

REPORT IN SUPPORT OF
RECOMMENDATION 77-3

EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING
PROCEEDINGS

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This Committee was established to consider the problems crystalized by the opinion of the Court of Appeals for the District of Columbia in *Home Box Office v. FCC* dealing with ex parte communications in informal rulemaking proceedings.¹ The gist of that opinion is that once a notice of proposed rulemaking is issued pursuant to the Administrative Procedure Act (5 U.S.C. §553) there should be no oral communications between interested persons and officials of the agency dealing with the merits of the proposed rules outside the confines of public meetings or hearings conducted in accordance with public notices, and no written communications dealing with the merits of the proposed rules that are not placed in the public file or record of the rulemaking proceedings in accordance with established procedures designed to make them available for examination and rebuttal by interested persons. The rationale of the opinion is that the existence of such ex parte communications in rulemaking proceedings is inconsistent with adequate judicial review on "the full administrative record" in accordance with *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), and also inconsistent with "fundamental notions of fairness implicit in due process," citing *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959).

Insofar as this decision of the Court of Appeals purports to apply the principles of *Sangamon Valley* to the particular rulemaking proceedings of the FCC involved in the *Home Box Office* case, it is not presently a matter of general concern to the Administrative Conference of the United States. In *Sangamon* the Court of Appeals held that ex parte communications were inappropriate in a rulemaking proceeding that involved an amendment of the Table of Television Channel Assignment so as to transfer a VHF Channel from Springfield, Illinois, to St. Louis, Missouri, and two UHF channels to Springfield. This amendment was not required by the Federal Communications Act "to be made on the record after opportunity for agency hearing," and so the proceedings were not technically subject to sections 556 and 557 of the APA. It was, however,

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¹ This is a per curiam opinion handed down March 25, 1977, on behalf of a three-judge panel of the Court of Appeals consisting of Circuit Judges Wright and MacKinnon and District Judge Weigel. Judge MacKinnon wrote a separate concurring opinion, disagreeing only with respect to the breadth of the opinion regarding ex parte communications. Apart from the holding with respect to ex parte communications the Court held invalid the FCC rules regulating the programming of cable television as "arbitrary, capricious, and unauthorized by law." The FCC has filed a petition for certiorari. [Ed. Note: The decision has been reported at 567 F.2d 9 (D.C. Cir. 1977). Certiorari and petitions for rehearing were subsequently denied. 434 U.S. 829, 988 (1977).]

closely associated with comparative hearings then in progress to determine the allocation of the VHF channel among competing applicants. With this relationship apparently in mind the Court's opinion explained that "whatever the proceeding may be called, it involved not only the allocation of TV Channels among communities but also resolution of conflicting private claims to a valuable privilege and . . . [therefore] basic fairness requires such a proceeding be carried on in the open. . . . Accordingly the private approaches to the Commission vitiated its action . . ." 269 F.2d at 224.² The concurring opinion of Judge McKinnon in the Home Box Office case suggests that the parallel between that case and the Sangamon case was so strong that the principle of Sangamon could be regarded as controlling, without reliance upon the broader principles announced by the majority opinion. This was true, in his view, "because the rulemaking undeniably involved competitive interests of great monetary value and conferred preferential advantages on vast segments of the broadcast industry to the detriment of other competing business interests." Slip Opinion at p. 4. Whatever may be the merits of that view, it is plain that the majority view is not so limited. Rather its position appears to be that once any rulemaking proceeding has reached the stage of notice of proposed rulemaking, any further *ex parte* communications become inappropriate. This is a position of great concern to the Administrative Conference because it carries the concept of improper *ex parte* communications far beyond that previously entertained by the Congress, the courts and most of the federal administrative agencies.³

² The Court in Sangamon also held that the *ex parte* communications permitted in that case violated the FCC's own rules. This was because in the allocation of TV channels to particular communities it was the Commission's usual practice, followed in Sangamon, to prescribe a cut-off date for filing with the Commission "written data, views or arguments," and a cut-off date for "comments or briefs in reply," with the further warning that no additional comments were to be filed without a request from the Commission or a showing of good cause. "By plain implication," said the Court, "this rule forbade submitting material to the Commission's members after time for filing with the Commission had gone by." 269 F.2d at 225. In Home Box Office, the Court's opinion also holds, albeit in a footnote, that the FCC violated its own rules, referring to notices setting time limits for public filings and adding "No additional comments may be filed unless specifically requested or authorized by the Commission." Footnote 122, Slip Opinion at pp. 92-84. Even Mr. Geller, in his brief on *ex parte* communications in the Court of Appeals, shrank from adopting this position. Instead he pointed out that after Sangamon the FCC had adopted the practice of specifying on a case-by-case basis the rulemaking proceedings to which the Sangamon rule would apply. In a non-Sangamon or "open" proceeding the Notice would read: "In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it in addition to the specific comments invited by this Notice." In a Sangamon or "closed" proceeding, the Notice states: "All submissions by parties to this proceeding or persons acting on behalf of such parties, must be made in written comments, reply comments, or other appropriate pleadings." In the Home Box Office proceeding, the Notices used the non-Sangamon or "open" language. Mr. Geller argued that this was a violation of the Sangamon principle, but not of the Commission's own rules. I have been advised that the FCC has generally limited the use of the Sangamon or "closed" Notice language to proceedings involving amendments of the Table of Assignment of broadcasting frequencies to particular localities, i.e., the Sangamon situation.

³ The Court's opinion notes that the most far-reaching federal statutory provision is the amendment of §557 of the APA, enacted by Section 4(a) of the Government in the Sunshine Act of 1976 (P.L. 94-409, 90 Stat. 1241, Sept. 13, 1976), which prohibits *ex parte* communications only in proceedings subject to that provision of the APA. This amendment is consistent with the *ex parte* communications provisions in the procedural regulations of most of the federal administrative agencies, which in turn reflect the recommendations of the temporary Administrative Conference of the United States, 1961-1962. Selected Reports of the Administrative Conference of the United States (1963), Sen. Doc. No. 24, 88th Cong., 1st Sess., at pp. 165-205. The Conference recommendation was that:

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

The opinion of the Court of Appeals seems to recognize that its position with respect to *ex parte* communications in §553 rulemaking proceedings may not be wholly consistent with the views generally prevailing in the past with respect to the informality legally permissible in such proceedings.⁴

Nevertheless, the opinion also defends its position as the natural, if not inevitable, consequence of recent developments with respect to both the conduct of such proceedings and judicial review on the administrative record of the proceedings. The essence of the Court's reasoning is summarized in the following paragraphs.

"Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those 'in the know' is intolerable. Whatever the law may have been in the past, there can now be no doubt that implicit in the decision to treat the promulgation

The term "on-the-record proceeding" was defined as follows:

- a. The term "on-the-record proceeding" should be defined as any proceeding required by statute or constitution or by the agency in a published rule or in an order in the particular case to be decided solely on the basis of an agency hearing, and any other proceeding which the agency designates by published rule or order in the particular case as subject to these prohibitions.

In commenting on this definition the accompanying Committee Report took particular note of the possible effects of the Sangamon doctrine, saying in part:

The recommendation makes it clear that the sanctions proposed later in the recommendation should be imposed only for violations in connection with proceedings to which the agency, by published rule, or order in the particular case, has made the prohibitions and requirements of the code applicable. But as indicated in the Report, it would not be inconsistent with the Committee's recommendations if a court remanded to the agency for its further consideration any case in which it concluded that *ex parte* communications prejudiced the interests of a party to a proceeding to which the agency had not made the recommended prohibitions and requirements applicable because, for example, the agency mistakenly concluded that neither statute, Constitution nor the Sangamon doctrine required a decision solely on the basis of the record of an agency hearing. Sen. Doc. No. 24, *supra* at pp. 174-175.

It seems probable that the Sunshine Act amendment of §557 of the APA, adding §557(d), does not include the Sangamon doctrine, since it is generally assumed that Sangamon did not involve an "on-the-record" proceeding subject to sections 556 and 557 of the APA. It is possible, however, that the Supreme Court might yet hold that due process considerations, applied to a situation like Sangamon, require a hearing on the record in the same sense as Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) required a determination "on the record after opportunity for agency hearing" in deportation proceedings, thus satisfying §554(a) and triggering the application of Sections 556 and 557 of the APA. Indeed it might be said that the very concept of *ex parte* communications implies an "on-the-record" proceeding in a substantial sense and also in the sense of that phrase as used in Sections 553(c) and 554(a) of the APA to trigger the application of sections 556 and 557. The following statement in the House Report recommending enactment of §4(a) of the Sunshine Act would probably be cited in opposition to this position:

The prohibition only applies to formal agency adjudication. Informal rulemaking proceedings and other agency actions that are not required to be on-the-record after an opportunity for a hearing will not be affected by the provision. H. R. No. 94-880 at p. 19; 3 U.S.C. Congressional and Administrative News (1976) at p. 2201.

⁴ A footnote to the opinion cites a statement in the Attorney General's Manual on the Administrative Procedure Act to the effect that "Section 4(b) does not require the formulation of rules upon the exclusive basis of any 'record' made in informal rulemaking proceedings." Slip opinion, footnote 118 at p. 89. The same note also states: "The Department of Justice, in apparent accord with these views, relied on the Commission's own rules which defined the administrative record to be comments and reply comments, and not the Administrative Procedure Act, in arguing that the *ex parte* contacts were invalid." Slip Opinion at p. 90. Discussions of the problem of *ex parte* communications have generally assumed that the problem arose only in adjudicatory, or on-the-record proceedings, and not in informal rulemaking proceedings. See Peck, Regulation and Control of *Ex Parte* Communications with Administrative Agencies, 76 Harv. L. Rev. 233, 250-256 (1962); Schwartz, Administrative Law (1976), §127, pp. 361-364; Compare, Sterling National Bank of Davie v. Camp, 431 F.2d 514, 517 (5th Cir. 1970); Rev. 233, 250-256 (1962); Schwartz, Administrative Law (1976), §127, pp. 361-364; Compare, Sterling National Bank of Davie v. Camp, 431 F.2d 514, 517 (5th Cir. 1970):

Since no formal adversary hearing is required and the Comptroller is authorized to obtain information by special commission 'or otherwise,' it is obvious that the Comptroller committed no unlawful action when he accepted and perhaps considered information sent to his office by some of the applicants, even though this was done without the knowledge of those opposing the charter.

of rules as a 'final' event in an ongoing process of administration is an assumption that an act of reasoned judgment has occurred, an assumption which further contemplates the existence of a body of material — documents, comments, transcripts, and statements in various forms declaring agency expertise or policy — with reference to which such judgment was exercised. Against this material, 'the full administrative record that was before [an agency official] at the time he made his decision,' *Citizens to Preserve Overton Park, Inc. v. Volpe*, *supra*, 401 U.S. at 420, it is the obligation of this court to test the actions of the Commission for arbitrariness or inconsistency with delegated authority. *See id.* at 415–416; pages 48–52 *supra*. Yet here agency secrecy stands between us and fulfillment of our obligation. As a practical matter, *Overton Park's* mandate means that the public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings. This course is obviously foreclosed if communications are made to the agency in secret and the agency itself does not disclose the information presented. Moreover, where, as here, an agency justifies its actions by reference only to information in the public file while failing to disclose the substance of other relevant information that has been presented to it, a reviewing court cannot presume that the agency has acted properly, *Citizens to Preserve Overton Park, Inc. v. Volpe*, *supra*, 401 U.S. at 415, 419–420; *see* K. Davis, *Administrative Law of the Seventies* §11.00 at 317 (1976), but must treat the agency's justifications as a fictional account of the actual decisionmaking process and must perforce find its actions arbitrary. *See Ruppert v. Washington*, 366 F.Supp. 686, 690 (D. D.C. 1973), *aff'd by order*, D.C. Cir. No. 73–1985 (Oct. 26, 1976)." Slip Opinion at pp. 89–91.

But the opinion is not only concerned with the failure of the administrative record to disclose to the reviewing court all of the considerations that may have influenced the deliberations of the agency. It also expressed the concern that: "Even if the Commission had disclosed to this court the substance of what was said to it *ex parte* it would still be difficult to judge the truth of what the Commission asserted it knew about the television industry because we would not have the benefit of an adversarial discussion among the parties. The importance of such discussion to the proper functioning of the agency decisionmaking and judicial review processes is evident in our cases. We have insisted, for example, that information in agency files or consultants' reports which the agency has identified as relevant to the proceedings be disclosed to the parties for adversarial comment. Similarly, we have required agencies to set out their thinking in notices of proposed rulemaking. This requirement not only allows adversarial critique of the agency but is perhaps one of the few ways that the public may be apprised of what the agency thinks it knows in its

capacity as a repository of expert opinion. [Citing *Environmental Defense Fund, Inc. v. EPH*, No. 75-2259, Nov. 10, 1976.] From a functional standpoint, we see no difference between assertions of fact and expert opinion tendered by the public, as here, and that generated internally by the agency: each may be biased, inaccurate or incomplete — failings which adversary comment may illuminate. . . . We do not understand the rulemaking procedures adopted by the Commission to be inconsistent with these views since those procedures provide for a dialogue among interested parties through provisions for comment, reply-comment, and subsequent oral argument. What we do find baffling is why the Commission, which apparently recognizes that ready availability of private contacts saps the efficacy of the public proceedings, nonetheless continues the practice of allowing public and private comments to exist side by side." (Slip opinion, pp. 91-94.)

This two-pronged rationale of the Court's position poses the fundamental question of the extent to which the developing law with respect to judicial review on the administrative record of §553 rulemaking proceedings naturally leads to the conclusion that all communications dealing with the merits of the proposed action must be included in the administrative record of the proceeding. Stated this baldly, the question would include communications from staff members to the deciding heads of the agency dealing with the merits of the proposed action and similar communications from the public occurring even before the issuance of the notice of proposed rulemaking. Presumably the Court's use of the issuance date as the pivotal point in time was based more on pragmatic than theoretical considerations; some manageable beginning point was required. Similarly the inclusion of all staff communications with respect to the merits of the proposed action might well create a record of unmanageable proportions and also unduly inhibit internal deliberations. Accepting then some pragmatic limitations on the scope of the record, the question remains whether the adversary process envisioned by the Court is the natural and appropriate consequence of judicial review on the administrative record of §553 rulemaking proceedings, or dictated by other considerations of fairness or constitutional law.

In order to probe the question further it may be helpful to consider how the problem of ex parte communications would appropriately be handled in rulemaking proceedings in the absence of judicial review on the administrative record. Ever since the famous opinion of Mr. Justice Holmes in *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915), it has been almost hornbook law that in general rulemaking proceedings due process does not require any opportunity for hearing at all, much less the opportunity for the adversary type of hearing lauded by the Court's opinion in *Home Box Office*. As Justice Holmes put it in his customary epigrammatic fashion:

Where a rule of conduct applies to more than a few people, it is impracticable that every one should have a direct voice in its adoption. The constitution does not require that all public acts be done in town meeting or an assembly of the whole. 239 U.S. at 445.

Nonetheless, the rationale of the *Bi-Metallic* opinion has not won the approval of all commentators, especially insofar as it makes the number of people involved the determinative factor. Professor Davis in particular has urged that the appropriate test should be the character of the factual issues involved: adjudicative or particularized factual issues should be resolved in adjudicatory proceedings; general or legislative facts should be resolved in a legislative type proceedings. Davis, *Administrative Law Treatise* §7.06, V. 1 at 429-432 (1958). In more recent years the *Bi-Metallic* and Davis rationales have tended to merge as illustrated in Mr. Justice Rehnquist's opinion in *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973). After comparing the *Bi-Metallic* case with previous cases like *Londoner v. Denver*, 210 U.S. 373 (1908), and *ICC v. Louisville & Nashville R. Co.*, 227 U.S. 88 (1913), and subsequent cases like *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292 (1937), and *FCC v. WJR*, 337 U.S. 265 (1949), Justice Rehnquist said:

While the line may not always be a bright one, these decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other. 410 U.S. at 245.

It would be an oversimplification to assume, however, that this line of cases establishing the principle that general, legislative-type rules could be issued without an adjudicatory or adversary type of hearing at the administrative level, entirely eliminated the possibility of a right to an adjudicatory hearing on disputed issues of fact in the course of judicial review of the validity of a rule. This was made clear in Mr. Justice Brandeis' opinion in *Pacific States Box and Basket Co. v. White*, 296 U.S. 176 (1935), in which the Court sustained the dismissal of a complaint challenging the validity of a state administrative regulation establishing standards for fruit and vegetable containers. In holding that the complaint was not sufficient to withstand a motion to dismiss because it set forth only conclusions rather than specific facts to support its allegations that there were no legitimate public purposes to justify the regulations, Mr. Justice Brandeis also made it clear that, if there had been adequate factual allegations, the plaintiff would have been entitled to an opportunity to establish, in a judicial trial, the truth of those allegations. This he did by quoting language from an opinion by Chief Justice Hughes to this effect:

When such legislative action is called into question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common

knowledge, or other matters which may be judicially noticed, or other legitimate proof, that the action is arbitrary. *Borden Farm Products Co. v. Baldwin*, 293 U.S. 194, 209 (1934).

In other words, although administrative regulations, like legislation, were entitled to a presumption of validity in the face of a challenge to their validity on due process grounds, that presumption did not entirely foreclose the opportunity to establish in a judicial trial the arbitrary character of the regulations.⁵

This was not the only qualification recognized in the law of the 1930's with respect to the relative immunity of administrative regulations from judicial invalidation on either substantive or procedural grounds. In the famous Morgan cases (*Morgan v. United States*, 298 U.S. 468 (1936) and *Morgan v. United States*, 304 U.S. 1 (1938)), Chief Justice Hughes characterized action taken by the Secretary of Agriculture under the Packers and Stockyards Act to establish maximum rates for all market agencies buying and selling stock at the Kansas City Stockyards, "as a proceeding of a *quasi-judicial* character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusions uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action." 298 U.S. at 480. In the first Morgan case this reasoning was used to justify an inquiry into the question whether the Administrator had indeed personally considered the evidence and the arguments. In the second Morgan case the same reasoning was used to justify a decision holding the rate order invalid on the ground that the market agencies had not been given an adequate opportunity to know and to refute the Government's final position on the matters in dispute. "Apart from what was said on its behalf at oral argument, the Government formulated no issues and furnished the appellants no statement or summary of its contentions and no proposed findings." 304 U.S. at 16. Instead: "Findings were prepared in the Bureau of Animal Industry, Department of Agriculture, whose representatives had conducted the proceedings for the government, and were submitted to the Secretary, who signed them, with a few changes in the rates, when his order was

⁵ The correctness of this qualification, implied from Mr. Justice Brandeis opinion, is further demonstrated by the following language in Chief Justice Hughes' opinion in the Borden's Farm Products case:

But where legislative action is suitably challenged and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are particularly the subject of evidence and findings. With the notable expansion of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions will not be reached without adequate factual support. 293 U.S. at 210.

made No opportunity was afforded to appellants for the examination of the findings thus prepared in the Bureau of Animal Industry until they were served with the order." 304 U.S. at 16-17. The Chief Justice regarded these proceedings just as much a violation of "those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature" as if "in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections. . . ." 304 U.S. at 19-20.⁶ To the argument that this was not a fair comparison because "the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry," the Chief Justice responded by saying: "It is idle to say that this was not a proceeding against the appellants when the very existence of their agencies was put in jeopardy." 304 U.S. at 20. The Chief Justice also indicated that considerations of judicial review were not irrelevant when he said: "While we are not now dealing with the merits, the breadth of the Secretary's discretion under our rulings applicable to such a proceeding . . . places in a strong light the necessity of maintaining the essentials of a full and fair hearing, with the right of the appellants to have a reasonable opportunity to know the claims advanced against them as shown by the findings proposed by the Bureau of Animal Industry." 304 U.S. at 21.

The exact scope and appropriate effect of decisions like those in the *Morgan* cases was the subject of extensive inquiry and debate in the course of the legislative history leading up to the enactment of the Administrative Procedure Act. Some of the protagonists were concerned that rulemaking processes had been much too informal and uncontrolled either by constitutional or statutory limitations; they welcomed the *Morgan* decisions and were anxious to see their strictures solidified and extended by specific statutory restrictions. Others were concerned that the philosophy of the *Morgan* cases might be carried too far and all rulemaking proceedings turned into adversary or adjudicatory proceedings. The Report of the Attorney General's Committee on Administrative Procedure presented a carefully balanced appraisal of the considerations on both sides of this debate. They were summarized in the following passages:

⁶ It will be noticed that the Chief Justice's opinion in the second *Morgan* case treated *ex parte* communications between the administrator and his staff as equivalent to *ex parte* communications between a judge and one of the parties to the litigation. The APA rejected that analogy at least so far as rulemaking is concerned by confining the separation of function provisions of §554(d) to adjudication as distinguished from rulemaking and confining them still further by excepting certain types of adjudication. Nevertheless, the question whether *ex parte* prohibitions should apply to certain staff members as well as private parties in rulemaking proceedings has continued to be a hotly debated question. See, e.g., Report of the Administrative Conference (1962) *supra*, note 3 at 182; Peck, *supra*, note 4 at pp. 256-262. Presumably the Court's opinion in *Home Box Office* does not apply to intra-agency communications although that question may have to be faced if the court's general position is adopted.

Hearings in rule making are usually either investigatory or designed to permit persons who may not have been reached in a previous process of consultation and conference to come forward with evidence or opinion. The purpose is not to try a case, but to enlighten the administrative agency and to protect private interests against uninformed or unwise action.

Rule-making proceedings do occur, however, in which an adversary element is present. It may be clear in advance which interests will benefit and which will suffer if proposed regulations are issued. Low-cost producers as against high-cost producers with respect to maximum prices or minimum wages; workers as against employers with respect to wages or working conditions; buyers as against sellers with respect to the regulation of agricultural marketing; the makers of machinery which will be barred by proposed safety regulations as against others whose product will be lawful; these are recurring divisions of interested parties which from time to time confront an administrative agency engaged in rule making. Frequently the number of parties constituting a single interest is small and existing members are known. In any event, whether their number is great or small, they may often gain or lose with relative finality in the rule-making proceeding itself. The content of the regulations when issued may be definite and the consequences of noncompliance severe, such as the loss of the right to do business. Under these circumstances it may be desirable to let affected parties treat the rule-making proceedings as adversary, so that all the information, conclusions, and arguments submitted to the agency may be publicly disclosed to opposing interests which may answer, explain, or rebut. For this purpose the procedure of consultation and conference and of nonadversary hearings may be inadequate. Where this is the case, hearings, in which information is introduced as evidence subject to refutation and often to cross-examination, have come to be employed.

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The application of the procedures of a judicial trial to administrative rule making is limited, however, by the distinctive characteristics of rule-making proceedings. The issues are normally complex and numerous; the parties may be diverse and not alignable into classes; the outcome will involve a judgment concerning the consequences of rules to be prescribed for the future and a discretion in devising measures to effectuate the policies of the statute. These factors differentiate these proceedings from the normal judicial trial in which adversary hearings are traditionally employed and accordingly limit the possibility of defining issues in advance, of addressing evidence to them, of permitting systematic cross-examination, and of stating the findings and conclusions fully. The problem is evident, for example, in the case of a set of regulations which in thousands of paragraphs lays down rules for ship construction or one which governs as discretionary a matter as the nature of the disclosures to be made in a registration statement for new issues of securities.

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Even if the expense and delay of these adversary rule-making processes cannot be wholly eliminated, they may, insofar as they do not constitute a break-down of governmental regulation, purchase advantages which justify them. The ultimate judgment of whether they do or not should determine whether they are to be continued. The possible advantages are primarily those, including greater satisfaction to the parties, which result from the check to which the evidence and arguments may be subjected by counter evidence, cross-examination and argument. They include also the discipline to which the reasoning of an administrative agency is subjected when it must make findings based upon identified evidence and predicate its conclusions, in turn, upon these findings. This discipline should be self-imposed in any event within an agency's organization if not publicly; but it is not always true that it is.

These possible advantages of adversary procedure in situations involving contro-

versial economic interests may account for the voluntary adoption of this type of procedure by a number of agencies. There are indications, on the other hand, that in some instances the use of such procedure may spring from conscious or unconscious adoption of trial methods in rule making by agencies which also have cases to hear and decide or from a supposed necessity imposed by Supreme Court decisions or public sentiment relating to the administrative process. Except insofar as binding procedural requirements actually exist with respect to rule making, the adoption of adversary methods should be governed wholly by realistic considerations. Final Report of the Attorney General's Committee on Administrative Procedure (1941), Sen. Doc. No. 8, 77th Cong., 1st Sess., at pp. 109-111.

The Administrative Procedure Act as originally enacted substantially reflected the attitude expressed in the foregoing passages of the Report of the Attorney General's Committee. Formal adversary hearings, i.e., hearings conducted in accordance with §556 and §557 — were required with respect to rulemaking only when otherwise mandated by statute or by due process, in accordance with the interpretation adopted in *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1951). In other instances, the only procedural requirements with respect to rulemaking were those stated in §553. The requirements were two-fold: (1) publication of a "general notice of proposed rule-making", and (2) an opportunity for "interested persons to participate in the rulemaking." The notice was required to contain only "(1) a statement of the time, place and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." The opportunity to participate was further defined to include "submission of written data, views, or arguments with or without opportunity for oral presentation." Conceivably this could have been interpreted to mean that all submissions, whether written or oral, were to be included in a public file to be available to the general public for inspection. There is, however, no affirmative support for this interpretation in the legislative history, nor was there any early practice by the agencies to conform with such an interpretation. The Attorney General's Manual on the Administrative Procedure Act certainly gave support to a contrary interpretation by saying: "Such informal rulemaking procedure may take a variety of forms: informal hearing (with or without a stenographed transcript), conferences, consultation with industry committees, submission of written views, or any combination of these." Manual at p. 31. The assumption underlying this sentence seems to have been that conferences or consultations might be private or public in the discretion of the agency. This assumption is further substantiated by the following comment: "It is entirely clear, however, that §4(b) does not require the formulation of rules upon the exclusive basis of any "record" made in informal rulemaking proceedings. Senate Hearings (1941) p. 444. Accordingly, except in formal rulemaking governed by §7 and §8, an agency is free to formulate rules upon the basis of materials in its files and the knowledge and

experience of the agency, in addition to the materials adduced in public rulemaking proceedings." Manual at pp. 31-32. The only other relevant provision of §553 is the requirement that: "After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." Thus §553, both on its face and in the light of its history and contemporaneous interpretation, seems to be entirely consistent with a permissive use of ex parte communications.

With respect to proceedings conducted in accordance with §556 and §557, on the other hand, the APA seems to suggest an opposite conclusion at least with respect to matters relating to substantive decision making. This is particularly indicated by the provisions of §556(e):

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding constitute the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Even so there was no explicit general ban on ex parte communications in the original APA. Section 554(d) contains a partial prohibition but this is limited to an "employee who presides at the reception of evidence pursuant to §556 of this title." It provides that: "Except to the extent required for the disposition of ex parte matters as required by law, such an employee (1) may not consult a person or a party on a fact in issue, unless on notice and opportunity for all parties to participate." It is also inapplicable "in determining applications for initial licenses," "to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers," and "to the agency or a member or members of the body comprising the agency." To the extent that these provisions permitted ex parte communications with private parties, they have, of course, been superseded by the Government in the Sunshine Act amendment of §557.

It is also noteworthy that the legislative history of the Government in the Sunshine Act itself seems to reflect a general consensus that a ban on ex parte communications in §553 rulemaking proceedings would be undesirable. In the first place, none of the American Bar Association supported bills dealing with ex parte communications undertook to prohibit such communications in §553 rulemaking proceedings; they were all limited to §556 and §557 "on-the-record" proceedings.⁷ This was also true of all the bills which eventually led up to the adoption of the Government in the Sunshine Act with the single exception of S. 260, which explicitly made its ex parte communications provision applicable to §553 rulemaking proceedings.⁸ This provision was disapproved by almost all of the

⁷ Senate Report No. 94-354, 94th Cong., 1st Sess. (1975) at pp. 203-204.

⁸ This was the original form of S. 260. See Hearings Before Subcommittee on Reorganization, Research and International Organizations of Committee on Government Operations, 93rd Cong., 2nd Sess. (1974) at p. 334.

witnesses who testified on this aspect of the Bill. Even Mr. Geller, who introduced the *ex parte* communications issue into the Home Box case, expressed the view that the *ex parte* communication prohibitions should not apply to §553 rulemaking proceedings.⁹ Similarly the Report of the Committee on Federal Legislation of the Association of the Bar of the City of New York on S. 5, after noting with approval the limitation of the *ex parte* provisions of that bill to formal hearings because "extension of its *ex parte* rules to notice and comment rulemaking would result in undesirable rigidity" (p. 21), offered some tentative suggestions with respect to possible future developments in opening up notice and comment rulemaking to greater public scrutiny.¹⁰ These included the possibility that all written communications received after the issuance of notice of proposed rulemaking should be placed in a public file which, at some time before the agency made its final determination, would be made available to the public. But the Report also added this qualification: "A requirement that agency officials prepare a summary of every oral communication they receive regarding an investigation which has been 'noticed' appears, however, to be a burden which would unduly hamper the activities of the agency and result in lack of compliance." Federal Legislative Report No. 75-1 (March 31, 1975) at p. 22.

In the light of this general background it is clear that, apart from the analogy to *Sangamon*, the Court's Home Box Office opinion, in its strictures against all *ex parte* communications after notice of proposed rulemaking, is a departure from the generally prevailing view over many years with respect to the informality and flexibility permissible in §553 rulemaking proceedings. This is made especially apparent by the flat statement in the opinion to the effect that: "Once a notice of proposed rulemaking has been issued, however, any agency official or employee who is or reasonably may be expected to be involved in the decisional process of the rulemaking proceeding should 'refus[e] to discuss matters relating to the disposition of a [rulemaking] proceeding with any interested private party, or an attorney or agent for any such party, prior to the [agency's] decision. . . .'" Slip Opinion at pp. 97-98. Nevertheless, it must also be recognized that the prevailing view with respect to informality in §553 rulemaking proceeding was developed before, or without apparent reference to, the statutory or judicial prescription of judicial review on the administrative record of §553 proceedings.¹¹

⁹ Hearings on S. 260 *supra*, at 219. See also testimony of Mr. Ray Garret, Chairman of the SEC, at pp. 214-215; and Mr. Richard Berg, Executive Secretary of the Administrative Conference of the United States, at pp. 248-249.

¹⁰ See testimony of Mr. Eric Bregman on behalf of the Association of the Bar of the City of New York, Hearings Before a Subcommittee of the House Committee on Government Operations on H.R. 10315 and H.R. 9868, 94th Cong., 1st Sess. (1975) at pp. 219-257.

¹¹ There are some opinions that reflect the original view of the unconfined nature of §553 proceedings, even though review was apparently on the record of the administrative proceedings. Examples of these are *California Citizens Band Association v. United States*, 375 F.2d 43 (9th Cir. 1967), and *Angel v. Butz*, 487 F.2d 260 (10th Cir. 1973). While the results in these cases are probably still sound, the language of the opinions would have to be revised substantially to make them consistent with the generally prevailing procedural law of §553 proceedings. Compare cases cited in Footnote 13 *infra*.

The crucial question is whether the development of this type of judicial review necessarily or properly implies the accompanying development of rules discouraging *ex parte* communications in §553 proceedings essentially similar to the law or policy prevailing with respect to formal proceedings.¹²

In support of its view the opinion in the Home Box Office case suggests that a reviewing court cannot determine whether an administrator's discretion was exercised in a rational and responsible manner unless the court can be sure that it has available to it in the administrative record all of the relevant representations made to the administrator. Superficially this position is not entirely without merit. But it also suffers from over-identification of the Court's role with that of the agency both in the development of policy and the resolution of factual issues. The strictures which the courts of appeals in general and the District of Columbia Court in particular have already imposed upon the conduct of §553 proceedings go far toward assuring an adequate basis for judicial review of both factual and policy determinations. As the Home Box Office case emphasizes, the opening statement accompanying the Notice of Proposed Rulemaking must now include a summary of the factual material that the agency considers relevant, accompanied by any internal staff memoranda or studies upon which the agency has relied in reaching those factual conclusions. The opportunity of private parties to respond is well calculated to bring to light any significant factual disagreements. How those disagreements are to be resolved then depends on the nature of the factual issues involved. This is the teaching of many leading opinions, including those of the District of Columbia Circuit itself.¹³ In some of these opinions the courts concluded that there were no significant issues of concrete fact requiring further adversary proceedings for their resolu-

¹² There are apparently few decisions dealing directly with *ex parte* communications in informal rulemaking proceedings. The Home Box Office opinion cites two, besides the Sangamon case. One, *Courtauld's (Alabama) Inc. v. Dixon*, 294 F.2d 899 (D.C. Cir. 1961), involved a rule promulgated by the FTC under the Title Fiber Products Identification Act establishing generic names for manufactured fibers. The appellant asserted that the Commission procedures were invalid because the Commission and its staff during the course of the rulemaking proceedings received *ex parte* pertinent material and information from governmental and private sources. The Commission in issuing the final rules considered the public record, its own files and such *ex parte* communications. The Court rejected the claim that this was a violation of the Sangamon principle on the grounds that the case in no way involved a license available to only one competitor, that there was no showing as to what competitors were advantaged by the Commission's rule, and that the "proceeding was clearly one of rulemaking both in form and substance, and hence was not subject to all the restrictions applicable to a quasi-judicial hearing." (P. 905).

In the second case, *Ruppert v. Washington*, 366 F. Supp. 686 (D.D.C. 1973), *aff'd* by order of the Court of Appeals, the plaintiffs challenged the legality of a Zoning Commission order resulting in the down-zoning of a substantial part of the downtown area. The district judge characterized the administrative proceedings as "quasi-legislative in character, not adjudicative in nature." However, he also said that "the Court is not required to hold a trial *de novo* nor may it substitute its view of the evidence before the Commission for that of the Commission." 366 F. Supp. at 688. Finally, he declined to dismiss summarily the plaintiff's claim that the Zoning Commission had "received and presumably considered oral and written information, *ex parte*, and that these communications are not a matter of record." 366 F. Supp. at 689. Instead the district judge permitted limited discovery into the *ex parte* phase of the case, after which he concluded that it was not serious enough to vitiate the proceedings. The opinion is ambiguous. Some emphasis was placed on the fact that the *ex parte* communications were from public agencies with legitimate interests.

¹³ These significant opinions include the following: *American Air Lines, Inc. v. C.A.B.*, 359 F.2d 624 (D.C. Cir. 1966); *Automotive Parts and Accessories Ass'n v. Boyd*, 407 F.2d 330 (D.C. Cir. 1968); *Chrysler Corp. v. Department of*

tion; in others the courts found just the opposite and remanded for appropriate proceedings. In either event, it is difficult to see how the presence of *ex parte* communications could have had any significant impact on the process of judicial review with respect to the merits of factual questions. Presumably the administrator could not have relied upon *ex parte* communications to support his findings of fact. Neither could the challenging parties have relied upon such communications to support their version of the facts. In that sense it would appear that judicial review on the record of §553 rulemaking proceedings should have a healthy effect in discouraging too much reliance upon *ex parte* communications. That is not the same thing as saying that the presence of *ex parte* communications will have a debilitating effect on review; indeed the opposite seems to have been true in Home Box Office, since the Court had no hesitancy in setting aside the Commission's order as "arbitrary, capricious and unauthorized by law."¹⁴

The relation between *ex parte* communications and judicial review of questions of policy presents more subtle difficulties. The Court's concern seems to be that the agency may have presented one policy rationale in its

Transportation, 472 F.2d 659 (6th Cir. 1972); Associated Industries of N.Y.S., Inc. v. Department of Labor, 487 F.2d 342 (2d Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); Mobil Oil Corp. v. F.P.C., 483 F.2d 1238 (D.C. Cir. 1973); Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973); Amoco Oil Co. v. EPA, 501 F.2d 722 (D.C. Cir. 1974); Bell Telephone Co. of Pennsylvania v. F.C.C., 503 F.2d 1250 (3d Cir. 1974); Industrial Union Dept. A.F.L. C.I.O. v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974); South Terminal Corp. v. E.P.A., 504 F.2d 646 (1st Cir. 1974); National Courier Ass'n v. Board of Governors of Federal Reserve System, 516 F.2d 1229 (D.C. Cir. 1975); National Asphalt Pavement Ass'n v. Train, 539 F.2d 775 (D.C. Cir. 1976).

In the National Courier opinion the Court particularly considered the question whether the record must include "intra-agency memoranda addressed to the Board from its Legal Division and its Research and Statistics Division, parts of which the Board deleted on the ground that they contained 'internal recommendations, staff analysis, and work product and legal opinions.'" 516 F.2d at 1241. As a general guide to the resolution of this question the Court announced this proposition: "The proper approach, therefore, would appear to be to consider any document that might have influenced the agency's decision to be 'evidence' within the statutory definition, but subject to any privilege that the agency properly claims as protecting its interest in non-disclosure." 516 F.2d at 1241. Drawing on the analogy of the scope of the privilege for intra-agency memoranda in the Freedom of Information Act, the Court concluded that the record should contain "(1) those parts of such memoranda as are purely factual in nature . . . and (2) memoranda adopted by the agency as part of its decision." 516 F.2d at 1242.

The opinion in Home Box Office may have had in mind the National Courier opinion, as well as Environmental Defense Fund v. EPA, — F.2d — (D.C. Cir. Nov. 10, 1976), cited in Footnote 121, when it said: "From a functional stand-point, we see no difference between assertions of fact and expert opinion tendered by the public, and that generated internally in an agency. . . ." Slip Opinion at 92. In making this analogy the Court seems to ignore the equally compelling analogy to the internal communications which are apparently exempt from disclosure under the FOIA and the Courier opinion. A more general principle that might be said to apply equally to both internal communications and *ex parte* private communications would be that all factual statements which are relevant to the issues and might have been so treated by the agency should be included in the record. In the first instance the application of this principle would have to depend upon the agency's own sense of relevance and its scrupulousness in keeping a record of all communications. An absolute rule requiring all communications, internal or external, factual or argumentative, to be on the record would theoretically solve the difficulty, but even if such a rule could be enforced with draconian severity, its contribution to fairness would have to be weighed against its inhibiting and delaying characteristics.

These developments are fully explored in articles by Dean Carl Auerbach and Professor Ralph Fuchs, which are soon to be published in the Northwestern University Law Review. Dean Auerbach, in particular, although he approves of the legal basis for most of these decisions, also expresses concern that the informal rulemaking process may have become overformalized as a result of them. He proposes, as a remedy, the separation of the formulation and adoption of the rule from the process of challenging its validity and building an administrative record for the purpose of judicial review.

¹⁴ The decision on the merits was based partly upon First Amendment considerations but it was also based upon lack of evidence in the record to support the Commission's assumption that, unless cable television programming was limited by regulation, so much "siphoning" of programs from free television would occur that the public would be substantially injured. Because of this lack of evidence, the cable television rules were, in the Court's view, arbitrary and capricious.

statements for the record, while it actually reached its conclusion on the basis of quite a different rationale, developed only in *ex parte* conversations. In part, at least, this seems to be the suspicion of the Court in Home Box Office. Various extreme possibilities might be postulated. A powerful private interest might threaten a commissioner with opposition to his reappointment; or a powerful congressman might threaten a cut in appropriations. Such obvious abuses of power might occur no matter what rules are adopted with respect to *ex parte* communications. A more realistic concern is that the policy formulations of an agency may only dimly or inaccurately reflect what its public policy concerns really are. But this is a problem inherent in all decision-making processes; criticism and exposure of this intellectual failing is the staple of much scholarly criticism of judicial opinions. Again there is little reason to believe that *ex parte* communications have much bearing on the problem. Presumably administrative decision makers, like judicial decision makers, will try to put forward the best rationale they can think of for their policy choices. So far as judicial review is concerned, if the formulation given is an appropriate one under the governing statute, that should be sufficient to sustain the administrative action. It might be that administrative action was also motivated by some other policy considerations which could not be so easily articulated or which had no relation to the acknowledged purposes of the statute or the agency. Such ulterior purposes might or might not be suggested by disclosure of *ex parte* communications. Even so it is hard to see why the existence of such ulterior motives should be the proper concern of a reviewing court, any more than it would be if the court were reviewing the reasonableness of legislation. Compare *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185-186 (1936).

There is, on a theoretical level at least, more justification for the court's concern that *ex parte* communications might deprive some parties to the proceedings of their right to a fair hearing. It must be emphasized, however, that the right to a fair hearing in this context is dependent upon the mechanics of judicial review rather than upon the nature of the administrative proceedings. Unless the whole course of decisions stretching from the *Bi-Metallic* case to the *Florida East Coast* case is to be repudiated, it must be assumed that the rulemaking proceedings themselves did not engender any right to an administrative hearing in any interested parties, except insofar as such a right was accorded by statute. Nevertheless, it must also be assumed that due process does include a fair opportunity to challenge the validity of the rule in judicial proceedings on factual as well as legal grounds. Even in the *Pacific States Box and Basket* case, *supra*, when Mr. Justice Brandeis spoke of the presumption of validity that attached to administrative regulations, he was careful to qualify the statement by reference to the opportunity to establish, in appropriate judicial proceedings, the contrary of the facts apparently assumed by the administrator. In judicial review on the

record of the administrative proceedings the court must similarly require a fair opportunity in the course of the administrative proceedings to establish the contrary of the facts assumed by the administrator. This is the basis upon which the courts of appeals in reviewing rules made in §553 proceedings have engrafted upon the statutory framework additional requirements designed to assure that all interested parties will have an adequate opportunity to know the basis upon which the administrator purports to act and to rebut the factual assumptions underlying his judgments. It is also the rationale for additional legislative requirements with respect to rulemaking proceedings in such statutes as the Consumer Products Safety Act,¹⁵ Fair Trade Commission Improvement Act¹⁶ and the Securities Exchange Act Amendments of 1975.¹⁷ It is also noteworthy that none of these statutory elaborations of the essentials of fair hearing in rulemaking proceedings, designed in part to assure an adequate record for judicial review, saw fit to include a prohibition of *ex parte* communications. The hard question is whether the essentials of fair hearing in the full context of the proceedings justify the implication of such a prohibition.

In approaching this question it is important to remember that judicial review is not the major objective of the proceedings. Neither are the proceedings necessarily adversary in character, in the sense that was emphasized, for example, by Chief Justice Hughes in the Morgan cases. In the ordinary rulemaking proceedings the parties are not identified in advance. Neither are conflicting interests established in advance among those subject to the proposed regulation or between them and the government agency involved. In such a situation the very concept of *ex parte* communications is strikingly out of place; there are no parties to begin with and it is entirely problematic what parties will develop and what their conflicting interests will be. It is entirely possible that informal conferences will resolve any outstanding difficulties or disagreements and that there will be no occasion for a challenge to the validity of the regulations and the exercise of judicial review. Under such circumstances it would be unfortunate if the mere possibility of judicial review should warp the most natural and beneficial course of the proceedings. For most rulemaking proceedings experience seems to tell us that the most natural and beneficial course is a maximum opportunity for easy and informal contacts between the public and the regulatory agency.¹⁸ There is a basic

¹⁵ 15 U.S.C.A. §2058 (1972).

¹⁶ 15 U.S.C.A. §57a (1975).

¹⁷ 15 U.S.C.A. §78s (1975).

¹⁸ Such contracts might, and in practice frequently do, include telephone conversations between staff members and members of the public, other agencies of the federal government, members of Congress, and state and local officials intimately concerned with the subject matter of proposed regulation; meetings between staff members and individuals or groups belonging to the various constituencies mentioned; on site inspections or visits by staff members, coupled with interviews with the most knowledgeable members of the public or the industry subject to the regulation. While the results of such myriad contacts might be summarized and incorporated in public files, to treat each contact as an *ex parte* communication to be separately noticed in advance for general participation by the public, would tax the facilities of the agency and the patience of the individuals concerned far beyond their effective limits.

inconsistency between that objective and the requirement that all contacts should be either at public hearings, duly noticed in advance, with equal opportunity for all those interested to participate orally, or by written communications designed for incorporation in a public file. Apart from the physical and mechanical handicaps inherent in such arrangements, they are also subject to the psychological impediments which make it difficult to explore truly tentative positions and uncertainties in a public setting. There are, therefore, strong reasons to avoid an iron-clad prohibition against ex parte communications in rulemaking proceedings, unless there are compelling considerations of fair hearing pointing in the opposite direction.

The principal concern on this score expressed by the Court's opinion in the Box Office case was that interested parties not privy to the ex parte communications might be prejudiced by the lack of adequate opportunity to respond to representations by other parties with opposing interests. This assumes, of course, just such opposing interests as were present in the Home Box Office case. The crucial question is whether the likelihood of such a risk is sufficiently great to justify a general prohibition applying to all section 553 rulemaking proceedings. The first qualification to be kept in mind is that in many rulemaking proceedings there will be no such opposing parties. In the second place, even if there are such parties, the ex parte communications may not deal with the issues that are in dispute between them. Assuming, however, that there are such issues, they might be conveniently divided into three categories — legal issues, factual issues, and policy issues. The legal issues may be rather summarily dismissed. Presumably they will be apparent on the face of the proceedings, including the notice of asserted legal basis for the proposed action. If there are such issues it will be to everyone's interest to make their best case in the public proceedings as well as in any private discussions. Failure to present any legal objections on the face of the administrative proceedings can only prejudice the presentation of such objections in the proceedings on judicial review. Furthermore, since such issues will be open for full review in the judicial review proceedings, if they do occur, it is hard to see how any of the contending parties could benefit by something less than full disclosure of their legal arguments or by secret rather than open presentation of such arguments.

With respect to factual questions the problem might be a more realistic one. It is conceivable that some of the parties might have some confidential data about their own businesses which they would be willing to disclose to the administrator, but not to the opposing parties. This is one of the most ticklish questions that can arise in any proceedings, formal or informal. Compare *Wirtz v. Baldor Electric Co.*, 337 F.2d 518 (D.C. Cir. 1964).¹⁹ For most practical purposes a solution can be worked out

¹⁹ The Baldo Electric case is symptomatic of the difficulties involved in requiring all communications to be public. It grew out of formal rulemaking proceedings conducted under the Walsh-Healey Public Contracts Act for the purpose of

whereby the administrator gets all the information but the opposing parties get summaries with identifying characteristics removed. Here again the potentialities of judicial review on the record of the administrative proceedings provide an incentive to all parties to make the fullest disclosure on the record to protect their own interests. If the disclosure is not sufficient for purposes of rebuttal, this itself will be grounds for challenge on due process or fair hearing grounds in the course of judicial review. Another possibility is that data submitted by some of the parties on the record of the proceedings may be discredited by other parties in the course of private conversations. Here again, this is risky business both for the parties concerned and the administrator. If the administrator ignores relevant information in the record without adequate explanation, this itself may provide grounds for setting aside his findings by the reviewing court. Of course, there is always the possibility that the record evidence might be so evenly balanced that the administrator could find either way without substantial risk of reversal. Conceivably, *ex parte* communications might be the decisive factor in making up his mind. This is presumably the major justification for the prohibition of *ex parte* communications in judicial proceedings and quasi-judicial proceedings. If exactly the same problem should arise in section 553 rulemaking proceedings there is good reason for saying it should be resolved in the same way. However, the likelihood of its arising in most rulemaking proceedings is so slight that it provides little justification for the kind of absolute prohibition suggested by the Home Box Office opinion. On the other hand, administrative agencies might well be alert to the possibility of such a situation arising in rulemaking proceedings, especially where there are opposing private interests or disputed factual issues with respect to which *ex parte* communications might make a decisive difference. In such a situation a ban on *ex parte* communications might well be called for and failure to impose it might be an appropriate ground for judicial reversal. In order to minimize the likelihood of this occurring, the general procedural regulations of the agencies could provide for the invocation of such a ban in appropriate circumstances.

Questions of policy fall somewhere between questions of law and questions of fact insofar as the risks of *ex parte* communications are concerned. On the one hand, it is difficult to believe that significant policy issues would not be fully ventilated on the face of the open proceedings, just as much as significant legal issues would be. On the other hand, policy

establishing the prevailing minimum wage for a particular industry. By explicit provision such determinations were required to be "made on the record after opportunity for hearing"; consequently sections 556 and 557 of the APA applied. A possible effect of the decision was to require the Administrator to release to all members of the industry the specific data supplied by individual members, rather than summaries without individual identification of the underlying data. The possibility of such a disclosure requirement was so shocking to the industry and the Bureau of Labor Statistics that it threatened for a time to undermine the efficacy of the statute. See Morton, *Public Contracts and Private Wages: Experience Under the Walsh-Healey Act (1965)* at pp. 78-79. A prohibition of all *ex parte* communications, literally interpreted, would presumably have had the same effect.

judgments, like factual judgments, would call for considerable deference in the course of judicial review. However, in this latter respect, there would be no difference between judicial review on the administrative record and de novo judicial review without any administrative record. It is true that the Home Box Office opinion introduces the additional concept, borrowed from proceedings like the Chenery cases, that the administrator cannot justify his determinations by policy considerations that were not advanced in the course of the administrative proceedings. Compare *Securities Exchange Commission v. Chenery* 318 U.S. 80 (1943).²⁰ But even if the agency cannot defend the regulation upon grounds not disclosed in the record, it does not follow that, simply because ex parte communications might have suggested such different policy considerations, the rule should be invalidated. The significant questions would be whether the agency was in fact influenced by such considerations and whether they introduced new policy issues of which other interested parties were not aware. The likelihood of this occurring seems relatively remote since it is difficult to see why such considerations, if they tended to support the regulation, would be hidden from the outside world. It seems more likely that they would be kept out of the public record because they were regarded as irrelevant or could not be satisfactorily articulated. Furthermore, careful regard for the application of the Sangamon principle — or a requirement that all written communications and the substance of all oral communications dealing with the merits of a proposed rule and not exempt from disclosure under the Freedom of Information Act must be placed in the public file — should be sufficient to protect against unfairness to other interested parties.²¹

Inssofar as the foregoing considerations suggest that a general prohibition of ex parte communications is both unnecessary and undesirable,

²⁰ This is a principle which the D.C. Circuit has enunciated several times before in some of the cases previously mentioned. See, for example, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 395 (D.C. Cir. 1973); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973).

²¹ A particular concern of the Court and the petitioners in the Home Box Office case seems to have been that the ex parte communications there involved in effect concealed a bargaining process that went on between the FCC and representatives of the broadcasting industry and eventuated in a compromise between the public position of the industry opposing any relaxation of the limitations on cable television and the most drastic relaxation of those limitations that was feared by the industry. Although such a bargaining process may not be the most engaging model of the regulatory process, neither is it an unmitigated evil to be stamped out of existence at the behest of the judiciary. Just as compromises are frequently essential elements of the legislative process, they may sometimes be an appropriate and even necessary part of the quasi-legislative or rulemaking process. When an agency is dealing with anticipated effects of regulatory changes which have no background in experience, it may be of considerable importance to find out what the industry is willing to accept as something it "can probably live with." Such reluctant admissions may come out only in confidential discussions, as opposed to public or on-the-record concessions. It is true, as the Home Box Office opinion emphasizes, that Chairman Wiley himself decried the tendency of the broadcasting industry representatives to take "hardline" positions in the formal proceedings while reserving for private discussions more realistic admissions of what they might be willing to accept. He also suggested that the Commission might meet this problem by prohibiting entirely private discussions after notice of public hearing, and accepting at its face value the "hard line" position presented at the hearing, thus cutting off the possibility of compromise. Home Box Office, Slip Opinion at p. 94, Fn. 7, 123. However, it is also interesting to note that the petitioner in *Action for Children's Television v. F.C.C., C.A.D.C.*, No. 74-20006, July 1, 1977, charged that Chairman Wiley was himself especially responsible for the "closed-door" bargaining which eventuated in changes in the Broadcasting Industry's Code of Self-Regulation and termination of the proposed rulemaking with respect to children's television.

they are illustrated and confirmed by the recent opinion of a panel of the Court of Appeals for the District of Columbia Circuit in *Action for Children's Television v. F.C.C.*, No. 74-2006, decided July 1, 1977.²² This opinion carefully considers and explicitly rejects the general position taken by a different panel of the same court in the Home Box Office case, although, as the opinion itself notes, the Children's Television case was easily distinguishable on its facts from the Home Box Office case. Children's Television came before the Court on a petition to review a decision by the FCC not to adopt certain rules proposed by the petitioner, Action for Children's Television, or ACT, to improve children's television, especially by increasing the amount of such programming and by limiting or eliminating commercial advertising in connection with such programs. After considerable preliminary deliberation and investigation of these proposals, the FCC issued a Notice of Inquiry and Notice of Proposed Rulemaking, saying in effect that it was seriously considering the adoption of these or similar proposals, but at the same time warning that it might ultimately decide against such adoption. 28 F.C.C.2d 368, 372-376 (1971). There followed elaborate §553 proceedings, which are thus described in the Court's opinion:

By its own description, response to the Commission's *Notice* was "overwhelming." 50 F.C.C.2d 1, 2 (1974); J.A. 2. More than 100,000 comments were filed, filling 63 docket volumes, licensees and networks submitted extensive formal pleadings and programming data and, during 1972 and 1973, the Commission hosted three days of panel discussions and three days of oral argument during which representatives of the industry and members of the general public were afforded an opportunity to express their views regarding the full spectrum of children's television practices. *See id.* at 32-34; J.A. 49-51. ACT subsequently filed comprehensive reply comments, J.A. 125-87, in support of its essential position that "unless commercial pressures were eliminated, children would never receive adequate broadcast service." Petitioner's Brief at 11. Slip Opinion pp. 6-7.

The proceedings finally culminated with the issuance by the Commission of its Children's Television Report and Policy Statement which explained its decision not to adopt specific rules governing children's television practices at that time. 50 F.C.C.2d 1 (1974).

The public §553 proceedings were not, however, all that transpired between the FCC and officials of the broadcasting industry during the period between the issuance of the formal Notice of Proposed Rulemaking and the final negative decision of the Commission. The National Association of Broadcasters devoted considerable attention to the problem and eventually amended its self-regulatory Code dealing with the nature and amount of advertising used in connection with children's programs. The petitioner ACT charged, in its petition for review, that these amendments of the Code were in effect negotiated "behind the

²² This panel consisted of Circuit Judges Tamm, MacKinnon and Wilkey. The opinion was written by Judge Tamm. It will be recalled that Judge MacKinnon also sat on the Home Box Office panel and disassociated himself from the broad sweep of the majority's position on *ex parte* communications.

closed doors of Chairman Wiley's office in a private meeting with NAB officials . . . [in which] the industry was clearly coerced into action under the threat of FCC regulation." This type of negotiations, ACT contended, "undermines the administrative process since it denies public participation at every stage of the regulatory process when issues of critical public importance are considered, frustrates effective judicial review and renders the extensive comment-gathering stage 'little more than a sop. . . ." Slip Opinion at p. 18. Judge Tamm's opinion for the Court of Appeals directly meets and rejects this objection after observing that "a thorough airing of ACT's procedural challenge would not be inappropriate in this case, especially in light of the agency's tentative conclusion of these informal rulemaking proceedings shortly after ex parte discussions with regulatee representatives." Slip Opinion at p. 20.

In the course of this "thorough airing" of the issue, the Court's opinion in *Children's Television*, after examining in detail previous judicial decisions on ex parte communications and the legislative history of both the APA and the Sunshine Act, concludes: "The novelty of this requirement [of the Home Box Office opinion] should have been apparent to all." Slip Opinion at p. 33.²³ In addition to its analytical and historical dissection of the problem, Judge Tamm's opinion also summarizes the practical objections to a general prohibition of ex parte contacts in §553 proceedings in the following passage:

If we go as far as *Home Box Office* does in its ex parte ruling in ensuring a "whole record" for our review, why not go further to require the decisionmaker to summarize and make available for public comment every status inquiry from a Congressman or any germane material — say a newspaper editorial — that he or she reads or their evening-hour ruminations? See generally DAVIS, *supra* §13.12 (Supp. 1970). In the end, why not administer a lie-detector test to ascertain whether the required summary is an accurate and complete one? The problem is obviously a matter of degree, and the appropriate line must be drawn somewhere. In light of what must be pre-

²³ In reaching this conclusion Judge Tamm also took account of such cases as *Moss v. C. A. B.* 430 F.2d 891 (D.C. Cir. 1970), and *Writers Guild of America, West, Inc. v. F.C.C.*, 423 F. Supp. 1064 (D.C. Calif. 1976). In the *Moss* case, ex parte meetings between the airlines and the CAB were "followed by what was alleged to be nothing more than a pro forma public hearing limited to oral argument." The Court found that the CAB's order which purported simply to approve carrier proposed rates, was really a prescription of rates, without public hearing, because the "pressures on the carriers to file rates conforming exactly with the Board's formula were great, if not actually irresistible." This Judge Tamm distinguished as a violation of the hearing provisions of Federal Aviation Act. Slip Opinion at pp. 27-28, Fn. 25.

In the *Writers Guild* case the district court held that the FCC had violated §553 of the APA because: "Without providing public notice and without affording any opportunity for interested parties to be heard, the Commission, acting through its Chairman, negotiated with powerful industry forces to form a new policy for television, new policy which affects millions of lives." 423 F. Supp. at 1151. This decision Judge Tamm distinguished because the Commission there entirely ignored §553 of the APA whereas here "the FCC substantially complied with the requirements of §553." Slip Opinion at pp. 28-31, Fn. 27.

Finally, Judge Tamm's opinion relies upon a decision not mentioned in the *Home Box Office* opinion, *Van Curler Broadcasting Corp. v. United States*, 236 F. 2d 727 (D.C. Cir. en banc) cert. denied, 352 U.S. 935 (1962). In that case the Court held that ex parte contacts between Commission members and CBS representatives during informal rulemaking proceedings on a TV channel assignment did not invalidate the Commission's subsequent allocation. After explaining the rather uncertain reasoning of *Van Curler*, Judge Tamm's opinion concludes: "We do not propose to argue that *Van Curler* stands for the proposition that ex parte contacts always are permissible in informal rulemaking proceedings — they are of course not — but we do think it can be read as supporting the proposition that ex parte contacts do not per se vitiate agency informal rulemaking action, but only do so if it appears from the administrative record under review that they may have materially influenced the action ultimately taken." Slip Opinion at pp. 35-36.

sumed to be Congress' intent not to prohibit or require disclosure of all ex parte contacts during or after the public comment stage, *see* note 27, *supra*, we would draw that line at the point where the rulemaking proceedings involve "competing claims to a valuable privilege." *Home Box Office, supra* at 7 (MacKinnon, J., concurring specially). It is at that point where the potential for unfair advantage outweighs the practical burdens, which we imagine would not be insubstantial, that such a judicially-conceived rule would place upon administrators. As Judge Leventhal has cautioned in *American Airlines, Inc. v. CAB*, 359 F.2d 624, 629 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966):

[R]ule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy . . . [and] is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making.

See also Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338-43 (D.C. Cir. 1968). Slip Opinion at pp. 36-37.

In sum, I conclude that the extent to which ex parte communications might interfere with the adequacy of judicial review or the fairness of the administrative hearing is not sufficient to justify an absolute ban upon ex parte communications in section 553 rulemaking proceedings. I am further confirmed in this view by my concern that such a ban might well prove self-defeating. It is obviously impracticable to apply such a ban to communications occurring before the formal notice of proposed rulemaking is issued.²⁴ Consequently, the effect of the ban might well be to encourage the agency and the more active or influential members of the industry involved to carry on their most significant discussions before the notice of proposed rulemaking is issued, thus reducing the statutory part of the proceeding to a relatively insignificant formality. If that should happen it would not be the first time that the complications of formal proceedings may have induced administrative agencies to accomplish their most important business by less formal means. It was impatience with long drawn-out formal proceedings under sections 556 and 557 that led the ICC to turn to section 553 rulemaking proceedings in the Florida East Coast case, and FPC to do the same in the National Gas Rate Order proceedings. Opinion No. 699, FPC, June 21, 1971, sustained in *Shell Oil Company v. FPC*, 520 F.2d 1061 (5th Cir. 1975).²⁵ Consequently, it would not be surprising if overformalization of section 553 rulemaking

²⁴ It should also be noted that "ex parte communications" are likely to take place after the rule has been issued, because in rulemaking, unlike adjudication, the problem is a continuing one. The rule is in effect always open to reconsideration and those subject to it may well continue their efforts to get it revised while it is being challenged in the courts and perhaps long afterwards. Consequently any cut-off of such communications for a particular period is likely to be an artificial one, whether one looks at the beginning of the period or at the end of it.

²⁵ It should be noted, however, that use of informal §553 proceedings, as distinguished from §556 and §557 formal proceedings, was not passed on directly by the Court in the Shell Oil case, because it found the proceedings adequate to satisfy the requirements of §556 and §557 as well as those of §553. It should also be noted that the FPC by its own procedural regulations bars the use of ex parte communications in general ratemaking proceeding, even though they purport to be carried on under the aegis of §553. Order instituting National Rate Proceeding, Dec. 4, 1974, Docket No. RM 75-14 (39 F.R. 43093). This is not surprising since both the nature of the conflicting private interests and the character of the factual issues in dispute are well calculated to bring such proceedings within the scope of the Sangamon principle.

proceedings were to encourage the disposition of most substantial questions in informal negotiations before the formal notice of proposed rulemaking was issued. This would of course vitiate the major purpose of the Home Box Office opinion and reduce the section 553 proceedings to even more of an empty shell than the Court itself seemed to feel might have resulted from the presence of *ex parte* communications.

I also believe that this conclusion is not inconsistent with the major purposes of the Government in the Sunshine Act and the Freedom of Information Act. Those statutes represent careful compromises between the right of the public to know what is going on in their government and the need of government officials for a measure of privacy both in their internal deliberations and in their communications with various sectors of the public. Presumably those statutes presently go about as far as the Congress thought feasible and desirable in requiring governmental operations to be carried on in a gold-fish bowl. Their general requirements apply as much to communications that occur in the course of section 553 proceedings as to any other governmental operations.²⁶ They also leave a measure of discretion to the various governmental agencies in experimenting with more drastic requirements with respect to the openness of all government operations. Some agencies might, for example, provide that, after notice of proposed rulemaking, all written communications and summaries of all oral communications dealing with the merits of the proposed rule, and not exempt from disclosure under the Freedom of Information Act, must be placed in the public file.²⁷ Other governmental agencies might wish to experiment with a requirement as drastic as that suggested by the Home Box Office opinion, prohibiting all *ex parte* communications in all section 553 proceedings after the notice of proposed rulemaking.²⁸ I am concerned, however, that the side-effects of such a rule, if it were adopted throughout the government in all section 553 proceedings, might significantly detract from the accomplishment of the major purposes of section 553 proceedings — the education of the regulatory agencies and the effective participation of the public in the regulatory process.

²⁶ Notice should also be taken of those provisions of the Federal Advisory Committee Act of 1972, 5 U.S.C. App. I, §1-15 (1977) which may also cut across §553 proceedings. Compare, *Center for Auto Safety v. Tieman*, 414 F. Supp. 215 (D.C. D.C. 1976); *Consumers Union of U.S., Inc. v. Dept. of Health, Ed. and Welfare*, 409 F. Supp. 473 (D.C. D.C. 1976); *Food Chemical News, Inc. v. Davis*, 378 F. Supp. 1048 (D.C. D.C. 1974); *Nader v. Baroody*, 396 F. Supp. 1231 (D.D.C. 1975) (case dismissed Jan. 10, 1977 D.C. Cir. Ct. App. No. 75-1969).

²⁷ This seems to be the effect of the rules adopted by the Consumer Products Safety Commission. See testimony of Chairman Simpson, Hearings on H. R. 10315 and H. R. 9868, *supra* note 10 at pp. 48-81; 16 C.F.R. Part 1012 (1977). Even if it be assumed that such an internal agency rule would be desirable, it does not follow, especially in §553 rulemaking proceedings, that compliance with it should be regarded as a requirement of due process or fair hearing. If it were so regarded, it would be an invitation to bickering and litigation regarding the accuracy and the completeness of the public summaries, so adding to the time and the expense of the entire proceeding.

²⁸ This is the position which has recently been adopted by the CAB in amending its procedural regulations with respect to *ex parte* communications so as to ban such communications in §553 proceedings from the time of the notice of proposed rulemaking until the termination of the proceeding. 42 F.R. Part 300.2(b)(ii), April 11, 1977.

As another example of a recent adoption of a general ban on ex parte communications in administrative proceedings, the Home Box Office opinion points to Executive Order 11920, June 10, 1976, 12 Weekly Comp. of Presidential Documents 1040 (1976), "which prohibits ex parte contacts with members of the White House staff by those seeking to influence allocations of international air routes during the time route certifications are before the President for his approval." Slip Opinion at p. 96. Reliance on this Executive Order seems to ignore the fact that Presidential review of international air route certifications is generally the culmination of formal, on-the-record, adversary proceedings in which individual airlines compete for such certifications before the CAB. Presidential review is provided primarily for the purpose of safeguarding interests of national defense and foreign policy. With respect to such considerations the Executive Order permits exceptions to the ban on ex parte communications to "be made when the head of an appropriate department or agency outside of the Executive Office of the President personally finds that direct or oral communications between a private party and a person within the Executive Office of the President is needed for reasons of defense or foreign policy." Sec. 4, Executive Order 11920, supra at p. 1041. The apparent purpose of the Executive Order was to prevent representatives of the airlines involved from privately rearguing their CAB cases in the White House. It is also interesting that the Executive Order concludes with this paragraph:

Sec. 6. Although it is recognized that the provisions set forth in this Order will frequently apply to review of decisions made in adversary proceedings involving private parties, this Order is intended solely for the internal guidance of the departments and agencies in order to facilitate the Presidential review process. This Order does not confer rights on private parties." *Id.* at 1041.