



2-1-1981

Separation of Functions in Formal Licensing Adjudications

Harvey J. Shulman

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Harvey J. Shulman, *Separation of Functions in Formal Licensing Adjudications*, 56 Notre Dame L. Rev. 351 (1981).

Available at: <http://scholarship.law.nd.edu/ndlr/vol56/iss3/1>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Separation of Functions in Formal Licensing Adjudications

*Harvey J. Shulman**

TABLE OF CONTENTS

	<i>Page</i>
I. Introduction	352
II. The General Treatment under the APA of Separation of Functions in Formal Licensing Proceedings	355
A. <i>The Early Dispute over Separation of Functions</i>	355
B. <i>The Initial Licensing Exemption</i>	358
C. <i>Illustrative Uses of Separation of Functions in Agency Licensing Proceedings</i>	361
III. Section 554(d)(2) Separation of Functions Requirements	364
A. <i>"Investigative or Prosecuting" Functions in Accusatory Cases</i>	364
B. <i>"Investigative or Prosecuting" Functions in Non-Accusatory Cases</i>	367
C. <i>The Meaning of "Participate or Advise in the Decision, Recommended Decision, or Agency Review"</i>	370
IV. Section 554(d)(1) Separation of Functions Requirements	374
V. The Interplay between the <i>Ex Parte</i> Provision in Section 557(d) and the Separation of Functions Provision in Section 554(d)	377
VI. Separation of Functions under the Due Process Clause	380
A. <i>The Constitutional Framework</i>	380
B. <i>Interests at Stake in Licensing Cases</i>	381
C. <i>Risks of Error Associated with Combinations of Functions</i>	384
D. <i>Separation of Functions Safeguards or Other Procedural Requirements</i> ..	388
E. <i>Government Interests and their Relationship to a Requirement of Separation of Functions</i>	389
F. <i>Application of the Balancing Test to Particular Combinations of Functions</i>	391
1. Communications between Agency Adjudicators and Agency Regulatory Staff in Accusatory Proceedings	392
2. Communications between Agency Adjudicators and Agency Regulatory Staff in Non-Accusatory Proceedings ..	394
a. <i>Communications with Staff Advocates</i>	397

* Associate Professor of Law, The University of Oregon School of Law. B.S., University of Maryland, 1969; J.D., University of Michigan, 1972. This article was written while the author was on leave as the Special Assistant to the General Counsel of the U.S. Nuclear Regulatory Commission (NRC). It is based upon the author's preparation of "A Study of the Separation of Functions and *Ex Parte* Rules in Nuclear Regulatory Commission Adjudications for Domestic Licensing," NUREG-0670 (March 1980). The opinions expressed in this article do not reflect the views of the NRC. The author wishes to specially thank Mr. David F. Smith, a third year law student at the National Law Center, George Washington University, for his exceptional assistance in the preparation of this article, and Ms. Jeanette Williams and Ms. Darlene Collins, for their typing and organizing of the several drafts.

b.	<i>Communications with Staff Investigators or Reviewers</i>	398
c.	<i>Communications with Staff Witnesses</i>	399
d.	<i>Communications with Supervisors</i>	400
e.	<i>Communications with Non-Involved Staff</i>	401
3.	Communications between Various Adjudicators in Accusatory and Non-Accusatory Cases.....	401
VII.	An Examination of Alternatives for Achieving Separation of Functions Objectives	404
A.	<i>A Model Separation of Functions System in Licensing Cases: Agency Staff to Perform a Traditional Advocacy Role</i>	405
1.	Staff Advocates	405
2.	Staff Witnesses	406
3.	Staff Investigators or Reviewers	407
4.	Supervisors	408
5.	Consultations between Adjudicators	409
6.	Non-Involved Staff and Personal Staff	411
B.	<i>The Separated Staff System</i>	412
C.	<i>The Neutral Staff Concept</i>	415
VIII.	Conclusion.....	418

I. Introduction

Licenses issued by federal regulatory agencies are prerequisites to the pursuit of a wide range of private activities. Many of these licenses can be issued only after a hearing which is conducted at least partly as a formal adjudication under the Administrative Procedure Act (APA).¹ While the statutory requirement of a formal licensing hearing is not a new development,² much recent attention has focused on the permissible extent of private contacts between staff members involved in the licensing proceeding and agency decisionmakers. Although this issue has been raised previously in license suspension or revocation proceedings, significantly it is now also being raised in initial licensing proceedings.³ Those challenging agency procedures argue that decisionmaker-staff contacts taint the fairness of these procedures. Agencies respond that strict separation of functions of personnel would dilute the benefits of the institutional decisional process. This conflict between the need to protect the rights of private parties and the need for administrative efficiency constitutes the crux of the separation of functions controversy.

Since agencies were established to centralize expertise and thereby improve governmental decisionmaking, the question of intra-agency contacts may appear to be a non-issue. Staff members often work informally with a license applicant

1 5 U.S.C. § 554 (1976). *See, e.g.*, Surface Mining Control and Reclamation Act, 30 U.S.C. § 1264 (Supp. I 1977); Deepwater Ports Act of 1974, 33 U.S.C. § 1504 (1976); Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1341 (1976).

2 In cases of initial licensing or license modification, suspension or revocation, many statutes expressly provide for formal adjudications. *See, e.g.*, Federal Communications Commission Act of 1934, as amended, 47 U.S.C. §§ 309, 409 (1976); Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239 (1976).

3 In some instances, license holders or applicants themselves have challenged the agency for allowing such private communications. *See, e.g.*, Marathon Oil Company v. EPA, 564 F.2d 1253, 1264-65 (9th Cir. 1977). In other cases, intervenors have complained of these contacts. *See, e.g.*, San Luis Obispo Mothers for Peace v. Hendrie, 502 F. Supp. 408 (D.D.C. 1980) (dismissed on jurisdictional and exhaustion grounds); Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 880-88 (1st Cir. 1978).

in the pre-hearing stage, investigate allegations made against the license applicant or holder, or act as counsel for the agency during the formal adjudication itself. Also, the "institutional decision" has been hailed as one of the greatest assets of the present administrative system. As a result, allowing those agency staff members most familiar with a case to maintain regular contact with agency adjudicators to advise them on how to handle or decide the case seems appropriate.

In the adjudicatory process, however, an agency must protect those whose property and liberty interests may be affected by its decisions. Combining staff advisory, investigatory and adversarial functions may threaten fair and impartial decisionmaking. License applicants and licensees are understandably concerned when hostile agency investigators or advocates with knowledge of substantial information not in the formal case record are called upon to privately advise the agency decisionmakers. Similarly, intervenors contesting a license application are understandably alarmed when agency trial staff that have promoted the applicant's position advise agency decisionmakers privately.

The current tension between efficient agency decisionmaking and concerns for fairness has never been greater. Increasingly, agency decisions depend upon the assimilation and analysis of scientific or economic data which staff members most involved in the case can best provide. Also, as agencies have been opened to public interest representatives and competitors of license holders and applicants, license proceedings involve more parties in an adversarial situation. In this situation, fairness considerations regarding the competing parties are greater than ever.

In 1976 analogous fairness considerations were specifically addressed by Congress regarding *ex parte* contacts between interested private persons involved in formal adjudications and commissioners or other decisional employees.⁴ Private parties, much like agency staff members, possess knowledge about the issues which would be useful to agency adjudicators if presented privately and informally. However, the unfairness of such contact led to Congress's prohibiting it. Unfortunately, Congress has not adopted any generic legislation dealing with internal separation of functions since the passage of section 554 of the APA over 30 years ago.⁵ Thus, agencies and private parties have wrestled with agencies'

⁴ 5 U.S.C. § 557(d) (1976). It is important to distinguish between the terms "separation of functions" and "*ex parte*." Simply stated, separation of functions relates to the internal mechanisms in an agency whereby decisionmaking personnel are "separated" from (i.e., not permitted to consult with) other agency employees who perform investigatory or other functions. The bulk of § 554(d) of the APA deals with separation of functions. The term "*ex parte*" refers to communications made to a decisionmaker by only one side in a proceeding, without notice to other parties. It has more often been used to describe private contacts between persons outside an agency and agency decisionmakers. This is the use that Congress made of the term in § 557(d). It is also an appropriate term to describe the restrictions placed on an agency employee who presides over the receipt of evidence and who is prohibited from certain communications under § 554(d)(1).

To the extent that some agency employees can be viewed as parties to a proceeding, it is possible to use the term "*ex parte* communications" to refer to communications between them and agency decisionmakers. For example, the Nuclear Regulatory Commission's *ex parte* rule, 10 C.F.R. § 2.780 (1980), has been applied to intra-agency communications and has, through interpretation, created far more barriers to such communication than the agency's separation of functions rule, 10 C.F.R. § 2.719 (1980). However, since the term "separation of functions" is more accurate in that situation, it is used in this article.

⁵ During the 96th Congress, committees in the Senate and the House of Representatives did propose new legislation which would have clarified many of the ambiguities in the current APA and, for the most part, would have mandated more stringent separation of functions rules. SEN. COMM. ON GOVERNMENT-

own statutes and procedural rules to resolve the tension inherent in any separation of functions scheme.

In recent years various agencies' separation of functions procedures have spurred criticism. Reaction to the approaches of the Nuclear Regulatory Commission (NRC) and the Environmental Protection Agency (EPA) illustrates the controversy engendered and the difficulty of balancing competing policies. Although the NRC takes a very strict approach toward separation of its staff, and the EPA has adopted a more lenient system, both approaches have been criticized.⁶

In its report, the President's Commission on the Accident at Three Mile Island found that the NRC commissioners "have adopted unnecessarily stringent *ex parte* rules to preserve their adjudicative impartiality . . ." Although the President's Commission declined to make any recommendations regarding these rules, the report of the Chief Counsel of the President's Commission blamed the *ex parte* rules, in part, for the "strained communication system within NRC" which interferes with the agency's ability to protect public health and safety.⁸ The Chief Counsel's Report noted that, although not required by the APA, the NRC's *ex parte* rules apply to initial licensing cases and to all NRC staff.⁹ Thus, the report suggests that if the NRC were willing to relax its *ex parte* rules, many of the agency's problems could be better resolved. Similarly, the "Rogovin Report" concluded that NRC members are isolated "from detailed consideration of case-related safety issues by the so-called '*ex parte* rule.'" ¹⁰ The report stated that the NRC rule goes far beyond APA requirements in separating commissioners from "those within their own agency who have the most knowledge and expertise about those questions."¹¹ The Rogovin Report called for the NRC *ex parte* rule to be "very significantly limited and applied more rationally."¹²

While the NRC was criticized for inefficiency because it strictly adhered to its procedures to assure fairness, the EPA was criticized for neglecting fairness in attempting to maximize efficiency. The EPA attempts to maximize efficiency in its decisionmaking while safeguarding fairness by giving its staff a neutral posture in some proceedings. The EPA has formulated a system of "non-adversary" pro-

TAL AFFAIRS & SEN. COMM. ON THE JUDICIARY, REFORM OF FEDERAL REGULATION: JOINT REPORT, S. REP. NO. 1018, pt. 1, 96th Cong., 2d Sess. (Oct. 30, 1980) (to accompany S. 262, 96th Cong., 2d Sess. (1980)); H.R. REP. NO. 1393, 96th Cong., 2d Sess. (Sept. 25, 1980) (to accompany H.R. 3263, 96th Cong., 2d Sess. 1980)). Both bills died without further action in the lame duck session of the 96th Congress.

6 The controversy over separation of functions was most recently reflected at the December 1980 plenary meeting of the Administrative Conference of the United States. The Conference's Ad Hoc Committee on Separation of Functions offered a lengthy recommendation which called upon agencies with strict separation of functions rules, like the NRC, to liberalize those rules. After extensive debate, the recommendation was tabled and the Committee was instructed to revise its proposal for re-submission to the June, 1981 plenary session. *Legal Times* of Washington, Dec. 15, 1980 at 4.

7 U.S. PRESIDENT'S COMMISSION ON THE ACCIDENT AT THREE MILE ISLAND, REPORT OF THE PRESIDENT'S COMMISSION ON THE THREE MILE ISLAND ACCIDENT [hereinafter cited as PRESIDENT'S COMMISSION REPORT] 51 (1979). The NRC's *ex parte* rule has been used like a separation of functions rule. See note 4 *supra*.

8 REPORT OF THE OFFICE OF CHIEF COUNSEL ON THE NUCLEAR REGULATORY COMMISSION [hereinafter cited as CHIEF COUNSEL'S REPORT] 31 (1979).

9 *Id.* at 40. The NRC is considered a "party" to such cases.

10 NRC SPECIAL INQUIRY GROUP, THREE MILE ISLAND: A REPORT TO THE COMMISSIONERS AND TO THE PUBLIC [hereinafter cited as ROGOVIN REPORT] 141 (1980).

11 *Id.*

12 *Id.*

cedures for initial licensing whereby a panel of experts cross-examines witnesses, evaluates evidence, and advises the EPA Administrator in rendering the decision. Unlike an adversarial trial staff, the panel is designed to be impartial in the hearing. In a hearing on a water permit for the Seabrook nuclear power plant, the EPA used and directed its staff "not to appear at this hearing as proponents of any particular result, and avoid to the extent possible taking any adversary position in it."¹³ Later, staff members who had taken a neutral part in the hearing were able to advise the Administrator in making the decision. In a lawsuit challenging EPA's procedure, the Seacoast Anti-Pollution League (SAPL) unsuccessfully argued that the staff was required by law to take a side since it was a party to the proceeding and had a mandate to protect the environment. In remaining neutral in order to be able to advise the decisionmaker, SAPL argued, the staff had neglected its role as a zealous advocate of the public interest.

Although the court rejected SAPL's argument, the case suggests the variety of available perspectives on the separation of functions issue and the proper role of agency staff. Various agencies give their staffs different roles and create different separation of functions problems. This article addresses the statutory and constitutional principles regarding separation of functions in formal license proceedings which must be resolved on the basis of the record, how such principles might apply to different agency staff configurations, and the policy implications of different systems of separation of functions presently in use or proposed for use in connection with formal licensing adjudications.

II. The General Treatment Under the APA of Separation of Functions in Formal Licensing Proceedings

A. *The Early Dispute over Separation of Functions*

Separation of functions caused a major dispute among drafters of the APA. As early as 1941, when administrative agency reform became the topic of proposed legislation, separation of functions was debated. The 1941 bills grew out of the Report of the Attorney General's Committee on Administrative Procedure.¹⁴ Although the Committee agreed on a broad range of administrative reforms, separation of functions produced sharp disagreement. A minority of the Committee advocated a complete separation of functions, with one agency making rules and formulating policy, and another agency deciding cases. This organization was likened to the separation between the Internal Revenue Service and the Tax Court.¹⁵ However, the Committee majority rejected complete separation and proposed internal separation of functions like that eventually established in the APA. Prosecutors and decisionmakers could work in one agency provided they engaged in no private consultation on cases before the agency. This prohibition

¹³ *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 307 (1st Cir. 1979).

¹⁴ In 1939 the Attorney General requested a committee to investigate existing administrative practices and to recommend improvements. President Roosevelt, in anticipation of the Attorney General's Report, vetoed in 1940 the Walter-Logan Bill, which Congress passed and which would have made significant changes in administrative agency procedures. In January 1941, the Attorney General's Report was issued.

¹⁵ FINAL REPORT OF THE ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE [hereinafter cited as 1941 ATTORNEY GENERAL'S REPORT] 207-08 (1941). See also *Hearings on S. 674, S.675 and S. 918 Before the Sen. Comm. on the Judiciary*, 77th Cong., 1st Sess. [hereinafter cited as *1941 Hearings*] 1308-28 (1941).

would assure that prosecutorial staff would not provide biased advice to decisionmakers and would also help preclude interpolations from facts not on the record but attributable to the staff's *ex parte* familiarity with the case.

The majority view was premised largely on the cost and duplication of effort inherent in complete separation. The Committee majority also noted that complete separation was not necessary to achieve fairness. Nonetheless, both the majority and minority agreed fairness was crucial in any administrative agency process:

[I]nvestigators, if allowed to participate would be likely to interpolate facts and information discovered by them *ex parte* and not adduced at the hearing, where the testimony is sworn and subject to cross-examination and rebuttal. . . . A man who has buried himself on one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions. Clearly the advocate's view ought to be presented publicly and not privately to those who decide.¹⁶

The majority's solution to the need for fairness—internal separation of functions—was adopted by the framers of the APA in 1945-46.¹⁷ Yet the separation of functions requirements in subsection 554(d)(2)(A) contain an exemption for "determining applications for initial licenses." To understand how the exemption arose and whether it is consistent with the concern for fairness requires an examination of the exemption's legislative history¹⁸ and its relationship to the basic dichotomy in the APA between adjudication and rulemaking.

The initial licensing exemption grew from generalizations which may not hold true in particular instances.¹⁹ In exempting such matters as the granting of certificates of convenience and necessity which are of indefinite duration, Congress relied upon the theory that "in most licensing cases the original application may be much like rulemaking."²⁰ Unfortunately, however, because there is little elaboration upon the similarities between initial licensing and rulemaking, one must resort to general principles for guidance. Although a rule may be of general or particular applicability, it is essentially future oriented and its adoption is typically based primarily on questions of policy rather than evidentiary fact. In

16 1941 ATTORNEY GENERAL'S REPORT, *supra* note 15, at 56.

17 5 U.S.C. § 554(d) (1976). *See* APA LEGISLATIVE HISTORY, SENATE DOCUMENTS Vol. 8, 79th Cong., 2d Sess. [hereinafter cited as SENATE DOCUMENTS] 24-25 (1946). The draft bill recommended by the majority had no separation of functions provisions, but the APA clearly incorporated what was the majority position on this issue.

18 As a general proposition, there is no need to examine legislative history when the terms of a statute are clear. However, despite superficial appearances, the exemption for "initial licenses" is sufficiently unclear to have required several paragraphs of interpretation in the ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947) at 50-53. Furthermore, "ambiguity is not uniformly insisted on as a prerequisite to the use of aids to construction. Thus it has been said that '[u]sually a court looks into the legislative history to clear up some statutory ambiguity . . . but such ambiguity is not the *sine qua non* for a judicial inquiry into legislative history,' and that 'the plain meaning rule . . . is not to be used to thwart or distort the intent of Congress by excluding from consideration enlightening material from the legislative files.'" 2A C. SANDS, STATUTES & STATUTORY CONSTRUCTION § 48.01 at 182 (4th ed. 1973) noting *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955).

19 When an initial licensing proceeding is "accusatory in form" and involves sharply contested factual issues, Congress apparently did not intend the initial licensing exemption to apply. *See* text accompanying notes 28-41 *infra*.

20 U.S. DEPT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT [hereinafter cited as 1947 ATTORNEY GENERAL'S MANUAL] 50 (1947) (citing SENATE DOCUMENTS, *supra* note 17, at 203, 262 in support). The APA does not require separation of functions for rulemaking.

turn, policy determinations most often rely upon "legislative facts"²¹ of a broad or general nature.²² The 1947 Attorney General's Manual states that:

The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policymaking conclusions to be drawn from the facts.²³

Given the nature of rulemaking, consultations between decisionmakers and staff were considered necessary because staff expertise offered decisionmakers a thorough understanding of technical matters and legislative facts from which policy alternatives might emerge. Additionally, agency employees marshalling material for rulemaking could be guided by the decisionmaker's expression of the policy considerations most important to their decisions. Thus, if even in formal rulemakings before an intra-agency lower tribunal or an administrative law judge, decisionmakers can consult with agency staff experts who assist agency heads in making policy decisions, "the intermediate decisions will be more useful to the parties in advising them of the real issues . . ."²⁴ Furthermore, in rulemakings, unlike adjudications, consultations between staff experts and decisionmakers were not thought to involve the same "Anglo-American tradition" of fairness. In short, in Congress's view, there was much to be gained and nothing to be lost by allowing such consultations in rulemakings.

Unlike rulemakings, adjudications are not usually future oriented. As the 1947 Attorney General's Manual suggests, a different type of fact finding is involved in adjudication. The decisionmaker must determine "evidentiary facts, as to which the veracity and demeanor of witnesses would often be important"²⁵ because

[a]djudication is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action. Or, it may involve the determination of a person's right to benefits under existing law so that the issues relate to whether he is within the established category of persons entitled to such benefits. In such proceedings, the issues of fact are often sharply controverted.²⁶

Thus, in Congress's view, two factors distinguishing rulemaking from adjudication justified establishing a separation of functions requirement for adjudication but not for rulemaking: the accusatory nature of many adjudications and the

21 "Legislative facts" are "ordinarily general and do not concern the immediate parties." 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 15.03 at 353 (1958). See also 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 12:3 at 413 (2d ed. 1979).

22 The classic example given is the Civil Aeronautics Board's proceedings for the issuance of certificates of convenience and necessity. In licensing an airline for a new route, certain relevant facts are considered (e.g., the extent of passenger travel between two cities, the number of existing routes, income to airlines on a route, etc.). Some of these facts may favor approval of a certificate, and others may support denial. Many of these relevant facts might be assumed or uncontested. Most important is the weight to be given to the respective factors in light of developing agency policy towards airline travel, competition and the like.

23 1947 ATTORNEY GENERAL'S MANUAL, *supra* note 20, at 14. See also 1941 Hearings, *supra* note 15, at 657, 1298, 1451.

24 1947 ATTORNEY GENERAL'S MANUAL, *supra* note 20, at 15.

25 *Id.* at 14.

26 *Id.* at 14-15.

customary dispute over evidentiary facts. Although there may be benefits in consultations between agency staff and decisionmakers in adjudications, "fundamental principles of due process" dictate that the decisionmakers should not be exposed to off the record input from parties or staff intimately associated with making the case for or against those parties.²⁷ Because such staff might develop the zeal of advocates in accusatory proceedings, they would abandon the proper state of mind for providing neutral and dispassionate advice to decisionmakers.

B. *The Initial Licensing Exemption*

Generalizations about the differences between rulemaking and adjudication may have been seriously questioned and undermined over the years.²⁸ Nonetheless, the generalizations formed the basis for the initial licensing exemption. Having found separation of functions unnecessary in rulemaking, and initial licensing more akin to rulemaking than adjudication, Congress could readily create an exemption from separation of functions requirements for initial licensing proceedings.²⁹ However, the APA's legislative history indicates that Congress realized its generalizations about initial licensing would not always apply. The Senate Judiciary Committee stated that when initial licensing cases are "accusatory in form *and* involve sharply controversial factual issues," agencies "should not apply the exceptions in such cases, because they are not to be interpreted as precluding fair procedure where it is required."³⁰ Thus, the initial licensing exemption is not as broad as it may appear.³¹ If an initial licensing proceeding involves "sharply controversial factual issues" *and* is "accusatory in form," separation of functions should be applied.³² Although the phrase "sharply controversial factual issues" requires little explanation, Congress's meaning of the phrase "accusatory in form" warrants further inquiry.

In hearings on administrative procedure bills proposing separation of functions, discussion had focused upon adjudications because they are primarily accusatory. According to the 1941 Attorney General's Report, the two proceedings in which a combination of functions was least desirable were those in which "either the agency initiates proceedings on its own motion, or private parties make

27 *Id.* at 55.

28 I K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.01 at 285-94 (1958).

29 Obviously Congress did not believe that initial licensing should be considered more like rulemaking than adjudication in terms of the other protections accorded the applicant for an initial license (see 5 U.S.C. §§ 554(a)-(c); 555; 556(a)-(c), (e); 557(a), (c), (d); 558(c) and portions of §§ 556(d), 557(b) (1976)).

30 SENATE DOCUMENTS, *supra* note 17, at 204 (emphasis added). In its general comments on the bill, the Senate Judiciary Committee noted that it had "expressed its reasons for the language used and has stated that, where cases present sharply contested issues of fact, agencies should not as a matter of good practice take advantage" of the initial licensing exemption. *Id.* at 216. While this summary omits the requirement that the proceeding be accusatory, as well as involve controverted facts, the more specific language earlier in the report more accurately presents the Committee's intent.

31 Examining the APA's legislative history in 1948, Professor Davis concluded that the congressional intent "to draw a line between accusatory proceedings and policy-making proceedings was so strong as to impel the suggestion that the line should govern even in the face of words of the Act which seem to put the line elsewhere." Davis, *Separation of Functions on Administrative Agencies*, 61 HARV. L. REV. 612, 637 (1948). Professor Davis suggested that "[p]erhaps interpretation should strive to give maximum weight to references in the legislative history to the line between accusatory proceedings and policy-making proceedings, and to give minimum weight to the literal meaning of the words 'initial license.'" *Id.* at 640.

32 The 1947 ATTORNEY GENERAL'S MANUAL states that the separation of functions provision was meant to apply to "all those phases of licensing in which accusatory or disciplinary factors are, or are likely to be, present." 1947 ATTORNEY GENERAL'S MANUAL, *supra* note 20, at 51.

complaints and the agency then makes those complaints its own."³³ The Senate Judiciary Committee print of the original bill introduced by Senator McCarran in 1945 explained in a note to what is now section 554(d) that separation of functions applied "in so called 'accusatory' proceedings."³⁴

Thus, although the APA exemption for initial licensing was originally proposed to be applicable to all "applications for licenses," the Senate Judiciary Committee inserted the word "initial":

It is apparent from the legislative history that the word "initial" was inserted in the exception to distinguish original applications for licenses, i.e., any agency "approval" or "permission," from applications for renewals of licenses. This is entirely consistent with the underlying analogy of initial licensing to rule making, because renewal proceedings frequently involve a review of the licensee's past conduct and thus resemble adjudication rather than rule making.³⁵

The phrase "accusatory in form" is perhaps most readily understood by examining the separation of functions rule as applied to adjudications. Congress viewed adjudications as frequently concerned with the lawfulness of past conduct. The phrase "accusatory in form" thus refers to proceedings involving violations of laws or rules and not proceedings in which general derogatory charges are made.³⁶ Congress thus chose to prevent decisionmakers from obtaining advice from staff members performing "investigative or prosecuting functions."³⁷ The statute's reference to "prosecuting functions" implies the narrow, legal interpretation of the term "accusatory in form," rather than its popular definition.³⁸ Thus, a proceeding is "accusatory in form" if it involves charges of violations of law or rules.³⁹

Although the "initial licensing" exemption is not as broad as its language indicates,⁴⁰ it does apparently apply to proceedings to amend and modify licenses. The Attorney General's Manual states that:

33 1941 ATTORNEY GENERAL'S REPORT, *supra* note 15, at 208.

34 SENATE DOCUMENTS, *supra* note 17, at 24.

35 ATTORNEY GENERAL'S MANUAL, *supra* note 20, at 52.

36 "In its popular sense 'accusation' applies to all derogatory charges or imputations, whether or not they relate to a punishable offense, and however made, whether orally, by newspaper, or otherwise. . . . But in legal phraseology, it is limited to such accusations as have taken shape in a prosecution." BLACK'S LAW DICTIONARY 39 (4th ed. 1968).

37 5 U.S.C. § 554(d)(2) (1976).

38 As explained later, the term "investigative" must be viewed in this same light—i.e., an investigation leading to a prosecution, or to charges of conduct violative of law or rule. See text accompanying notes 76-77 *infra*.

39 There is a question about how the separation of functions rule should apply when a proceeding only partially involves an accusatory element (i.e., there are charges of wrongdoing, accompanied by other, non-accusatory issues). Congress did not provide guidance on this matter. However, where the accusatory element is significant, the entire proceeding should be viewed as "accusatory in form." As a result of the accusations, participants in the proceedings (including agency staff) can be forced into "taking sides" with the result that impartiality or the appearance of impartiality on the non-accusatory issues may be difficult or impossible to achieve. However, a different view of the matter is not unreasonable—i.e., that initial licensings can be separated into accusatory and non-accusatory issues so as to disallow the use of the exemption for the former issues, but to permit it for the latter issues. Also, the proceeding in which the accusation is being made need not be a prosecution in the precise meaning of that word. For example, if it is suggested that an initial license be denied to an applicant because he has violated several laws and regulations with regard to an already licensed facility, the proceeding could be said to be "accusatory in form"; the "penalty," rather than a fine, is a denial of a new license.

40 The Congressional committees which proposed the 1980 regulatory reform legislation stated that there is no separation of functions requirement under the APA in initial licensing cases. S. REP. NO. 1018, 96th Cong., 2d Sess. 85-86 (Oct. 30, 1980); H.R. REP. NO. 1393, 96th Cong., 2d Sess. 34 (Sept. 25, 1980). This overbroad conclusion evidences a lack of knowledge of the clearly expressed intentions of the Con-

In view of the function of the exemption, the phrase "application for initial license" must be construed to include applications by the licensee for modifications of his original license. In effect, this gives full meaning to the broad definition of "license" in section 2(e), i.e., "the whole or part of any agency *permit*, certificate, *approval*, registration, charter, membership, statutory exemption or *other form of permission*. . . ." In other words, the definition clearly suggests that any agency "approval" or "permission" is a license, regardless of whether it is in addition to or related to an earlier license. Only by such a construction can the appropriate procedures be made applicable to those aspects of licensing which are dominated by policy making considerations and in which accusatory and disciplinary factors are absent. In this way, the basic dichotomy of the Act between rulemaking and adjudication is preserved, because section 5(c) will remain applicable to licensing proceedings involving the renewal, revocation, suspension, annulment, withdrawal or the *agency-initiated* modification or amendment of licenses—i.e., all those phases of licensing in which the accusatory or disciplinary factors are, or are likely to be, present.⁴¹

To some extent, this logic is persuasive. Since Congress believed that policy questions and legislative facts predominate in initial licensing, it is reasonable to conclude that similar questions and facts will predominate in proceedings involving amendments or modifications requested by a licensee. In contrast, agency initiated license proceedings, especially renewals and revocations, might involve accusatory elements and sharply disputed adjudicative facts. Following the reasoning behind the separation of functions provision, licensee originated modification proceedings might not require separation of functions while agency initiated proceedings would.

However, such general conclusions have only limited applicability. For example, if the NRC staff decides that because of recently conducted test results, changes in a license are needed to better protect the public, the NRC will likely persuade the licensee to file a formal application. If the licensee files such an application, the initial licensing exemption would apparently apply. However, if the licensee remains unpersuaded of the staff's position and the agency itself must initiate action, there is little basis for concluding the amendment proceeding has become accusatory in nature. Although the proceeding may be contested by the staff and the applicant, the proceeding differs little functionally from a contested, but non-accusatory, initial licensing case. In non-accusatory initial licensing cases separation of functions does not apply. Yet the 1947 Attorney General's Manual appears to require the separation of functions rule's application to agency initiated amendment proceedings. Similarly, not all renewals, revocations or suspensions are accusatory in nature and should not require application of the separation of functions rule. For example, the NRC license revocations or suspensions may be necessitated by new technology in earthquake prediction or a changed policy regarding emergency evacuation plans.

Despite the breakdown in the generalizations made by Congress when it adopted the APA, it seems clear that Congress intended the initial licensing exemption to include licensee initiated amendments and modifications,⁴² on the

gress which adopted the APA that separation of functions should be applied in contested, accusatory, initial licensing cases.

41 ATTORNEY GENERAL'S MANUAL, *supra* note 20, at 51 (emphasis in original) (citation omitted).

42 Even licensee-initiated modifications may not be considered to be "initial-licensing," as is illustrated by an early District of Columbia Circuit case which wrestled with the question of what falls into the "initial licensing" category. In *Chotin Towing Corp. v. FPC*, 250 F.2d 394 (D.C. Cir. 1957), the court

general assumption that such proceedings will not be accusatory. In contrast, Congress appears to have intended that agency initiated amendments or modifications, and all revocations, suspensions, renewals and the like, should not come within the initial licensing exemption on the general assumption that these proceedings will likely be accusatory. These conclusions are supported by the Attorney General's findings that they are consistent with the APA's general dichotomy between rulemakings and adjudication and the legislative history of that statute.⁴³ However, in the modern era when many licenses are issued, amended, suspended or revoked on scientific or economic grounds, without any accusations of misconduct, the aforementioned distinctions seem unreasonable and outmoded.⁴⁴

C. *Illustrative Uses of Separation of Functions in Agency Licensing Proceedings*

Reviewing several federal agencies' licensing practices reveals the practical dimensions of the separation of functions controversy. Because of the initial licensing exemption's uncertain limits, only the EPA presently takes full advan-

examined an application to abandon a pipeline as a natural gas facility and to use it instead for transportation of petroleum products. The court held that this was not an application for an initial license, despite the fact that it was not an accusatory adjudication and the licensee had initiated the process. The court adopted the "common sense" principle suggested by petitioners that an "application to withdraw, limit, terminate or modify all or part of . . . existing rights and obligations established in an outstanding license is not an application for an initial license." *Id.* at 395. *Chotin Towing* thereby indicates the confusion over whether license modifications, even in non-accusatory proceedings initiated by a licensee, come within the "initial licensing" exemption to § 554(d). Without reference to the ATTORNEY GENERAL'S MANUAL and relying upon only a tiny excerpt from the APA's legislative history, the Ninth Circuit expressed its approval of the *Chotin Towing* decision in *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1264 (9th Cir. 1977).

43 Referring to a Senate Committee Report on the initial licensing exemption, the Attorney General noted that the inapplicability of the exemption to amendments or modifications was meant to include only those amendments or modifications imposed by the agency on the ground that in such proceedings, as in renewal proceedings, the issues would often relate to the licensee's past conduct. ATTORNEY GENERAL'S MANUAL, *supra* note 20, at 52.

44 Indeed, Congress itself may now be willing to revisit the distinctions it made 40 years ago. The regulatory reform bills reported by the Senate and House committees in 1980 would have amended the APA so as to require separation of functions in all formal adjudications conducted under § 554. In particular, the initial licensing exemption would have been abolished for such adjudications. S. REP. NO. 1018, 96th Cong., 2d Sess. 147 (Oct. 30, 1980) would have deleted § 554(d)(2)(A). H.R. REP. NO. 1393, 96th Cong., 2d Sess. 15 (Sept. 25, 1980) would have recodified § 554(d) as § 556(e) and deleted § 554(d)(2)(A).

In addition, however, both committees provided for "expedited" hearing procedures in certain types of formal adjudications (i.e., in any proceeding "which predominantly concerns policy issues of a general character, including . . . initial licensing, rather than a proceeding which predominantly concerns specific factual questions requiring trial-type procedures for their resolution, except that this subsection shall not apply to any proceeding to impose civil penalties or fines or otherwise to establish that a culpable violation of law has been committed by any person . . ."). S. REP. at 147-48. Similar language was used by the House committee. H.R. REP. at 14. The Senate version of the expedited hearing procedures does not contain a separation of functions requirement, but the House committee's bill would prohibit agency employees who perform "investigative or litigating functions for an agency in a proceeding" from giving private advice to decisionmakers in that expedited proceeding.

The failure of the two committees to agree on whether separation of functions should be applied in expedited cases should not obscure a more significant development. Under both bills, unless an agency can take advantage of the expedited procedures, it must utilize formal procedures that include separation of functions. Accusatory-type cases could not be conducted according to expedited procedures, and hence separation of functions would continue to apply, as presently. But, according to these bills, in non-accusatory cases as well, where "specific factual questions requiring trial-type procedures" predominate, the expedited procedures would appear not to be available (even in initial licensing cases) and thus separation of functions would be necessary. Accordingly, two of the distinctions made under the present APA (the initial/non-initial licensing distinction and the accusatory/non-accusatory distinction) may soon disappear, to be replaced by an adjudicatory scheme under which all cases that involve predominantly factual questions requiring trial-type resolution will be subject to separation of functions requirements.

tage of the exemption. Adopted in 1979, the EPA's "Non-Adversary Procedures for Initial Licensing" for National Pollutant Discharge Elimination System (NPDES) permits⁴⁵ embrace the APA rationale that strict separation of functions is not required in initial licensing cases because the final decision depends primarily on "highly discretionary judgments on a variety of legal and factual issues" and because the proceeding is non-accusatory.⁴⁶ To avoid the adversary or accusatory format, the EPA dispenses with a trial staff in most cases and substitutes a non-adversarial panel of experts. The panel cross-examines witnesses, evaluates the evidence, and advises the presiding officer on the initial decision. When a trial staff is involved, however, separation of functions provisions apply. EPA initial license hearings rely primarily on written evidence and argument. Oral argument is available at the discretion of the presiding officer. Upon appeal of the initial decision, the Administrator may receive advice from only staff members "without substantial prior connection with the matter." However, the "unconnected" staff members may freely consult the presiding officer, the panel, or any other staff members.⁴⁷

The NRC takes advantage of the initial licensing exemption only in uncontested initial licensing proceedings. In such proceedings, the presiding officer may consult any staff member as well as licensing board panel members not assigned to the case.⁴⁸ However, because it does not include contested initial licensing cases which, if non-accusatory, could come within the exemption, the NRC's rule does not fully utilize the initial licensing exemption. Also, because future NRC licensing decisions will likely be hotly contested, the exemption will be used rarely if at all. Thus, although it has chosen to stress fairness in its strict separation of functions rule, the NRC apparently also recognizes that the logic behind the initial licensing exemption (that policy issues and legislative facts usually predominate in initial licensing and make the proceedings more like rulemakings than adjudications) may apply less to NRC proceedings where intervenors regularly inject sharply disputed evidentiary facts.

Other agencies have shown even less enthusiasm for the initial licensing exemption and the "policy decision" rationale behind it. The Federal Communications Commission (FCC), which generally follows section 554(d), is forbidden by

45 These permits, required of water pollutant dischargers, go through several stages of public comment and state and federal review. When the final permit is issued, any interested party may request an evidentiary hearing on the contested issues. 33 U.S.C. §§ 1326(a), 1342(a)(1) (1976). The courts have interpreted the hearing requirement in these statutory provisions as mandating a formal adjudication under 5 U.S.C. § 554 (1976). *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir. 1978); *Marathon Oil Co. v. EPA*, 564 F.2d 1253 (9th Cir. 1977); *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977). If the permit is an "initial license," the hearing will fall under the special non-adversary procedures, codified at 40 C.F.R. §§ 124.111-127 (1980).

46 44 Fed. Reg. 32888 (1979).

47 40 C.F.R. § 124.126 (1980). By allowing the Administrator's advisors to consult those who have been involved with the case, the EPA seems to allow the Administrator himself to consult with those same people, albeit indirectly. EPA's explanation is that the primary reason for appointing uninvolved staff members to advise the Administrator is to have a "fresh look" at the evidence, rather than to prevent unfairness that may arise from staff members reviewing their own decisions. EPA views the risk of unfairness in that situation as minimal.

48 See 10 C.F.R. § 2.719(c) (1980). The NRC has a unique licensing process under which a formal adjudication must be held before the issuance of a construction permit to build a nuclear facility, even if no one contests the issuance of the permit. The parties to that adjudication are the NRC staff and the license applicant.

statute to apply the initial licensing exemption.⁴⁹ Oddly, the FCC prohibition was imposed in 1961 by amendments which generally streamlined FCC adjudicatory procedures, that had been stiffened by a 1952 amendment to the Communications Act of 1934. The 1952 amendment had barred commissioners from consulting their general counsel or chief engineer on adjudicatory matters and had completely separated prosecutors and investigators from all agency cases, including those in which they were not involved. The 1961 amendments were intended to allow the Commission "to make better use of its own time, and more effective use of its experienced and technically qualified personnel to handle its workload of adjudicatory cases with greater speed and efficiency than [had been] possible."⁵⁰ Given the amendment's goal of increased efficiency, it is significant that Congress removed the initial licensing exemption option, which was itself intended to streamline adjudicatory procedure. Aside from a general concern about fairness, the legislative history gives no indication of any specific problems prompting the initial licensing exemption's elimination. The Senate report stated that the bill "will also speed up [FCC] adjudicatory proceedings *while providing the necessary safeguards to assure due process*."⁵¹ The House report on the bill cryptically noted that "The committee feels that there are good reasons (in the case of the Communications Act of 1934, at least) for applying the separation of functions provisions of section 5(c) to cases involving applications for initial licenses as well as to other cases of adjudication."⁵² In any case, although it acknowledged the provision mandating separation of functions went beyond APA requirements, Congress included the provision apparently to ensure fairness in licensing proceedings.

The Civil Aeronautics Board (CAB) has voluntarily refused to apply the initial licensing exemption. Amending its separation of functions rule in 1978, the CAB considered removing rate determination and initial licensing proceedings from the rule's requirements. The Board cited the appearance of unfairness as one reason for rejecting the removal. The appearance of unfairness was said to result from the public's inability to respond to advice given decisionmakers by advocates.⁵³ The Board apparently considered fairness no less a concern in initial licensing proceedings than in other adjudicatory proceedings, even though Congress considered the former more policy-dominated.

Until 1973, the Federal Energy Regulatory Commission (FERC) took advantage of the initial licensing exemption. When its separation of functions rule was discontinued, FERC noted that "The section currently provides an exception for initial licenses and proceedings involving the validity or application of rates. As the Commission does not believe that current practice should or does admit to this exception, we are eliminating it."⁵⁴ The FERC obviously believed

49 "The provision in section 554(d) of Title 5 which states that such subsection shall not apply in determining applications for initial licenses, shall not be applicable hereafter in the case of applications for initial licenses before the Federal Communications Commission." 47 U.S.C. § 409(c)(2) (1976).

50 107 CONG. REC. 13704 (1961) (statement of Sen. Pastore).

51 S. REP. NO. 576, 87th Cong., 1st Sess. 6, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 2462, 2464.

52 H.R. REP. NO. 723, 87th Cong., 1st Sess. 5 (1961).

53 *See* 43 Fed. Reg. 29933 (1978).

54 38 Fed. Reg. 9293, 9293-34 (1973).

changing circumstances had invalidated the original rationale for exempting initial licensing from separation of functions requirements.

In sum, agencies have disagreed on whether their initial licensing proceedings should incorporate a separation of functions requirement. With the recent emphasis on removing regulatory "red tape" and the increasing complexity of cases at agencies like the NRC or the EPA, more pressure to liberalize or remove separation of functions requirements can be anticipated. It remains to be seen, however, whether the rules adopted by individual agencies will conform with APA and constitutional requirements as well as with each agency's organic statute.⁵⁵

III. Section 554(d)(2) Separation of Functions Requirements

A. "Investigative or Prosecuting" Functions in Accusatory Cases

Protecting the rights of subjects of agency initiated accusatory proceedings was, as previously noted, a major concern of the APA's drafters in the separation of functions section.⁵⁶ This concern also underlies the interpretation of the phrase "employee or agent engaged in the performance of investigative or prosecuting functions" for an agency.

The typical adjudication envisioned by the drafters of the APA separation of functions scheme involved an agency's accusing a party of violating a statute or regulation—the Securities and Exchange Commission prosecuting a corporation for failing to register securities, for example—culminating in the imposition of a

⁵⁵ It might be argued that where an agency's statute requires a public hearing in all licensing cases, it creates a mandate that the proceedings be open, thus requiring that consultations with staff prosecutors, investigators or advocates be on the record. The licensing statute could be said to create a separation of functions requirement that is independent of the APA. This argument follows from *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir.), cert. denied, 439 U.S. 824 (1978), where the court discussed the initial licensing exemption of 5 U.S.C. § 556(d) (1976). That section requires that parties be given the right to present oral and written evidence, except that written evidence may suffice in initial licensing cases. The court ruled that since an EPA water permit statute required a "public hearing," this was sufficient to nullify the initial licensing exemption in § 556(d) and to create an independent basis for requiring an oral hearing and cross-examination. Similarly, one might argue that the requirement to hold a "public hearing" overrides the initial licensing exemption in § 554(d) and creates an independent basis for a separation of functions system that includes even advocates in non-accusatory licensing cases.

The logic behind the *Seacoast Anti-Pollution League* case is questionable. The EPA's reasoning, on the remand of the case, is persuasive:

To say that [the initial licensing exemption] does not apply whenever the statute at issue requires a "hearing" would be in effect to say that it never or almost never applied, since a statutory "hearing" requirement is necessary to make the APA applicable in the first place. It would be in effect to say that the same statutory reference that makes formal hearing procedures applicable generally also makes the . . . initial licensing [exemption] . . . inapplicable . . .

44 Fed. Reg. 32890 (1979).

This reasoning should prevail, whether an agency's statute requires merely a "hearing" or a "public hearing," since the type of hearing covered by the APA is, of course, a public one. However, on occasions where the legislative history behind an agency's statutory hearing mandate expressly states or strongly suggests that Congress envisioned a licensing hearing with separation of functions safeguards, the result suggested by *Seacoast Anti-Pollution League* is not objectionable. See also *United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, 539-41 (D.C. Cir. 1978). Cf. Oral Presentations Before the Commission and Communications With Commissioners and Their Staffs in Trade Regulation Rulemaking Proceedings, 45 Fed. Reg. 78626 (1980) (FTC implementation of specific separation of functions requirement imposed in hybrid rulemakings by § 12 of FTC Improvements Act of 1980, Pub. L. No. 96-252).

⁵⁶ 5 U.S.C. § 554(d) (1976) provides:

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.

penalty or a withdrawal of benefits. In such a proceeding, the staff counsel arguing the case in the agency hearing engages in a prosecuting function.⁵⁷ The counsel's aides may engage in "investigative" functions relative to the prosecution, as do those actually investigating the violations.⁵⁸

Determining when other staff members are sufficiently involved to be performing "investigative or prosecuting functions" within the meaning of the statute is more difficult.⁵⁹ In making this determination, it is useful to examine several different groups of staff members, while keeping in mind the aims of the separation of functions provision: preventing biased advice by staff with a "will to win" and precluding interpolation from facts not on the record but gleaned from an *ex parte* familiarity with the case. Further, it is necessary to recall the Attorney General's admonition that the APA's separation of functions section is not intended to "isolate the agency heads from their staffs."⁶⁰

The first staff group to be considered consists of supervisors, those mid-level employees who report to agency heads and who supervise staffers performing

57 An interesting situation is the case in which an agency's staff sides with a party accused of misconduct by an intervenor. Would the staff be "prosecutors" in that situation? The writers of the APA apparently did not anticipate such a case, though it may be quite likely to occur today. One could say that the staff is not trying to find a violation, so the staff would not be performing prosecutorial functions in the traditional sense of the word. Since Congress's primary concern was to protect party defendants from unfair, private consultations between decisionmakers and staff *opposed* to the party, it would not conform to Congressional intent to interpret the separation requirement to apply to staff members who side *with* the party. One could argue that it is likely that the writers of the APA might have prohibited such contacts if they had envisioned this situation, but the fact remains that they chose the word "prosecuting," leaving the matter uncovered by the statute.

On the other hand, it is possible to argue that the word "prosecuting" is equivalent to "advocacy," and that staff consultations are prohibited even when the staff (as an advocate) sides with the party defendant. Certainly a staff member on the side of the party in an accusatory case has "buried himself on the side" of a controversial charge of misconduct, and one might question that member's ability to advise an agency objectively. There are extensive references in the legislative history of the APA to support this notion. For example, in the 1945 print of the bill, "advocate" is used in place of "prosecutor," SENATE DOCUMENTS, *supra* note 17, at 25; in the 1941 ATTORNEY GENERAL'S REPORT, *supra* note 15, at 55-56, "prosecution" is used interchangeably with "advocacy" and "advocate" is defined as "the agency's attorney." The 1947 ATTORNEY GENERAL'S MANUAL refers to separation of functions as forbidding consultation with "employees of the agency who have had such previous participation in an *adversary* capacity," 1947 ATTORNEY GENERAL'S MANUAL, *supra* note 20, at 57 (emphasis added), and there is little reason to believe this could not be viewed as "adversary" to an intervenor. However, the better argument is that the term "prosecuting" in the APA does not include advocacy in non-accusatory cases. See text accompanying notes 68-81 *infra*.

58 Some examples would be a member of the NRC's Inspection and Enforcement staff who had inspected a plant, or an assistant to a commissioner who had contacts with the investigative file in the pre-adjudicative phase of a case. A recent case has given broad reading to the terms "investigative or prosecuting." In *Grolier, Inc. v. FTC*, 615 F.2d 1215 (9th Cir. 1980), the court held that by using these terms, Congress "intended to preclude from decisionmaking in a particular case not only individuals with the title of 'investigator' or 'prosecutor,' but all persons who had, in that or a factually related case, been involved with *ex parte* information or who had developed, by prior involvement with the case, a 'will to win.'" *Id.* at 1220. See also *Twigger v. Schultz*, 484 F.2d 856 (3d Cir. 1973) in which the court found a violation of § 554(d) where an adjudicating officer, prior to his having served as adjudicator, had reviewed investigative reports from a special agent and had recommended prosecution of the case to his superiors.

59 It should be emphasized that staff members who perform "investigative or prosecuting functions" in a "factually related case" may not participate or advise in an agency decision in a case. The term "factually related case" refers to "two different proceedings arising out of the same or a connected set of facts," such as a cease and desist proceeding and license revocation proceeding stemming from the same violation. 1947 ATTORNEY GENERAL'S MANUAL, *supra* note 20, at 57. See also *Giambanco v. Immigration & Naturalization Service*, 531 F.2d 141, 150 n.4 (3d Cir. 1976), in which Judge Gibbons, dissenting on another issue, provided a good discussion of the "factually related case" standard. *Id.* at 150 (Gibbons, J., dissenting). Thus, staff members would not be prohibited from advising the agency in a case simply because they were involved in another case which had a similar pattern of facts.

60 1947 ATTORNEY GENERAL'S MANUAL, *supra* note 20, at 57.

investigations or prosecutions. The Attorney General's Manual suggests that a supervisor, such as a general counsel, who has not consulted significantly with the prosecuting staff under him probably could advise the decisionmaker. However, the Manual assumes that if a supervisor has consulted extensively with his subordinates, he becomes unavailable for consultation or advice regarding the decision.⁶¹ This interpretation comports with the philosophy of separation because a supervisor's bias would tend to increase the more he consulted.

The case law holds that a supervisor is disqualified from advising in a case developed by his subordinates only when he has been personally involved. In *Amos Treat & Co. v. SEC*⁶² the court held that a supervisor of the Division of Corporate Finance who later became a commissioner of the SEC could not decide a case he had helped develop as supervisor. The court cited as grounds for its decision section 554(d) (then section 1004(c)) and the due process clause. The court also indicated that initiating an investigation, weighing its results, and recommending filing charges constitutes prosecuting or investigating.⁶³ A supervisor merely overseeing an initial investigation before a decision to prosecute is made might argue his was not an investigative or prosecuting function.⁶⁴ But even if a supervisor directs an investigation without actually bringing the case to prosecution, he could be barred under section 554(d)(2) from advising the decisionmaker since he, the supervisor, engaged in investigative functions in a case leading to a prosecution. Thus, if the supervisor merely points the investigation toward prosecution, *Amos Treat* indicates the supervisor would be barred from consulting with the decisionmaker. In all the above situations, the prevention of biased advice is not the only policy consideration involved in separation of functions. The other consideration, interjection of *ex parte* facts, might be implicated if the supervisor gathers such facts and inadvertently injects them, off the record, during the decisionmaking process.

The second category of agency employees to be examined consists of lower level agency adjudicators. Persons performing solely adjudicative functions do not perform investigative or prosecuting functions, nor are they exposed to *ex parte* material. Thus, the APA⁶⁵ does not appear to prohibit initial decisionmakers consulting other initial decisionmakers not involved in the case. Through such consultations, lower level decisionmakers receive an opportunity to better understand the agency's decisions and policies. Likewise, appellate board

61 *Id.* at 58.

62 306 F.2d 260 (D.C. Cir. 1962).

63 *Id.* at 266.

64 Soon after the APA was passed, Professor Davis argued that initiating proceedings was not inconsistent with participating in the decision, on the theory that the initial decision to prosecute is similar to the decision of a judge to issue a temporary restraining order. The judge only makes a preliminary determination based on the evidence then available. Professor Davis conceded, however, that such a decision tends to commit the judge (or administrative decisionmaker) "to some extent as to his view of the probable facts in advance of a full development of the evidence." Davis, *supra* note 31, at 612. This latter sentiment accords more closely with case law as it has developed, in *Amos Treat* and *R. A. Holman & Co. v. SEC*, 366 F.2d 446 (2d Cir. 1966), *cert. denied*, 389 U.S. 991 (1967), to the point that only personal involvement in initiating proceedings was said to constitute the performance of investigative or prosecuting functions.

65 One might argue that there are due process problems in allowing hearing officers or boards to consult with those who will review their decisions in advance of those decisions. Similarly, a due process claim might be made with regard to agency members seeking advice from appellate boards or hearing boards (or appellate boards seeking advice from hearing boards) on the ground that the lower decisionmakers might have a stake in their decisions being upheld. See text accompanying notes 227-238 *infra*.

members may benefit from consulting with initial decisionmakers because the trier of fact may be able to assist the appellate board member in reviewing the record for decision.

These rationales apply equally to consultations between agency commissioners, initial decisionmakers and appellate boards. In such consultations, however, the members of the agency may have performed either investigative or prosecuting functions in the early, pre-hearing stages of a case. Under section 554(d)(2), the agency members are evidently excluded from advising hearing officers or boards and appellate boards with regard to the facts, law or policy in case. However, the section 554(d)(2)(C) exemption applies here because the separation of functions provision does not apply to the "members of . . . the agency."⁶⁶ This exemption reflects Congress's recognition that members of an agency must possess some freedom to initiate investigations or prosecutions, and not sacrifice their right to guide lower level decisionmakers where desirable.

Finally, staff members who testify as witnesses in licensing proceedings warrant special mention. The APA does not deal specifically with staff witnesses and separation of functions. Even in accusatory proceedings, a witness is not a prosecutor in the traditional sense. A witness does not present the agency's case, even though his testimony may further it. In testifying on technical matters, a staff member need not become biased. Nor would a staff member's testifying result in his absorbing off the record facts which he might interject *ex parte* during the decisionmaking process. In fact, Professor Davis has concluded the APA does not prevent "a member of an agency's staff from serving as an expert witness at the hearing and later advising the heads of the agency in making the decision."⁶⁷

Nonetheless, upon testifying on behalf of the agency and being cross-examined and forced to publicly defend the agency's position, a staff witness may become biased toward the agency's point of view. Were the witness a member of the investigative and prosecuting staff, he could certainly not later advise. On the other hand, Professor Davis argues that a staff member who has been cross-examined *should* advise since his views already have been subject to dispute on the record. Whatever the policy merits, the APA apparently allows private consultation between decisionmakers and staff witnesses who have not performed investigative or prosecuting functions.

B. "Investigative or Prosecuting" Functions in Non-Accusatory Cases

In non-accusatory adjudications involving disputed issues, do staff members perform a "prosecuting function" under the APA by taking a side on the issues? That is, does "prosecuting function" amount to advocacy in the general sense?

Evidently, Congress did not intend to characterize staff advocates in non-accusatory proceedings as performing a "prosecuting" function. As previously noted, Congress appears to have been concerned solely with accusatory adjudications when it adopted the separation of functions provision of the APA.⁶⁸ A staff advocate in non-accusatory proceedings would be able to advise the decisionmaker. He is an advocate, but not a prosecutor. Even though non-accusa-

⁶⁶ 5 U.S.C. § 554(d)(2)(C) (1976).

⁶⁷ Davis, *supra* note 31, at 649.

⁶⁸ See text accompanying notes 35-44 *supra*.

tory proceedings may involve disputed issues, such proceedings do not involve the misconduct of a private party. Instead, Congress believed that the issues in such proceedings are primarily policy-oriented. Consequently, staff generally offers opinions on technical and policy matters, and under this view any alleged bias would not generate the same type of error as might occur in a proceeding where evidentiary facts predominate. In addressing this matter, Professor Davis provides the example of the CAB public counsel opposing the merger application of two airlines.⁶⁹ Although an advocate, it is questionable whether the staff member should be considered a prosecutor under the APA.⁷⁰ Professor Davis asserts that although its language arguably includes proceedings which are accusatory in nature even if no formal charges are being pressed, section 554(d) might not include non-accusatory proceedings.⁷¹

Professor Davis's assertion is not irrefutable, however. If "investigative or prosecuting functions" do not include advocacy in non-accusatory cases, then what did Congress intend by specifically denying the FCC the initial licensing exemption?⁷² Because FCC initial licensings are rarely accusatory and rarely involve "investigative or prosecuting functions," subjecting the FCC's initial licensings to the separation of functions requirement in section 554(d) would mean nothing if the requirement does not include advocacy functions. More recently, in passing section 557(d) of the APA, proscribing *ex parte* communications in all accusatory or non-accusatory formal adjudications, Congress evidently assumed that in advocating an agency staff position, "an agency attorney litigating the case for the agency will not be involved in the decisionmaking process of the agency."⁷³ Nonetheless, although these Congressional sentiments appear to reflect a broader view of the separation of functions proscription, they are hardly sufficient to overcome the more clearly expressed intentions of Congress in passing the APA.⁷⁴

Interpreting "investigative" functions in section 554(d) also requires examining the policy and legislative history behind the APA. A literal reading of section

69 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 13.07 at 218 (1958); Davis, *supra* note 31, at 619.

70 Davis, *supra* note 31, at 620.

71 *Id.*

72 See text accompanying notes 49-52 *supra*.

73 S. REP. NO. 354, 94th Cong., 1st Sess. 36 (1975); H.R. REP. NO. 880, 94th Cong., 2d Sess. 20 (1976). It may be, of course, that this statement was made not with regard to APA requirements, but rather with the belief that either good practice or due process would require this result.

74 The regulatory reform bill recently reported by a Senate committee would resolve any doubts about the applicability of separation of functions in non-accusatory cases. In addition to eliminating the initial licensing exemption (see note 44 *supra*), the prohibition on private advice would apply to agency employees performing "litigating" functions, rather than prosecuting functions. The committee report has recognized that the "bill extends the category of agency employees barred from having any role in participating or advising in the agency decision." SEN. REP. NO. 1018, pt. 1, 96th Cong., 2d Sess. 85 (Oct. 30, 1980). With particular reference to the terms "prosecuting" and "litigating," the report states that the "prohibition in the current law bars involvement in the decisionmaking process by those *prosecuting* the case on behalf of the agency. Since the word *prosecuting* fails to accurately describe all the kinds of formal proceedings which may now be subject to the prohibition of this section, the term *litigating* has been substituted for it." *Id.* at 86 (emphasis in original). The House bill, however, only creates further problems in resolving the question of whether the "prosecuting" function under the present law includes advocacy functions in non-accusatory cases. Although the House bill would require a separation of functions scheme applicable to "litigating" employees in expedited formal adjudications (see note 44 *supra*), it would retain the word "prosecuting" in the present § 554(d) for non-expedited cases. H.R. REP. NO. 1393, 96th Cong., 2d Sess. 69, 71 (Sept. 25, 1980). As stated in the text, a narrower statutory interpretation of the term "prosecuting" seems more in order with Congress's earlier intention of protecting rights in cases which were essentially accusatory in nature.

554(d) bars anyone investigating any accusatory or non-accusatory case from advising in its decision. However, Professor Davis and others believe the term “investigative” should be read narrowly and applied to investigations looking toward prosecutions.⁷⁵ Thus, in a non-accusatory proceeding investigators could consult decisionmakers since, under the rationale expressed by the APA’s drafters, the decisionmakers’ questions would typically be policy oriented. Professor Davis gives the example of a Social Security investigator who simply gathers relevant information without siding for or against the claimant. That investigator would not have developed the “state of mind incompatible with . . . objective impartiality” that the APA’s drafters feared in prosecutors and investigators.⁷⁶

The legislative history supports a narrow reading of the term “investigative.” The explanation given in the section in the 1945 printing of the original Senate bill states that the section was meant to protect fairness in “so-called ‘accusatory’ proceedings.”⁷⁷ In addressing the “investigative and prosecuting” part of section 554(d), the print telescoped “investigative and prosecuting” into the word “prosecuting” when referring to the “segregation of deciding and prosecuting functions.” Impliedly, investigating is a subset of prosecuting.⁷⁸ Likewise, the committee report on the bill also telescoped “investigative and prosecuting” under the general term “prosecuting.” The report explained section 554(d)(2), which requires the hearing examiner to be not subject to the supervision of an employee “engaged in the performance of investigative or prosecuting functions,” by saying, “they may not be made subject to the supervision of prosecuting officers.”⁷⁹ The committee report further explained that prosecuting officers “may not participate in the decisions except as witness or counsel in public proceedings.”⁸⁰ Significantly almost every other time the term “investigative” and “prosecuting” are mentioned, they are used together—in the language of the statute, in the Attorney General’s Manual, and in the legislative history. Although “prosecuting” is sometimes used to denote the two together, the term “investigative” does not appear to have been used separately. Thus, the legislative history indicates that the term “investigative functions” applies to investigations related to prosecutions in accusatory proceedings. Because the separation of functions doctrine was intended by Congress to protect parties whose past conduct is being questioned, a narrow reading of the term “investigative functions” is preferable.⁸¹

In short, in light of both the APA’s legislative history and policy, staff members of an agency do not perform “prosecuting” or “investigative” functions—as those terms were used by Congress in the APA—in non-accusatory adjudications.

75 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 13.07 at 216-18 (1958); Davis, *supra* note 31, at 616-18.

76 Davis, *supra* note 31, at 618.

77 SENATE DOCUMENTS, *supra* note 17, at 24.

78 *Id.*

79 *Id.* at 203.

80 *Id.*

81 One could argue that to be excluded from decisionmaking on the basis of having performed “investigative” functions, an agency employee must have had both a “will to win” for the prosecutorial team and exposure to extra-record material. However, in *Grolier, Inc. v. FTC*, 615 F.2d at 1220, 1221, the court concluded that mere exposure to *ex parte* material by an investigator in any case covered by § 554(d) was sufficient to mandate disqualification.

C. *The Meaning of "Participate or Advise in the Decision, Recommended Decision, or Agency Review"*

Investigators and prosecutors in accusatory cases are not absolutely prohibited from communicating with agency adjudicators. Investigators and prosecutors are not to "participate or advise in the decision, recommended decision, or agency review pursuant to section 557."⁸² Clearly, this provision forbids investigators and prosecutors from privately advising adjudicators how to resolve issues of law, fact or policy in a pending case. However, the permissibility of other contacts by investigators and prosecutors with adjudicators, particularly commissioners, remains unclear. Considering the policies underlying separation of functions helps determine the scope of the section 554(d)(2) ban.

As previously stated, in adopting the separation of functions rule Congress intended to protect decisionmakers from biased advice and exposure to off the record facts introduced by investigators and prosecutors familiar with the case. However, these problems were discussed as arising in the context of the decisionmakers' being provided biased advice or off the record information as they perform their adjudicative roles. Congress recognized that communications between commissioners and the entire agency staff, including prosecutors and investigators, were appropriate when made in connection with the commissioners' performance of their non-adjudicative responsibilities. Thus, if initiation of an investigation or prosecution is generally approved by agency members, allowing investigators and prosecutors to consult with commissioners on whether to investigate or prosecute would present no problem. Such consultations would not be "participat[ing] or advis[ing] in the decision, recommended decision or agency review," since no adjudication would have commenced and no decision would be under consideration.⁸³

Once an accusatory adjudication has begun, however, what contacts may commissioners have with investigators and prosecutors? Apparently, short of participating or advising in the decision, any contacts are proper.⁸⁴ Proper contacts may arise as commissioners perform other duties: investigation or prosecution, rulemaking, informal adjudicative decisionmaking, or supervising agency staff generally or regarding particular pending adjudications. Each of these responsibilities will be considered in turn.

Assume Company A's conduct is at issue in accusatory adjudication X. Assume also that the agency staff has discovered new information indicating that additional charges should be brought against Company A, and that Company B should be investigated and possibly prosecuted. Can the investigators and prosecutors conducting adjudication X confer privately with the commissioners about the need for additional investigation or prosecution against either Company A or Company B when the facts to be discussed relate directly to adjudication X

⁸² 5 U.S.C. § 54(d)(2) (1976).

⁸³ *See, e.g.*, Porter County Chapter of Izaak Walton League of America v. NRC, 606 F.2d 1363, 1370-71 (D.C. Cir. 1979) in which the court recognized that § 554(d) does not apply in the pre-hearing investigative phase of a case.

⁸⁴ As stated in the 1947 ATTORNEY GENERAL'S MANUAL, the APA "merely excludes from any such participation in the decision of a case those employees of the agency who have had such previous participation in an adversary capacity in that or a factually related case . . ." 1947 ATTORNEY GENERAL'S MANUAL, *supra* note 20, at 57 (emphasis added).

which is before the commissioners for decision? The following answer was provided by the court in *Environmental Defense Fund, Inc. v. EPA*:

It may happen that during the course of an agency proceeding against two individuals the "prosecuting" staff discerns from the evidence that proceedings should also be instituted against, or the initial proceeding broadened to include, a third individual. The prosecutorial staff would not be debarred from consulting with the agency head about these steps by the mere fact that a related proceeding was already under way. The same conclusion is applicable where there is no new party but the emerging evidence indicates that a new charge or a broadened charge is appropriate.

Congress has not accepted the view that the possibilities of unfairness require prohibition of an administrative structure that permits the same agency to issue the notice that begins a proceeding and to make the ultimate determination. . . . It has accepted a pragmatic view that the need for effective control by the agency head over the commencement of proceedings requires an ability to conduct consultations in candor with an investigative section on the question whether a notice should be issued and a proceeding begun, and this notwithstanding any residual possibilities of unfairness. [In this case] there is no allegation of communication between "prosecutor" and agency head regarding the final decision⁸⁵

Thus, even if an accusatory adjudication requiring separation of functions is pending, the APA does not prevent commissioners from consulting with the prosecutors and investigators in that proceeding if such consultations relate to commencing an additional investigation or prosecution, or broadening the pending charges.⁸⁶

A similar conclusion may be reached regarding an agency discharging rulemaking and other adjudicative responsibilities. Assume the NRC has pending or is considering initiating a generic rulemaking proceeding on seismic problems facing nuclear power plants. Although the agency may wish to consult privately with its staff experts on seismic problems in the rulemaking,⁸⁷ these

⁸⁵ 510 F.2d 1292, 1305 (D.C. Cir. 1975).

⁸⁶ Additional support for this view can be found in *Pangburn v. CAB*, 311 F.2d 349 (1st Cir. 1962), which rejected a due process challenge in a similar setting. In that case members of the CAB conducted an investigation and issued a report on the probable cause of an accident and, at the very same time, adjudicated an appeal from the pilot, who was involved in the accident and whose license had been suspended by a CAB hearing examiner. The court focused on two statutory duties of the CAB: to investigate and to report on accidents for the purposes of determining probable cause and considering safety recommendations, and to decide through adjudicatory proceedings whether the public interest requires suspension of the licenses of pilots involved in accidents. The court recognized that although "similar questions may frequently be involved in the two proceedings," Congress had determined to vest in the agency these two important, clear-cut and fundamentally different functions. *Id.* at 356. Although no APA claim was made, the court specifically mentioned that separation of functions would not apply in the case before it to "members of . . . the agency" because of the exemption in § 554(d)(2)(C) of the APA. *Id.*

⁸⁷ It is assumed, of course, that there is no statutory or constitutional bar to the commissioners' consulting privately with agency staff members who are involved in such rulemakings. Clearly, there are no APA prohibitions on decisionmakers consulting privately with agency staff members in rulemaking proceedings. *See, e.g., Hoffman-La Roche, Inc. v. Kleindienst*, 478 F.2d 1 (3d Cir. 1973) and cases cited at note 206 *infra*. The view apparently adopted by the writers of the APA was stated in the 1941 ATTORNEY GENERAL'S REPORT, *supra* note 20, at 57-58:

Particularly in cases where adjudicatory functions are not a principal part of the agency's work or are closely interrelated with other activities, whatever gains might result from separation would be plainly outweighed by the loss in consistency of action as a whole. . . . In greater or lesser degree these same considerations are applicable wherever the adjudicatory and nonadjudicatory functions or an agency are required to be exercised in harmony with each other and where the knowledge secured in the exercise of the one group of functions is important in the wise exercise of the other. . . . These powers must be exercised consistently and, therefore, by the same body, not only to realize the public purposes which the statutes are designed to further but also to avoid confusion of the private interests.

experts may have performed investigative or prosecuting functions in a pending accusatory adjudication.⁸⁸ Even if the rulemaking involves some of the same factual, legal or policy matters which arose in the adjudicatory proceeding, the APA should not bar the commissioners from consulting with the investigators or prosecutors about the rulemaking. The investigators or prosecutors should not be considered as providing advice "in the decision, recommended decision or agency review" of the adjudicatory proceeding.

The same argument could be made where rather than being concerned with a rulemaking proceeding, the NRC commissioners had to resolve the seismic issue as part of an informal adjudication, such as an export license application.⁸⁹ This might occur where a seismic problem had a global impact. In order to obtain expert advice on how to resolve the seismic issues in this informal adjudication, the commissioners should be permitted to consult—consistent with the APA—knowledgeable prosecutors and investigators who are involved in a factually related accusatory adjudication.⁹⁰

Finally, general supervision by commissioners of investigative or prosecuting staff warrants consideration. If the supervision concerns generic issues transcending individual cases and provides guidance on general agency policies, supervisory contacts should not violate APA separation of functions requirements.⁹¹ By such contacts, agency investigators and prosecutors would not be participating on or advising a particular decision.

More difficult problems may arise regarding commission efforts to supervise investigators and prosecutors in connection with a particular accusatory adjudication. Although they permitted agency members to oversee investigations and approve commencing prosecutions, the APA's drafters preferred that commissioners "delegate the actual supervision of investigation and initiation of cases to responsible subordinate officers," and reserve for themselves the decisionmaking function.⁹² Congress apparently did not envision commissioners actually supervising the conduct of a particular prosecution. This does not mean, however,

88 For a discussion of the constitutional questions raised by decisionmakers' private contacts with agency staff, see text accompanying notes 194-226 *infra*. One could assume that a licensee has been charged with violating certain NRC rules with regard to protection against seismic hazards, and that this misconduct is the subject of an enforcement adjudication.

89 Unlike license proceedings for domestic nuclear power plants, license proceedings involving the export of reactor components or fuel are informal adjudications. 42 U.S.C. § 2155a (Supp. II 1978).

90 If export license applications were required to be resolved according to formal adjudicatory procedures (assuming the initial licensing exemption did not apply), the knowledgeable prosecutors and investigators in a factually related formal adjudication would be barred by 5 U.S.C. § 554(d) (1976) from advising in the export license case.

91 For example, suppose the Commission has had to reverse lower level decisionmakers on the basis of policy considerations. The commissioners may desire to talk to the investigative and prosecuting staff in order to assure that these persons are aware of the new policy, and that their investigations and prosecutions will be carried out in accordance with that policy.

92 SENATE DOCUMENTS, *supra* note 20, at 204. The 1941 ATTORNEY GENERAL'S REPORT, which laid the foundation for the APA, did not envision involvement by commissioners in the day-to-day activities of the agency, but it left little doubt that such involvement would be appropriate:

Save at the level of the agency heads, an internal separation of function can afford substantially complete protection against the danger that impartiality of decision will be impaired by the personal precommitments of the investigator and the advocate. Even at the level of ultimate decision there can be similar protection, for the sheer volume of work does not permit the agency heads to participate actively in developing one side of any single side but requires that they reserve themselves for the task of deciding questions presented to them by others. Nevertheless, so far as the agency is empowered to initiate action at all, the agency heads do have the responsibility of determining the general policy according to which action is taken. *They have at*

that such supervision is improper under the APA. The question is whether a commissioner's supervising a particular prosecution would lead to participation or advice to commissioners regarding how to decide the particular case. Although directions by commissioners to prosecutors to "do this" or "don't do that" should not be interpreted to violate the statutory prohibition, an extensive interchange between agency prosecutors and commissioners about the specific facts and policies applicable to a particular proceeding might allow a court to conclude that the prosecutors or investigators had, in effect, advised the decisionmaker on how the case should be resolved.⁹³

Of course, such supervision may expose commissioners to the facts of a particular adjudication. The commissioners may later be required to take a position regarding those facts to resolve the proceeding which earlier caused them to seek the advice of the technical staff. However, when it bestowed various responsibilities upon agencies, Congress recognized that agencies should not be forced to sacrifice some goals to obtain others. For example, commissioners should not be faced with sacrificing expert advice in an investigative proceeding merely because the same experts are involved in a factually related accusatory adjudication.⁹⁴

There are, however, limits to the consultations the APA appears to sanction. The consultations must truly involve the resolution of a non-accusatory proceeding. That is, the consultations cannot be used to circumvent the proscription in section 554(d)(2) against investigators and prosecutors advising in the adjudication or in one factually related. The line between circumvention and proper conversations may be fine. The totality of the circumstances surrounding the consultation should be considered, including the extent of overlapping facts, the expressed intent of the communicants, the nature of the consultation (informational, advocacy, and so forth), and the necessity for the consultation. Additionally, the commissioners should not prejudice any issues which must be resolved later on the basis of the record in the accusatory proceeding.⁹⁵ To the extent such judgments are necessary in the context of the proceeding causing the consultations, those judgments should be strictly limited to that other proceeding.⁹⁶

least residual powers to control, supervise, and direct all the activities of the agency, including the various preliminary and deciding phases of the process of disposing of particular cases.

1941 ATTORNEY GENERAL'S REPORT, *supra* note 20, at 57 (emphasis added).

93 A more serious problem in this situation is not the problem of the APA, but rather a question of due process. There seems to be some inherent unfairness in having the person who approved and supervised the investigation, who agreed to the prosecution, and who actually supervised the prosecution team also adjudicate the case. Furthermore, there are concerns that through such close supervision, the adjudicators will prejudice the case. For a discussion of these issues, see text accompanying notes 122-238 *infra*.

94 *Environmental Defense Fund, Inc. v. EPA*, 510 F.2d 1292, 1305 (D.C. Cir. 1975).

95 The APA requires that an on the record adjudication must be resolved strictly on the basis of the evidence presented in that case. 5 U.S.C. §§ 556(e), 706(2)(E) (1976). If additional information reaches the decisionmaker, whether through persons outside the agency or agency staff members, the decision may be reversed unless the information is made public and there is an opportunity for rebuttal, and cross-examination where appropriate. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978); *Twiggs v. United States Small Business Administration*, 541 F.2d 150 (3d Cir. 1976). See text accompanying note 226 *infra*.

96 The principle allowing for consultations with staff should also extend to agency administrative matters (e.g., budget preparation or congressional testimony) where some issues that are being litigated in a formal licensing case may arise. In the context of congressional hearings, however, not only must the staff refrain from associating the consultations with resolution of a pending adjudication, but Congress itself must avoid intruding into that adjudication. *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966); *Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978).

Finally, because in non-accusatory licensing cases there are no prosecutors or investigators within the meaning of section 554(d), the APA does not prohibit supervisory consultations between agency advocates or witnesses and commissioners. Such consultations may be for purposes of the commissioners' obtaining advice about deciding a particular non-accusatory case or because the commissioners wish to supervise the staff presentation in such a case.⁹⁷

IV. Section 554(d)(1) Separation of Functions Requirements

Section 554(d)(1) of the APA provides that a hearing officer may not consult with "any person or party" on any "fact in issue, unless on notice and opportunity for all parties to participate."⁹⁸ Read literally, this provision means that a presiding officer may not consult privately with staff members not involved in the case since they are "persons."⁹⁹ A strict reading would even preclude advice from law clerks and assistants. But the legislative history of the APA and contemporary commentary support the conclusion that a hearing examiner may consult non-involved staff members despite the "person or party" limitation. The "person or party" language most likely refers to persons or parties outside the agency.

In 1941, a minority of the Attorney General's Committee proposed a clause prohibiting the hearing examiner from consulting privately with anyone but his law clerk and personal assistant.¹⁰⁰ This prohibition was sharply criticized in congressional hearings because hearing examiners would inevitably discuss cases with other hearing examiners and would need the help of staff experts to make intelligent decisions.¹⁰¹ Separation of functions concerns were relevant to hearing examiners because of the desirability of ensuring that prosecuting staff would not privately advise decisionmakers. No reason is given why a hearing examiner should not consult privately with non-involved staff members. In short, there is no indication the APA drafters adopted the minority position of the 1941 Attorney General's Committee.

The 1947 Attorney General's Manual, however, specifically states that even

⁹⁷ The meaning of the term "participate or advise in the agency decision" is relevant, however, in determining the constitutionality of consultations between decisionmakers and agency advocates in non-accusatory cases. As a general proposition for non-accusatory adjudications, there will be a potential due process problem only when the agency staff member who consults with the decisionmakers is thereby participating or advising in the decision. Accordingly, the bulk of the discussion in the due process section of this article will be concerned with staff advocates, witnesses and the like who advise in the decision in non-accusatory cases and not with staff members who consult with decisionmakers in a manner that does not amount to such participation or advice in an adjudication. See text accompanying notes 122-238 *infra*.

⁹⁸ 5 U.S.C. § 554(d) (1976) provides that:

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

- (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
- (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

⁹⁹ "Person" is defined at 5 U.S.C. § 551(2) (1976) to include an "individual, partnership, corporation, association, or public or private organization other than an agency." A staff member is certainly an "individual."

¹⁰⁰ 1941 ATTORNEY GENERAL'S REPORT, *supra* note 15, at 236.

¹⁰¹ 141 Hearings, *supra* note 15, at 592, 734, 736, 737.

in cases where separation of functions is required, a hearing officer may consult with non-prosecuting agency personnel:

[I]t is manifest from the third sentence of section [554(d)] . . . that the hearing officer may obtain advice from or consult with agency personnel not engaged in investigative or prosecuting functions in that or a factually related case.¹⁰²

Such consultations were considered desirable in assuring a decision based on sound factual determinations and reflecting agency policy. In light of the legislative history, how can the "person or party" language be read to *not* include agency staff? Professor Nathanson confronted this problem in an article written soon after the passage of the APA.¹⁰³ Noting it was "inconceivable" that Congress meant to preclude private staff assistance for hearing officers, Professor Nathanson proposed two alternative meanings for this part of section 554(d).

First, Professor Nathanson suggested the statutory reference to the hearing examiner included staff assistants or clerks assigned to help him in his duties. That is, the staff assistants and clerks, together with the actual hearing officer, form a "corporate person," the "hearing officer."¹⁰⁴ This reading comports with the common view that an action required of a certain official may be performed by his subordinates,¹⁰⁵ or at least with the assistance of his subordinates.¹⁰⁶

Professor Nathanson also suggested that "person or party" refers only to persons *outside* the agency.¹⁰⁷ Professor Davis supported this reading in an article written soon after Professor Nathanson's. Both commentators cited two reasons why staff members are not "persons or parties" with whom, under the statute, the hearing examiner may not privately consult. First, keeping in mind the general intent of section 554(d) to avoid consultations with persons biased toward one side of the case, there is no indication in the legislative history that Congress meant to impair the institutional decisionmaking process by preventing advice by non-involved agency staff. Second, the APA consistently uses "person or party" to refer to individuals outside the agency. Professor Davis counted thirty-eight references in the APA to "person" or "party," and concluded that "in every instance [Congress] seem[s] to have reference only to outsiders and not to members of the agency's staff."¹⁰⁸ When Congress intended to refer to agency staff, it typically used the terms "officer," "employee," or "agent." For example, the phrase in section 554(d) "employee or agent engaged in the performance of investigative or prosecuting functions for an agency" could have been written "*persons* engaged in . . ." if "persons" were intended to include staff members. Moreover, if the reference to "person or party" includes staff members, the succeeding paragraph prohibiting decisionmakers from consulting prosecuting staff would be superfluous insofar as presiding officers are concerned. Thus, "person or party" most likely refers to persons outside the agency.

102 1947 ATTORNEY GENERAL'S MANUAL, *supra* note 20, at 55.

103 Nathanson, *Some Comments on the Administrative Procedure Act*, 41 Ill. L. Rev. 368 (1946).

104 *Id.* at 388-89.

105 *See, e.g.*, *Jay v. Boyd*, 351 U.S. 345, 351 n.8 (1956); *Shafer v. United States*, 229 F.2d 124, 129 (4th Cir. 1956); *Johnson v. United States*, 206 F.2d 806, 809 (9th Cir. 1953).

106 *See, e.g.*, *Morgan v. United States*, 298 U.S. 468, 481-82 (1936); *De Remer v. United States*, 340 F.2d 712, 716-17 (8th Cir. 1965).

107 Nathanson, *supra* note 103, at 389-90.

108 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 11.17 at 107 (1958); Davis, *supra* note 31, at 613-16.

However, there is a case to be made for reading the statute literally in order to bar hearing examiners from consulting privately all staff members.¹⁰⁹ For policy reasons, if the hearing examiner consults with someone, including non-involved staff, off the record, he may be provided information not on the record, and not subject to rebuttal and cross-examination by the parties affected. This was the major concern of the minority of the Attorney General's Committee.¹¹⁰ Moreover, in *Butz v. Economou*,¹¹¹ the only reported case addressing the issue, the Supreme Court referred to the APA's prohibiting a hearing examiner from consulting "any person or party, including other agency officials."¹¹² However, given the total picture portrayed in the legislative history, such a view was evidently not adopted by Congress in passing the APA. Professor Davis concluded that:

Altogether, the problem of interpreting "person or party" is a close question which could go either way. The literal interpretation has the merit of simplicity and is likely to be adopted by a court that fails to make a rather profound and extended inquiry into the problem. But a court which digs deeply enough may well be impressed with the reasons for rejecting the literal interpretation.¹¹³

Professor Nathanson's conclusion was more forceful:

I conclude then that the subsection is designed to isolate the hearing officer only from those engaged in prosecutory or investigatory questions in the particular case before him or in factually related cases. Otherwise, he is free to avail himself of the assistance of all the facilities of the agency. Such freedom clearly works toward strengthening, not weakening, the position of the hearing officer in the administrative process.¹¹⁴

Thus, the better view holds that when Congress prohibited hearing examiners from consulting privately with "persons or parties" on a fact in issue, Congress meant persons or parties outside the agency, and did not mean to prohibit consultation with agency staff.¹¹⁵

¹⁰⁹ The obvious reason is simply the "natural meaning of the words used." The plain meaning excluded all persons, and normally a statute will be construed to mean what it says. A similar argument can be made with regard to the word "party." See, e.g., *New England Coalition on Nuclear Pollution v. United States Nuclear Regulatory Comm'n*, 582 F.2d 87, 94 n.12 (1st Cir. 1978).

¹¹⁰ See text accompanying note 100 *supra*.

¹¹¹ 438 U.S. 478 (1978).

¹¹² *Id.* at 514. *Butz* can hardly be viewed as precedent since the quoted phrase is pure dictum; the case did not concern separation of functions. In *Butz* the issue was whether, and to what extent, federal agency officials are entitled to immunity from damage suits. Regarding persons performing adjudicatory functions within federal agencies, the Supreme Court found that there was absolute immunity. In its reasoning, the Court declared that federal administrative law judges are "functionally comparable" to court judges, citing a series of APA provisions, including § 554. *Id.* at 513-14. The reference to § 554 was off-hand, with no reference to legislative history, scholarly comment or the 1947 ATTORNEY GENERAL'S MANUAL.

¹¹³ 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 11.17 at 109 (1958). Apparently, some 35 years after the APA was adopted, there are still no court cases which provide a definite ruling on which of the two interpretations is correct.

¹¹⁴ Nathanson, *supra* note 103, at 390.

¹¹⁵ This conclusion means that, to a great extent, § 554(d)(1) is superfluous in light of the recent prohibition in § 557(d). In fact, the American Bar Association recommended that § 554(d)(1) be deleted in favor of adopting a more general restriction on *ex parte* contacts. *Government in the Sunshine: Hearings Before Subcomm. on Reorganization, Research, & Int'l Organizations of Sen. Gov't Operations Comm.*, 93d Cong., 2d Sess., 373 (1974). However, as the head of the Administrative Conference of the United States observed, § 554(d)(1) prohibits private contacts about facts in issue with any person outside the agency, and not merely interested parties covered by § 557(d) (e.g., presumably persons such as outside experts). *Id.* at 258. Of course, Congress did not delete § 554(d) when it adopted § 557(d).

V. The Interplay between the *Ex Parte* Provision in Section 557(d) and the Separation of Functions Provision in Section 554(d)

Although agencies may take advantage of the initial licensing exemption in non-accusatory proceedings, failing to separate administrative functions may encumber licensing procedures because of the application of section 557(d) of the APA.¹¹⁶ Section 557 applies when agency adjudicators consult with staff members concerning the record in a licensing proceeding under review by the commissioners. In such cases, the advising staff members are “employee[s] who [are] or may reasonably be expected to be involved in the decisional process of the proceeding,” under the *ex parte* provision in section 557(d). Pursuant to that provision, after a licensing case is noticed for hearing, “no interested person outside the agency”—including applicants and intervenors—could communicate with such staff members about the merits of the licensing proceeding unless these communications were “on the public record” or the other parties had advance notice.

Such an application of section 557 could restructure the licensing process in some agencies if adjudicators seek decisional advice from staff members assigned to review, litigate or testify in the license application. Such staff members would no longer be available for unlimited, informal, private communications with applicants, particularly after the license application has been noticed for hearing. Informality would have to give way to pre-planned communications in which all parties could participate, as judges cannot speak with one party outside the presence of the other parties. Furthermore, the scope of communications between staff members involved in the decisional process and other staff members might be restricted on the following rationale. Section 557(d) arguably breaks agency employees into two mutually exclusive classes for purposes of on the record adjudications: (1) those “involved in the decisional process of the agency” and who, consequently, may not communicate privately and informally about the merits of the case with persons outside the agency; and (2) those who may continue to communicate privately and informally with persons outside the agency about the merits of the case and who, consequently, may not be “involved in the decisional process of the agency.” The question remaining is what kind of communications are permitted between these two classes of employees?

If the section 557(d) prohibition is to have meaning, the first class of employees (those assisting adjudicators to decide the case) should not be able to seek

116 The relevant sections of 5 U.S.C. § 557(d)(1) (1976) read as follows:

In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of *ex parte* matters as authorized by law—

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an *ex parte* communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an *ex parte* communication relevant to the merits of the proceeding;

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

private advice from the second class of employees (those continuing informal communications with outsiders and not assisting adjudicators in deciding the case) on how the issues in the case should be determined; otherwise, the second class of employees would be "involved in the decisional process of the agency." However, the separation between these two classes of employees effectuated by section 557(d) is not absolute. As long as the communications between these two groups does not involve the second class in the "decisional process of the agency" or cause members of the first class to become members of a prosecutorial or advocacy team and thereby cause other APA or constitutional problems, such communications are proper. For example, assume the first class includes staff supervisors and the second class includes staff attorneys and witnesses involved in the licensing case. The attorneys and witnesses could seek general advice from the supervisors about what policy and legal issues are implicated in the case and what sorts of evidence are relevant to these issues. Analogously, the supervisors could give policy and evidence instructions to the staff attorneys and witnesses.¹¹⁷ For the most part, such communications should not result in the staff attorneys' and witnesses' becoming "involved in the decisional process of the agency." However, when the initial decisionmakers or the commissioners decide the case, only the supervisors (assuming they have had no *ex parte* contacts with persons outside the agency and have not themselves become prosecutors or advocates) can advise in the decisional process; the staff attorneys and witnesses (assuming they have had *ex parte* contacts with persons outside the agency) cannot advise the licensing board or the commission directly, or indirectly by advising the supervisors.

There are three caveats implicit in the conclusion that certain types of communications between the two classes of staff employees are permissible even after a license application is noticed for hearing. First, private contacts between the second class of employees "acting as agents for interested persons outside the agency" and the first class of employees are "clearly within the scope of the prohibitions" in section 557(d).¹¹⁸ Thus, the communications allowable between both classes of employees presume a good faith desire to seek advice or provide supervision, rather than an intent to secretly pass along outsiders' comments to employees who will later assist the adjudicators deciding the case. Second, because the first class of employees will be involved in the case's decisional process, such employees should not allow their communications with or supervision of other staff members to result in their prejudging the issues or their becoming advocates themselves. Otherwise, a due process claim that the decisionmaker was tainted by biased advice may be maintained. Third, conversations between

¹¹⁷ It may be that for reasons other than § 557(d), the supervisors may not be able to advise in the decisional process if, through their extensive involvement with the staff, they have become akin to staff advocates for a particular viewpoint. For example, if the supervisor has directed the staff to take a specific position and to introduce evidence in support of it, the supervisor may be little different from the staff advocate litigating the case. Accordingly, if the staff advocate is precluded from privately advising the adjudicators because of potential legal problems, the supervisor who is heavily involved in the case may suffer the same prohibitions. In the end, through the application of § 557(d) and the due process clause, the commission could be left with a supervisor who will render advice to adjudicators in their deliberation of a particular case, but who will be foreclosed from private consultations with outsiders in that case and whose supervisory authority over the staff in that case will be limited to rather general guidance that is given from a detached and more neutral perspective. See notes 223-225 *infra* and accompanying text.

¹¹⁸ S. REP. NO. 354, 94th Cong., 1st Sess. 36 (1975).

the two classes of employees should be based solely upon information publicly available or soon available. Should secret material enter into these conversations, a due process objection might arise on the ground that a person involved in the decisionmaking process and advising the adjudicators has been exposed to, and has had his judgment colored by, private, off the record information. In short, an agency's decision to use certain staff members as advisors during an adjudication apparently prohibits any substantive communications after the adjudication is noticed, between those persons and persons outside the agency. Further, that decision evidently restricts the contacts between those persons and other agency staff members.¹¹⁹

The initial licensing exemption appears to be of no use in avoiding such results since there is no indication in the legislative history or in the language of section 557(d) that Congress did not intend the *ex parte* restrictions to apply in initial licensing cases. In fact, the contrary appears to be the case. Section 557(d)(1) provides that the *ex parte* provision applies "in any agency proceeding which is subject to subsection (a) of this section." Subsection (a) states that "this section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title." Section 556(a) states that "this section [i.e., section 556] applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section." Section 554(c) expressly states that "to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title" there must be an opportunity for hearing afforded interested parties. The initial licensing exemption which appears in subsection (d) of section 554, does not affect the reach of subsection (c) of section 554. Thus, section 557(d)'s *ex parte* provisions apply to initial licensing cases, as they apply to all adjudications required by statute to be determined on the record after opportunity for an agency hearing.¹²⁰ Because an agency charged with licensing determines the extent to which

¹¹⁹ Amendment of § 557(d) might be considered if Congress feels that the first class of staff members, who directly advise the adjudicators, should be allowed to consult freely about the case with the second class of staff members, who may have had *ex parte* contacts with outsiders about the case. This would allow more extensive use of staff expertise, and would rely upon the first group of staff advisers as a "buffer" against contamination of the actual decisionmakers.

¹²⁰ The NRC is faced with a unique and difficult question of whether § 557(d) applies to *uncontested* proceedings. On the one hand, as discussed above, the application of that subsection comes about through the series of statutory references back to § 554. However, § 554(c)(2) states that the hearing and notice provisions of §§ 556 and 557 apply "to the extent that the parties are unable so to determine a controversy by consent." Obviously, in an uncontested construction permit proceeding, the parties (the staff and the applicant) have agreed how the case should be resolved. Furthermore, there is no "controversy" which need be resolved. Apparently, the APA did not envision a complete, on the record adjudicatory hearing in such uncontested situations and hence there is little reason to believe that Congress intended the *ex parte* restrictions in § 557(d) to apply.

On the other hand, it is very possible to read § 554(d) to conclude that, at least with regard to uncontested construction permits (as opposed to uncontested initial operating license cases) the staff and the applicant are "unable" to resolve the case by consent. This is because § 189a of the Atomic Energy Act 42 U.S.C. § 2239 (1976), has been interpreted to require a formal, on the record adjudication in uncontested, as well as contested, construction permit cases. *Compare Costle v. Pacific Legal Foundation*, 445 U.S. 198 (1980). In view of the fact that such formal procedures must be followed, it is also reasonable to argue that the *ex parte* restrictions in § 557(d) should apply; the decision on the construction permit should be based solely on the record in the case and communications known to both the staff and the applicant. Thus, where a person outside the agency seeks to privately influence an adjudicator to deny the license application, even if it is formally uncontested, this is obviously unfair to the applicant. Furthermore, if the outsider is siding with the applicant and the staff, the public may be denied its statutory right to have the

members of the agency staff are involved in the decisionmaking process, it must weigh the impact these consultations will have on the present flexibility and informality of communications between staff and applicants or intervenors, and between staff involved in the decisionmaking process and other staff members.¹²¹

VI. Separation of Functions under the Due Process Clause

A. *The Constitutional Framework*

Although the APA would not prohibit consultations between an agency's commissioners and its regulatory staff, including the staff counsel, in non-accusatory licensing proceedings¹²² the limitations required by the due process clause for initial licensing and other proceedings remain unclear.¹²³

Due process is required whenever government action deprives a person of life, liberty or property. However, "due process is flexible and calls for such procedural protections as the particular situation demands."¹²⁴ In *Mathews v. El-*

mandatory construction permit hearing resolved solely on the basis of record evidence. Private comments from supportive outsiders may inject new information into the adjudicator's mind, and although this information may assist the applicant in getting a license, the public may never know about it.

This discussion is important because the question of whether § 557(d) applies to uncontested cases, which would be asked in the construction permit situation, does have some implications for the relaxation of the separation of functions rules at the NRC. Of course, in uncontested cases there would be no problem with a communication between the agency staff member who was to advise the adjudicators and the license applicant because this would not be an *ex parte* communication: the only parties to the proceeding, the staff and the applicant, would obviously have notice of and be involved in the communication. However, a problem might result if the staff desired to consult with some interested person outside the agency, other than the applicant, about the merits of the uncontested case. Unless such communication was on the record or the applicant had notice of it, this might be viewed as an *ex parte* communication between the outsider and the staff member who is an advisor to the adjudicator. If this interpretation of the law were to prevail, even in uncontested cases the NRC would have to sacrifice either the informality of communications between staff members serving as advisors to adjudicators and persons outside the agency or the prospect of consultations between these staff members and the adjudicators. As with contested cases, the NRC would not be able to have both. In light of these consequences, and because of the unique requirement of a mandatory formal adjudication on even uncontested licensing cases, § 557(d) should be interpreted as not applying to uncontested cases.

121 One other point must be made about the potential application of § 557(d) in contested or uncontested cases. The statute requires that the restriction on *ex parte* communications must commence at the time that a hearing is noticed, "unless the person responsible for the communication has knowledge that it will be noticed." § 557(d)(1)(E). Obviously, in the case of NRC construction permits, it is known to everyone that there will be a hearing. While it may be said that Congress never intended the *ex parte* rules to apply in every respect to the unique type of mandatory construction permit hearing conducted by the NRC, it is necessary to note that a broad reading of § 557(d) could well destroy the flexibility of the Commission's licensing process. If the adjudicators wish to consult with staff assigned to advocate or investigate in a construction permit case, a broad reading of § 557(d) would mean that these persons could not consult informally with the applicant or others outside the agency *even before* a formal hearing was noticed because everyone would know that a hearing will definitely be held. This interpretation of the statute is not compelled and, in fact, it is not very likely. However, it is possible that a court may reach the opposite conclusion.

122 As to whether an agency's organic statute would bar such consultations, see note 55 *supra* and accompanying text.

123 Most of the discussion in this section concerns staff members who have been involved in a case and who later serve as advisors to the adjudicators in the course of their decisionmaking process. Any potential due process problems are far more likely to be associated with such advisory consultations, rather than with efforts of the commissioners to supervise the staff involved in a proceeding or with consultations between these involved staff members and the commissioners about other matters such as independent, but factually related, investigations, rulemaking and the like (though the latter situations do not present merely frivolous concerns). See notes 82-97 *supra* and accompanying text. As for due process problems which might result where new information or arguments, not already on the record, were privately communicated by staff to the adjudicators, see note 226 *infra* and accompanying text.

124 *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

dridge,¹²⁵ the Supreme Court indicated that a delicate balancing of three distinct factors must be undertaken to determine whether a particular procedure satisfies the due process clause:

[First], the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹²⁶

B. *Interests at Stake in Licensing Cases*

Whether a life, liberty or property interest is at stake in a licensing proceeding depends, in large part, upon who asserts the due process claim. The interest of a license applicant or a license holder threatened with revocation or suspension differs from the interest of an intervenor in a license related proceeding claiming to be adversely affected by the grant of or a failure to revoke or suspend a license.

Applying for or holding a license likely implicates a property interest. The determination of whether such an interest exists is made according to the test set forth in *Board of Regents v. Roth*:¹²⁷

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.¹²⁸

Whether a "legitimate claim of entitlement" exists, however, does not depend upon the Constitution. Instead, "[p]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ." ¹²⁹ Where federal entitlements are concerned, the source of the property interests may be federal statutes¹³⁰ or agency regulations.¹³¹

Even before the statutory entitlement principle was announced, courts recognized that if a person held a license necessary to his livelihood, he had a protected property interest which could not be revoked without procedural due process.¹³² More recently, a property interest has been found to exist whenever a license is "essential in the pursuit of a livelihood."¹³³ Thus, where agencies are charged with issuing licenses and regulating licensees, the agencies have been

¹²⁵ 424 U.S. 319 (1976).

¹²⁶ *Id.* at 335.

¹²⁷ 408 U.S. 564 (1972). The *Roth* test followed, by two years, what appears to have been the formal abandonment in *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970), of the "right/privilege" test for defining a property interest. See Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965), cited in *Goldberg*, 397 U.S. at 262 n.8, for the proposition that "[s]ociety today is built around entitlement." For a harsh result worked by application of the "right/privilege" test, which assists in understanding why it is outmoded today, see *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

¹²⁸ 408 U.S. at 577.

¹²⁹ *Id.*

¹³⁰ See, e.g., *Pence v. Kleppe*, 529 F.2d 135, 140-42 (9th Cir. 1976).

¹³¹ See, e.g., *Joy v. Daniels*, 479 F.2d 1236, 1240-41 (4th Cir. 1973).

¹³² See, e.g., *In re Ruffalo*, 390 U.S. 544 (1968) (license to practice law); *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935) (license to practice dentistry).

¹³³ *Bell v. Burson*, 402 U.S. 535 (1971). See *Barry v. Barchi*, 443 U.S. 55 (1979) (suspension of race horse trainer's license).

required to afford licensees due process before suspending, revoking or modifying licenses relating to radio or television service,¹³⁴ air carrier service¹³⁵ or securities broker-dealer registration.¹³⁶ Termination of license related benefits differs little from revocation of other statutorily created entitlements which implicate due process protections.¹³⁷

Applications for initial licenses required for pursuing a business or profession have also been found to involve protected property interests.¹³⁸ Whether there is a "legitimate claim of entitlement" to an initial license depends upon the statutory scheme involved.¹³⁹ Although even under the current expansive definition of property, every initial license application may not qualify for due process protection,¹⁴⁰ the current refusal to distinguish between applications for initial licenses and suspensions or revocations comports with the realities of modern day life.¹⁴¹ In many instances an initial license may be required to continue an ongoing business. For example, a nuclear equipment supplier's request for an initial license for a nuclear test facility may be essential to normal business expansion or product testing. Similarly, a drug manufacturer may seek an initial license for a new drug to match competitors. Also, a steel plant operator may seek an initial license to discharge wastes which are by-products of a new process indispensable to the plant's continued operation. Even if the license is required for initiating, rather than the continuing, a business, it must be recognized that with the wide range of present day governmentally licensed activities, a significant investment of resources is often required to comply with application requirements.¹⁴² Few

134 See, e.g., *L. B. Wilson, Inc. v. FCC*, 170 F.2d 793, 798, 802-03 (D.C. Cir. 1948).

135 See, e.g., *Standard Airlines, Inc. v. CAB*, 177 F.2d 18 (D.C. Cir. 1949).

136 See, e.g., *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C. Cir. 1962).

137 See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262 n.9, in which the Court, in deciding that welfare benefits constituted a property interest, analogized to licensing cases.

138 See, e.g., *Konigsberg v. State Bar of Cal.*, 353 U.S. 252 (1957) (application for license to practice law); *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117 (1926) (application for admission to bar of government board); *Dent v. West Virginia*, 129 U.S. 114 (1889) (application for license to practice dentistry); *Freitag v. Carter*, 489 F.2d 1377 (7th Cir. 1973) (chauffeur's license application); *Raper v. Lucey*, 488 F.2d 748 (1st Cir. 1973) (driver's license application); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964) (liquor license application).

139 In *Roth*, the Court explained its earlier holding in *Goldsmith* in terms consistent with the entitlement concept: "[T]he existence of the Board's eligibility rules gave the petitioner an *interest and claim* to practice before the Board to which procedural due process requirements applied." 408 U.S. at 576 n.15 (emphasis added). Lower courts which have found protected property interests in applications for initial licenses or government benefits have similarly looked to the statutory scheme. See, e.g., *Griffeth v. Detrich*, 603 F.2d 118 (9th Cir. 1979), *cert. denied*, 445 U.S. 970 (1980) (Rehnquist, J., dissenting) (welfare benefits) and cases cited at note 138 *supra*.

140 In *Leis v. Flynt*, 439 U.S. 438, the Supreme Court found that although the State of Ohio had a practice of allowing out-of-state attorneys to practice *pro hac vice* in its courts, an individual attorney could not claim a constitutional right based upon a "wholly and expressly discretionary state privilege. . . ." *Id.* at 444 n.5 (emphasis in original). See *Schlake v. Beatrice Prod. Credit Ass'n*, 596 F.2d 278 (8th Cir. 1979) (credit loan application); *Berry v. Arapahoe & Shoshone Tribes*, 420 F. Supp. 934 (D. Wyo. 1976) (liquor license).

141 In *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979) the Supreme Court recognized a "crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires." *Id.* at 9. While this statement may be true and legally significant in the context of parole revocation versus parole granting, its application in other situations is doubtful. Moreover, the Court may have been concerned about the bounds of the liberty interest, which finds its genesis in fundamental rights, unlike property interests, which are created by normative laws. Thus the Court recognized the highly subjective and discretionary nature of parole release decisions. *Id.* at 9-10. Even in this context of convicted offenders, however, four Justices rejected the distinction between being granted freedom and not having one's freedom terminated. *Id.* at 18, 22 (Powell & Marshall, JJ., dissenting in part).

142 There is a two-step licensing process at the FCC, 47 U.S.C. §§ 308-309 (1976), and the NRC, whereby an applicant for an initial license must first obtain a construction permit and, after construction is

would make such expenditures knowing their applications could be arbitrarily denied and their investment destroyed. Nor would arbitrary denials foster entry into the marketplace and the increased competition that would result from the applicant's exercising his right to compete.¹⁴³

A liberty interest may also be implicated by initial application for or suspension, revocation or modification of a license associated with conducting a business or profession,¹⁴⁴ at least if natural persons are concerned.¹⁴⁵

In modern administrative law practice, the license applicant is often not the only non-governmental party to the adjudication. The intervention explosion after *Office of Communication of United Church of Christ v. FCC*¹⁴⁶ has included extensive involvement in licensing proceedings at virtually every federal agency by persons and organizations who claim either a personal stake in the outcome of the licensing case or an interest in protecting the public good. If these intervenors possess a property or liberty interest which will be impacted by the decision whether to grant, modify or revoke a license, they may not be deprived of that interest without due process of law.

To the extent that an intervenor is permitted, in an agency's discretion, to take part in a licensing adjudication even though he asserts no interest not shared by all members of the public, it is difficult to argue that there is any statutory entitlement that rises to the level of a property interest.¹⁴⁷ Where, however, a federal statute expressly provides for intervention on the part of affected parties,

completed, an operating license. The latter may be viewed "as a logical, but not an automatic, sequel to the fulfillment of the conditions of the construction permit." *In re Power Reactor Development Co.*, 1 A.E.C. 128, 137-38 (1959) *aff'd* *Power Reactor Development Co. v. Electrical Workers*, 367 U.S. 396 (1961) (rev'g Court of Appeals opinion setting aside Atomic Energy Commission order). In such instances, not only is application of the "entitlement" analysis appropriate, but it is difficult to justify any distinction between the application for the initial operating license and agency action to suspend or revoke an existing license.

143 Rather than distinguishing between initial and non-initial licensing, one might more appropriately distinguish between accusatory and non-accusatory licensing cases. Accusatory adjudications involve damage to a licensee's reputation and/or the creation of a stigma associated with the licensee, unfair consequences if the accusations are false. The Supreme Court has ruled, however, that reputation alone is not a liberty interest protected by the due process clause. The stigma attached to the licensee in the accusatory proceeding is only one factor that is useful in evaluating the extent of harm caused by governmental action that otherwise deprives a person of property or liberty. *Paul v. Davis*, 424 U.S. 693 (1976). *See Codd v. Velger*, 429 U.S. 624 (1977).

144 In *Northwestern Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243 (1906), the Supreme Court stated that "the liberty guaranteed by the 14th Amendment against deprivation otherwise than by due process of law embraces the rights to pursue a lawful calling and enter into all contracts proper, necessary, and essential to the carrying out of such calling." *Id.* at 253. *See Greene v. McElroy*, 360 U.S. 474 (1959) (termination of employment); *Shaw v. Hospital Auth.*, 507 F.2d 625 (5th Cir. 1975) (application by doctor for hospital staff privileges).

Of course, agencies license individuals to engage in activities which are unrelated to the pursuit of employment. For example, the CAB issues pilot licenses to private pilots, 14 C.F.R. § 61.5(a)(ii) (1980), the FCC issues citizens band licenses, 47 C.F.R. § 95.401, rule 3 (1980), and, on the state level, driver's licenses are issued. Courts have held that even licenses granted for such recreational purposes come within the liberty interest protected by the Due Process Clause. *See, e.g., Wall v. King*, 206 F.2d 878, 882 (1st Cir.), *cert. denied*, 346 U.S. 915 (1953); *Perez v. Tynan*, 307 F. Supp. 1235, 1238 (D. Conn. 1969).

145 In *Riggs*, the Supreme Court stated that "[t]he liberty referred to in [the Fourteenth] Amendment is the liberty of natural, not artificial, persons." 203 U.S. at 255. *See Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). *But see New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978). One exception to this general proposition is that "[f]reedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty guaranteed by the Due Process Clause" for natural and artificial persons. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 780 (1978).

146 359 F.2d 994 (D.C. Cir. 1966).

147 *Compare Bi-Metallic Inv. Co. v. Colorado*, 239 U.S. 441 (1915).

this would be strong evidence that Congress intended to create a protectable property interest.¹⁴⁸ Similarly, where a licensing decision may result in the deprivation of a property right created by state law,¹⁴⁹ due process safeguards would be applicable.¹⁵⁰

C. *Risk of Error Associated with Combinations of Functions*

After identifying the property or liberty interests that are implicated in a regulatory licensing scheme, due process analysis must identify the risks of erroneous decisionmaking associated with a combination of functions. The extent of these risks depends primarily upon which functions are combined and which agency personnel are involved. The APA drafters recognized at least two dangers in combining functions which could harm the decisionmaking process. These are concern about advice to adjudicators from staff members who had performed conflicting non-judicial functions and concern about these staff members interjecting off the record facts into adjudicative deliberations. Two additional possible dangers not reflected in the APA's separation of functions section are that decisionmaking personnel may prejudge the case¹⁵¹ or decisionmakers may be called upon to evaluate their own prior conclusions. Each of these dangers is discussed generally. Then their application to specific combinations of functions is examined.

The existence of a partial decisionmaker or advisor constitutes the first potential danger. The impartiality of the decisionmaker is perhaps the most important element of the adjudicatory process. The due process clause "entitles a person to an impartial and disinterested tribunal in both civil and criminal cases."¹⁵² This principle applies whether the case is before a court or an adminis-

148 An intervenor's right to a hearing on the license may itself constitute a property interest. For example, in *Union of Concerned Scientists v. AEC*, 499 F.2d 1069, 1081 (D.C. Cir. 1974), the court stated that "[d]ue process does indeed require that, where a right to be heard exists, it must be accommodated 'at a meaningful time in a meaningful manner.'" In that case, the Atomic Energy Act created a right to be heard. See also *Carolina Environmental Study Group v. United States*, 510 F.2d 796, 801 (D.C. Cir. 1975), in which the court assumed that an intervenor in an agency licensing proceeding had due process rights, although the court did not identify the particular property or liberty interest at stake. An intervenor's right to a hearing in a licensing case might also reflect congressional recognition of a more substantive property or liberty interest. See also *Davis v. Ball Memorial Hosp. Ass'n*, — F.2d —, 49 U.S.L.W. 2294 (7th Cir. Oct. 3, 1980) (No. 80-1209). Compare *Geneva Towers Tenants' Organization v. Federated Mortgage Investors*, 504 F.2d 483 (9th Cir. 1974) and *Gramercy Spire Tenants' Ass'n v. Harris*, 446 F. Supp. 814 (S.D.N.Y. 1977) with *Grace Towers Tenants' Ass'n v. Grace Hous. Dev. Fund Co.*, 538 F.2d 491 (2d Cir. 1976).

149 *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 469 F. Supp. 836, 858-62 (N.D. Ill. 1979), *aff'd*, 616 F.2d 1006, 1015 (majority opinion), 1017-19 (Pell, J., dissenting) (7th Cir. 1980). The municipality's zoning actions in this case can profitably be analogized to an agency's licensing determination which will have an adverse impact on the property of third persons. *O'Bannon v. Town Court Nursing Center*, 100 S. Ct. 2467, 2475 n.17 (1980).

150 In *O'Bannon*, the Supreme Court concluded that there is a "distinction between government action that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally . . ." 100 S. Ct. at 2476. Thus, it found that residents of a governmentally funded nursing home could not be said to be "deprived" of liberty or property when they are forced to leave the home because the state has revoked the home's license. The critical question, in the licensing context, is whether the effect on the citizen which arises from government action for or against a licensee is sufficiently direct to constitute a deprivation, assuming the existence of a property or liberty interest.

151 There is a specific provision in § 556(b) requiring lower level presiding employees to be "impartial" and allowing the agency to disqualify such employees for "personal bias," but there is no similar provision applicable to commissioners.

152 *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). The requirement of a neutral decisionmaker is so central to the fulfillment of due process that in its absence a violation of constitutional rights should be

trative agency¹⁵³ and whether the proceeding is accusatory or non-accusatory.¹⁵⁴ The term "impartial and disinterested" adjudicator means a decisionmaker whose job does not include performing functions which arguably conflict with an objective evaluation of the merits of the case.¹⁵⁵ For example, in accusatory cases an investigator who ferrets out facts to support initiating an enforcement action or a prosecutor who litigates the enforcement action are not impartial or disinterested. The performance of such non-adjudicatory functions, rather than the unique actions or judgments of a particular individual, destroys impartiality. To the extent such persons participate in the decisionmaking process, the Supreme Court declared in *Withrow v. Larkin*¹⁵⁶ that they "would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position."¹⁵⁷ As a result, these persons, who have developed a "will to win,"¹⁵⁸ might view the factual issues in a case in a biased manner. Despite Congress's early belief that initial license proceedings resemble rulemakings because policy concerns rather than factual disputes predominate, modern day agencies do more factfinding than policymaking in individual licensing cases. For the most part, an agency's policy judgments are made in its regulations which incorporate the delicate balancing of competing policies. For example, at the NRC, once a license applicant has satisfied the

found without the necessity of balancing. See, e.g., *NLRB v. Phelps*, 136 F.2d 562, 563-64 (5th Cir. 1943). The seminal case on separation of functions, *Withrow v. Larkin*, 421 U.S. 35 (1975), did not engage in a balancing analysis; it was, however, decided before *Mathews*. Moreover, since the *Withrow* Court concluded there was an impartial decisionmaker, it was not necessary to go further and balance other interests. In *Hortonville Joint School Dist. v. Hortonville Educ. Ass'n*, 426 U.S. 482 (1976), the Court did use the *Mathews* balancing test to approve a combination of functions; but it did so after finding no lack of impartiality on the part of the decisionmaker, and in the course of evaluating the general fairness of the proceeding.

153 See K. DAVIS, ADMINISTRATIVE LAW TEXT § 12.04 at 250 (3d ed. 1972), cited with approval in *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *Goldberg v. Kelly*, 397 U.S. at 271.

154 *Gibson v. Berryhill* was an accusatory adjudication involving revocation of an optometrist's license for unprofessional conduct. *Goldberg v. Kelly* was a non-accusatory adjudication concerning revocation of welfare benefits for failure to meet financial and other eligibility requirements.

155 Of course, financial interest in the outcome of a case is disqualifying, *Connally v. Georgia*, 429 U.S. 245 (1977), *Tumey v. Ohio*, 273 U.S. 510 (1927), as is personal bias against or in favor of a party, *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

156 421 U.S. 33 (1975).

157 *Id.* at 57. *Withrow* rejected the idea that, as a general proposition, the combination of investigating and judging functions in the same person or agency was necessarily tantamount to a denial of due process. In that case a state licensing board had conducted an investigative proceeding involving a doctor in order to determine whether to commence formal license suspension proceedings, over which the same board would preside. The doctor claimed that the board's combination of investigative and adjudicative responsibilities was a denial of due process. The Supreme Court rejected this claim of "institutional" bias, stating that the claim must "overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of the psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individual poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.* at 47. The Court focused on the different functions being performed by the board in its investigative and adjudicative capacities: to find "probable cause" sufficient to commence a prosecution in the former, but to make a finding of an actual violation based solely on the record evidence in the latter. In this context, the Court rejected the bias claim.

Although the *Withrow* case concerned alleged bias in the ultimate decisionmakers, many of the principles enunciated therein are equally applicable to initial decisionmakers (administrative law judges, appeal boards, etc.) and to agency staff who assist all adjudicators in making their decisions.

158 See S. REP. NO. 1018, pt. 1, 96th Cong., 2d Sess. 85 (Oct. 30, 1980).

agency's regulations, the applicant is entitled to a license.¹⁵⁹ Although in many licensing cases the factual dispute involves the reliability of testing procedures, formulae or results, resolving such disputes usually involves weighing expert opinion evidence or the underlying data, which itself may be highly disputed.¹⁶⁰ In these and in less technical disputes, the agency's decision must be based upon "reliable, probative and substantial evidence."¹⁶¹ Thus, in every decision, an agency performs a factfinding role, regardless of whether there are also policy choices involved.

The nature of the facts in a particular licensing proceeding affects the potential for decisionmaking error. For example, because disputes between experts might appear evenly balanced from reading a written record, the interjection of private advice by a biased advisor on the vital issue of expert credibility could skew the decision. Further, given the complicated nature of scientific disputes, and the massive amounts of data involved, a decisionmaker may tend to forgo firsthand detailed analysis and rely upon available advice. This susceptibility to persuasion by biased advisors could also distort the factfinding process where experts have little involvement in particular types of cases, but where witness veracity might be critical.¹⁶² While a decisionmaker can obtain most information from the written record, he may not know which facts to weigh most heavily. Advice from the agency litigator who sponsored a witness's testimony could cause the adjudicator to focus on the strengths of a witness's testimony and ignore its own inconsistencies or its conflicts with other testimony. To conclude, the risk of error associated with private advice to decisionmakers from biased staffers in licensing proceedings is not insubstantial.

The second source of error associated with combining functions is that facts not on the record might be interjected into the adjudicative process by persons who have performed non-adjudicative functions. On one hand, "mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not . . . disqualify a decisionmaker."¹⁶³ For example, prior to a hearing agency members consult freely with the investigators and prosecutors recommending commencement of formal adjudicatory hearings to suspend or revoke licenses. Such pre-hearing consultations might expose members to information which might not, or could not, be admitted into evidence at a formal hearing. But this practice has been upheld against due process objections. In

159 *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), Atomic Licensing App. Bd. No. 422, 6 N.R.C. 33, 42-43 (1977).

Another good example of how policy determinations are generally reflected in agency regulations is illustrated in *Hale v. FCC*, 425 F.2d 556 (D.C. Cir. 1970). The petitioners sought a hearing on whether the renewal of a radio license was consistent with the statutory public interest standard. Those opposed to the renewal argued that the multiple stations owned by the applicant presented an undue concentration of media control. The court upheld the FCC's refusal to act on the issue in the context of the renewal adjudication, finding that an ongoing FCC rulemaking was the preferred method for dealing with the general policy question of multiple ownership licensees.

160 *See, e.g.*, *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 881 (1st Cir. 1978); *Deutsch v. United States Atomic Energy Comm'n*, 401 F.2d 404 (D.C. Cir. 1968).

161 5 U.S.C. § 556(d) (1976).

162 *See, e.g.*, *Pressley v. FCC*, 437 F.2d 716 (D.C. Cir. 1970), where witness credibility was critical to determining if a license should be denied on grounds that the license renewal applicant had improperly encouraged a third party to compete for a license. Many other FCC cases involve charges where veracity is important, e.g., race or sex discrimination, news distortion or slanting, etc.

163 *Hortonville Joint School Dist. v. Hortonville Educ. Ass'n*, 426 U.S. at 493.

Withrow the Court declared that "mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness" of a later adversary proceeding.¹⁶⁴ The Court based its conclusion on the assumption that agency members are people "of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances."¹⁶⁵ Similarly, agency staffers arguably are included in this assumption in connection with the risk they might introduce off the record material into an adjudicative decision in which they are asked to give private advice after having performed non-adjudicative duties. Under this reasoning, pre-hearing exposure alone to extra-record material does not pose a sufficient justification for precluding agency staff from advising decisionmakers in a particular adjudication.¹⁶⁶ The risk of error associated with the infusion of such material into the decisionmaking process is not great enough to conflict with due process requirements. Where additional dangers¹⁶⁷ exist, however, the risk of error could easily be compounded if these staff members have been exposed to extra-record material which they would be psychologically less able to ignore.

A less acceptable risk of error exists when the adjudicator or those advising him have prejudged the case as a result of having performed other duties. Prejudgment should be distinguished from partiality. Partiality depends largely upon the nature and scope of the non-adjudicatory role played by one who must also adjudicate; it involves an institutional overview. Prejudgment, however, focuses on a conclusion about the facts of a particular case before formal adjudicatory procedures have been exhausted. However, prejudgment, like partiality, automatically disqualifies one charged with deciding a case.¹⁶⁸

Although various tests could be used to determine when an improper prejudgment has been made, the courts have evidently adopted the opinion that when "a disinterested observer may conclude that [the agency] . . . has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it" an improper prejudgment has been made.¹⁶⁹ The prejudgment in-

164 421 U.S. at 55. See also *United States v. Litton Indus., Inc.*, 462 F.2d 14 (9th Cir. 1972).

165 *Id.* (citing *United States v. Morgan*, 313 U.S. 409, 421 (1941)).

166 One could argue that agency staffers, unlike virtually all other agency members, are not appointed by the President and confirmed by the Senate, with the result that their consciences and intellectual discipline have not been subjected—and will not be so subjected—to the type of public scrutiny which allows the assumption of fairness to be made. While this concern is not frivolous, it is problematic whether it is a sufficient reason to distinguish between agency members and staffers for due process purposes.

167 *E.g.*, advice coming from partial staff members.

168 See *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970); 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 12.01-.06 at 130 (1958).

169 425 F.2d at 591 (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959)).

See *Texaco, Inc. v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964), *vacated and remanded on other grounds*, 381 U.S. 739 (1965). This general test was reaffirmed recently in *Lead Indus. Ass'n v. EPA*, No. 78-2201, slip op. at 97-99 (D.C. Cir. June 27, 1980). But see *American Cyanamid Co. v. FTC*, 363 F.2d 757, 765 (6th Cir. 1966) in which the court simply concluded that a commissioner should be disqualified for having formed, in advance of a hearing, "conclusions as to the facts". The Supreme Court itself has not formulated any single, general test. It refused to disqualify commissioners in *FTC v. Cement Inst.*, 333 U.S. 683 (1948) because it was not shown that their "minds . . . were irrevocably closed . . ." *Id.* at 701. In *Withrow* the Court opined that disqualification might be proper if a member's "initial view of the facts based on the evidence derived from non-adversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision . . ." 421 U.S. at 58. In *Hortonville*, the Court asked if the adjudicator was "capable of judging a particular controversy fairly on the basis of its own circumstances." 426 U.S. at 493.

quiry entails examining all the facts and circumstances relating to the charge of prejudgment, such as the depth of the adjudicator's prior contact with the factual issues in the case, the extent of factual overlap, the prior role of the adjudicator and his public utterances.¹⁷⁰ This inquiry must focus on whether the *facts* of the case have been prejudged. A decisionmaker is not disqualified on due process grounds for taking "a position, even in public, on a policy issue related to the dispute,"¹⁷¹ or for expressing a preference for a particular legal standard.¹⁷²

Finally, combining functions may result in an unacceptable risk of error where adjudicators are asked to review their own prior adjudications.¹⁷³ Due largely to the ambiguous language in recent Supreme Court decisions the rule in such cases is somewhat confusing. A judge is not disqualified from sitting in a retrial because he was reversed on earlier rulings, nor is an administrative law judge precluded from sitting because he ruled against a party in a first hearing.¹⁷⁴ This rule was reaffirmed in *Withrow*,¹⁷⁵ although the Court concluded by noting that "[a]llowing a decisionmaker to review and evaluate his own prior decision raises problems that are not present here."¹⁷⁶ The risk of error in such situations is obvious: having carefully scrutinized the facts of a case and publicly announced his decision, the adjudicator will tend to defend his decision against any argument that it is incorrect. Because there are two or three levels of decisionmaking in federal agencies, the risk of error could vary depending upon which adjudicators are being consulted about a case, the status of the case during the consultation, and the purpose of the consultation.

D. *Separation of Functions Safeguards or Other Procedural Requirements*

Separation of functions requirements could decrease the risks of error in an adjudicative process. The chance for an impartial decision increases when those persons who have performed non-adjudicatory functions and may have become psychologically wedded to a viewpoint are precluded from participating in the decision. The potential effect of off the record information is also reduced if persons exposed to that information do not decide the case. Obviously, grave error would result and an adjudication would exist in name only if those who had prejudged a case were allowed to decide it. Finally, persons who have served in one adjudicative capacity in a case could increase the chance of error if they are allowed to adjudicate the facts again and sit in judgment of their own prior decision.

Although the risks of error may be diminished by requiring separation of functions, alternative safeguards might overcome these risks. The greatest safeguard is the requirement that the adjudicator base his decision solely on the rec-

¹⁷⁰ See *Lead Indus. Ass'n v. EPA*, slip op. at 96-97 (citing *American Cyanamid*). For an illustration of how these factors can be balanced, see *Safeway Stores, Inc. v. FTC*, 366 F.2d 795, 801-02 (9th Cir. 1966), cert. denied, 386 U.S. 932 (1967).

¹⁷¹ 426 U.S. at 493.

¹⁷² 333 U.S. at 703.

¹⁷³ The combination of functions in this context is the performance of two different adjudicatory functions by the same persons, for example, an administrative law judge who issued an initial decision being called upon later to advise the members of the agency who are reviewing his decision.

¹⁷⁴ *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 236-37 (1947). See also 28 U.S.C. § 47 (1976).

¹⁷⁵ 421 U.S. at 49, 57.

¹⁷⁶ *Id.* at 58 n.25.

ord in the case.¹⁷⁷ A panoply of procedural protections is associated with this obligation. Sections 557(c)(1)-(3) require that the parties be permitted to submit proposed findings and conclusions (or exceptions to initial decisions) and supporting reasons, and section 557(c)(3)(A) requires that the record show a ruling on each such proposed finding, conclusion and exception, and that the decisions include specific findings, conclusions and reasoning of the adjudicator. Moreover, although independent, close judicial review cannot legitimize an otherwise constitutionally infirm initial adjudication,¹⁷⁸ such review strengthens procedural protections at the agency level. Finally, when a biased person advises the decisionmaker, the decisionmaker might simply discount the advice. However, even taken together, these safeguards probably cannot adequately protect against the risks of error attributable to a combination of functions. There are always some facts supporting a result desired by a biased adjudicator or an adjudicator who has prejudged the case. Even *ex parte* information, though not in the record to support a decision, may influence inferences drawn from the evidence. The doctrine precluding examining the mental processes of a decisionmaker¹⁷⁹ makes it virtually impossible to establish the existence of an effort to direct the decision to a particular result. Perhaps the only safeguard in this respect is a separation of functions rule which prevents biased staffers from taking part in the private decisionmaking process.

Although further safeguards could be added, they would undercut the essence of combined functions. For example, consultations between adjudicators and agency staff members who had performed non-adjudicative duties could be required to occur in public or transcripts of such consultations could be required. While salutary in many respects, exposing such consultations to public scrutiny would not really preserve the classic concept of combination of functions which includes informality and privacy.¹⁸⁰

E. *Government Interests and their Relationship to a Requirement of Separation of Functions*

Due process analysis requires looking at the government interests to be weighed against the personal interests at stake and the risks of error associated with a combination of functions. Several government interests apply to virtually all agencies. Additionally, an agency's own statutory mandate plays an important role.

The primary government interest in a combination of functions is the ability

¹⁷⁷ 5 U.S.C. § 556(e) (1976).

¹⁷⁸ *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972).

¹⁷⁹ *Morgan v. United States*, 304 U.S. 1, 18 (1938). The *Morgan* doctrine has been somewhat modified by *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971), which recognized the possibility that an adjudicator might be required to submit to questioning about the decisional processes he employed where the record compiled by the agency does not give any basis for a decision. Moreover, courts have compelled agency heads to go behind the stated grounds for their decisions to reveal improper *ex parte* contacts. *See, e.g., Home Box Office, Inc. v. FCC*, 567 F.2d 9, 52-53 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

¹⁸⁰ Under the APA, 5 U.S.C. § 554(d) (1976), separation of functions is required in that persons who investigate or prosecute in a case may not participate in the decision in that case or a factually related case "except as witness or counsel in public proceedings." It is the requirement of formality and public scrutiny, and not any absolute ban on participation in the decisionmaking process, which results in the separation of functions.

of agency decisionmakers to call upon the specialized knowledge of those most familiar with the facts of a case. A thorough grasp of a complex scientific process can often be gained only by long-term, in-depth investigation and analysis. An agency has few experts in fields such as nuclear energy or toxic substances. These experts frequently perform the pre-adjudicatory work on a license application. To foreclose their providing advice to the agency's administrative law judges or commissioners would nullify an important strength of the administrative process—the integration of diverse expertise in a single agency.

Agencies could hire additional specialists so their adjudicative apparatus would mirror its investigative and analytical departments. The investigative and analytical departments would then focus solely on pre-adjudicative preparation or other processes unrelated to adjudications such as rulemaking. However, such duplication would be expensive and perhaps even impossible. Agencies presently have difficulties attracting specialists from lucrative industry positions. Even if available, the best talent is expensive.¹⁸¹ In *Mathews*, the Supreme Court expressly authorized consideration of the cost factor:

Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources, is a factor that must be weighed.¹⁸²

A separation of functions requirement will likely impair an agency's ability to exercise its discretion in determining which combination of staff responsibilities best serves the public. The government has a significant interest in assuring that agencies are not hamstrung by procedural requirements not imposed by Congress.¹⁸³

These government interests point to perhaps the overriding concern about a separation of functions requirement: that an agency will be unable to carry out its statutory mandate to protect the public. This consideration had decisive persuasiveness in *FTC v. Cement Institute*.¹⁸⁴ In that case the Court noted that if FTC commissioners were required to disqualify themselves for having investigated certain practices, the legality of which they were later called upon to adjudicate, the agency's statutory mandate could not have been carried out by those appointed to regulate.¹⁸⁵ Although this rationale supports a combination of functions in commissioners, it still would be possible for an agency to perform its duties under a strict separation of functions rule applicable to lower staff members. For decades, the Atomic Energy Commission (AEC) and the NRC have performed their adjudicative roles under one of the most severe, self-imposed separation of functions schemes.¹⁸⁶ Nonetheless, as both the President's Commission on Three Mile Island and the Rogovin Commission suggested, the commissioners' inability to consult freely and privately with staff members could easily deny them access

181 The question of federal salaries has received extensive attention recently, especially because such salaries have not kept pace with the rate of inflation. See, e.g., *Panel Urges Big Pay Boosts for Top Federal Officials*, Washington Post, Dec. 17, 1980, at A-6; *Administrative Conference Report on ABA Proposals To Amend The Administrative Procedures Act*, 25 AD. L. REV. 419, 435-36 n.2 (1973).

182 *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). See *Richardson v. Perales*, 402 U.S. 389 (1971).

183 *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 546.

184 333 U.S. 683.

185 *Id.* at 701.

186 See text accompanying note 48 *supra*.

to information and ideas they might need to better protect public health and safety.¹⁸⁷ Concerns that procedural protections might interfere with protection of the public is a critical element in due process analysis.¹⁸⁸ Unlike agencies which have operated with strict separations of functions, agencies which have come to depend heavily on non-separated staffs in adjudicatory cases might make a case for the harm which would result from separation. Moreover, although threats to public health and safety are of paramount concern, agency mandates relating to economic harm also warrant consideration.¹⁸⁹

Finally, the government itself has an interest in assuring its licensing proceedings are conducted fairly, appear to have been conducted fairly and leave parties satisfied that license applications or objections to the issuance of licenses receive just consideration.¹⁹⁰ The axiom that government depends upon the consent of the governed is even more appropriate when the very concept of administrative agency regulation is being questioned.¹⁹¹ To the extent it undermines fairness concerns, a combination of functions is counterproductive to good government.

F. *Application of the Balancing Test to Particular Combinations of Functions*

As the Supreme Court recognized in *Withrow*, "the growth, variety, and complexity of the administrative processes have made any one solution [to the separation of functions debate] highly unlikely."¹⁹² Although a combination of investigative and adjudicative functions in agency commissioners, even in an accusatory licensing case, does not violate due process, the opposite may be true where lower level agency staffers are assigned both prosecutorial and adjudicative duties. The nature of the consultations, the persons involved, the type of proceeding and many other factors could tip the balance away from that in *Withrow*. Absent a definite Supreme Court decision, the circumstances under which separation of functions is constitutionally required remain unclear. Nonetheless, it is useful to analyze various combinations under the *Mathews* balancing test. Furthermore, because accusatory adjudications raise concerns not existing in non-accusatory cases, each class will be discussed separately.¹⁹³

¹⁸⁷ See text accompanying notes 7-12 *supra*.

¹⁸⁸ See, e.g., *Addington v. Texas*, 441 U.S. 418 (1979) (protection of community from dangerous tendencies of some mentally ill patients must be considered in determining standard of proof for commitment); *Dixon v. Love*, 431 U.S. 105 (1977) (public safety of roads is important factor in deciding on procedures for suspension of driver's license); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (public interest in protection from paroled convicts is factor to be weighed when deciding procedures for revocation of parole).

¹⁸⁹ In *FTC v. Cement Institute*, 333 U.S. 683, 701-02, the Court focused on the need to protect the public from unfair trade practices. In *Barry v. Barchi*, 443 U.S. 55, 65 (1979), the Court was concerned about harm to the public from a horseracing industry in which the horses on which bets were placed might be drugged.

¹⁹⁰ *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

¹⁹¹ Congress has recently passed legislation to substantially deregulate the airline industry, *Airline Deregulation Act of 1978*, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C. (Supp. II 1978)); the railroad industry, *Railroad Transportation Policy Act of 1980*, Pub. L. No. 96-448 and the trucking industry, *Motor Carrier Act of 1980*, Pub. L. No. 96-296, 94 Stat. 793. A modest deregulatory proposal applicable to all agencies was adopted in the *Regulatory Flexibility Act*, Pub. L. No. 96-354, 94 Stat. 1164 (1980).

¹⁹² 421 U.S. at 51.

¹⁹³ The following analysis applies to advocates who are participating or advising in the formal adjudication in question, or in a factually related formal adjudication. As under the APA, these advocates should be permitted to advise agency heads privately in connection with rulemakings, preparation of

1. Communications between Agency Adjudicators and Agency Regulatory Staff in Accusatory Proceedings

Typically involving suspensions or revocations, accusatory licensing proceedings may result in a licensee's loss of property or liberty insofar as his pursuing the licensed occupation or operation is concerned. Despite the gravity of this interest, the *Withrow* decision rejects the argument that a combination of investigative and adjudicative duties in the members of an agency during the course of an accusatory proceeding raises an unacceptable risk of bias violating due process.¹⁹⁴ Moreover, insofar as the agency commissioners delegate the actual investigative tasks to the regulatory staff (which, in turn, makes a recommendation to the commissioners on whether to commence formal proceedings), there are no due process problems with the commissioners consulting privately with and supervising the investigators during the investigation, at least until a formal hearing is ordered.¹⁹⁵ However, after a hearing has commenced, consultations about how to decide the case between commissioners or initial adjudicators and the investigative or prosecuting staff should be circumscribed to afford the parties due process.

After a hearing has commenced, commissioners may want to supervise the prosecutorial staff in a particular case. By so doing, the commissioners themselves perform prosecutorial functions. A combination of prosecutorial and adjudicative functions in the same person has been found to violate due process, both before¹⁹⁶ and after¹⁹⁷ *Withrow*. On the other hand, Professor Davis, noting the

congressional testimony and similar budgetary matters which may address some of the issues at stake in the formal adjudication. See text accompanying notes 84-94 *supra*. Whether these advocates should also be allowed to advise the decisionmakers privately in a factually related informal adjudication, at least where the party in the formal adjudication is also a party to the informal proceeding, is dubious after *Bethlehem Steel Corp. v. EPA*, No. 79-2382 (7th Cir. Dec. 22, 1980). In *Bethlehem Steel* the EPA had commenced an enforcement action in federal court against a steel company, while at the same time, in an informal adjudication, the agency was entertaining review of a state order which would have permitted the company to delay compliance with the state air pollution implementation plan. Although § 554 is inapplicable to informal adjudications, the court ruled that the due process clause was violated because the attorney who was prosecuting the enforcement action had privately advised the EPA decisionmaker in the informal adjudication. It is possible that the court meant to prohibit such private advice from prosecutors in all related informal adjudications, although the ruling might be read more narrowly. The court was concerned that the agency may have been using the informal adjudication in an effort to improve its position in the enforcement action; that the decisionmaker's rationale in the informal adjudication was expressed in language identical to that used in an internal agency memorandum dealing with the enforcement action; that the agency had failed to disclose adequately the documents upon which it relied in making its adjudicative decision; and that the private communications between enforcement attorneys and the decisionmaker in the informal adjudication had taken place after the period for public comment on the EPA review of the state order.

194 The combination of investigative and limited adjudicative functions was upheld, following *Withrow*, in *NLRB v. Aaron Bros. Corp.*, 563 F.2d 409 (9th Cir. 1977). See also *O'Brien v. DiGrazia*, 544 F.2d 543 (1st Cir. 1976).

195 In *Withrow*, the Supreme Court noted that the board had assigned the actual investigation to its staff, and that the recommendation to prosecute was made by an assistant attorney general. The Court stated that this internal board organization, geared to minimize the risks from combining investigative and adjudicative duties, was "not essential" to the decision upholding the constitutionality of the board's combination of both duties. 421 U.S. at 54 n.20.

196 In *re Murchison*, 349 U.S. 133 (1955), struck down a "one-man grand jury" system in which a judge could compel witnesses to testify before him about possible crimes, and then accuse and try them for contempt and perjury. Although *Withrow* gave a narrow reading to *Murchison* and indicated that it would not apply to a combination of adjudicative and investigative functions, *Murchison* could well still be applicable to a combination of adjudicative and prosecutorial functions. In another pre-*Withrow* case, *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C. Cir. 1962), the court ruled that it "would be tantamount to that denial of administrative due process against which both the Congress and the courts have inveighed" to

APA itself permits a combination of prosecuting and judicial functions in agency heads, cited a number of pre-*Withrow* state court decisions upholding this combination against due process attacks.¹⁹⁸ At least one court has reached a similar result after *Withrow*.¹⁹⁹

Confronted by such differences of opinion, agencies handling initial and other licensing cases should seek a middle course. Commissioners should be permitted during the course of these proceedings to communicate with the staff involved in an accusatory proceeding to supervise and guide the staff on general legal and policy considerations. However, commissioners should limit discussion concerning the precise facts of the case. Commissioners would thus decrease the risk of error which might later result if they identified with the prosecutorial attitude toward the facts, absorbed off the record information during the adjudicative process or prejudged the facts of the case. By overseeing the prosecution generally, commissioners could coordinate their various statutory duties and assure that the agency's policies are reflected in the theories pursued by its prosecutors. Moreover, a lack of detailed involvement would help avoid embroiling the agency members in individual cases to the exclusion of their other, broader duties. Lack of detailed involvement would also contribute to fairness and the appearance of fairness. Thus, balancing these various factors, as required by *Mathews*, allows agency members to achieve limited, but meaningful, involvement in supervising agency prosecutors during trials.

Prosecutors or investigators advising agency members on how to decide an accusatory case presents a very different set of concerns.²⁰⁰ The APA prohibits

allow a commissioner to partake in an agency adjudication after having been promoted from a staff position where he initiated an investigation, weighed its results and perhaps recommended the filing of charges. *Id.* at 266-67. *Withrow* specifically noted *Amos Treat*, but refused to either reject or endorse it. 421 U.S. at 50 n.16. Finally, in *Mack v. Florida State Bd. of Dentistry*, 296 F. Supp. 1259 (S.D. Fla. 1969), *modified*, 430 F.2d 862 (5th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971), the court found due process violations where, in an accusatory license revocation proceeding, the legal advisor to a board made adjudicative decisions for the board and also acted as the prosecuting attorney, and where that same person was present during the deliberative sessions of the board. See also *Hoberman v. Lock Haven Hospital*, 377 F. Supp. 1178 (M.D. Pa. 1974) (dictum).

197 In *Huber Pontiac, Inc. v. Allphin*, 431 F. Supp. 1168 (S.D. Ill. 1977), *rev'd on other grounds*, 585 F.2d 817 (7th Cir. 1978), the court held that *Withrow* dictates that combining prosecuting and adjudicating functions in one person violates due process. The court stated that the adjudicator would become "psychologically predisposed" toward one side of the controversy. 413 F. Supp. at 1172. See also *Doremus v. Farrell*, 407 F. Supp. 509 (D. Neb. 1975), which came after but did not cite *Withrow*.

198 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 13.10 at 237, 240 n.15 (1958).

199 Halleck v. Berliner, 427 F. Supp. 1225 (D.D.C. 1977).

200 The Supreme Court has yet to rule on the constitutionality of a combination of prosecutorial and adjudicative functions in the same administrative agency officials, be they commissioners or staff members who advise commissioners. In *Gibson v. Berryhill*, 411 U.S. at 579 n.17, the Court found no need to comment upon cases like *Mack* or *Amos Treat*. In *Pickering v. Board of Educ.*, 391 U.S. 563, 578 n.2 (1968), it refused to rule on a claim that the due process clause was violated in that an impartial tribunal did not exist where the trier of fact was also both the victim of the accused's statements and the prosecutor who brought the charges. Citing *Murchison* and *Tumey v. Ohio*, 273 U.S. 510 (1927), however, it did "not propose to blind [itself] . . . to the obvious defects in the fact-finding process occasioned by the Board's multiple functioning vis-a-vis appellant." *Id.* at 573 n.2. In *Withrow*, 421 U.S. at 53 n.19, the Court noted that the due process claim in *Pickering* was different from that in *Withrow* and that, in any event, the claim was not resolved in *Pickering*. In *Pangburn v. CAB*, 311 F.2d 349 (1st Cir. 1962), which the *Withrow* court found to be "instructive", 421 U.S. at 50 n.16, the board members alleged to have violated due process had played an investigative role in one proceeding, followed by an adjudicative role in a factually related proceeding, both in accordance with the agency's statutory mandate. The due process claim was rejected. Yet, *Pangburn* is clearly distinguishable from a case involving a combination, in the same proceeding, of prosecutorial and adjudicative functions in agency commissioners or staff members. Not only were very

such private consultations in most formal adjudications,²⁰¹ including accusatory initial licensing cases.²⁰² The risks of error prompting congressional enactment of a separation of functions rule are relevant to a due process analysis of all accusatory cases involving initial or non-initial licensing. Likewise, the nature and importance of the affected private interests does not significantly differ in the two types of cases. As for governmental interests, extending separation of functions to initial licensing cases would entail increased costs, problems in taking advantage of specialized knowledge within an agency, and perhaps greater frustration in carrying out an agency's statutory mandate. Yet, the importance of these interests can be questioned in light of Congress's willingness to forgo them in licensing cases covered by section 554(d). Balancing these various factors should lead to the conclusion that due process is violated if prosecutors or investigators privately advise the adjudicators in their deliberations.²⁰³

2. Communications between Agency Adjudicators and Agency Regulatory Staff in Non-Accusatory Proceedings²⁰⁴

Many of the private interests at stake in accusatory licensing cases are also

different proceedings involved in *Pangburn*, but the board members performed investigative—and prosecutorial—and adjudicative functions. 311 F.2d at 356.

201 To the extent that the "members of . . . the agency" exemption in § 554(d)(2)(C) has been viewed as permitting consultations between members and agency employees involved in "prosecuting" or "investigative" activities, this view is erroneous. It would make meaningless the restriction in § 554(d)(2) on persons who perform these activities participating or advising in "review" of an initial decision. At the time the APA was passed, virtually all agency review processes were appeals directly from initial decisionmakers to agency heads. If the "members of . . . the agency" exemption were viewed to allow private consultations in those situations, there would be nothing left of the separation of functions section of the APA. *See Grolier, Inc. v. FTC*, 615 F.2d 1215, 1220 (9th Cir. 1980).

202 For a discussion of how Congress had not intended the initial licensing exemption to be applicable to contested accusatory-type cases, see text accompanying notes 28-41 *supra*. A court which rejects this reading of the initial licensing exemption should nonetheless find separation of functions a constitutional requirement in accusatory-type cases.

203 *See, e.g., Gonzales v. McEuen*, 435 F. Supp. 460 (C.D. Cal. 1977), in which the court held that the expulsion process in a high school violated due process when the counsel for the administration (the prosecutors) also advised the school board (the adjudicators). The court also condemned the presence of the school superintendent, who was the chief of the prosecuting team, at the deliberations of the adjudicating board, saying that it was "fundamentally unfair" and raised a "presumption of bias." *Id.* at 465.

The case of *Marcello v. Bonds*, 349 U.S. 302 (1955) has been cited by Professor Davis in support of the proposition that a combination of judging with the performance of prosecuting or investigative functions does not violate due process. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 13.02 at 175 (1958). *See also Shaughnessy v. United States ex rel. Accardi*, 349 U.S. 280 (1955). In *Marcello* the adjudicating officer was subject to the supervision of those performing prosecuting and investigative functions in a deportation proceeding. The case is of doubtful validity today, at least outside of immigration law. The Court's terse conclusion was based solely on its recognition of "the long-standing practice in deportation proceedings, judicially approved in numerous decisions in the federal courts, and against the specific considerations applicable to deportation which Congress may take into account in exercising its particularly broad discretion in immigration matters." 349 U.S. at 311. Moreover, this conclusion was reached without the type of balancing analysis now required under *Mathews*. Finally, *Marcello* has not been cited by the Supreme Court in 15 years, since *Woodby v. Immigration Service*, 385 U.S. 276 (1966), a particularly serious omission in light of the Court's treatment of the separation of functions issue in cases like *Withrow* and *Hortonville*.

204 The previous section dealing with accusatory proceedings discussed the due process implications of communications between adjudicators and staff investigators or prosecutors. Contacts between adjudicators and other agency employees in such proceedings were not discussed (*e.g.*, conversations with staff witnesses or with non-involved staff members). However, the due process discussion in the case of non-accusatory proceedings is also relevant to such contacts not specifically discussed in the text accompanying notes 194-203 *supra*.

involved in non-accusatory proceedings.²⁰⁵ The fundamental rule also remains the same in that the parties are entitled to a decision by impartial decisionmakers relying solely upon the evidentiary record compiled in the case. Yet, in non-accusatory proceedings there are no prosecutors and, to the extent there are investigators, their functions often differ from those of investigators in accusatory cases. Instead, staff may advocate a particular viewpoint opposed by a party to the proceeding. Staff advocates include the agency's trial staff, if the agency actually advocates a position during and after the hearing as opposed to its merely taking a neutral trial role. Additionally, staff investigators and witnesses are advocates when they compose an integral part of the trial team. The distinct staff organizations at various agencies will lead to differing determinations of which staff are advocates and what risks of error are associated with a combination of advocacy and adjudicative functions. The strength of the government interests may also vary since concerns unrelated to licensee misconduct are involved in non-accusatory adjudications. Although generalizations are difficult to make in predicting the application of the balancing analysis required by *Mathews*, it is useful to look at the cases which have considered the issue of private contacts between staff and agency decisionmakers in the context of informal rulemakings because of the recent developments in that area.

Early case law left no doubt that due process did not require separation of functions in informal rulemaking.²⁰⁶ A few cases left the issue temporarily unsettled,²⁰⁷ though it is now clear that due process generally does not require separa-

²⁰⁵ The major exception, of course, is the absence of any stigma associated with the resolution of the non-accusatory issues.

²⁰⁶ *See, e.g.*, *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676 (9th Cir.) *cert. denied*, 338 U.S. 860 (1949) (no violation of APA or due process where chief government witness and chief government counsel in rulemaking proceeding aided and prepared portions of findings and conclusions); *Wilson & Co. v. United States*, 335 F.2d 788 (7th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965) (no violation of APA or due process where government counsel of record in ratemaking/rulemaking proceeding participated in decisional review process within agency); *A.T.&T. v. FCC*, 449 F.2d 439 (2d Cir. 1971) (no violation of APA or due process where agency staff members and staff witness in ratemaking/rulemaking proceeding advised agency with regard to final decision); *Hoffman-LaRoche, Inc. v. Kleindienst*, 478 F.2d 1 (3d Cir. 1973) (no violation of APA or due process where government trial counsel in rulemaking proceeding helped prepare agency's tentative and final orders).

²⁰⁷ In *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977), the court flatly prohibited *ex parte* communications between persons *outside* the agency and agency decisionmakers in an informal rulemaking proceeding. One basis for the court's decision was that it had previously condemned agency decisions which were based upon information known only to the staff of the agency and not commented upon by parties to the rulemaking proceeding. *See, e.g.*, *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998 (D.C. Cir. 1976) *cert. denied*, 431 U.S. 925 (1977); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973). Accordingly, the *Home Box Office* court found that "[f]rom a functional standpoint, we see no difference between assertions of fact and expert opinion tendered by the public . . . and that generated internally in an agency: each may be biased, inaccurate, or incomplete . . ." 567 F.2d at 55. Thus, the court used the rationale of the impropriety of such secret staff information to find contacts with persons outside the agency to be equally inappropriate.

The analogy would appear to have come full circle: if *ex parte* communications from interested persons outside the agency are prohibited in light of *Home Box Office*, why should interested staff members inside an agency—at least where they have taken an advocacy position adverse to other participants in a rulemaking proceeding—be allowed to communicate in private with agency decisionmakers? The post-*Home Box Office* cases dealing with this issue have been confusing and contradictory: two courts have flatly rejected the suggestion that staff-decisionmaker contacts are violative of due process, *Marketing Assistance Program v. Bergland*, 562 F.2d 1305 (D.C. Cir. 1977); *Katherine Gibbs School v. FTC*, 612 F.2d 658, 670 (2d Cir. 1979); one court left this sensitive constitutional issue "to another day" in light of unique facts in the case before it, *Hercules, Inc. v. EPA*, 598 F.2d 91, 126 (D.C. Cir. 1978); and another court raised serious doubts about the practice but dismissed the challenge as premature, *Association of Nat'l Advertisers v. FTC*, 617 F.2d 611, 620 (D.C. Cir. 1979); *Id.* at 632-34 (Wright, C.J., concurring).

tion of functions in informal rulemakings.²⁰⁸ In light of the courts' willingness to seriously reexamine this matter, there is reason to be concerned about such contacts in formal, on the record non-accusatory licensing adjudications. This conclusion comports with the notion that private communications "by an adversary party to a decisionmaker in an adjudicatory proceeding are prohibited as fundamentally at variance with our conceptions of due process."²⁰⁹ To the extent courts may view an agency's staff members as representing an "adversary party" in a non-accusatory adjudication, due process limitations may apply to private consultations between staff members and the adjudicators. The private contacts in non-accusatory formal licensing cases between agency adjudicators and staff advocates, witnesses, investigators and supervisors will be examined in turn.

208 A very recent District of Columbia circuit case appears to have settled the issue of whether due process requires separation of functions in informal rulemakings. In *United Steelworkers v. Marshall*, No. 79-1048 (D.C. Cir. Aug. 15, 1980), the court found no constitutional violation where an agency employee reviewed preliminary research, drafted a proposed rule standard, helped organize public hearings on the proposal, communicated regularly with prospective expert witnesses outside of the hearing, questioned agency witnesses and cross-examined other witnesses during the hearing itself, and then assisted the Assistant Secretary by reviewing the evidence, preparing summaries and analyses, and drafting recommendations for the final rule standard. The court recognized that the informal rulemaking proceedings may have been transformed into an adversary proceeding, with the key agency employee having advocated a viewpoint that was contrary to other views offered by industry parties. Nonetheless, the court noted that "the mere fact that this particular proceeding became highly adversarial cannot transform informal rulemaking into something else." *Id.*, slip op. at 30 n.24. It stated that even if the agency employee could be considered an advocate for a particular standard, his "conduct remained within the general boundaries of the deliberative process and, however biased, his communications with the Assistant Secretary remained within the boundaries of deliberative material." *Id.* at 27 n.20 (emphasis in original). The court distinguished its language in *Home Box Office*, where it focused on the similarities between *ex parte* contacts from persons outside the agency and staff advice given privately to agency decisionmakers. The court clarified that in *Home Box Office* it meant to condemn only "a case where agency employees supplied the decisionmaker with actual new evidence which the agency has identified as part of the basis for its decision, but which it refused to disclose except through a 'blind reference.'" *Id.* The court also referred to its earlier concern about combined functions in informal rulemakings, expressed in *Hercules*, as dictum. *Id.* at 34. In short, the court concluded, "[r]ulemaking is essentially an institutional, not an individual, process, and it is not vulnerable to communication within an agency in the same sense as it is to communication from without." *Id.* at 35.

The evolution of the issue of separation of functions in informal rulemakings is a good example of how due process analysis has matured. Although the *United Steelworkers* court did not refer to the balancing test envisioned by *Mathews*, the court did, in fact, conduct such a balancing. It contrasted the rulemaking with other types of proceedings, stating that "the concept of advocacy does not apply easily where the agency is not determining the specific rights of a specific party . . ." *Id.* at 25. Moreover, the court focused on the important government interest in assuring that rulemakings remain an essentially "institutional" process. Any risk of error in arriving at a final rule appeared to the court to be quite small, and acceptable within the confines of institutional decisionmaking, especially since it gave little weight to specific private interests of specific parties which could be affected by the rulemaking.

Of course, one can find fault with the balancing done in the *United Steelworkers* case. The valuation of the competing interests can be questioned since the adopted rule imposed substantial economic costs on specific industries. Moreover, the court's minimization of the risk of error, and its acceptance of this risk, is debatable since it is based, in part, on the terse conclusion that although Congress, in the case under review, had added "to informal rulemaking the special requirement of a substantial evidence test[, this] does not change the essential character of the rulemaking . . ." *Id.* at 29-30. Thus, the court's clinging to the rulemaking/adjudication dichotomy undermines its more important contribution, which is the need for a balancing analysis to resolve the separation of functions issue. Finally, if nothing else, the case is a good illustration of the fact that the separation of functions issue continues to remain as troublesome today as it was when Congress first examined it in the 1940's.

209 *Doe v. Hampton*, 566 F.2d 265, 276 (D.C. Cir. 1977). *Doe* was an accusatory adjudication, but it cited the above proposition as a general rule and as support referred to *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959), *cert. denied*, 376 U.S. 915 (1964). The latter case, however, was a rulemaking proceeding involving *ex parte* contacts by persons outside the agency.

a. *Communications with Staff Advocates*

At some agencies the regulatory staff of technical experts and attorneys typically forms a definite opinion on a license application at the conclusion of the non-adversarial pre-hearing investigative stage of the licensing process. The staff members then take an advocacy position during contested adjudicatory proceedings. Typically, on the merits of the license application the position is adverse to an intervenor and adverse to either the intervenor or to the applicant on procedural issues.²¹⁰ Like other parties to the adjudication, the staff at such agencies files its proposed findings and conclusions with the initial decisionmakers, the agency appeal board and finally with the commissioners themselves. Thus, arguably, the staff has prejudged the issues by the time the adjudicators sit down to decide the case and it also has a “will to win” for its position.

In these circumstances, there is a risk of error in allowing such staff advocates to advise the decisionmakers. While the strength of their advocacy might vary from agency to agency, or from case to case, generally such staff advocates “would be so psychologically wedded to their [prior positions] that they would consciously or unconsciously avoid the appearance of having erred or changed position.”²¹¹ Such a risk is somewhat smaller than it is in the case of prosecutors in accusatory proceedings. In accusatory proceedings, there is a greater feeling of right and wrong, of a desire to punish a particular person and of doing justice. Many non-accusatory cases come down to debates over matters of financial or technical qualifications.²¹² In such debates there might be controversy over lay or expert evidence, but the agency advocate—unlike the agency prosecutor in an accusatory proceeding—might involve himself more with the substance of the disputed issues rather than with winning a case against a particular party. As in accusatory cases, the decisionmakers would be aware of the advocates’ interest and could thereby discount or more carefully scrutinize the advice received. However, these factors and the additional APA safeguards would not generally reduce the risk of error to an acceptable degree.

The government interests in a non-accusatory case can also vary considerably, even when compared with the government interests in accusatory cases. The government interest in protecting public health and safety underlying an agency’s effort to deny or revoke a license in a non-accusatory proceeding deserves more weight than does the government interest in an accusatory case in imposing a civil penalty against a Citizens Band radio operator for violating FCC rules regarding maximum power for a transmitter. On the other hand, there is an overwhelming government interest in conducting an accusatory proceeding to revoke the license of an aviator displaying a total disregard of air safety rules, while the government interest in denying a radio license to a financially unqualified applicant in a non-accusatory licensing case is far less important. To the extent that private consultations with agency advocates can be

210 In *Withdraw*, the court pointed out that there were no due process problems involved in taking a position during a non-adversarial investigative phase, and then adjudicating a matter. Hence, the court was not dealing with an agency employee (whether staff or commissioner) who performed an advocacy role during the adjudicatory phase of a proceeding.

211 *Withdraw v. Larkin*, 421 U.S. at 57.

212 42 U.S.C. § 2232(a) (1976) authorizes the NRC to consider an applicant’s technical and financial qualifications.

proved to significantly increase the decisionmakers' ability to achieve their public health and safety goals in non-accusatory cases, the government interest in that process must weigh heavily in the *Mathews* balancing test. However, equally important is the government interest in assuring the appearance of fairness in all non-accusatory causes—a goal that is inconsistent with allowing private advice from staff advocates.

Considering the totality of factors, agency advocates generally should be disqualified from advising decisionmakers in non-accusatory licensing adjudications on due process grounds. Even a strong government interest in achieving public safety or health goals should not overcome a party's interest in obtaining, and the government's interest in providing, an impartial adjudicator whose decision is not tainted by private advice from staff advocates. Alternative mechanisms not relying upon such combinations of functions must be developed to help an agency attain its statutory goals. On the record briefings by advocates or an expanded adjudicatory advisory staff are two possibilities.

Although it is a pre-*Withrow* case, *Trans World Airlines v. CAB*,²¹³ supports this conclusion. The case involved a non-accusatory adjudication in which the Postmaster General contested a compensation request filed by TWA. The Solicitor of the Post Office, who had signed the brief on behalf of the Postmaster General, was a member of the CAB by the time the case came before the agency. After referring to the adjudicatory duties given the CAB by Congress, the court stated:

The fundamental requirements of fairness in the performance of such functions require at least that one who participates in a case on behalf of any party, whether actively or merely formally by being on pleadings or briefs, take no part in the decision of that case by any tribunal on which he may thereafter sit.²¹⁴

Although the case concerned the representation of a party outside the agency and not the agency staff, the result would likely have been no different if the represented "party" had been a CAB staff bureau. Arguably, consistent with due process, the counsel for the bureau would not have been allowed to later adjudicate the case although such consultation would not have been barred by the APA. Even the *Mathews* balancing test would not countenance a biased decisionmaker. It would not require a great extension of the rationale to reach a similar conclusion were the former advocate an advisor to the decisionmaker rather than the ultimate decisionmaker.²¹⁵

b. *Communications with Staff Investigators or Reviewers*

The propriety of private consultations between agency adjudicators and in-

²¹³ 254 F.2d 90 (D.C. Cir. 1958).

²¹⁴ *Id.* at 91.

²¹⁵ As previously discussed, the risk of error is present, though in somewhat different form, where the advocate is an advisor to the adjudicator, rather than the adjudicator himself. Certainly the government interest in the *Trans World Airlines* case was substantial—to avoid hindering the appointment of experienced, highly qualified individuals to serve as CAB members. If top echelon officials, such as agency solicitors general or bureau chiefs, were required to be disqualified from hearing a case as agency commissioners because of their former roles in the case as advocates, the President would be far less inclined to appoint such persons as commissioners. Yet, the risk of error and the countervailing interest in fairness overrode the government interest in the appointment process. Significantly, the *Withrow* court took note of *Trans World Airlines*, but expressly declined to pass on its validity. 421 U.S. at 50 n.16.

investigators in non-accusatory licensing cases is easily resolved by many agencies. Unlike the investigator in an accusatory proceeding whose investigation ferrets out instances of misconduct, the investigator in a non-accusatory adjudication may be a neutral employee whose primary function is to review an application or amendment and discover all facts relevant to the issues in the proceeding.²¹⁶ In performing this function, the investigator is not often called upon to advocate any particular viewpoint in the investigation or subsequent trial. The neutral investigator does not become "psychologically wedded" to a position from which he cannot retreat without confessing error, nor does he have a "will to win."

The Supreme Court has approved a scheme under which those charged with gathering and introducing evidence may also sit in judgment in a non-accusatory proceeding.²¹⁷ Under the *Mathews* balancing terminology, the risk of error is low in allowing such investigators or reviewers to advise the adjudicators based upon the formal record in the case. The benefit to the government of having knowledgeable staff members participate in the decisionmaking process is obvious. Thus, there are no due process problems with such an institutional arrangement.²¹⁸

c. *Communications with Staff Witnesses*

At some agencies²¹⁹ staff witnesses may be considered staff advocates. In those situations, the previously discussed concerns regarding staff advocates apply. At other agencies, however, staff witnesses may be considered a separate category. The government interest in an agency's attaining its statutory objectives is promoted when staff witnesses possessing expertise in a complex area can privately advise adjudicators. Moreover, the risk of decisional error appears different when staff witnesses, rather than staff advocates, provide private advice. Professor Davis considers the risk of error not one of "contamination" of the adjudicators, but rather the "assurance of appropriate opportunity to meet what is considered" in the private consultations.²²⁰ Professor Davis recommends that "[i]f deciding officers may consult staff specialists who have not testified, they should be allowed to consult those who have testified."²²¹ According to Professor Davis, those experts who have served as witnesses have explained their positions on the record and been cross-examined. Thus, their credibility and competence can be determined by an adjudicator relying upon such private advice. On the contrary, private advice from non-witness staff experts will more likely contain new information and untested opinions, and yet the risk of error in such advice has not been deemed sufficient to impose a constitutional or statutory prohibition against such private advice. Significantly, Professor Davis's treatment of this is-

²¹⁶ At some agencies like the NRC, there may rarely, if ever, be a neutral investigator or reviewer. These persons at the NRC ultimately become part of the trial advocacy team.

²¹⁷ *Richardson v. Perales*, 402 U.S. 389, 408-10 (1971). In *Perales* an allegation of a due process violation was made with respect to the roles performed by a social security hearing examiner. The examiner is charged with developing information relevant to a claimant's request for social security benefits and also ruling on that request, though the case is not one of formal adjudication.

²¹⁸ This is not to say, of course, that a party should be precluded from making a showing of actual partiality or prejudice on the part of the investigator.

²¹⁹ The NRC is an example of an agency in which staff witnesses serve as part of the trial advocacy team.

²²⁰ 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 13.11 at 249 (1958).

²²¹ *Id.*

sue was cited with approval in dictum in *Withrow*.²²²

Although the Davis rationale is compelling, it overlooks potential sources of error in private advice from witnesses. Some staff witnesses may be just as "psychologically wedded" to a viewpoint as the staff attorney. More than the attorney hired to perform an advocate's role, the staff witness may be more dedicated to the principles he espouses on the stand. To expect a witness to overlook his firmly held convictions approaches asking an expert to confess error. If staff attorneys and other advocates should be precluded for due process reasons from privately advising adjudicators, a similar rationale might be applied to expert witnesses. Additionally, Professor Davis's rationale assumes the staff witness would repeat in private what he has testified to in public. While this assumption might be true, making private consultation available to adjudicators could cause the staff witness to assume a different testimonial tone or emphasis. Nevertheless, the due process clause should not be a basis for prohibiting decisionmakers from obtaining the advice of a non-advocate staff witness.

d. *Communications with Supervisors*

Determining whether a staff supervisor may privately advise agency adjudicators without violating the due process clause requires an examination of the precise role played by the supervisor in the particular non-accusatory case. When a supervisor personally and actively participates in developing the positions presented by the agency trial staff in a particular non-accusatory case, there are strong reasons for considering the supervisor an advocate in the licensing proceeding.²²³ The rationale for prohibiting private consultations with such supervisors may be even stronger since the adverse "party" is often the division headed by the supervisor rather than the trial staff.²²⁴ The *Mathews* balancing test, which appears to bar private advice from staff advocates, should generate the same result here, although the agency might have a greater interest in consulting with one of its supervisors than in speaking with a lower level staff advocate.

Where the supervisor's role has been *pro forma*, however, it is difficult to conclude there is a risk of error sufficient to preclude on due process grounds an adjudicator's private consultation with the supervisor. Even in accusatory adjudications where a supervisor has supervised persons in the division charged with the prosecutorial function, absent some significant personal involvement in that or a factually related case, the supervisor is not precluded from later performing adjudicatory functions.²²⁵ But arguably, having formally associated himself with

²²² 421 U.S. at 56 n.24.

²²³ The most obvious application of this principle is when one considers a supervisor of an agency's trial staff. If this supervisor has been intimately involved in a proceeding, he must be viewed as being as much of an advocate as the trial attorneys.

²²⁴ At the NRC for example, in licensing proceedings the trial staff represents the various offices within the staff, the totality of which constitutes the "party" in the proceedings. At the FCC, in broadcast licensing cases the trial staff represents the Chief of the Broadcast Bureau. *See* *Amos Treat & Co. v. SEC*, 306 F.2d 260, 266-67 (1962).

²²⁵ *See* *R. A. Holman & Co. v. SEC*, 366 F.2d 446, 453 (2d Cir. 1966) (no due process violation where supervisor of investigatory staff personally performed no role in investigation); *San Francisco Mining Exch. v. SEC*, 378 F.2d 162 (9th Cir. 1967) (supervisors of prosecutorial division performed no role related to pending prosecution and any other connection with facts of case was too remote in time to support alleged due process violation); *Giambanco v. Immigration & Naturalization Service*, 531 F.2d 141, 145 n.7

the position of his staff, the supervisor may be unable or unwilling to provide impartial advice to the adjudicators, and he thereby creates an unreasonable risk of error in the decision. Moreover, the government interest in assuring the appearance of fairness in regulatory proceedings may be undermined if the supervisor can privately advise an adjudicator on matters on which his staff has publicly advocated a position to which the supervisor has even *pro forma* subscribed. Nonetheless, because the risk of error appears small and the government interests in obtaining that advice are probably substantial, a rigid constitutional barrier should not be erected to such advice.

e. *Communications with Non-Involved Staff*

There is no due process bar to private consultations between agency adjudicators and non-involved staff in non-accusatory proceedings. However, if as a result of any consultations between adjudicators and staff—non-involved *or* involved—the adjudicators are exposed to new information, due process has been violated unless this information is disclosed to the parties and subject to rebuttal.²²⁶

3. Communications between Various Adjudicators in Accusatory and Non-Accusatory Cases

Although various types of consultations between adjudicators are possible,²²⁷ private communications by a higher level adjudicator with a lower level

(3d Cir. 1976) (no due process violation where board member previously supervised prosecutor in pending case but had no knowledge of case).

The primary case contrary to this principle is *Trans World Airlines*, in which a due process violation was said to exist when a supervisor who was “merely formally . . . on pleadings or briefs” later became an adjudicator in the case. 254 F.2d at 91. After *Withdraw*, the correctness of this broad ruling is open to question. One post-*Withdraw* case has followed *Trans World Airlines*, however. In *American Gen. Ins. Co. v. FTC*, 589 F.2d 462 (9th Cir. 1979), the court ruled that a FTC commissioner could not sit on a case in which he had earlier signed a brief and argued before a court on behalf of the agency. In dictum, it suggested that the result would have been the same had his involvement been only superficial and supervisory. Unfortunately, *American Gen. Ins. Co.* did not engage in the *Mathews* balancing test, nor did it cite *Withdraw*.

²²⁶ *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1029-31 (D.C. Cir. 1978). The on the record decisional requirements of the APA would also be violated. See note 95 *supra*. This argument may be extended to the introduction of new rationales.

A more difficult question arises where an adjudicator desires the private assistance of non-involved staff members whose supervisors were themselves advocates or prosecutors in the case. It is possible that the non-involved staff members may seek to curry favor with their supervisors by privately emphasizing the facts and arguments espoused by the supervisors. There is also an appearance of unfairness in a situation where a staff member reports to an adjudicator in the morning for the purpose of advising on the strengths and weaknesses of the case presented by the supervisor, to whom he will report in the afternoon for the purpose of working on other matters. Nonetheless, such consultations have long been recognized as proper. 1947 ATTORNEY GENERAL'S MANUAL, *supra* note 20, at 55, 57-58. Furthermore, the alternatives to such consultation are highly undesirable: either the decisionmaker must forgo important assistance from uninvolved staff members (which itself creates a risk of error in the decision) or else the decisionmaker must surround himself with a large and costly adjudicative staff which duplicates expertise found elsewhere in the agency. Finally, there is some safeguard that the non-involved staff member's advice to the decisionmaker is private, so that the supervisor should never know the extent to which the non-involved staff member influenced the decision.

Where a staff witness or reviewer is to advise an adjudicator, see text accompanying notes 216-222 *supra*, and the supervisor of the witness or reviewer is an advocate in the case, analogous concerns exist and they may be similarly analyzed.

²²⁷ Some of the other types of consultation include communications between an initial decisionmaker who is about to decide a case and the commissioners of an agency and between an adjudicator in a case and other adjudicators who have not had, and will not have, any other contact with the case. The latter

adjudicator who has already rendered a decision in the case present the greatest due process concern. The government interest in this institutional arrangement can be substantial, particularly in complex cases with masses of technical data. More than any other party to the licensing proceeding, the lower level adjudicator will likely have reflected upon the issues from all perspectives. The higher level adjudicator's decision will likely be better, quicker and more focused if he can tap the knowledge of those who have already wrestled with the case. Such consultation can, in turn, increase the agency's ability to attain its regulatory goals.

But the risks of error in such consultation cannot be overlooked. When a lower level adjudicator reaches a decision after overseeing the trial process for months or years, and he publicly issues that decision which is subsequently attacked by one or more parties on appeal, he hardly has a disinterested position on the ultimate resolution of the appeal. The lower level adjudicator might be as "psychologically wedded" to his determination of the issues, and as unwilling to "confess error," as the staff attorney who litigated the case. His studied neutrality of the issues, although still sincerely held, would not outweigh the concern that he might give biased advice to adjudicators taking another, fresh look at the case.²²⁸ Yet, even assuming biased advice, what error could actually result? Presumably the grounds for the lower decision are set out in the statement of findings and conclusions. Because he does not want to be reversed on appeal, the lower level adjudicator must also have marshalled the best possible support for his decision in the public opinion issued. Unlike staff advocates or others, the lower level adjudicator has not been exposed to *ex parte* information which he could inject, consciously or not, into his advice to higher level adjudicators. In large cases he could emphasize portions of the record supporting his decision and downplay contrary evidence. Even in that instance, however, the higher level adjudicators must be presumed conscientious enough to assure the arguments and evidence cited by the appellants have been thoroughly considered. In short,

obviously involves no risk of error of partiality or prejudice, and is much like a judge consulting his law clerk or a commissioner consulting his technical expert. The former situation also should not present constitutional problems, even if the commissioners will later hear the case. The commissioners have an overriding duty to coordinate agency policies, and this interest should be sufficient to allow them to give general policy direction to guide the lower level decisionmaker. The major caution here, however, is that commissioners must be careful, while giving advice, not to prejudice the merits of the case or destroy the impartiality of the fact-finding process below.

228 Commenting upon a recent proposal before the Administrative Conference of the United States, which would have endorsed the concept of allowing consultations between agency heads and lower-level adjudicators who had issued an initial decision, the Federal Energy Bar Association argued as follows:

A presiding officer's decision should stand on the findings and reasoning which are expressed in that decision. Permitting subsequent consultation with the decisionmakers would disserve the public interest in two ways. First, it would tend to cause the presiding officer to become an advocate for his position There is no need or justification to force the presiding officer into a position of advocacy.

The second, the equally serious concern is the possibility that the presiding officer will provide further justification for reaching his decision in off-the-record consultation with the agency decisionmakers.

Letter from Carl D. Hobelman, President, Federal Energy Bar Association to Reuben B. Robertson, Acting Chair, Administrative Conference of the United States, (Dec. 10, 1980). It should be noted that the Administrative Conference, at its December, 1980 plenary session, tabled the recommendation which included the provision allowing for consultation between lower-level adjudicators and agency heads. *Legal Times of Wash.*, Dec. 15, 1980, at 4.

although a risk of error exists in allowing lower level adjudicators to advise higher level ones, other safeguards appear to substantially reduce that risk.

In addition to the risks of error, however, the government interest in assuring an appearance of fairness to litigants before an agency warrants consideration. If an agency's organic statute or the APA sets up a two or three tier adjudicatory system, a party assumes that a lower level adjudicator ruling against him will play no private role in an appeal. Although a multi-tier adjudicatory system is not constitutionally required, having been established, it must operate in a manner promoting public perceptions of integrity and fairness.

Unfortunately, the case law on higher level adjudicators consulting with lower level adjudicators is inconclusive. In *Goldberg v. Kelly*, stressing the necessity of an impartial decisionmaker, the Court noted that although "prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker . . . , [h]e should not, however, have participated in making the determination under review."²²⁹ Lower courts have followed this general rule prior to *Withrow*.²³⁰ However, *Withrow* itself in dictum appears to give conflicting signals on the issue. In a footnote, the Court quoted with approval Professor Davis's view that no due process problem arises in allowing staff witnesses to advise an adjudicator.²³¹ By analogy, lower level decisionmakers are arguably no more "wedded" to their positions or likely to inject error into the decisionmaking process than are such staff witnesses. However, in another footnote, the Court cited cases standing for the proposition that "when review of an initial decision is mandated, the decisionmaker must be other than the one who had the decision under review."²³² The Court then stated that "[a]llowing a decisionmaker to review and evaluate his own prior decisions raises problems that are not present here,"²³³ leaving the impression that were similar circumstances present in the administrative agency context, the Court might find a due process violation. Following *Withrow*, a major due process challenge was rejected when a court upheld the EPA's non-adversarial initial licensing system for the issuance of NPDES²³⁴ permits wherein the final decisionmaker could consult with the presiding officer and the panel making the initial decision. In *Marathon Oil v.*

²²⁹ 397 U.S. at 271. *Goldberg* can be distinguished on the ground that the welfare official whose decision was being reviewed was performing more of an administrative or informal adjudicatory role than a formal judicial role. Accordingly, the Court may have felt that there was more danger associated with advice coming from such persons.

²³⁰ In *Pregent v. New Hampshire Dep't of Employment Security*, 361 F. Supp. 782 (D.N.H. 1973), *vacated*, 417 U.S. 903 (1974), the court made a strong case, in *dictum*, for a due process violation. "If the Chairman of the Appeal Tribunal did have prior involvement with a claimant's case, whether in the investigatory, fact-finding or decision-making state, we would regard such prior official contact as disqualifying and as violative of due process." *Id.* at 797.

[I]f the certifying officer who made the initial decision to terminate claimant's unemployment benefits sat on the Appeal Tribunal, we would regard this as a clear violation of due process. In addition, the same individuals who either made the initial decision to terminate benefits or conducted a review thereof should not be permitted to sit in judgment of their own determination. For administrative review to be meaningful, each review officer must not have had any prior official involvement with the case before him.

Id. at 797-98 n.24. This language is quoted with approval in *King v. Caesar Rodney School Dist.*, 380 F. Supp. 1112, 1119 (D. Del. 1974), which also warned that excessive familiarity with the facts would tarnish the fairness of review proceedings.

²³¹ 421 U.S. at 56 n.24.

²³² *Id.* at 58 n.25.

²³³ *Id.*

²³⁴ *See* text accompanying notes 45, 46 *supra*.

EPA,²³⁵ the court found no “unacceptable risk of bias” in such an arrangement.²³⁶ An arguably inconsistent result was reached in *National Rifle Association v. United States Postal Service*.²³⁷ In that case the court found that the due process standards set forth in *Withrow* had been violated when an adjudicator issued a proposed decision ordering that certain mailing privileges not be granted and then purported to reconsider that decision on appeal. Although the Court found no “institutional bias,” it found a “well-defined predisposition” and “prejudgment”—because of vulnerability to “psychological pressures”—which disqualified the adjudicator from making the latter decision.²³⁸

Thus, the due process aspects of higher level adjudicators consulting privately with lower level adjudicators in formal licensing proceedings have not been resolved by the courts. Strong arguments can be made on both sides. In the context of a trial court decision before an appellate court on review, private advice from the trial judge to the appellate judges would not be tolerated. Agencies, however, are not imbued with the same sense of history and fairness as the judiciary. Moreover, the combination of quasi-judicial and quasi-legislative duties in a single agency indicates that as an agency attempts to achieve its substantive statutory goals, procedures foreign to the courts might be appropriate. Barring private advice from lower level decisionmakers to higher ones may cause greater judicialization of the administrative process, but this may be a salutary step, especially in the minds of litigants in licensing cases.

VII. An Examination of Alternatives for Achieving Separation of Functions Objectives

Agencies possess substantial legal flexibility in fashioning their separation of functions rules. While for policy reasons an agency might wish to be more protective of private interests in accusatory licensing cases, the accusatory versus non-accusatory distinction drawn implicitly in the APA is outmoded. The triggering mechanism for a separation of functions requirement should be whether or not the licensing adjudication is contested, particularly regarding evidentiary matters. Furthermore, the distinction explicitly drawn in the APA between initial licensing and other licensing cases conflicts with a realistic evaluation of present day licensing proceedings. The importance of the interests at stake and the balance in a particular case between evidentiary disputes and policy decisions based upon legislative facts do not usually depend upon whether the case is one of initial or non-initial licensing.

Keeping in mind these general principles and APA and constitutional limitations, three alternative approaches for achieving separation of functions objectives appear. The first alternative focuses on a model separation of functions scheme for an agency choosing to conduct its licensing proceedings in a traditional manner, that is, where the agency is represented by a trial staff that takes an advocacy role in the adjudication during which agency witnesses testify. Under this approach, the role of each individual agency employee in a particular

235 564 F.2d 1253 (9th Cir. 1977).

236 *Id.* at 1265.

237 407 F. Supp. 88 (D.D.C. 1976).

238 *Id.* at 94.

case determines the limitations on his ability to advise an adjudicator. The second alternative offers a simpler approach. All agency employees within certain divisions of the agency are deemed part of a "separated staff." This scheme could also apply to licensing adjudications conducted in the traditional manner. The third alternative attempts to solve the problems created by separation of functions by establishing a "neutral staff" system which substitutes even-handed, but aggressive, hearing assistants for trial advocates.

Examining these alternatives involves balancing the policy considerations discussed throughout this article. Fairness and the appearance of fairness must be weighed against the need for informed agency decisions reflecting policies established by agency heads, reached under an efficient and economical separations scheme. Additionally, any separations system must assure that agency heads or commissioners are sufficiently informed about the agency's overall activities. Because their responsibilities transcend individual licensing cases, commissioners and agency heads must be able to set policies and adopt rules, the impetus for which often depends upon their having an opportunity to speak with staff members to identify problem areas common to several licensing cases. Analogously, if commissioners are to be able to manage their agency, they must have open lines of communications to staff supervisors. Finally, any separation of functions system must take account of the *ex parte* restrictions placed upon decisionmaking personnel under APA section 557(d).

A. *A Model Separation of Functions System in Licensing Cases: Agency Staff to Perform a Traditional Advocacy Role*

In the typical licensing proceeding at many agencies, the agency staff performs a traditional advocacy role. In initial licensing adjudications, the staff may support or oppose the applicant's request for a license or a license amendment. In revocations, suspensions or even license renewal proceedings, the staff opposes the licensee. Intervenors in any of these proceedings complicate the scenario since intervenors may either side with or oppose the licensee. A suggested rule for each class of agency employees is discussed.

1. Staff Advocates

In deciding whether to allow staff advocates to privately advise adjudicators, an agency faces a host of considerations. In contested cases there are opposing sides. Often, the issues are sharply debated and the facts are hotly disputed. In this setting, staff advocates generally entrench themselves on a side of a case in which, despite the lack of accusatorial allegations, significant interests are at stake. For example, a resolution of disputed nuclear scientific and engineering issues affects construction permit applicants as much as or more than a prosecution for safety violations entailing a \$100,000 fine. Additionally, priceless rights of persons living near a nuclear facility site may be at stake and conflict with the applicant's plans, as well as the agency staff's position.

In the context of the contested initial licensing case, there is a serious problem of fairness if only staff advocates—and not other parties to the proceeding—are allowed to consult privately with agency adjudicators about the merits of the case. Even if no new off the record evidence is interjected, private lobbying gives

the staff advocate a unique opportunity to emphasize some arguments and ignore others. Staff advocates with the "will to win" would contaminate the decision-making process.²³⁹ Likewise, the appearance of fairness could be impaired by such consultations. Furthermore, if staff advocates participate in the adjudicators' private decisionmaking process, the staff advocates' contact with persons outside the agency—such as the licensee—will be severely restricted by the *ex parte* rule in APA section 557(d). Also, assuming case law already does not bar such contacts, there are serious due process questions associated with private contacts between staff advocates and adjudicators.

The benefits of adjudicators consulting with staff advocates are obvious. The flow of information to adjudicators, particularly commissioners, will result in more knowledgeable decisions reflecting agency policy. The commissioners could better supervise the staff and could receive information about new uncertainties in individual cases. In fact, the staff member most familiar with the facts of a case can best provide the commissioners with advice.²⁴⁰

These arguments are all subject to dispute. For example, advice from staff advocates might always be fair in those non-accusatory cases where policy and technical matters predominate. Since no one is being tried, no bias would result. In addition, commentators have suggested adjudicators are better off consulting staff advocates whose views have been presented and disputed publicly and on the record, than consulting in secret with uninvolved staff members whose ideas have not been subjected to scrutiny by the parties.

In deciding whether, as a matter of policy, commissioners or other agency adjudicators should be allowed to consult privately with staff advocates about the merits of a case, an agency must weigh all of these factors. However, the legal and policy arguments against such consultation are more persuasive.²⁴¹ Accordingly, an adjudicator should not be permitted to seek advice from staff advocates involved in a case—be they staff attorneys, witnesses or others performing advocacy functions.

2. Staff Witnesses

Because staff witnesses are typically considered staff advocates at agencies like the NRC, adjudicators should not be able to seek advice from them in deciding a case. However, at agencies where the staff witness is not part of the advocacy team, a different analysis is appropriate. Commentators have approved of private consultations with staff witnesses as entirely consistent with the spirit of the APA on the ground that such witnesses merely provide information and do not take sides.²⁴² Even if the witness's supervisor is an advocate in a case, the

²³⁹ As Professor Davis stated, "Judicial equilibrium gives way to partisanship. Materials on one side are maximized and those on the other are minimized." 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 13.07 at 218 (1958).

²⁴⁰ See *Administrative Conference Statement on ABA Proposals to Amend the Administrative Procedure Act*, 25 AD. L. REV. 419, 435 (1973).

²⁴¹ This conclusion is consistent with the regulatory reform bills proposed by Senate and House committees in 1980, which would have separation of functions applicable to all non-expedited formal adjudications, including licensing cases. See note 44 *supra*. Even at the Environmental Protection Agency, which relied upon the initial licensing exemption in the present APA to adopt one of the most informal and novel licensing schemes utilized by any federal agency, there is a separation of functions rule applicable to staff advocates who are not prosecutors. 40 C.F.R. § 124.78 (1980).

²⁴² See, e.g., Davis, *supra* note 31 at 649.

witness's advice to the adjudicator is given privately and is therefore unlikely to be known by his supervisor. This alleged lack of bias allows the conclusion that there would be no unfairness or appearance of unfairness in allowing these consultations. Moreover, allowing adjudicators to seek advice from an expert who has testified and been subjected to cross-examination may be more fair than permitting adjudicators to consult experts who may have strong views which have not been subjected to vigorous public scrutiny. Also, better decisions would result.

There are, however, compelling reasons for prohibiting adjudicators from consulting privately with staff witnesses. Much like the staff attorney, the staff witness may be "psychologically wedded" to his position and may have an unexpressed "will to win." The staff witness would thus subject the decisionmaker to biased advice. In fact, the witness's views may be more rigid than even the staff attorney's since they may come from years of experience molded into a "true belief" about a subject. In this light, little difference appears between the staff witness and the prosecutor or advocate: the prosecutorial advice is explicitly condemned in the APA and advice from advocates has been viewed as equally unfair. In *AT&T v. FCC*,²⁴³ for example, although it refused to find any legal bar to commissioner consultations with staff expert witnesses in a rulemaking proceeding, the court considered such private contacts "ill-advised."²⁴⁴ In addition, where a witness's supervisor is an advocate in a case, one can question the witness's ability to serve two masters: the adjudicator and the advocate. Finally, if such witnesses do assist the adjudicators, section 557(d) of the APA would require that they be prohibited from privately consulting on the merits of the case with interested persons outside the agency. This is perhaps a troubling restriction, although maybe not as troubling as placing a similar restriction on staff advocates. If an agency believes it can live with the section 557(d) restriction and if it is watchful for abuses in cases in which the witness's supervisor is an advocate, it should allow private advice from non-advocate staff witnesses to adjudicators.²⁴⁵

3. Staff Investigators or Reviewers

In agencies with uncommitted investigators or reviewers, wide latitude is given adjudicators to discuss the merits of the case with these agency staff members in non-accusatory cases. As previously discussed in regard to due process considerations,²⁴⁶ such neutral investigators do not search for evidence to support a prosecution, but typically ensure that all relevant facts are uncovered, whether the case is contested or not. The agency advocate then uses these facts to mold a position on the issues. Although a reviewer's supervisor may be an advocate, the reviewer's advice is given privately to the adjudicator and is thus unlikely to

²⁴³ 449 F.2d 439 (2d Cir. 1971).

²⁴⁴ *Id.* at 453.

²⁴⁵ The Senate committee report on the 1980 proposed regulatory reform bill states that "an agency employee who testifies to any significant degree in a proceeding on behalf of the proposed agency position" should come within the separation of functions prohibition on the assumption that the witness has developed a "will to win." S. REP. NO. 1018, 96th Cong., 2d Sess. 85 (Oct. 30, 1980). Although this conclusion seems overbroad, it offers a more definite standard which may be applied more easily, perhaps overemphasizing fairness at the expense of efficient, economical and knowledgeable decisionmaking. A statute that would grant agencies some discretion with regard to witnesses would be more appropriate.

²⁴⁶ See text accompanying notes 216-218 *supra*.

reach his supervisor. Accordingly, there may be no unfairness or appearance of unfairness in allowing adjudicators to consult with these neutral investigators. As potential decisional employees, however, these investigators would be precluded from *ex parte* communications with persons outside the agency once the formal hearing has commenced. An agency may find these concerns minimal when weighed against the benefits of competent decisions and better informed commissioners possible from consultations.

A contrary argument, however, could be made. To the extent the facts uncovered by the investigator are placed in the framework of a staff position, the investigator is part of the advocacy team. Consultations with advocates raise fairness problems with regard to biased advice. Even if the investigator is truly neutral, he may have been exposed to large amounts of information which have not been incorporated into the record, and which may unfairly affect his advice to the adjudicators. In addition to *ex parte* contacts in the pre-hearing stage being prohibited under section 557(d) of the APA, some concern also arises about the appearance of unfairness in having investigators who have been exposed to extra-record information later serve as advisors to the adjudicators. Some may also allege an appearance of unfairness, especially if the reviewer's supervisor is an advocate in the case. However, in the case of uncommitted agency reviewers or investigators, as with staff witnesses, the balance can be tipped in favor of allowing private consultations with adjudicators if the agency can accept the section 557(d) restrictions.

4. Supervisors

If a supervisor directly supervises staff advocates, reviews their work and contributes to the development of the case, he may himself be thrust into the position of an advocate. Thus, the fairness and appearance of fairness due process concerns justifying criticism of private advice from staff advocates to adjudicators apply here as well. Additionally, the supervisor who will serve as an advisor during the decisionmaking process would be foreclosed from consulting privately with persons outside the agency under section 557(d) of the APA. For these reasons, supervisors who play such advocacy roles in non-accusatory initial licensing cases should not advise the commissioners or other adjudicators in those cases.²⁴⁷ Some may also allege an appearance of unfairness, especially if the reviewer's supervisor is an advocate in the case.

The situation is more complicated where a supervisor's subordinates are advocates but the supervisor has little or no personal involvement in the direction or review of their work in the case. Some would question whether a supervisor in that situation would naturally tend to defend his subordinates' positions and promote their point of view. For this reason, the CAB prohibits even uninvolved bureau supervisors from consulting with the Board in disciplinary or accusatory cases in which any of the supervisor's subordinates are involved in prosecuting

²⁴⁷ See notes 117-121 *supra* and accompanying text (§ 557(d)) and notes 223-225 *supra* and accompanying text (due process) for a more extended discussion of the § 557(d) and due process rationales.

On the other extreme, if neither the supervisor nor his subordinates are involved in an initial licensing proceeding, he becomes like any other non-involved staff member who should be free to privately advise the adjudicators.

the case, regardless of whether the supervisor himself is personally involved.²⁴⁸ In a small, close-knit division where personal contacts among staff are often extensive, there may be pressures on even a non-involved supervisor called upon to second-guess his staff in advising the adjudicators.²⁴⁹ Where the supervisor has had some marginal involvement there is the risk that he may subconsciously inject extra-record material into his advice to the decisionmakers. On the other hand, the "bureau loyalty" rationale could disqualify all members of a bureau when any member is involved in a case on the theory that they would all uphold the view of their fellow staff members. Few agencies have gone this far, apparently reasoning that professional objectivity and the cloak of anonymity in the advising situation will overcome bureau loyalty. In addition, supervisors performing advisory duties should, like the ultimate decisionmakers, be presumed to be people of integrity who can set aside information gained from any prior marginal involvement in the case. Furthermore, the supervisory level may be the point at which the benefit of increased information and expert advice begins to outweigh the slight detriment to fairness associated with supervisors providing advice to adjudicators. Forcing decisionmakers to seek advice from sources other than trusted supervisors may also cause inefficient use of limited agency resources. For these reasons, agencies should allow a supervisor not involved, or only marginally involved, in a case to advise the adjudicators.²⁵⁰

5. Consultations between Adjudicators

When a case is under consideration by an adjudicator at one agency level, to what extent should he be allowed to discuss the case with adjudicators at his or other levels? For example, can an administrative law judge adjudicating a case consult with other judges not on the case, members of an appeal board, or the commission?

Few fairness problems result from consulting adjudicatory personnel on the same level of the agency. The experiences of other panel members in similar cases should help decisionmakers make more informed decisions which better ac-

²⁴⁸ 14 C.F.R. § 300.4(a) (1980). The CAB rule in initial licensing cases, even if they are accusatory, is more relaxed, and the debate over its adoption illustrates the conflicting policy considerations. In 1977 the CAB adopted a rule which prohibited advice to the Board from any supervisor of a bureau employee who participated in the adjudicatory hearing, regardless of the supervisor's personal involvement in the case. 42 Fed. Reg. 17436 (1977). After only one year of functioning under this rule, the CAB concluded that the 1977 amendment was too restrictive and had kept the Board from consulting senior bureau personnel in cases where their general policy advice would be helpful. 43 Fed. Reg. 29936 (1978). The Board rejected the notion that a supervisor would simply restate and support his bureau's position in the case, rather than provide independent advice. As a result, the rule was amended in 1978 to allow limited consultation with non-involved supervisors. They may advise the Board in cases involving rates or initial licenses, but that advice must be given on the record, and the parties must be given an opportunity to comment in writing on the supervisor's advice. 14 C.F.R. § 300.4(b) (1980). Though this change broadened the CAB rule, the rule is still more restrictive than the APA and is out of line with most other agencies, where private advice from non-involved supervisors is welcomed. The NRC, of course, prohibits such advice from any non-involved staff members in contested initial licensing cases, including supervisory staff members.

²⁴⁹ See *Columbia Research Corp. v. Schaffer*, 256 F.2d 677 (2d Cir. 1958), which disapproved of a situation in which an agency's general counsel adjudicated a case prosecuted by one of his subordinates, the assistant general counsel. The court's rationale, however, was that the subordinate would be likely to take litigative positions that he believed would please the general counsel. That possibility may exist, but its impropriety does not seem clear since all agency advocates are answerable to the ultimate agency adjudicators, the commissioners.

²⁵⁰ The proposed 1980 regulatory reform legislation apparently would have allowed for these results. S. REP. NO. 1018, 96th Cong., 2d Sess. 85 (Oct. 30, 1980).

cord with agency policy. Trial judges in the judicial system often engage in such consultations, as do members of administrative appeal boards. A problem might arise if two panel members deciding factually related cases concerning the same party at the same time confer. Such consultation might inject off the record facts and taint the decisionmaker. However, such a situation is unlikely and in this context, perhaps it should not be assumed adjudicators will stray from the record in arriving at a decision.

For many of the same reasons, appeal board members should be allowed to consult with lower level adjudicators who did not initially decide the case under consideration. Similarly the commission should be allowed to consult with appeal board members and lower level adjudicators who did not previously decide the case under consideration.

More problems are associated with commissioners consulting initial or appellate decisionmakers when the latter two are making a decision because the commission may eventually have to decide the same case. If the commission seeks information about the case from the initial or appellate decisionmakers, a party might argue that the commission's receipt of selective information would render the commissioners less than impartial in the formal review. Conversely, if the commission seeks to guide the lower boards with private policy advice, a party might argue that the commission is judging the merits of a case before receiving the formal record and arguments during the review to follow. In addition, individual commissioners could pressure boards to decide a case in a manner inconsistent with the record or other commissioners' policies, thereby also compromising the independence of the lower level adjudicators.

Absent this appearance of unfairness, many benefits will result from such consultations, such as more knowledgeable decisions, more informed commissioners, and decisions more accurately reflecting agency policy. Although these consultations appear improper at first, because of their benefits and their slight risk of unfairness, they were expressly encouraged by the 1947 Attorney General's Manual.²⁵¹

For the same reasons, there are no significant legal problems in allowing communications between appeal board members who will hear a case and lower level adjudicators before whom the case is pending.²⁵² However, the wisdom of such consultations can be questioned. Although appeal boards effectuate agency policy, they are not the ultimate source of such policy. Thus, unlike commissioners, appeal boards have less reason to privately advise initial decisionmakers. Also, unlike commissioners who have a broad range of experience as a result of their rulemaking duties and congressional appearances, appeal board members have less to offer to lower level adjudicators in terms of overall policy guidance. And because they are not ultimate policymakers, appeal board members have less reason to keep advised of initial decisions or interlocutory rulings through private consultations. This is especially true since public records of such matters are available. Therefore, private consultations between appeal boards and initial

²⁵¹ ATTORNEY GENERAL'S MANUAL, *supra* note 20, at 55.

²⁵² Typically, when a case is before an initial decisionmaker it is not known which appeal board members will hear a case. Hence, the suggested scenario is not very likely. However, there are instances when an appeal board has heard a case and has remanded it to the initial decisionmaker. In these instances, informal advice between the appeal board and the initial decisionmaker might take place.

decisionmakers, while the case is pending before the latter, should not be allowed.²⁵³

Finally, the most difficult question is whether a commission, in the course of considering a case on review, should be allowed to consult with lower level adjudicators who heard the case below.²⁵⁴ The major benefit of such consultation is that the lower tribunals have given the case extensive thought from a neutral, adjudicative perspective. The lower level adjudicators are probably most familiar with the facts and the weaknesses and strengths of the parties' arguments. Their advice to the commissioners would be invaluable, and would produce a more knowledgeable decision by the commission. However, to the extent the lower tribunals might have a vested interest in seeing their decisions upheld, they may not put aside their prejudices and objectively advise the commission. In terms of the *Withdraw* rationale, lower level adjudicators would be "psychologically wedded" to their views. To advise otherwise would amount to a confession of "error."

In response to these due process concerns, one might argue that because the lower tribunals have already given their advice in their formal decisions, there would be few secrets in what they would tell the commissioners in private. However, privacy allows different emphasis and more strident commitment to the public decision. Thus, the due process concerns of avoiding error and promoting the appearance of fairness should encourage agencies to prohibit such consultations unless the agency's ability to attain its statutory mandate would be jeopardized.²⁵⁵

6. Non-Involved Staff and Personal Staff

There would appear to be no doubt that adjudicators should be allowed to consult with staff members not involved in a case. Presently decisionmakers at the NRC, for example, can consult with non-involved staff, as with staff involved in a case, only in uncontested initial licensing proceedings. There is clearly no problem allowing consultations in such cases. The question is whether the rules such as these should be changed to allow consultations with non-involved staff in a contested licensing case.

Rules like those at the NRC could be an overreaction to fears of the appearance and reality of improper consultations. They are designed to absolutely assure that no tainted advice or *ex parte* material will reach the decisionmaker's ears. The by-product of this assurance is difficulty for the decisionmaker in ob-

²⁵³ For these same reasons, when an initial decisionmaker has consulted informally with members of an appeal board panel prior to any appeal board contact with a case, an appeal board appointed to review the case should generally not include those appeal board panel members who were informally consulted. At agencies like the NRC, where appeal board members are drawn from a large panel, this is possible. However, as long as the board members who were consulted have not prejudged the merits of the case, this result is not compelled by any existing court decision.

²⁵⁴ The same considerations to be discussed also apply to determining whether the initial decisionmaker who decided a case should be allowed to advise the appeal board which is considering it on review.

²⁵⁵ *But see* Pedersen, *The Decline of Separation of Functions in Regulatory Agencies*, 64 VA. L. REV. 991, 1001 (1978). Pedersen argues that the concept of a hearing examiner has changed from the original "gatherer of evidence" who makes a recommended decision to the present "administrative law judge" concept. He advocates a return to the old concept, under which there is no problem with the agency heads consulting the hearing examiner in private, since the examiner is not really judging, but is just preparing the record for an agency decision. Consultation by the agency is more appropriate under this view.

taining expert advice, thus reducing the information flow within the agency and hindering efficiency by forcing decisionmakers to gain information by more time consuming means. This would not be an unbearable sacrifice in the interest of fairness, but the likelihood that the decision will be improperly affected by allowing consultations with non-involved staff is negligible. Staff members may possibly become prejudiced through some indirect involvement with the case or the parties, but even where the issues are sharply contested, allowing such consultations presents small difficulties in comparison with the resulting benefits.²⁵⁶ Furthermore, the adjudicator is as likely to be exposed to extra-record material if he consults a textbook or his own staff member to understand the record. Finally, where a non-involved staff member advising an adjudicator in a case is, as to other matters, subject to the supervision of an agency official who is an advocate or oversees the advocates in that case, the appearance of unfairness associated with the service of two masters must be considered. Although a broad constitutional ban seems unwise, agencies should be sensitive to the potential for abuse and might prohibit advice to the adjudicator from the non-involved staff member in some instances, particularly where the supervisor is heavily involved in the case. Of course, absent any problem of personal bias or insertion of extra-record material, there is also no question that a decisionmaker should be able to consult his permanently assigned staff.

B. *The Separated Staff System*

In a "separated staff" system, entire offices regularly involved in proceedings as prosecutors or advocates, as well as other employees detailed on a case-by-case basis, would be precluded from advising adjudicators deciding a case. Those not on the separated staff could advise the adjudicators, although they would be precluded from communicating *ex parte* with persons outside the agency in violation of section 557(d) of the APA.

A separated staff system provides many benefits. The system is designed to avoid overlapping inconsistent functions within a single bureau or division. If one bureau engages exclusively in advocacy, while another bureau engages exclusively in advising decisionmakers, decisionmakers will know better with whom they can talk without inquiring whether that person was involved in a particular adjudication. Such institutional separation would decrease the likelihood of unfairness to parties attributable to inadvertent contacts. Moreover, this system eliminates the possibility that biased staff members serving in the same bureau as agency prosecutors will advise the decisionmaker. The system also reduces the likelihood that biased staff members would absorb off the record information they could later inject during consultations. Additionally, a separated staff system increases the appearance of fairness, since parties and the public can see a definite line drawn between those with whom the decisionmaker may consult and those with whom he may not speak. Absent a separated staff system, the APA requires that this line change from adjudication to adjudication, depending upon which staff members from several divisions prosecute a particular case. Fi-

²⁵⁶ It is important to note, as was stated in the discussion of due process, that the advice involved here is in interpreting the record. Advisors may not offer new facts or arguments unless those facts or arguments have been put on the record and subject to public scrutiny. See notes 95 and 226 *supra*.

nally, a separated staff system may encourage informed decisions because decisionmakers will be able to develop a rapport with non-separated staff members with whom they may consult regularly.

A separated staff system does, however, present some problems. The system would constrict the flow of information to decisionmakers, since they could not consult separated staff members not involved in the particular case. Inefficiency and duplication might also result, since staff resources would be diluted due to staff members' inability to perform variously as advocates and advisors in different cases.

A balance must be struck between the increased fairness and appearance of fairness associated with a separated staff and the less efficient flow of information to decisionmakers resulting from placing non-involved staff members off limits to decisionmakers simply because the members belong to the separated staff. The separated staff system's benefits to fairness would generally be greater in agencies with many adjudications. In such agencies there would be more commission-staff consultation and greater occasion for improper contact absent a separated staff. A separated staff system would also be more effective in agencies with small bureaus because bureau members advising adjudicators would more likely support each others' positions out of bureau loyalty.

The AEC and the FCC have used the separated staff system. The AEC's system was instituted in 1957. At that time, the agency eliminated the Division of Civilian Applications, which had performed both promotional and regulatory functions, and substituted a Division of Licensing and Regulation and an Office of Industrial Development. The entire Division of Licensing and Regulation and a portion of the general counsel's office were barred from advising the commissioners and hearing officers. Other staff members, including the promotional staff and the military program staff, unless designated part of the separated staff for a particular case, were free to consult with decisionmakers. The AEC adopted this system to assure fairness and impartiality in its first contested licensing case, *In re Power Reactor Development Corporation*.²⁵⁷ This practice was continued through other contested licensing cases. In 1959, however, the AEC adopted a very strict *ex parte* rule, applied originally to contacts between adjudicators and license applicants. Although not initially intended to cover intra-agency contacts,²⁵⁸ soon after its adoption the AEC began interpreting the *ex parte* rule as prohibiting commissioners and presiding officers at licensing hearings from consulting with the separated staff.²⁵⁹ Thus, except in a very few instances the staff was effectively separated from licensing boards and commissioners by rule.

When the Energy Reorganization Act of 1974 divided the AEC into two

²⁵⁷ 1 A.E.C. 128 (1959).

²⁵⁸ 10 C.F.R. § 2.757 (1960), 24 Fed. Reg. 9330 (1959). *But see* Legal Times of Washington, Dec. 15, 1980 at 4, referring to a decision by the Administrative Conference of the United States to table a recommendation that would have allowed such consultation, in part because of criticism that it "would destroy the independence of the administrative law judge, create innumerable conflicts and bring back the horrors that occurred before the [APA] . . . and before the independence of the administrative law judges." *Id.*

²⁵⁹ See II JOINT COMM. ON ATOMIC ENERGY, 87TH CONG., 1ST SESS., IMPROVING THE A.E.C. REGULATORY PROCESS 123-24, 401, 756 (Comm. Print 1961). The AEC had a separation of functions rule at that time, 10 C.F.R. § 2.734 (1959), which contained the initial licensing exemption, and which was therefore inapplicable to staff contacts in licensing cases. It is for this reason that the *ex parte* rule, and not the separation of functions rule, was used to endorse the separated staff system.

agencies,²⁶⁰ the promotional and military staffs were transferred to the Energy Research and Development Agency (ERDA) while the regulatory staff, which had composed the bulk of the separated staff, remained with the newly-created NRC. Because the NRC retained most of the old AEC rules on licensing procedure, the strict separation of functions and *ex parte* rules remained in effect and separated the vast majority of NRC staff from consultation in all but a few licensing cases. Now, under the separation of functions rules, a licensing board member making the initial decision is limited to consulting privately only with members of his personal staff.²⁶¹

On review, a commissioner may consult his own staff, and the Office of General Counsel and the Office of Policy Evaluation, the legal and technical arms, respectively, for the commissioners. The members of these offices are the "other NRC officials and employees who advise the commissioners in the exercise of their quasi-judicial functions" allowed by the NRC's *ex parte* rule to consult commissioners privately. All other agency staff members are off limits to adjudicators. The NRC's strict rules mean that decisionmakers have even fewer technical staff available for consultation in adjudications than under the AEC because they no longer have access to the promotional staff which formed the largest part of the non-separated staff. However, there is at least a distinct line between staff offices which commissioners may and may not consult. Had the NRC relaxed its rules to the extent permitted by the APA, this line would vary from case to case.

Although concerns about unfairness and the appearance of unfairness have prevented the NRC from relaxing its rules, charges of inefficiency leveled in the wake of the accident at Three Mile Island have prompted some commissioners to recommend expanding communication with the NRC's technical staff.²⁶² Because of the relatively small number of licensing cases handled by the Commission, keeping track of which staff members are working on which case would not be difficult. It remains to be seen, however, whether the growing sentiment to abandon the institutionally separated staff concept will result in any changes.

In contrast, the FCC's analogous system seems unlikely to be modified. The FCC is larger than the NRC and handles many more adjudications, and more licensing cases. The FCC maintains a separated staff system whereby certain officers are designated "decisionmaking personnel" and may advise in adjudicatory decisions. All other offices are designated as "nondecisionmaking personnel" and may not advise.²⁶³ Under the FCC's separated staff system, the entire Broadcast Bureau, dealing primarily with licensing and license revocation cases, consists of nondecisionmaking personnel who may not advise the Commission once a hearing has been set. The Common Carrier Bureau, dealing primarily with ratemaking and rulemaking cases, consists of decisionmaking personnel who may consult the Commission unless there is a trial staff, in which case that trial staff alone is separated. The Broadcast Bureau deals with cases typically involving many "adjudicatory" facts often non-technical in nature. In contrast, the

²⁶⁰ Pub. L. No. 93-438, 88 Stat. 1234 (1974) (codified at 42 U.S.C. §§ 5811-5891 (1976 & Supp. II 1978)).

²⁶¹ 10 C.F.R. § 2.719(c) (1980).

²⁶² See PRESIDENT'S COMMISSION REPORT, *supra* note 7, at 51; CHIEF COUNSEL'S REPORT, *supra* note 8, at 43.

²⁶³ 47 C.F.R. §§ 1.1201(c), (d); .1205, .1209 (1979).

Common Carrier Bureau more often deals with "legislative" facts related to ratemaking. In such cases the Commission has greater need for staff technical advice to understand the difficult issues involved. The FCC system appears well adapted to the caseload and structure of the FCC. Few complain that the system unduly restricts the flow of information to commissioners in broadcasting cases or treats parties unfairly in common carrier cases.

The FCC separated staff system was arrived at after years of experimentation with different statutorily mandated systems. In 1952, for example, Congress focused on the need for fairness at the FCC and separated virtually the entire agency staff, including its Chief Engineer's Office and its general counsel, from agency adjudicators.²⁶⁴ This system soon proved to hamper decisionmaking because of a lack of adequate expert staff support. When the statute was relaxed in 1961, the chief engineer and general counsel were placed on the non-separated side. The system has operated to the present to the satisfaction of the agency.²⁶⁵

To be sure, the separated staff system constitutes an extreme approach to the separation of functions problem. Its advantage of simplicity of application may be useful at agencies with an abundance of non-separated staff available to advise the decisionmakers, or at agencies where there are no complex scientific or economic issues upon which decisionmakers might seek staff advice. In modified form, it might be useful to designate as a separated staff at least an agency's staff members who regularly litigate licensing proceedings. However, broader application of the separated staff system is not desirable.

C. *The Neutral Staff Concept*

Changing the role of agency staff so that they perform a neutral factfinding function in adjudicative proceedings, rather than a prosecuting or advocacy function, has received little practical acceptance. This "neutral staff" would scrutinize each side's position before and during the public proceedings and summarize the issues and alternatives for an agency without publicly committing itself to one side or the other. The decisionmaker would then make a decision based upon the outlined alternatives. An adjudicator's privately consulting any staff member would present no problem under the APA or the due process clause because no staff member would be performing prosecuting or advocacy functions. Because of section 557(d) of the APA, however, staff members could not consult *ex parte* with persons outside the agency, at least after the hearing was noticed.

A neutral staff system would allow the staff to perform both an advisory and a factfinding role in developing a complete record. Efficient use of staff resources and an increased flow of information to the decisionmakers could result. Under the neutral staff system, the staff could perform as a "devil's advocate" toward both sides of the controversy and bring out all relevant facts and alternatives.

A neutral staff system would, however, place greater importance on public proceedings, as opposed to informal staff-applicant negotiations. It is questionable whether neutral staff could negotiate privately with an applicant on the suffi-

²⁶⁴ See [1952] U.S. CODE CONG. & AD. NEWS 683 for the former wording of 47 U.S.C. § 409(c)(2).

²⁶⁵ See 47 U.S.C. § 409(c)(2) (1976). For the history of the 1961 amendment, see [1961] U.S. CODE CONG. & AD. NEWS 464.

ciency of the application, and then be truly neutral during subsequent public proceedings. Staff members who have negotiated substantive changes on an application would probably find it difficult to be neutral scrutinizing those changes when they are considered in the public hearing. Such involvement would raise fairness questions. The staff member's acting as an advocate in the negotiating situation could create due process and prejudgment problems in his later advising the decisionmaker. A truly neutral staff system would probably require that staff members refrain from substantive pre-hearing negotiations with applicants. Such a requirement would leave more issues to be aired and resolved in the public proceedings, considerably expanding the public portion of application proceedings.

The FCC once attempted to maintain a neutral staff posture in its Common Carrier Bureau ratemaking proceedings. In the *AT&T* case²⁶⁶ the Commission investigated the reasonableness of Bell's rates for various services. Although the Commission wanted the expert advice and assistance of the agency's technical staff in preparing its decision, it remained sensitive to the need to maintain fairness in a proceeding relating to a single carrier. For this reason, the Commission promulgated a procedural order allowing the Common Carrier Bureau to advise in the final decision but instructing the Bureau

not to be an advocate of a preconceived position or to take a conventional adversary position. Rather it is to insure the development of a full and complete record which presents the facts and other ratemaking considerations relevant to a fair and meaningful legislative determination by the Commission of the complex issues involved.²⁶⁷

The Commission majority justified the order by relying on *Wilson & Co. v. United States*,²⁶⁸ which declared that in ratemaking the Common Carrier Bureau could act as counsel in the proceedings and advise in the final decision without violating the APA. The *Wilson* court held that a proceeding similar to that in *AT&T* was not an adjudication and therefore was not only legal under *Wilson*, but was sound policy "in view of the legislative nature of these proceedings and the *nonadversary* role of the Bureau."²⁶⁹ The Commission felt that AT&T would be treated fairly, and the Commission would have access to the expertise of its technical staff.

Commissioner Loevinger filed a strong dissent to the neutral staff system as applied in *AT&T*.²⁷⁰ The commissioner asserted the staff was already an adversary in the case because it had filed a report which urged initiating the proceedings.²⁷¹ Commissioner Loevinger also pointed to the APA's legislative history that the initial licensing-ratemaking exemption should not be used in contested accusatory cases.²⁷² The majority tersely dismissed the dissent by saying the proceeding was not accusatory, and that the staff had merely recommended initiating proceedings, not any final action.

Commissioner Loevinger's *AT&T* dissent underscores the two main objec-

²⁶⁶ 2 F.C.C. 2d 142 (1965).

²⁶⁷ *Id.* at 146 (emphasis in original).

²⁶⁸ 335 F.2d 788 (7th Cir. 1964).

²⁶⁹ 2 F.C.C. 2d at 147 (emphasis added).

²⁷⁰ *Id.*

²⁷¹ *Id.* at 161.

²⁷² *Id.*

tions regarding the neutral staff concept. First, in practice, can the staff stay neutral and subject both sides to equally rigorous scrutiny? As Commissioner Loevinger pointed out, because a staff member is usually involved in a case before the hearing, he may develop an advocate's point of view on the case. Additionally, in the course of their investigations, staff members come into contact with *ex parte* facts which they might inject into the decisionmaking process. Section 554(d) of the APA was adopted to prevent these problems. Furthermore, if an agency whose staff had traditionally performed an advocacy role adopted a system that suddenly called upon that staff to impartially present both sides of the case to the decisionmaker, it would be especially difficult for staff members to become and remain neutral. For example, the NRC staff is accustomed to scrutinizing applications before the hearing, negotiating and approving technical changes, and strongly advocating granting the license. Such an orientation would probably have some lingering effect were those staff members called upon to become neutral. Finally, adopting the neutral staff concept might require restructuring licensing processes like the NRC's. As noted above, staff members who had privately negotiated and approved changes in a license application's technical specifications would have difficulty being neutral in presenting that application to the licensing board in the hearing. With a neutral staff system, negotiations would have to be performed on the record under the supervision of the licensing board. Such a procedure would be cumbersome.

Second, even if staff members could remain neutral, adversarial proceedings may still be the most efficient way to arrive at the best decisions. A basic premise of the American legal system is that factfinding is best done when two sides zealously present their arguments and attack opposing arguments, thereby revealing the strengths and weaknesses of each argument.²⁷³ Faced with several cases involving complex technical issues, a decisionmaker might rather have the staff sift through the evidence and then advocate a result. Under this approach, the decisionmaker can work from one point of view or another, rather than start with a mass of facts and develop his own point of view. Moreover, he can make full use of the staff's expertise.

Without more practical data it is difficult to evaluate the neutral staff system. Such a system would expand the pool of expertise available to decisionmakers needed in evaluating a case's record. However, the neutral staff system places great faith in the staff's ability to remain truly neutral and yet develop the case's record, and in the decisionmaker's ability to focus on a case's central issues. Judging from the infrequent use of such a system, most agencies do not have such faith at present.²⁷⁴ Nonetheless, agencies might wish to con-

273 In the 1970 supplement to his treatise, Professor Davis sharply criticized the FCC neutral staff system. Not only did he feel that the staff could not remain totally neutral, but he also felt such a system would cripple the testing process whereby ideas and policies are challenged. Professor Davis argued that a primary role of a regulatory agency is to be a zealous advocate for the public interest and present a point of view different from the industry's. A neutral staff, he argued, would be a lukewarm check on the advocacy of a company like AT&T. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 13.00 at 445-57 (Supp. 1970).

Ideally, of course, the neutral staff would rigorously scrutinize all sides of an issue, including the industry's. Whether this would actually happen in practice must await more practical experience with the system than we currently have.

274 EPA's "Non-Adversary Procedures for Initial Licensing" are the closest thing to a "neutral staff" system in the present administrative spectrum. In its NPDES permit proceedings, EPA would substitute

tinue experimenting with neutral staff systems. In that event, agencies should also consider a modified version under which the staff retains an open-minded and neutral posture during the trial itself, but summarizes the evidence and makes recommendations to the initial adjudicator, as might the adjudicator's law clerk. Then, the neutral staff could privately advise the adjudicator, and perhaps even higher level adjudicators if the agency allows consultation between the various adjudicatory tiers.

VIII. Conclusion

Although the separation of functions debate has continued over decades, in light of the relatively few judicial decisions there are still many uncertainties about APA and the due process restrictions. Compounding the legal dispute is the philosophical battle over reconciling conflicting policy considerations involving agency efficiency and fairness to litigants. Unfortunately, many agencies seem unwilling to take a fresh look at separation of functions issues. More importantly, Congress has failed to assume responsibility in reexamining its own out-moded assumptions about the regulatory process which led to the separation of functions balance drawn in the APA. In particular, the nature of the licensing process, the rights involved therein, the agency staff's changing roles and the complexity of the decisionmaking process must be reevaluated. This article attempts to provide some answers, though it is written with the understanding that no single solution appears likely. Perhaps its major contribution will be the identification of the issues yet to be resolved and the factors relevant to their resolution, allowing individual agencies or Congress to focus with more acuity on the problem.

for its trial staff a non-adversarial "panel," which would prepare an initial summary of the evidence (usually written) and cross-examine witnesses, but would not take one predetermined side in the controversy. Unfortunately, though the system was introduced by rule in 1978, it has never really been used by EPA, so one cannot evaluate the system.