nor, I concede, in rulemaking), and a particularized bias about the parties or the issues in a pending case, which is disqualifying. But when you add to these arguably innocuous public comments Pertschuk's letters to two other agency directors, a United States Senator, and a journalist, all obviously intended to marshal support for the FTC's actions against television advertising aimed at children,⁷⁴ I think you have unmistakable proof of a closed mind and legal bias. You have not only partisan opinion but partisan advocacy.⁷⁵ That defeats the whole purpose of having public comment and argument in rulemaking. The object of that process is to provide interested parties with an opportunity to persuade rulemakers on a particular position. But what kind of opportunity do you have to persuade one who is committed to advocating an opposing position? If, as the court in *National Advertisers* held, this is not sufficient ground for disqualification, it is difficult to identify any realistic situations that would be.

useless to such an inquiry.

⁷¹ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *United States v. Morgan (Morgan IV)*, 313 U.S. 409 (1941).

⁷² 627 F.2d at 1197-98.

⁷³ 2 DAVIS TREATISE, *supra* note 29, § 12.01, at 131.

⁷⁴ See note 24 *supra*.

⁷⁵ For a decision reaching the same conclusion on similar facts, see *Berkshire Employees Ass'n v. NLRB*, 121 F.2d 235 (3d Cir. 1941). An NLRB member attempted to aid the cause of a union in a strike by writing to a large customer of the employer and in effect requesting the customer to use its influence to persuade the employer to meet the union's demands. In holding such blatant advocacy to be grounds for disqualifying the Board member from participating in a subsequent adjudication concerning the controversy, the court found this more serious than "ill-advised extra-judicial statements" (which, it implied, would not necessarily be disqualifying). *Id.* at 239.

Publius

True, Judge Tamm's standard for disqualification will be difficult to meet in cases where disqualification is sought solely on the basis of the individual administrator's expressed views. But it should be. What is the alternative? Surely you do not want to impeach decision makers merely for possessing a "vagrant opinion without visible means of support"—to borrow Ambrose Bierce's definition of "prejudice."⁷⁶ Judge MacKinnon complains about the majority erecting a barrier to disqualification that is "horse high, pig tight and bull strong." Well, that barrier works two ways. If we disqualify an administrator for possession of any opinion on issues relevant to a rulemaking, administrators will soon learn to keep those opinions to themselves. Do you want to keep this "bull" in or let it out? Judge Tamm has a preference for letting it out. So do I. That way, interested parties are at least aware of which opinions they must persuade an administrator to change.

Importantly, Judge Tamm's standard would appear to require disqualification for egregious forms of bias. I assume that if it could be shown that a decision maker had a pecuniary stake in the outcome, or that he had a personal animosity toward individual parties based on something other than a moral conviction that they were doing bad things, he would be disqualified even in rulemaking.⁷⁷ This is important: the majority is not saying that *anything* goes; at most it is saying that professional prejudgment, as distinct from pecuniary or personal interest, does not require disqualification. I do not find that so terrible. Disqualification for bias has traditionally been very unusual for both agency officials

⁷⁶ A. BIERCE, *THE DEVIL'S DICTIONARY* 264 (1911).

⁷⁷ Disqualification would appear to be required in the case of pecuniary interest by 18 U.S.C. § 208 (1976), which prohibits government employees from participating "in a particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization . . . or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest." By its terms, this provision covers far more than cases of adjudication, and there is no reason to construe it as inapplicable to rulemaking. On the other hand, there is at least one good reason besides the generality of the language to construe the section as covering rulemaking. Congress and most other legislatures, which (as the *National Advertisers* majority pointed out, see text and note at note 37 *supra*) perform a function similar to rulemaking, have imposed similar, albeit weaker, conflict-of-interest rules on themselves. SENATE RULE XLV, SENATE MANUAL, S. DOC. NO. 1, 95th Cong., 1st Sess. 96-101 (1977); H.R. RULE XLIII, H.R. DOC. NO. 403, 95th Cong., 2d Sess. 631-35 (1979). For a review of state rules, see Note, *Conflicts of Interest of State Legislators*, 76 HARV. L. REV. 1209 (1963). It seems unlikely that the legislators would restrict themselves in this area but leave their delegates, the administrative officials, untrammelled.

and judges.⁷⁸ Despite the rigorous rhetoric employed in judicial statements of the principle of impartiality, the actual occasions when the principle is applied to disqualify an adjudicator appear to be few indeed. *Cinderella* is exceptional in this regard.⁷⁹ I do not want to argue the merits of *Cinderella* as applied to adjudication, however. For now I only question the wisdom or necessity of extending its holding to rulemaking.

Brutus

What we have in Pertschuk's case is a lot more than an expression of "vagrant opinion," and that is the cause of my concern. There is a significant difference between knowledge or information leading to a preliminary opinion on a policy issue and belief in a cause. I thus agree with the court in *Skelly Oil Co. v. FTC*⁸⁰ that no basis for disqualification in adjudication (or, I would add, in rulemaking) "arises from the fact or assumption that a member of an administrative agency enters a proceeding with advance views on important economic matters in issue"⁸¹—even if the belief in question is a "vagrant opinion without visible means of support." What I am suggesting, however, is that different standards be applied to dispassionate belief on the one hand and ardent advocacy

⁷⁸ In the early English common law, disqualification of judges was confined to cases involving pecuniary interest. See Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609-12 (1947). By the late 19th century, however, the English courts had expanded their standards to embrace bias on other than pecuniary interest. See Note, *Disqualification of a Judge on the Ground of Bias*, 41 HARV. L. REV. 78, 79 (1927). American courts were slow to follow suit. As late as 1941, it was reported that the prevailing American common law practice refused to recognize bias as sufficient grounds for disqualification of judges or agency officials. Note, *The Disqualification of Administrative Officials*, 41 COLUM. L. REV. 1384, 1384-91 (1941). Today, however, both agency officials acting in an adjudicative capacity and federal judges are subject to disqualification for bias, under essentially similar standards. See generally *Mitchell v. Sirica*, 502 F.2d 375, 382-83 (D.C. Cir.) (en banc) (MacKinnon, J., dissenting), cert. denied, 418 U.S. 955 (1974). The federal statutory standard for judges, 28 U.S.C. §§ 144, 455 (1976), was amended by Act of Dec. 5, 1974, Pub. L. No. 93-512, § 1, 88 Stat. 1609, to broaden and clarify the standards for disqualification. See Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 242 (1978).

⁷⁹ One searches in vain for more than a handful of federal cases disqualifying agency adjudicators for bias. See generally 2 DAVIS TREATISE, *supra* note 29, §§ 12.01-.06; DAVIS, LAW OF THE SEVENTIES, *supra* note 29, §§ 12.01-.05 (1976 & Supp. 1980). Disqualification of judges appears to be equally or even more exceptional. See *United States v. Haldeman*, 559 F.2d 31, 129-39 (D.C. Cir. 1976) (en banc) (per curiam), cert. denied, 431 U.S. 933 (1977); *Mitchell v. Sirica*, 502 F.2d 375 (D.C. Cir.) (en banc) (per curiam), cert. denied, 418 U.S. 955 (1974).

⁸⁰ 375 F.2d 6 (10th Cir. 1967), modified on other grounds, 390 U.S. 747 (1968).

⁸¹ *Id.* at 18.

on the other. To be sure, the apparent difference between belief and advocacy may sometimes be more a matter of the style in which an opinion is expressed than commitment to that opinion.⁸² But it may also be more than that. I admit the distinction may be difficult to draw in particular cases, but it can be made.⁸³

In any case, I would not make too much of the distinction between personal or pecuniary interest and your concept of professional bias. After all, the underlying concern is the same, whether the bias is derived from personal interest or professional judgment. We want to ensure that administrators make decisions based on the information presented to them rather than on their own biases.

Suppose that one of the following hypothetical factors lies behind the allegations of bias: Pertschuk's wife is president of an organization seeking the ban on children's advertising; Pertschuk intends to run for Congress and several citizen groups seeking the ban have pledged critical support for his campaign; Pertschuk's young daughter became seriously ill from swallowing the contents of a bottle of flavored aspirin advertised on television programs that she customarily viewed; or as chief counsel to the Senate

⁸² Indeed, this possibility may explain the current public problems besetting the FTC and its Chairman. See Gellhorn, *The Wages of Zealotry: The FTC Under Siege*, REGULATION, Jan.-Feb. 1980, at 33, 39.

⁸³ Professor Davis has expressed the distinction in the adjudicative context as follows: [T]he ideal commissioners will be men whose sincere ideas of policy conform to the broad legislative intent. A Price Administrator ought not to be indifferent to the forces of inflation, a Trade Commissioner should not be neutral on anti-monopoly policies. . . . Administrators who are unsympathetic toward the legislative program are very likely to thwart the democratic will; the way to translate legislative policies into action is to secure administrators whose honest opinions—biases—are favorable to those policies. . . .

This is far from saying that the law should be administered by zealots or crusaders who lack perspective or stability. Judgment must of course be guided by intellectual perception, not by emotion. . . . Sincere conviction should not be so steadfast as to shut out inquiry and re-examination. Belief must not be so unyielding as to smother the contributions that alert practical administration may make to the molding and remolding of policy. And yet a dominant point of view or bias may appropriately color all activities, including even the fact-finding function. Thoroughly conscientious men of strong conviction may sometimes interpret evidence to make findings which indifferent men would not make. The theoretically ideal administrator is one whose broad point of view is in general agreement with the policies he administers but who maintains sufficient balance to perceive and to avoid the degree of zeal which substantially impairs fairmindedness.

2 DAVIS TREATISE, *supra* note 29, § 12.01, at 137-38 (footnotes omitted). This is even more true in rulemaking, where the administrator is attempting to create a generally applicable legal framework to carry out the legislative intent, rather than to determine that intent in a particular case.

Commerce Committee before his appointment to the FTC, Pertschuk was involved in an investigation of the issue and was publicly critical of the FTC for failure to take "immediate, strong action against unfair and immoral children's advertising." The first three cases would presumably involve personal interest, while the fourth would illustrate professional bias.

But is there any fundamental difference among these situations? The only relevant distinction I can see is that the situations may carry different weight as evidence of prejudice. We may regard the first three cases as stronger indications of a closed mind than the fourth. But the distinction goes not to the underlying reason for disqualification, that is, bias; it goes only to the likelihood that bias exists to a degree that requires disqualification. Of course, many other types of evidence, such as the public statements Pertschuk actually made, are also relevant to this question. Once we are satisfied that the totality of the evidence reveals an inability to form an impartial judgment, why do we care whether the bias stems from family relationship, personal interest, personal experience, or professional activities? It is not the source of bias but rather the fact of bias—that is, an excessive degree of actual or probable commitment to an opinion—with which we are concerned. It is essentially irrelevant whether, for example, Pertschuk's mind is closed because he suffered trauma while watching "Captain Caveman" on Saturday morning television or because he has a personal relationship with one of the protagonists.

Publius

The particular cause of *bias* may not be important, but it is appropriate to distinguish between a judgment that is based on factors that would be irrelevant or improper to present in the proceeding itself, and those based on considerations that are relevant and proper but happen to come to the administrator's attention outside of the proceeding.

Consider, for example, the first two hypotheticals. Both raise at least a suspicion that Pertschuk's judgment will be influenced by considerations that would not be proper, whether or not they were made part of a public record. It is, of course, difficult to imagine that anyone would publicly try to persuade the Chairman by reference to personal or financial advantages, or would be allowed to succeed if he did, and that bears out my point that these are wholly impermissible considerations. The third case may perhaps be borderline, but I would be inclined to think that the illness of

Pertschuk's daughter is relevant and is a permissible influence on his judgment. I assume it would be legitimate to argue to Pertschuk in a public proceeding that children in general are being induced by television advertising to ingest dangerous drugs. Personalizing the argument may be a bit tacky, but it is not legally improper. The fourth case is different from each of the others because it does not indicate the source of any influence on Pertschuk's judgment. In itself, the speech does not tell us whether his judgment was based on proper or improper considerations. At most, it tells us simply that his opinions were sufficiently influenced by something to induce him to make a judgment. Without knowing anything more about what that influence was, I would not disqualify him from a rulemaking proceeding, even though I concede he would be subject to disqualification given such circumstances if the pending proceeding were an adjudication.⁸⁴

Brutus

Your argument about the importance of the source of bias has appeal. I also agree that the fourth case clearly would present grounds for disqualification under existing legal precedent applicable to adjudicatory cases. But your analysis does not tell us why the same basic principle is not transferable to rulemaking. If the administrator's participation would be unfair in one context, it would be equally unfair in the other. And as Justice Hans Linde has persuasively argued, even the legislature must comply with some basic due process standards,⁸⁵ which I assume would include the obligation to make rational, unbiased decisions. If this is true, agencies, which cannot be delegated more power than the legislature itself possesses, must be subject to standards that are at least equally vigorous.

⁸⁴ Thus, in *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966), FTC Chairman Dixon was disqualified on the ground that he had previously participated, as chief counsel of a Senate subcommittee, in an investigation of the case. The court emphasized that Dixon's prior position as counsel for the subcommittee did not in itself require disqualification, but his active, in-depth involvement in the investigation did. This is consistent with what appears to be the general rule regarding prior active participation in investigative or prosecutorial activities related to an adjudication. See, e.g., *American Gen. Ins. Co. v. FTC*, 589 F.2d 462 (9th Cir. 1979) (FTC commissioner disqualified because of prior participation in case as counsel, including argument before court of appeals); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 266-67 (D.C. Cir. 1962) (SEC commissioner disqualified because of previous participation in investigation of case).

⁸⁵ See Linde, *Due Process of Lawmaking*, 55 *NEB. L. REV.* 197 (1976).

Publius

Your argument exaggerates the point. Even Justice Linde does not go so far. On the one hand, he argues there are no judicially enforceable standards of rationality or fairness in legislative law-making; on the other, he maintains that there are some standards of procedural regularity and of basic democratic "legitimacy" with which the legislature must comply.⁸⁶ What does this mean? There are, of course, certain procedural and institutional prerequisites to making law, such as compliance with quorum and majority vote requirements. But these essentially jurisdictional formalities do not constitute "due process" in any relevant sense. They do not impose any enforceable requirements of rationality or fairness on legislative deliberations. At most they simply prescribe the mechanical details of how laws are legitimately enacted. If legislative activity does not follow the prescribed processes for enacting a law—for example, if the legislature votes on a measure without a required quorum—then such activity does not produce a valid law. This is quite different from saying that a law passed with all requisite formalities is invalid if, for example, the legislators did not allow for public participation or were influenced by improper contacts with special interests.

As regards Justice Linde's standard of "legitimacy," I question whether the concept is meaningful except as it is embodied in particular constitutional restraints (against, for example, denial of equal protection or abridgment of free speech). Professor Ely notwithstanding,⁸⁷ I would not classify such constitutional limitations as process restraints. In any case, they do not deal with due process in the sense relevant here. They do not prescribe standards for lawmaking process; rather, they proscribe certain types of legisla-

⁸⁶ A major burden of Justice Linde's analysis is to show that there should not be judicial enforcement of legislative rationality in terms of a due process requirement that would insist on a rational relationship between legislative means and articulated legislative purpose. See *id.* at 201-22. He emphasizes that lawmakers should not be expected or required to pursue their goals in a rational manner, or even to pursue goals that are themselves rational. *Id.* at 222-35. Justice Linde goes on to insist, however, that there are some standards of legitimacy involving the process by which laws are enacted and implies that, at least in certain instances, these standards should be judicially enforced. *Id.* at 235-51. Thus, his thesis is that substantive due process is a chimera, and that courts have no business overturning laws they regard as irrational. Rather, they should overturn only those failing to meet inherent procedural standards. See *id.* at 238-39, 241.

⁸⁷ See J. ELY, *DEMOCRACY AND DISTRUST* (1980). Ely's process rationalization is challenged in Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063 (1980).

tion. If that were what Justice Linde meant by his "legitimacy" concept, I would have no quarrel with him. But he appears to have in mind some general concept of lawmaking legitimacy not tied to particular substantive constitutional constraints.⁸⁸ I question whether that concept has any usefulness in the absence of a clearer definition of what it means and how it is to be enforced.⁸⁹

Brutus

I do not think you can dismiss the concept of "legitimacy" on the ground that it is not legally enforceable. That the Supreme Court has indicated doubt about its power to invalidate a law procured by bribery,⁹⁰ for example, attests only to the limits of judicial scrutiny of legislative process. As Justice Linde observes, it does not mean that bribery is an acceptable element of the legislative process.⁹¹

Your response, moreover, leaves too wide a gap in the structural support for agency action. Justice Holmes once observed that "[m]en must turn square corners when they deal with the Government."⁹² That principle may adequately express the formal, mechanical requirements for obtaining a tax refund. As a general principle of democratic government, however, Holmes's dictum is upside down: it is the *government* that ought to turn square corners in dealing with its citizens. In a democratic society, government is entitled to claim the assent of its citizens only to the extent that public officials seek to advance some general public interest rather than their own private advantage. "Turning square corners" in this sense is the core consideration that makes the social contract binding. To me, this means that public officials must be concerned with shared values of rationality, or relating means to legitimate public ends, and fairness, or taking all interests into ac-

⁸⁸ See note 86 *supra*.

⁸⁹ Justice Linde himself is unclear about what he means by legitimacy. He never really defines the term, other than to assert that it embraces "a very concrete, well understood set of institutional procedures," which he does not specify. Linde, *supra* note 85, at 241; see *id.* at 240-42.

⁹⁰ *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 129-31 (1810); cf. *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220, 224 (1949) (refusal to consider lower court finding that legislation was procured by insurance lobby in order to eliminate competing business because "a judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive in testing constitutionality.").

⁹¹ Linde, *supra* note 85, at 248.

⁹² *Rock Island, Ark. & L.R.R. v. United States*, 254 U.S. 141, 143 (1920) (failure to file appeal with Commissioner of Internal Revenue barred suit for tax refund).

count in making decisions. Whether such a standard of legitimacy is practically or legally enforceable is a secondary question, if indeed it is important at all.

Publius

I cannot find any clause in my copy of the social contract that directs legislators to turn square corners. Without attempting to delve into social philosophy in general or contractarian theory in particular, I would question your assumptions about what people expect or should expect of their lawmakers. Consider, for example, the views of Justice Black, himself an ex-legislator, in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*⁹³ The Court, in an opinion by Justice Black, held that a concerted effort by a group of railroads to influence the legislature to enact laws harmful to their competitors was not a violation of the anti-trust laws even though the lobbying campaign involved distortion and manufacture of facts as well as deception of the public.⁹⁴ While criticizing that conduct, Justice Black observed that such a " 'no-holds-barred fight' between two industries both of which are seeking control of a profitable source of income . . . [is] commonplace in the halls of legislative bodies."⁹⁵ I take this statement as more than a disclaimer of judicial competence to intervene; I think it clearly reflects Black's view of the accepted norms of legislative process. This implies that legislative decisions based on such distorted, unfair premises—that is, biased decisions—are permissible.

It is true, of course, that legislatures have adopted some standards for themselves, such as conflict-of-interest rules.⁹⁶ But these standards are not often enforced by the legislatures.⁹⁷ Basically,

⁹³ 365 U.S. 127 (1961). Linde, *supra* note 85, at 227, cites the case to illustrate the absence of enforceable due process standards of rationality in lawmaking. See also *UMW v. Pennington*, 381 U.S. 657, 669-70 (1965).

⁹⁴ 365 U.S. at 140. But see *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 512-13 (1972).

⁹⁵ 365 U.S. at 144 (footnotes omitted) (quoting *Noerr Motor Freight v. Eastern R.R. Presidents Conference*, 273 F.2d 218, 222 (3d Cir. 1959) (Biggs, C.J., dissenting)).

⁹⁶ See note 77 *supra*.

⁹⁷ See Kirby, *Federal Conflict of Interest Regulations and Their Relation to Official Compensation* in *THE REWARDS OF PUBLIC SERVICE* 165, 186-201 (R. Hartman & A. Weber eds. 1980); Note, *supra* note 77, at 1223. It has been urged that courts can and should enforce legislative ethics rules. *Id.* at 1214. The courts have declined the invitation, however, at least in the context of disqualifying legislators from participation in the enactment of laws. In cases where the proscribed conduct is made criminal, see *id.* at 1224-27, prosecution of the individual legislator presumably is always possible. Unfortunately, that does not seem

enforcement of legislative rationality, fairness, "legitimacy," or whatever catch phrase you wish to use, is left to the electorate—which to all appearances does not insist on a very high standard of behavior.⁹⁸ Mark Twain once wrote that it "could probably be shown by facts and figures that there is no distinctly native American criminal class except Congress."⁹⁹ The quip reflects, even if it distorts, a widely shared public contempt for legislative ethics.

Brutus

I will concede—indeed, who could deny—that legislators are not always high-minded guardians who act only out of a sense of the public good. Nonetheless, I see no reason why we should not insist that legislators, like all other public officials, be held accountable to some kind of standards. If there is a risk of error in setting such standards, we should err on the side of rationality and fairness.

Publius

I did not mean to suggest that I apply no standards to laws. Idealist that I am, I even believe some rationality and fairness can be constitutionally demanded in terms of *substantive* due process and equal protection requirements.¹⁰⁰ But I have few if any expectations for individual lawmakers. I think it is feckless to try to enforce standards of legislator behavior other than—Twain's hypothesis notwithstanding—minimal honesty. To the extent one expects rational and fair processes, one must look to the *system*, not to particular legislators. It is another example of an invisible hand at work. The social utility—the fairness, if you will—of the end result depends more on the successful interaction of different, competing

to be a promising mechanism for effective enforcement of legislative due process; it is too cumbersome and it would still leave the law involved in effect.

⁹⁸ See, e.g., 36 CONG. Q. 2975, 3286 (1978) (reelection of Congressman Charles Diggs after conviction for payroll kickbacks); 25 *id.* 600 (1967) (reelection of Congressman Adam Clayton Powell after exclusion from House for improper conduct). But see 38 *id.* 3317 (1980) (five of six congressmen involved in Abscam scandal defeated in reelection contests). See also G. ROBINSON, E. GELLHORN & H. BRUFF, *THE ADMINISTRATIVE PROCESS* 619-67 (2d ed. 1980).

⁹⁹ S. CLEMENS, *FOLLOWING THE EQUATOR* 80 (1897).

¹⁰⁰ In particular, requiring a rational relationship between a law and its purported purpose, which would encourage legislative candor rather than obfuscation, might be required by equal protection analysis. See Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

individual interests than on legislators' selfless dedication to the public interest. We might, therefore, even want to encourage the advocacy of particular points of view rather than banning it as evidence of bias. I grant you the political marketplace does not work in exactly the same fashion as the economic market.¹⁰¹ Sometimes it works better, sometimes worse. But I am more interested in the soundness of the end result, which in either market depends only slightly, if at all, on the purity, or even the rationality, of the individual actors.¹⁰²

Brutus

We have gone somewhat astray in talking about legislative due process when in fact we are really interested in administrative due process in agency rulemaking. As I pointed out earlier, any inherent due process limitations on legislative actions would apply a priori to agency rulemaking, inasmuch as an agency cannot be delegated more power than the legislature has to begin with. But even if we were to decide that there are no due process standards of rationality and fairness in legislative lawmaking, that does not necessarily mean that there are none for agency rulemaking.¹⁰³

Publius

Are we talking about constitutional due process or due process prescribed by the legislature? If the former, I do not see where the standards come from. Such Supreme Court precedent as we have suggests that there are no such guidelines.¹⁰⁴ If the latter, you must be more specific about the statutory source. I grant you that a leg-

¹⁰¹ For comparisons and contrasts, see Stigler, *Economic Competition and Political Competition*, 13 *PUB. CHOICE* 91 (1972). See generally A. BRETON, *THE ECONOMIC THEORY OF REPRESENTATIVE GOVERNMENT* (1974).

¹⁰² Cf. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 *J. POL. ECON.* 211 (1950) (rationality in economic marketplace).

¹⁰³ See Linde, *supra* note 85, at 225-27.

¹⁰⁴ See *Friedman v. Rogers*, 440 U.S. 1, 15-18 (1979) (licensing board made up of members of only one of competing factions allowed to promulgate rules notwithstanding claim of economic self-interest); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (hearing not required before board promulgates rule increasing valuation of all taxable property in county). In contrast, the Court has not hesitated to impose due process requirements on adjudication and quasi-adjudicative administrative proceedings. *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973) (board members with conflicting pecuniary interests cannot constitutionally participate in a licensing hearing); *accord*, cases cited note 84 *supra*. *But see Withrow v. Larkin*, 421 U.S. 35, 58 (1975) (relying on federal administrative law to uphold combination of investigative and adjudicative functions).

islature may prescribe for agencies any rulemaking due process that it wishes. But I remind you of the Supreme Court's decision in *Vermont Yankee* instructing the courts not to add special process requirements to those prescribed by Congress.¹⁰⁵

Brutus

It is true that statutory prescriptions are the most obvious source of rulemaking due process requirements, and I accept your challenge to provide specifics. We can set *Vermont Yankee* aside, however, because in the present context it is a red herring. That case dealt only with the question of whether special procedures can be judicially imposed on rulemaking. I am not concerned with special adjudicatory procedures and standards imposed on rulemaking by a court, but rather with those requirements imposed by Congress itself. It has established minimum requirements of notice, comment, and rationality for rulemaking,¹⁰⁶ all of which would effectively be overridden if the rulemaker became an advocate with a closed mind. Congress did not mandate this procedure only to have it essentially ignored at the first opportunity.¹⁰⁷ In the case of the rulemaking involved in *National Advertisers*, Congress, in the Magnuson-Moss Act, added requirements that adjudicative-type hearings be held on any disputed issues of material fact.¹⁰⁸ Moreover, any action taken in such rulemaking must satisfy the substantial evidence test instead of the supposedly less rigorous arbitrary and capricious test normally used to review informal rulemaking.¹⁰⁹ Taken together, these requirements seem to indicate a fairly strong congressional intent to impose rigorous standards of discipline on FTC commissioners in trade regulation rulemaking proceedings. But it simply makes no sense to require that determinations of material fact be subject to the rigors of a

¹⁰⁵ *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 542-48 (1978).

¹⁰⁶ 5 U.S.C. § 553 (1976).

¹⁰⁷ See Preston, *A Right of Rebuttal in Informal Rulemaking: May Courts Impose Procedures to Ensure Rebuttal of Ex Parte Communications and Information Derived from Agency Files after Vermont Yankee?*, 32 *Ad. L. Rev.* 621 (1980).

¹⁰⁸ 15 U.S.C. § 57a (1976). For legislative explanations of the Act's purpose, see S. CONF. REP. No. 1408, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7755; H.R. REP. No. 1107, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7702. A similar hybrid-rulemaking procedure was mandated for the OSHA rulemaking involved in the *United Steelworkers* case. See 29 U.S.C. § 655(b)(3) (1976).

¹⁰⁹ 15 U.S.C. § 57a(e)(3)(A) (1976). The same requirement was present in the *United Steelworkers* case. See 29 U.S.C. § 655(f) (1976).

hearing and the substantial evidence test without also requiring that the triers of fact be untainted by bias.

Publius

So far as the special procedures created by Magnuson-Moss are concerned, the evidence of congressional intent is ambiguous at best. As Judge Tamm indicates,¹¹⁰ the legislative history suggests that the hearing procedures were intended to apply only to "specific" or "adjudicative" facts pertaining to particular parties, not to "legislative" facts about broad policy issues—such as the impact of advertising on children. Clearly Pertschuk's "bias" is directed to the latter and so does not contravene the purpose of the additional procedural requirements.

Brutus

I do not find the adjudicative-legislative fact distinction, which the court borrows from Professor Davis, particularly helpful in this context.¹¹¹ The crucial point is that if bias is involved in either case, the proposed rules may rest on assumptions that are both disputed and critical. In addition, as Judge MacKinnon points out, the legislative history is susceptible to an interpretation that does not support such a distinction.¹¹²

Publius

I was not arguing for a legislative-adjudicative fact test; I was merely pointing out that Congress seems to have mandated it. In order to carry out the legislative intent behind the Magnuson-Moss procedures, we must therefore interpret the meaning of the distinction. If you look at what the FTC Chairman actually said, I think it is clear that his statements are more "legislative" in character than "adjudicative."

¹¹⁰ 627 F.2d at 1163-64.

¹¹¹ See Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L.J. 1, 47; Jaffe, *Administrative Procedure Re-Examined: The Benjamin Report*, 56 HARV. L. REV. 704, 719 (1943); Robinson, *supra* note 3, at 494, 536.

¹¹² See 627 F.2d at 1183-84 (MacKinnon, J., dissenting in part and concurring in part) (legislative history indicates Magnuson-Moss procedures are applicable to all FTC rulemaking).

Brutus

Let us put aside the narrow question of congressional intent in the Magnuson-Moss Act and return to the broader issue of generally applicable due process standards. As I read Judge MacKinnon's dissent, he would be prepared to require at least some minimal impartiality of agency members in traditional informal rulemaking proceedings. It is noteworthy that even Judge Tamm assumes that some degree of impartiality is necessary in all rulemaking.¹¹³ But he insists on a lower standard of impartiality—or at least on a higher burden of proof of bias—for rulemaking than for adjudication.¹¹⁴ How do you justify a different standard for the two types of proceedings?

Publius

I do not want to explain Judge Tamm's distinction; in fact I am not sure I fully understand it. I concede that even in rulemaking, agency officials ought to be held to some minimal standard of impartiality. I think it would be intolerable to permit a rulemaker to have a personal stake in the decision. For example, an official who has a pecuniary interest in a particular outcome should be disqualified. Such cases are not very interesting, however, and they are fully taken care of by conflict-of-interest statutes.¹¹⁵ Furthermore, I see no basis in law or policy for moving beyond this minimal, legislatively prescribed limit.

Brutus

This disparate treatment of adjudication and rulemaking results in a very curious ethic. A different standard is applied to the same official, and possibly even to the same types of regulatory decisions, depending on which mechanism the agency chooses—that is, essentially on how the agency chooses to label its own actions.¹¹⁶ I take it that the FTC could have pursued its proposed children's

¹¹³ *Id.* at 1174.

¹¹⁴ *Id.* at 1161-70.

¹¹⁵ *See, e.g.*, 18 U.S.C. § 208 (1976), *quoted in note 77 supra.*

¹¹⁶ *Compare* SEC v. *Chenery Corp.* (*Chenery I*), 318 U.S. 80, 92-93 (1943) *with* SEC v. *Chenery Corp.* (*Chenery II*), 332 U.S. 194, 201-03 (1947). In *Chenery I*, the Court stated that the decision-making processes for rulemaking and adjudication would be judged by different standards. The impact of that decision was undercut by the subsequent decision in *Chenery II*, which held that the practical effect of adjudication and rulemaking need not differ and that an agency was free to choose either.

advertising policy by means of individual adjudications.¹¹⁷ In fact, before the Octane Posting Case¹¹⁸ held, in a somewhat expansive interpretation of the statutes, that the agency had rulemaking powers, there was doubt whether it could have proceeded in any other way.¹¹⁹ Let us suppose the FTC were to decide to promulgate part of its children's advertising policy by way of adjudication and part by way of rulemaking. Participating in the former, Chairman Pertschuk must emulate Calpurnia in being above suspicion; in the latter, it is quite enough if, imitating Richard Nixon, he can assert that he is not a crook.

Publius

I would say there is nothing peculiar about the existence of two sets of standards. That is precisely the point of differentiating between rulemaking and adjudication. We have different procedures, different standards of "proof," and different standards of review, because of the different characteristics of the processes. The analogy between agency rules and congressional legislation is again instructive. Congress may pass a law laying down a "rule" identical in substance to what a court or agency might achieve through the radically different process of adjudication, just as an agency could achieve the same result through rulemaking. Yet surely you would not wish to disqualify legislators for having previously formed an opinion, or even for being biased, on the issue. For example, suppose that a congressional committee considers proposed legislation banning or limiting children's advertising in precisely the manner proposed by the FTC: is a senator barred from participation because of past statements for or against such rules? Of course not. Legislators are elected in part on the basis of their past advocacy. Disqualification on such grounds would undermine democracy.

Brutus

I think Judge MacKinnon has already answered your latter point: agency rulemaking is not lawmaking and agency administrators are not congressmen.¹²⁰ As I have already noted (and you con-

¹¹⁷ See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

¹¹⁸ *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), cert. denied, 415 U.S. 915 (1974).

¹¹⁹ See, e.g., Robinson, *supra* note 3, at 492.

¹²⁰ 627 F.2d at 1194.

veniently ignored), an agency is a mere creature of Congress. As a result, it must act within a set of prescribed rules and standards to which Congress itself is not subject.

Publius

Now who is introducing the red herring? I agree that agency rulemakers are bound by standards and procedures not applicable to legislators. But such standards can only be set by the legislature itself. Congress is of course free to prescribe standards of impartiality for rulemaking that are the same as those applied to adjudication, but where has it done so?

Brutus

The fact that Congress has not explicitly established standards of impartiality for rulemaking is not dispositive. It has not done so for administrative adjudication either, yet those standards clearly exist.¹²¹ What Congress has done, for both types of proceedings, is to prescribe certain formalities designed to limit and rationalize the exercise of administrative discretion. Although the procedures in notice-and-comment rulemaking are not as strictly confining as those required in adjudication or hybrid rulemaking, their basic design and effect is similar. In all cases, an agency must explain the basis of its action; likewise, it is subject to at least minimal standards of rationality in all cases.¹²² Now what is the point of imposing such constraints if agency members may in fact rest their decisions on extraneous influences, bias, and the like?

Publius

Given such a principle of statutory construction, I think you could argue that all rulemaking is implicitly subject to all of the basic procedural requirements imposed on adjudication. I do not say that there is no judicial support for such an approach; *Home Box Office* is close on point. But that case is a very uncertain precedent.¹²³ Additionally, the finding of implicit statutory procedural requirements is suspect after *Vermont Yankee*. Most importantly,

¹²¹ See, e.g., *Cinderella Career & Finishing Schools, Inc. v. FTC*, 429 F.2d 583 (D.C. Cir. 1970); 2 DAVIS TREATISE, *supra* note 29, § 12.01.

¹²² See 5 U.S.C. §§ 557, 706 (1976).

¹²³ See text and notes at notes 54-62 *supra*.

it is unclear whether so narrow and rigid an approach to rulemaking is desirable.

In any case, whatever you may infer from legislative intent in creating minimal standards of fairness and rationality, it remains true that Congress has in fact prescribed different, and significantly less stringent, procedures for rulemaking than for adjudication.¹²⁴ Furthermore, the courts have encouraged the use of these more liberal procedures.¹²⁵ Deciding whether these procedures, like the stricter standards imposed on rulemaking, inherently imply an impartiality requirement comes down to a question of expectations. My reason for analogizing agency rulemakers to congressional lawmakers, and hence imposing only a minimal impartiality standard, is that I think we have essentially similar expectations about permissible behavior for both groups when they are functioning in their "legislative-rulemaking" capacity.¹²⁶

Brutus

You cannot transform agency members into congressmen by putting a hyphen between the words legislative and rulemaking. If the question of fairness is indeed rested on public expectations, your argument clearly fails. The expectation is *not* the same for agency rulemakers and legislators. As you yourself emphasized earlier, we tolerate and even expect partisanship in the case of legislators. It is understood that they are elected to represent particular constituencies and interest groups. But administrators, such as the five regulatory commissioners of the FTC, do not quite a legislature make. They are not elected, they are not representative, and we do not expect them to behave as advocates for particular constituencies or interests.¹²⁷ In fact, we are shocked and offended when they do so, which is why an impartiality requirement is necessary.

¹²⁴ Compare 5 U.S.C. § 553 (1976) (rulemaking) with *id.* § 554 (adjudication).

¹²⁵ For judicial encomiums to the virtues of the rulemaking process, see, e.g., *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 679-84 (D.C. Cir. 1973); *American Airlines, Inc. v. CAB*, 359 F.2d 624, 629-30 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966). See also Mayton, *The Legislative Resolution of the Rulemaking versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103.

¹²⁶ For a more complete statement of this argument, see Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 778-79 (1975) (forcing "the agencies into a judicial mode that is incongruous with the legislative function they are expected to perform . . . is potentially mischievous").

¹²⁷ See 627 F.2d at 1192-94 (MacKinnon, J., dissenting in part and concurring in part).

Publius

Let me raise two practical questions. First, if a regulatory commissioner is not supposed to represent a particular constituent interest, how did Chairman Pertschuk, for example, get appointed in the first place? I will not pretend that every regulator is picked specifically to represent some interest group.¹²⁸ In the case of Pertschuk, however, there was no doubt at the time of his appointment that he was a strong consumer advocate whose constituency clearly included the group that pressed for the ban on advertising directed at children.¹²⁹ Nor was any concern about such "bias" expressed publicly before his appointment. It would even seem probable that his appointment was in large part the result of a desire to have such a partisan on the Commission. It would be highly ironic, and hardly rational, to appoint a known consumer advocate to the post and then to decry his publicizing that advocacy. Let us suppose that Pertschuk made the challenged statements the day before his confirmation hearing. Do you think the Senate would have withheld confirmation? If not, on what basis do we now disqualify him when the FTC moves to put his ideas into action?

My second practical question concerns what you expect to accomplish by disqualifying administrators who reveal their biases in public. Does disqualification ensure impartiality or merely its appearance? In the immediate case, we presumably remove the biased decision maker. But what effect will this have on future decisions? The decision maker's basic biases are unlikely to change, but unless he is extremely obtuse he will think twice about making them public before the completion of any future proceeding in which they might be grounds for disqualification. Thus, Pertschuk's speeches would no doubt continue even if he had been disqualified, but always with just enough of the sharp edges rounded to remove any basis for subsequent challenges.

Keep in mind that biased views or conflicts of interest are, in practice, provable only by evidence of what the decision maker has said or done, not by proof of what he thinks. Even if we were willing to believe the decision maker's potentially self-serving account of his own mental processes, we would be unable to obtain it. *Mor-*

¹²⁸ See generally STAFF OF SENATE COMM. ON COMMERCE, 94TH CONG., 2D SESS., APPOINTMENTS TO THE REGULATORY AGENCIES: THE FCC AND FTC (1949-74) (Comm. Print 1976).

¹²⁹ See N.Y. Times, Mar. 31, 1977, § 4, at 1, col. 4.

*gan IV*¹³⁰ says a decision maker cannot be examined to determine whether he gave personal attention to the issues, because of the need to preserve the integrity of the administrative process.¹³¹ I take it that the same principle would prevent examining a decision maker concerning possible bias. In consequence, once decision makers were aware of the rule, they would render it nugatory by restricting their public statements.

Brutus

If your latter argument proves anything, it proves too much. The same point could be made of disqualification for bias in adjudicatory cases such as *Cinderella*. If the difficulties of proof can be surmounted in the one context, they can also be overcome in the other.

As to the other point, it raises a question of line drawing. I assume Pertschuk was expected to reflect a consumer bent. That is, he was expected to have a generalized bias in favor of government intervention on behalf of the consumer. Had he done no more than demonstrate such a philosophy, he would not have been subject to disqualification, even in an adjudicatory case. But Pertschuk expressed an impermissible degree and type of bias when he indicated that he was committed to a particular disposition of an issue before him in his official capacity. Although agency members may be chosen for their particular philosophical orientation, that does not mean that they may be so closed-minded that they cannot or will not seriously consider all points of view. This line that I would draw to separate the permissible from the impermissible may not be bright, but at least it is intelligible and uniform. It is crossed when one becomes a protagonist actively seeking to build support for one's beliefs. The important point, in short, is not whether an agency member holds strong views, but whether he has become an advocate or in some other fashion (such as by accepting a bribe) left himself little or no room to make a reasoned judgment on the basis of the evidence produced at the proceeding.¹³²

¹³⁰ *United States v. Morgan (Morgan IV)*, 313 U.S. 409 (1941).

¹³¹ *Id.* at 422.

¹³² See text and notes at notes 80-83 *supra*. See also *FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948).

Publius

I think you may have just unwittingly embraced Judge Tamm's "unalterably closed mind" standard for impartiality in rulemaking,¹³³ which you originally purported to reject. As to whether my burden of proof argument undercuts the present adjudicatory standard, it probably does. That does not trouble me as much as it does you. Moreover, I think that one can construct a plausible case for enforcing the adjudicatory standard of bias all the same. The need for such a standard clearly is greater in adjudication than in rulemaking. This is reflected in the traditional disparity between the stringency of the requirements imposed on judicial and legislative bias. Given the greater need, we should be less deterred by the evidentiary complexities. Also, we expect judges, unlike legislators, not to exhibit partisan opinions. We should therefore make a greater effort to deter such statements by an administrator in his capacity as adjudicator than in his capacity as rulemaker.

In rulemaking, however, the point is that we really want agency decision makers to speak out on general issues of policy. I meant what I said earlier about letting "the bull" out. If I were an advertiser, I might not like what Pertschuk had to say about children's advertising, but I would rather have it publicly acknowledged than suppressed. Either way I would feel the impact of the opinion, in that it would be equally influential in Pertschuk's decision. But in the former situation, I at least have a warning; I would know what I was up against and could proceed accordingly. There are more than enough incentives for agency members to play it safe in what they say and make banal pronouncements about "the public interest" that tell little about what the officials actually intend to do. I do not want to add to these incentives. I therefore see no advantage in sanding down the ragged edges of an agency member's tongue, just because he wags it in public.

Finally, it is important to remember that, whatever the biases of the rulemaker, his rules still must be explained on rational grounds, which are subject to judicial review.¹³⁴

Brutus

Let me suggest that you might not want to have biases made

¹³³ 627 F.2d at 1170.

¹³⁴ 5 U.S.C. §§ 557, 706 (1976).

public if the effect is to make it difficult for the decision maker to change his mind. Common intuition tells me that once a person has made a public commitment, it will be more difficult to persuade him to change his views than if he harbors them in private.

As to your point about judicial review, I thought you wanted to talk in *practical* terms. You know as well as I that the standards of review—whether the substantial evidence or the arbitrary and capricious test—accord the decision maker considerable discretion with regard to the final outcome. But judicial review of rationality cannot reach impermissible influences leading the decision maker to exercise his discretion in favor of one of two rational alternatives. The point of disqualification is to ensure that this discretion will not be unduly influenced by factors outside the "record." In this regard, disqualification serves the same due process objective as the rule banning *ex parte* contacts.

III. THE EX PARTE PROBLEM

Publius

Well, we have finally found a point on which we fully agree, namely, that bias and *ex parte* issues are related. Both raise similar basic questions about due process and the character of agency rulemaking. But the two issues are nevertheless distinct. For one thing, the *Home Box Office* ban on *ex parte* contacts presents legal problems not raised by the bias issue. Specifically, in *Vermont Yankee* the Supreme Court emphatically instructed the court of appeals that "[a]bsent constitutional constraints or extremely compelling circumstances,"¹³⁵ agencies could not be required to follow procedures beyond those set forth by Congress in the APA (or, presumably, in an agency's authorizing statute). Inasmuch as a rule against *ex parte* contacts, unlike a rule requiring impartiality, necessarily results in procedural requirements, this language threatens the continued vitality of *Home Box Office*. The *Vermont Yankee* Court went on to note that additional procedures could not be justified on the grounds that "a more adequate record . . . will give interested parties more of an opportunity to participate and contribute to the proceedings."¹³⁶ This statement undercuts the principal policy justification for the ban on *ex parte* contacts.

¹³⁵ 435 U.S. at 543.

¹³⁶ *Id.* at 547.

Brutus

Although I would accept your implied conclusion that neither constitutional constraints nor compelling circumstances bar outside contact with agency rulemakers, I do not think *Vermont Yankee* will carry all the freight you want to load on it. The Court there recognized that rules are still subject to review under the APA's arbitrariness standard to determine whether they are "sustainable on the administrative record made";¹³⁷ this review, which the APA states may be of the "whole record,"¹³⁸ can examine everything before the agency decision maker, including all ex parte contacts.¹³⁹ An effort to control ex parte contacts in rulemaking is therefore well within the traditional role of judicial oversight mandated by Congress. The *Home Box Office* rule can be explained, consistently with *Vermont Yankee*, as expressing the determination that the existence of ex parte contacts means that a rule could never be sustained on the record.

Publius

If that is true, is it not true as well of other judicial requirements for rulemaking, such as the very requirements that the court invalidated in *Vermont Yankee*?¹⁴⁰

Brutus

Perhaps, and that is one reason why *Vermont Yankee* is unlikely to have the impact on judicial activism in this area that some have supposed.¹⁴¹ In any case, I do not think that we can simply dismiss *Home Box Office* on the strength of *Vermont Yankee*.¹⁴²

¹³⁷ *Id.* at 549.

¹³⁸ 5 U.S.C. § 706 (1976) ("In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party"); see *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 249 (2d Cir. 1977).

¹³⁹ *United States Lines, Inc. v. Federal Maritime Comm'n.*, 584 F.2d 519, 541-42 (D.C. Cir. 1978); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54-55 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977).

¹⁴⁰ This seems to be the inference drawn by Professor Stewart. See Stewart, *supra* note 64, at 1821.

¹⁴¹ See, e.g., Nathanson, *supra* note 20, at 406. See also 1 DAVIS TREATISE, *supra* note 29, §§ 6.35-37 (2d ed. 1978).

¹⁴² See text and notes at notes 62-63 *supra*.

Publius

A moment ago you stressed that the ex parte and bias problems were closely related. How, then, do you reconcile *Home Box Office* and *National Advertisers*?

Brutus

If *National Advertisers* had gone the other way, it would have provided compelling support for *Home Box Office*. A requirement of neutrality surely demands the inference that clandestine extrarecord influences cannot be allowed. On the other hand, I think I can justify a ban on ex parte contacts in rulemaking even though agency rulemakers are not disqualified for most bias. In other words, I think *Home Box Office* can coexist with the actual decision in *National Advertisers*. The former case attempts to ensure the integrity of the rulemaking process as far as practicable by confining basic evidence to that produced "on the record"; the latter merely accepts your implicit belief in the futility of also trying to ensure a truly neutral decision maker, and prevents the waste of judicial resources on such an impossible task.

Publius

Saying that *Home Box Office* is necessary to ensure the integrity of the rulemaking process begs the question. Ex parte contacts during notice-and-comment rulemaking were commonplace at the FCC and other agencies before *Home Box Office*, and no one asserted that such contacts impeached the integrity of rulemaking.¹⁴³ The court in *Home Box Office* necessarily admitted to making new law in this respect.¹⁴⁴

Brutus

It is hardly the first time—particularly for that court. Surely you are not going to argue that the courts cannot make new law.

Publius

No, but the fact that the agencies constantly engaged in ex parte consultations on issues of policy confronting them in rulemaking proceedings without evoking any complaints is clearly

¹⁴³ See text and note at note 42 *supra*.

¹⁴⁴ 567 F.2d at 54.

relevant to the question of whether such contacts compromise the integrity of the process.

Brutus

You exaggerate the unanimity of acceptance for this practice. The *Sangamon Valley* case¹⁴⁵ would never have been brought nor decided as it was if ex parte contacts were regarded as wholly innocuous. That the issue of a general ban on ex parte contacts is only now squarely before the courts is probably the result of the same several factors that explain the recent emergence of the bias issue for the first time: the relative newness of agency use of rulemaking to develop important policy issues; an increased concern with open government; and a more active judicial role in reviewing agency action in general and rulemaking in particular. Thus I would not put much reliance on the old test-of-time criterion. It may seem surprising that such basic issues of due process are emerging as questions of first impression this late in the game. But most of the jurisprudence of administrative due process is the creation of the last thirty years.¹⁴⁶

Publius

Obviously courts can and do change the law not only to accommodate changing social needs but also to reflect changing social and ethical norms. I only meant to suggest that this new ethic created by *Home Box Office* is indeed *new*. You cannot find much precedent, by the way, in *Sangamon Valley*. That opinion not only stated a limited principle (the restriction applied only to "conflicting private claims to a valuable privilege"¹⁴⁷) but it also applied that principle in a very special rulemaking context—a narrowly focused rule that directly affected only a few parties. In fact, the proceeding in *Sangamon Valley* was in substance an adjudicatory contest to determine which of two private parties would receive the

¹⁴⁵ *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959); see text and notes at notes 44-48 *supra*.

¹⁴⁶ The jurisprudence involving administrative rulemaking is illustrative. See cases cited notes 5-14 *supra*. Another, even more striking example is the development of a right to a hearing in cases involving intangible interests and entitlements such as occupational freedom, welfare benefits, and educational opportunity. See cases collected in G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 98, at 611-822.

¹⁴⁷ 269 F.2d at 224.

privilege of using a particular television channel.¹⁴⁸ By contrast, the rulemaking in *Home Box Office* involved rules of extremely wide application, affecting a broad array of different interests.¹⁴⁹ Only by an exercise of the purest legal fantasy can the issues and circumstances involved in *Home Box Office* and *Sangamon Valley* be deemed comparable. For this reason, I am not at all satisfied with either Judge MacKinnon's separate opinion in *Home Box Office* or Judge Tamm's opinion in *ACT* insofar as they suggest that *Home Box Office* can be limited to *Sangamon Valley*-type situations. If the proceeding in *Home Box Office* is an appropriate occasion for invoking the *Sangamon Valley* principle, it is difficult to imagine what rulemaking proceedings would not qualify.

Brutus

I agree that the facts of *Home Box Office* are quite different from those of *Sangamon Valley*. But treating the former as an application of the latter does provide at least a potential means of limiting the future application of the ex parte ban. Surely that should satisfy you.

Publius

I would be more satisfied to see *Home Box Office* recognized

¹⁴⁸ See text and notes at notes 45-47 *supra*. Compare *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959) with *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). The latter is an adjudication that also involved a conflict between two private parties for the privilege of operating on the same frequency in two different cities. There is no fundamental difference in the nature and scope of the issues involved in *Ashbacker* and *Sangamon Valley*. The use of rulemaking in one case and adjudication in the other was instead based on the agency's procedural convention. *Sangamon Valley* involved a change in the FCC's previously established table of television assignments, and such changes typically have been accomplished by rulemaking prior to the licensing of individual stations; AM radio assignments, such as that involved in *Ashbacker*, have been made largely on an ad hoc basis as part of the licensing of individual stations. It is noteworthy that several early deintermixture cases similar to *Sangamon Valley* were decided in adjudicatory proceedings. See, e.g., *Peoria Deintermixture Case*, 22 F.C.C. 342 (1957); *Springfield Deintermixture Case*, 22 F.C.C. 318 (1957).

¹⁴⁹ The importance and wide effect of these rules can be gauged by the number of different groups that filed comments in the rulemaking. The list is a formidable one. It includes the motion picture and television production industry; several different sports interests (professional baseball, hockey, and basketball associations); theater owners and operators; several cities; the Department of Justice; the Office of Telecommunications Policy (then located in the Executive Office of the President); representatives of several minority groups; the ACLU; other public interest groups; the Metropolitan Opera Company; and others. *Subscription Programming*, 52 F.C.C.2d 1, 8-42 (1975).

for what it purports to be: a flat ban on ex parte contacts in *all* rulemaking.¹⁵⁰ Only then can the full ramifications of the case be understood, and I hope, corrected.

Brutus

When you say corrected, I assume you mean the case should be overturned.

Publius

I confess to ambivalence on that score. The absence of any constraint on how and where agency officials obtain their information bothers me. I have some sympathy for the argument made to the court in *Home Box Office* that the ex parte contacts had circumvented the formalities prescribed to ensure reliability in oral argument before the agency.¹⁵¹ Similar consequences follow, I suppose, whether or not there is oral argument. Whenever interested persons are able to present their facts and arguments to individual agency members and staff without notifying other parties, the rulemaking process imposes no check on the reliability of information presented to the decision makers. This raises obvious concerns of fairness, as well as substantial problems of effectiveness and efficiency, given the problems inherent in evaluating such information. Allowing unfettered ex parte communications also undermines the incentive for interested persons to submit reliable, carefully prepared documents because their work is so easily lost in the shuffle of off-the-record encounters. Many regulatory policy makers are forced to place great reliance on oral briefing and discussion because of the massive quantities of paper confronting them. Because of this reliance, even the most carefully produced commentary of one party can be negated by the offhand, ex parte comments of another.

On the other hand, ex parte contacts also operate as an important check on the reliability of staff information and interpretation. Given the potential unreliability of staff-provided information, ex parte contacts with persons outside the agency are an important means of avoiding "staff capture."¹⁵² To be sure, one

¹⁵⁰ 567 F.2d at 56-57.

¹⁵¹ *Id.* at 55-56.

¹⁵² See Wilson, *The Dead Hand of Regulation*, 25 PUB. INTEREST 39, 48 (1971) ("If the agencies have been 'captured' by anybody, it is probably by their staffs"). To the extent that staff capture is a serious concern, the approach suggested in the *United Steelworkers* case,

does not want an agency to rely entirely on outside informants, but neither does one want it to be the prisoner of agency staff. Indeed, depending on the rigor of the ex parte prohibition, the staff itself may have difficulty obtaining information.

Brutus

I do not understand this concern about possibly inadequate access to information. Surely the agency can ask that any information it feels is necessary to or influential in its decision be submitted on the record, where it is subject to public scrutiny and rebuttal as appropriate.

Publius

Your incomprehension results from your initial mischaracterization of my concern. Obtaining information is not the problem. Agencies seldom want for information or argument in a quantitative sense. If anything, they suffer from the opposite, what Alvin Toffler has described as "information overload."¹⁵³ If you examine the docket in any major rulemaking, such as the proceeding at issue in *Home Box Office*, you will see what I mean. What the agency rulemaker needs is both a means to get to the heart of the case, and an exchange of views with the advocates of competing positions in which he can test his, and their, understanding of the issues. It is somewhat ironic that one of the principal proponents of a ban on ex parte contacts, Judge Wright, should also interpret the APA as requiring rulemaking to provide "a genuine dialogue between agency experts and concerned members of the public."¹⁵⁴ The formal submission of documents to an agency, in response to a formal public notice, seems unlikely to constitute a "genuine" dialogue—but this would be the only permissible communication between the agency and the parties if the ban on ex parte contacts stands.

The evils of this rigid formalism are obvious. For example, in *Home Box Office* a key issue was whether relaxation of the then-existing restrictions on pay-TV presentation of movies and sports events would cause a "siphoning" of such programs from adver-

allowing such contacts by the agency staff but not by interested parties outside of the agency, is exactly backwards.

¹⁵³ See A. TOFFLER, *FUTURE SHOCK* 311-15 (1970).

¹⁵⁴ Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 381 (1974).

tiser-supported television to pay TV because of the supposedly greater buying power (on a per viewer basis) of the latter. Suppose an FCC commissioner wants clarification of a particular narrow issue bearing on this question, such as the current cost of broadcast television program procurement, but can find nothing in the mountain of documents submitted by the parties that adequately addresses the point. Under the *Home Box Office* rule, his only recourse is to make a formal request for information on this subject. Presumably this would be done through public notice satisfying the requirements of the APA, inviting comments. After several months, and God knows what expenditure of time and money in preparation of formal responses by the parties, the commissioner may receive the information he desires—something he probably could have gained in a half-hour conversation with one of the parties. It is also possible that the parties will misunderstand the initial request and provide the wrong information, or respond in a way that adds to the commissioner's confusion. This would require a repetition of the entire wasteful formal process. In a normal conversation, of course, such inadequate responses could be pointed out and remedied immediately.

I do not rest my argument for allowing informal, off-the-record communications solely on the need to obtain factual data, however. More important is the need for a means enabling the agency rulemaker to get behind the public positions of the different interest groups to examine the intensity of their various demands, and to explore possible compromises. In the absence of a market for the sale of public choice decisions of the kind made in rulemaking, we have no accurate way to evaluate the true demand for different outcomes. Yet this is a vital component of rulemaking, just as it is of legislative lawmaking. A conscientious rulemaker wants to know not only who gains and loses from enactment of a rule, but also by how much. More than that, the rulemaker will want to consider compromises that can satisfy all of his different interest constituents to the greatest extent possible. An agency is not simply an issuer of edicts; it is also an arbitrator of interests. Again *Home Box Office* is illustrative. Some of the ex parte contacts involved in that case apparently took place partly for the purpose of exploring possible compromises among the competing groups.¹⁵⁵ It is difficult to envision how such compromise efforts,

¹⁵⁵ See 567 F.2d at 53, noting one meeting in which broadcast representatives described the kind of pay-cable regulations "they could live with."

which are clearly desirable, could be made without some informal contacts.¹⁵⁶ Surely you would not expect the Commission to attempt to develop a compromise in a public forum. Such an attempt at negotiating in public would be doomed to failure; no interest group would be willing to retreat from its avowed positions in the eye of public opinion.

Brutus

You make two quite different points. One concerns the essentially mechanical problem of how best to obtain information; the other raises the more complex question of what agencies are supposed to do.

I think I can dispose of the second point by noting that the rulemaker-as-arbitrator is not an appropriate model for agencies. No doubt rules often reflect compromises among competing interest groups. I do not deplore that. Even where rulemaking is a zero-sum game among different interests, agencies are properly sensitive to minimizing the losses to any particular group as a consequence of the rule being adopted. Bargaining is not objectionable except where it is done without rules, which would allow the decision to be unfairly skewed by irrelevant factors such as who was able to contact whom, when, and so forth. On the other hand, why do we have a structured rulemaking process with notice and comment and, in the *Home Box Office* case, even oral argument? Is this just a warmup for negotiations? I think not. It would seem to be an attempt to require rulemakers to do more than rubberstamp agreements by the affected parties. Instead, they must independently assure themselves, from the evidence produced by these procedures, that the rule is in fact in the public interest. That determination could be rendered illusory by unregulated ex parte contacts creating a predisposition in the rulemaker's mind.

Moreover, I think it is somewhat naive to suppose that it is necessary for an agency rulemaker to have informal discussions with particular parties in order to gain an adequate understanding of their "bottom line." For example, I think your FCC commissioner in *Home Box Office* would, from the outset, have a pretty

¹⁵⁶ An even better example of this point than the pay-TV proceeding is the FCC's 1972 cable television rulemaking that explicitly incorporated a "consensus agreement" among the principal industries concerned. Cable Television Report of Order, 36 F.C.C.2d 143 (1972), *aff'd*, 523 F.2d 1344 (9th Cir. 1975). See Besen, *The Economics of the Cable Television "Consensus"*, 17 J.L. & Econ. 39 (1974).

good sense of what was soft and what was firm in the positions of the parties as a result of his familiarity with the industry. If he did not, I doubt he would obtain it from *ex parte* discussions. The parties would be just as likely to seize such an opportunity to impress him with the fervor of their opinions and the rational basis thereof in hopes of securing a completely favorable decision, as they would be to reveal which of their claims they would be willing to concede without any *quid pro quo*.

Regarding your point about agencies being overloaded with information, your cure is puzzling: *ex parte* contacts will only add to the overload. Also, your *Home Box Office* illustration seems an odd one. The effect of pay TV is exactly the kind of factual information the agency staff should have on hand or be able to research from comments already submitted. The example confirms my suspicion that part of the agency pressure against *ex parte* limitations may be explained by the usual desire to follow the path of least resistance. It is simply easier for an agency to ask the parties than to investigate an issue itself. That does not mean it is impossible for the agency to do the latter. In other words, I am not persuaded that a ban on *ex parte* contacts would cause any reduction in the amount of information available in usable form to the commissioners. The ban would merely have the beneficial effect of providing an increased incentive for rulemaking participants and agency staffs to supply all the necessary information in a comprehensible form in the first instance. But there is another, even more serious, problem with your analysis. Suppose that the information given the commissioner is grossly erroneous. Or, to be more charitable, suppose that it is skewed in such a manner as to favor the interests of the party providing the information. If the information is provided by *ex parte* contacts, opposing parties will never even be aware of, let alone have a chance to correct, the distortion. As a result, if I were a broadcaster opposed to relaxing the pay-TV rules, I would not be comfortable with your seeking important information from potential beneficiaries of the change such as the Motion Picture Association without my being notified and given a chance to respond.

Publius

I will not prolong our discussion of models of the rulemaking process by an extended examination of the theoretical objections to your analysis. I merely point out that you have to answer a number of questions, such as the degree to which the "public inter-

est" is the product of "private interest" arbitration. I would, however, like to pursue some of the practical problems associated with your model of rulemaking.

I think you have not appreciated the practical limits to enforcing decision-making "integrity" in the administrative process. Take the kid-vid proceeding. Can you prevent Chairman Pertschuk from reading books on dental hygiene and nutrition to inform himself about the effects of sugared products on children, or from reading Piaget and other developmental psychologists to learn about children's perceptions and their ability to evaluate advertising messages? Probably not;¹⁵⁷ yet such self-education would seem open to precisely the same objections you raise against *ex parte* contacts.

Brutus

There are always enforcement problems. Let's not confuse these practical questions concerning compliance with the necessary normative judgments about what is proper. As I said earlier, it is important to establish normative criteria for due process even if their enforcement depends largely on self-discipline. After all, for the most part we already rely on that in the realms of both judicial and legislative behavior in regard to such matters as bias and pecuniary interest. Even the bias and conflict-of-interest provisions most clearly spelled out by statute or agency rules normally are enforced only by voluntary recusal. As you noted earlier, disqualification for bias is unusual even in adjudication. Besides, although we may be unable to eliminate all extrarecord influences—Pertschuk's perusal of Piaget, for example—we can and should eliminate those extrarecord influences that are most obnoxious because most distorted: those that involve communications with interested parties. With regard to the unavoidable extrarecord

¹⁵⁷ In addition to the practical impossibility of censoring a decision maker's reading, it seems to be firmly established that such efforts to acquire some modest degree of personal expertise on relevant issues is permissible. See 2 DAVIS TREATISE, *supra* note 29, § 15.03, which gives numerous examples of courts and agencies drawing on "legislative facts" outside the record of a particular case. A noteworthy recent example is *Roe v. Wade*, 410 U.S. 113 (1973), where, it is reported, Justice Blackmun spent two weeks in the library of the Mayo Clinic doing medical research on abortion for his opinion in the case. B. WOODWARD & S. ARMSTRONG, *THE BRETHREN* 229 (1979). Whether Justice Blackmun's extrajudicial investigation was appropriate depends perhaps on one's views of the Court's "legislative" role in the case. Compare Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) with Tribe, *The Supreme Court, 1972 Term—Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

influences, we may be concerned if Pertschuk's judgment about a particular case is shaped by his study of untested sources outside the record. But we can expect that most such generally available sources will be neutral with respect to the particular issues, both factual and legal, involved in the case. Moreover, these sources are not secret. The primary vice of *ex parte* contacts is the secrecy of the communication, which prevents any possibility of exposing factual errors or flaws in arguments.

Publius

Why do you assume that these outside sources will be neutral? Suppose AT&T hires a leading economist to present testimony in a rate case in support of the use of a particular economic theory to evaluate the reasonableness of certain rates.¹⁵⁸ Under *Home Box Office*, the FCC commissioner cannot consult him off the record about his testimony, but if the economist has also written a book or an article on the same issue and reached the same conclusion,¹⁵⁹ may the commissioner not read that?

Brutus

We are back to the point about enforcement. In addition, the same scenario could occur in adjudication. Because I take it that you are not advocating a change in the present ban on *ex parte* contacts in adjudication, your last argument must not be a very persuasive reason not to adopt such a ban in rulemaking.

Publius

I can suggest that the practical problems of enforcement of a ban on *ex parte* contacts in rulemaking will be more difficult than in adjudication because, one, there is less of a moral consensus about the impropriety of *ex parte* contacts in the former process

¹⁵⁸ See, e.g., AT&T (Telpak Tariff), 61 F.C.C.2d 587, 612, 631 (1976) (testimony of Professor William Baumol in support of incremental cost standard for judging reasonableness of AT&T rates), *on reconsideration*, 64 F.C.C.2d 971 (1977); 67 F.C.C.2d 1441 (1978), *aff'd in part, vacated in part, rev'd in part sub nom.* Aeronautical Radio, Inc. v. FCC, Nos. 77-1333 (D.C. Cir. Nov. 5, 1980), *petitions for cert. filed*, 49 U.S.L.W. 3620 (U.S. Feb. 9, 1981) (No. 80-1343), 49 U.S.L.W. 3664 (U.S. Feb. 20, 1981) (No. 80-1408).

¹⁵⁹ See Baumol & Walton, *Full Costing, Competition and Regulatory Practice*, 82 YALE L.J. 639 (1973) (incremental cost and fully distributed costs as standards for judging public utility rates). See also Baumol, *On the Proper Cost Tests for Natural Monopoly in a Multiproduct Industry*, 67 AM. ECON. REV. 809 (1977); Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 YALE L.J. 1 (1979).

and, two, it provides a greater opportunity to cheat. With regard to my first contention, the fact that ex parte contacts have been so long accepted, and are still consciously defended, is sufficient proof. As to the second, I note simply that any agency that wants to avoid the rule can easily do so by conducting all of its basic fact-finding process before a notice of rulemaking is issued. It is, of course, impossible for a communication to constitute an ex parte contact before there are any proceedings or parties. This approach is not merely a theoretical possibility. The FCC, for example, has quite often conducted preliminary "inquiries" prior to informal rulemaking.¹⁶⁰ Although this practice was common before *Home Box Office*, I predict that it will become the norm in the future. As a result, the "rulemaking" proceedings and their ban on ex parte contacts will become largely a formality.¹⁶¹

You could, of course, extend the ex parte ban to such "inquiries." But where do you stop? You cannot put the agency in a hermetically sealed container permanently insulated from all contacts. Yet that seems to be precisely what proponents of the "new due process" seek—witness the recent effort to apply the new rules to preclude ex parte communications between an executive agency and the White House.¹⁶² If the new due process rule persists for private ex parte contacts, we can expect to see it also being applied to block effective presidential, and perhaps even congressional, influence over the federal bureaucracy.¹⁶³

¹⁶⁰ See, e.g., *Inquiry into Economic Relationship between Television Broadcasting & Cable Television*, 71 F.C.C.2d 632 (1979). Sometimes an "inquiry" is combined with rulemaking. See, e.g., *Second Computer Inquiry*, 72 F.C.C.2d 358 (1979). What advantage the agency derives from tacking the label "inquiry" onto a rulemaking proceeding is not clear. Indeed, before *Home Box Office* the agency may not have attached any procedural importance to the distinction between an inquiry and an informal rulemaking. Presumably the only distinction was that a mere "inquiry" signaled to the public that the agency was not prepared to formulate even tentative rules. Since *Home Box Office*, however, the distinction between the two types of proceedings takes on substantial importance.

¹⁶¹ There is a hint of this evolutionary process in the recent FCC rulemaking proceedings on deregulation of cable television, which followed "inquiries" that thoroughly explored the issues, obtained public comment, and developed "tentative" decisions. See *Cable Television Syndicated Exclusivity Rules*, 71 F.C.C.2d 951 (1979); *Inquiry into Economic Relationship Between Television Broadcasting & Cable Television*, 71 F.C.C.2d 632 (1979).

¹⁶² See Verkuil, *supra* note 20, at 945-47.

¹⁶³ See Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1433-37 (1977); Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 500-06 (1979). Of course, if Chief Judge Wright's gloss of *Home Box Office* in *United Steelworkers* is accepted, the ex parte ban would be limited to parties with a financial stake in the outcome; in that case the rule presumably would be inapplicable to contacts by the legislature or the executive.

Brutus

This parade of horrors only confuses the central question and causes us to lose sight of the issue before us. The controversies over presidential and congressional control of the bureaucracy transcend the *Home Box Office* issue.¹⁶⁴ For example, the debate over White House intervention in executive agency rulemaking¹⁶⁵ is only partly related to the issue of ex parte contacts; it also involves what some perceive to be White House interference with objectives mandated by Congress.¹⁶⁶ Quite apart from the form that White House intervention takes—whether it is on or off the record—it is important that such intervention be faithful to the laws Congress has passed.

I mention this point not to suggest that we pursue it, but rather to put the due process issue in political perspective. It is, I think, naive to suppose that the controversy over presidential control and influence derives from *Home Box Office* or any other judicial precedent. It really arises out of the general political controversy over openness in government and control of our growing bureaucracy. These problems have been with us for several decades, and have prompted endless regulatory reform and government reorganization.¹⁶⁷ They have evoked more intense and controversial concern in recent years for a number of reasons, both political and economic—for example, celebrated abuses of power; the adverse impact of government programs on the economy; greater public awareness of and unhappiness with the magnitude of government intervention in the economy and society; and political competition between the President and Congress for control of the bureaucracy.

Publius

If we cannot pursue all of these political factors, can we never-

¹⁶⁴ For recent reviews of the executive and congressional roles in rulemaking, and the various legal issues raised, see authorities cited note 163 *supra*.

¹⁶⁵ See generally Verkuil, *supra* note 20; see also AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM 68-91 (1979) [hereinafter cited as ABA COMMISSION REPORT]. The concern caused by presidential intervention in regulatory affairs is scarcely a new one. See, e.g., H. FRIENDLY, *supra* note 6, at 147-62.

¹⁶⁶ ABA COMMISSION REPORT, *supra* note 165, at 78.

¹⁶⁷ Recent reform measures are summarized and reviewed in G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 98, at 801-83. Major effects prior to 1970 are noted in Robinson, *On Reorganizing the Independent Regulatory Agencies*, 57 VA. L. REV. 947 (1971). See also ABA COMMISSION REPORT, *supra* note 165, at 13-23.

theless discuss the role of law in all this? I agree that the present controversies over White House¹⁶⁸ influence on agency rulemaking go well beyond the question of rulemaking due process. But the due process question is in a sense the focal point on which much of the general controversy is now converging. Unfortunately, the rather narrow focus of the legal procedure question may well obscure the larger substantive issues, both political and legal, at stake. You did not respond to my point that the strict due process logic of the *Home Box Office* rule threatens a drastic and unwise restriction on the prerogative of the White House. Indeed, it threatens the prerogative of Congress as well. If the President is forbidden to communicate *ex parte* with the administrator of the Environmental Protection Agency over proposed environmental regulations, such contacts by senators or the Senate Committee on Government Operations would presumably be forbidden as well.¹⁶⁹ We are left with the following remarkable state of affairs: the President of the United States cannot tell his own executive departments what to do in carrying out his executive prerogatives, and Congress cannot give those departments its sense of its legislative mandate. You might conceivably explain barring White House intervention in independent regulatory agency rulemaking by the theory that agency policies are not subject to direct White House control.¹⁷⁰ In the case of congressional intervention, you could ar-

¹⁶⁸ The term "White House" is used to include both the President and his immediate advisors, who necessarily act as his surrogates in most interventions. See H. FRIENDLY, *supra* note 6, at 153-54. Most, but not all, of the current controversies involve intervention by White House aides. See ABA COMMISSION REPORT, *supra* note 165, at 74-78. On earlier interventions, see W. CARY, *POLITICS AND THE REGULATORY AGENCIES* 5-26 (1967).

¹⁶⁹ Thus, in *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966), the court forbade congressional intrusion in an agency adjudication. The intrusion consisted of interrogation of agency members in open public hearings. In *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972), the court invalidated a decision by the Secretary of Transportation approving construction of a bridge across the Potomac River, because it was made under congressional pressure. The pressure consisted of threats by the head of a House appropriations committee to delay appropriations for Washington's subway system until the Secretary approved the bridge construction. Although the case was not strictly legislative in character (and the court indicated that the result might have been different if it had been), neither was it in any way adjudicative.

Senator Dirksen would be appalled, and rightly so, that we had fallen to such a state. As he remarked a generation ago: "I have been calling agencies for 25 years. . . . Are we to be put on the carpet because we represent our constituents, make inquiries, and find out what the status of matters is, and so serve our constituents?" 105 CONG. REC. 14057 (1959). See also 5 U.S.C. § 557(d)(2) (1976) (rules barring *ex parte* contacts in adjudication are not authority to withhold information from Congress).

¹⁷⁰ This is the inference quite commonly drawn from *Humphrey's Ex'r v. United*

gue that any attempt to control agency policy exceeds Congress's prerogatives, which are limited to enacting laws, not overseeing their administration.¹⁷¹ But the *Home Box Office* ex parte ban presumably would forbid the President even to talk to his own Secretary of Labor about health standards regulations.¹⁷² This seems to me to be an absurd—and possibly unconstitutional¹⁷³—restriction.

Brutus

Again, you confuse the due process issue with the broader political question. Whatever may be permissible limits on the presidential power to direct independent agency policy or on the congressional power to oversee administration of the laws, what we are discussing here does not involve them. No one argues that the White House or Congress cannot seek to influence agency rules by communicating their views. They have at least as much right to do so as any private person. The relevant question is rather how such communications shall be made. On this view of the issue, we do

States, 295 U.S. 602 (1935) (removal of FTC commissioner). The qualifying word "direct" denotes that certain specific presidential prerogatives such as the appointments power and budgetary review can be used to influence policy. See Bruff, *supra* note 163, at 491-99. Beyond these kinds of controls, it is unclear how much legal authority the President has to direct (as distinct from political power to influence) the actions of independent agencies. Compare *id.* at 499 (authority to issue procedural directives) with Robinson, *supra* note 37, at 207-08, 208 n.89 (no basis for distinguishing between procedural and substantive directives under President's article II powers.) See generally P. Strauss, Presidential Authority over Regulatory Decisions (Oct. 23, 1980) (on file with *The University of Chicago Law Review*).

¹⁷¹ See *Buckley v. Valeo*, 424 U.S. 1, 121-22, 139-41 (1976) (per curiam); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 1042-43 (1975). See also *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972); *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966).

¹⁷² Cf. Demuth, *The White House Review Program*, REGULATION, Jan.-Feb. 1980, at 13, 19 (possible impropriety of President Carter's involvement in cotton dust case).

¹⁷³ See *Myers v. United States*, 272 U.S. 52, 117 (1926):

The vesting of the executive power in the President was essentially a grant of the power to execute the laws. . . . He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication . . . was that as part of his executive power he should select those who were to act for him under his discretion in the execution of the laws.

The context for this statement was the question whether Congress could deprive the President of the power to remove an officer of the executive branch. The power of selection and removal does not necessarily imply a power of unfettered discretion in direction, or indeed vice versa. See P. Strauss, *supra* note 170. It is, however, a fair inference from the Court's reasoning that at least the prerogative of selection and removal implies a coextensive prerogative of direction.

not need to become enmeshed in a consideration of separation of powers or constitutional prerogatives.

All that is being claimed is that once a rulemaking process is underway, any communications *intended to influence that proceeding*¹⁷⁴ must be made publicly, on the record, and with notice to other parties.¹⁷⁵ Just as in the case of the ban on private *ex parte* contacts, this merely expands on a principle already applied in nonrulemaking cases.¹⁷⁶

Publius

So you have now come full circle and returned to the earlier argument about whether adjudicatory due process is appropriately applied to rulemaking in general. I would rather raise a new question: whether executive or legislative intervention presents a special case where *ex parte* contacts should be permitted, regardless of the general rule. As I suggested earlier, the logic of *Home Box Office* seems clearly to extend to all extrarecord influences, whether the source is a private party or an official body. In either situation, the integrity of the process is compromised. Yet it seems unrealistic to treat the President or Congress as just another party in these cases. Each has special constitutional prerogatives to defend. It is true that these prerogatives are not absolute; in the case of adjudication, they are limited by the competing constitutional norms of due process.¹⁷⁷ But I am not aware of any comparable constitu-

¹⁷⁴ Under the *Home Box Office* formulation, any communications "relating to the disposition" of the proceeding are banned. 567 F.2d at 57 n.126 (quoting Exec. Order No. 11,920, 3 C.F.R. 121 (1976 Compilation)). The court did not consider the problem of general discussions of policy matters that may inadvertently touch on a pending rulemaking. Before *Home Box Office*, this problem was resolved by requiring intent to influence. See note 41 *supra*. Such a standard seems consistent with *Home Box Office*. There, the court conceded the need to maintain a general flow of information to the agency. Without this exception, it would be difficult or impossible to keep any informal information channels open. That is to say, if everyone with an interest in any pending rulemaking who discussed policy issues with the agency were subject to a strict liability standard with regard to the *ex parte* rules, virtually no contacts would be allowed.

¹⁷⁵ The recent report of the ABA Commission on Law and the Economy recommends that the President be given the power to direct agencies to consider, reconsider, modify, or reverse rulemaking actions, but specifies that such power be exercised in accordance with "applicable statutes or regulations governing the affected agency as to *ex parte* contacts." ABA COMMISSION REPORT, *supra* note 165, at 81.

¹⁷⁶ See, e.g., D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972); Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966).

¹⁷⁷ Cf. United States v. Nixon, 418 U.S. 683, 707-13 (1974) (general privilege of confidentiality of presidential communications superseded by due process requirements of criminal justice system).

tional requirements for rulemaking. On what basis, then, do the courts presume to limit the constitutional prerogatives of the President and Congress by forbidding them to exercise *ex parte* influence in agency rulemaking?

Brutus

I fail to see how any constitutional prerogative of Congress is involved. As you noted previously, Congress's power to enact laws does not imply any corresponding power to shape executive implementation of those laws. To repeat my earlier points, Congress may, and it certainly does, seek to influence agency policy—a "prerogative" shared with all members of the public. But I know of no special congressional constitutional prerogative in this area.

In the case of the President, a constitutional prerogative to influence agency action is more easily discerned, at least so far as the executive branch agencies are concerned. In fact, one of the core presidential prerogatives is the power to give general directions to officials in the executive branch on how to administer the laws and implement public policies. But even this prerogative is bounded. Suppose, for example, the President directs the administrator of the EPA to include a cost-benefit analysis in his review of state plans implementing air quality standards. Such a directive would be contrary to the Clean Air Act,¹⁷⁸ and the President's possession of *constitutional* prerogatives regarding enforcement does not give him the authority to override Congress's directions. The same is true of purely procedural matters: I take it the President cannot direct his Secretary of the Interior to disregard the Administrative Procedure Act and not provide public notice of and opportunity to comment on strip mining regulations. Can he nevertheless render the APA rulemaking process a sham by an *ex parte* contact directing the Secretary to disregard any comments received in opposition to the regulations as proposed?¹⁷⁹

Publius

To be sure, the President would exceed his authority by giving such an instruction. But I think you are trying to cover up a faulty

¹⁷⁸ See *Union Elec. Co. v. EPA*, 427 U.S. 246, 256-66 (1976) (EPA may not reject state pollution plan on grounds of economic infeasibility).

¹⁷⁹ See discussion of the controversy over the strip mining rules and the *ex parte* contacts by White House staff in ABA COMMISSION REPORT, *supra* note 165, at 75-76.

premise with a flawless, but irrelevant, logical deduction. In your hypothetical, the President's action is impermissible because it is an attempt to override a valid congressional directive, not because it was an *ex parte* contact. The fact is that Congress has not proscribed *ex parte* contacts in informal rulemaking. Such contacts therefore are not forbidden. Admittedly, Congress just recently imposed some restrictions on *ex parte* contacts in FTC rulemaking. But these were explicitly recognized as special regulations justified by the previous judicialization of FTC rulemaking.¹⁸⁰ That these special regulations were seen as necessary is a clear indication that Congress itself does not believe it has precluded *ex parte* contacts.¹⁸¹

Brutus

You had originally implied that the President had certain constitutional prerogatives to influence his executive officers, and I merely wanted to show that these prerogatives are not absolute,

¹⁸⁰ The Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 12, 94 Stat. 374 (amending 15 U.S.C. § 57a), essentially codifies a previous FTC practice rule requiring that all *ex parte* communications be made a part of the rulemaking record. (In the case of oral communications, a verbatim transcript was required.) See 16 C.F.R. § 1.18 (1980). To these agency requirements, Congress has added a requirement of advance public notice. Although the imposition of a notice and verbatim record requirement radically transforms the character of what *ex parte* contacts have typically been understood to be, it is noteworthy that, contrary to *Home Box Office*, Congress is explicit in permitting *ex parte* contacts that conform to these requirements. See also S. REP. NO. 500, 96th Cong., 1st Sess. 22-23 (1979), reprinted in [1980] U.S. CODE CONG. & AD. NEWS 2268, 2289-90. It is especially significant that these notice and record restrictions on contacts were seen as special to the FTC. Explaining the Senate bill's *ex parte* contacts provision—which was adopted by the conference committee, see H.R. CONF. REP. NO. 917, 96th Cong., 2d Sess. 32, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 2309, 2315—the Senate Report states:

By recommending adoption of special requirements for disclosure of *ex parte* communications between the rulemaking staff and the Commission in Magnuson-Moss rulemakings, the Committee does not endorse any general departure from the long-established requirements in rulemaking proceedings of other agencies. The Committee acknowledges the concern that, in other agency rulemaking proceedings, such requirements could unduly rigidify the decision process and unduly hamper internal communication, but the Committee recommends the application of disclosure requirements here because it feels that such requirements will not unduly hamper or rigidify Magnuson-Moss rulemakings.

S. REP. NO. 500, 96th Cong., 1st Sess. 22 n.7 (1979), reprinted in [1980] U.S. CODE CONG. & AD. NEWS 2268, 2290 n.7.

¹⁸¹ This inference draws further support from the fact that Senator Kennedy thought it was necessary to introduce a bill, S. 1291, 96th Cong., 1st Sess. (1979), that would have amended section 533 of the APA to extend restrictions on *ex parte* contacts to informal rulemaking.

but rather are subject to both substantive and procedural constraints as enacted by Congress or declared by the courts. You are correct in stating that Congress has not banned *ex parte* contacts in informal rulemaking; indeed one might even argue that it has implicitly approved them inasmuch as it recently adopted such a ban for on-the-record proceedings only.¹⁸² But Congress, like the rest of government, does not always appreciate the full legal force of its actions until the courts uncover the "inner logic." That is essentially what *Home Box Office* does. The *ex parte* ban is admittedly a judicial innovation, perhaps a fairly radical one, but it is ultimately derived from the legislative mandate of the APA requiring meaningful procedures and effective judicial review of agency action.

Publius

Your resort to the phrase "ultimately derived" is a bit like Justice Douglas's perception of a right of privacy in the "penumbras, formed by emanations" from the Constitution.¹⁸³ Unfortunately, some of us have difficulty in seeing these emanations. We are thus put in a position of anxious dependence on those fortunate enough to possess such vision.

Perhaps the emanations will be made more visible by future congressional action. But I doubt that Congress will endorse a flat ban on *ex parte* contacts in agency rulemaking. Significantly, it did not purport to do so in its recent FTC Act amendments. Congress certainly will not ban *ex parte* contacts to the extent of forbidding its own free-wheeling efforts to influence agency rules. Such a move would run contrary to the obvious motive for enacting legislative veto provisions—which is to provide congressional committees and staff the leverage to influence agency rules *before* they are adopted.¹⁸⁴

In any event, whether or not Congress endorses the *Home Box Office* rule, I see nothing but mischief coming from its general prohibition on all *ex parte* communications. I am not against formalized process in administrative regulation. I can even regard the development of hybrid-rulemaking requirements as benign. But

¹⁸² Sunshine Act, Pub. L. No. 94-909, § 4(a), 90 Stat. 1246 (1976) (codified at 5 U.S.C. § 557(d) (1976)); see H.R. REP. No. 880, 94th Cong., 2d Sess. 19, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2183, 2201.

¹⁸³ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

¹⁸⁴ See Bruff & Gellhorn, *supra* note 163, at 1409-12.

wholesale judicialization of rulemaking threatens to defeat the most desirable feature of the rulemaking process—its flexibility for obtaining information and opinion.

Brutus

Throughout our discussion the emphasis has been on *prohibiting* communications. Your latest objection might be remedied by emphasizing the *ex parte* aspect. It ought to be possible to permit informal contacts and exchanges of views but still to maintain a public record that would serve to notify other parties at least with regard to the occurrence and general subject matter of such contacts.¹⁸⁵

Publius

That does seem like an appealing compromise. I am disconcerted, however, by the thought that such a solution, like other recent record disclosure requirements,¹⁸⁶ will introduce even more complexity into administrative procedure. Is this the price of rational process, or an unnecessary encumbrance with little gain at high cost? I foresee the end result as being the creation of yet another mountain of official records, infested with an army of researchers wanting to know who talked to whom about what. No doubt the seekers of truth will not be content merely to look; they will want to challenge the accuracy or completeness of the records being disclosed.¹⁸⁷ More rules will be necessary, along with more bureaucrats to administer them.¹⁸⁸ Needless to say, the courts will

¹⁸⁵ The FCC, for example, has recently adopted rules requiring a record of outside contacts with decision makers during the pendency of all rulemaking proceedings to be kept and periodically published. See *Ex Parte Presentations*, 47 RAD. REG. 2d (P & F) 1213, 1222-25 (F.C.C. June 30, 1980). The requirements imposed on FTC rulemaking by the Federal Trade Commission Improvements Act of 1980 go further in requiring both a record and notice in advance of the contacts. See note 180 *supra*. See also ABA COMMISSION REPORT, *supra* note 165, at 81 (proposal for logging *ex parte* contacts with President and staff); Note, *supra* note 2, at 209-11 (proposing a public record for *ex parte* contacts, in addition to other restrictions: showing of good cause and limitation of contacts to period after the time for public comment is closed).

¹⁸⁶ The most notable example is 5 U.S.C. § 552 (1976).

¹⁸⁷ Such is the lesson to be learned from the extensive Freedom of Information Act litigation over the completeness of the records disclosed by the agency and agency claims of exemption. See generally Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1022-1163 (1975); Note, *The Freedom of Information Act: A Seven Year Assessment*, 74 COLUM. L. REV. 895 (1974).

¹⁸⁸ It is not known how many public employees are required to handle current FOIA requests. One report recently noted: "In 1978, 51,345 freedom of information requests were

have to be included in the game, to take a "hard look" for themselves at the records and record-keeping requirements in order to ensure full openness.¹⁸⁹ The courts will almost surely want more rules—and rulemaking.

Brutus

Subject to due process, I hope.

Publius

Of course. It will be as Grant Gilmore has predicted: "In Hell there will be nothing but law, and due process will be meticulously observed."¹⁹⁰

IV. POSTSCRIPT

Our dialogue is not merely inconclusive, it is incomplete, and not a little impressionistic in approaching the problems of rulemaking due process. Nevertheless, we were loath to try to impose greater order, certainty, or finality on this subject than we have found in the altogether modest jurisprudence that has so far developed. The most we can offer are a few closing observations about how the law and public attitudes are developing, where they may take us in the future, and what the implications are for the administrative process.

We began by pointing out the changing focus of the legal issues surrounding rulemaking—from questions of power to ques-

filed at the Department of Health, Education and Welfare, 56,466 at the Department of Defense (costing \$6 million to process), and 1,732 . . . at the FTC." Lemann, *Freedom of Information Act: More Helpful to Lawyers*, Washington Post, June 7, 1980, § A, at 3, col. 1. See also *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 613 n.14 (D.C. Cir. 1976) (FOIA requests occupied 191 full-time FBI employees in 1976); Weaver, *U.S. Information Act: Difficulties Despite Successes*, N.Y. Times, Aug. 8, 1977, at 1, col. 4. Some administrative law scholars have gone so far, in fact, as to call FOIA litigation and scholarship "one of the major growth areas of administration [sic] law." W. GELLHORN, C. BYSE & P. STRAUSS, *ADMINISTRATIVE LAW* 580 n.4 (7th ed. 1979). This is not to say that the costs of public disclosure necessarily outweigh the benefits, but they ought not to be incurred except for substantial reasons.

¹⁸⁹ Cf. *Ray v. Turner*, 587 F.2d 1187, 1191-95 (D.C. Cir. 1978) (scope of judicial review and procedures to be observed by agencies with respect to FOIA exemptions). The extent of judicial involvement can be seen in the recent Supreme Court interest in the subject. See, e.g., *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375 (1980); *Forsham v. Harris*, 445 U.S. 169 (1980); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980).

¹⁹⁰ G. GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977).

tions of process. That change is in part the predictable result of a maturing jurisprudence: questions of power are logically antecedent to questions of the process by which it is to be exercised. But the new focus on process has also unearthed some fundamental concerns about the uses of rulemaking that perhaps ought to have been—but were not—considered in the first instance when questions of power were foremost. At one time, the courts were so enthusiastic about the virtues of rulemaking as a tool for making policy that they virtually commanded its use in place of adjudication.¹⁹¹ Ironically, the courts now appear to be attempting to engraft adjudicatory formalities onto rulemaking.¹⁹² If, as Emerson said, "a foolish consistency is the hobgoblin of little minds,"¹⁹³ perhaps our minds are simply too small to detect the core of sense in this apparent inconsistency in attitude. It may be that what we see as inconsistency is merely the working out of a kind of rough Hegelian dialectic: the thesis of rulemaking virtues and antithesis of rulemaking vices may be resolving themselves into a new synthesis.

Just what that synthesis will be is unclear. One reason is that we have not yet developed any clear or enduring conception of how great a legislative role agencies should play in rulemaking. When the early law affirmed that agencies could and should use rulemaking to develop agency policy, it was largely in the limited context of deciding whether particular issues could be determined in rulemaking rather than adjudication.¹⁹⁴ Little attention was paid to the fact that the use for rulemaking as a tool inevitably implied a wider scope of *legislative* power to agencies than before. Broad legislative delegations of power to agencies were, of course, approved before the courts ever looked at the question of rulemaking as a means of exercising that power.¹⁹⁵ Even a very broad delegation of power to an agency may have little significance, however, if it can be exercised only through costly and time-consuming adjudi-

¹⁹¹ See, e.g., *Bell Aerospace Co. v. NLRB*, 475 F.2d 485, 495-97 (2d Cir. 1973), *rev'd*, 416 U.S. 267, 290-95 (1974).

¹⁹² See, e.g., *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973); *Appalachian Power Co. v. EPA*, 477 F.2d 495 (4th Cir. 1973). *But see* *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

¹⁹³ R. EMERSON, *ESSAYS: FIRST SERIES* 58 (1890).

¹⁹⁴ *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194 (1947); *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966).

¹⁹⁵ *Lichter v. United States*, 334 U.S. 742 (1948); *Fahey v. Mallonee*, 332 U.S. 245 (1947); *Yakus v. United States*, 321 U.S. 414 (1944).

catory processes. In that case, the agency's positions develop into legal values only through the slow evolution of case precedent. Such processes give far less rein to the exercise of delegated power than does the ability to promulgate general rules that are immediately binding and readily enforceable against all within the jurisdictional reach of the agency.

At the very least, the appearance of basic agency power has been enhanced as a consequence of recognizing rulemaking processes. For example, the FTC's power to remedy "unfairness" in the marketplace never received as much attention when it was used to shore up adjudicatory complaints against individual advertisements¹⁹⁶ as when it was used to challenge by rule a class of advertising by an entire industry.¹⁹⁷ The greater immediate reach of the rule made the agency appear much more threatening, even though it could have achieved the same result by a series of adjudications. Given the growing popular disenchantment with the pervasive bureaucratization of economic and social life, it seems inevitable that this apparent evidence of increased bureaucratic power in the form of rulemaking would prompt attempts to limit that power.¹⁹⁸

Limitations have appeared, or have been proposed, in different forms. One type is expressed by changes in the legislative charter, the most dramatic of which are exemplified by current trends in industry deregulation and other legislative alterations in the scope of agency mandates.¹⁹⁹ Less dramatic in effect but far more com-

¹⁹⁶ See, e.g., *Spiegel, Inc. v. FTC*, 540 F.2d 287 (7th Cir. 1976).

¹⁹⁷ See *Children's Advertising*, 43 Fed. Reg. 17,967 (F.T.C. 1978), suspended by the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374, discussed in note 180 *supra*.

¹⁹⁸ Also contributing to this increased attention was the decision of the Supreme Court in 1967 that agency rules are subject to preenforcement review. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). Although designed to protect regulated persons from the cost of compliance with a rule ultimately reversed, preenforcement review can also have the effect of precluding later challenges to the validity of a rule in a subsequent enforcement proceeding. See, e.g., *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 n.9 (1980). This denial of an effective opportunity for review—not a new phenomenon in the enforcement of agency policy or rules, see G. ROBINSON & E. GELLHORN, *THE ADMINISTRATIVE PROCESS* 84 (1974)—also seems a possible basis for the felt dissatisfaction with the rulemaking process. Cf. J. THIBAUT & L. WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975) (importance of participation to perceptions of justice); Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 591-93 (1972) (same); Walker, Lind & Thibaut, *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1416-17 (1979) (same).

¹⁹⁹ E.g., *Airline Deregulation Act of 1978*, Pub. L. No. 95-504, 92 Stat. 1705 (codified at 49 U.S.C. §§ 1301-1729 (Supp. III 1979)); *Clean Air Amendments of 1977*, Pub. L. No. 95-95,

mon is the legislative veto of agency rules²⁰⁰—a concept that has recently been incorporated into proposals for a presidential veto.²⁰¹

Against the background of these developments, the creation of procedural constraints on agency rulemaking takes on a slightly different coloration than we gave it in our dialogue. These procedural limits appear to be less an outgrowth of traditional due process concerns of fairness and accuracy in the application of law²⁰² than a negative reaction to the independent use of legislative power by agencies.

For just this reason one should expect the future of these kinds of limits to be tied directly to the larger trends. Despite the dissatisfaction with the *Home Box Office* ex parte rule, for example, one should not be surprised to see some such restriction incorporated into general legislation.²⁰³ It is even possible to foresee the ultimate adoption of a bias standard for rulemakers similar to that rejected in *National Advertisers*. More generally, it is foreseeable that hybrid rulemaking will increase, not diminish, *Vermont Yankee* notwithstanding.

We do not offer this forecast to suggest approval. On that score our dialogue is still unfinished. In large measure one's view depends on how one looks at the exercise of rulemaking power. We do think it likely that present trends, if continued, will cause some shift from rulemaking back to adjudication. The adjudicatory methods may not, as we noted, offer the same advantages to the agency as rulemaking in terms of establishing a broad range of easily enforceable legal power. But as open power becomes vulnerable to attack, it may be to an agency's advantage to employ less visible

91 Stat. 685-796 (codified at 42 U.S.C. §§ 7401-7626 (Supp. II 1978)) (112 pages of statutory specification).

²⁰⁰ See generally Bruff & Gellhorn, *supra* note 163; McGowan, *Congress, Court and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1975).

²⁰¹ See generally Bruff, *supra* note 163; Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395 (1975).

²⁰² This is the traditional due process case. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976).

²⁰³ An early forerunner is contained in the recent amendment to the Federal Trade Commission Act. See note 180 *supra*. At bottom, the issue of what if any limitations to impose on rulemakers in connection with evidence of bias or ex parte contacts, is a question of how our government should be structured and policy formulated—who should be allowed to participate and when. In regard to informal rulemaking, section 553 of the APA provides no guidance, for the current role of rulemaking in making policy was not anticipated by its framers. Nor does it seem appropriate for courts to supply a post hoc rule and rationalization for such a basic issue of governance.

methods of applying its delegated power.²⁰⁴

We do not profess to see the longer term implications of this new "synthesis." Logically it should follow that substantial constraints on the rulemaking process could diminish the scope of practicably enforceable agency power. One might even foresee that agencies will retreat to a more modest role of "filling in" legislative gaps, or serving as real, not merely fictional, arms of Congress.²⁰⁵ But this is heady speculation, and we are reluctant to indulge it on the basis of this dialogue.

²⁰⁴ See Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 YALE L.J. 982, 993-98 (1980) (contending that use of adjudication rather than rulemaking to achieve policy objectives renders those objectives less conspicuous and thus minimizes conflict with Congress).

²⁰⁵ For a very interesting analysis along these lines, see Ackerman & Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L.J. 1466 (1980).