ARTICLES

THE INCOMPATIBILITY PRINCIPLE

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INTRODUCTION

American legal scholars, after examining our separation of powers jurisprudence, have deemed it a mess.[1] They point to the Supreme Court's modern cases, which tend to oscillate between two incompatible doctrinal approaches without explaining why one is chosen.[2] The "formalist" cases stress the undoubted purpose of the Constitution's Framers to create three separate and distinct branches of government.[3] Formalism is a process of

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1. *See, e.g.*, E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506 (1989).

2. *See generally* Symposium, *Reviving the Structural Constitution*, 22 HARV. J.L. & PUB. POL'Y 3 (1998); Harold H. Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 491 (1987); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

3. *See* THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) (stating that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the

reasoning logically, and often narrowly, from the text of the Constitution and the emphasis on the need for three autonomous branches. One goal is to draw clear lines of authority. Other cases are "functionalist," stressing the Framers' equally apparent purpose to allow some blending of power.[4] Functionalism responds to the modern-day perception of a need to allow for diverse government structure, especially below the level of the three constitutional branches themselves. Functionalists stress the blending of powers in the Constitution and the Framers' arguments for checks and balances. They ask such questions as whether a particular institutional arrangement aggrandizes the power of a branch or invades the "core functions" of another branch—if not, they would uphold it.

Apart from the Court's doctrinal inconsistency, there are defects in each of its favored approaches. Formalism is very fierce; it consumes statutes that may serve real needs of government. Functionalism is quite permissive; it blesses statutes that may contain serious flaws. The way out of this mess, I believe, is for the Court to identify principles establishing when it should take a strict approach to statutes, and when it should not. That task, once completed, can lead to a judgment that our separation of powers jurisprudence is not a "mess" after all—it is merely complicated and, like all law, imperfect in some particulars.

The Framers of the Constitution had three broad purposes in mind as they constructed a scheme of partly separated powers. First, they hoped to ensure the rule of law as a government "of laws not men."[5] Second, because oppression can result from duly enacted laws as well as from despots, they searched for means to preserve their newly-won liberties. Third, they hoped to create a republic that would be marked by public virtue and promotion of the public, not private, interest.[6] The complex and original means that the Framers chose to achieve these purposes was a government featuring three branches that were partly autonomous but also partly accountable to each other. The Framers hoped that the effect of this unique structure would be a balanced government. Indeed, they wanted this form of government to reflect the traditional "mixture" theories they had endorsed as the way to avoid tyrannical power concentrations.[7]

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same hands, . . . may justly be pronounced the very definition of tyranny").

4. *See id.* at 302 ("[Montesquieu] did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other.").

5. *See* M.N.S. SELLERS, AMERICAN REPUBLICANISM, ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION 69-70 (1994) (attributing the phrase to Livy). In England, it was taken up again by James Harrington in The Commonwealth of Oceana (1656). *See* POLITICAL WORKS OF JAMES HARRINGTON (J.G.A. Pocock ed., 1977).

6. GARRY WILLS, EXPLAINING AMERICA (1981).

7. *See, e.g.*, I. BERNARD COHEN, SCIENCE AND THE FOUNDING FATHERS 215-17 (1995) (explaining that among the Framers, John Adams, drawing on arguments for balanced government from the works of Machiavelli and Harrington's *Oceana*, placed special emphasis on balance). Traditional mixture theories, dating from Polybius, used a balance of

American courts, and especially the Supreme Court, have translated these general purposes and structural characteristics into a body of law concerning separation of powers. After more than two centuries of case law, the resultant doctrines fall into four broad categories, each of which can be tied to the original purposes of the separation of powers doctrine. First, some leading cases promote the rule of law by forcing the executive to obey statutes and Congress to obey the Constitution.[8] This is not, however, an uncomplicated task. The rule of law must always accord an appropriate place for discretion; judgments about the appropriate tradeoffs between the two values are inevitable.[9] Second, other leading cases balance the need for the autonomy of each branch against the equally evident need that it be accountable to the other branches and to the people in essential ways.[10] The question here is what particular kinds of autonomy and accountability should be recognized. Third, the courts engage in a general review of legislation to detect any aggrandizement of power or disturbance of the overall balance that might have escaped the other two inquiries.[11] Not surprisingly, this rather unanchored third test is often assailed for its subjectivity.

To review the jurisprudence that has been generated by these first three inquiries is a separate subject.[12] In this Article, I isolate a fourth portion of the Supreme Court's doctrine and suggest a principle by which it can be understood, guided, and critiqued. The focus of this body of law is the need to maintain the essential structure of the Constitution while allowing construction of a complex modern government. I begin, as the Framers did, with a foundational choice about the structure of the national government: that it would be a system of separated powers instead of the blending that characterizes parliamentary government.[13] My thesis is that the Court should enforce the formal separations between Congress and the executive that establish the boundaries between these two branches, and

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the elements of monarchy, aristocracy, and democracy to prevent the dominance of any one of them. The American republic, lacking monarchs and nobles, had to balance government branches to achieve a similar effect.

8. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

9. A major role of modern administrative law, especially after the expansion of standing in the second half of the twentieth century, is to allow citizens and organizations to serve as a check on the government's compliance with statutes.

10. *See, e.g.*, United States v. Nixon, 418 U.S. 684 (1974).

11. *See, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988).

12. I have explored the subject in HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE (2006).

13. The Framers' equally foundational choice of federalism is not pertinent to my discussion, as it involves the relationship of the national government to the states. For a ringing endorsement of the parliamentary form for nations contemplating new governments, see Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).

that most other relationships among the branches be left to Congress to adjust by statute. To understand why, it is necessary to begin at the beginning.

In his famous discussion of the separation of powers in *The Federalist*, James Madison asked: "Will it be sufficient to mark, with precision, the boundaries of these [three] departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power?"[14] Experience had taught that the answer was "no." Instead, "the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition."[15] A primary mechanism to achieve these goals was the Incompatibility Clause in Article I, § 6, providing that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." The Clause assures that different persons will write and execute the laws, creating the means and motives that keep the branches separate.

The Incompatibility Clause has never been interpreted by the Supreme Court. That does not trivialize the Clause, however. Our system of government rests on textual provisions of the Constitution that have never been litigated because their clarity has forestalled controversies that the Framers intended to prevent.[16] The Incompatibility Clause ought to be much more important to judicial interpretation of our system of separated and checked powers than its history of neglect by the courts suggests. Most of the Supreme Court's formalist cases can be explained and justified by reference to the policies that underlie the Clause. I call these policies the incompatibility principle to distinguish them from the narrower textual force of the Clause itself. The principle has lain just below the surface even where the Court has chosen to rely on other, related constitutional provisions such as the Appointments Clause.[17] The primary effect of the

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14. THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

15. *Id.* at 322.

16. For example, Article I assures Congress the right to meet every year, as well as the right to control who sits as a member. These provisions responded to abuses that had occurred in seventeenth century England, when a king prorogued Parliament for eleven years and Cromwell's generals sat at the door of Parliament, determining who could enter. *See generally* CHRISTOPHER HILL, THE CENTURY OF REVOLUTION, 1603-1714 (1961). Hence, fundamental guarantees of the autonomy of Congress lie partly in constitutional commands that have (happily) laid beyond controversy.

17. The Court's tendency to rely on constitutional text that it has frequently interpreted, to the exclusion of more obscure, but perhaps more relevant provisions, is well known. *See, e.g.*, CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 165 (1969) ("But to a Court which depends on a document for its authority, it is not clear that the structural simplicity achieved by having a few clauses dominate constitutional adjudication

principle on constitutional adjudication should be to require strict separations between legislative and executive personnel and functions.[18] Thus, the Court's use of a permissive balancing, or "functional," approach to approve blended powers in contexts not involving the legislative-executive boundary can be explained and justified by the limits of the incompatibility principle.

The Incompatibility Clause has prevented the development of a semi-parliamentary form of government in the United States, in which many or all members of the president's cabinet might sit simultaneously in Congress.[19] The election of the president by the people, as refracted through the electoral college, precludes any full parliamentary system. The autonomy of each of the two political branches has persisted through all the stresses and strains of our history. Even though, at the nadir of presidential power in the late nineteenth century, Woodrow Wilson could describe our system as "Congressional Government," the subsequent revival of an independent and forceful executive needed only the firm hands of Theodore Roosevelt on the reins of the presidency.[20]

This Madisonian tension and competition between the branches depends on two kinds of separations between them. First, there are formal relationships. The executive branch selects its officers, promotes them, dismisses them, and assigns them to particular activities, all within the parameters allowed by law. Congress does the same for its own agents. Control follows these basic features of employment, and would be vitiated or lost if some or all were absent. Second, the informal aspects of separation, although dependent on the formal aspects, are no less important. The two branches have their own distinct cultures, which they transmit to

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is preferable to the directness with which decisions could be explained from the constitutional text if more clauses were permitted to play a role.").

18. *See infra* notes 81-91 and accompanying text (discussing, in connection with *INS v. Chadha*, 462 U.S. 919 (1983), that the principle could also call for separating legislative and judicial functions).

19. Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045 (1994) (discussing the background and effect of the Incompatibility Clause, and arguing for the extension of its principle to joint executive-judicial and federal-state office holding).

20. *See* WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 6 (1885) ("The noble charter of fundamental law given us by the Convention of 1787 is still our Constitution; but it is now our *form of government* rather in name than in reality, the form of the Constitution being one of nicely adjusted, ideal balances, whilst the actual form of our present government is simply a scheme of congressional supremacy."). By 1900, Wilson perceived change: The president was once again "at the front of affairs." *See* WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 22 (15th ed. 1900) ("He [the president] may be both the leader of his party and the leader of the nation, or he may be one or the other."). "If he lead the nation, his party can hardly resist him. His office is anything he has the sagacity and force to make it." *Id.* When he reached the presidency, Wilson certainly tried to play this role, and often succeeded. *See* AUGUST HECKSCHER, WOODROW WILSON (1991).

new employees through training, peer pressure, and daily exposure to the arguments favoring their own branch. Officers of the political branches soon form loyalties to and share the values of their own branch; they readily believe that their branch is right and the other is wrong about the enduring issues. All lawyers experience this kind of effect when they participate in adversary procedures. Indeed, many workers in all fields generate loyalty to their employers—at least if the company treats them decently.

Members of Congress and their staffs see Congress as the "first branch," tied closely to the people and exercising the primal function of legislation.[21] From Capitol Hill, the executive branch appears arrogant and secretive, dangerous in its capacity for sudden action, and strangely unresponsive to the people's will as embodied in Congress. In contrast, the president and his cabinet see themselves as representing the nation in a way that local politicians in Congress cannot, and they certainly consider themselves sufficiently open to outside influences from many quarters, including Congress and the general public. From the White House and its environs, Congress appears meddlesome, suspicious, and fractured. Both of the branches tend to descend into self-righteousness when relating to each other. This characteristic confirms the Madisonian tension, but at the cost of impeding working relationships.

Lawyers for a branch of government are immersed in a longstanding legal tradition of shared views about their branch's powers and perquisites. The body of precedents that their predecessors have generated is known to them, and is self-perpetuating because no one wants to waive or undermine traditional institutional arguments. In addition, career advancement within the branch is more likely for those who strongly champion its interests. Finally, there is never an absence of competing views from the other branch and private parties, which to the government lawyer seem to be skewed by interest and clearly erroneous on the merits. These competing arguments create compensatory aggressiveness in interpretation and argument. On the other hand, opposing views may check irresponsible arguments by exposing their flaws.

The effectiveness of the combination of formal and informal means of control is especially clear when a long-time member of one branch moves to the other.[22] For example, when Senator John Ashcroft became Attorney General Ashcroft, no one should have expected him to remain a

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21. *See, e.g.*, ABNER J. MIKVA & PATTI B. SARIS, THE AMERICAN CONGRESS, THE FIRST BRANCH (1983).

22. For example, Abner J. Mikva served as a member of Congress, U.S. Circuit Judge, and White House Counsel, a separation of powers trifecta. He seems to have adjusted his loyalties appropriately with each new post.

congressional loyalist, nor did he. The most that should have been expected is sympathetic understanding of the interests of the branch formerly occupied. The Framers understood the mutability of loyalty, as they demonstrated by their prohibition of joint but not sequential office holding in the two branches.

I. CONSTITUTIONAL HISTORY

The original purpose of the Incompatibility Clause was to protect, rather than to confine, legislative power.[23] The Framers, who kept a close eye on British political developments, followed a longstanding controversy over "corruption."[24] The term had several meanings in that era, centering on the use of public office to produce private gain over public virtue. After restoration of the monarchy in the seventeenth century, English kings searched for ways to control the surging power of Parliament. They began "corrupting" Parliament by offering its members lucrative executive positions, in hopes of securing influence over them in their legislative capacity.[25] The Framers learned about government in Great Britain largely through the writings of the opposition, the "outs," who were fearful of placemen and of Parliament's habit of expanding government by making

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23. *See* Calabresi & Larsen, *supra* note 19, at 1052-77.

24. GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 80-81, 174-75 (1992); *see also* Margaret A. Banks, *Drafting the American Constitution—Attitudes in the Philadelphia Convention Towards the British System of Government*, 10 AM. J. LEGAL HIST. 15, 31 (1966).

25. *See* J.H. PLUMB, ENGLAND IN THE EIGHTEENTH CENTURY 47 (1950) (noting that in the early eighteenth century, "the relationship between executive and legislature bewildered contemporary Englishmen"). He explains:

> Bolingbroke, the chief expositor of constitutional theory in the early decades, felt that the executive had no right to be in Parliament which was to be the judge of its acts, but the practical wisdom of Walpole and Newcastle saw that, if any continuity of policy was to be achieved, the executive needed to be in control . . . . Nor was there any party organization as we know it. Hence, left to its own devices, Parliament would have been an anarchy of individual minds and wills, swayed by the tide of circumstance.

Id. The solution, Plumb explains, was to give the King's supporters places, "usually sinecures, such as Master of the King's Tennis Court or Taster of the King's Wines in Dublin," in return for which they voted as desired and helped "in piloting government measures through the Commons." *Id.* at 47-48; *see also* W.S. Holdsworth, *The Conventions of the Eighteenth-Century Constitution*, 17 IOWA L. REV. 161, 163-70 (1932) (discussing influence as a link between the Crown and Parliament). In the eighteenth century, the Cabinet was a loose link; Parliament could oust a minister or demand an appointment, but defeat of a program would not cause resignation of the group. Cabinet government and collective ministerial responsibility had not yet developed, and emerged only well into the nineteenth century. In the eighteenth century, the Crown used patronage which checked Parliament and kept it from dominating completely.

new places to fill.[26] Hence, to our founding generation, joint office holding threatened to afford the executive undue influence over the legislature.[27]

The subsequent history of Great Britain demonstrated that "corruption" works both ways. Joint office holding soon became the mechanism by which Parliament worked its will with the executive. This point about the potential effects of blended functions is fundamental to the incompatibility principle. Drawing a bright line between our own legislative and executive branches assures the autonomy of each from the other. The temporary political ascendancy of one branch cannot be converted into a permanent institutional one, as has occurred in Britain.

In America, both the post-revolutionary state governments and the Articles of Confederation banned joint office holding.[28] Without controversy, the Constitutional Convention adopted the Incompatibility Clause to prevent it. There was, however, spirited controversy over the companion Ineligibility Clause which, as eventually adopted, provides that "[n]o Senator or Representative shall, during the Time for which he was

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26. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967) (noting that English opposition thought was "devoured by the colonists," and was very familiar to them throughout the eighteenth century). He further states that this was the set of beliefs "from which would issue the specific arguments of the American Revolution." *Id*. at 44. Key elements were natural rights, the contract basis of society, and the value of the mixed constitution of England. Opposition writers of both left and right "viewed their circumstances with alarm, . . . and dwelt endlessly on the evidences of corruption they saw about them and the dark future these malignant signs portended." *Id*. at 46. They saw political stability under Walpole as based "on the systematic corruption of Parliament by the executive, which, they warned, if left unchecked, would eat away the foundations of liberty." *Id*. at 48. They "hammered away" at this "obsessive concern" and found a receptive audience in the colonies, where their heated descriptions were received as fact. *Id*.

27. There was a related concern among the colonists about multiple office holding in general, regardless of whether it produced a technical incompatibility. The poster child for this concern was Thomas Hutchinson of Massachusetts, who held numerous royal offices simultaneously. *See* FRED ANDERSON, CRUCIBLE OF WAR 605-06, 669 (2000).

28. *See* Calabresi & Larsen, *supra* note 19, at 1056-58 (explaining that in the Colonies, Royal Governors used patronage to buy support for the Crown, and that eleven of thirteen state constitutions had strict incompatibility clauses, with New York and South Carolina being the exceptions); *see also* GORDON S. WOOD, THE AMERICANIZATION OF BENJAMIN FRANKLIN 164 (2004) (reporting Franklin's republican purity in urging the state constitution's drafters in Pennsylvania to adopt an article that "expressed a view of government that his witnessing corrupt English politicians seeking lucrative royal offices had taught him"). As enacted, it condemned "'offices of profit, the usual effects of which are dependence and servility unbecoming freemen, in the possessors and expectants; faction, contention, corruption, and disorder among the people.'" WOOD, *supra*, at 164. Wood concludes that "Americans in 1776 thought that the Crown had used money and influence to buy up the House of Commons and had corrupted the English constitution. They meant to prevent that corruption in their own new republican state constitutions." *Id*. at 165. Article V of the Articles of Confederation accordingly forbade every delegate to Congress to hold "any office under the United States, for which he, or another for his benefit, receives any salary, fees or emolument of any kind." ART. OF CONFEDERATION art. V.

elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time."[29]

The Virginia Plan, with which the Constitutional Convention began, rendered members of Congress ineligible for "any office . . . under the authority of the United States . . . during the term of service," and for an unspecified time thereafter.[30] Thus, joint office holding would be barred, and sequential office holding limited. Debate, which focused on the sequential barrier, harkened back to the British experience. The Convention's most ardent republicans, Gerry and Mason, stressed the proven dangers of executive corruption and thought a strong ineligibility provision was essential to protecting the people's liberty.[31] Hamilton, invoking Hume, responded that the executive needed some means of influence to preserve the overall balance among the branches.[32] Wilson cautioned that a rigid ineligibility rule could deprive the nation of its best military leaders in wartime if they happened to be serving in Congress—and everyone knew he was referring to Washington. Madison opposed ineligibility because he thought the prospect of subsequent executive office would attract more able candidates for Congress. He crafted a characteristically elegant compromise by proposing the clause as it was eventually adopted. He thought that congressional nest-feathering, and not

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29. U.S. CONST. art. I, § 6, cl. 2. *See* Calabresi & Larsen, *supra* note 19, at 1062-77 (charting the constitutional history of the Incompatibility and Ineligibility Clauses); *see also* THORNTON ANDERSON, CREATING THE CONSTITUTION, THE CONVENTION OF 1787 AND THE FIRST CONGRESS 143-48 (1993); 2 THE FOUNDERS' CONSTITUTION 346-73 (Philip B. Kurland & Ralph Lerner eds., 1987) (offering a selection of original sources bearing on the Clauses).

30. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 20-21 (Max Farrand ed., rev. ed. 1987) (May 29, 1987) [hereinafter FARRAND].

31. *See* WOOD, *supra* note 28, at 216-17 (demonstrating how Benjamin Franklin exemplified republican purity by his proposal that members of the executive in the new nation serve without pay). Franklin

> had long believed that there were 'two Passions which have a powerful Influence in the Affairs of Men . . . *Ambition* and *Avarice*; the Love of Power and the Love of Money.' Each separately was a forceful spur to action, but when united in the minds of some men they had the most violent effects . . . . Franklin's evidence for his views was England. For many years he had believed . . . that 'the Root of the Evil' in England's politics lay 'in the enormous Salaries, Emoluments, and Patronage' of its 'Great Offices.'

Id. The American counter-example, of course, was Washington, who had served as Commander in Chief for eight years without pay. Franklin's "classically republican" motion was seconded, tabled, and forgotten. "'It was treated with great respect,' Madison noted, 'but rather for the author of it than from any conviction of its expediency or practicability.'" *Id.*

32. *See* FARRAND, *supra* note 30, at 381 ("We have been taught to reprobate the danger of influence in the British government, without duly reflecting how far it was necessary to support a good government.") (quoting Alexander Hamilton).

ordinary ambition, was the abuse to be remedied.[33] It was only late in the Convention, however, that disagreements over ineligibility were resolved and Madison's compromise adopted.[34]

The Incompatibility and Ineligibility Clauses were linked closely to the Appointments Clause in the minds of the Framers.[35] The joint operation of these three provisions would promote the delicate balance of power that suffuses the Constitution. Congress could create or enhance offices but could neither fill them itself nor press for nomination of its members to new offices.[36] The president, holding an important patronage power, could

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33. *See id.* at 386, 388 (calling his position a "middle ground," Madison "supposed that the unnecessary creation of offices, and increase of salaries, were the evils most experienced . . . ."). If "the door was shut" against them "it might properly be left open" for other appointments as an inducement to "the Legislative service." *Id.* at 386. This raises the possibility that the Ineligibility Clause can be satisfied (or evaded) by depriving an appointee of the increase in emoluments that occurred during his or her congressional service. *See* Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907 (1994) (providing an account of the recurrent controversy about this issue and a strict view of the Clause).

34. *See* FARRAND, *supra* note 30, at 166 (showing how The Committee of Detail Report still had a bar on joint offices during congressional terms, and another year for senators). On August 14, 1787, that provision was considered. *Id.* at 283-90. Pinkney, arguing that the bar was a waste of talent and a disincentive to serve, moved to replace it with an ineligibility clause such as the one earlier proposed by Madison. Mason thought this would encourage a "mercenary and depraved ambition." Mercer argued the executive's need for influence by the power to offer appointments. Gouverneur Morris urged a simple incompatibility clause: "Why should we not avail ourselves of their services if the people chuse to give them their confidence." The issue was postponed until the Committee of Eleven reported, providing for ineligibility during the term of congressional office, along with a simple incompatibility clause. *Id.* at 483. On September 3, 1787, it was taken up and amended into essentially its final form. *Id.* at 492.

35. *See* THE FEDERALIST NO. 76, at 459 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (closing his discussion of the president and the appointment power, and noting that the check of senatorial confirmation was not the Constitution's "only reliance" for controlling the president's appointments). The Incompatibility and Ineligibility Clauses "provided some important guards against the danger of executive influence upon the legislative body." *Id.* Madison called the Ineligibility Clause a way to prevent the president from suborning the "virtue" of the House. *See* THE FEDERALIST NO. 55, at 346 (James Madison) (Clinton Rossiter ed., 1961); *see also* H. Lee Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CAL. L. REV. 983, 1037-43 (1975).

36. *See* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 483-84 (1989) (Kennedy, J., concurring) (refusing to countenance statutory restrictions on the President's process for selecting judicial nominees). Kennedy thought the role of Congress under the Appointments Clause was closely limited.

> By its terms, the Clause divides the appointment power into two separate spheres: the President's power to "nominate," and the Senate's power to give or withhold its "Advice and Consent." No role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment.

Id. at 483. Kennedy buttressed his viewpoint by invoking the words of Alexander Hamilton:

> In the act of nomination, [the President's] judgment *alone* would be exercised; and as it would be his *sole* duty to point out the man who, with the approbation of the Senate, should fill an office, his responsibility would be as *complete* as if he were to make the final appointment.

Id. (quoting THE FEDERALIST NO. 76, at 456-57 (Alexander Hamilton) (Clinton Rossiter ed., 1961)) (emphasis added).

> It will be the office of the President to *nominate,* and, with the advice and consent

fill offices with the Senate's consent, but could neither create them nor offer them to someone who would also remain in Congress.[37] Hence, the functions of generating and applying the laws would be placed in separate hands, reducing the potential for arbitrary treatment of citizens.[38]

The fear of corruption remained evident in the early Republic, the period of the Framers-in-government. Jefferson's visceral opposition to Hamilton's financial program at the new Treasury Department grew out of his understanding of British history: Walpole had built his own power by expanding the Treasury and linking it to both the Commons and commercial interests.[39] There were even concerns regarding a proposal to have Hamilton report his recommendations on raising revenue to Congress out of a fear of undue executive influence.[40] In these early days, the Washington Administration's practice of appointing members of Congress to the European ministries raised old fears of executive patronage, even though they resigned to take the offices. The fact that appointments were being made only from the President's party seemed corrupt as well.[41] The new Constitution contained no bar against joint judicial-executive service, probably because the judiciary was only beginning to be separated clearly from its executive roots in England.[42] Yet, republican purists objected to

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> of the Senate, to *appoint.* There will, of course, be no exertion of *choice* on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice he may have made.

Id. (quoting THE FEDERALIST NO. 66, at 405 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). "Indeed, the sole limitation on the President's power to nominate these officials is found in the Incompatibility Clause . . . ." *Id.* at 484.

37. *See* THE FEDERALIST NO. 69 (Alexander Hamilton) (defending the presidency as less powerful and dangerous than the British monarchy on a number of grounds, including the monarch's ability both to create and fill offices, whereas the president was only allowed to nominate to existing offices, with the Senate checking him in that function).

38. *See* THE FEDERALIST NO. 47 (James Madison) (Clinton Rossiter ed., 1961) (offering the classic statement of this purpose of separation of powers).

39. *See* BERNARD BAILYN, TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICAN FOUNDERS 49-50 (2003). Jefferson

> understood the threatening implications immediately; they squared perfectly with his historical memory and his political beliefs and fears. He, like radical theorists in Britain, believed it had all happened before, early in the century, in Walpole's buildup of the power of the British Treasury in collaboration with [banking and commercial interests.] That alliance, he knew, had allowed Walpole to buy the votes he needed in the House of Commons, overthrow the famed separation of powers of the government, and usher in an age of limitless greed and political squalor."

Id. The engine of corruption was to be the Bank of the United States. "The bank's stockholders, like those of the Bank of England, would forever be able to manufacture a legislative majority to suit them and so corrupt the Constitution and reshape it 'on the model of England . . . . Hamilton truly believed, Jefferson wrote, 'that corruption was essential to the government of a nation.'" *Id.*

40. JOSEPH M. LYNCH, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT 104 (1999).

41. *Id.* at 172-73.

42. *See* Case of Hayburn, 2 U.S. (2 Dall.) 409, 413 (1792) (holding that no court could

the appointment of the first two Chief Justices, Jay and Ellsworth, to be ambassadors while continuing to serve on the Court.[43]

Throughout American history, the Incompatibility Clause has been mostly self-enforcing. No one thinks that he or she can hold another major federal office while in Congress. Thus, at the outbreak of the Civil War, several members of Congress resigned to join the Army, hoping, no doubt, soon to return triumphant.[44] In addition, "the President's duty to take care that the law of the Incompatibility Clause is observed requires him or her to ensure that appointments and legislation creating governmental positions are consistent with the Clause."[45] The Department of Justice does not object to the service of members of Congress in other offices that are "advisory or ceremonial," such as the Commission on the Bicentennial of the Constitution.[46] For more substantial posts, the Department can treat acceptance of a seat in Congress as an implied resignation of the executive office.[47] Nevertheless, political delicacies can forestall strict enforcement of the Clause, as can be seen in the Supreme Court's only flirtation with the merits of an incompatibility controversy.[48]

II. INCOMPATIBILITY AND STANDING TO SUE

In *Schlesinger v. Reservists Committee to Stop the War*,[49] and its companion case, *United States v. Richardson*,[50] the Court declined to reach the merits of separation of powers cases on grounds that the plaintiffs lacked standing. *Schlesinger* involved a claim that the Incompatibility

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perform an executive task reviewable by the Secretary of War, but several Justices thought that individual judges could perform such service).

43. LYNCH, *supra* note 40, at 137, 211. *See generally* WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH (1995).

44. Those members who resigned to join the Confederate Army encountered an incompatibility of truly unique proportions.

45. Memorandum from Assistant Attorney General Walter Dellinger, Office of Legal Counsel, U.S. Dep't of Justice, on The Constitutional Separation of Powers Between the President and Congress*, reprinted in* H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL 653 (1999).

46. *Id.*; *see also* Appointments to the Commission on the Bicentennial of the Constitution, 8 Op. Off. Legal Counsel 200 (1984) (providing advice about compliance with the Clause).

47. *See, e.g.*, Case of the Collectorship of New Orleans, 12 Op. Att'y Gen. 449 (1868).

48. *See* Memorandum Opinion for the Counsel to the President, Members of Congress Holding Reserve Commissions, 1 Op. Off. Legal Counsel 242, 244 n.11 (1977) ("In 40 Op. Atty. Gen. 301 (1943), Attorney General Biddle advised President Roosevelt that the power to enforce Art. I, § 6, Cl. 2, rested with Congress and that the House of Representatives had in the past disqualified Members who accepted military commissions for active service. He concluded that it would be a 'sound and reasonable policy' for the President to avoid any possible conflict with the clause by not permitting Members of Congress to serve on active duty. We do not know what action, if any, the President took in response to the opinion.").

49. 418 U.S. 208 (1974).

50. 418 U.S. 166 (1974).

Clause forbade members of Congress to hold commissions in the Armed Forces Reserve. The plaintiffs, an antiwar group, had sought mandamus against the Secretary of Defense to force him to remove members of Congress from the reserve lists. They alleged injury as war opponents, citizens, and taxpayers, caused by undue executive influence over Reserve officers who were also members of Congress.

The posture of the case reveals an immediate difficulty with judicial enforcement of the clause. Its text—forbidding those holding offices to be members of Congress—appears to be addressed to Congress, yet the plaintiffs sued the military for relief. The reason is obvious: They were trying to avoid the Speech or Debate privilege that protects members of Congress from certain kinds of lawsuits.[51] To be sure, the Court has allowed suit directly against members of Congress in contexts not within the privilege.[52] Even by steering well clear of that reef, however, the plaintiffs could not hide the lurking presence of congressional autonomy interests that the executive, for its part, had not been willing to confront.[53] The Court would not confront them either.

Chief Justice Burger's opinion for the Court characterized the plaintiffs' claim as involving "only the generalized interest of all citizens in constitutional governance, and that is an abstract injury."[54] Of course, the plaintiffs had tried to articulate an interest not shared with the public, and had plausibly done so. Hence, Justice Marshall's dissent would have grounded standing on the plaintiffs' antiwar stance, which they did not share with everyone. They had, according to Marshall, "alleged a right, under the Incompatibility Clause, to have their arguments considered by Congressmen not subject to a conflict of interest by virtue of their positions in the Armed Forces Reserves."[55] Nevertheless, the majority mischaracterized their claim as a generalized grievance in a way that it often does in standing cases.[56] Gliding on, the Court said that a concrete injury was necessary to give the courts a factual context that would aid

51. *See* U.S. CONST. art. I, § 6 (stating "for any speech or debate in either house, they shall not be questioned in any other place").

52. *See, e.g.*, Hutchinson v. Proxmire, 443 U.S. 111 (1979) (allowing a defamation action for a press release).

53. After *Schlesinger* was decided, a Member of Congress wrote the President asking that he enforce the Clause against reservists in Congress. The Department of Justice opined that "the exclusive responsibility for interpreting and enforcing the Incompatibility Clause rests with Congress." *See* Memorandum Opinion for the Counsel to the President, *supra* note 49, at 242. The opinion distinguished the president's usual refusal to make appointments contravening the Clause from this situation, in which the contested appointments had already occurred.

54. *Schlesinger*, 418 U.S. at 217.

55. *Id.* at 239 (Marshall, J., dissenting). Justice Brennan, also dissenting, would have upheld taxpayer standing. *Id.* at 235-38 (Brennan, J., dissenting).

56. *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984).

sound judgment by revealing the consequences of a controversy. Moreover, judicial restraint minimized conflict between the branches—in this case, the Court feared potential conflict with both other branches. The Court concluded that "[t]he proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries."[57] If the consequence was that no one had standing, the issue would be remitted to the political process.

Justice Douglas's dissent reached the merits. He argued that, as Hamilton had pointed out, "the Incompatibility Clause had a specific purpose: to avoid 'the danger of executive influence upon the legislative body.'"[58] Accordingly, the Framers "set up constitutional fences barring certain affiliations."[59] This was to protect the interests of citizens, whose "'personal stake' in the present case is keeping the Incompatibility Clause an operative force in the Government by freeing the entanglement of the federal bureaucracy with the Legislative Branch."[60]

The companion case, *Richardson*, involved a taxpayer's attempt to compel publication of the Central Intelligence Agency's (CIA) budget. He invoked the Constitution's requirement in Article I, § 9, that a "regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."[61] The CIA Act authorized secrecy for the agency's accounts.[62] In another opinion by Chief Justice Burger, the Court denied Richardson standing to sue. The Court declined to extend *Flast v. Cohen*,[63] which allowed taxpayers to challenge federal spending, beyond the Establishment Clause context in which it arose. The Court argued that because Richardson was not directly challenging an exercise of the taxing or spending power, but rather the statutes regulating the CIA, there was no "logical nexus" between his status as a taxpayer and Congress's failure to require the executive to supply a more detailed report of CIA expenditures. Although Richardson wanted more detailed

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57. *Schlesinger*, 418 U.S. at 227.
58. *Id.* at 232.
59. *Id.* at 233.
60. *Id.* at 234. He continued,

> The interest of the citizen in this constitutional question is, of course, common to all citizens. But as we said in *United States v. SCRAP*, 412 U.S. 669, 687-688 [(1973)], "standing is not to be denied simply because many people suffer the same injury . . . . To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."

Id. at 235.

61. U.S. CONST. art. I, § 9, cl.7.
62. The Act permitted the Agency to account for its expenditures "solely on the certificate of the Director." 50 U.S.C. § 403j(b) (2000).
63. 392 U.S. 83 (1968).

information so that he could monitor the government, "the impact on him is plainly undifferentiated and 'common to all members of the public.'"[64] The Court accordingly remitted him to the political process.[65]

As these cases reveal, American courts have not adopted the concept of the "public action," a right of any citizen to hold the government accountable to law.[66] In *Schlesinger*, the majority revealed its concern that citizenship standing to contest constitutional violations would have "no boundaries." Justice Powell's concurrence in *Richardson* gave a classic exposition of judicial hesitancy to start down that road. He feared making the judiciary a free-floating Council of Revision whose excessive power would only invite retaliation from the political branches.[67] Nevertheless, the *Flast* criteria for taxpayer standing are invented ways to allow Establishment Clause challenges to federal spending without opening the gates to other taxpayer or citizen suits. It is possible to do something similar for separation of powers cases.

As it has done in reapportionment cases, the Court could look for situations where the political process will not correct a problem. In the companion cases, both political branches profited from allegedly unconstitutional arrangements. Secret spending protects both branches

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64. United States v. Richardson, 418 U.S. 166, 176-77 (1974). The Court quoted *Ex parte Lévitt*, 302 U.S. 633, 634 (1937), a case involving the Ineligibility Clause. The Court described *Lévitt* as follows:

> There Lévitt sought to challenge the validity of the commission of a Supreme Court Justice [Hugo Black] who had been nominated and confirmed as such while he was a member of the Senate. Lévitt alleged that the appointee had voted for an increase in the emoluments provided by Congress for Justices of the Supreme Court during the term for which he was last elected to the United States Senate. The claim was that the appointment violated the explicit prohibition Art. I, §6, cl. 2, of the Constitution . . . . Of course, if Lévitt's allegations were true, they made out an arguable violation of an explicit prohibition of the Constitution. Yet even this was held insufficient to support standing because, whatever Lévitt's injury, it was one he shared with "all members of the public."

Richardson, 418 U.S. at 177-78 (internal footnote omitted).

65. In *FEC v. Akins*, 524 U.S. 11 (1998), the Court subsequently upheld standing based on an "informational injury" that is very difficult to distinguish from the injury alleged by Richardson. In *Akins*, however, Congress had attempted to confer standing to challenge the FEC's actions, as it had not done in *Richardson*.

66. *See* LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 459-500 (1965) (distinguishing public and private rights of action).

67. Justice Powell argued that "allowing unrestricted . . . citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government." *Richardson*, 418 U.S. at 188. Repeated confrontations between the courts, with their limited political capital, and the political branches would harm both sides. If courts were to employ the potent power of judicial review imprudently, "we may witness efforts by the representative branches drastically to curb its use." *Id*. at 191. Justice Stewart, who dissented in *Richardson*, concurred in *Schlesinger*. He argued that "unlike *United States v. Richardson*, . . . the respondents do not allege that the petitioners have refused to perform an affirmative duty imposed upon them by the Constitution." Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228-29 (1974) (Stewart, J., concurring). Justice Powell's concurrence demolished this distinction between affirmative and negative constitutional duties.

from accountability for their actions; military commissions for members of Congress give each branch influence in the other. Obviously, discussing political incentives of other officers to violate the Constitution is not an activity the courts relish. Nevertheless, a responsible judgment that a plaintiff can be left to invoke the political process does demand a corollary judgment that the asserted constitutional violation has not vitiated that very process.

Thus, standing could vary according to the perceived purposes of particular constitutional provisions and how proximately they affect the public.[68] Citizen standing to enforce the Incompatibility Clause could be grounded on three premises. First, the purpose of the Clause is to prevent consensual arrangements by the political branches that violate its command. Second, violations would likely skew legislative behavior in ways that affect citizens. Third, there is likely no other available plaintiff. For a contrary example, consider a citizen's attempt to review a decision by Congress concerning whether to expel a member for misconduct on the floor. If expelled, the member would provide a superior plaintiff; if not, the interests of the public in policing this aspect of congressional behavior seem far more remote than an incompatibility controversy. Moreover, Congress can claim an autonomy interest in controlling its internal processes, an interest that would not be present in other constitutional contexts.

Standing is a doctrine that identifies parties who may sue, as compared to other possible parties. When all citizens share the same interest in a possible constitutional violation, as in *Richardson*, a denial of standing equates to a determination that an issue is a political question. In *Schlesinger*, the Court remarked that the "more sensitive and complex task of determining whether a particular issue presents a political question" influenced courts to prefer standing analysis.[69] Perhaps this preference deters some abuses by leaving the other branches to wonder whether the Court might someday find a suitable plaintiff if sufficiently tempted to do so.

These two doctrines can, however, produce different outcomes, as the companion cases illustrate. *Richardson* may have presented a political question, given the sensitive judgments that underlie secret spending and the limited capacity of courts to review them intelligently. If some secret spending is legitimate, courts probably lack manageable standards for determining how much to allow. Alternatively, the cloak-and-dagger

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68. Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1162 (1993).
69. *Schlesinger*, 418 U.S. at 215.

aspects of national security spending fairly invite a reviewing court to announce that the issue is textually committed to the political branches.

In contrast, the Incompatibility Clause presents no barrier to the articulation of manageable legal standards. The opinion by Judge Gesell that the Supreme Court reversed in *Schlesinger* provides an example.[70] Reaching the merits, he noted that most congressmen were in the Standby or Retired components of the reserve. All were subject to a call to active duty without their consent. Standby status carried no pay but allowed participation in training and accrual of promotion and retirement credits. Retired members could receive pay. Gesell decided that the purposes of the Clause barred these affiliations—it meant to erect "an inflexible barrier" against the holding of "any other office" by members of Congress.[71] He cited a report by the House Judiciary Committee that forbade a Representative to serve in the National Guard and that rejected an argument for a *de minimis* exception to the Clause on grounds that "no line can be drawn between the large and the small office. The Constitution prohibits a Member of Congress from holding 'any' office under the United States . . . ."[72]

A bright line is certainly a manageable standard. For good measure, Judge Gesell added an argument based on degrees of influence: "[G]iven the enormous involvement of Congress in matters affecting the military, the potential conflict between an office in the military and an office in Congress is not inconsequential."[73] In addition, members of the reserves were disproportionately represented on congressional committees that dealt with military affairs.

I agree that the Framers would have considered "corruption" through influence purchased by offices to be a matter not of degree but of kind—hence the force of Justice Douglas's argument about "constitutional fences." The mutuality of influence that stems from joint office holding creates conflicts of interest in both federal branches, as it did in *Schlesinger*. A reservist member of Congress experienced conflicting incentives both within the military itself—solidarity with the war effort versus fear of callup—and between military and legislator status—loyalty to military needs versus demands of civilians. High defense officials experienced incentives to curry favor with reservist congressmen regardless of whether that behavior accorded with military principles. The usual response to such conflicts is to forbid them, rather than to assess whether they have, in fact, produced the evils feared.

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70. Reservists Comm. to Stop the War v. Laird, 323 F. Supp. 833 (D.D.C. 1971).
71. *Id.* at 838.
72. H.R. REP. NO. 64-885, at 7 (1916).
73. *Laird*, 323 F. Supp. at 838-39.

The fact that the Department of Justice declined to consider the merits of the very issue involved in *Schlesinger* reveals that the executive is not free of its own debilitating conflicts in considering these issues.[74] Unless the courts are willing to reach the merits of incompatibility controversies, the Clause may not be enforced even when vital interests of the public are at stake. Congress can receive some deference by judicial crafting of a *de minimis* exception. Thus, Congress allows uncompensated service by its Members as trustees of public institutions and in similar functions.[75] Some kinds of honorific extra-legislative service are harmless and even laudable, but I would not allow service with any entity that has any role in implementing federal law.

III. THE LEGISLATIVE VETO: A BOUNDARY DEFINED BY PROCESS

A longstanding constitutional controversy over the legislative veto, which was eventually settled by the Supreme Court in a landmark case, reveals the need to define where legislation ends and execution begins. By drawing a bright, formal line between these two constitutional functions, the Court has clarified their allocation between legislative and executive officers. The Court's distinction is essential to the operation of the incompatibility principle.

Legislative veto is a shorthand phrase for any mechanism through which Congress employs a resolution of one or both of its houses to approve or disapprove an executive exercise of delegated authority.[76] These resolutions purport to have mandatory effect, although they are not submitted to the President for his possible veto. For example, using a "one-house veto," Congress may delegate to an agency the authority to promulgate a rule, but provide that the rule shall not go into effect if it is disapproved by either house of Congress. A two-house veto takes the form of a concurrent resolution, which is a resolution of both houses not submitted to the president.[77]

The use of legislative vetoes resulted from congressional frustration with the problem of delegating power to the executive. Congress has never been comfortable with broad grants of statutory power because they are so difficult to modify or retract in the face of the president's veto. The power of the president's veto is great: Throughout American history, Congress has

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74. *See supra* note 53.

75. Dellinger, *supra* note 46; CONGRESSIONAL RESEARCH OFFICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. DOC. NO. 99-16, at 131 (1987).

76. For a comprehensive history of the legislative veto, see Watson, *supra* note 35. There also have been vetoes assigned to committees in either of the houses of Congress.

77. In contrast, a *joint* resolution is presented to the president and is essentially the same as ordinary legislation. It creates no constitutional issues.

overridden only about seven percent of presidential vetoes.[78] At the same time, Congress has not wanted to confine executive discretion so closely in advance that national needs might go unmet. To Congress, the veto device offered a very attractive alternative to this dilemma—an initial, broad delegation could be made, but with legislative veto authority retained. Then Congress could monitor executive implementation of the statute and veto particular actions that it disapproved. Between the eve of the New Deal, when the device first became prominent, and 1983, when the Supreme Court considered the constitutional issue, it was embedded in over 200 statutes.[79]

Presidents from Franklin Roosevelt through Ronald Reagan resisted legislative veto provisions on both constitutional and policy grounds, while often signing bills containing veto provisions. The primary constitutional objection was always that legislative veto resolutions have the effect of law because they invalidate otherwise effective executive actions, yet they are not presented to the president for his veto or signature. Ironically, the veto, designed to *increase* congressional control of the executive, *decreased* that control whenever Congress did not give active review to an executive action because it encouraged Congress to make broader delegations than it would have done in the absence of the veto reservation.[80]

The Supreme Court finally considered the issue in *Immigration and Naturalization Service v. Chadha*.[81] A provision of the Immigration and Nationality Act authorized the Immigration and Naturalization Service (INS) to suspend an alien's deportation on grounds of "extreme hardship," and allowed either house of Congress to pass a resolution to invalidate any suspension. Chadha, an alien who was deportable because his student visa had expired, sought and obtained suspension of deportation from INS. At an adjudicative hearing within INS, he proved hardship by establishing that

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78. PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW: CASES AND MATERIALS 151-55 (2d ed. 2005) (discussing the extent of presidential veto power and noting that by 2003, there had been a total of 2,550 such vetoes—1,484 regular and 1,066 pocket). The figure of seven percent does not include pocket vetoes, which are absolute. *Id.* at 153.

79. *See* James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L. REV. 323, 324 (1977):

> Since 1932, when the first veto provision was enacted into law, 295 congressional veto-type procedures have been inserted in 196 different statutes as follows: from 1932 to 1939, five statutes were affected; from 1940-49, nineteen statutes; between 1950-59, thirty-four statutes; and from 1960-69, forty-nine. From the year 1970 through 1975, at least one hundred sixty-three such provisions were included in eighty-nine laws.

Id.

80. Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977) (characterizing the legislative veto as a "negative check on policies proposed by the agencies, not a means for making policy directly").

81. 462 U.S. 919 (1983).

he might suffer discrimination if deported. The Chairman of the House Subcommittee on Immigration subsequently introduced a resolution opposing several suspensions of deportation, including Chadha's. The House passed the resolution by voice vote after a floor statement by the Chairman arguing that these individuals did not meet the statutory standard for hardship.

When Chadha's challenge to the congressional veto reached the Supreme Court, Chief Justice Burger's majority opinion began by reviewing the purposes of the clauses in Article I of the Constitution that define the legislative process and require presentation of bills to the President. Both the bicameral structure of Congress and the president's veto, he said, were designed with two goals in mind: to check congressional encroachment on the executive by providing the President a means of self-defense, and to promote wise legislation by filtering it through three separate constituency bases. This much was not controversial.

The Court then stated that the bicameralism and presentment requirements of Article I applied only to exercises of "legislative power." The House resolution regarding Chadha was legislative because it "had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch."[82] In other words, the resolution had legal effect like a statute; therefore, it had to be processed like a statute. Because Congress had granted statutory authority to the INS to suspend deportations, the Court held that it "must abide by its delegation of authority until that delegation is legislatively altered or revoked."[83] Accordingly, the one-house legislative veto offended both the bicameralism and presentment requirements of Article I.[84]

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82. *Id*. at 952.
83. *Id*. at 955.
84. In his concurring opinion, Justice Powell observed that the Court had swept away all other legislative veto provisions, as none of them provided for presentation to the president. He would have invalidated the challenged statute on a narrower ground. "When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers." *Id.* at 960. He stressed constitutional history—the early state legislatures had assumed and abused judicial powers, much to the distress of the Framers of the Constitution. They had responded with the general safeguard of separated powers and, more specifically, the Bill of Attainder Clause in Article I, § 9. Both were intended to prevent trial by legislature. Justice Powell stated that in this case, the House clearly did not enact a general rule; rather, it determined that certain persons did not meet specific statutory criteria. Consequently, the House had exercised unchecked power. Its action lacked the substantive and procedural constraints that force administrative agencies and courts to treat individuals fairly. Even the political check that attends enactment of general rules that bind everyone was lost. Justice Powell provided a persuasive explanation of the inappropriateness of the legislative veto in cases involving individuals. Even so, Congress does decide many particular matters by legislation, and there is little chance that these statutes will be held to violate the separation of powers. Moreover, congressional review of executive action through the legislative veto virtually always

Justice White, in a long dissent, defended the legislative veto.

> [I]t has not been a sword with which Congress has struck out to aggrandize itself at the expense of the other branches—the concerns of Madison and Hamilton. Rather, the veto has been a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Art. I as the Nation's lawmaker.[85]

He stressed the practical devolution of lawmaking power to the executive under the broad delegations of power that created the administrative state. This led him to see executive actions, for example in promulgating vast numbers of regulations, as true changes in law upon which Congress attempted to retain a modest check.

Hence, Justice White regarded an executive action such as the suspension of Chadha's deportation as a proposed change in law, which would then be effective only if both houses of Congress accepted it. This met the requirements of Article I, he argued, although in reverse order.[86] This "reverse legislation" theory has an irony.[87] It might justify a one-house veto because majorities in both houses must support an executive action for it to survive. Yet it would not support a two-house veto, which at least satisfies the need for bicameral action. The reason for this discrepancy is that if a proposed change in law is effective when either house supports it, passing legislation is far easier than the Framers intended it to be.

Justice White's "reverse legislation" theory has another fundamental defect. Executive actions that implement statutes are not merely proposals for legislation. They are the core of executive power in the constitutional sense. It is the executive who is charged to "take Care that the Laws be faithfully executed."[88] The Court tried to make this point in a rather

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considered broad policy concerns that are distinct from the limited purposes of judicial review. Therefore, the majority was correct to focus on Article I.

85. *Id.* at 974. Justice Rehnquist also dissented, arguing that Congress did not intend the legislative veto provision to be severable from the rest of the statute (even though the statute contained a provision favoring severability). Therefore, Chadha could not prevail because even if he won his constitutional point, no suspension authority would remain, and he would be deported.

86. Justice White also argued that the veto mechanism meets Article I requirements because it is merely a condition contained in a statute that is passed in full constitutional fashion. Certainly, statutes condition executive action on a myriad of events, but it begs the question of the validity of the legislative veto mechanism to uphold it on the basis of the process that its authorizing statute has undergone. Instead, the issue is the validity of the particular condition, just as it would be for a condition containing a defect that is unrelated to congressional process.

87. *See* Peter M. Shane, *The Separation of Powers and the Rule of Law: The Virtues of "Seeing the Trees*,*"* 30 WM. & MARY L. REV. 375, 380-81 n.27 (1989) (further discussing the "reverse legislation" theory).

88. U.S. CONST. art. II, § 3.

clumsy and conclusory footnote.[89] It correctly stated that executive actions, except for those based on the president's independent constitutional powers, draw their legal effect from an authorizing statute and may not exceed its scope. Congress can decide a policy issue directly through legislation or delegate it to the executive. To the extent it does the latter, the delegated discretion is executive in nature until Congress removes the authority through legislation.

The Court's decision in *Chadha* has received sharp criticism.[90] It is easy to fault the majority opinion for its conclusory and formalistic approach. The Court stated a syllogism: legislation must follow the constitutional path; legislative veto resolutions have legal effect; therefore, they are unconstitutional. Perhaps the majority was correct in finding that *Chadha* was an easy case, dictated by the plain meaning of the Constitution.[91] Many observers, however, disagree.

The *Chadha* Court never did connect its conclusions to the purposes of bicameralism and presentation. By making that connection, it is possible to articulate a more complete rationale for the Court's action. The structure of Article I serves three purposes, of which the Court identified two—preventing encroachments on the executive and dampening the effects of

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89. The Court said:

> To be sure, some administrative agency action—rulemaking, for example—may resemble "lawmaking." . . . This Court has referred to agency activity as being "quasi-legislative" in character. . . . When the Attorney General performs his duties pursuant to § 244, he does not exercise "legislative" power. The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7. . . . It is clear, therefore, that the Attorney General acts in his presumptively Art. II capacity when he administers the Immigration and Nationality Act. Executive action under legislatively delegated authority that might resemble "legislative" action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. . . .

INS v. Chadha, 462 U.S. 919, 953-54 n.16 (1983) (citations omitted).

90. *See, e.g.*, E. Donald Elliott, INS v. Chadha*: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 134-35, 144-47; Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789; Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 5-9 (1984).

91. Peter M. Shane, *Conventionalism in Constitutional Interpretation and the Place of Administrative Agencies*, 36 AM. U. L. REV. 573, 585-86 (1987).

> It is difficult to see how two-house vetoes, not presented to the President, can pass muster under [the Presentment Clauses]. . . . If that is true, then the question in *INS v. Chadha* was essentially, is there any reason to think that one-house vetoes are more permissible than two-house vetoes? . . . No matter what purpose is ascribed to article I, section 7, I cannot imagine an affirmative answer to that question.

Id. See Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988) (arguing that the Constitution prescribes, in a way that is capable of relatively formal implementation, how and when each branch may act, but leaves open to a balancing analysis those cases where one branch acts within express constitutional constraints, although in a manner that intrudes on another branch's domain); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 52-58.

faction.[92] The third is to reduce the amount of legislation that would burden the people. The legislative veto interferes with the realization of all three.

When Congress sent the President a bill containing a legislative veto provision, it simultaneously contravened two of the purposes of Article I. First, it proposed an encroachment on executive power. In both theory and practice, legislative veto provisions gave Congress a share in the execution of the law in a way that infringed on the incompatibility principle. Without legislative veto authority, the executive bears sole legal responsibility for statutory implementation. With a veto, one or both houses share that responsibility through their power to choose whether to override executive action or to allow it. In practice, programs containing veto provisions featured much more direct participation by congressional committees in formulating executive actions than is otherwise the case.[93] The committees possessed this increased leverage because it was relatively easy to pass a veto resolution compared to ordinary legislation. This leverage was not based on the fact that the other house and the president were not needed, but occurred because a veto resolution did not call for an affirmative and perhaps controversial statement of policy by the house passing it. The veto resolution could simply reject the particular executive policy in question, and could be justified by the institutional congressional need to keep the executive under control.

If legislative vetoes encroached on executive power, why did presidents sign so many statutes containing them? The reason is that the executive wanted power that Congress would not delegate without a veto condition. Hence, statutes containing vetoes expanded the power of the federal government as compared to ordinary legislation. Presidents yielded to the temptation to enter into improper bargains with Congress, receiving increased executive power but sharing it with Congress. This pattern evaded the attempt of the Framers to make the legislative process cumbersome enough to minimize federal legislation, leaving the states and the people free to govern themselves.

The Court could also have pointed out that the Incompatibility Clause forbids Congress from engaging in execution. To the framing generation, the spectacle of Congress and the president bargaining to expand their joint power by trading on mutual influence and evading the limits of the Presentation Clauses would have seemed like "corruption" at its worst. Moreover, the Framers-in-government debated the permissible limits of congressional delegation of power to the executive in quite modern terms,

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92. *See* Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 220-22 (1984).

93. *See* Bruff & Gellhorn, *supra* note 80, at 1378-81.

revealing their shared view that the boundary between the legislature and executive required enforcement.[94]

Supporters of the legislative veto can rejoice, however, as Justice Holmes once pithily remarked: "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power."[95] It is certainly true that the president is entitled to no particular substantive content in the statutes empowering the executive, at least outside the realm of his independent constitutional powers over foreign policy and war-making. At the same time, not every procedural condition on delegation is automatically valid, as the Holmes position suggests.[96] The presence in our Constitution of both the Presentation Clause and the Incompatibility Clause requires us to find some boundary between legislation and execution. That boundary is necessarily one of process.

Agencies perform functions that resemble all three constitutional archetypes of power: they adjudicate cases as do the courts, promulgate rules as does Congress, and take enforcement action as does the executive.[97] Hence, there is no coherent functional definition of the boundary between legislation and execution. The one available boundary is that of statutory process: While a statute delegating power to the executive exists, that power is executive in the constitutional sense, until and unless modified or revoked. This boundary recognizes only contingent executive authority, but in light of the practical power of the president's opportunity to veto rescinding legislation, that authority is substantial. The process boundary also reflects the conventional understanding of the limits of congressional and executive oversight of agency action: Informal political pressure may influence an agency within the limits of authority conferred by statute, but may not induce a contravention of that authority.[98]

After *Chadha*, Congress has continued to include legislative veto provisions in new legislation, especially appropriations statutes. Although the executive claims that these have no legal effect, Congress clearly expects informal compliance with them and often obtains it.[99] This

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94. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS, THE FEDERALIST PERIOD 1789-1801 147-49, 246-47 (1997).

95. Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting); *accord id.* at 292 (Brandeis, J., dissenting) ("The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted.").

96. Thus, the quote from Holmes' dissenting opinion in *Myers*, *id.* at 177, was offered in support of a statute requiring the Senate's advice and consent to remove an executive officer, a condition that the Supreme Court did not allow Congress to impose.

97. *See generally* RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE, ch. 2 (2002).

98. *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

99. LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR AND SPENDING 180-81 (2000);

phenomenon reveals a fundamental difference between substantive legislation and appropriations, one that reveals why enforcement of the process boundary for substantive statutes is important. Most appropriations require yearly renewal if they are to continue.[100] This primal fact brings the executive to Congress to seek funds just as the presence of the president's veto brings Congress to the White House when it wishes to legislate. In the yearly appropriations cycle, the executive often wishes to "reprogram" funds from one budgeted purpose to another within a statutory appropriations account.[101] To do so, it consults the appropriations committees within Congress, lest retaliatory budget-slashing occur the next year. Adding a legislative veto provision to this tradition provides emphasis but little more. In other words, for yearly appropriations, the presence or absence of a legislative veto has little legal or practical consequence.

To maintain the reciprocal binding effect of the president's veto for substantive legislation and Congress's power of the purse for appropriations on the branches, each branch needs autonomy within its sphere. The president needs the unimpaired bulwark of his veto opportunity for substantive legislation as much as Congress needs its power to deny funding by the simple expedient of doing nothing.

IV. THE LINE ITEM VETO: A MISNOMER

Proposals granting the President a statutory line item veto circulated for many years before Congress initiated such an experiment in 1996. The impetus behind these proposals was that the president, with his national constituency, was not subject to the incentives that caused members of Congress to package spending provisions favorable to localities into omnibus, "pork barrel" legislation. The Line Item Veto Act authorized the President to "cancel" three types of provisions in enacted appropriations statutes: "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit."[102] A cancellation would be effective if not overturned by enactment of a special disapproval bill by both Houses, subject to presidential veto.

Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 288-91 (1993).

100. *See generally* ALLEN SCHICK WITH FELIX LOSTRACCO, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS (rev. ed. 2000).

101. Since the executive's budgetary promises about the use of funds within a statutory appropriations account appear in the legislative history and not the statute, they lack direct legal effect. Lincoln v. Vigil, 508 U.S. 182 (1993).

102. 2 U.S.C. § 691(a) (2000).

In *Clinton v. City of New York*,[103] the Supreme Court invalidated the Act. The President had cancelled two spending provisions; in response, the Court held that "[i]n both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each."[104] Under *Chadha*, repeal of statutes, like enactment, had to follow the full dictates of Article I. Hence, the Act was unconstitutional. Justice Stevens' majority opinion struggled to distinguish traditional statutory delegations of authority to the President. For example, he said that *Field v. Clark*,[105] in which the Court upheld presidential power to suspend exemptions from import duties, was a case involving the execution of a congressional policy, rather than a presidential action rejecting a congressional policy. That distinction, however, omits attention to the statutory policy contained in the Line Item Veto Act. Furthermore, the majority would not compare the Act to the president's traditional authority to withhold some spending authorized by appropriations statutes. The difference was that "this Act gives the President the unilateral power to change the text of duly enacted statutes."[106]

Clinton is thus a formalist opinion much in the style of *Chadha*. This time, though, the Court was wrong. The two former professors of administrative law on the Court, Justices Scalia and Breyer, who were joined by Justice O'Connor, furnished the correct analysis. They characterized the Act as making a delegation to the executive that was subject to the usual need for legislative standards, which were present. Justice Scalia remarked that the title of the Line Item Veto Act "has succeeded in faking out the Supreme Court."[107] In both *Chadha* and *Clinton*, the statutory authorizations for legislative or item vetoes had been enacted through the full constitutional process for legislation. The difference lay in the identity of the recipient of the delegated power. In *Chadha*, power flowed to one or both houses of Congress to control the implementation of executive power in violation of the incompatibility principle. In *Clinton*, power flowed to the president to make policy choices within the range of discretion conferred by statute, in compliance with the incompatibility principle. This distinction also accords with traditional practice under the Constitution. Appropriating funds is clearly a function

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103. 524 U.S. 417 (1998).
104. *Id*. at 438.
105. 143 U.S. 649 (1892).
106. *Clinton*, 524 U.S. at 447.
107. *Id*. at 469.

solely for Congress;[108] spending those funds is an executive function that is controlled by the appropriations statutes but ordinarily contains substantial amounts of discretion.[109]

V. EXECUTIVE APPOINTMENTS AND REMOVALS

The body of Supreme Court doctrine that most often implicates the incompatibility principle is that concerning the appointment and removal of executive officers. The Appointments Clause of Article II works closely with the Incompatibility Clause to separate legislation from execution. The Supreme Court has consistently allowed Congress to restrict, but not assume, executive powers of appointment and removal. Again, the effect is to keep legislation and execution in separate hands.

The Constitutional Convention gave serious attention to the method of executive appointments. The initial draft constitution by the Committee of Detail gave the Senate power to appoint ambassadors and Supreme Court Justices; the president could appoint other officers.[110] Late in the Convention, the Committee of Eleven took up unfinished business and reported back the Appointments Clause in essentially its present form. Evidently a compromise had occurred. The Senate's proposed hegemony of foreign policy and the judiciary was replaced by authority in the president to nominate all officers, subject to the check of the Senate's advice and consent for principal officers. The Convention adopted the change.[111]

It is interesting to speculate about the changes in American history that would have resulted had the Convention adopted the initial version of the appointments scheme. The president would have controlled an executive branch for domestic but not foreign policy. A foreign policy dictated by scores of masters would have been notably less coherent at any given time than has been the case. To compensate, the overall direction of foreign policy might have been stabilized by the absence of sharp reversals as the presidency changed hands. The courts would have lacked the insulation from Congress that stems from executive nomination, with some loss of their independence. The road to the Supreme Court would have gone through the Senate. A Supreme Court closely allied to the Senate might have articulated a narrow view of executive power under the Constitution. Such a Court probably would not have taken a strict view of the Incompatibility Clause.

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108. U.S. CONST. art. I, § 9 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").
109. *See* SCHICK WITH LOSTRACCO, *supra* note 100.
110. FARRAND, *supra* note 30, at 171-72.
111. *Id.* at 533.

For many years, Congress made no effort to strip the president of his role in executive appointments.[112] In *Buckley v. Valeo*,[113] however, the Supreme Court invalidated such an effort. It refused to allow Congress to appoint members of the Federal Election Commission (FEC), which regulates campaigns for federal elective office. Congress had required the FEC, an independent regulatory agency, to have two Commissioners appointed by the president, two by the House of Representatives, and two by the Senate. Each of the three appointing authorities had to select one person from each political party; a majority of both houses of Congress would then vote to confirm the nominees. The Secretary of the Senate and the Clerk of the House were also to serve as ex officio, nonvoting members. This unique arrangement undoubtedly reflected the political sensitivity of the FEC's duties, which are to regulate members of Congress and presidential candidates themselves. The FEC's center of gravity would surely have been on Capitol Hill, from which a majority of its members were to come.

The Court decided that this scheme violated the Appointments Clause, which does not authorize congressional appointments of executive officers.[114] The majority did not discuss the Incompatibility Clause. Justice White thought that the two clauses operated in tandem to establish the "fundamental tenet . . . that the same persons should not both legislate and administer the laws."[115] The Court held that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by" the Appointments Clause.[116] The Court said that congressional appointees could perform investigative and informative tasks of the sort that congressional committees do, but that only "Officers of the United States" could do the FEC's duties of bringing civil enforcement actions, promulgating regulations, and deciding administrative adjudications.

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112. In *Springer v. Government of the Philippine Islands*, 277 U.S. 189 (1928), the Court held that the Legislature of the Philippine Islands could not provide for legislative appointment to executive agencies.

113. 424 U.S. 1 (1976).

114. The Court rejected an argument that Congress's power over federal elections, combined with the Necessary and Proper Clause, justified the scheme:

> Appellee Commission . . . finally contend[s] . . . that . . . Congress had ample authority under the Necessary and Proper Clause of Art. I to effectuate this result . . . . Congress could not, merely because it concluded that such a measure was "necessary and proper" to the discharge of its substantive legislative authority, pass a bill of attainder or *ex post facto* law contrary to the prohibitions contained in § 9 of Art. I.

Id. at 134-35.

115. *Id.* at 272-73 (White, J., concurring in part and dissenting in part).

116. *Id.* at 126 (majority).

The Court's sharp distinction between investigative and administrative tasks allows Congress to perform its vital investigative functions, whether directly or through special entities it may create. Moreover, the test is easy to apply. It does allow Congress to use the power of information about an agency's activities to influence its policy—in that sense, the distinction is not as clear in practice as it is in theory.[117] Among functions that do constitute execution of the law, the Court included the "quasi-legislative" activity of rulemaking and the "quasi-judicial" activity of adjudication, rejecting an argument that these were not executive in the constitutional sense.[118] This part of the opinion was consistent with *Chadha*'s emphasis that all exercises of delegated statutory power that have legal effect constitute execution of the law.

Buckley was formalist in approach—the Court started with the text of the Appointments Clause, added a premise about what officers do, and concluded that Congress could not share this power because it was not on the list of those who may appoint executive officers.[119] The Court did not ask the questions usually associated with functional analysis: Whether core executive functions are threatened, how much, and with what justification. The Court could easily have written a purely functionalist opinion, however, because the President would retain little control of administration if Congress could place ordinary regulation in the hands of its own agents. The opposite result in *Buckley* would have shifted a large portion of control over the agencies from the executive to Congress, producing, in fact, the "congressional government" that Woodrow Wilson described in the late nineteenth century. Hence, the Court's choice of an analytic approach in *Buckley* did not affect the outcome.

In *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc. (MWAA)*,[120] the Supreme Court overturned another

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117. Regarding investigative functions, consider the United States Commission on Civil Rights. Under 42 U.S.C. § 1975c (2000), the Commission's duties are to "study and collect information" and then to "make appraisals of the laws and policies of the Federal Government" concerning civil rights violations, and to report its findings to Congress and the President. 42 U.S.C. § 1975a. Following a controversy over President Reagan's removal of several Commission members, the Commission was reconstituted by Congress. *See* Comment, *The Rise and Fall of the United States Commission on Civil Rights*, 22 HARV. C.R.-C.L. L. REV. 449, 476-80 (1987). Under 42 U.S.C. § 1975(b)(1), four members are appointed by the president, two by the President pro tempore of the Senate, and two by the Speaker of the House. *See* 42 U.S.C. § 1975(b)(1)-(4). Even though the Commission's activities are investigative, the president could argue that he should be able to appoint all the members of a body that functions as a watchdog over federal civil rights enforcement. Congress would respond by saying that is a good reason for the current composition of the Commission.

118. *See* Buckley v. Valeo, 424 U.S. 140-41 (1976).

119. *See* Theodore Y. Blumoff, *Illusions of Constitutional Decisionmaking: Politics and the Tenure Powers in the Court*, 73 IOWA L. REV. 1079, 1155-61 (1988) (criticizing the Supreme Court's approach in appointments cases); Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037, 1041-44 (1987) (same).

120. 501 U.S. 252 (1991).

congressional involvement in administration through appointments. In *MWAA*, Congress authorized the transfer of control over two major airports near the District of Columbia from the Federal Aviation Administration to the MWAA, a regional authority established by a Virginia-D.C. compact. To assume control of the airports, the MWAA had to create a Board of Review with the power to veto its decisions. The nine members of the Board of Review were required to be members of Congress, "serving in their individual capacities" as representatives of airport users. Litigation arose over approval of a master plan for expansion of National Airport.

The Supreme Court decided that the Board of Review's power to veto decisions of the MWAA represented federal action taken on behalf of Congress.[121] Turning to the permissibility of the Board's composition, the Court disclaimed direct reliance on either the Appointments Clause or the Incompatibility Clause. Instead, Justice Stevens' majority opinion relied on general separation of powers principles. He noted the Framers' fears of the legislature:

> To forestall the danger of encroachment "beyond the legislative sphere," the Constitution imposes two basic and related constraints on the Congress. It may not "invest itself or its Members with either executive power or judicial power." And, when it exercises its legislative power, it must follow the "single, finely wrought and exhaustively considered, procedures" specified in Article I.
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> . . . The Court of Appeals found it unnecessary to discuss the second constraint because the court was satisfied that the power exercised by the Board of Review over "key operational decisions is quintessentially executive." We need not agree or disagree with this characterization by the Court of Appeals to conclude that the Board of Review's power is constitutionally impermissible. If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7.[122]

The majority felt no need to determine which constituted the better characterization—the Act served as "a blueprint for extensive expansion of the legislative power beyond its constitutionally confined role."[123] I think the Board was exercising executive power by applying law generated by Congress or the states, and *MWAA* could therefore have been framed as an

121. Justice White and two others dissented, arguing that it was implausible to regard Board of Review members as agents of Congress because Congress did not appoint them, continuity in Congress or on any committee was not a condition for completion of service on the Board, Congress could not remove Board members, and Board members had no legal obligations to Congress. *See id.* at 277-93 (White, J., dissenting).

122. *Id.* at 274-76 (citations omitted).

123. *Id.* at 277.

Incompatibility Clause case. The Court, however, held back, probably because the Clause does not forbid members of Congress from holding state executive offices and the conclusion that the Board performed federal action was strained enough to counsel against further exploration of its implications.

Congress responded to *MWAA* by removing the requirement that the Board be composed of members of Congress, although it still restricted its membership to congressional nominees. Congress also removed the Board's veto authority, but allowed the members to have nonvoting participation at meetings of the airport Directors. Congress further authorized the Board to make recommendations to the Directors which, if not adopted, would subject the Directors' actions to joint resolutions of disapproval by Congress. In *Hechinger v. Metropolitan Washington Airports Authority*,[124] the D.C. Circuit struck down the new arrangement. It correctly concluded that the Board still served as an agent of Congress and still exercised federal power as defined in *MWAA*.

In *Federal Election Commission v. NRA Political Victory Fund*,[125] the D.C. Circuit strictly interpreted *Buckley* and *MWAA* by finding unconstitutional the continuing presence on the FEC of the two nonvoting congressional appointees—a matter not discussed in *Buckley*. The court held that "the mere presence of agents of Congress on an entity with executive powers offends the Constitution"[126] because the congressional agents would necessarily influence the other commissioners. As in *MWAA*, the court thought that the danger of congressional encroachment on the executive justified a strict separation of powers approach.

Two related issues in *NRA Political Victory Fund* concerned the constitutionality of congressional moles within executive agencies. The first issue dealt with whether executive officers have a substantive right to be free of direct congressional pressure while engaging in policy formulation. This interest in executive autonomy implicates the incompatibility principle directly; the court correctly valued this interest highly. The second issue, primarily procedural in nature, concerned the confidentiality of policy dialogue. Although Congress opened many of the deliberations of multi-member agencies like the FEC to public view through the Sunshine Act,[127] the Act contains exceptions allowing confidential discussions, which would lose much of their efficacy if congressional monitors were present for discussions among the Commissioners. A constitutional issue lurks in the background. Executive

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124. 36 F.3d 97 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).
125. 6 F.3d 821 (D.C. Cir. 1993), *cert. dismissed,* 513 U.S. 88 (1994).
126. *Id.* at 827.
127. 5 U.S.C. § 552b (2000).

privilege has fallen on bad days,[128] and the Court has never decided whether the independent agencies may avail themselves of its protection. The basic constitutional privilege recognized in *United States v. Nixon*,[129] however, still shields policy debate in at least some precincts. The values underlying both executive privilege and the incompatibility principle suggest the need for some zone of privacy for executive deliberation.

Thus, the courts have made it clear that Congress may not administer the laws it enacts, either directly through its own members (*MWAA*), or indirectly by appointing persons who thereby become its agents (*Buckley*). Nor may Congress take legislative action without presentation to the president (*Chadha*). When Congress is not trying to seize the reins controlling ordinary regulation from the executive, the Court has not taken a strict formalist view of the Appointments Clause. Thus, the Court has upheld the use of private arbitrators to apply statutory norms in some federal programs.[130] Because these cases concerned adjudicative functions, the Court's concerns centered on the requisites of Article III and due process, not the Appointments Clause. The Court has also blessed an executive agreement that transferred claims pending in federal court to international arbitral panels composed partly of foreign citizens who are emphatically not "Officers of the United States."[131] Historical practice and the nation's needs for effective international claims settlement mechanisms took precedence over a literal interpretation of the Appointments Clause.

Once an officer is appointed, he or she can be removed by Congress through the impeachment power. However, everyone understands that this power is too limited and cumbersome to serve as an everyday tool for supervising an officer's conduct. As a result, most controversies focus on the availability and nature of other means of removing executive officers. The assumption throughout has been that the branch that can remove an officer controls the officer for constitutional purposes.

The Constitutional Convention did not discuss the subject of removal, except for the question of impeachment. The First Congress considered the removal issue in 1789 in the process of constructing the new executive departments. The result has been called the "decision of 1789," a name that obscures an important ambiguity in the decision that actually occurred.[132] In the House, Madison moved for the creation of departments

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128. *See* Symposium, *Executive Privilege and the Clinton Presidency*, 8 WM. & MARY BILL RTS. J. 535 (2000).

129. 418 U.S. 683 (1974).

130. *See* Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568 (1985); Schweiker v. McClure, 456 U.S. 188 (1982); *see also* Harold H. Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441, 446-48 (1989).

131. Dames & Moore v. Regan, 453 U.S. 654, 686-87 (1981); Harold H. Bruff, *Can* Buckley *Clear Customs?*, 49 WASH. & LEE L. REV. 1309 (1992).

132. *See* CURRIE, *supra* note 94, at 36-41; MILLER, *supra* note 17, at 52-70, app.

of war, treasury, and foreign affairs. Each was to be headed by a secretary, who would be appointed by the president with the advice and consent of the Senate and who would "be removable by the President." Madison thought that removal was an exclusively executive power, serving the "great principle of unity and responsibility in the Executive department."[133] He confronted substantial opposition from two disparate groups, however. Some Representatives thought that removal lay in the control of Congress, to be conferred or restricted by statute. Others thought that, like appointment, the removal of a principal officer should require the consent of the Senate. This last group could cite *The Federalist No. 77* as authority, in which Hamilton, quite uncharacteristically, took that very position.[134] During this controversy, Hamilton sent word to Congress that he had since changed his mind![135]

Given his status as a good legislative general, Madison divided the opposition and won a partial victory over one group and a complete victory over the other. Through an ally, Madison crafted a substitute for his original text. The new text identified the subordinate who would run the Department "whenever the principal officer shall be removed" by the President. The provision, which added the support of those who thought Congress could confer or deny removal to those who thought it an executive function, became law.[136] This terminology allowed Madison to hope that his position would eventually be vindicated, and indeed it would be. The only position in the debate that had been definitely rejected was the one that Congress could always participate in particular removals by refusing to consent to them.

An unlitigated removal controversy that presented the issue of senatorial participation in removals culminated in our first impeachment of a President. Andrew Johnson's impeachment and near removal from office resulted from his defiance of the Tenure of Office Act of 1867, which forbade presidential removal of cabinet members without the consent of the Senate.[137] Johnson vetoed the bill on the grounds of its unconstitutionality, and his veto was immediately overridden. He then removed Secretary of

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133. 1 ANNALS OF CONGRESS 499 (Joseph Gales ed., 1789).

134. THE FEDERALIST NO. 77, at 372 (Alexander Hamilton) (Terrence Ball ed., 2003) ("The consent of [the Senate] would be necessary to displace as well as to appoint. A change of the chief magistrate therefore would not occasion so violent or so general a revolution in the officers of the government, as might be expected if he were the sole disposer of offices.").

135. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 350 (1996).

136. The same statutory technique regarding removal of the secretary was used in forming all three of the original departments—State, War, and Treasury. *See* LEONARD D. WHITE, THE FEDERALISTS, A STUDY IN ADMINISTRATIVE HISTORY 118-31 (1948).

137. MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON (1973).

War Stanton, who had opposed his Reconstruction policies. The House impeached Johnson for his act of defiance; the Senate fell one vote short of the two-thirds majority needed for conviction and removal. The courts never entered the fray.

Johnson's acquittal, at a time when he was extremely unpopular in Congress for his activities during the presidential phase of Reconstruction, has provided an important political precedent for the nation.[138] Impeachment could have become a rough form of a no-confidence vote about a presidency, moving our system toward a parliamentary executive. If even Andrew Johnson could escape—after he had gone far toward squandering the fruits of military victory in the Civil War by a policy of appeasement of the defeated South—no merely unpopular President would have to fear impeachment.

On the merits of the action that served as the basis for the impeachment, Johnson correctly perceived the unconstitutionality of the Tenure of Office Act. If a president cannot remove a Secretary of War or a Secretary of State who undermines and defies him—as Stanton had Johnson—he cannot implement his independent constitutional powers relating to war and foreign affairs. Nor would such a diminished president be able to discharge his general duty to assure that the laws are faithfully executed. Both appointments and incompatibility principles suggest that legislation and execution would not effectively be kept in separate hands if Congress could require the Senate's consent to the removal of members of the president's cabinet.

Almost sixty years after Johnson's impeachment, a remaining fragment of the Tenure of Office Act finally produced litigation that reached the Supreme Court. Although the proceeding involved a minor official—a postmaster—the Court gave extensive and scholarly attention to the underlying issues. The result must have comforted the ghost of Andrew Johnson. *Myers v. United States*[139] involved a statute that provided for presidential appointment of postmasters with the advice and consent of the Senate and forbade their removal without the consent of the Senate. These were important patronage appointments and Congress was unwilling to leave the political benefits of distributing them to the president or his department heads.

Woodrow Wilson appointed Frank Myers postmaster first class for Portland, Oregon, in 1917, for a term of four years. Some irregularities in the administration of the Portland post office led Wilson to demand Myers's resignation in 1920. Myers refused. Wilson directed his

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138. *See* WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992).
139. 272 U.S. 52 (1926).

Postmaster General to remove him, but decided not to present the matter to the Senate. When Myers sued for his lost salary, the Supreme Court ruled against him on the grounds that Congress could not condition removals on the consent of the Senate. Chief Justice Taft, the only former President ever to serve on the Supreme Court, wrote the majority opinion in *Myers*. To Taft, the "decision of 1789" constituted a clear endorsement of the president's unrestricted constitutional power to remove executive officers. The actual historical record, of course, was far cloudier. Buttressed, he thought, by constitutional history, Taft proceeded to state a broad theory of executive power. His approach was quite formalist: No branch should have implied power to participate in functions assigned by the Constitution to another branch. Because removal is an executive function, the Senate may not share it. Therefore, the president has an illimitable power to remove those executive officers whom he has appointed.

Taft considered removal to be an executive power because the president needs it to perform his own constitutional duties, for which he must have loyal subordinates.[140] Surely there is a core of truth to this, but Taft did not explain why the president needs an unlimited removal power that extends to the Portland postmaster. It appears that Taft's underlying concern involved the possibility that allowing Congress to block particular removals would destroy the autonomy of the executive branch. He repeatedly quoted Madison's statements in 1789 to the effect that Congress may define, but not fill, executive offices.[141] The incompatibility principle strengthens that

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140. Taft argued that the Senate's check on appointments is a much lesser intrusion on executive power than a check on removals would be. "The rejection of a nominee of the President for a particular office does not greatly embarrass him in the conscientious discharge of his high duties . . . because the President usually has an ample field from which to select for office, according to his preference, competent and capable men." *Id.* at 121.

141. Taft rejoined to the argument that Congress could invoke the necessary and proper clause to participate in removals.

> Another argument urged against the constitutional power of the President alone to remove executive officers. . .is that, in the absence of an express power of removal granted to the President, power to make provision for removal of all such officers is vested in the Congress by section 8 of Article I.
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> Mr. Madison, mistakenly thinking that an argument like this was advanced by Roger Sherman, took it up and answered it as follows:
>
> > He seems to think . . . that the power of displacing from office is subject to Legislative discretion; because, having a right to create, it may limit or modify as it thinks proper. . . . [W]hen I consider that the Constitution clearly intended to maintain a marked distinction between the Legislative, Executive and Judicial powers of Government; and when I consider that if the Legislature has a power, such as is contended for, they may subject and transfer at discretion powers from one department of our Government to another; they may, on that principle, exclude the President altogether from exercising any authority in the removal of officers; they may . . . vest it in the whole Congress; or they may reserve it to be exercised by this house. When I consider the consequences of this doctrine, and compare them with the true principles of the Constitution, I own that I can not subscribe to it. . . .

Id. at 125-26 (citation omitted). Again, he cited Madison, "If there is any point in which the

position, discouraging any implication that the Senate may decide whether to allow the President to dismiss particular officers. The Tenure of Office Act and the fate of Andrew Johnson demonstrate the danger that Congress may attempt to capture the allegiance of executive officers from the president. Restrictions on the power of the president to remove officers without cause, however, present a distinct problem because the president retains the removal power, albeit within limits.

Three dissenting Justices took an approach resembling a modern functional one. Stressing Congress's undisputed power to define the powers of offices and determine appropriations for them, the dissenters argued that Congress should be able to organize the executive largely as it pleases, under the grant of power in the "necessary and proper" clause.[142] They also argued convincingly that the president did not need plenary removal power extending to the Portland post office to discharge his responsibilities.

Myers, like many broad decisions, would not long survive unscathed. In *Humphrey's Executor v. United States*,[143] the Court limited the scope of the president's plenary power of removal to "purely executive" officers, and held that Congress could constitutionally forbid the president from removing members of the Federal Trade Commission without cause. Of course, *Humphrey's Executor* is best known for its sweeping dicta asserting a special constitutional status for the independent regulatory agencies, whose officers, the Court said, were to be independent of the president "except in [their] selection."[144] This is not the place to rehash the endless debate over the independent agencies. Suffice it to say that the distinguishing structural characteristics of these agencies do not offend the incompatibility principle. Statutes do not place execution in the hands of Congress or its agents when they blur political partisanship by forming multi-headed agencies that are politically balanced and protected by cause requirements for removal.

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separation of the Legislative and Executive powers ought to be maintained with great caution, it is that which relates to officers and offices." *Id.* at 116 (citation omitted). And again:

As Mr. Madison said in the First Congress:

> The powers relative to offices are partly Legislative and partly Executive. The Legislature creates the office, defines the powers, limits its duration and annexes a compensation. This done, the Legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an Executive nature . . . .

Id. at 128 (citation omitted).

142. *See supra* note 94 and accompanying text.
143. 295 U.S. 602 (1935).
144. *Id.* at 625.

In more recent times, the Supreme Court has considered whether Congress may vest executive functions in an officer who is removable only by congressional joint resolution. *Bowsher v. Synar*[145] was a challenge to a very complex statute, the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the Gramm-Rudman-Hollings Act.[146] The Act attempted to eliminate federal budget deficits by setting declining yearly targets for them, and by creating an elaborate enforcement mechanism. Each year, the Directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) were to independently estimate the amount of the deficit for the next fiscal year and report their conclusions to the Comptroller General. After considering these figures, the Comptroller was to arrive at a final estimate. If the projected deficit exceeded the target, the president was then required to issue an order reducing spending in many federal programs according to a statutory formula.

This cumbersome enforcement mechanism reflected separation of powers tensions and directly implicated the incompatibility principle. Congress would not trust estimates by the president's agency, OMB, yet it could not use its own appointees in CBO to execute the law. Hence, it delegated the final decision to the Comptroller, an officer of the United States nominated by the president and subject to senatorial confirmation. Unlike other federal officers, however, the Comptroller is not removable by the president, but by joint resolution for stated causes of the usual sort.[147] Because it takes the equivalent of a statute to remove the Comptroller, the decision to do so lies with Congress, subject to the president's veto. It was this obscure feature of the scheme that sparked a successful challenge by Representative Synar and others.

Chief Justice Burger's opinion for the Court concluded that the Act unconstitutionally vested executive functions in the Comptroller. The Court emphasized that the Constitution authorizes Congress to remove executive officers only by impeachment. A direct congressional role in the removal of officers charged with the execution of the laws beyond this limited one is inconsistent with separation of powers.[148] This case, stated the Court, resembled *Myers*, not *Humphrey's Executor*, because the latter concerned the power of Congress to limit the president's powers of

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145. 478 U.S. 714 (1986). *See generally* Symposium, Bowsher v. Synar, 72 CORNELL L. REV. 421 (1987); David P. Currie, *The Distribution of Powers After* Bowsher, 1986 SUP. CT. REV. 19; Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L.J. 699 (1987).

146. 2 U.S.C. §§ 901-907d (2000).

147. A Comptroller General may be removed by joint resolution for "(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude." 31 U.S.C. § 703(e)(1) (2000).

148. *Bowsher*, 478 U.S. at 723.

removal. Therefore, the Court determined that it could invalidate this statute without casting doubt on the constitutionality of ordinary independent agencies.[149]

Without relying explicitly on the Incompatibility Clause, the Court invoked its values. "To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws."[150] Because Congress could not execute laws, it could not grant its own officer that power. The Court cited the history of this removal provision to support its conclusion that Congress meant to control the Comptroller.[151] The Court also analogized to *Chadha*, reasoning that allowing officers controlled by Congress to execute the law would be the equivalent of a forbidden legislative veto because Congress could threaten to remove an officer who ignored its wishes. Finally, it was clear to the Court that the statute assigned the Comptroller executive powers. "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."[152] The Court concluded that the Act violated "the command of the Constitution that the Congress play no direct role in the execution of the laws."[153]

Justice Stevens wrote an odd concurrence. First, he agreed with the majority that the Comptroller was an agent of Congress, but was so because of the sum of his assigned statutory duties and not because of the "dormant" removal power—no one had ever tried to remove a Comptroller. There was much to this point—the very reason that Congress selected the Comptroller to make final deficit estimates was that this officer is mostly, although not entirely, an agent of Congress. For other agencies, however, an approach that questions whether an officer's "center of gravity" is in Congress or in the executive would not yield clear answers compared to the

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149. *See id.* at 725 n.4.

150. *Id.* at 726. The Court quoted the District Court's opinion. "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." Synar v. United States, 626 F. Supp. 1374, 1401 (D.D.C. 1986).

151. The removal provision came from the Budget and Accounting Act of 1921, ch. 18, § 303, 42 Stat. 20, 23-24. An earlier version of the bill allowed removal only by concurrent resolution of the two houses of Congress. After President Wilson objected that this would be unconstitutional, it was changed to the present form. *See* H.R. DOC. NO. 805-66, at 1 (1920). The Court said that "Congress created the office because it believed that it 'needed an officer, responsible to it alone, to check upon the application of public funds in accordance with appropriations.'" *Bowsher*, 478 at 730-31 (quoting HARVEY C. MANSFIELD, THE COMPTROLLER GENERAL: A STUDY IN THE LAW AND PRACTICE OF FINANCIAL ADMINISTRATION 65 (1939)).

152. *Bowsher*, 478 U.S. at 733. The Court also correctly determined that "the Comptroller General must exercise judgment concerning facts that affect the application of the Act. He must also interpret the provisions of the Act to determine precisely what budgetary calculations are required. Decisions of that kind are typically made by officers charged with executing a statute." *Id.*

153. *Id.* at 736.

majority's formalism. Where, for example, does the Board of Governors of the Federal Reserve System lie?

Second, Justice Stevens could not agree that the Comptroller's functions under the Act were executive, or that characterizing them was even essential. This was the most innovative part of his opinion. He pointed out that Congress could have made estimates itself, in which case the power would have been legislative. Yet, when the Comptroller did the same thing, the majority characterized it as executive. Although he could see no clear line between legislative and executive functions, this line exists. As *Chadha* establishes, it is a matter of process—not, as Justice Stevens assumed, of the nature of the decision involved. Until and unless Congress assigns a policy determination to the executive, it is legislative in nature. Once Congress enacts a statute delegating the determination to the executive, it becomes executive power until withdrawn or modified by another statute. The Comptroller's actions under the Act were executive for constitutional purposes. Justice Stevens concluded that "when Congress, or a component or an agent of Congress, seeks to make policy that will bind the Nation, it must follow the procedures mandated by Article I of the Constitution."[154] Not quite. When Congress makes binding policy, that is legislation, and indeed it must follow Article I. When a congressional agent acts pursuant to a statutory delegation, that is execution and is forbidden by the Incompatibility Clause.

Justice White, dissenting, agreed that congressional agents may not execute the law. He, however, could not agree that the Comptroller was such an agent. Instead, he saw the Comptroller as independent of both political branches, in part because removal would be so difficult to effectuate.[155] He thought that the Comptroller would have far more reason to fear Congress's ordinary powers of legislation and appropriation than the presence of removal authority.[156]

Moving on to general separation of powers analysis, Justice White, taking a loose, functional approach, perceived no congressional usurpation or disruption of executive prerogatives. Like Holmes and Brandeis in *Myers*, he thought that the executive was entitled to the tools conferred on

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154. *Id.* at 737.

155. Majorities in both houses would be required if the Comptroller had displeased the president also; if not, two-thirds majorities would be needed. *Id.* at 771-72.

156. *See id.* at 774-75. Justice Blackmun, also dissenting, would have invalidated the removal provision, if ever exercised, rather than the Deficit Control Act. *Id.* at 775 n.14. In the wake of *Bowsher*, doubts surrounded the GAO's other statutory functions. *See, e.g.*, Comment, *The New Separation of Powers Jurisprudence and the Comptroller General: Does He "Execute the Law" Under the Federal Employees' Retirement Act?*, 9 GEO. MASON L. REV. 35 (1986). Congress could amend the removal provision to make the Comptroller removable by the President for cause. *See* Paul R. Verkuil, *The Status of Independent Agencies After* Bowsher v. Synar, 1986 DUKE L. J. 779, 802-04.

it by Congress, and no more. Conflating spending with appropriation, Justice White greatly understated the amount of executive spending discretion that normally exists, and that may have a constitutional basis. Whether to appropriate money ordinarily lies in the absolute discretion of Congress; whether to spend appropriated funds is an executive decision, within limits conferred by the appropriation. The Act, by allowing the Comptroller to dictate spending cuts to the president for large areas of the federal budget, may have invaded executive authority.[157] The majority did not reach the issue, and Justice White dismissed it too quickly.

In an opinion issued the same day as *Bowsher*, the Court described the decision as based on congressional aggrandizement.[158] Although the *Bowsher* majority phrased its opinion formalistically and made no such assertion, that position represents an accurate characterization of the statute it invalidated. Use of a congressional agent to perform vital executive functions was enough both to constitute an aggrandizement and to contravene the incompatibility principle. The *Bowsher* majority could have avoided the constitutional issue of the removal provision by construing the statute to allow the president to remove a Comptroller for reasons related to the president's performance of his own constitutional duties. That approach would have brought the majority to the thicket Justice Stevens entered: the question of finding the Comptroller's center of gravity. Justice Stevens, however, did resolve that issue correctly in *Bowsher*. A majority opinion based on this rationale would have been more persuasive than the majority's blank formalism and would have drawn a line between executive and legislative agencies that would not have imperiled most agencies.

Since *Bowsher*, the Court has followed a functional approach in two important cases. Neither result contravenes the incompatibility principle. In *Morrison v. Olson*,[159] the Court upheld the use of independent counsel to investigate and prosecute crimes committed by senior executive officers. The counsel were court-appointed, and could be removed by the Attorney General for cause. The appointment portion of this scheme complied with the Constitution's authorization of courts to appoint inferior officers. It was also consistent with the incompatibility principle, since Congress was not allowed to appoint the counsel. Regarding removal restrictions, the

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157. *See* E. Donald Elliott, *Regulating the Deficit After* Bowsher v. Synar, 4 YALE J. ON REG. 317 (1987).

158. In *Commodity Futures Trading Commission v. Schor*, Justice O'Connor stated: "Unlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch. Instead, the separation of powers question presented in this litigation is whether Congress impermissibly undermined, without appreciable expansion of its own power, the role of the Judicial Branch." 478 U.S. 833, 856-57 (1986).

159. 487 U.S. 654 (1988).

Court reformulated the constitutional test: Henceforth, they are invalid only if they "impede the President's ability to perform his constitutional duty."[160] Indeed, that has always been the pertinent question, whatever the verbal formulation. The Court decided that the executive branch retained sufficient powers over independent counsel to justify the counsels' performance of prosecutorial duties, which were clearly executive in nature. The Court found comfort in the fact that "Congress retained for itself no powers of control or supervision over an independent counsel."[161] This statutory scheme, which deeply intruded on executive autonomy, could be justified only by the well-established need to control executive misbehavior and by the conflicts of interest that attend self-investigation.[162] As the controversy over the investigation of President Clinton demonstrates, however, the Act created a prosecutorial scheme remarkably free of control by any of the constitutional branches, a concern pertinent to functional analysis.[163]

In *Mistretta v. United States*,[164] the Court upheld the composition of the United States Sentencing Commission, which regulates the imposition of criminal sentences by lower federal courts. The Court found that the unique structure of the Commission, which combines federal judges serving extrajudicially with executive officers, did not disturb the overall balance of powers. It noted that although the Incompatibility Clause would forbid policymaking by a combination of congressional and executive officers, judges were not forbidden to perform executive functions when not sitting on the bench, and many had done so.[165]

VI. THE EFFECTS OF THE INCOMPATIBILITY PRINCIPLE

In its appointment and removal cases, the Court has strictly enforced the incompatibility principle that Congress and the executive must employ separate personnel. Although the Court has always invoked other provisions of the Constitution in explaining these rulings, prohibiting

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160. *Id.* at 691.
161. *Id.* at 694.
162. *See* Harold H. Bruff, *Independent Counsel and the Constitution*, 24 WILLAMETTE L. REV. 539, 539-43 (1988).
163. *See* Eleanor D. Kinney, *The Independent Counsel Statute*, 51 ADMIN. L. REV. 627 (1999); Christopher H. Schroeder, *The Independent Counsel Statute: Reform or Repeal?*, 62 LAW & CONTEMP. PROBS. 1 (1999); Jerome J. Shestack, *The Independent Counsel Act: From Watergate to Whitewater and Beyond*, 86 GEO. L. J. 2011 (1998).
164. 488 U.S. 361 (1989).
165. In earlier cases, two circuit courts split regarding the propriety of President Reagan's Appointment of Circuit Judge Irving Kaufman as chair of the President's Commission on Organized Crime. *See In re* Scaduto, 763 F.2d 1191 (11th Cir. 1985) (determining that service on the Commission involved a pro-government stance that ill-fitted judicial neutrality and that might generate information that would also undermine neutrality); *In re* Scarfo, 783 F.2d 370 (3d Cir. 1986) (noting that recusal in particular cases could protect the work of the courts).

incompatibility provides both a common thread and a link to a firm purpose of the Framers. Congress may not control executive officers by assuming the president's power to nominate or remove them (*Buckley*, *Myers*, *Bowsher*). Congress may, however, constrain presidential removal in ways compatible with his duty to ensure faithful execution of the law (*Humphrey's Executor*, *Morrison*). The Court has been strict in drawing the line between legislative and executive functions. Congress may not participate in execution by overriding executive actions with nonstatutory processes (*Chadha*, *MWAA*). Yet, Congress remains free to employ innovative structural arrangements that do not draw its Members into execution (*Mistretta*). Thus, the Court has largely contented itself with preventing our government from evolving into a parliamentary model at the instance of Congress.

Overall, the constitutional law that governs separation of powers remains unconfining. Many of the largest issues remain unresolved. For example, what is the set of executive functions that Congress may shield from plenary presidential supervision? For purposes of maintaining a system of separated powers, it is enough to know that the president retains his constitutional claim to exert enough supervision to ensure that he can perform his constitutional duties (*Morrison*). What this may mean in a particular context awaits assessment in the light of the facts of a particular controversy.

In the shadow of persisting uncertainty about these ultimate issues, the branches negotiate problems of everyday power. The dominance of a bargaining relationship between Congress and the executive has allowed our government to operate effectively through the years. The two most likely determinants of the balance of power over a given issue, the president's veto power and Congress's power of the purse, lie at the heart of our system but outside judicial supervision. These two great stabilizers work to prevent power struggles between the branches from spinning out of control: The president's possession of the veto forces Congress to deal with him if it wants to legislate. Congress's possession of the power of the purse forces the president to deal with it if he wants the means to execute. Thus, our system is one of bargaining under the strong practical constraint that flows from mutual dependency.

If Congress had been allowed to blur the line between the branches, the Madisonian competition of loyalties and values would have weakened or evaporated as well. An "executive" officer appointed by Congress, removable by Congress, and whose decisions are subject to legislative veto, would be unlikely to display significant loyalty to the executive or meaningful resistance to informal congressional pressure. Perhaps the kind of legislative dominance that marked the revolutionary state governments

would have evolved. Even if that failed to occur, our system could be fundamentally different from its present form.

The political branches often make informal compensations for even the clearest legal rules, which can undermine the law as it appears on the books. Examples include the propensity of Congress to continue enacting forbidden legislative vetoes—expecting informal executive compliance with them—and the practice of the executive to clear judicial nominations in advance with the Senate.[166] Nevertheless, a legal rule matters even when custom vitiates it. Some of the Court's most important decisions that enforce the incompatibility principle tend to protect the beneficiaries of legal rules against themselves. That is, the executive holds nomination and removal authority and cannot formally cede them to Congress, nor may the executive accord a legislative veto formal effect. Constitutional responsibility for all of these matters clearly remains with the executive, wherever practical power may place choice for the time being. The Court's rules stand as reminders to the other two branches, and to the people as well, about where particular constitutional duties lie.

The incompatibility principle suggests corollaries for doctrines other than the ones that most obviously define the boundary between the legislature and executive. First, if the executive is to remain fully independent of Congress, impeachment must be restrained enough that it does not evolve into a rough vote of no confidence for politically unpopular presidents.[167] Although it is a bit early to pronounce history's verdict on the Clinton impeachment, one careful observer believes that its effect will be to make it more, not less, difficult to impeach future presidents for behavior that does not obviously rise to high crimes and misdemeanors.[168] Second, any revival of the statute that creates independent counsels to prosecute high-level executive branch crimes must ensure better controls on the counsels than those found in the version upheld in *Morrison*. Independent prosecution, as the *Clinton* case shows, serves as a weapon of sufficient force to jeopardize the independence of the executive. Third, doctrines of executive immunity from damages should be structured to channel partisanship into politics not litigation. *Nixon v. Fitzgerald*,[169] granting presidents immunity from damages for their official actions, has

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166. To the founding generation, the modern practice of executive-congressional negotiations over appointments might well have seemed the sort of mutual influence that they condemned as "corruption."

167. Chief Justice Rehnquist's book about impeachments, *supra* note 138, makes this point forcefully. *See generally* RICHARD POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON (1999).

168. *See* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 194 (2d ed. 2000).

169. 457 U.S. 731 (1982).

that effect, but *Clinton v. Jones*,[170] by exposing presidents to lawsuits for conduct unrelated to their duties, makes it all too easy for the president's enemies to manufacture harassing litigation. Fourth, executive privilege disputes between the executive and Congress should be left largely to political adjustment, as they are now.[171] The executive privilege cases involving judicial subpoenas have become routine losses for the executive.[172] Enforcement of judicially determined showings of need for information is a limited invasion of executive autonomy; judicial sanction for free-ranging congressional desires for information might not be subject to effective constraint.

CONCLUSION

In short, good fences make good neighbors. If the Court reserves its formalist rigor for situations that fit the incompatibility principle, it will have done almost enough by way of constitutional definition of the essential separations of power. The possibility of aggrandizement beyond these situations remains, however. The Court can remain alert to such dangers, reviewing statutes with appropriate deference, as it so often does today.

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170. 520 U.S. 681 (1997).

171. LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE 1 (2004).

172. *See* Iain R. McPhie, *Executive Privilege and the Clinton Presidency*, 8 WM. & MARY BILL RTS. J. 535 (2000); Randall K. Miller, *Presidential Sanctuaries after the Clinton Sex Scandals*, 22 HARV. J.L. & PUB. POL'Y 647 (1999); Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of Executive Privilege*, 60 MD. L. REV. 205 (2001).

BEYOND PLAYING "BANKER": THE ROLE OF THE REGULATORY AGENCY IN EMISSIONS TRADING

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INTRODUCTION

A celebrated aspect of emissions trading regulatory programs is their potential to transform the environmental compliance roles of regulatory agencies and regulated entities. In the idealized emissions trading regime, the regulatory agency plays the role of the "banker" or "accountant" of pollution credits, responsible for keeping track of data, assessing compliance, and imposing penalties for noncompliance.[1] The regulated entities, in turn, become "strategic planners," who take charge of their compliance decisions without interference by regulators.[2] With new roles, regulators and regulated entities also may enjoy a new relationship. Under traditional "command and control" regulation, regulators were involved in complex discussions with regulated entities about how to comply, often leading to a contentious relationship.[3] Under an emissions trading regime, the regulator is removed from compliance decisionmaking, and their relationship is thought to be more cooperative and harmonious.[4]

This idealized conception of the roles of regulator and regulated and the relationship between them is present in theoretical literature on emissions trading as well as empirical literature about the implementation of the Environmental Protection Agency's (EPA) Acid Rain Program, a national "cap and trade" program designed to reduce the emissions of sulfur oxides from power plants.[5] With the reported success of the Acid Rain Program,

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1. *See infra* Part I.C (discussing the difference of the agency role between traditional and cap and trade programs).

2. *See infra* Part I.B (noting that the new role of regulated entities as strategic planners leads to a more flexible program).

3. The terms "command and control" and "traditional" are used interchangeably herein. The term "command and control" is most common in the literature, but should be avoided because it fails to capture many aspects of environmental regulation as it has been implemented over the past several decades. *See* Daniel H. Cole & Peter Z. Grossman, *When Is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection*, 1999 WIS. L. REV. 887, 892 (stating that use of the term "command and control" is misleading); David M. Driesen, *Is Emissions Trading an Economic Incentive Program?: Replacing the Command and Control/Economic Incentive Dichotomy*, 55 WASH. & LEE L. REV. 289, 296-99 (1998) (arguing command and control programs are not as rigid as often criticized).

4. *See* Joseph Kruger, *Companies and Regulators in Emissions Trading Programs*, RES. FOR THE FUTURE, Discussion Paper 5-03, at 2 (2005) ("[T]he focus of both parties on a routine and predictable administrative program has been mutually beneficial and has led to a reasonably harmonious relationship between industry and program administrators. . . ."). For information on the literature describing adversarial and cooperative regulatory styles, see *infra* note 64.

5. While relatively little has been written in legal literature about compliance in cap and trade programs, several economists have focused on it. *See* Carlos A. Chavez & John K. Stranlund, *Enforcing Transferable Permit Systems in the Presence of Market Power*, ENVTL. & RESOURCE ECON. 25, 65-78 (2003) (deriving an enforcement strategy to achieve compliance in a cost-effective manner); John K. Stranlund et al., *Enforcing Emissions Trading Programs: Theory, Practice, and Performance*, 30 POL. STUD. J. 343 (2002) (explaining the compliance systems in a number of cap and trade programs).

proposals for cap and trade regulation have proliferated.[6] The Nitrogen Oxide (NOx) Budget Program, first implemented in 1999 and expanded in 2004, set a cap on NOx emissions from electric power generating facilities and industrial boilers in Eastern and Mid-Atlantic states during the summer ozone season.[7] More recently, the EPA chose cap and trade as its primary approach for achieving further reductions of air pollutants in the 2004 Clean Air Interstate and Clean Air Mercury Rules.[8] Outside the United States, the Chinese government has taken lessons directly from the Acid Rain Program in adopting a cap and trade approach in its efforts to control power plant emissions.[9] In fact, cap and trade regulation is the regulatory instrument of choice in almost all policy initiatives to reduce greenhouse gas emissions at the regional,[10] national,[11] and international scales.[12]

This Article empirically examines how the idealized roles of the regulator and regulated entities in environmental compliance fit another long-standing cap and trade program, the Regional Clean Air Incentives

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6. *See, e.g.*, Dallas Burtraw & Byron Swift, *A New Standard of Performance: An Analysis of the Clean Air Act's Acid Rain Program*, 26 ENVTL. L. REP. 10411, 10411 (1996) (demonstrating the success of the Acid Rain Program and advocating for adoption of more cap and trade programs); Byron Swift, *How Environmental Laws Work: An Analysis of the Utility Sector's Response to Regulation of Nitrogen Oxides and Sulfur Dioxide Under the Clean Air Act*, 14 TUL. ENVTL. L.J. 309, 323 (2001) [hereinafter Swift, *Environmental Laws*].

7. EPA, Cap & Trade Multi-state NOx Programs, *available at* http://www.epa.gov/airmarkets/cap-trade/docs/nox.pdf (last visited Feb. 23, 2007).

8. *See* EPA, Clean Air Rules of 2004, *available at* http://www.epa.gov/cleanair2004/ (stating that the Clean Air Interstate Rule and the Clean Air Mercury Rule employ a cap and trade approach).

9. *See, e.g.*, Jinnan Wang et al., *Controlling Sulfur Dioxide in China: Will Emissions Trading Work?*, ENV'T, June 2004, at 28-39 (examining the Chinese government implementation of cap and trade programs and their potential success).

10. *See, e.g.*, Northeastern and Mid-Atlantic States' Regional Greenhouse Gas Initiative (RGGI), *available at* http://www.rggi.org (last visited Feb. 23, 2007) (describing a regional strategy for RGGI participating states that includes "the implementation of a multi-state cap-and-trade program"); California's Climate Change Initiatives, *available at* http://www.climatechange.ca.gov/biennial_reports/2006report/index.html (addressing California's response to climate change).

11. *See, e.g.*, Press Release, Senator Dianne Feinstein's Office, Senator Feinstein Outlines New Legislation to Curb Global Warming, Keep Economy Strong (Mar. 20, 2006), *available at* http://www.feinstein.senate.gov/06releases/r-global-warm320.htm (advocating for the Strong Economy and Climate Protection Act, which would establish a mandatory cap and trade system).

12. International initiatives include the Kyoto Protocol and the European Union Emissions Trading System (EU ETS). *See, e.g.*, Kyoto Protocol to the U.N. Framework Convention on Climate Change, Dec. 10, 1997, art. 3, U.N. Doc. FCCC/CP/1997/L.7/Add.1, 37 I.L.M. 22 (1997), *available at* http://unfccc.int/resource/docs/convkp/kpeng.pdf (detailing the responsibilities of the parties to the protocol); European Union Emissions Trading Program, http://ec.europa.eu/environment/climat/emission.htm (establishing emissions trading in greenhouse gases); Vivian E. Thomson, *Early Observations on the European Union's Greenhouse Gas Emission Trading Scheme: Insights for United States Policymakers*, PEW CENTER ON GLOBAL CLIMATE CHANGE, Apr. 19, 2006, *available at* http://www.pewclimate.org/docUploads/Early%5FObservations%5Fon%5FEUETS%5FThomson%2Epdf (evaluating the European Climate Change Program and Emissions Trading Scheme).

Market (RECLAIM) Program.[13] RECLAIM was designed to reduce emissions of nitrogen and sulfur oxides in the Los Angeles region to reduce smog and bring the region into compliance with the Clean Air Act.[14] While similar to the Acid Rain Program in many respects, the heterogeneity in size and industrial category of RECLAIM participants suggests that RECLAIM may be even more representative than the Acid Rain Program for many proposed applications of cap and trade regulation.[15] Given the current momentum behind cap and trade, policymakers must incorporate lessons from the experience of the few programs that have historical records of performance.[16]

This Article finds that the idealized roles did not come to fruition in the RECLAIM Program. The regulatory agency responsible for implementing and enforcing RECLAIM did not effectively play the role of "banker," and regulated entities did not become effective "strategic planners." This Article argues, moreover, that the conception of the regulatory agency as "banker" is an insufficient characterization of the role that regulatory agencies implementing cap and trade programs may need to play. The RECLAIM experience teaches that cap and trade programs may require a very active and involved regulatory agency that not only effectively plays the role of banker, but also analyzes and disseminates market performance information, assists regulated entities in designing compliance plans, and formulates a contingency plan in case of program weakness or failure. Far from being diminished, the role of the regulatory agency may well be more demanding and resource-intensive than its role in traditional regulation.

More specifically, RECLAIM shows that cap and trade programs do not necessarily make regulatory enforcement easier than it is with traditional regulation. A cap and trade program requires a very sophisticated level of emissions monitoring and a rigid compliance policy with sanctions that are sufficiently punitive to deter noncompliance. Where monitoring systems are not well designed or operated and noncompliance becomes prevalent,

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13. Regional Clean Air Incentives Market (RECLAIM) was implemented in 1994, a year before the Acid Rain Program. South Coast Air Quality Management District, Regulation XX—Regional Clean Air Incentives Market, Rules 2000-20, *available at* http://www.aqmd.gov/rules/reg/reg20_tofc.html.

14. *Id.*

15. For more information on the heterogeneity of RECLAIM sources, see *infra* notes 161-63 and accompanying text.

16. Another cap and trade program that has received little scholarly attention and has experienced problems in some similar ways to those of RECLAIM is the Emissions Reduction Market System (ERMS) implemented in 2000 to control emissions of volatile organic materials (VOMs) in the Chicago, Illinois airshed. For more information on ERMS, see David A. Evans & Joseph A. Kruger, *Taking up the Slack: Lessons from a Cap-and-Trade Program in Chicago*, RES. FOR THE FUTURE, Discussion Paper 06-36, at 8-9 (July 2006), *available at* http://www.rff.org/rff/Publications/Discussion_Papers.cfm (highlighting sources of delay and inefficiency in implementing ERMS).

the need for extensive auditing arises so as to ensure program integrity. RECLAIM sought to have a similar degree of automation in its data tracking and compliance determination process as the Acid Rain Program, but was unable to achieve it. Moreover, RECLAIM administrators eschew the idea of automatic sanctions because they would not be able to consider the specific circumstances of each noncompliant source. Cap and trade programs that include a heterogeneous set of sources are likely to experience similar difficulties in automating compliance and enforcement.

Part I of this Article explains the design of cap and trade programs and the idealized roles of the regulatory agency and the regulated entity, illustrated with examples from the literature on the Acid Rain Program. Part II shows that in RECLAIM, noncompliance has been a greater problem than in the Acid Rain Program, and companies and agencies have not fulfilled the roles of strategic planners and banker, respectively. Part III suggests that regulatory agencies must be prepared to go beyond playing banker to ensure that regulated entities have the information and ability to become effective planners and that potential program failure does not undermine the achievement of the environmental goals of the program.

I. THE ACID RAIN PROGRAM AND THE IDEALIZED ROLES OF REGULATOR AND REGULATED

Since its implementation in 1995, the Acid Rain Program arguably has become the most celebrated environmental regulatory program in the country. Whereas traditional regulation was criticized as inefficient and adversarial, the Acid Rain Program is praised for achieving emissions reductions at low costs as well as enabling the regulatory agency and industry to work more harmoniously toward pollution reduction goals.[17] The first section below explains the design of cap and trade programs generally and the Acid Rain Program particularly. The two sections that follow explain how the regulatory agency plays the role of the "banker" or "accountant" of program allowances, while companies are called on to be "strategic planners" and "entrepreneurs" in the allowance market.

A. Cap and Trade Design: The Acid Rain Program

The Acid Rain Program was passed into law as part of the Clean Air Act Amendments of 1990.[18] Yet, cap and trade regulation has a much longer history in theoretical writings than in practical implementation. The idea of cap and trade regulation often is traced back to a 1960 article by Ronald

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17. *See infra* notes 108-10 and accompanying text.
18. 42 U.S.C. §§ 7401-7700 (1994).

Coase that formed the basis for the Coase Theorem.[19] Economists Thomas Crocker and John H. Dales developed the idea of tradable pollution rights later that decade.[20] Pointing to the inefficiency of traditional environmental regulation, legal academics built upon these insights and urged the implementation of market-based reforms to environmental policy. In many ways, the enactment of the Acid Rain Program was the culmination of many years of theoretical discussion and debate.

Succinctly stated, there are five basic components of a cap and trade program.[21] First, the regulatory agency sets a cap on total mass emissions for a set of sources over a fixed compliance period, generally a year. Second, the regulatory agency divides the cap into allowances, each representing an authorization to emit a specific quantity of pollutant. Third, the allowances are allocated among the sources. Fourth, each source measures and reports its emissions throughout the compliance period. Finally, after the end of the compliance period, the regulatory agency compares emissions to allowance holdings and imposes penalties if emissions are greater than allowance holdings.

To the extent that the number of allowances allocated to a source is not sufficient to cover its emissions, sources have several alternatives to achieve compliance. They may reduce their emissions to meet the number of allowances held, reduce their emissions below the number of allowances held and then sell the remainder on the allowance market, or emit at a level higher than the number of allowances held and purchase allowances in the market to make up the difference.[22] Sources generally have a "grace period" or "reconciliation period" of several months immediately after the compliance period ends in which they have time to buy and sell allowances on the allowance market. On a predetermined date thereafter, sometimes

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19. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 41-44 (1960). The Coase Theorem states that in the absence of transaction costs, all government allocations of property are equally efficient because interested parties will bargain privately to correct any externalities. Cap and trade regulation is based on this central idea of assigning property rights in pollution and allowing bargaining.

20. *See* Thomas D. Crocker, *The Structuring of Atmospheric Pollution Control Systems*, *in* ECON. OF AIR POLLUTION 61, 61-86 (Harold Wolozin ed., 1966) (relating the pollution problem to a market failure); JOHN H. DALES, POLLUTION, PROPERTY, AND PRICES 77-100 (1968) (proposing pollution rights as a social experiment); *see also* W. David Montgomery, *Markets in Licenses and Efficient Pollution Control Programs*, 5 J. ECON. THEORY 395 (1972) (discussing the application of pollution and emissions licensing to achieve higher levels of environmental quality).

21. EPA, TOOLS OF THE TRADE: A GUIDE TO DESIGNING AND OPERATING A CAP AND TRADE PROGRAM FOR POLLUTION CONTROL, EPA430-B-03-002, at 1-2 (June 2003) [hereinafter TOOLS OF THE TRADE].

22. Swift, *Environmental Laws*, *supra* note 6, at 321.

called "true-up" or "annual reconciliation," sources must show that they have a sufficient number of allowances to cover the quantity of pollutant that they emitted in the compliance period.

The implementation of cap and trade programs most often are justified based on the efficiency improvements they promise. Cap and trade programs are said to be more efficient primarily because they allow individual facilities flexibility in determining whether, when, and how to reduce their emissions.[23] A facility that confronts very high costs to reduce emissions may purchase allowances from a facility that has lower costs, thus reducing compliance costs per unit of pollution overall.[24] Companies also may modify their compliance approach freely depending on changes in market conditions.[25] Implicit in this flexibility is a reduction in the conflict between regulator and regulated that was once pervasive in environmental regulation. Companies no longer have to expend resources negotiating with regulators about how and when to comply with technology-based standards.[26]

The EPA's Acid Rain Program is hailed as having "proven the concept" of cap and trade.[27] The policy goal of the Acid Rain Program was to reduce acid deposition caused primarily by the long-range transport of sulfur dioxide (SO_2) emissions from electric generating plants.[28] In Phase I of the Acid Rain Program, covering years 1995 to 1999, the program required the 263 largest coal-fired electric generation units to participate.[29]

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23. *See* EPA, ACID RAIN PROGRAM 2004 PROGRESS REPORT, EPA 430-R-05-012, at 3 (2005), *available at* http://www.epa.gov/airmarkets/progress/docs/2004report.pdf [hereinafter ACID RAIN PROGRAM REPORT 2004].

24. *See* Dallas Burtraw et al., *Economics of Pollution Trading for SO_2 and NOx*, RES. FOR THE FUTURE, Discussion Paper 05-5, at 4 (Mar. 2005) ("The key feature of emissions trading is that allowing regulated facilities to transfer emission allowances should lead to a distribution of emission reductions that equates the marginal cost of emission reductions among facilities and therefore minimizes the total costs of emission reductions.").

25. TOOLS OF THE TRADE, *supra* note 21, at 1-2.

26. Jason Scott Johnston, *Tradable Pollution Permits and the Regulatory Game*, *in* THIRTY YEARS OF MARKET-BASED INSTRUMENTS FOR ENVIRONMENTAL POLLUTION: A RETROSPECTIVE 10 n.36 (Charles Kolstad & Jody Freeman eds., Oxford Univ. Press 2006). For an explanation of technology-based standards, see *infra* notes 59-69 and accompanying text.

27. *See* Byron Swift, *U.S. Emissions Trading: Myths, Realities, and Opportunities*, NAT. RES. & ENV'T, at 3 (Summer 2005) (lauding the success of the Acid Rain Program). This Article will focus on the aspects of the Acid Rain Program that regulate sulfur dioxide (SO_2). While NOx is regulated under the Acid Rain Program as well, it is not regulated through a cap and trade program. For a detailed analysis and comparison of each, see Swift, *Environmental Laws*, *supra* note 6.

28. *See* Reimund Schwarze & Peter Zapfel, *Sulfur Allowance Trading and the Regional Clean Air Incentives Market: A Comparative Design Analysis of Two Major Cap-and-Trade Permit Programs?*, 17 ENVTL. & RES. ECON. 279, 280 (2000) (noting the aim of RECLAIM is to avoid and reduce natural damages from emissions).

29. The EPA defines a "unit" as a fossil fuel-fired combustor that serves a generator that provides electricity for sale. ACID RAIN PROGRAM REPORT 2004, *supra* note 23, at 5. The 263 units included in Phase I of the program were located in 110 generating plants. A.

In Phase II of the program, beginning in 2000, the program added to its universe all fossil-fuel fired electric generating units with an output capacity greater than twenty-five megawatts.[30] In the years 1995 to 1999, the cap for Phase I sources declined from 8.7 to 7 million tons worth of SO_2 allowances.[31] With the inclusion of Phase II sources in 2000, the number of allowances allocated rose to almost 10 million.[32] Beginning in 2010, the Act places a cap of 8.95 million on allowances issued to units each year, which is about 50% of the amount of SO_2 emitted by all electric generating units in 1980.[33] Allowances not utilized by a unit in a given year could be "banked" for use in a future year.[34]

The Acid Rain Program has met or exceeded expectations in terms of compliance rates and emissions reductions. The program enjoyed 100% compliance from 1995 to 1999, and compliance levels remained above 99% from 2000 to 2004.[35] In Phase I, participants over-complied, emitting 30% fewer tons of SO_2 than authorized.[36] From 1995 to 2004, SO_2 emissions from Acid Rain Program sources were reduced about 13%, despite a 20% increase in their utilization.[37]

DENNY ELLERMAN ET AL., MARKETS FOR CLEAN AIR: THE U.S. ACID RAIN PROGRAM 6 (2000) (noting that the phases were a means to reach an emissions cap).

30. ELLERMAN, *supra* note 29, at 8. In 2004, 3,391 generating units were subject to the Acid Rain Program. ACID RAIN PROGRAM REPORT 2004, *supra* note 23, at 4.

31. ENVTL. DEF., FROM OBSTACLE TO OPPORTUNITY: HOW ACID RAIN EMISSIONS TRADING IS DELIVERING CLEANER AIR 5 (2000) (noting that the units allowed declined from 445 in 1995 to 398 in 1999).

32. EPA, ACID RAIN PROGRAM 2000 PROGRESS REPORT, EPA 430-R-01-008, at 7, *available at* http://www.epa.gov/airmarkets/progress/docs/2000report.pdf. In 2004, the EPA allocated a total of 9.5 million allowances. ACID RAIN PROGRAM REPORT 2004, *supra* note 23, at 4-5.

33. ACID RAIN PROGRAM REPORT 2004, *supra* note 23, at 4 (stating that the cap of 8.95 million is permanent).

34. *See* Schwarze & Zapfel, *supra* note 28, at 287 (reviewing operation of the Acid Rain Program).

35. Interview with Bob Miller, Market Operations Branch, Clean Air Markets Division, EPA (Jan. 6, 2006); *see also* ACID RAIN PROGRAM REPORT 2004, *supra* note 23, at 8.

36. Approximately 38.1 million allowances were issued in Phase I, but net emissions were only 26.5 million tons. Swift, *Environmental Laws*, *supra* note 6, at 326. While it has not been emphasized in the literature, it would not be incorrect to say that the Acid Rain Program was overallocated in its initial years. Between 1985 and 1993, the emissions of Phase I units fell from 9.3 million tons to 7.6 million tons. ELLERMAN, *supra* note 29, at 79. Yet the cap for 1995 was set at 8.7 million tons. *See* ACID RAIN PROGRAM REPORT 2004, *supra* note 23, at 5 (fig.3). In his comprehensive study of the pre-program trend in SO_2 emissions, Ellerman finds that the pre-1994 emission reductions largely were attributable to declines in the price of Western low-sulfur coal and concluded that "it would not be correct to attribute much[,] if any[,] of the pre-1994 emission reductions to early compliance with the provisions of Title IV, since these reductions are largely explained by economic factors independent of Title IV." ELLERMAN, *supra* note 29, at 104-05.

37. ACID RAIN PROGRAM REPORT 2004, *supra* note 23, at 4. It is worth noting, however, that emissions in the years 2000 to 2004 consistently have been above the annual number of allocations, a result of the use of banked allowances from Phase I of the program. *Id.* at 5.

B. Regulated Entity as Strategic Planner

The new role of industry in a cap and trade regulatory regime has been described as that of a "strategic planner and entrepreneur."[38] Cap and trade programs enshrine the virtue of providing sources with flexibility regarding decisions they make to achieve compliance. The wide range of possible compliance options, in turn, increases the complexity of developing a compliance strategy and ideally puts pressure on regulated sources to determine the most efficient and effective one.

Flexibility is a primary goal of cap and trade regulatory design. Describing the concept of cap and trade programs, the EPA states,

> [t]he sources . . . are provided with the flexibility of choosing how they want to abate their emissions. Each source can choose to invest in abatement equipment or energy efficiency measures, to switch fuel to fuel sources with no or reduced emissions, or to shutdown or reduce output from higher emitting sources.[39]

Moreover, sources have the flexibility to not abate their emissions; they may choose to meet their caps by buying allowances.

Traditional technology-based air pollution regulation, in contrast, often has been characterized as uniform and inflexible.[40] In implementing traditional regulatory programs under the Clean Air Act, regulatory agencies relied extensively on technology-based emission-rate standards. Based on studies of emission reduction technologies, environmental agencies determined a "performance standard," the maximum emission rate that would be allowed for a given type of point source. While this approach theoretically gave facilities flexibility in choosing how to comply with the performance standard, in practice, facilities often felt compelled to comply by using the technology upon which the standard had been based.[41] Undoubtedly, in some cases technology-based performance standards led companies to install technologies that were not the most effective or efficient for their plant configurations or business plans.[42]

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38. *See* Kruger, *supra* note 4, at 2 (creating a new role for regulated entities).

39. TOOLS OF THE TRADE, *supra* note 21, at 1-3.

40. *See, e.g.*, Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171, 172-73 (1988) (noting the uniformity and stringent controls of "best available technology" strategies).

41. *See* Burtraw & Swift, *supra* note 6, at 10414 (noting that the program was geared toward currently available technology, which was a disincentive to innovation). *But see* Driesen, *supra* note 3, at 302-04 (citing lack of empirical evidence for this notion and stating that polluters "have substantial economic incentives to use the flexibility that performance standards offer to employ innovative means of meeting emission limitations that are less costly").

42. *See* Kruger, *supra* note 4, at 2 ("A company is not forced to meet a technology mandate that may not make sense for its plant configuration or business plan.").

Professor Ackerman and Professor Stewart explained in an important early article on emissions trading that companies, rather than regulatory agencies, would become responsible for economic and technological assessment of compliance options in an emissions trading program.[43] The "information-processing burden" is placed on company officials "who are in the best position to figure out how to cut back on their plant's pollution costs."[44] Ackerman and Stewart also recognize the possibility that emissions trading will "reward innovative improvements."[45] Later literature has continued to highlight the potential of emission trading regulation to spur more technological innovation than traditional regulation.[46]

Evidence from the Acid Rain Program suggests that the flexibility afforded to companies changed both the locus and the analytical tools used in environmental decisionmaking. There is anecdotal evidence that companies adopted "interdepartmental" approaches to integrate compliance planning into their overall business strategy.[47] Kruger explains that in the early years of the Acid Rain Program, "companies often formed teams to ensure that they had structures in place to meet compliance requirements."[48] The teams included not just members of the environmental compliance unit of the firm, but also upper level management.[49] According to Swift, cap and trade programs broke down

43. *See* Ackerman & Stewart, *supra* note 40, at 180 (discussing the transfer of technology assessment from bureaucrats to business managers).

44. *Id.*

45. *Id.* at 183.

46. *See, e.g.*, Daniel J. Dudek & John Palmisano, *Emissions Trading: Why Is this Thoroughbred Hobbled?*, 13 COLUM. J. ENVTL. L. 217, 218 (1988); Adam B. Jaffe & Robert N. Stavins, *Dynamic Incentives of Environmental Regulations: The Effects of Alternative Policy Instruments on Technology Diffusion*, 29 J. ENVTL. ECON. & MGMT. S-43, S-45 (1995); Swift, *Environmental Laws*, *supra* note 6, at 392 (containing a section of the article entitled "Cap-and-Trade Program, Promotes Broader Technology Use and Innovation"). There is, however, a lack of empirical evidence supporting this thesis that existing emission trading programs have spurred significant innovation. *See, e.g.*, Driesen, *supra* note 3, at 332-36 (emphasizing that emissions trading reduces the incentive for high-cost sources to apply new technology thus leading to a net weakening of incentives to innovate); Richard Toshiyuki Drury et al., *Pollution Trading and Environmental Injustice: Los Angeles' Failed Experiment in Air Quality Policy*, 9 DUKE ENVTL. L. & POL'Y F. 231, 275-78 (arguing that companies in trading regimes are not motivated to innovate, but rather to purchase emission reduction credits); Evans & Kruger, *supra* note 16, at 25 ("Industry and government officers said that they believed that the flexibility of the program led to the identification of numerous low-cost abatement options, but there is little evidence that this is the case.").

47. *See* Kruger, *supra* note 4, at 5-7 (stressing the importance of inter-dependent coordination with compliance planning).

48. *Id.* at 4.

49. *See id.* (noting participation of senior officials including chief financial officers).

the "green wall" that typically kept the environmental compliance unit of a firm separated from the rest of the company.[50]

Companies also have developed new analytical tools to make compliance decisions. According to Swift, power plants have incorporated allowance prices into the dispatch models that determine which of the plant's generating units will operate at any given time.[51] Companies have developed computer models that forecast emissions and allowance prices to analyze alternative compliance scenarios and optimize net profits, and they study these models to gain a strategic edge over their competitors.[52] Companies also use sophisticated software to track their emissions and allowances. In addition to enabling the company to transmit their data to the EPA as required, the software allows them to share emissions information among departments, make compliance projections, and compare actual emissions to projections.[53]

With these types of changes, cap and trade programs are believed to lead to the integration of environmental and economic decisionmaking within firms.[54] Because cap and trade programs allow companies greater flexibility to identify and implement the most cost-effective strategy, companies have the opportunity to become strategic and entrepreneurial with respect to their compliance decisions.[55]

C. Agency as Banker

In cap and trade programs, regulators are no longer responsible for persuading or coercing a company to reduce its emissions. Rather, the agency may primarily play the role of "banker" or "accountant," responsible for keeping track of emissions and allowances and making sure the allowance "checkbook" balances at the end of the reporting year.[56] Relieved of the responsibility of "grandly deciding what is best for firms

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50. *See* Swift, *supra* note 27, at 7. *But see* Timothy F. Malloy, *Regulating by Incentives: Myths, Models, and Micromarkets*, 80 TEX. L. REV. 531, 589-90 (2002) (setting forth a "resource allocation model" that suggests that the division between the environmental and operating departments of a firm may often be "ossified" and "deeply embedded in the firm").

51. Swift, *supra* note 27, at 7 (offering an example of how cap and trade programs allow the integration of economic and environmental variables).

52. *See* Kruger, *supra* note 4, at 6-7 (analyzing computer forecasting models of PEPCO and American Electric Power and each company's satisfaction with the results).

53. *See id.* at 9-10 (adding that the software also allows the company to determine ahead of compliance deadlines whether their allowance holdings are adequate).

54. *See* Swift, *supra* note 27, at 7 ("The effect of trading in establishing a market price for a ton of reductions helps integrate environmental decision-making within a firm.").

55. *See* Kruger, *supra* note 4, at 2 (stating that the larger role sources take on with trading schemes allows a more tailored emissions reduction plan).

56. *Id.* at 10.

and individuals, entertaining equitable appeals, and enforcing the result," the new role of regulators in emissions trading regulation has been called "revolutionary."[57]

The importance of the governmental role in accurately monitoring and appropriately sanctioning noncompliance is widely acknowledged in the literature on cap and trade regulation.[58] As foreseen by Professors Ackerman and Stewart, monitoring and enforcement have become the priorities of regulatory agencies in administering cap and trade programs.[59] Indeed, as compared to traditional regulation, cap and trade programs greatly enhance the capacity of regulatory agencies to monitor environmental performance and enforce environmental laws. Professors Ackerman and Stewart recognized that emissions trading programs would create strong incentives for effective monitoring and enforcement because allowances would not hold their value if companies could emit pollutants without fear of detection or sanction.[60]

In traditional air pollution regulation, regulatory agencies had the difficult responsibility of setting and enforcing technology-based standards. The 1970 Clean Air Act, for example, charged the EPA with setting New Source Performance Standards (NSPS) for various source categories that reflected "the degree of emission limitation achievable through the application of the best system of emission reduction which . . . the Administrator determines has been adequately demonstrated."[61] The NSPS and other technology-based standards established under the Clean Air Act inevitably involved agency officials in discussions with companies about which emissions control technologies were technologically and economically feasible in an industry or a particular firm.[62] Given the difficulty of determining feasibility, the setting of standards was a complicated and often contentious process. As explained by Jason Scott

57. *Id.* (citing A. Denny Ellerman, *The Next Restructuring: Environmental Regulation*, 20 ENERGY J. 1, 141-48 (1999)).

58. *See, e.g.*, Schwarze & Zapfel, *supra* note 28, at 288 ("The administration of emissions inventories and permit accounts is 'the' classic function reserved for the regulatory agency in cap-and-trade programs.") (emphasis omitted).

59. Ackerman & Stewart, *supra* note 40, at 183.

60. *See id.* (recognizing the lack of incentive to purchase polluter rights if no enforcement is present).

61. 42 U.S.C. § 7411(a)(1) (2000). Examples of source categories subject to New Source Performance Standards (NSPS) include medical waste incinerators, sulfuric acid plants, glass manufacturing plants, and the beverage can surface coating industry. *See id.* § 7411(b).

62. *See* Johnston, *supra* note 26, at 11 (highlighting the "intense bargaining process" between regulators and industry with technology-based standards); *see also* David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 B.C. ENVTL. AFF. L. REV. 1, 2-3 (2005) (comparing feasibility principle and cost benefit analysis theories on environmental statutes).

Johnston, "The process of promulgating technology-based standards is a long, costly battle between industry and [the] EPA over issues regarding the cost and effectiveness of a particular technology, and how these vary with facility type . . . ."[63]

Moreover, once the standards were promulgated, the enforcement process was often also complicated and contentious. Firms might argue with regulators about the applicability of a standard to their facility or formally seek a variance.[64] They might also try to negotiate about which technologies could be employed to satisfy the applicable standards in their particular firms.[65] Gaining compliance often required a long series of interactions between regulator and regulated.[66] Regulators would often essentially supervise the firm's choice of technology.[67] Studies of compliance with traditional regulation conceptualized it as a "fluid, negotiable matter" rather than an "objectively-defined unproblematic state."[68] It involved a "continuing relationship between officer and polluter" constituted by "a continuing effort towards attainment of a goal as much as attaining the goal itself."[69] Ultimately, a compliance determination would rest on an inspection to verify that the company had installed a specified technology.[70] Very often, regulatory agencies lacked the resources to consistently monitor compliance and initiate enforcement actions.[71]

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63. Johnston, *supra* note 26, at 11.

64. *See id.* Johnston notes that while the courts have held that uniform technology-based standards are designed to be applied uniformly across firms in the relevant source category, the EPA and state regulators often take the economic circumstances of particular firms into account when permits are written. *Id.* at 12.

65. *See* Kruger, *supra* note 4, at 1 ("Most companies explore numerous compliance scenarios before selecting a strategy based on their [internal] analysis . . . .").

66. A large body of literature emerged about "enforcement styles" that describes how regulatory officials assess compliance with the law and respond to situations of noncompliance using strategies of persuasion and coercion. *See generally* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 19-20 (1992) (arguing regulatory agencies are more likely to secure compliance by "speak[ing] softly" while carrying "big sticks"); KEITH HAWKINS & J. M. THOMAS, ENFORCING REGULATION 4 (1984) (analyzing regulatory enforcement from a political and organizational perspective); Robert A. Kagan, *Regulatory Enforcement*, *in* HANDBOOK OF REGULATION & ADMIN. LAW 383, 387 (D. H. Rosenbloom & R. D. Schwartz eds., 1994) (discussing the impact of decisionmaking style in regulatory enforcement); Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1186 (1998) (defending traditional enforcement techniques).

67. Swift, *Environmental Laws*, *supra* note 6, at 322.

68. Keith Hawkins, *Compliance Strategy, in* A READER IN ENVIRONMENTAL LAW 161, 183 (Bridget M. Hutter ed., 1999).

69. *Id.* at 165.

70. *See* Stephanie Benkovic & Joseph Kruger, *To Trade or Not to Trade? Criteria for Applying Cap and Trade*, 1 SCI. WORLD J., 953, 955 (2001) (noting that many environmental regulations measure "compliance" based on adherence to technology or processes).

71. Ackerman & Stewart, *supra* note 40, at 181-82.

Compliance in cap and trade programs is inherently more ascertainable and quantifiable than compliance in traditional regulation. Compliance is determined by comparing a facility's emissions with its allowance holdings and has the simplicity of a mathematical equation.[72] To solve the compliance equation for each facility in a cap and trade program, however, a significant amount of data is required. The regulator requires data on both the emissions levels of each facility over the reporting period and the number of allowances that each firm possesses at the time of annual reconciliation. As such, strict monitoring, reporting, and verification rules are deemed essential to the success of a cap and trade program in a way that they are not essential to the success of traditional regulation. As explained by Benkovic and Kruger, "[f]or an emissions market to develop, there must be confidence that emissions will be correctly measured and reported, that compliance will be verified, and, if there is noncompliance, that a significant cost will be assessed."[73]

If a source is able to underreport its emissions, then it will have to surrender fewer allowances at the end of the compliance period, and the cap may be reported as being met, but not be met in fact.[74] Moreover, that source will gain an unfair advantage in the marketplace because it will be able to sell its excess allowances. The greater supply of allowances available on the market will, in turn, decrease the value of allowances, thus undermining the incentives that other facilities have to invest in emissions reductions.[75] As several commentators have noted, without reliable monitoring there is no confidence in the market: "[T]hese data are the 'gold standard' that backs up the currency of emissions allowances."[76] Reliable monitoring instills confidence by verifying the existence and value of the traded allowance.[77]

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72. Benkovic & Kruger, *supra* note 70, at 953. *But see* Stranlund et al., *supra* note 5, at 345 (pointing out a second type of noncompliance: a reporting violation, where a source's actual emissions exceed its reported emissions). Both the Acid Rain Program and the RECLAIM Program, however, use compliance rates to communicate the prevalence of cap violations rather than reporting violations. Also, reporting violations may ultimately lead to a cap violation.

73. Benkovic & Kruger, *supra* note 70, at 958.

74. TOOLS OF THE TRADE, *supra* note 21, at 2-4.

75. *Id*.

76. Blas Pérez Henríquez, *Information Technology: The Unsung Hero of Market-Based Environmental Policies*, RES., at 11 (Fall/Winter 2004); *see also* Richard F. Kosobud, *Emissions Trading Emerges from the Shadows*, *in* EMISSIONS TRADING 3, 30 (Richard F. Kosobud ed., 2000) (emphasizing that public confidence in the market depends on the perception of effective monitoring and enforcement).

77. Pérez Henríquez, *supra* note 76, at 11.

The Acid Rain Program accordingly set in place stringent technology requirements for monitoring and reporting emissions.[78] The program required that continuous emission monitoring systems (CEMS)—or a comparable emission monitoring system—be installed on each affected unit.[79] CEMS are electronic devices that measure actual emissions of SO_2 and other gases on a continuous basis.[80] The data generated by the CEMS is electronically sent to the source's computer system, after which it is compiled for submission to the EPA on a quarterly basis. After receiving the quarterly data, the agency runs a program that checks the data for completeness.[81] The extent to which CEMS are automated is considered to reduce opportunities for submitting false emissions data.[82] Under the program, 36% of the regulated units, accounting for 96% of emissions in the program, are equipped with CEMS.[83] Other units generally quantify emissions by measuring fuel input and multiplying it by an emissions rate.[84]

So-called "missing data provisions" in the Acid Rain Program are designed to avoid the underestimation of emissions.[85] By establishing protocols that tend to overestimate emissions when actual data is unavailable because of monitoring equipment failure or other reasons, missing data provisions have provided sources with incentives to ensure that CEMS are operative as much as possible. The missing data provisions get increasingly punitive as the amount of time in which actual data is unavailable increases. If monitoring equipment is inoperative less than 90% of the time, the emissions value substituted for each missing hour is

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78. Stranlund et al., *supra* note 5, at 349 (explaining that the technology required depends on the type of emission source); *see also* Continuous Emission Monitoring, 40 C.F.R. pt. 75 (2006) (providing a list of specific monitoring and reporting requirements).

79. 42 U.S.C. § 7651(k) (2000). Continuous emission monitoring systems (CEMS) are expensive, with an average annual cost of about $124,000 per unit, amounting to 7% of compliance costs in 1995. Pérez Henríquez, *supra* note 76, at 11.

80. Pérez Henríquez, *supra* note 76, at 11 (describing CEMS).

81. *See* Stranlund et al., *supra* note 5, at 349 (stating that every emissions report sent to EPA is subject to a series of reviews to verify accuracy and determine compliance).

82. John K. Stranlund et al., *Enforcing Emissions Trading When Emissions Permits Are Bankable*, 28 J. REG. ECON. 181, 182 (2005).

83. Joe Kruger & Christian Egenhofer, *Confidence Through Compliance in Emissions Trading Markets*, 99 CTR. FOR EUR. POL'Y STUD. 1, 3 (2006).

84. *See* EPA, *Continuous Emissions Monitoring Fact Sheet*, http://www.epa.gov/airmarkets/emissions/continuous-factsheet.html (last visited Mar. 23, 2007).

85. *See* Benkovic & Kruger, *supra* note 70, at 958 (noting that missing data rules generally require a very conservative substitute value, which might be used for any hours of missing emissions data).

the maximum value recorded in a previous time period.[86] Given that the substitute data is likely to overestimate actual emissions, sources have a great incentive to ensure that CEMS data is available.

Given the data-intensity of compliance determinations in cap and trade programs, sophisticated data management has been a key component of program administration. Information technology has been called the "unsung hero" of the Acid Rain Program.[87] Technological advances in information technology permitted the EPA to design systems that could process and disseminate large amounts of information about emissions and allowances.[88] CEMS send data electronically to the companies' information systems, which then compile and send them to EPA. EPA developed software programs to assist utilities in preparing, reviewing, and submitting quarterly data reports, and virtually all participants submit their data over the Internet.[89] An Emissions Tracking System receives the electronic quarterly reports of emissions data from sources, conducts quality assurance protocols, and makes the emissions data available to the public.[90] An Allowance Tracking System serves as the central registry of allowance transfers among sources.[91]

If at the end of the compliance year a source does not have sufficient allowances to cover its emissions, an automatic penalty is assessed. The penalty was statutorily set in 1990 at $2,000 per ton of SO_2.[92] Adjusted annually for inflation, the penalty rose to $2,963 per ton by 2004.[93] In addition, EPA deducts the company's allotment for the following year by the amount of the exceedence.[94] Because the price of a ton of sulfur dioxide on the Acid Rain Program allowance market consistently remained below the value of this monetary penalty, averaging $200 per ton between

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86. *See* EPA, *Continuous Emissions Monitoring Fact Sheet*, http://www.epa.gov/airmarkets/emissions/continuous-factsheet.html (last visited Mar. 23, 2007).

87. Pérez Henríquez, *supra* note 76, at 1.

88. *See* Stranlund et al., *supra* note 5, at 348-49 (emphasizing that CEMS, or an equivalent device, are fully automated, thus minimizing the risks of tampering with emissions data).

89. *See* Pérez Henríquez, *supra* note 76, at 11 (reporting that approximately 80% of transfers are entered online by the sources themselves).

90. *Id.*; *see also* Evans & Kruger, *supra* note 16, at 5-6 (discussing the efforts of the EU ETS in developing market-based policies for reducing emissions).

91. Pérez Henríquez, *supra* note 76, at 10-11; *see also* Evans & Kruger, *supra* note 16, at 10 (describing Allotment Trading Units (ATU), which are transferable emission rights).

92. 42 U.S.C. § 7651(j) (1994). Additional discretionary penalties in the form of fines or surrender of additional allowances are also provided for, but have been used rarely. Interview with Bob Miller, Market Operations Branch, Clean Air Markets Division, EPA (Jan. 6, 2006).

93. ACID RAIN PROGRAM REPORT 2004, *supra* note 23, at 8.

94. *See* Swift, *Environmental Laws*, *supra* note 6, at 321; *see also* Stranlund et al., *supra* note 5, at 350 (noting that a noncompliant utility must offset the excess emissions from its allowance in the following year).

1995 and 2004, noncompliance predictably has been very low.[95] Over the lifetime of the program, a total of twenty-three units have been out of compliance with respect to their allowance holdings, emitting 1,195 excess tons of SO_2. For these violations, the EPA assessed automatic monetary penalties totaling $3,856,513.[96] The highest single fine was $1,581,180.[97] In addition, the EPA assessed nine civil penalties totaling $589,805 for monitoring violations.[98]

The near-100% compliance rates achieved in the Acid Rain Program are music to the ears of those familiar with compliance rates in many traditional environmental regulatory programs. To the extent that compliance rates have been quantified for traditional programs, many studies have indicated significant rates of noncompliance.[99] In 1999, for example, the EPA's Office of Enforcement and Compliance disclosed that major discharging facilities were in violation of the Clean Water Act as much as 58% of the time.[100] Also in 1999, a study found that more than 39% of major facilities in five industrial sectors were out of compliance with the Clean Air Act.[101] As indicated above, assessing compliance with traditional regulation was plagued by a variety of barriers, including the

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95. *See* Kruger, *supra* note 4, at 13 (stating that because participants know that the cost of a ton of excess emissions exceeds the cost of buying on the market, they have every incentive to comply); *see also* Stranlund et al., *supra* note 5, at 346 (showing that complete compliance will be guaranteed as long as the market price of a unit allowance remains less than both (1) the per unit fine for a cap violation (making a cap violation economically irrational), and (2) the probability that a reporting misrepresentation will get detected multiplied by the per unit fine for a reporting violation and a cap violation (making a reporting misrepresentation economically irrational)).

96. Interview with Bob Miller, Market Operations Branch, Clean Air Markets Division, EPA (Jan. 6, 2006) (accompanied by documents entitled "Compliance Summary for the Acid Rain Program (as of July 5, 2005)" and "Acid Rain Program Units Assessed Penalties for Excess Emissions (as of July 5, 2005)" [hereinafter 2005 Compliance Documents]). In comparison with the documentation dated July 5, 2005, the EPA's Annual Progress Reports for the years 2000 and 2001 underreport the number of units out of compliance and amount of excess tons. *Id.* For 2000, the Annual Progress Report states that there were six units out of compliance, with total excess emissions of fifty-four tons. EPA, ACID RAIN PROGRAM: ANNUAL PROGRESS REPORT (2000). However, the 2005 Compliance Documents show eight units out of compliance with total excess emissions of seventy tons. For 2001, the Annual Progress Report states that there were two units out of compliance with total excess emissions of eleven tons. EPA, ACID RAIN PROGRAM: ANNUAL PROGRESS REPORT (2001). The 2005 Compliance Documents show nine units out of compliance with total excess emissions of 603 tons.

97. Interview with Bob Miller, Market Operations Branch, Clean Air Markets Division, EPA (Jan. 6, 2006).

98. *Id.*

99. *See* JOSEPH DIMENTO, ENVIRONMENTAL LAW AND AMERICAN BUSINESS: DILEMMAS OF COMPLIANCE 20 (1986) (citing studies in the 1980s showing high noncompliance with the Clean Water Act, the Toxic Substances Control Act, and the Clean Air Act).

100. Joel Mintz, *The Uncertain Future Path of Environmental Enforcement and Compliance*, 33 ENVTL. L.J. 1093, 1094 (2003).

101. *Id.*

lack of access to facilities, inadequate data, and the complexity of compliance determinations. In contrast, cap and trade holds out the possibility—even the promise—of full compliance and enforcement.

Moreover, the literature suggests that the operation and enforcement of cap and trade programs require fewer administrative resources than traditional regulation. In its manual about cap and trade design, the EPA states that "cap and trade programs can cost significantly less than more traditional policy options" and the Acid Rain Program "requires significantly fewer administrative and operational resources than traditional command-and-control programs in the United States."[102] While the literature acknowledges that cap and trade programs may require significant "up-front costs" in terms of human resources and investment in information technology for data collection and processing, it widely suggests that once the program is operating, the administrative costs are low or even "negligible."[103]

The low personnel requirements of the Acid Rain Program often are cited as evidence of the reduced administrative costs. The EPA estimates that approximately 100 governmental staff members nationwide play a role in the administration of the Acid Rain Program.[104] About sixty are federal EPA employees, half of whom are involved primarily in quality assurance and verification of emissions data.[105] The rest are state and local agency employees who help conduct field audits.[106] To a large degree, monitoring and enforcement is accomplished on the basis of the information collected electronically.[107] To assure the reliability of emissions data, the EPA primarily relies on "electronic audits" in which reported data is subject to a series of calculations that screens the data for errors at the time they are

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102. *See, e.g.*, TOOLS OF THE TRADE, *supra* note 21, at 4-6; *see also* Swift, *supra* note 27, at 7 (emphasizing that transaction and administrative costs are far lower in cap and trade programs than with traditional rate-based standards).

103. Schwarze & Zapfel, *supra* note 28, at 291; *see also* Swift, *supra* note 27, at 7 (positing that "[g]overnmental administration costs are lower for cap-and-trade because the role of the government regulator is transformed from that of evaluating and approving technologies to one of monitoring emissions and enforcing compliance. Eliminating the former vastly simplifies permitting policies and also reduces government costs."). *But see* Driesen, *supra* note 3, at 333 (explaining that enforcers in trading programs need information about emissions at two sources to verify compliance of a single source and concluding that "agencies relying upon trading need more resources to verify compliance than agencies relying on traditional regulation").

104. TOOLS OF THE TRADE, *supra* note 21, at 4-6.

105. *Id.*

106. *Id.*

107. Stranlund et al., *supra* note 5, at 349.

received.[108] Field audits, when performed, focus on the inspection of measurement equipment and on-site records.[109]

Finally, in contrast to enforcement relationships in many traditional regulatory programs, interactions between the regulators and the regulated in cap and trade have tended to be "relatively harmonious."[110] According to anecdotal evidence from the Acid Rain Program, industry officials are "generally satisfied with the interactions" they have with regulators.[111] The regulatory agency's focus on emissions data rather than compliance options is credited with easing friction between the regulators and the regulated because it reduces the transaction costs and delays associated with agency involvement in compliance decisions.[112] Moreover, the straightforward objective compliance determinations stand in contrast to the discretion-laden subjective compliance determinations typical in traditional regulation. Compliance determinations predictably are less subject to negotiation, contention, and litigation.

II. IDEALIZED ROLES UNREALIZED: THE CASE OF RECLAIM

The RECLAIM Program shows that the idealized roles of agencies and regulators do not always apply in cap and trade regulatory programs. The first section below explains the problems that RECLAIM experienced with noncompliance and eventual program reform. The following two sections show that RECLAIM companies did not become adept strategic planners with respect to program compliance and the South Coast Air District did not act as an effective banker or accountant.

A. Noncompliance and Program Reform in RECLAIM

The RECLAIM Program has not been as extensively commented upon and analyzed, but along with the Acid Rain Program, it is the longest-standing cap and trade program in the country.[113] RECLAIM is a regional program administered by the South Coast Air Quality Management District (South Coast Air District or District), the political subdivision in California responsible for air pollution control in the South Coast Air Basin, consisting of Orange County, and parts of Los Angeles, San Bernardino, and Riverside Counties. The RECLAIM Program was adopted by the

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108. *See* TOOLS OF THE TRADE, *supra* note 21, at 4-5 (describing the electronic auditing procedure for emissions data); *see also* Interview with Rey Forte, Emissions Monitoring Branch, Clean Air Markets Division, EPA (Jan. 6, 2006).
109. TOOLS OF THE TRADE, *supra* note 21, at 4-4.
110. Kruger, *supra* note 4, at 13.
111. *Id.*
112. Swift, *Environmental Laws*, *supra* note 6, at 390.
113. *See id.* (providing a detailed comparison of the design parameters of the two programs).

South Coast Air District in 1993 and came into effect in 1994. The policy goal of the RECLAIM Program was to help bring the South Coast Air Basin into compliance with National Ambient Air Quality Standards for ozone and particulate matter by capping emissions of NOx and SO_2 from the largest stationary sources.[114]

The sources covered by the RECLAIM Program are more heterogeneous than those of the Acid Rain Program, including not only power plants, but also refineries, asphalt and cement producers, and a wide variety of industrial sources that emit as little as four tons of NOx or SO_2 annually.[115] At the beginning of the RECLAIM Program, the universe numbered 394 facilities, including 392 NOx emitters and 41 SO_2 emitters.[116] Over the life of the program, exclusion of some sources from the program and facility shutdowns reduced the number of sources. In the 2004 compliance year, the universe consisted of 311 facilities, including 311 NOx emitters and 33 SO_2 emitters.[117]

RECLAIM Trading Credits (RTC) are the unit of currency in RECLAIM. One RTC represents a license to emit one pound of pollutant. The RECLAIM Program was designed such that the annual weighted average reduction in RTC allowances for all facilities was 8.3% of initial allocations for NOx and 6.8% of initial allocations for SO_2.[118] From 1994 to 2003, the NOx cap steadily declined from 40,127 tons of to 12,484 tons, and the SO_2 cap steadily declined from 10,365 tons to 4,292 tons.[119] Unlike the Acid Rain program, RECLAIM did not allow the banking of allowances.[120]

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114. Schwarze & Zapfel, *supra* note 28, at 280. The RECLAIM Programs for NOx and SO_2 were implemented simultaneously but are independent of the cap and trade program. There is no interpollutant trading, and only a small subset of the facilities that participate in the NOx program also participate in the SO_2 program. This Article focuses to a greater extent on the NOx program because of the particular difficulties it experienced. *Id.*

115. *See* South Coast Air Quality Management District (SCAQMD), Regulation XX: Regional Clean Air Incentives Market; *see also* James M. Lents, *The RECLAIM Program (Los Angeles' Market-Based Emissions Reduction Program) at Three Years*, *in* EMISSIONS TRADING 223 (Richard F. Kosobud ed., 2000) (excluding sewage treatment plants and landfills from the program). For a complete list of the types of facilities organized by SIC code, see SCAQMD, RECLAIM PROGRAM THREE-YEAR AUDIT AND PROGRESS REPORT 1998, apps. D-E [hereinafter THREE-YEAR AUDIT].

116. At the end of the 1996 compliance year, the universe consisted of 329 facilities, including 329 NOx emitters and 37 SO_2 emitters. SCAQMD, ANNUAL RECLAIM AUDIT REPORT FOR THE 1996 COMPLIANCE YEAR 1-2 (1998) [hereinafter RECLAIM AUDIT 1996].

117. SCAQMD, ANNUAL RECLAIM AUDIT REPORT FOR THE 2004 COMPLIANCE YEAR 1-2 (2006) [hereinafter RECLAIM AUDIT 2004].

118. Scott Lee Johnson & David M. Pekelney, *Economic Assessment of the Regional Clean Air Market: A New Emissions Trading Program for Los Angeles*, 72 LAND ECON. 277, 281 (1996).

119. *Compare* SCAQMD, SECOND ANNUAL RECLAIM PROGRAM AUDIT REPORT (1997) [hereinafter RECLAIM AUDIT 1995], *with* SCAQMD, ANNUAL RECLAIM AUDIT REPORT FOR THE 2003 COMPLIANCE YEAR (2005) [hereinafter RECLAIM AUDIT 2003].

120. Schwarze & Zapfel, *supra* note 28, at 287. The question of whether cap and trade programs in general, and RECLAIM in particular, should incorporate banking is beyond the

Despite many similarities in design, the RECLAIM Program has experienced significantly more problems achieving compliance than the Acid Rain Program.[121] In its early years from 1994 through 1999, despite an abundance of inexpensive RECLAIM allowances available on the market, noncompliance with facility allocations ranged from 4% to 15%.[122] The South Coast Air District attributed noncompliance with allocations to several types of problems including failures to purchase sufficient allowances on the market, emission calculation errors such as using the wrong emission factor or making arithmetic errors, and failures to follow missing data provisions.[123]

In 2000, the RECLAIM Program ran into more serious difficulties. The California "energy crisis" led power producing facilities to increase production in response to energy demands.[124] Attempting to remain compliant with RECLAIM, these facilities bought allowances on the market, causing a drastic increase in the price of the allowances. The average price of NOx allowances sold in 2000, $45,609 per ton, was almost twenty-five times greater than the average price of allowances sold in 1999.[125] Relatedly, RECLAIM's NOx cap was significantly exceeded in 2000. In 2000, power-producing facilities initially were allocated 2,302 tons of allocations, but they emitted 6,788 tons of NOx.[126] They were able to purchase 2,550 tons of allowances on the market from non-power producing facilities so that their total exceedences amounted to 1,936

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scope of this Article. For a perspective on the role of banking in the RECLAIM Program, see Burtraw et al., *supra* note 24, at 281 (positing that had allowance banking been permitted, the RECLAIM Program would have out-performed other regulatory programs).

121. *See supra* notes 111-18.

122. *See* EPA, AN EVALUATION OF THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT'S REGIONAL CLEAN AIR INCENTIVES MARKET—LESSONS IN ENVIRONMENTAL MARKETS AND INNOVATION 12 (Nov. 2002) [hereinafter EPA EVALUATION OF RECLAIM], *available at* http://www.epa.gov/region09/air/reclaim/report.pdf (basing its conclusions on data collected from Nov. 2001 through Jan. 2002).

123. *See, e.g.*, RECLAIM AUDIT 1995, *supra* note 119; SCAQMD, ANNUAL RECLAIM AUDIT REPORT FOR 2002 COMPLIANCE YEAR 5-3 (2004) [hereinafter RECLAIM AUDIT 2002]. For further insight into the relatively high noncompliance rates in RECLAIM, see Stranlund et al., *supra* note 5, at 353 (suggesting that "a number of RECLAIM facilities have decided that the incentives they face do not warrant their full compliance").

124. For information on the California energy crisis, see Alan Ramo, *California's Energy Crisis—The Perils of Crisis Management and a Challenge to Environmental Justice*, 7 ALB. L. ENVTL. OUTLOOK J. 1, 8 (2002); *see also* David B. Spence, *The Politics of Electricity Restructuring: Theory vs. Practice*, 40 WAKE FOREST L. REV. 417, 417-18 (2006) (arguing that the economic rationale for restructuring is inconsistent with the political rationale for the same).

125. *Compare* SCAQMD, ANNUAL RECLAIM AUDIT REPORT FOR 2000 COMPLIANCE YEAR ES-1 (2002), [hereinafter RECLAIM Audit 2000] (asserting that the average allowance price in 2000 was $45,609 per ton), *with* SCAQMD, ANNUAL RECLAIM AUDIT REPORT FOR 1999 COMPLIANCE YEAR ES-2 (2001) [hereinafter RECLAIM Audit 1999] (comparing emissions for compliance for years 1994 through 2002).

126. SCAQMD, ANNUAL RECLAIM AUDIT REPORT FOR 2001 COMPLIANCE YEAR F-23 (2003) [hereinafter RECLAIM AUDIT 2001].

tons.[127] Non-power producing facilities sold so many allowances that their holdings did not cover their emissions, and they ended up with exceedences of 1,358 tons.[128] In total, all facilities together exceeded the NOx cap in 2000 by 3,294 tons, or 19%.[129]

RECLAIM rules provided that the South Coast Air District review the program and implement measures to amend the program in the event that aggregate emissions exceeded the allocations by 5% or more or that the average price of allowances exceeded $15,000.[130] Both conditions were met in 2000, and the District initiated a review that culminated in the adoption of significant amendments to RECLAIM in May 2001.[131] Power-producing facilities were prohibited from buying or selling RECLAIM allowances and were required to install Best Available Retrofit Control Technology (BARCT) by the end of 2003.[132] Other large RECLAIM facilities were required to submit compliance plans specifying approaches for complying with facility allocations.[133] Smaller RECLAIM facilities were required to submit forecast reports projecting allocations for compliance years 2001 through 2005.[134]

In effect, power-producing facilities were removed from the RECLAIM market and subjected to a technology-based standards regime. Many non-power producing facilities, while not automatically required to install pollution control technologies, were required to communicate much more extensively than before about how they intended to comply. In these ways, the RECLAIM Program was supplemented and, in part, replaced by a command and control regulatory approach.

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127. *See* RECLAIM AUDIT 2002, *supra* note 123, tbl.3-2, at 3-4.
128. *Id*.
129. *Id*. at tbl.3-1, at 3-3.
130. SCAQMD, Rule 2015, Backstop Provisions, at 2015-3.
131. SCAQMD, WHITE PAPER ON STABILIZATION OF NOX RTC PRICES (2001), [hereinafter WHITE PAPER]; SCAQMD, PROPOSAL TO ADOPT PROPOSED CHANGES TO RECLAIM (May 11, 2001) [hereinafter PROPOSAL TO ADOPT CHANGES], *available at* http://www.aqmd.gov/hb/2001/010535a.html.
132. Compliance Plan for Power Producing Facilities, AQMD Rule 2009 (May 11, 2001) (as amended Jan. 7, 2005); *see also infra* text accompanying note 238. For a discussion on the Mitigation Fee Program, which was established so that power plants could pay for any excess emissions at the rate of $7.50 per pound or $15,000 per ton, see PROPOSAL TO ADOPT CHANGES, *supra* note 131, at 4. The District was instructed to use the program to invest in NOx emission reduction projects from mobile, stationary, or area sources to mitigate the air pollution effects of excess emissions.
133. Compliance Plans and Forecast Reports for Non-Power Producing Facilities, AQMD Rule 2009.1(b) (May 11, 2001); RECLAIM AUDIT 2001, *supra* note 126, at F-26-27; RECLAIM AUDIT 2000, *supra* note 125, at G-20.
134. *See* AQMD Rule 2009.1(e) (stating that facilities with between twenty-five and fifty tons of NOx emissions in 1999 or 2000 had to submit a forecast report outlining how they would comply with their annual NOx allocation between 2001 and 2005).

Even before the energy crisis, there were several signs that RECLAIM was not creating sufficient incentives for companies to reduce emissions. A 2002 Evaluation of the RECLAIM Program conducted by the EPA concluded that "[t]here was clear evidence by mid-1998 that control installation was occurring at a fraction of the rate anticipated at the time of program adoption. This situation did not improve by early 2000 and undoubtedly played a part in the credit shortage that occurred in 2000-2001."[135] In the first three years of the program—1994 through 1996—emissions remained at roughly the same level as the 1993 emission level.[136] Although the Program achieved a 19% emissions reduction by 2000, the environmental assessment prepared for Program adoption had predicted that RECLAIM would achieve a 47% reduction in emissions by then.[137] Moreover, the 19% reductions over the seven-year period from 1994 through 2000 paled in comparison to the five-year period from 1989 through 1993, in which an approximately 38% reduction in emissions was achieved in the same set of facilities.[138]

After implementation of the 2001 amendments, RECLAIM achieved significant NOx emissions reductions. Emissions from power plants decreased from 6,788 tons in 2000, to 1,047 tons in 2002—an 85% reduction.[139] As stated in the 2002 Annual Report, "[t]he decrease in emissions was due to the combination of a lower production level and the installation of NOx control equipment at power producing facilities."[140] By compliance year 2004, power producing facilities had reduced their emissions to 541 tons—over a 90% reduction from their 2000 emissions levels.[141] The reductions at non-power producing facilities were smaller but still significant. These facilities decreased their emissions by 28% between 2000 and 2002, and by 31% between 2000 and 2004.[142]

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135. EPA EVALUATION OF RECLAIM, *supra* note 122, at 56.

136. *See* THREE-YEAR AUDIT, *supra* note 115, tbl.3-1, at 3-3 (showing that actual emissions in the years 1993; 1994; 1995; and 1996 were 24,982; 25,314; 25,764; and 24,200 tons, respectively). SCAQMD notes, however, that emissions for 1995 and 1996 may have been overestimated because of the impact of the Missing Data Provisions. *Id.* at 3-6.

137. *See* SCAQMD, RECLAIM VOLUME III SOCIOECONOMIC AND ENVIRONMENTAL ASSESSMENT tbl.9-8, at 9-73 (Oct. 1993) (noting that emissions of NOx under Alternative G, the RECLAIM Program, are predicted to be thirty-seven tons per day, which is equivalent to 13,505 tons per year).

138. *See* THREE-YEAR AUDIT, *supra* note 115, fig.3-3, at 3-5 (showing that approximately 40,000 tons of NOx were emitted in 1989). *But see id.* at 8-8 to 8-9 (asserting that although significant emissions reductions had been achieved at a reasonable cost historically, "during the early 1990s it became apparent that limited opportunities for additional emissions reductions remained available to this approach . . . " and "[t]here is no assurance that the downward trends experienced during the 1980s and the first years of the 1990s would have continued under the command-and-control regime").

139. RECLAIM AUDIT 2002, *supra* note 123, tbl.3-3, at 3-4.

140. *Id.* at 3-3.

141. RECLAIM AUDIT 2004, *supra* note 117, tbls.3-2, 3-3 at 3-4.

142. *See* RECLAIM AUDIT 2002, *supra* note 123, tbls.3-2, 3-3 at 3-4 (showing emissions

B. Regulated Entities Did Not Plan Strategically

Companies participating in RECLAIM did not become strategic planners and entrepreneurs. As reportedly stated by one EPA official, "[f]or seven years, the [RECLAIM] Program did absolutely nothing. . . . Businesses got used to cheap credits. Nobody did what they were supposed to do: responsible planning."[143] Similarly, the EPA's 2002 evaluation of RECLAIM discusses this issue:

> [w]hile long range economic planning is the intent of at least the larger sources, the market never arrived at the kind of steady state functioning that could overcome short term market dynamics and considerations. The initial overallocations and consequent deflation of credit prices undercut the market driver for many of the projected decision-making behaviors.[144]

In sum, the program did not operate in a way that forced or enabled facilities to undertake the type of short and long-term planning activities that were expected.[145]

Interviews of regulatory agency officials, industry representatives, environmental stakeholders, and allowance market brokers conducted for an EPA evaluation of the RECLAIM Program in 2002 provide a great deal of information about the extent to which and the reasons why regulated entities failed to become strategic planners and entrepreneurs.[146] These reasons include habituation to low allowance prices, inadequate information about the market and pollution control alternatives, and a lack of interest or ability in being strategic RECLAIM participants.

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of 13,703 and 9,896 tons for compliance years 2000 and 2002, respectively); *see also* RECLAIM AUDIT 2004, *supra* note 117, tbl.3-3, at 3-4 (showing emissions of 9,412 tons for compliance year 2004).

143. Gary Polakovic, *Innovative Smog Plan Makes Little Progress*, L.A. TIMES, Apr. 17, 2001.

144. EPA EVALUATION OF RECLAIM, *supra* note 122, at 58-59.

145. SCAQMD, REPORT: PUBLIC HEARING TO RATIFY FINDINGS REQUIRED BY HEALTH AND SAFETY CODE SECTION 39616(e) PERTAINING TO THE RECLAIM PROGRAM (2000), at 2-32 [hereinafter PUBLIC HEARING REPORT] ("[c]ontrol technologies have not been implemented to the extent anticipated prior to adoption of RECLAIM because many facilities found it more economically attractive to delay capital investments in control equipment by purchasing low-cost RTCs [RECLAIM Trading Credits].").

146. To complete an evaluation of RECLAIM, a research team assembled by EPA Region IX interviewed over twenty stakeholders from regulated facilities, environmental organizations, regulatory agencies, and brokerage firms. The questions the team asked each set of respondents are included as Appendix B in PUBLIC HEARINGS REPORT, *supra* note 145, at 72-81. The data collected through these interviews was made available to the author by EPA Region IX in the form of a Microsoft Access database [hereinafter EPA Evaluation Database]. Each reference to the database includes the code used by the EPA for the respondent (e.g., "IN-12," referring to "Industry Stakeholder 12") and the code used by the EPA for the question (e.g., "Market Effectiveness"). The questions and their codes can be found in EPA EVALUATION OF RECLAIM, *supra* note 120, app. B, at 73-81.

1. Habituation to Low Allowance Prices

Evidence from RECLAIM suggests that participants became habituated to low allowance prices. The over-allocation of allowances in the first five years of the Program—1994 through 1998—led to very low allowance prices.[147] During this time, NOx allowance prices averaged $275 per ton and were readily available on the market.[148] In contrast, the District had projected at the program's inception that allowance prices would average $5,723 per ton over these years.[149] In 1999, the so-called "cross-over point"—when the program cap would fall below actual historic emissions—was within sight. The 1999 NOx cap was 21,013 tons, actual emissions were 20,775 tons, and the market price for NOx allowances rose to $1,827 per ton.[150]

The low allowance prices in the first five years of the program led facilities to decide not to install emission reduction technologies.[151] Even by the year 2000, when the the NOx cap had declined to 17,197 tons,[152] relatively few RECLAIM facilities had proposed emission reduction projects. In 2001, the District reported that sixty-six projects had been proposed that were estimated to result in emissions reductions of 1,100 tons and 3,880 tons for 2001 and 2002, respectively.[153] In contrast, meeting the annual caps for 2001 and 2002 would require reductions of 4,798 and 6,447 tons of NOx, respectively.[154] As stated by the District in its 1999 Program Audit,

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147. *See* SCAQMD, PROPOSED AMENDMENTS TO REGULATION XX—REGIONAL CLEAN AIR INCENTIVES MARKET (RECLAIM) (Jan. 7, 2005), at 2 (stating that "the program was initially over allocated, which led to an under-utilization of available, cost-effective technologies").

148. For the actual prices of allowances, see RECLAIM AUDIT 1995, *supra* note 119; RECLAIM AUDIT 1996, *supra* note 116; SCAQMD, ANNUAL RECLAIM AUDIT REPORT FOR THE 1997 COMPLIANCE YEAR 2 (1999) [hereinafter RECLAIM AUDIT 1997]; SCAQMD, ANNUAL RECLAIM AUDIT REPORT FOR THE 1998 COMPLIANCE YEAR 2 (2000) [hereinafter, RECLAIM AUDIT 1998]. On the projected prices of allowances, see SCAQMD, RECLAIM VOLUME I: DEVELOPMENT REPORT AND RULES 6-10 (1993) [hereinafter RECLAIM VOLUME I].

149. *See* SCAQMD, *supra* note 137, tbl.6-2, at p. 6-10 (table entitled "Average RTC Price for SOx and NOx").

150. RECLAIM AUDIT 1999, *supra* note 123, at F-18.

151. Before the first announcement of RTC prices in 1994, nine selective catalytic recovery (SCR) units that would have significantly reduced NOx emissions had been scheduled for installation in RECLAIM facilities. Within a year, all were cancelled. CLEAN AIR ACTION CORP., U.S. EXPERIENCE WITH EMISSIONS TRADING 49 (Jan. 22, 2002).

152. RECLAIM AUDIT 2000, *supra* note 123, at F-16 to F-18.

153. WHITE PAPER, *supra* note 131, at 26.

154. Numbers were calculated by comparing year 2000 reported emissions of 20,491 tons with the RECLAIM caps for years 2001 (15,693 tons) and 2002 (14,044 tons). *See* RECLAIM AUDIT 2004, *supra* note 117, tbl.3-1, at 3-3 for data.

> [u]nfortunately, even though AQMD has published figures [showing the prediction of the cross-over point] at least once each year starting in January 1996; the majority of RECLAIM facilities have relied on purchasing inexpensive RTCs [allowances] to bring their RTC holdings up to the level of their emissions rather than reducing their emissions to the level of their RTC holdings by making capital expenditures on emissions controls.[155]

As noted above, the EPA Evaluation concluded that the 2000 price spike was partially the product of the lack of pollution control prior to 2000.[156]

Interview responses of industry representatives and brokers help explain why RECLAIM facilities became habituated to low allowance prices. As stated by one broker, "[t]he initial allocations . . . were so high that many facilities grew accustomed to a constant supply of cheap credits and did not even contemplate installing controls for years."[157] An industry representative explained that

> [g]iven the history of low RTC prices, many companies were lulled into believing that the long-term RTC prices would continue to stay low. The RTC price spike happened so quickly that companies did not predict it and they had not considered installing pollution control technology. Companies also believed that future credits would be available.[158]

This view is similarly reflected in the comment of an environmental stakeholder: "Some companies were unsophisticated in forecasting RTC prices and believed that the low prices would continue. The companies were not smart about their compliance decisions. In 1999, the credit prices were so cheap . . . and the companies did not realize that the prices could increase so quickly."[159]

In effect, despite information that was available to suggest that allowance prices would rise, RECLAIM participants behaved as if prices would remain low. They do not appear to have used available information to forecast price increases or to incorporate such forecasts into their

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155. RECLAIM AUDIT 1999, *supra* note 125, at F-18. Such figures also are included in each Annual Audit Report: RECLAIM AUDIT 1996, *supra* note 116; RECLAIM AUDIT 1997, *supra* note 148; RECLAIM AUDIT 1998, *supra* note 148; RECLAIM AUDIT 1999, *supra* note 125; THREE-YEAR AUDIT, *supra* note 113, tbl.3-1, at 3-3; REVIEW OF RECLAIM FINDINGS (Oct. 2000); and WHITE PAPER, *supra* note 131.

156. *See supra* note 133 and accompanying text; *see also* EPA CLEAN AIR MARKETS DIVISION, AN OVERVIEW OF THE REGIONAL CLEAN AIR INCENTIVES MARKET (RECLAIM) (Aug. 14, 2006) [hereinafter EPA OVERVIEW OF RECLAIM], http://www.epa.gov/airmarkets/resource/docs/reclaimoverview.pdf ("It is generally accepted that the primary cause of the NOx RTC price spike was the state's energy supply situation, but the lack of new pollution control investments under RECLAIM up to this point . . . also likely had a role.").

157. EPA Evaluation Database, *supra* note 146, at respondent BR-17, code Market Effectiveness.

158. *Id.* at respondent IN-3, code Decision-Making Process.

159. *Id.* at respondent ENV-12, code Effectiveness.

decisions about compliance options. Unlike participants in the Acid Rain Program, RECLAIM participants do not appear to have perceived the possibility of gaining a competitive edge by utilizing such forecasts.

2. Inadequate Information for Planning

Several RECLAIM participants indicated that the information that they had access to regarding the RECLAIM market and available control technologies was insufficient for planning purposes. As expressed by one broker,

> RECLAIM would work better if there were better market signals. Because the market is affected by regulatory policy, the supply of and demand for credits are not as predictable as is the case for other market commodities. The higher degree of uncertainty makes forecasting more difficult. . . . [T]here wasn't enough information or signals on when [the cross-over] point would occur so long-term planning wasn't really possible.[160]

An industry stakeholder commented that a sustainable, predictable market for allowances never developed and that RECLAIM was more like "a game with rules" than an operational market.[161]

Some companies, particularly small ones, seemed to have insufficient information about available and cost-effective pollution control technologies. As stated by one industry stakeholder,

> when CAC [Command and Control] regulations were stopped, companies lost the CAC compass and so they did not know what equipment was available to be installed . . . . Companies had an easier time under CAC because they knew that by a given year they had to install a certain type of equipment. It is easier to be told what to install than to have to figure emissions levels out and decide whether to install technology or buy credits.[162]

Another industry participant explained,

> [t]he District is making progress in making the right information available to the regulated community. Private brokers also provide supplemental information. Smaller companies might benefit from more information about available types of control technologies. The District should ensure that information on control technologies is available to those companies that need it.[163]

In the Acid Rain Program, participants seemed to have the information that they needed to plan for compliance. In contrast, RECLAIM participants perceived a lack of information both about the performance of

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160. *Id.* at respondent BR-15, code Market Effectiveness.
161. *Id.* at respondent IN-3, code Decision-Making Process.
162. *Id.*
163. *Id.* at respondent IN-2, code Decision-Making Process.

the market itself and about pollution control technologies. Part of the difference may lie in the size and sophistication of the participants in the Acid Rain Program. Calculated on the basis of average annual emissions, RECLAIM facilities are substantially smaller than Acid Rain Program facilities. RECLAIM included all facilities in the region that emitted at least four tons of NOx or SO_2 annually. The average facility included in RECLAIM emitted seventy-seven tons of NOx and 207 tons of SO_2.[164] In Phase I of the Acid Rain Program, the average participant had annual emissions of 20,000 tons of SO_2, and the smallest participant had annual emissions of sixty-three tons.[165] Even in Phase II of the Acid Rain Program, when smaller facilities were added, the average facility in the Acid Rain Program emitted about 12,000 tons of SO_2 annually.[166] Only about 15% of RECLAIM participants are considered under the Program to be "major" sources that are required to monitor their emissions using CEMS.[167]

Like RECLAIM, most future cap and trade programs can be expected to have a universe of sources that is more heterogeneous in terms of industry affiliation and facility size than the Acid Rain Program. Participants in these programs may be more likely to require information beyond knowledge of their allocations and price signals to adequately plan for compliance.

3. Lack of Interest or Ability in Strategic Planning

The failure of RECLAIM participants to become strategic planners also may reflect a corresponding lack of ability or interest. Small and medium-sized companies may lack the resources to dedicate to such planning. As stated by one industry representative,

> [i]n general, long-range planning is not done by most medium and small companies. When these companies usually conduct long-range planning, it is in regard to market share, not environmental compliance, and the time frame is only several years into the future. Most small and medium size companies do not plan for the long term, they are more concerned about selling products and making money.[168]

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164. The average emissions of RECLAIM facilities was calculated based on 1995 program data contained in THREE-YEAR AUDIT, *supra* note 115, at 1-3, 3-3 (stating that the program included 345 NOx facilities and 39 SO_2 facilities at the end of the 1994 compliance year and that total 1995 emissions were 25,764 tons of NOx and 8,064 tons of SO_2).

165. Schwarze & Zapfel, *supra* note 28, at 285.

166. The average emissions of Acid Rain Program facilities at the beginning of Phase II in 2000 was calculated by dividing the 2000 emissions of 11.2 million tons by a count of approximately 920 separate facilities included in the program. *See* EPA, ACID RAIN PROGRAM ANNUAL PROGRESS REPORT 6 & app. A (2000), http://www.epa.gov/airmarkets/progress/docs/2000report.pdf (stating total emissions and listing all participating facilities).

167. *See infra* note 171 and accompanying text.

168. EPA Evaluation Database, *supra* note 146, at respondent IN-3, code Decision-

While larger companies may have the resources to plan strategically, they may not have the interest. The focus of their attention is on the product market in which they participate. As a result, environmental compliance may remain a regulatory requirement rather than an opportunity for entrepreneurial spirit.[169] As stated by one industry representative, "[n]o decision-makers at large companies, such as utilities and aerospace, conducted long range planning based on environmental concerns. . . . Very few companies took a pro-active approach and voluntarily reduced emissions."[170] Another industry representative explained that his company decided "that they won't generate credits for sale as a means of profit because this is not their primary business. Their main goal is to minimize cost and disruption to business."[171] Yet another industry representative stated that a company he worked with essentially ignored the RECLAIM Program and chose to comply in the manner that would have been required under a command and control regime. The company was afraid that if the RECLAIM Program collapsed then they would have to install pollution control devices under traditional command and control regulations. As a result, the company forecasted the production increases they might have in the future and also estimated the company's future emissions. Based on these estimates, they made decisions on equipment installation and retirement as if under predicted [command and control] regulations.[172]

The evidence thus suggests that many RECLAIM facilities may not have had the interest or the ability to become strategic planners or entrepreneurs in their approach to compliance. Some appear not to have had sufficient confidence in the viability of the program or in the potential value of their future allowances. Others, particularly smaller companies, do not appear to have conducted strategic economic planning that could be integrated with environmental planning in the manner envisioned by commentators on the Acid Rain Program.

C. The Agency Was Not an Effective Banker

In several important ways, the South Coast Air District did not effectively play the role of banker in the RECLAIM Program. As a banker, the regulatory agency must efficiently collect and verify emissions and allowance trading data. The agency also must assess compliance and

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Making Process.

169. *See generally* Malloy, *supra* note 50 (explaining reasons why firms, despite market incentives, remain inefficient).

170. EPA Evaluation Database, *supra* note 146, at respondent IN-3, code Decision-Making Process.

171. *Id.* at respondent IN-5, code Decision-Making Process.

172. *Id.* at respondent IN-13, code Decision-Making Process.

impose sanctions in a timely and objective manner. Finally, the agency should be able to perform these tasks with fewer resources than would be required under traditional regulation. Problems experienced in these areas are discussed below. As discussed, the heterogeneity of the RECLAIM universe significantly complicated the agency's accounting tasks.

1. Problems in Tracking Program Data

Like the Acid Rain Program, the design of RECLAIM emphasized the collection and verification of emissions and allowance trading data. Compliance determinations in RECLAIM, however, have not been as straightforward. Because RECLAIM included many different types and sizes of industries, the data required to be submitted by participants varied widely. Efforts to automate data submission and verification were hindered by the lack of uniformity.[173] Moreover, RECLAIM rules and agency practices limited the agency's ability to accurately track and publicize trading data.

RECLAIM established stringent technology requirements for monitoring and reporting emissions.[174] However, monitoring requirements differ among types of sources. Major sources of both NOx and SO_2, including about 15% of all sources regulated under RECLAIM that account for 84% of total NOx emissions and 98% of total SO_2 emissions, are required to use CEMS.[175] Other sources must calculate emissions by measuring fuel input and multiplying it by an appropriate emission rate. Major sources were required to use a Remote Terminal Unit (RTU) to telecommunicate data to the District, while other sources could opt to compile the data manually and transmit it via modem.[176] RECLAIM's missing data provisions were modeled after, and are very similar to, the Acid Rain Program's missing data provisions.[177]

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173. Interview with Danny Luong, Air Quality Analysis and Compliance Supervisor, SCAQMD (June 27, 2006).

174. *See* Stranlund et al., *supra* note 5, at 349-50 (explaining specific reporting requirements that differ among types of sources); *see also* Continuous Emission Monitoring, 40 C.F.R. § 75 (2006) (detailing the emissions monitoring requirements).

175. THREE-YEAR AUDIT, *supra* note 115, tbl.5-1, at 5-9. A major source includes any source that emits ten or more tons of NOx per year. For the full definition of a major source, see SCAQMD, RULE 2012 PROTOCOL FOR MONITORING, REPORTING, AND RECORDKEEPING FOR OXIDES OF NITROGEN (NOX) EMISSIONS, app. A, tbl.1-A, http://www.aqmd.gov/rules/reg/reg20/r2012_chap_1.pdf (listing ten criteria for determining major source category). Note that a single facility may have more than one "source." In 1996, for example, there were 329 RECLAIM facilities and over 3,995 sources. THREE-YEAR AUDIT, *supra* note 115, tbl.1-1, at 1-3.

176. Stranlund et al., *supra* note 5, at 349.

177. *See* SCAQMD, RULE 2011 PROTOCOL FOR MAJOR SOURCES—CONTINUOUS EMISSION MONITORING SYSTEM, 2011A-2-29 through 2011A-2-36 (Jan. 7, 2005), *available at* http://www.aqmd.gov/rules/reg/reg20/r2011_chap_2.pdf. (detailing the procedures that must be used to identify alternative data when emissions data has not been recorded).

RECLAIM's emissions monitoring and verification processes did not achieve the level of automation and efficiency of the Acid Rain Program. After the period of reconciliation, each RECLAIM facility is required to submit an Annual Permit Emissions Program Report certifying its emissions for the preceding compliance year.[178] The District then conducts an audit of each facility, which includes field inspections to check equipment, monitoring devices, and operational records, and verifies reported emissions data.[179] When the compliance audit reveals that a facility has exceeded its allowance holdings, the facility has an opportunity to review the audit and to "present additional data to further refine the audit results."[180] The RECLAIM compliance process thus contains more opportunities for delay and negotiation than the Acid Rain Program compliance process.[181]

A definitive compliance determination can be made only after the audit, which often takes up to a year after the end of the compliance year to be finalized. In a 2000 evaluation of the RECLAIM Program, the California Air Resources Board (CARB) recommended that the District complete audits in a more timely fashion.[182] CARB found that out of a set of audits performed in April 1998, only half had final audit reports by August 1998.[183] According to the District, audits generally are completed within nine months of the end of the reconciliation period.[184] The District explains that the audit process cannot begin until forty-five to ninety days after the end of the reconciliation period to allow time for data entry of the final reported emissions and for preparation of audit forms; the preparation of the final audit reports requires additional time.[185] As noted in an EPA evaluation, while typical audits under command and control regulations took one day to conduct, audits under RECLAIM take at least one week, and can take longer if there are disputes with the facility.[186]

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178. SCAQMD, ANNUAL RECLAIM AUDIT REPORT FOR 2001 COMPLIANCE YEAR F-38 (Feb. 28, 2003) [hereinafter RECLAIM AUDIT 2001-B]. Throughout the compliance period, emissions are reported on a daily, monthly, or quarterly basis depending on the size of the source.

179. THREE-YEAR AUDIT, *supra* note 115, at 5-3; *see also* Stranlund et al., *supra* note 5, at 349 (stating that comprehensive audits involving the evaluation of emissions reporting data for accuracy and noncompliance and the inspection of equipment, records, and monitoring devices are conducted at the end of the compliance year).

180. THREE-YEAR AUDIT, *supra* note 115, at 5-3.

181. For information on audits in the Acid Rain Program, see *supra* notes 104-07.

182. CALIFORNIA AIR RESOURCES BOARD (CARB), AN EVALUATION OF THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT'S AIR POLLUTION CONTROL PROGRAM V-8 (2000) [hereinafter CARB EVALUATION OF RECLAIM].

183. *Id.*

184. *Id.* app. A, at 6. *But see* EPA EVALUATION OF RECLAIM, *supra* note 122, at 31-32 (stating that "it can take several years for SCAQMD to audit facilities" and that "SCAQMD fell several years behind in their auditing in the early stages of RECLAIM").

185. CARB EVALUATION OF RECLAIM, *supra* note 182, app. A, at 6.

186. EPA EVALUATION OF RECLAIM, *supra* note 122, at 31.

Because RECLAIM requires that facilities that exceed their caps purchase current year allowances in an amount equal to the excess, the delay in compliance determinations induces participants to withhold current year allowances from the market.[187] One RECLAIM broker estimated that 80% to 90% of companies, especially large companies, hold onto excess credits instead of selling them.[188] According to the District, additional efforts were made to automate and expedite the audit process in the latter half of the Program's life.[189]

In comparison to the Acid Rain Program, the tracking and publication of trades in RECLAIM were not as automated and transparent. As noted by the EPA, "for a cap and trade system that relies on trades recorded in near real time, it is necessary for the regulating authority to provide data on allowance availability and individual accounts."[190] For the Acid Rain Program, the EPA developed an Allowance Tracking System that keeps track of and provides detailed information about allowance transfers reported to EPA.[191] By 1997, two years after the beginning of the Program, the EPA was processing and posting almost 90% of the transactions within twenty-four hours; by 2004, 80% of transfers were entered over the Internet by the sources themselves.[192]

The RECLAIM rules required facilities that trade allowances to report the price, date, and rationale for the transaction.[193] The District, however, did not require immediate recording of trades, and some facilities waited several years before conveying the information.[194] The District compiled the transaction information it received into a thirteen-week rolling average.[195] In interviews conducted for the EPA's 2002 evaluation of RECLAIM, company representatives complained that the regulatory agency did not make information on allowance trades available quickly enough. One particular recommendation was that

187. *Id.* at 32; EPA Evaluation Database, *supra* note 146, at respondent IN-13, code Trade Costs.

188. EPA Evaluation Database, *supra* note 146, at respondent BR-19, code Market Effectiveness.

189. CARB EVALUATION OF RECLAIM, *supra* note 182, app. A, at 6; *see also* EPA EVALUATION OF RECLAIM, *supra* note 122, app. F, attachment A, at 8 (highlighting the significant improvements made to the automation system to make trading information more transparent and facilitate data transmission status checks).

190. TOOLS OF THE TRADE, *supra* note 21, at 5-2.

191. Notably, companies are only required to report allowance transfers if they will be used for compliance. Pérez Henríquez, *supra* note 76, at 10-11. There are also various companies in the private sector that track and disseminate Acid Rain Program allowance price information. *Id.*

192. *Id.*

193. Anne Egelston & Maurie J. Cohen, *California RECLAIM's Market Failure: Lessons for the Kyoto Protocol*, 4 CLIMATE POL. 427, 433 (2005).

194. *Id.* (noting that this program design feature allowed facilities to withhold potentially valuable information regarding their emissions from others).

195. *Id.*

> [t]he District should also work to limit the time delay between when they receive notice of transactions and when they made the trade information available. Price signals are delayed, which makes decision-making more difficult. Price information on trades should be conveyed within a week to give accurate information about prices and total supply and demand.[196]

Another states, "public information on trades should be reported and disseminated more quickly. The District is not equipped to manage a market mechanism. There is a considerable delay between when trades are reported to the District and when information on price and the quantity of credits traded is available."[197] An allowance broker bemoaned the fact that the District's electronic bulletin board was difficult to access because it was a dial-up service and that postings were often two to three months old.[198] Notably, the May 2001 amendments to RECLAIM addressed the issue of increasing allowance trading information availability and accuracy. The amendments required trades to be reported jointly by the buyer and seller within five days of the trading transaction, and the District committed to providing timely electronic information on trading.[199]

The District's efforts to efficiently track emissions and allowance data were frustrated by the unexpected difficulty of automating the data collection, compilation, and analysis processes. According to a District official, the difficulty in tracking emissions efficiently primarily resulted from the heterogeneity of the RECLAIM universe of sources.[200] With so many different sizes and types of sources, emissions data collection was not uniform or consistent among sources. Allowance trading was also more difficult to track than expected as the agency had to rely on industries and brokers for accurate and timely reports of trades.[201] RECLAIM's experience points to both the importance of automating data management and the difficulties in doing so.

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196. EPA Evaluation Database, *supra* note 146, at respondent IN-1, code Changes to Trading.
197. *Id.* at respondent IN-4, code Cost Effective Modifications.
198. *Id.* at respondent BR-17, code Recommendations.
199. Currently, the District posts a spreadsheet covering the prior three months with trading information updated to the previous business day. *See, e.g.*, RECLAIM Trading Credits (RTCs) Trade Information, http://www.aqmd.gov/reclaim/rtc_main.html (last visited Mar. 26, 2007).
200. Interview with Danny Luong, Air Quality Analysis and Compliance Supervisor, SCAQMD (June 27, 2006).
201. *Id.*; *see also* RECLAIM AUDIT 2001-B, *supra* note 178, at F-19 (describing Board rules requiring participants to voluntarily report current and future trades within five days of agreement).

2. Absence of Automatic Sanctions

Unlike the Acid Rain Program, RECLAIM rules did not provide for automatic sanctions for noncompliance.[202] Commentators have identified the Acid Rain Program's automatic sanctions as one of the main reasons for its high compliance rates.[203] Some of the noncompliance in RECLAIM is likely attributable to the absence of automatic sanctions.

One of the great virtues of cap and trade regulation is the possibility of full enforcement. With full enforcement, the agency identifies and sanctions every regulated entity that is out of compliance in a consistent manner. In traditional command and control regulation, full enforcement is generally an unattainable ideal. The scarcity of agency resources almost always limits the detection rate of violations.[204] Where the agency detects violations, the large degree of administrative discretion inherent in enforcement leads to variations in compliance determinations and sanctions.[205] However, in a cap and trade program, where compliance determinations emerge from the objective comparison of continuously-measured emissions to allowance holdings, full enforcement should be achievable.

In RECLAIM, the exercise of administrative discretion in both the emissions verification and sanctioning processes has hindered full enforcement. As noted above, RECLAIM allows facilities to present additional data to refine the audit results when an audit reveals that a facility has emissions in excess of its allowance holdings.[206] In an evaluation of RECLAIM, CARB found that the agency gave insufficient weight to missing data procedures during case settlement.[207] Although CARB found that District staff correctly calculated excess emissions using the missing data procedures, the District also provided the facility the opportunity to demonstrate that its actual emissions were lower through

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202. *See supra* notes 92-93 and accompanying text.

203. *Cf.* Stranlund et al., *supra* note 82, at 182 (stating that policy analysts attribute two elements of the Acid Rain Program to have led to almost 100% compliance—namely, automatic penalties that are higher than market price, and CEMS that produce quarterly reports).

204. *See, e.g.*, Robert A. Kagan, *On Regulatory Inspectorates and Police*, in ENFORCING REGULATION at 39-40 (Keith Hawkins & John M. Thomas eds., 1984) (noting that regulatory inspectors can only visit potentially dangerous places like mines, factories, and chemical dumps a few times a year, even though dangers may be present twenty-four hours a day on most days of the year).

205. *See id.* at 41-42 (providing the example that a more detached higher agency official may be more lenient than a field-level enforcer).

206. *See supra* note 180 and accompanying text.

207. *See* CARB EVALUATION OF RECLAIM, *supra* note 182, at V-3 (explaining that the procedures intentionally overstate actual emissions so as not to create an incentive to disable the recordkeeping systems).

other means during the case settlement process.[208] Because the punitive effects of the missing data provisions are not as likely to be felt under these circumstances, this lowers the incentives to avoid the application of missing data provisions.

Once the regulatory agency establishes an exceedence, the agency has a considerable degree of discretion in determining the sanction. The RECLAIM rules provide that any emissions "in excess of the allocation shall constitute a single, separate violation for each day of the compliance year."[209] Companies, however, have an opportunity to demonstrate that they were in violation for fewer days.[210] Once the agency agrees upon the number of days of violation, the agency may apply a wide range of monetary penalties. State law provides for civil penalties of up to $75,000 per day of violation, but the District must consider a variety of mitigating factors including the extent of harm caused by the violation, the nature and persistence of the violation, the unproven or innovative nature of the control equipment, any action taken by the defendant to mitigate the violation, and the financial burden to the defendant.[211] As a result, regulators have considerable discretion in how they calculate both the number of days of violation and the applicable sanction.

The case-by-case nature of RECLAIM penalties makes the consequences of noncompliance less certain for RECLAIM facilities. As explained by an economist, while it is difficult to judge the deterrence value of the RECLAIM sanctions, it is clear that they provide less of a deterrent against violations than if they were fixed and automatic. [212] In its 2002 evaluation of RECLAIM, the EPA opined that the District's approach to enforcement failed to have an adequate deterrent effect to "drive either the projected or needed behavior" in terms of emissions reductions and compliance.[213] Also, CARB's evaluation found the time between the issuance of a notice of violation and case settlement to be "excessive," possibly because of the negotiated nature of the sanctioning process.[214]

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208. *See id.* at V-4 (recommending that the settlements give greater weight to the emissions data from the missing data procedures to preserve the integrity of the system).

209. RECLAIM Rule 2004(d)(1).

210. *See* RECLAIM Rule 2004(d)(2) (placing the burden on the Facility Permit holder to establish the lesser period).

211. *See* California Health and Safety Code §§ 42402.3, 42403 (1954).

212. *See* Stranlund et al., *supra* note 5, at 350-51 (reasoning that the facilities will base their expectations on the penalty the agency would be likely to apply rather than he maximum penalty available).

213. EPA EVALUATION OF RECLAIM, *supra* note 122, at 33; *see also* Stranlund et al., *supra* note 5, at 350 (finding that the agency imposes RECLAIM penalties on a case-by-case basis and that "[b]ecause of the resulting uncertainty that facilities must have about the consequences they will face if they are noncompliant, it is difficult to judge the deterrence value of the RECLAIM sanctions").

214. CARB EVALUATION OF RECLAIM, *supra* note 182, at V-3 (recommending an average settlement time of ninety days instead of the current average of twelve months).

RECLAIM administrators defend the program's approach to sanctions. The District asserts that an automatic nondiscretionary penalty for cap violations in RECLAIM is inappropriate because of wide variations in the size and complexity of facilities and the multitude of reasons that cap violations may occur.[215] The fact that both RECLAIM Program designers and District staff support the exercise of discretion in imposing sanctions suggests that automatic sanctions may not be appropriate for all cap and trade programs.

3. High Administrative Costs

Despite the widespread impression that emissions trading programs require fewer administrative resources to operate and enforce than traditional regulatory programs, anecdotal evidence from RECLAIM suggests otherwise.[216] As one EPA official explained, "RECLAIM is incredibly resource intensive for the regulatory agencies. Eleven percent of the stationary source NOx inventory is regulated under RECLAIM and the program was supposed to be about five percent of the District's budget. RECLAIM is far more resource intensive than CAC regulations by orders of magnitude."[217] Another official stated, "The amount of resources needed to monitor RECLAIM was greatly underestimated. It takes more resources to monitor the cap and trade program than CAC. More resources are needed, in part because additional information about a facility is needed to determine whether the facility is in compliance with the cap."[218] According to both officials, the District did not accurately forecast the resources it would need to implement the RECLAIM Program.

The agency expected that RECLAIM would be able to reduce costs by automating the tracking and verification of emissions to a greater degree. As in the Acid Rain Program, RECLAIM information systems were supposed to provide automatic and instantaneous information about the compliance status of facilities.[219] Instead, complex annual audits of each RECLAIM facility remained necessary to ascertain compliance. Moreover, given the significant differences between RECLAIM inspections and inspections conducted under command and control regulation, District inspectors had to learn an "entirely new set of compliance protocols."[220]

215. *See id.*, District Response at 5.
216. The author is pursuing data on the actual costs of running RECLAIM.
217. EPA Evaluation Database, *supra* note 146, at respondent REG-21, code Effectiveness.
218. *Id.* at respondent REG-20, code Oversight.
219. *See id.* at respondent REG-21, code Forecasting Resource (stating that the computer system was a "dismal failure because the District overestimated [its] technical ability").
220. EPA EVALUATION OF RECLAIM, *supra* note 122, at 31.

Ascertaining compliance remained very labor-intensive and the agency did not realize the anticipated reductions in the costs of enforcement.[221] In this regard, a significant decline in District staffing levels that occurred in the 1990s may have exacerbated RECLAIM's problems. The number of full-time employees at the District declined from almost 1,200 in 1993 to about 700 in 1998.[222] Similarly, the number of inspectors decreased from 140 in 1993 to about 70 in 1997.[223]

The suggestion that cap and trade programs may require greater administrative resources to administer than traditional regulation raises the question of how the agency should pay for these expenses. Early calls for the implementation of emissions trading systems suggested that agencies would be able to raise "substantial sums of money" by obliging polluters to buy their marketable permits at a government-run auction.[224] However, neither the Acid Rain Program nor RECLAIM relied on auctions in the manner envisioned. This leaves open the question of how agencies should cover these costs, particularly when they are higher than anticipated.[225]

III. AGENCY ROLES IN CAP AND TRADE: BEYOND PLAYING BANKER

In the idealized model of cap and trade, regulators no longer play a direct role in influencing how companies comply. Rather, in the ideal situation, the less company compliance decisions involve the regulator, the more efficiently the program works. However, this ideal model may not be appropriate for all cap and trade programs. In RECLAIM, the evidence suggests that the program required the regulatory agency not only to be a more effective banker, but also to go beyond playing banker. This section discusses three other roles that the RECLAIM Program required the South Coast Air District to play—namely, market maker, technical consultant, and contingency planner. Future cap and trade programs that share characteristics with RECLAIM, such as source heterogeneity and over allocation of allowances, also may require the regulatory agency to play these roles.

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221. *See id.* at 31 (explaining that the monitoring systems did not reduce the costs of enforcement because of "problems in the automation of [SCAQMD's] information system").
222. *See* CARB EVALUATION OF RECLAIM, *supra* note 182, at vi.
223. *See id.*
224. Ackerman & Stewart, *supra* note 40, at 180-81.
225. *See, e.g.*, Stranlund et al., *supra* note 5, at 345, 353 (noting that RECLAIM provides for "emissions fees" assessed on a per-unit of emissions basis to help fund program administration, but criticizing these fees as an incentive for noncompliance).

A. Market Maker

In the idealized model of cap and trade programs, participants have sufficient knowledge about the allowance market to make strategic decisions about how to participate in it. In the RECLAIM Program, however, many industry stakeholders complained about a lack of information about market performance and compliance options. They called on the agency to play a greater role in "market making" through analyzing and disseminating market information, as well as possibly playing a lead role in coordinating the market to help it develop and operate.

Industry stakeholders complained that the District did not provide sufficient information to allow forecasts about the market. As one explained,

> [T]he information base was not adequate for making long-range planning decisions because all emissions are aggregated . . . . The District had a hands-off approach, "let the market work." . . . As a result, industry was not well informed of the cross-over period and could not see the price spike coming. Businesses are not trained to think without sufficient information . . . .[226]

A broker similarly stated,

> RECLAIM's effectiveness will be determined by how much lead time and planning the District invests . . . . There needs to be more analysis of the supply/demand balance so that the District can account and plan for growth, which will significantly impact the demand for credits . . . . Companies cannot conduct this type of research, but they can use this information to make decisions on whether to install control technology or buy credits based on the program's anticipated growth.[227]

EPA's evaluation recommended that the District "investigate ways to provide information that would facilitate long-range planning and decision-making."[228] As asserted by an industry stakeholder, "To improve the program, the District should play a more active role as a market maker. The District should send market signals to companies to help companies figure out where the market is heading." This stakeholder suggested that the District publicize the number of companies that apply to install pollution control technologies so that other companies can anticipate future supply and demand.[229] According to a RECLAIM administrator, the

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226. EPA Evaluation Database, *supra* note 146, at respondent IN-3, code Decision-Making Process.
227. *Id.* at respondent BR-19, code Recommendations.
228. EPA EVALUATION OF RECLAIM, *supra* note 122, at 22.
229. *See* EPA Evaluation Database, *supra* note 146, at respondent IN-3, code Decision-Making Process.

District has begun to provide forecasts of credit prices to companies for them to use in their planning processes.[230]

Some industry stakeholders further called on the District to institute a centralized market for allowance trading. As stated by one such stakeholder, "Developing a centralized market would allow buyers and sellers to see the total demand and supply for credits and could facilitate more efficient trades."[231] RECLAIM, like the Acid Rain Program, was designed as an "over the counter" market in which buyers and sellers negotiate and sign a contract to effectuate an exchange.[232] Advocates of a centralized market called for the creation of an exchange in which trading would be undertaken in a more structured way, including standardized contract terms.[233] With an exchange, "all trading would take place at a single point through an electronic system for matching buyers and sellers and determining a clearing price."[234] An exchange could be operated either by the agency itself or by a third party.[235]

The 2001 Amendments to RECLAIM included a resolution that the District would evaluate the merits of a centralized market. In a report released one year later, the District recommended maintaining the existing market.[236] The report found that considerable time and money resources would be required of the agency to develop a centralized market. Rule changes were deemed necessary to require all trades to go through a single system, and the costs to develop trading software were predicted to be over $700,000.[237] If a third party operated the exchange, "close oversight" by the District would be required.[238] The report concluded that while a centralized market could have some benefits, "significant obstacles" existed to changing the existing structure.[239]

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230. *See* Interview with Danny Luong, Air Quality Analysis and Compliance Supervisor, SCAQMD (June 27, 2006).

231. EPA Evaluation Database, *supra* note 146, at respondent IN-1, code Changes to Trading.

232. KAREN R. POLENSKE & ALI SHIRVANI-MAHDAVI, REVIEW OF AN EMISSIONS PERMIT EXCHANGE AND THE CHARACTERISTICS OF THE RECLAIM NOX MARKET IN LOS ANGELES 6 (2001) (prepared for SCAQMD).

233. *Id.*

234. EPA Overview of RECLAIM, *supra* note 156, at 10.

235. *See* SCAQMD, REPORT: MERITS OF A CENTRALIZED MARKET FOR RECLAIM (May 3, 2002) [hereinafter MERITS OF A CENTRALIZED MARKET] (considering both options).

236. *Id.*

237. *Id.* at ES-3.

238. *Id.*; *see, e.g.*, Press Release, U.S. Department of Justice, Broker of Air Pollution Credits Pleads Guilty To Wire Fraud Scheme in Federal Court (Apr. 26, 2005), *available at* http://www.usdoj.gov/usao/cac/pr2005/063.html (reporting allegations of illegal activity by several RECLAIM brokers). In March 2002, the District cited Anne Sholtz, one of the architects of RECLAIM who later founded a brokerage firm, for alleged violations of the agency's emissions credit trading regulations. In 2005, Sholtz pled guilty to wire fraud in a related federal investigation.

239. *See* SCAQMD, MERITS OF A CENTRALIZED MARKET, *supra* note 235, at 9 (citing significant costs and increased oversight as some of the difficulties).

Playing the role of market maker involves going beyond tracking emissions and allowance data. It means that the regulatory agency must play a more active role in the market that would include analyzing market performance and other available information to forecast market trends. It also may mean that the agency must play a central role in setting up and possibly operating a market exchange system. The call for agencies to serve as a market maker contradicts the basic assumption in cap and trade programs that private actors are in the best position to forecast market behavior and supply the market infrastructure required for efficient trading.

B. Technical Consultant

Another type of information that the South Coast Air District ultimately was called on to provide concerned the availability and cost-effectiveness of pollution control technologies. Apparently, the RECLAIM Program incorporated companies that were not prepared to engage in the type of collection and analysis of information regarding compliance options that trading envisions. While it is often assumed that the industry has superior information to regulatory agencies, this may not be true with respect to smaller sources that are incapable of planning or with larger sources that are simply disinterested in planning. While the literature on cap and trade sets forth a "hands-off" role for regulatory agencies with respect to compliance decisions, the RECLAIM experience suggests the need for a more hands-on approach.[240]

As RECLAIM was experiencing problems in 2000, the agency conducted a technical report of the cost of installing air pollution control equipment.[241] It found that the RECLAIM emissions reduction goals were attainable using existing technologies and that such reductions, "could be realized at a very reasonable and bearable cost" to the sources.[242] The study yielded an overall cost-effectiveness for the reduction of NOx emissions of $3,300 per ton, significantly lower than the over $45,000 per ton average price of NOx allowances in 2000. After the study, the agency conducted outreach to disseminate the information by mailing it to each RECLAIM facility and conducting technology meetings in each county to inform participants about available control options.[243]

If this information had been available and distributed in prior years along with forecasts of allowance pricing under alternative economic and behavioral scenarios, RECLAIM companies may have made different

240. *Cf.* Kruger, *supra* note 4, at 10 (stating that both government and industry officials have noted the importance of a "hands off" approach to the market by government officials).
241. SCAQMD, REVIEW OF RECLAIM FINDINGS, *supra* note 155, at 2-30 to 2-39.
242. *Id.* at 2-39.
243. PROPOSAL TO ADOPT CHANGES, *supra* note 131.

compliance choices. Indeed, one of the changes adopted by the District in the May 2001 amendments to RECLAIM was the initiation of an outreach program to encourage installation of pollution control equipment. The District recognized at this point that "facility operators may not be fully aware of all the opportunities for further emissions reductions" and "cost-effective control might be missed" because of lack of knowledge.[244] It was determined that the District should "actively contact operators of facilities that have been identified . . . as potential sources for emissions reductions."[245]

A hands-on approach could incorporate the use of compliance plans, a regulatory tool commonly used in command and control regulation. Compliance plans set forth a timetable for the installation of control technology and other measures to reduce emissions. Under command and control regulations, they were used to bringing a noncompliant source into compliance within a predetermined period of time. Cap and trade programs could require that each source draft a compliance plan at the outset of the program and revise it periodically. Agency officials would assist sources in the formulation of these compliance plans to ensure that sources consider both the installation of control technologies as well as buying allowances to attain compliance.

The 2001 reforms to RECLAIM instituted the use of compliance plans as both a substitute for—and supplement to—allowance allocations. At the center of the reforms was a new rule requiring the fourteen power-producing facilities to submit compliance plans delineating a schedule for the installation of Best Available Retrofit Technology by the end of 2003.[246] The rule also required the forty-one other facilities with NOx emissions of fifty tons or more to submit compliance plans specifying their approaches to complying with the facility allocations. These compliance plans were required to demonstrate that future RECLAIM allocations could be met, either through installation of controls, purchase of credits, or other qualified emission reduction strategies.[247] Finally, the rule required the twenty-four facilities with annual NOx emissions between twenty-five and fifty tons to submit forecast reports projecting compliance with allocations for years 2002 through 2005.[248] All compliance plans and forecast reports were required to be submitted to the District by September 2001.

In 2002, in response to the EPA's evaluation of RECLAIM, the South Coast Air Basin conceded that it would have been "desirable to require

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244. WHITE PAPER, *supra* note 131, at 44.
245. *Id.*
246. Rule 2009, *supra* note 132; RECLAIM AUDIT 2001, *supra* note 126, at F-26.
247. Rule 2009.1, *supra* note 132; RECLAIM AUDIT 2000, *supra* note 125, at G-20.
248. Rule 2009.1(e), *supra* note 134.

facilities to draft compliance plans early in program implementation."[249] As explained by the District, "Initially, AQMD believed that such requirements [for the drafting of compliance plans] were inconsistent with the theory of market-based programs, but perhaps a lesson learned from RECLAIM is that such programs need mechanisms beyond the market to assure long-range planning by facilities."[250]

The compliance plans forced RECLAIM participants to plan over a multi-year horizon. As discussed above, this type of planning seems to have been lacking in the early years of the program. The incorporation of compliance plans into cap and trade programs would enable greater information exchange between agencies and regulated entities, which may in turn enhance compliance. In the case of noncompliance, a regulated source could be required to revise its compliance plan, and the compliance plan could become enforceable. Future noncompliance would then be sanctionable with additional penalties, increasing the deterrent effect of the cap and trade program's penalty system.

The EPA's 1992 comments on the RECLAIM Program during its development set forth the concept of imposing a compliance plan requirement at the first instance of noncompliance:

> We believe that facility owners should be required to develop enforceable compliance plans as a remedial measure in those cases where a facility has exceeded its emission cap for a given averaging period. By "compliance plan," we mean a comprehensive statement of how each emissions source within the facility will be operated in order to ensure compliance with the facility's overall emissions cap. Compliance plans, as we envision them, would include appropriate schedules for implementing additional emissions control equipment or other procedures at a sufficient number of emissions sources to bring the overall facility into compliance.[251]

While the EPA's recommendation was not incorporated into RECLAIM, the RECLAIM experience suggests that it remains valuable advice for the design of cap and trade programs.

C. Contingency Planner

Given the still-experimental nature of cap and trade programs and their inherent lack of reliability, regulatory agencies also are called on to play the additional role of "contingency planner." In the RECLAIM Program, a significant amount of resources were expended to determine how best to

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249. EPA EVALUATION OF RECLAIM, *supra* note 122, District Response at 5.

250. *Id.*; *see also id.* at 7 ("[I]t may not be feasible to rely on a 'pure' market-based program without requiring enforceable compliance plans from affected facilities . . .").

251. EPA, *Guidance Concerning Stationary Source Requirements Under RECLAIM*, Feb. 28, 1992, http://www.epa.gov/ttn/nsr/gen/memo-e.html.

deal with the drastic price spikes that began in 2000. While RECLAIM provided for a program review in the wake of such an event, the agency arguably should have done more preparation ahead of time for such a contingency. Moreover, contingency plans may be important to implement not just when allowance prices get too high, but also when they get too low.

In traditional regulation, compliance hinged on the environmental performance at each particular facility. Regulators were charged with understanding the opportunities and constraints regarding emissions reductions faced by a facility or a set of facilities, establishing standards, and bringing facilities into compliance with them, using an array of persuasive and coercive strategies. While sometimes inefficient and inflexible, such an approach generally was reliable. Pollution control technologies were installed and emissions reductions were achieved.[252]

Rather than creating and enforcing technology-based standards, cap and trade regulation relies on a governmentally-created allowance market to provide the incentives for pollution reduction. There is thus the possibility that the allowance market will fail, and the efficiency and flexibility of cap and trade regulation will be gained at the cost of reliability and dependability.[253] In RECLAIM, the market failed in part because an external shock caused allowance prices to spike and become unaffordable for many sources. A significant set of sources could neither purchase allowances on the market, nor install technologies or make other emissions reductions quickly enough to meet their annual allocations. Under these conditions, the RECLAIM Program was deemed to be in need of a major reform that partly abandoned the cap and trade model.[254]

While the RECLAIM rules provided for a program review in the case of such a price spike, the rules could have contained a more specific contingency plan or required the development of a contingency plan early in the program.[255] Rather than requiring one to two years of development, the contingency plan could then be implemented immediately upon program failure. Contingency planning by the agency could also include formulation and evaluation of mid-course corrections to the allowance

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252. *Cf.* Ackerman & Stewart, *supra* note 40, at 178 (discussing how pollution regulation is based on the best technology available).

253. *Cf.* Neil Gunningham & Darren Sinclair, *Designing Smart Regulation*, *in* A READER IN ENVIRONMENTAL LAW 183, 308 (Bridget M. Hutter ed., 1999) ("Command and control has virtues of high dependability and predictability . . . but inflexible and inefficient . . . economic instruments tend to be efficient, but, in most cases, not dependable.").

254. *See generally* WHITE PAPER, *supra* note 131; PROPOSAL TO ADOPT CHANGES, *supra* note 131 (explaining the reform options that the District considered and the reasons for the chosen reforms).

255. *See supra* notes 130-34 and accompanying text (discussing the changes made).

levels in case allowance prices were too low.[256] In the case of RECLAIM, an early correction in the overallocation of allowances might have prevented some of the program's later problems. Environmental groups that commented upon the RECLAIM Program during its design predicted that RECLAIM would be significantly overallocated, but officials from the District and oversight agencies disagreed.[257] Given this concern at the outset, however, RECLAIM rules might have provided the District with authority to ratchet down allocations after one or two years of program operation.

The formulation and implementation of contingency plans in cap and trade programs represent a departure from the ideal that regulatory agencies should intervene as little as possible in the operation of the program to create greater market predictability and certainty for sources.[258] Based on the experience of RECLAIM, however, it is clear that cap and trade programs have a vulnerability that was not shared by their command and control predecessors: They are subject to market failures. The importance of attaining environmental goals requires that regulatory agencies implementing cap and trade programs play the role of "contingency planner" so that they are prepared to intervene and reform programs upon evidence that program failure will or has occurred.

CONCLUSION

Cap and trade regulatory programs change the roles that companies and regulatory agencies play in environmental compliance. In the ideal, regulatory agencies efficiently and effectively play the role of banker, keeping track of emissions and trading data, as well as efficiently assessing penalties when necessary. With the flexibility to choose among a wider array of compliance options and free from having to meet emission rate standards or install particular technologies, companies become strategic planners and entrepreneurs in environmental compliance.

In the Los Angeles RECLAIM Program, however, many companies failed to become strategic planners. They became habituated to low allowance prices despite predictions that allowance prices would increase. They did not generate or collect information about market performance and

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256. *Cf.* Evans & Kruger, *supra* note 16, at 28 (commenting upon the problem of low allowance prices in the Chicago ERMS program and suggesting the possibility of mechanisms to address lower than anticipated prices).

257. EPA Evaluation Database, *supra* note 146, at respondent REG-21, code Involvement (quoting a regulatory stakeholder stating that an environmental group predicted in 1993 "that there would be seven years of fluff paper credits but EPA believed that there would only be about two or three years").

258. *See* Kruger, *supra* note 4, at 10-11 (emphasizing the importance of certainty in program administration).

pollution control technologies necessary for planning. Many companies displayed a lack of interest in developing, or ability to engage in, a strategic plan. The regulatory agency that administered the program also failed to effectively play the role of banker. Most critically, it was not able to develop data management tools that enabled it to automate the collection and analysis of emissions and trading data. This lack of robust information systems as well as the absence of automatic sanctions complicated the agency's assessment of penalties for noncompliance. While cap and trade programs are thought to reduce administrative costs, it is quite possible that RECLAIM became more expensive and resource-intensive than traditional regulatory programs.

Policymakers and regulators that hope to design effective future cap and trade programs have an opportunity to learn from the experience of the handful of programs that have been implemented. Based on an empirical analysis of the RECLAIM Program, agencies may need to assume roles beyond being an effective banker in order to make cap and trade programs successful. In addition to playing the role of banker, they may be called on to play the roles of market maker, technical advisor, and contingency planner. These roles require agencies to remain more active and engaged in the compliance process than is envisioned in the idealized cap and trade program. Accordingly, policy instruments and techniques associated with traditional regulation may be useful in the cap and trade context. For example, cap and trade programs may usefully incorporate compliance plans in which regulators work with regulated firms to map out and choose among their compliance options.

As agencies are called upon to play roles in program administration beyond that of banker, cap and trade programs may require significant administrative resources. While a highly efficient enforcement regime that utilizes the most sophisticated monitoring and verification technologies available and eschews discretion in the determination of penalties may reduce enforcement costs, in many other cases a cap and trade approach is likely to increase enforcement costs.[259] Designers of cap and trade programs that minimize the agency's role and promise a reduction in administrative costs risk sacrificing environmental outcomes to an idealized version of how cap and trade regulation works.

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259. That cap and trade programs may impose additional burdens on administrators does not mean they should not be implemented. *See* Ackerman & Stewart, *supra* note 40, at 198 (noting in a similar context that "[t]he additional administrative costs may be outweighed by greater benefits by society as a whole"). However, to the extent that novel forms of regulation create new and expensive bureaucratic responsibilities, the question of how they will be funded should be considered.

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RESTRICTED COMMUNICATIONS AT THE UNITED STATES NUCLEAR REGULATORY COMMISSION

ROLAND M. FRYE, JR.*

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In this Article's footnotes I included the NRC's Agency Document Access and Management System (ADAMS) accession numbers, where applicable, to aid the reader in accessing the cited document online. ADAMS is a computerized storage and retrieval system for NRC documents, publicly accessible through the NRC's web page. *See* NRC ADAMS, http://www.nrc.gov/reading-rm/adams.html.

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INTRODUCTION

For nearly three decades, the United States' nuclear power industry has been repeatedly declared "dead on arrival"[1]—and not without reason. After all, the United States Nuclear Regulatory Commission (NRC or Commission) has issued no nuclear plant construction permits since 1978, nor has the industry ordered any plants since 1973; indeed, the industry has canceled ninety-seven new reactors.[2]

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1. *See, e.g.*, John Elkington & Mark Lee, *Dancing with the Scars: Is the World Ready to Waltz with Nuclear Energy Again?*, GRIST, Dec. 13, 2005, http://grist.org/biz/fd/2005/12/13/nuclear/ ("[W]hen the ill-fated Chernobyl site was shut down for good in 2000, some critics hailed the closure as the beginning of the [nuclear energy] industry's end.").

2. *See* LARRY PARKER & MARK HOLT, CONG. RESEARCH SERV., LIBRARY OF CONG., CRS REPORT FOR CONGRESS, NUCLEAR POWER: OUTLOOK FOR NEW U.S. REACTORS CRS-1 (May 31, 2006) [hereinafter CRS REPORT] (remarking upon utility companies' rising interest in nuclear power after nearly thirty years without any orders for nuclear power plants); Matthew L. Wald, *Slow Start for Revival of Reactors*, N.Y. TIMES, Aug. 22, 2006, at C1 (reporting that all nuclear power plants "ordered after 1973 were canceled"); 18 NRC, NUREG-1350, INFORMATION DIGEST (2006-2007) 80-94, 98-102 (Aug. 2006) (providing detailed information concerning commercial nuclear power reactors at Appendix A, "U.S. Commercial Nuclear Power Reactors" and Appendix C, "Cancelled U.S. Commercial Nuclear Power Reactors"); J. SAMUEL WALKER, NRC, NUREG/BR-0175, A SHORT HISTORY OF NUCLEAR REGULATION 1946-1999, at 53 (Jan. 2000), *available at* ADAMS Accession No. ML003726170 (discussing the effect of Chernobyl and Three Mile Island on the United States nuclear energy industry).

Much of the nuclear industry's slowdown in the late 1970s was attributable to the partial meltdown at the Three Mile Island facility (TMI) in 1979.[3] Even prior to the TMI incident, the nuclear industry was already a member of the "walking wounded" due to both the growing expense of new nuclear projects and the industry's and its federal regulators' belated recognition that predictions for future electricity demand were overly optimistic. By 1978, orders for new nuclear plants had fallen drastically.[4]

The U.S. nuclear industry continued to suffer repeated—predominantly minor—setbacks in the 1980s. A few of these setbacks include: America's largest-ever default ($2.25 billion) for the construction of nuclear power plants no longer needed; the Indiana Public Service Commission's 1984 halt of the construction of two Marble Hill reactors despite a $2.5 billion investment; the NRC's order that Commonwealth Edison of Chicago not operate its $4.2 billion Byron nuclear plants due to safety problems; and, by 1984, cost overruns of nearly fifteen times the original estimates for Long Island Lighting Company's Shoreham nuclear plant, driving that company's stock from $16 down to $4.[5] The 1986 meltdown disaster at the Chernobyl reactor in the Ukraine likewise helped keep nuclear power development on ice during the late 1980s and the 1990s.[6] The combination of high insurance costs, double-digit interest rates, overbuilding of electric generation capacity, and construction delays due to public opposition in the

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3. From a public relations perspective, the industry also suffered bad luck in the fact that the anti-nuclear film *The China Syndrome* was released just two weeks prior to the Three Mile Island accident. *See* Jon Gertner, *Atomic Balm?*, N.Y. TIMES, July 16, 2006 (Magazine), at 36.

4. *See id.* (noting the significant decline in new orders). As a point of reference, the Atomic Energy Commission (AEC) in the early 1970s predicted that, by the year 2000, the United States would have 1,000 operating nuclear power plants. *Id.*

5. *See* John Temple Ligon, *Nuclear Power for Electric Power, Again*, COLUMBIA STAR, Mar. 24, 2006, *available at* http://www.thecolumbiastar.com/news/2006/0324/Business/051.html (reporting on these and other setbacks in the U.S. nuclear power industry); *see also* Gertner, *supra* note 3 (highlighting the severity of cost overruns at Shoreham, and noting that the plant, which was "estimated to cost about $260 million in the 1960s before construction started, was completed in 1984 for $5.5 billion . . ."—a multiple of twenty-two).

6. The anti-nuclear activists' frequent references to Chernobyl are misleading, for the Chernobyl reactor's design was quite different from those of currently operating American reactors. The latter are not susceptible to the kind of accident that occurred at Chernobyl. As one commentator observed,

> [T]he type of reactor used at the Chernobyl facility was graphite moderated and the core was not housed inside a containment vessel. When the core overheated, due to human error, a steam explosion ignited the graphite which burned for days, releasing massive amounts of radioactivity directly into the atmosphere for lack of said containment vessel. By comparison, the U.S. employs light water moderated reactors which cannot burn as Chernobyl did, houses these reactors in containment vessels, and by all accounts has far superior safety standards to those in operation at Chernobyl. Comparing Chernobyl to the American nuclear industry is, for this very reason, not valid.

Richard Karn, *Nuclear Tide*, RESOURCE INVESTOR, Aug 1, 2006, http://www.resourceinvestor.com/pebble.asp?relid=22187#_ftn1.

1980s rendered the financial cost of those delays intolerable to many utilities.[7] The Federal government's reduction of funding for nuclear engineering programs during several years in the 1990s also contributed to the perception that the industry was dead.[8]

Yet the reports of that death have proven greatly exaggerated, and the nuclear industry now appears to be on the cusp of the oft-touted "nuclear renaissance."[9] Numerous indications of such a renaissance include:

- As of March 2007, the Commission expected to receive applications between 2007 and 2009 to build and operate as many as thirty-two new power reactor units[10] and were hearing predictions that up to fifty new

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7. *See* Dale E. Klein, Chairman, NRC, S-07-002, Remarks at the Ohio State University Department of Mechanical Engineering Distinguished Lecturer Series, 2 (Jan. 26, 2007), http://www.nrc.gov/reading-rm/doc-collections/commission/speeches/2007/s-07-002.html; Mike Stuckey, *New Nuclear Power "Wave" — or Just a Ripple? How Millions for Lobbying, Campaigns Helped Fuel U.S. Industry's Big Plans*, MSNBC.COM, Jan. 23, 2007, http://www.msnbc.msn.com/id/16272910/; *see also* Greg Edwards, *Virginia Power Moves Forward with Plans for a Third Reactor*, RICHMOND TIMES-DISPATCH, Nov. 6, 2006, *available at* http://www.timesdispatch.com/servlet/Satellite?pagename=RTD%2FMGArticle%2FRTD_BasicArticle&c=MGArticle&cid=1149191515280&path=!business!metrobiz&s=1045855934857 (observing that opposition from the public, high interest rates, and regulatory changes were also disincentives for companies to invest in new plants); Stacy Shelton, *Nucleus for Nuclear: Atlanta, Southeast at Center of Industry Revival*, ATLANTA J.-CONSTITUTION, Nov. 4, 2006, at C1 (highlighting the effects of high construction costs and insurance rates on the industry).

8. *See* Andrew C. Kadak, *DOE's Blurred Nuclear Vision: A Consistent Strategy is the Key to a Successful Nuclear Future*, MIT TECH. REV., July 11, 2006, http://www.technologyreview.com/read_article.aspx?id=17088&ch=biztech.

9. *See, e.g.*, Dale E. Klein, Chairman, NRC, S-06-032, Remarks Before the American Nuclear Society Winter Meeting, 2 (Nov. 13, 2006) [hereinafter Albuquerque Remarks], *in* NRC NEWS, *available at* ADAMS Accession No. ML063320173 (referring to the "nuclear renaissance"); James A. Lake, *The Renaissance of Nuclear Energy*, EJOURNALUSA, http://usinfo.state.gov/journals/ites/0706/ijee/lake.htm (last visited Mar. 16, 2007) (claiming that a new "nuclear energy renaissance" could benefit the U.S. economy, security and environment while meeting increased demands for energy); *see also* Jenny Weil and Elaine Hirou, *Political, Public Support Said Never Stronger for Nuclear Power*, NUCLEONICS WK., Nov. 17, 2005, at 1 ("For the first time in several decades, the administration, Congress, the industry and the public are aligned in support of nuclear power, providing the best opportunity in years for construction of the next wave of nuclear plants in the U.S., Constellation Generation Group President Michael Wallace said."); *id.* at 10 ("Sen. Chuck Hagel . . . called the period that lie[s] ahead for the nuclear industry an 'almost golden time of possibilities.'").

10. *See, e.g.*, Jeffrey S. Merrifield, Commissioner, NRC, Remarks Titled "You Ain't Seen Nothin' Yet," at 1 (Mar. 13, 2007), http://www.nrc.gov/reading-rm/doc-collections/commission/speeches/2007/s-07-008.html ("Today we have the potential for 32 new reactors at 23 sites."); Dale E. Klein, Chairman, NRC, S-07-005, Remarks Before the Waste Management Symposium Plenary Session of the Education and Opportunity for the Next Generation of Waste Management Professionals, 2 (Feb. 26, 2007), http://adamswebsearch2.nrc.gov/idmws/doccontent.dll?library=PU_ADAMS^PBNTAD01&ID=070570136:2 ("30 or more reactor applications coming in."); Dale E. Klein, Chairman, NRC, S-07-004, Remarks at the Electricity Committee of the National Association of Regulatory Utility Commissioners—Winter Meeting, *2 (Feb. 19, 2007) [hereinafter Winter Meeting Remarks], http://www.nrc.gov/reading-rm/doc-collections/commission/speeches/2007/s-07-004.html ("To date, we have received letters of interest from several potential applicants that indicate we may expect that first plant to be followed by as many as 30 other[s]."); Dale E. Klein, Chairman, NRC, S-06-34, Remarks at

the First Annual Fuel Cycle Monitor Global Nuclear Renaissance Summit, 2 (Dec. 6, 2006) [hereinafter Washington Remarks], *in* NRC NEWS, *available at* ADAMS Accession No. ML063410475 ("Next year, we . . . expect that we will receive the first application for a new reactor, with applications for as many as 30 more reactors to follow."); Tina Seeley, *Exelon Wins Preliminary Approval for New Reactor (Update 2)*, BLOOMBERG.COM, Mar. 8, 2007, http://www.bloomberg.com/apps/news?pid=20601207&sid=aLG65DPbwgUg&refer=energy ("Fifteen applicants have announced proposals to build as many as 36 reactors, according to a tally by the Nuclear Energy Institute, the industry's trade association.").

Two companies recently announced their intent to seek construction and operation permits for new nuclear units. In April, Ameren announced its intention to apply for a permit for a plant to be built somewhere in the Midwest. *See* Jeffrey Tomich, *Ameren Takes a Nuclear Approach, Could Build Second Reactor*, ST. LOUIS POST-DISPATCH, Apr. 6, 2007, http://www.stltoday.com/stltoday/business/stories.nsf/story/0E9A28FC4DD371B3862572B5000A436E?OpenDocument. DTE Energy Company announced in February 2007 that it will apply for a construction and operation permit for a third reactor at its Fermi facility. *See* ENERGYONLINE.COM NEWS, DTE Plans New Reactor at Fermi Nuclear Power Plant, Feb. 14, 2007, http://www.energyonline.com/Industry/News.aspx?NewsID=7129&DTE_Plans_New_Reactor_at_Fermi_Nuclear_Power_Plant; *see also* Eric Morath, *DTE Plans for Nuclear Plant*, DETROIT NEWS, Feb. 13, 2007, at 1C, *available at* http://www.detnews.com/apps/pbcs.dll/article?AID=/20070213/BIZ/702130338/1001.

In addition, Idaho Power Company advised its state utilities commission in late November of 2006 that it was considering the possibility of constructing a nuclear plant by 2023. *See Idaho Power Envisions N-Plant in 20-year Plan*, DESERET MORNING NEWS, Nov. 28, 2006, *available at* http://deseretnews.com/dn/view/0,1249,650210504,00.html. Also, Alternative Energy Holdings, Inc., and an Idaho-based farmers' cooperative have collectively expressed interest in constructing a 1500-megawatt [MW] nuclear plant in Bruneau, Idaho. *See* William McCall, *Nuclear Power Unlikely Alternative in Northwest, Analyst Says*, KGW.COM, Feb. 13, 2007, *available at* http://www.kgw.com/sharedcontent/APStories/stories/D8N92PAO0.html (discussing the prospects of the proposed 1,500 MW nuclear plant on the Snake River in southwestern Idaho); *see also* Ken Dey, *Man Wants Nuclear Plant Near Bruneau; Idaho-Based Organizations are Skeptical About Idea*, IDAHO STATESMAN, Dec. 8, 2006, at 1.

Likewise, Pacific Gas and Electric Company announced in late November 2006 that it is considering construction of a nuclear power facility outside its home state of California, and Public Service Enterprise Group stated about the same time that it may add new nuclear plants to its fleet, though not in the immediate future. *See* David R. Baker, *PG&E Looking at Nuclear Plants: Alternative Power Sources Being Explored*, S.F. CHRON., Nov. 29, 2006, at C3, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2006/11/29/BUGPNMLIAH1.DTL&type=business; Daniel Horner, *Added Nuclear Capacity Mulled by PSEG, But Not in Near Term*, NUCLEONICS WK., Nov. 30, 2006, at 2. Another California organization, the Fresno Nuclear Energy Group, is even more ambitious—it seeks to overturn California's moratorium on nuclear plant construction and to build such a plant in central California. *See* Tom Harrison, *Group Envisions up to Two EPRs, Reprocessing Plant at Fresno Site*, NUCLEONICS WK., Dec. 21, 2006, at 3; Jeff St. John, *Nuclear Plant Idea Takes Hold: Group Says it Will Seek Power Facility for Fresno*, FRESNO BEE, Dec. 14, 2006, at A1. And their idea is gaining political traction. *See* Andrew Masuda, *Diablo Canyon Power Plant Could Expand If Proposed Bill Passes*, KSBY, Mar. 6, 2007, *available at* http://www.ksby.com/Global/story.asp?S=6189074 ("Assemblyman Chuck Devore from Orange County proposes lifting the state's ban on new nuclear plants."); *Bill introduced to lift Californian moratorium*, WORLD NUCLEAR NEWS, Mar. 6, 2007, http://www.world-nuclear-news.org/nuclearPolicies/060307-Bill_introduced_to_lift_Californian_moratorium.shtml ("A bill introduced in California's state legislature by Republican assembly member Chuck DeVore calls for the state's moratorium on the construction of new nuclear power plants to be lifted.").

And finally, Public Service Enterprise Group announced in November 2006 that it "may consider adding nuclear capacity at some point in the future" to its Salem and Hope Creek nuclear power facilities. Daniel Horner, *Operating Salem, Hope Creek seen as key factor in PSEG's future*, NUCLEONICS WK., Jan. 18, 2007, at 3.

units would be constructed by 2026;[11]

- It is likely that all or almost all nuclear power plant licensees will seek twenty-year extensions of their plants' operating licenses[12] (as of February 2007, the Commission had either received or granted renewal applications for half the nation's operating nuclear reactor units);[13]
- Many nuclear plants or plant licensees have been purchased, sold, or merged since 1999;[14]
- Many licensees have sought to "uprate" their plants' production capacity (to increase the NRC-authorized generating level);[15]
- The Tennessee Valley Authority (TVA) expects to restart its Browns Ferry-1 reactor unit in May 2007 (dormant since 1985), has expressed renewed interest in completing construction of (and seeking an operating license for) its long-dormant Watts Bar-2 reactor unit by 2013-2014, and has joined a consortium interested in reviving the TVA's unfinished Bellefonte reactor project;[16]

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11. *See, e.g.*, Albuquerque Remarks, *supra* note 9, at 2; *see also* Merrifield, *supra* note 10, at 2.

12. *See* Klein, *supra* note 7, at 2; Dale E. Klein, Chairman, NRC, S-06-020, Remarks to the Nuclear Energy Institute NSIAC Dinner, at 2 (Aug. 16, 2006), *in* NRC NEWS, *available at* ADAMS Accession No. ML062290227 ("[I]t's become an article of faith that just about every currently operating nuclear facility will have its license extended."); David Adams, *Energy: Continental Divide*, FORBES.COM, Oct. 9, 2006, http://www.forbes.com/energy/2006/10/06/energy-europe-america-biz-energy_cx_da_1009alternatives_energy06.html?partner=rss ("[V]irtually all U.S. nuclear plants are expected to apply for license renewal.").

13. *See, e.g.*, Winter Meeting Remarks, *supra* note 10, at *2; Klein, *supra* note 7; Washington Remarks, *supra* note 10, at 2; *see also* NRC, Status of License Renewal Applications and Industry Activities, http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html (last visited Dec. 5, 2006) (listing the status of license renewal applications, including those completed and those currently under review, as well as letters of intent to apply for license renewal); Merrifield, *supra* note 10, at 1, 3.

14. *See, e.g.*, CRS REPORT, *supra* note 2, at CRS-5 ("The merger of two of the nation's largest nuclear utilities, PECO Energy and Unicom, completed in October 2000, consolidated the operation of 17 reactors under a single corporate entity, Exelon Corporation."); Daniel Horner, *Sale Manager: Point Beach Garnered Top Price*, NUCLEONICS WK., Jan. 4, 2007, at 1 (referring to the recent sale of the Point Beach nuclear facility for a record-breaking price; also quoting energy analyst Nathan Judge of the London-based firm Atlantic Equities as saying prices for nuclear plants will continue to climb). Admittedly, several mergers have fallen through. *See, e.g.*, Kevin J. Shay, *Future is Bright, Constellation Says*, GAZETTE.NET, Oct. 27, 2006, http://www.gazette.net/stories/102706/businew182741_31946.shtml (discussing the failed merger attempts of Constellation and FPL, and also of Public Service Enterprise Group and Exelon Corp).

15. *See Uprates Continue to Increase U.S. Nuclear Generating Capacity*, NUCLEONICS WK., July 6, 2006, at 4 (noting increases in U.S. nuclear capacity, due to power uprates).

16. *See* Winter Meeting Remarks, *supra* note 10, at *2 (regarding Browns Ferry-1); Andrew Eder, *Is a New Day Dawning for TVA Nuclear Power?*, KNOXVILLE NEWS SENTINEL, Feb. 23, 2007, http://www.knoxnews.com/kns/business/article/0,1406,KNS_376_5371855,00.html (Watts Bar-2, Browns Ferry-1, Bellefonte); Jenny Weil, *Costs for New Plants Still High, Says FPL's Top Financial Officer*, NUCLEONICS WK., Feb. 15, 2007, at 2, 3 (reporting a May 22, 2007 target restart date for Browns Ferry-1; also discussing the Bellefonte-1 & -2 and Watts Bar-2 plants); Rebecca Smith, *Power Producers Rush to Secure Nuclear Sites: First to Develop Plans Could Tap $8 Billion In Federal Subsidies*, WALL ST. J., Jan. 29, 2007, at A-1 (regarding Browns Ferry); Jenny Weil, *Date for Browns Ferry-1 Restart Not Expected to Change*, NUCLEONICS WK., Jan. 18, 2007, at 5 (reporting on

- A consortium of energy companies began construction of a uranium enrichment facility in the summer of 2006—the first nuclear facility to begin construction in thirty years;[17] and
- More generally, countries that never before considered nuclear energy are now contemplating its use; other nations that foreswore the use of nuclear plants are now reconsidering their earlier decisions; and countries with operating nuclear plants are considering, or are in the process of, augmenting their fleets.[18] Indeed, the number of nuclear power plants worldwide is expected to increase by 40% in the next twenty-five years[19] and by more than 100% by mid-century.[20]

The "nuclear renaissance" in the United States is attributable, at least in significant part, to current and recent strong governmental support for the nuclear energy industry, significant scientific developments in the field of nuclear energy, nuclear energy's environmental and economic advantages over plants using competitor fuels, a significant increase in public support for the use of nuclear energy, the potential for releasing natural gas for uses

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both the May 2007 expected start-up date for Browns Ferry-1 and the anticipated completion of Watts Bar-2).

17. *See* Stuckey, *supra* note 7; Op-Ed, *Nuclear Twilight*, GAZETTE.COM, Sept. 5, 2006, http://www.gazette.com/display.php?id=1321210&secid=13.

18. A survey of press articles reveals seventy-one such countries: Argentina, Algeria, Armenia, Australia, Bahrain, Belarus, Brazil, Bulgaria, Burma, Cameroon, Canada, Chile, China (fifteen to thirty-two new nuclear plants by 2020, and forty to fifty by 2026), Czech Republic, Egypt, Estonia, Finland, France, Ghana, Germany, Hungary, India (twenty to thirty-two new nuclear plants by 2020), Indonesia, Iran, Israel, Italy, Japan (eleven new plants by 2010), Jordon, Kazakhstan, Kenya, Kuwait, Latvia, Lithuania, Libya, Malaysia, Mexico, Morocco, Namibia, the Netherlands, Nigeria, North Korea, Oman, Pakistan, Poland, Portugal, Qatar, Romania, Russia (forty-two to fifty-eight new plants by 2030), Saudi Arabia, Slovakia, Slovenia, South Korea, Spain, Sudan, Sweden, Switzerland, Syria, Taiwan, Tanzania, Thailand, Tunisia, Turkey, Union of South Africa, United Arab Emirates, United Kingdom, Ukraine, United States, Venezuela, Vietnam, and Yemen. *See, e.g.*, Merrified, *supra* note 10, at 1 (listing as examples Thailand, Vietnam, Malaysia, Indonesia, Burma, Venezuela, Chile, Poland, Estonia, Italy, Belarus, Turkey, Egypt, Israel, Namibia, Nigeria, Jordan, Qatar, and Morocco). Indeed, the International Energy Agency recently took the unprecedented step of urging governments to help accelerate the construction of new nuclear power plants. *See* Rebecca Bream & Carola Hoyos, *International Energy Agency Set to Back More Nuclear Power Plants*, FIN'L TIMES, Nov. 2, 2006, at 4 (remarking that this was the first such action in the agency's thirty-two year history).

19. *See* Richard Karn, *Nuclear Tide*, RESOURCE INVESTOR, Aug 1, 2006, http://www.resourceinvestor.com/pebble.asp?relid=22187#_ftn1 (citing WORLD NUCLEAR ASS'N, THE NEW ECONOMICS OF NUCLEAR POWER 6 (2005)).

20. The Department of Energy (DOE) predicts that the total number of nuclear power reactors in the world will increase from the current 441 to about 1000 by mid-century. *See* Matthew L. Wald, *The Best Nuclear Option*, MIT TECH. REV., July 11, 2006, http://www.technologyreview.com/read_article.aspx?id=17059&ch=biztech; *cf.* Ann MacLachlan, *Westinghouse 'Best-Positioned' to Win New Orders, Study Says*, NUCLEONICS WK., Oct. 5, 2006, at 5 (reporting that the French consulting firm Eurostaf predicts that, by 2030, China will increase its nuclear capacity seven-fold by 2030, Japan by 73% and Russia by 78%).

to which it is better (or even uniquely) suited, the anticipated increase in demand for electricity, significant advances in refueling techniques, and the budding financial support for the nuclear industry from Wall Street.

As a result of this renaissance, the NRC expects an increase in both the number and kinds of its administrative adjudications.[21] This acceleration of the Commission's adjudicatory caseload will, in all likelihood, result in many neophyte parties and counsel taking their maiden voyages into NRC adjudication. These new parties' and attorneys' lack of familiarity with the Commission's adjudicatory practice and procedure perforce increases their risk of inadvertently engaging in prohibited communications with decisionmaking personnel at the Commission.

The prohibitions against such communications fall into two categories. The "ex parte bar" prohibits certain kinds of communications between NRC adjudicators and individuals outside the NRC. The "separation-of-functions bar" prohibits similar kinds of communications between NRC adjudicators and those NRC staff members with a stake in the outcome of the adjudication.

The legal terrain of these two kinds of improper communication is (and has long been) sufficiently rugged[22] that even experienced nuclear law

21. *See infra* Part I (discussing in detail the expected increase in adjudications).

22. *See, e.g.*, MICHAEL ASIMOW, A GUIDE TO FEDERAL AGENCY ADJUDICATION at 121 n.74 (2003) [hereinafter ADJUDICATION GUIDE] ("The precise degree to which agencies should and must separate functions has long been a subject of dispute."); *id.* at 121 n.75 (drawing attention to the unresolved issue whether separation-of-functions constraints apply to non-prosecutorial proceedings); JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 335 (2006) [hereinafter RULEMAKING GUIDE] ("[T]he treatment of [ex parte] communications in informal rulemaking raises complex issues and conflicting considerations."); Charles D. Ablard, *Ex Parte Contacts with Federal Administrative Agencies*, 47 A.B.A. J. 473 (1961) ("One of the most difficult and troublesome problems in the field of administrative law is that of ex parte contacts in administrative adjudicatory proceedings."); John R. Allison, *Combinations of Decision-making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis*, 1993 UTAH L. REV. 1135, 1198 ("[I]t may be difficult to determine whether an incident constitutes an ex parte communication or an actual combination of decision functions. The distinction is one of degree, running along a continuum from minor input to actual participation in the making of the final decision."); Marshall J. Breger, *The APA: An Administrative Conference Perspective*, 72 VA. L. REV. 337, 352 (1986) ("[S]eparation of functions . . . has always provoked uneasiness and dissatisfaction, especially among the private bar."); Kenneth Culp Davis, *Separation of Functions in Administrative Agencies*, 61 HARV. L. REV. 612, 613-14 (1948) (explaining how the Administrative Procedure Act's (APA) separation-of-functions "provisions raise more problems of interpretation than at first meet the eye," and raising numerous questions for which the APA presents no ready answers); Nathaniel L. Nathanson, *Separation of Functions Within Federal Administrative Agencies*, 35 U. ILL. L. REV. 901, 901 (1941) (describing as a "hardy perennial" the issue of where to draw the line between proper and improper communications within federal administrative agencies); Cornelius J. Peck, *Regulation and Control of Ex Parte Communications with Administrative Agencies*, 76 HARV. L. REV. 233, 234 (1962) ("This problem [of ex parte communications] is one of the most complex in the entire field of Government regulation." (quoting MESSAGE OF THE PRESIDENT ON ETHICAL CONDUCT IN THE GOVERNMENT, H.R. DOC. NO. 87-145, at 6-7 (1st Sess. 1961))); Gregory Brevard Richards, *Administrative Law—Ex Parte Contacts in Informal Rulemaking Under the Administrative Procedure Act*, 52 TENN. L. REV. 67, 92

practitioners and technical advisors will occasionally stumble.[23] This Article is intended to guide new and experienced nuclear law attorneys alike through this terrain, to help them avoid its pitfalls, and to provide ample legal citations (perhaps overly ample, but then this *is* a law review article) to give those attorneys a running start on research into any of the specific "restricted communications" topics covered here. Although this Article aims specifically at nuclear law practitioners, I hope that it will also prove useful to practitioners in other areas of federal administrative law.[24]

(1984) (referring to "conflicting interpretations" of the ex parte ban by United States Courts of Appeals and District Courts); Antonin Scalia, *Separation of Functions: Obscurity Preserved*, 34 ADMIN. L. REV. v, vi-vii (1982) (pointing to significant ambiguities in the separation-of-functions provision of the Administrative Procedure Act (APA), 5 U.S.C. § 554(d)); Alfred L. Scanlan, *Separation of Functions in the Administrative Process*, 15 GEO. WASH. L. REV. 63, 76 (1946) ("[Section 554(c)'s] requisite of a case 'accusatory in form, etc.,' is rather a nebulous standard to apply."); *id.* at 77 (describing "the indefiniteness of the ['accusatory in form'] criteria"); *id.* at 80-83 ("[A] large area of conjecture . . . surrounds" the issue of whether the agency or top members who preside at the adjudicatory stage are able to consult with employees of the agency who have engaged in the investigative or prosecution phase of the case); Harvey J. Shulman, *Separation of Functions in Formal Licensing Adjudications*, 56 NOTRE DAME L. REV. 351, 361 n.42 (1981) (pointing out "the confusion over whether license modifications, even in non-accusatory proceedings initiated by a licensee, come within the 'initial licensing' exemption to § 554(d)" of Title 5, so that the restricted communications of the APA would not apply); Franklin M. Stone, *Ex Parte Communications: The Harris Bill, the CAB, and the Dilemma of Where to Draw the Line*, 13 ADMIN. L. REV. 141 (1961) ("The problem of improper ex parte communications is one of the most difficult to resolve in the general field of ethics in government."); Kathryn A. Thompson, *Ethics: Private Talks*, 93 A.B.A. J. 20 (2007) ("[J]urisdictions disagree about whether prohibiting ex parte communications with judges should apply to all communications or only those that go to the merits of a case."). Unfortunately, the efforts of the Administrative Conference of the United States (ACUS) in the early 1980s to provide some certainty in the midst of the APA's ambiguity proved unavailing. *See* Scalia, *supra*, at v-vii.

Even such distinguished judicial bodies as the United States Courts of Appeals for the District of Columbia and Second Circuits have had difficulty in determining exactly where to draw the line between acceptable and unacceptable ex parte contacts in informal rulemakings. *See, e.g.*, Ass'n of Nat'l Advertisers v. FTC, 617 F.2d 611, 633 (D.C. Cir. 1979) (Wright, J., concurring) (describing the law on ex parte contacts as "unsettled"). *Compare* Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977) (per curiam), *with* Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977), *and* Columbia Research Corp. v. Schaffer, 256 F.2d 677 (2d Cir. 1958), *with* R.A. Holman & Co. v. SEC, 366 F.2d 446 (2d Cir. 1966). *See generally* C. T. Harhut, *Ex Parte Communication Initiated by a Presiding Officer*, 68 TEMPLE L. REV. 673, 695 (1995) ("Pennsylvania judges are confused as to what extent they can confer with anyone regarding a pending case.").

23. *See* Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-5, 43 N.R.C. 53, 57-58 (1996) (involving a separation-of-functions violation by technical personnel). The acronym "CLI" is shorthand for "Commission Legal Issuance" and refers to adjudicatory decisions issued collectively by the Commissioners.

24. A non-NRC practitioner should recognize, however, that the policy considerations applicable in determining the appropriateness *vel non* of communications to and from the NRC adjudicatory personnel or, for that matter, other safety agencies may well differ from those applicable to economic regulatory agencies such as the Federal Energy Regulatory Commission (FERC) and to claims agencies such as the Social Security Administration. *See generally* Davis, *supra* note 22, at 394-95, 401, 417-18 (comparing and contrasting the implications of such communications for various agencies).

The restrictions on communications to and from the NRC's decisionmaking personnel are governed by a combination of the Due Process Clause of the United States Constitution, federal statutes, codes of legal and judicial conduct, the Commission's procedural rules, and NRC case law (which is itself generally based upon one or more of the previous four types of legal authority). This Article describes the constitutional, statutory, and regulatory limitations on communications to and from decisionmakers and their advisors, and also explores the application of those limitations to various factual and procedural situations arising at the NRC. It examines those applications in light of the tension inherent in *any* restricted communications scheme—how to balance the need for procedural flexibility that fosters efficiency in agency decisionmaking against the need for procedural formality that fosters fairness (and the appearance of fairness) to the parties.[25] Indeed, this inherent conflict

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25. *See* NRC, Final Rule, NRC Revision to Ex Parte and Separation of Functions Rules Applicable to Formal Adjudicatory Proceedings, 53 Fed. Reg. 10,360 (Mar. 31, 1988) ("[The] rule is intended to aid in maintaining effective communication . . . while ensuring that proceedings are conducted in an impartial manner."); *see also* CHARLES H. KOCH, JR., 2 ADMINISTRATIVE LAW AND PRACTICE 320 (2d ed. 1997) ("The prohibition against ex parte communication must be tempered by the need to allow the agency to do its job."); William H. Allen, *The Durability of the Administrative Procedure Act*, 72 VA. L. REV. 235, 251 (1986) (focusing on "fairness to affected parties, efficiency in the conduct of agency affairs, and accuracy of fact-finding . . ."); Davis, *supra* note 22, at 617 (referring to the APA's "broader objectives of efficiency and fairness"); Nathanson, *supra* note 22, at 934 (describing the advantages of "the combination of functions" [—i.e., the flip-side of "separation of functions," *see infra* note 78—] as including "responsibility, consistency[,] . . . restraint[,] . . . economy, efficiency and specialization") (footnote omitted); Stone, *supra* note 22, at 141 (posing the questions "Can we on the one hand, have more steps, more judicialization, more due process and, on the other hand, still have more expedition?" and answering the question in the negative).

Regarding other specific administrative agencies' struggles with this same balancing act, see, Pamela M. Giblin & Jason D. Nichols, *Ex Parte Contacts in Administrative Proceedings: What the Statute Really Means and What It Should Mean*, 57 BAYLOR L. REV. 23, 25 (2005) ("Texas' statutory scheme concerning ex parte communications with administrative decision makers embodies a tension between lofty principles and practical needs."); Nathaniel Stone Preston, *A Right of Rebuttal in Informal Rulemaking: May Courts Impose Procedures to Ensure Rebuttal of Ex Parte Communications and Information Derived from Agency Files After* Vermont Yankee*?*, 32 ADMIN. L. REV. 621, 659-60 (1980); Shulman, *supra* note 22, at 363-64 (briefly discussing the Federal Communications Commission, Civil Aeronautics Board, and the FERC); Comment, *Ex Parte Contacts with the Federal Communications Commission*, 73 HARV. L. REV. 1178, 1193 (1960).

between efficiency and fairness[26] has existed in American administrative law since at least the 1946 enactment of the Administrative Procedure Act (APA).[27]

This Article focuses primarily on restricted communications in the NRC's administrative adjudications. However, it also touches heavily on the related issue of such communications in NRC rulemakings, and addresses lightly the related issues of bias, recusal/disqualification, the "exclusive record rule,"[28] the right of notice and opportunity to comment, the Government in the Sunshine Act,[29] enforcement petitions (known in Commission parlance as "Section 2.206 petitions"[30]), uncontested proceedings, and export license applications.[31]

Part I of this Article describes the expected increase in the NRC's adjudicatory caseload—in other words, why the topic of this Article is relevant.[32] Many of the facts supporting Part I change rapidly—for example, the number of new nuclear power plants under consideration by

26. "Flexibility" and "formality" would, in my opinion, be a more accurate way of describing these balancing factors. But, as the quotations throughout this Article indicate, legal scholars and courts have for decades referred consistently to "efficiency" and "fairness." So, in the interest of maintaining a common terminology, I shall do the same. *See, e.g.*, Allison, *supra* note 22, at 1213 n.179 (questioning whether the advantages in terms of "efficiency []and . . . accuracy[] . . . so outweigh resulting negative fairness perceptions that admittedly improper ex parte communications should remain unremedied"); Scanlan, *supra* note 22, at 63 (noting that the APA resulted from a compromise between those in Congress and academia "who believe[d] that performance within the same body of the functions of investigator, prosecutor, judge and legislator violates basic postulates of Anglo-Saxon jurisprudence and those who espouse[d] the pragmatic and iconoclastic view that to impose such a conceptualistic restriction upon administrative bodies would be to negate entirely the efficiency of the administrative process"); Stuart N. Brotman, Note, *Ex Parte Contacts in Informal Rulemaking:* Home Box Office, Inc. v. FCC *and* Action for Children's Television v. FCC, 65 CAL. L. REV. 1315, 1330 (1977) (referring both to "[t]he informal rulemaking process [a]s carefully designed to be efficient and politically responsive" and to "the legislature's decision to place those values ahead of strict procedural fairness").

27. *See, e.g.*, George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1580 (1996); Scanlan, *supra* note 22, at 63, 74, 84-85 (discussing the legislative history of the APA).

28. *See* Goldberg v. Kelly, 397 U.S. 254, 271 (1970) ("[T]he decisionmaker's conclusion . . . must rest solely on the legal rules and *evidence* adduced at the hearing.") (emphasis added).

29. Pub. L. No. 94-409, § 4(a), 90 Stat. 1241, 1246-47 (1976) (codified as amended at 5 U.S.C. § 557(d) (2000)).

30. *See* 10 C.F.R. § 2.206 (2006).

31. This Article does not, however, go so far afield as to address the Freedom of Information Act's (FOIA) disclosure exemptions (such as Exemption 5 for inter- and intra-agency documents, and Exemption 9 for geological and geophysical information and data regarding wells). One must, after all, draw the line somewhere. For a thorough review and analysis of the law concerning these and other FOIA exemptions, see U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW (2004).

32. Part I addresses factors that, many believe, support the expansion of nuclear power. Any such discussions are intended *solely* to explain why the NRC's adjudicatory caseload is expected to expand. They should not be construed as advocacy for expansion—an issue on which I take no position.

the U.S. nuclear industry, or the extent of public opposition to the construction and operation of such plants. Therefore, many of those supporting facts will likely have been, in one way or another, superseded by the time you read this Article.[33] However, I believe that the justifications for my (and the Commission's) expectation of an adjudicatory deluge are so strong as to be unaffected by such developments.

Part II presents the germane constitutional, statutory, and regulatory background for the ex parte and separation-of-functions restrictions. Part III.A addresses issues involving ex parte restrictions. Part III.B addresses similar issues involving separation-of-functions restrictions. (In a handful of contexts, these two kinds of restricted communications are so tightly intertwined that separate discussions would be duplicative, confusing, or both. In those contexts, I discuss both types of communications simultaneously—in either Part III.A or III.B.)[34] Part III.C discusses the extent to which the ban on restricted communications applies to rulemakings. Finally, Part III.D examines the various remedies for violations of the ex parte and separation-of-functions restrictions, and ends with some practical suggestions on how to avoid violations of these two bans.

I. IMPENDING INCREASE IN THE COMMISSION'S ADMINISTRATIVE ADJUDICATIONS

The Commission faces, either now or in the near future, three new categories of administrative litigation. These are (i) the Department of Energy's (DOE) Yucca Mountain High-Level Nuclear Waste Repository (Yucca Mountain) application,[35] (ii) early site permit (ESP) applications for

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33. For this reason, and also to prevent the footnote tail from wagging the textual dog, I have spared the reader from slogging through literally hundreds of citations to supporting articles from the popular press regarding these and many other topics—particularly those addressed in Part I of this Article.

34. This combined treatment occurs for only four topics. Part III.A.1.e of this Article addresses the two kinds of restricted communications regarding either generic issues involving public health and safety or other Commission statutory responsibilities not associated with the resolution of the adjudicatory proceeding. Both ex parte and separation-of-functions communications in various certification proceedings (particularly "early site permit" and "combined operating license" proceedings) are discussed in Part III.A.2.c-d. Such communications in the context of § 2.206 Petitions are discussed in Part III.A.2.d. For a discussion of communications with adjudicatory employees regarding matters on which they are not advising the Commission, *see infra* Part III.B.3.d.

35. On July 18, 2006, DOE announced its intention to file its Yucca Mountain application with the NRC in June 2008. *See* Elaine Hiruo, *DOE's Latest Repository Schedule Targets 2017 for Receiving Fuel*, NUCLEONICS WK., July 20, 2006, at 4-5 (reporting, however, that the DOE's "new target date has been a subject of growing speculation" and observing that lawsuits could be an obstacle). As late as February 2007, DOE was still committed to that self-imposed deadline. Brendan Riley, *State Panel Warned About Effort to License Nuclear Dump in Nevada*, SANTA BARBARA NEWS-PRESS, Feb. 28, 2007, http://www.newspress.com/Top/Article/article.jsp?Section=OPINIONS-LETTERS&ID=

new nuclear reactors, and (iii) combined construction permit and operating license (COL) applications for new nuclear reactors.[36] The first[37] and second[38] categories have already seen adjudication at the Commission.

As for the third category, citizen groups are already promising litigation and other forms of opposition. As of the end of 2006, opposition had centered around seven locations for potential new nuclear units. The site that is so far drawing the greatest ire is, predictably, one of the very few that do *not* already contain at least one nuclear unit. This "greenfield" site is located near Cherokee Falls, South Carolina.[39] Opposition is also

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564971238314213761 ("Energy Secretary Samuel Bodman said Feb. 5 that the DOE will prepare [its Yucca Mountain] application . . . by June 2008.").

36. *See supra* notes 10, 16.

37. *See* DOE (High Level Waste Repository: Pre-Application Matters), CLI-06-5, 63 N.R.C. 143 (2006); CLI-05-27, 62 N.R.C. 715 (2005); CLI-04-32, 60 N.R.C. 469 (2004); CLI-04-20, 60 N.R.C. 15 (2004); LBP-04-20, 60 N.R.C. 300 (2004). Licensing Board orders, or "LBPs," do not carry precedential weight. Sequoyah Fuels Corp., CLI-95-2, 41 N.R.C. 179, 190 (1995).

38. *See, e.g.*, Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-07-4, 65 N.R.C. 24 (Jan. 22, 2007); Exelon Generation Co. (Early Site Permit for Clinton ESP Site), LBP-06-28, 64 N.R.C. 460, LBP-06-28 (2006); Exelon Generation Co. (Early Site Permit for Clinton ESP Site) and Sys. Energy Res., Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-06-28, 64 N.R.C. 404 (2006); Exelon Generation Co. (Early Site Permit for Clinton ESP Site) and Sys. Energy Res., Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-06-20, 64 N.R.C. 15 (2006); Exelon Generation Co. (Early Site Permit for Clinton ESP Site) (*Clinton ESP-2*), CLI-05-29, 62 N.R.C. 801 (2005), Petition for review field sub nom. Environmental Law and Policy Ctr. v. NRC, No. 06-1442 (7th Cir., Feb. 8, 2006); *Clinton*, CLI-07-12, 65 N.R.C. ___ (Mar. 8, 2007) (approving permit for Clinton ESP); *Clinton*, CLI-05-17, 62 N.R.C. 5 (2005) (*Clinton ESP-1*); *Clinton*, CLI-05-9, 61 N.R.C. 235 (2005); *Clinton*, LBP-05-19, 62 N.R.C. 134 (2005); *Clinton*, LBP-05-7, 61 N.R.C. 188 (2005); *Clinton*, CLI-04-31, 60 N.R.C. 461 (2004); LBP-04-17, 60 N.R.C. 229 (2004); Sys. Energy Res., Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-07-14, 65 N.R.C. ___ (Mar. 27, 2007) (approving the Early Site Permit for Grand Gulf), CLI-07-10, 65 N.R.C. ___ (Feb. 26, 2007), LBP-07-01, 65 N.R.C. ___ (Jan. 26, 2007), CLI-05-4, 61 N.R.C. 10 (2005), & LBP-04-19, 60 N.R.C. 277 (2004); Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), CLI-04-8, 59 N.R.C. 113 (2004), LBP-04-18, 60 N.R.C. 253 (2004), & LBP-06-24, 64 N.R.C. 360 (2006); Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 N.R.C. ___ (Mar. 12, 2007). The final adjudicatory decision on the North Anna ESP application is expected in 2007. Dale E. Klein, Chairman, NRC, S-06-034, Remarks at the First Annual Fuel Cycle Monitor Global Nuclear Renaissance Summit, at 2 (Dec. 6, 2006), *available at* ADAMS Accession No. ML063410475. In addition, public interest groups have sought a hearing to challenge Southern Nuclear Operating Company's Early Site Permit for two possible new units at its Vogtle facility in Georgia. *See* Petition to Intervene in the Matter of Vogtle ESP Site, NRC Docket No. 52-011 (Dec. 11, 2006), *available at* http://www.cleanenergy.org/pdf/VogtlePetition121106.pdf & ADAMS Accession No. ML063470165.

39. *See, e.g.*, Margaret Lillard, *Duke Energy Head Grim on Nuclear, Urges Swift Cliffside OK*, CHARLOTTE OBSERVER, Jan. 19, 2007, *available at* http://www.charlotte.com/mld/observer/news/local/16502773.htm ("Duke Energy is also proposing to build two nuclear reactors, but the idea is opposed by groups including the Public Staff - the [North Carolina Utility C]ommission's consumer advocacy arm - state Attorney General Roy Cooper, and private environmental and consumer groups."); Rick Lyman, *Town Sees Nuclear Plans for Nuclear Plant as a Boon, Not a Threat*, N.Y. TIMES, Apr. 10, 2006, at A1 (reporting that while some officials and residents support plans for the proposed nuclear plant, some environmental groups, such as the Blue Ridge Environmental Defense League, based in North Carolina oppose it). Moreover, the following groups have recently opposed

building for possible new units to be constructed on the existing reactor sites for Vogtle (in Georgia),[40] North Anna (in Virginia),[41] Grand Gulf (in Mississippi),[42] Clinton (in Illinois),[43] Shearon Harris (in North Carolina),[44]

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the Duke Energy's advance recovery of the construction costs for its proposed plant in Cherokee County: North Carolina Waste Awareness & Reduction Network, Public Citizen, the North Carolina Public Interest Research Group, the Nuclear Information and Resource Service, Common Sense at the Nuclear Crossroads, Clean Water for North Carolina, and the Blue Ridge Environmental Defense League. *See* Tom Harrison, *Duke Fails to Convince Opponents of Advance Nuclear Cost Recovery*, NUCLEONICS WK., Nov. 23, 2006, at 8. It would make sense to expect these same groups to oppose any reactor license application before the NRC.

40. *See* Petition to Intervene in the Matter of Vogtle ESP Site, *supra* note 38 (setting forth the complaints of the petitioners, all non-profit environmental organizations, concerning the early site permit application for the Vogtle site and requesting intervention); *see also* Stacy Shelton, *Hearing Set for Nuclear Reactors at Plant Vogtle*, ATLANTA CONSTITUTION, Feb. 12, 2007, http://www.ajc.com/services/content/metro/stories/2007/02/11/0212metvogtle.html?cxtype=rss&cxsvc=7&cxcat=13 ("Five environmental groups are protesting the proposed units, citing concerns about the impact on the Savannah River, low-income and minority communities nearby, potential terrorist attacks and energy alternatives."); Tom Harrison, *Groups Against New Vogtle Units Seek Hearing on ESP Application*, INSIDE NRC, Dec. 25, 2006, at 6 (reporting on the petition to intervene filed by environmental groups concerning Southern Nuclear Operating Co.'s Vogtle site application).

41. *See, e.g.*, Kerri Scales, *Reactor Hearing to be Held*, FREE LANCE-STAR (Fredericksburg, VA), Feb. 11, 2007, http://fredericksburg.com/News/FLS/2007/022007/02112007/258727 (reporting that opponents object to a new nuclear reactor unit on grounds of its likely effect on the local wildlife, the water level and overall ecology of Lake Anna, public health and safety, the problems of waste management, and the threat of terrorist attacks); *Residents Express Concerns About Proposed Plant's Lake Impact*, HAMPTON ROADS DAILY PRESS, Sept. 24, 2006, *available at* http://www.dailypress.com/news/local/virginia/dp-va-northanna-nuclear0924sep24,0,1721463.story?coll=dp-headlines-virginia ("Some local residents and representatives for the Sierra Club and other public-interest groups oppose new reactors, citing environmental and safety concerns, problems with nuclear waste disposal, and the public subsidies that seem to be required to build nuclear plants."); Rusty Dennen, *Dominion Pitches Reactor*, FREDERICKSBURG FREE LANCE-STAR, Sept. 20, 2006, *available at* http://www.fredericksburg.com/News/FLS/2006/092006/09202006/223026 ("There is no shortage of opposition to Dominion's plan: Half a dozen environmental groups and citizens organizations have weighed in on the prospect of a North Anna Unit 3."). The ESP application for the North Anna site has been challenged in adjudication before the Commission. *See supra* note 38 (providing citations for the related adjudicatory decisions).

42. *See, e.g.*, Danny Barrett Jr., *60 Show Up, Some Speak Out for, Against Nuclear Reactor*, VICKSBURG POST, Aug. 29, 2006, *available at* http://www.vicksburgpost.com/articles/2006/08/29/news/news03.txt (noting that while supported by city and county officials, the project is opposed by some residents, environmental groups, and consumer advocacy groups); *Second Mississippi Nuclear Plant Could be Running in a Decade*, PICAYUNE ITEM (Mar. 22, 2006), http://www.picayuneitem.com/articles/2006/03/22/news/11nuke.txt ("The plan for the nuclear reactor near Port Gibson—about 25 miles south of Vicksburg—has met some opposition, primarily from those who say that it could disproportionately put blacks who live in the area at risk."). The ESP application for the Grand Gulf cite has already been challenged in adjudication before the Commission. *See supra* note 38 (providing citations for the related adjudicatory decisions).

43. *See, e.g.*, Eliot Brown, *Clinton Eyes Going Nuclear Again*, J. STAR, Nov. 26, 2006 (referring to a group called No New Nukes as opposing the possible addition of another plant at the Clinton facility); Chris Lusvardi, NRC Gives Nod to 2nd Clinton Power Plant Idea, PANTAGRAPH.COM, Mar. 8, 2007, http://www.pantagraph.com/articles/2007/03/08/news/doc45f0dd26749e3481681735.txt (referring to Exelon's announcement in Fall 2006 that it was considering construction of a nuclear plant in Texas); Seeley, *supra* note

an as-yet-unnamed plant in Levy County (Florida),[45] and the South Texas Project (near Bay City, Texas).[46] Likewise, most of the possibilities for new nuclear units in Alabama,[47] Florida,[48] Maryland,[49] Michigan,[50] New

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10. The ESP application for a new reactor at the Clinton site has also been challenged in adjudication before the Commission. *See supra* note 38 (providing citations for the related adjudicatory decisions).

44. *See, e.g.*, Lillard, *supra* note 39 ("Duke Energy is also proposing to build two nuclear reactors, but the idea is opposed by groups including the Public Staff—the [North Carolina Utility C]ommission's consumer advocacy arm—state Attorney General Roy Cooper, and private environmental and consumer groups."); Michael Steinberg, *New Nukes: The Southern Strategy*, Z MAG. ONLINE, Mar. 2006, http://zmagsite.zmag.org/Mar2006/steinberg0306.html ("In the Triangle area of North Carolina, the North Carolina Waste Awareness and Reduction Network . . . has been organizing resistance to Progress Energy's plan to build nukes at its Shearon Harris nuclear plant . . . .").

45. Jeff M. Hardison and Mike Bowdoin, *Levy County Official React to Possible Plant*, WILLISTON PIONEER SUN NEWS, Dec. 19, 2006, http://www.willistonpioneer.com/articles/2006/12/18/news/news04.txt (noting Levy County Commissioner Sammy Yearty's statement that "most of the calls he's had have been in opposition, and . . . he's sure the proposal will generate statewide attention due to opposition to nuclear power in general"); Cathy Zollo, *Growing Needs, Changing Attitudes Fuel Drive for New Nuclear Plant*, SARASOTA HERALD-TRIBUNE CO., Dec. 17, 2006, at B51, *available at* http://www.heraldtribune.com/apps/pbcs.dll/article?AID=/20061217/NEWS/612170320/1006/SPORTS (quoting Progress CEO Jeff Lyash's statement that he expects opposition to the power plant, despite Levy County's positive initial reaction).

46. Dan Zehr and Robert Elder, *Nuclear Facility Could Expand*, AUSTIN AMERICAN-STATESMAN, June 22, 2006, at A1, *available at* http://www.statesman.com/news/content/news/stories/local/06/22power.html ("A coalition of Texas environmental groups [including the Texas Office of Public Citizen] strongly opposes the planned South Texas expansion."); Anton Caputo, *Nuke Plant Expansion Sought*, SAN ANTONIO EXPRESS-NEWS, June 22, 2006, at A1, *available at* http://www.mysanantonio.com/news/metro/stories/MYSA062206.01A.bay_city.1851745.html (reporting that the citizen group Environment Texas opposes the new plants).

47. *TVA Plans to Add 2 Nuclear Reactors in N. Alabama*, DECATUR DAILY NEWS, Jan. 29, 2007, http://www.decaturdaily.com/decaturdaily/news/070129/tva.shtml; *see also Tennessee Valley Authority to Pursue 2 New Reactors*, WASH. POST, Jan. 29, 2007, at A8; Dave Flessner and Pam Sohn, *Nuclear Revival*, CHATTANOOGA TIMES FREE PRESS, Jan. 28, 2007, http://tfponline.com/absolutenm/templates/content.aspx?articleid=10068&zoneid=83.

48. Lloyd Dunkelberger, *New Rules Could Lead to More Nuclear Energy Plants*, GAINESVILLE SUN, Feb. 14, 2007, http://www.gainesville.com/apps/pbcs.dll/article?AID=/20070214/LOCAL/702140331/-1/news ("In Southeast Florida, Florida Power and Light . . . has indicated it may build another plant . . . although it hasn't identified a potential site."); Kristi E. Swartz, *FPL wants another Fla. nuclear plant by 2018*, PALM BEACH POST, Feb. 10, 2007, at 2F ("Florida Power & Light Co. President Armando Olivera said . . . that within the next two years the utility will inform federal regulators that it wants to build another nuclear plant in Florida.").

49. Philip Rucker, *Proposed Nuclear Expansion Under Fire: Calvert Cliffs Could Get a Third Reactor*, WASH. POST, Mar. 8, 2007, at SM01 ("State environmental and public health activists launched a 'No New Nukes' campaign Tuesday to oppose a proposed third nuclear reactor . . . at the Calvert Cliffs Nuclear Power Plant."); Paul Adams, *Calvert Cliffs: Proposed Second Nuclear Plant is Called Dangerous and a Burden*, BALTIMORE SUN, Mar. 7, 2007, at 1D ("The Maryland Public Interest Research Group launched a grass-roots campaign yesterday to stop Constellation Energy from building a new nuclear reactor on the shores of Chesapeake Bay."); Andy Rosen, *Even Without a Proposal, Activists Oppose a New Calvert Cliffs Reactor*, DAILY RECORD, Mar. 6, 2007, http://www.mddailyrecord.com/article.cfm?id=647&type=UTTM ("Activists are not wasting any time in publicizing their opposition to a new nuclear reactor at Calvert Cliffs.").

50. Charles Slat, *Reaction to Nuclear Plant Idea Mixed*, MONROENEWS.COM, Feb. 13. 2007, http://www.monroenews.com/apps/pbcs.dll/article?AID=/20070213/NEWS01/102130020

York,[51] South Carolina,[52] central Texas,[53] and west Texas[54] have generated less publicized opposition.

The Commission has already received four ESP applications[55] and anticipates at least one more in 2007.[56] As recently as March 2007, the NRC was predicting COLs for as many as thirty-two new reactor units,[57] a number that will doubtless be out-of-date by the time this Article is published. NRC Chairman Klein has reported seeing projections of as

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(objections so far include nuclear waste and terrorism issues); Eric Morath, *DTE Plans for Nuclear Plant*, DETROIT NEWS, Feb. 13, 2007, http://www.detnews.com/apps/pbcs.dll/article?AID=/20070213/BIZ/702130338/1001 (Lana Pollack, president of the Michigan Environmental Council, stated, "[w]e need to protect the Great Lakes and having nuclear waste stored on its shores is a threat . . . . We're not saying no, not ever, but we are saying let's not rush to nuclear power.").

51. Ann MacLachlan & Jenny Weil, *Areva Sees Way to Gain Ground in NRC Licensing of US EPR*, NUCLEONICS WK., July 6, 2006, at 15-16 (referring to Constellation Energy's choice of Nine Mile Point in northern New York State as a site for a possible new reactor unit).

52. *Nuclear Power Industry Planning Seven New Reactors*, ENVTL. NEWS SERV., July 12, 2006, http://www.ens-newswire.com/ens/jul2006/2006-07-12-09.asp ("In February [2006], Santee Cooper and South Carolina Electric & Gas Company selected the V.C. Summer Nuclear Station near Jenkinsville, South Carolina, as a potential site for a new nuclear plant.").

53. Cyrus Reed, *Reed: No, Environmentalists Don't Back Nuclear Power*, AUSTIN AMERICAN-STATESMAN, Nov. 28, 2006, *available at* http://www.statesman.com/opinion/content/editorial/stories/11/28/28reed_edit.html (exhibiting general opposition to nuclear power in Texas); Robert Manor, *Exelon Eyes Texas Plant: Nuclear Power Push Revs Up; Paperwork Keeps 'Option Open*,' CHI. TRIBUNE, Sept. 30, 2006, at C1 (reporting that the Sustained Energy and Economic Development Coalition "will be organizing to oppose [five proposed] plants" in Texas); Christine DeLoma, *Nuclear Energy Production Verge of Renaissance*, EAST TEX. REV., Sept. 21, 2006, http://www.easttexasreview.com/story.htm?StoryID=3887 ("Texas environmental groups oppose NRG's and TXU's plans. 'Nuclear plants are too costly to build, too risky to operate, and the wastes are still too hot to handle,' said Tom . . . Smith of Public Citizen."). *But cf.* Jenny Weil, *TXU to Cancel Coal Projects, But New Buyers Keep Nuclear Proposals*, NUCLEONICS WK., Mar. 1, 2007, at 1 (reporting that Dave Hawkins, the director of the Natural Resources Defense Council's Climate Center, "told a reporter . . . that his group did not have a problem with more nuclear plants being built if the industry could finance the projects without any government subsidies . . . [but] there are still downsides to nuclear power, including nuclear waste disposal and proliferation concerns").

54. Reed, *supra* note 53 ("No, environmentalists don't back nuclear power"); Manor, *supra* note 53; DeLoma, *supra* note 53.

55. *Exelon Generation Co.*, Docket No. 52-007-ESP (Early Site Permit for Clinton ESP Site); *Dominion Nuclear North Anna*, Docket No. 52-008-ESP (Early Site Permit for North Anna ESP Site); *System Energy Res.*, Docket No. 52-009-ESP (Early Site Permit for Grand Gulf ESP Site); *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), Docket No. 52-011-ESP; Establishment of Atomic Safety and Licensing Board, Docket No. 52-011-ESP, 71 Fed. Reg. 77,071 (Dec. 22, 2006) (Southern Nuclear Operating Plant (Earl Site Permit for Vogtle ESP Site).

56. Jenny Weil, *Companies Mull Long-Lead Orders As Industry Intent To Build Intensifies*, INSIDE NRC, Aug. 7, 2006, at 1, 13 ("Amarillo Power . . . plans to file an early site permit application in fourth-quarter 2007."); Jenny Weil, *Lengthy Licensing Reviews in Past No Indication of Future, NRC Says*, INSIDE NRC, Mar. 6, 2006, at 5; Jenny Weil, *New Plant Licensing Work to Grow, Security Activities Down in FY-07*, INSIDE NRC, Feb. 20, 2006, at 4-5.

57. *See* Merrifield, *supra* note 10.

many as fifty new nuclear power plant units by 2026.[58] Both Chairman Klein and former-Chairman Diaz have described these upcoming applications as a "bow wave."[59]

Other Commissioners agree with this analogy. Commissioner Jeffrey Merrifield has forecast that, "absent a major accident, fifty years from now there may be as many as thirty to forty new reactor orders in process,"[60] and has described the upcoming wave of applications as a "second bandwagon" that could double the current number of 104 reactors within twenty years (alluding to the first "bandwagon" of applications from the 1960s).[61] Commissioner Edward McGaffigan, Jr., colorfully captured this overall feeling of his colleagues by predicting a "tsunami"[62] or "tidal wave"[63] of new reactor applications. Although the predictions both within and outside the Commission vary from month to month and from source to source,[64] the underlying message is the same—the Commission can expect to receive *a lot* of applications to build and operate nuclear power plants. In this regard NRC Commissioner McGaffigan predicted:

> If all the ESP/COL applications are submitted on the schedule currently projected, NRC will have more Atomic Safety and Licensing Boards . . . in operation at one time than in a quarter century. And I've not mentioned the Yucca Mountain proceeding that may be commencing in the same time period.[65]

Many if not all of these anticipated applications will be challenged in administrative hearings. The NRC expects hearings on COLs to occur from 2010 through 2012.[66] Consequently, the NRC's Office of the General Counsel recently reorganized in preparation for the onslaught of administrative litigation, hired additional lawyers, and is advertising for

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58. Dale Klein, Chairman, NRC, Prepared Remarks to the Women in Nuclear, NRC NEWS, S-06-023 at 1 (Sept. 7, 2006), *available at* ADAMS Accession No. ML062510090. Earlier in 2006, the industry was predicting up to 200 new reactor orders by 2030. *See* Pearl Marshall, *Up to 200 New Reactor Orders Seen by 2030, Industry Says*, NUCLEONICS WK., Apr. 20, 2006, at 1, 6.

59. Jenny Weil, *Diaz Convinced Agency Can Handle Future Workload and Challenges*, INSIDE NRC, May 29, 2006, at 1; Jenny Weil & Steven Dolley, *NRC Chairman-Designate, Dale Klein, Heads Toward Senate Confirmation*, INSIDE NRC, May 29, 2006, at 1, 17.

60. Jeffrey S. Merrifield, Commissioner, NRC, S-06-007, Remarks Entitled "Lessons from Sergeant Schultz," at 1 (Mar. 8, 2006), *available at* ADAMS Accession No. ML060670032.

61. Merrifield, *supra* note 10; Weil, *supra* note 59, at 1.

62. Edward McGaffigan, Jr., Commissioner, NRC, S-06-005, Remarks Entitled "The Challenges Ahead: The Musings of a Pessimist/Realist," at 2 (Mar. 7, 2006), *available at* ADAMS Accession No. ML060660575.

63. Weil, *supra* note 59, at 1.

64. For instance, in the first six months of 2006, estimates ranged from eleven to fifteen COLs for eleven to twenty-six new reactor units.

65. McGaffigan, *supra* note 62, at 6.

66. Winter Meeting Remarks, *supra* note 10.

still more attorneys.[67] The NRC likewise reorganized its existing Office of Nuclear Reactor Regulation to be ready for the expected influx of COL applications, and created a new Office of New Reactors.[68] The agency hired 370 new employees in 2006[69] and announced its intention to hire 400 new employees in fiscal year 2007, and again in fiscal year 2008[70]—although roughly half of these will replace retiring personnel.[71]

And finally, there is "the 800-pound gorilla in the corner": Yucca Mountain. DOE's application for a high-level nuclear waste repository in Yucca Mountain, Nevada is widely expected to generate the single most resource-intensive adjudicatory proceeding in the history of either the NRC

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67. For instance, in August 2006, the NRC's Office of the General Counsel (OGC) advertised to hire multiple attorneys. *See* http://www.jobsfed.com/rp/cgi/getJobsBySeries.cgi?Series=0905&STATE=MD&RegID=. Law firms with nuclear practice are following suit. Zusha Elinson, *Gone Fission: Firms Weigh Nuclear Option*, Law.com (Apr. 13, 2007), http://www.law.com/jsp/article.jsp?id=1176368649113&pos=ataglance.

68. Dale E. Klein, Chairman, NRC, S-06-034, Remarks at the First Annual Fuel Cycle Monitor Global Nuclear Renaissance Summit, at 2 (Dec. 6, 2006), *available at* ADAMS Accession No. ML063410475.

69. Dale E. Klein, Chairman, NRC, S-07-003, Remarks at the Third Annual Platts Nuclear Energy Conference, at 2 (Feb. 8, 2007), *available at* ADAMS Accession No. ML070390248 and http://adamswebsearch2.nrc.gov/idmws/doccontent.dll?library=PU_ADAMS^PBNTAD01&ID=070390222:2; Tom Harrison, *GAO: Mounting Retirements Pose Problem*, INSIDE NRC, Jan. 22, 2007, at 1, 3; Dan Caterinicchia, *Nuclear Regulatory Workforce Challenged*, HOUSTON CHRON., Jan. 18, 2007, http://www.chron.com/disp/story.mpl/ap/fn/4479973.html.

70. *See* Klein, *supra* note 69; Harrison, *supra* note 69; Caterinicchia, *supra* note 69; Dale E. Klein, Chairman, NRC, S-06-024, Remarks at the 2006 Annual Banquet of the National Organization of Test, Research and Training Reactors, at 4 (Sept. 14, 2006), *available at* ADAMS Accession No. ML062610056 ("The NRC . . . will hire between 300 and 400 professionals a year through 2008.").

Tellingly, the private sector is taking the same tack. *See* Hyun Young Lee, *Aging Work Force Poses Nuclear-Power Challenge*, WALL ST. J., Apr. 11, 2006, at A12. For instance, Westinghouse "hired 800 people [in 2005], . . . 900 more [in 2006] and expects to hire a minimum of 500 new workers in succeeding years." Dan Fitzpatrick & Steve Massey, *Western Pennsylvania Lands Westinghouse Engineering Unit*, PITTSBURGH POST-GAZETTE, Dec. 6, 2006, *available at* http://www.post-gazette.com/pg/06340/743843-28.stm; Thomas Olson, *Retirees return to Nuclear Family*, PITTSBURGH TRIBUNE-REVIEW, Oct. 8, 2006, http://www.pittsburghlive.com/x/pittsburghtrib/s_473514.html.

Likewise, General Electric's nuclear business hired around 300 employees in 2004-2005, and expected to add another 150-200 by the end of 2006. *See* Klein, *supra* note 69; Pearl Marshall, *Up to 200 New Reactor Orders Seen by 2030, Industry Says*, NUCLEONICS WK., Apr. 20, 2006, at 1, 6; Si Cantwell, *GE Talks Up Nuclear Energy*, WILMINGTON STAR, Sept. 30, 2006, *available at* http://www.wilmingtonstar.com/apps/pbcs.dll/article?AID=/20060930/NEWS/609300339/1004 (reporting that GE has hired more than 300 employees at its nuclear headquarters since 2003, and plans to hire 300-400 more). Although this increase in governmental and private-sector hiring is a sign of the nuclear industry's health, there is still a shortage of "highly-qualified nuclear professionals and a skilled workforce." *See* Klein, *supra* note 69; Washington Remarks *supra* note 10, at 3; *see also* David Gauthier-Villars, *Trials of Nuclear Rebuilding: Problems at Finland Reactor Highlight Global Expertise Shortage*, WALL ST. J., Mar. 6, 2007, at A6 ("A two-millimeter welding oversight is one of the many setbacks plaguing construction of a . . . $4 billion[] nuclear-power reactor in [Finland] . . . [that] highlight[s] how an unexpected challenge is holding back a global effort to revive the nuclear industry: an acute shortage of skilled manpower.").

71. Washington Remarks, *supra* note 10, at 3 ("[T]he NRC is increasing staff by a net of about 200 positions a year through 2008.").

or its predecessor agency, the Atomic Energy Commission—and perhaps even in the history of the entire federal government.[72]

II. CONSTITUTIONAL, STATUTORY AND REGULATORY BACKGROUND

The Due Process Clause of the Fifth Amendment to the United States Constitution requires "a fair hearing before an impartial tribunal"[73] in cases involving government infringement on life, liberty, or property interests—a requirement that "applies to administrative agencies which adjudicate as well as to [judicial] courts."[74] Inherent in this concept of due process is the

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72. *See* McGaffigan, *supra* note 62, at 2 ("[T]he licensing of the Yucca Mountain repository . . . is likely to be the most complex administrative proceeding in the history of mankind in preparation for which there are already more than 30 million pages of documents in the Licensing Support Network . . . .").

73. Hirrill v. Merriweather, 629 F.2d 490, 496 (8th Cir. 1980). Courts generally do not attempt to define "fairness" in the context of due process. *See* Allison, *supra* note 22, at 1192 n.141. Seemingly, they view it as Justice Stewart did obscenity—they can't define it but they know it when they see it. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

74. Withrow v. Larkin, 421 U.S. 35, 46 (1975). *Accord* Roach v. NTSB, 804 F.2d 1147, 1160 (10th Cir. 1986) ("Due process entitles an individual in an administrative proceeding to a fair hearing before an impartial tribunal."); *see* Allison, *supra* note 22, at 1162 ("[P]rocedural due process applies to adjudicative government decisions and not to legislative ones."); Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 779 (1981) (due process guarantees parties in an administrative proceeding the right to a neutral adjudicator); Preston, *supra* note 25, at 633, 653-54.

The Commission has itself acknowledged the applicability of the due process requirements to its *enforcement* adjudications—presumably due to the property interest at stake in such proceedings. *See* Advanced Medical Sys., CLI-94-6, 39 N.R.C. 285, 299 (1994) ("The Commission's regulations are consistent with . . . the dictates of due process."); Oncology Serv. Corp., CLI-93-17, 38 N.R.C. 44, 51 (1993) ("[T]hese elements are guides in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case." (quoting United States v. Eight Thousand Eight Hundred & Fifty Dollars in United States Currency, 461 U.S. 555, 565 (1983))); Oncology Serv. Corp., CLI-93-13, 37 N.R.C. 419, 421 (1993) ("For purposes of determining whether interlocutory review is appropriate, when a licensee is subject to an immediately effective suspension order, a licensee's due process interest in a prompt hearing is threatened by a 120-day stay of the proceeding."). *Compare* David Geisen, CLI-07-06, 65 N.R.C. __ (Feb. 1, 2007) (holding enforcement adjudication in abeyance for an indeterminate time), *with* David Geisen, CLI-06-20, 64 N.R.C. 9 (2006) (denying a motion to hold the same adjudication in abeyance), *and* Andrew Siemaszko, CLI-06-12, 63 N.R.C. 495 (2006) (declining to hold adjudication in abeyance).

Moreover, the Commission has at least implicitly recognized the *potential* applicability of the due process requirements to its own licensing adjudications. *See* Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation [ISFSI]), CLI-04-4, 59 N.R.C. 31, 46 (2004) ("[W]e cannot find that the Board's action amounted to a denial of due process."); Curators of the Univ. of Mo., CLI-95-1, 41 N.R.C. 71, 118 (1995) ("Generalized health, safety and environmental concerns . . . simply do not rise to the level of liberty or property interests that are protected by the due process clause."); Safety Light Corp. (Bloomsburg Site Decontamination and license Renewal Denials) CLI-92-13, 36 N.R.C. 79, 90 (1992) ("Subpart L is not inherently inadequate to satisfy the hearing requirements of . . . due process."). However, as noted at *infra* note 87 and accompanying text, NRC licensing cases rarely if ever involve life, liberty, or property interests protected under the Due Process Clause.

principle that no party in a formal adjudication should have private access to a decisionmaker.[75] Indeed the Supreme Court has ruled, in addressing issues of restricted communications, that "additional procedures may be required in order to afford aggrieved individuals due process" when an agency makes "a 'quasi-judicial' determination by which a very small number of persons are 'exceptionally affected, in each case upon individual grounds.'"[76]

Implementing the due process requirement,[77] the APA, as amended by the Government in the Sunshine Act, restricts the communications that an agency's adjudicatory personnel is permitted to have both with the adversarial members of the agency's staff ("separation of functions" restrictions[78]) and with the public ("ex parte" restrictions[79]). Although later

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75. *See, e.g.*, Morgan v. United States, 304 U.S. 1, 20-22 (1938) (per curiam); 4 JACOB A. STEIN, GLENN A. MITCHELL & BASIL J. MEZINES, ADMINISTRATIVE LAW § 32.01[1] at 32-14 to 32-15 (1996).

76. Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 542 (1978) (internal quotation marks omitted); *cf.* Bi-Metallic Inv. Co. v. State Bd. of Equalization of Co., 239 U.S. 441, 445-46 (1915) (stating that a rulemaking involving few individuals may give rise to due process rights that do not apply to rulemakings affecting many individuals); Londoner v. Denver, 210 U.S. 373, 374-87 (1908).

77. The Court stated in *Withrow*:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a . . . difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

421 U.S. at 47; *see also* GARY J. EDLES & JEROME NELSON, FEDERAL REGULATORY PROCESS: AGENCY PRACTICES AND PROCEDURES § 11.3, at 324 (2d ed. 1994) ("The case law is clear that a combination of judging with prosecuting or investigating, however undesirable, is not a denial of due process unless the combination 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'") (quoting Porter County Chapter of the Izaak Walton League v. NRC, 606 F.2d 1363 (D.C. Cir. 1979)); Preston, *supra* note 25, at 631 n. 70 (quoting Sen. McCarran's statement that the APA "is designed to provide guarantees of due process in administrative procedure"); Harold W. Davey, *Separation of Functions and the National Labor Relations Board*, 7 U. CHI. L. REV. 328, 331 (1940) ("[T]he fact that there is this fusion of prosecution and adjudication in a single tribunal does not imply the absence of all extrinsic checks . . . . [I]t simply implies absence of the traditional check. Such a combination of functions does not offend constitutional requirements of due process.") (footnote omitted). For examples of the very high bar that the courts have set for an ex parte communication to violate due process, see 4 STEIN, MITCHELL & MEZINES, *supra* note 75, § 33.02[2], at 33-25 to 33-28; Allison, *supra* note 22, at 1201-02 n.159. For examples of situations in which the courts have ruled on the applicability *vel non* of the separation-of-functions provisions of the APA, see *id.* § 33.02[3], at 33-30 to 33-35.

78. Scholars addressing separation-of-functions communications issues will, from time to time, also refer to its opposite—"combination of functions." *See, e.g.*, EDLES & NELSON, *supra* note 77, at 322-23; Asimow, *supra* note 74, at 780, 782; Davey, *supra* note 77, at 331; Davis, *supra* note 22, at 394.

79. 5 U.S.C. §§ 554, 556, 557 (2000); *see also* NRC, Final Rule, Revision to Ex Parte and Separation of Functions Rules Applicable to Formal Adjudicatory Proceedings, 53 Fed. Reg. 10,360, 10,361 (Mar. 31, 1988); *cf.* Model Code of Judicial Conduct, Canon 3(B)(7).

sections of this Article describe many differences between these two kinds of restrictions, here is a sample, courtesy of UCLA Law Professor Asimow:

> [U]nder separation of functions, non-adversary staff members can conduct off-the-record communications with agency heads, whereas the ex parte communications ban prohibits nearly all off-the-record contacts . . . . Separation of functions applies to "adversaries," but the ex parte contact rule applies to a much broader class of "interested persons." Separation of functions does not apply to formal rulemaking; the ex parte contact rule does . . . . There are important exceptions to separation of functions [restrictions] (including initial licensing and ratemaking and there is an agency head exception); no such exceptions apply to the prohibition on ex parte communications.[80]

At the NRC, adjudicatory personnel include the NRC Chairman, Commissioners, administrative judges on the Atomic Safety and Licensing Board Panel,[81] the law clerks serving that Panel, the personal staff of the Commissioners and Chairman, personnel in the Office of Commission Appellate Adjudication (OCAA)[82] and in the Office of the Secretary (SECY),[83] "adjudicatory employees" assisting a Licensing Board[84] or

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80. ADJUDICATION GUIDE, *supra* note 22, at 107 n.29.

81. The NRC's administrative judges are members of the Atomic Safety and Licensing Board Panel and generally sit either as three-member "boards" or as a one-person "presiding officer." *See generally* Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders, 10 C.F.R. § 2.4 (2006) (defining "presiding officer").

82. OCAA is responsible for assisting the Commissioners in preparing adjudicatory decisions. *See generally* Office of Commission Appellate Adjudication, SECY-05-0034, *Annual Report on Commission Adjudication*, at 1 (Feb. 17, 2005), *available at* ADAMS Accession No. ML050490074 [hereinafter *2005 Report on Commission Adjudication*].

83. SECY is responsible for planning, scheduling, announcing, organizing, and recording Commission meetings, including the affirmation meetings at which the commissioners affirm their votes on adjudicatory and rulemaking matters; assuring compliance with the Government in the Sunshine Act, 5 U.S.C. § 557(d); and coordinating the public release of meeting documents. SECY is bound by the Commission's separation-of-functions rules. *See, e.g.*, Letter from Emile Julian, SECY, NRC, to William D. Peterson (Feb. 2, 2004) at 1, *available at* ADAMS Accession No. ML040410524 ("There are prohibitions in 10 C.F.R. Part 2, Subpart G against an adjudicatory employee, such as myself, discussing the merits of the proceeding, the substance of filings in the proceeding or the disposition of the proceedings with a party, potential party or interested person.").

84. *See* Special Procedures Applicable to Adjudicatory Proceedings Involving Restricted Data and/or Security Information, 10 C.F.R. § 2.904 (2006) (explaining that the Commission may "designate a representative to advise and assist the presiding officer and the parties with respect to security classification of information and the safeguards to be observed"); *see also* Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), Request to Commission (Licensing Board, Jan. 23, 2004), ADAMS Accession No. ML040290903; Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), Request to Commission (Licensing Board, June 28, 2004), ADAMS Accession No. ML041810027. The applicability of the separation-of-functions rule to these representatives is apparent from the fact that the NRC Staff successfully objected to the appointment of the Board's choice of representative on the ground that he had "been involved in the Staff's consideration of Duke Energy Corporation's Security Plan submittal [and t]hus there is a potential separation of functions issue related to him advising the Board in this proceeding." NRC, Staff Response to Atomic Safety and Licensing Board Request to the Commission Pursuant to 10 C.F.R. § 2.904, at 1 (Jan. 28, 2004), *available at* ADAMS Accession No. ML040360454.

OCAA,[85] and attorneys within the "advisory" side of NRC's Office of General Counsel (OGC).[86]

Despite the fact that the Commission adjudicates relatively few cases involving life, liberty, or property interests protected under the Due Process Clause,[87] and despite the Commission's longstanding position that its Atomic Energy Act (AEA) proceedings are not "on the record" proceedings subject to the APA,[88] the Commission has promulgated

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85. OCAA has regularly enlisted adjudicatory employees to provide independent technical advice. *See generally 2005 Report on Commission Adjudication*, *supra* note 82, at 4. In anticipation of the Yucca Mountain adjudication, the Commission has created an office (Commission Adjudicatory Technical Support, or CATS) responsible for their selections and appointments. *See* NRC, DT-05-05, TRANSMISSION OF [REVISED] MANAGEMENT DIRECTIVE 9.7, ORGANIZATION AND FUNCTIONS, OFFICE OF THE GENERAL COUNSEL, HANDBOOK 9.7, pt. II, at 9 (Apr. 15, 2005), *available at* ADAMS Accession No. ML051240436. "The CATS office [has] identified 33 different technical disciplines that may arise with respect to the Yucca Mountain license application, and interviewed 106 people from within the agency (three to four candidates for each part-time, temporary position)." *2005 Report on Commission Adjudication*, *supra* note 82, at 4.

OCAA is also authorized to hire external consultants as adjudicatory employees if the NRC lacks available employees with the necessary background. If the Commission looks to outside consultants for adjudicatory advice, they would qualify as the "functional equivalent" of agency staff for purposes of separation-of-functions restraints. *See* Nat'l Small Shipments Traffic Conference v. ICC, 725 F.2d 1442, 1449 (D.C. Cir. 1984) (informal rulemaking context); United Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1218-20 (D.C. Cir. 1980) (rulemaking context); RULEMAKING GUIDE, *supra* note 22, at 354-55.

86. To avoid separation-of-functions problems, OGC is divided into advisory and litigation sections.

87. One judicial case suggests that an intervenor's right to a hearing in an AEC and NRC adjudication constitutes a constitutionally-protected property interest. *See* Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1081 (D.C. Cir. 1974) ("Due process does indeed require that, where a right to be heard exists [as it does in the Atomic Energy Act (AEA), 42 U.S.C. §§ 2011-2296b-7 (2000)] 'it must be accommodated at a meaningful time in a meaningful manner.'") (quoting Goldberg v. Kelly, 397 U.S. 254, 267 (1970), and Armstrong v. Manzo, 380 U.S. 545, 554 (1965))). But the weight of authority supports the opposite conclusion. *See* Citizens Awareness Network v. United States, 391 F.3d 338, 354 (1st Cir. 2004) ("[T]here is no fundamental right to participate in administrative adjudications."); City of West Chicago v. NRC, 701 F.2d 632, 645 (7th Cir. 1983) ("[G]eneralized health, safety and environmental concerns do not constitute liberty or property subject to due process protection."); *see also* Sequoyah Fuels Corp. (Sequoyah UF6 to UF4 Facility), CLI-86-17, 24 N.R.C. 489, 496 n.3 (1986).

Presumably, an enforcement action to suspend or revoke an operator's license, an operating license, or a construction permit would invoke due process issues involving property rights. *Cf.* Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 N.R.C. 282, 316-17 (1982) (regarding the need to offer licensee's employee an opportunity for a hearing on the Commission's requirement that he no longer have supervisory responsibilities over the training of non-licensed personnel). Regarding due process implications in other enforcement proceedings, see NRC decisions cited *supra* note 72. Likewise, a program fraud proceeding under 10 C.F.R. Part 13, which can result in civil penalties, would logically involve property rights. *See* Lloyd P. Zerr, ALJ-94-1, 39 N.R.C. 131 (1994); Lloyd P. Zerr, ALJ-93-1, 38 N.R.C. 151 (1993).

88. *See City of West Chicago*, 701 F.2d at 642 ("Section 181 of the AEA . . . did not specify the 'on the record' requirement necessary to trigger Section 554 of the APA."); *id.*at 644 ("[T]here is no indication even in the judicial review Section of the AEA . . . that Congress intended to require formal hearings under the APA."). *But cf. Citizens Awareness Network*, 391 F.3d 338, 350-51 (referring to "formal adjudications" and "on the record

regulations that, as a practical matter, implement the APA's "restricted communications" provisions[89] and also take into account the broader "fairness" requirements of the Due Process Clause.[90]

The Commission's regulations define the term "ex parte communication" as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given."[91] This definition parallels the one set forth in the APA.[92] Others have defined the term as "communication of information in which adversary counsel would be interested"[93] or as "evidence, arguments, or other information relevant to a disputed issue that are transmitted to a judging-type of decision maker in a way that renders the information insufficiently open to challenge and testing by an adversely affected party."[94]

The Commission's regulations nowhere define the related term "separation of functions." Nor does the APA. The Administrative Conference of the United States (ACUS) staff, however, proposed the following sensible definition for "separation of functions": "a principle of administrative law which seeks to protect the independence and the objectivity of the adjudicative function by restricting its combination with

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hearings" in its analysis of the reactor license hearing process governed by the Commission's 2004 procedural rules). The latter decision, however, has been severely criticized in legal academia. *See* RICHARD J. PIERCE, JR., I ADMINISTRATIVE LAW TREATISE § 8.2, at 138-39 (4th ed. Supp. 2006); Richard J. Pierce, Jr., *Waiting for Vermont Yankee II*, 57 ADMIN. L. REV. 669, 673-82 (2005).

The references and discussions of the APA throughout this Article are not intended to call into question the Commission's conclusion that the APA's "on the record" hearing requirements are inapplicable to the Commission's formal proceedings under 10 C.F.R. Part 2, Subpart G. The references and discussions are instead included because (i) the policies and goals underlying the Commission's restricted-communications regulations mirror those underlying the APA, (ii) the APA and its associated jurisprudence, even though not controlling authority in AEA proceedings, nonetheless carry significant weight on issues of restricted communications in those proceedings, and (iii) the Commission's occasional adjudications under the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. §§ 3801-3812 (2000), are clearly subject to the APA's "on the record" requirements. Regarding the Program Fraud Civil Remedies Act, see Lloyd P. Zerr, ALJ-94-1, 39 N.R.C. 131 (1994); Lloyd P. Zerr, ALJ-93-1, 38 N.R.C. 151 (1993).

89. *See generally* Chrysler Corp. v. Brown, 441 U.S. 281, 312-13 (1979) ("It is within an agency's discretion to afford parties more procedure [than provided in the APA].").

90. *See* 10 C.F.R. §§ 2.347-2.348 (2006) (repromulgating 10 C.F.R. §§ 2.780-2.781, without substantive change); 10 C.F.R. § 13.14 (addressing separation of functions); 10 C.F.R. § 13.15 ("No party or person . . . shall communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate."); *cf.* Morgan v. United States, 304 U.S. 1, 14-15, 22 (1938) (referring, repeatedly, to the need for "fair play" in administrative adjudicatory proceedings in its due process analysis).

91. 10 C.F.R. § 2.4 (2006).

92. 5 U.S.C. § 551(14) (2000).

93. *See* Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communication*, 37 HOUS. L. REV. 1343, 1363 (2000) (footnote omitted).

94. *See* Allison, *supra* note 22, at 1139; *see also id.* at 1197.

inconsistent functions, such as prosecution, investigation, or advocacy."[95] This definition restricts the scope of the separation-of-functions ban to internal communications between or among agency employees (and, presumably, agency contractors).[96]

This Article will follow the Commission's current practice of using these two terms ("ex parte" and "separation of functions") to distinguish between the two above-mentioned kinds of restricted communications[97]—even though the Commission itself has sometimes strayed from this path,[98] and

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95. ACUS Draft Recommendations: Separation of Functions in Agency Proceedings, 46 Fed. Reg. 26,487 (May 13, 1981) [hereinafter ACUS 1981 Draft Recommendations]; *see* Scalia, *supra* note 22, at v & n.2 (discussing the rejection of the 1981 Draft Recommendations by ACUS in its December 1981 Plenary Session).

96. *See supra* note 85.

97. *See* Yankee Atomic Elec. Co. (Yankee Rowe Nuclear Power Station), CLI-96-5, 43 N.R.C. 53, 56 n.2 (1996); NRC, SECY-88-43, PROPOSED FINAL RULE REVISING AGENCY PROCEDURES GOVERNING EX PARTE COMMUNICATIONS AND SEPARATION OF FUNCTIONS 2 (1988) (on file at NRC Public Document Room, 11555 Rockville Pike, Rockville, MD 20852, Document Accession No. 8802170361).

98. For instance, the NRC and the licensing board have occasionally used the phrase "ex parte communications" to refer to separation-of-functions communications. *See, e.g.*, Yankee Atomic Elec. Co. (Yankee Rowe Nuclear Power Station), CLI-91-11, 34 N.R.C. 3, 6-7 (1991) (denying a request that the Commission refrain from contacts with the NRC Staff because the "mere filing of a petition" does not invoke ex parte rules and in fact such rules do not attach "until a notice of hearing or other comparable order is issued"); Texas Utilities Elec. Co. (Comanche Peak Steam Elec. Station, Units 1 and 2), LBP-84-36, 20 N.R.C. 928, 930 ("Ex parte, *extra-judicial* information will not be relied upon in any manner by the Board"—with the emphasized language indicating a refusal to consider such information regardless of whether it came from within or outside the Commission), *vacated on other grounds*, LBP-84-48, 20 N.R.C. 1455 (1984); *see also* NRC, SECY-80-130, A STUDY OF THE SEPARATION OF FUNCTIONS AND EX PARTE RULES IN NUCLEAR REGULATORY COMMISSION ADJUDICATIONS FOR DOMESTIC LICENSING, at 16 n.27 (1980) (on file at NRC Public Document Room, 11555 Rockville Pike, Rockville, MD 20852, Document Accession No. 8005130642) (suggesting that the Commission's confusion of these two concepts may have stemmed from a 1959 OGC memorandum that itself mixed up these concepts); Memorandum from Nunzio J. Palladino, Chairman, NRC, to Rep. Tom Bevill, Separation of Functions, Ex Parte Communications, and the Role of the NRC Staff in Initial Licensing Proceedings: Status of Regulatory Reform Efforts, at 3 (Jan. 2, 1985) (on file at NRC Public Document Room, 11555 Rockville Pike, Rockville, MD 20852, Document Accession No. 8501150002) (indicating that the Commission's rules in 1985 did not reflect the distinction between adjudicators' communications with agency personnel and with outsiders); Memorandum from H.H.E. Plaine, General Counsel, NRC, to the Commissioners, NRC, Separation of Functions and Ex Parte Rules—Analysis of Initial Licensing Exception, at 3 (Apr. 5, 1984) (on file at NRC Public Document Room, 11555 Rockville Pike, Rockville, MD 20852, Document Accession No. 8501150018) ("[W]hen the subject of contacts between Commissioners and staff arises, there sometimes is confusion as to whether the problem is one of separation of functions or of ex parte.").

To some extent, the problem may simply be one of definition. The Commission almost invariably uses these two terms to denote separate and non-overlapping kinds of communication. However, some legal scholars use the two terms interchangeably, while others consider separation-of-functions communication to be a subset of ex parte communication. *See, e.g.*, JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING GUIDE 225 (3d ed. 1998) (defining ex parte communications in a way that would include separation-of-functions communications); *id.* at 240-43 (discussing separation of functions but referring to it both as separation of functions and as ex parte); JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING: STRUCTURING, OPPOSING, AND DEFENDING FEDERAL AGENCY REGULATIONS (1983) (providing an index that contains no

the language of the APA itself is confusing as to the exact distinction.[99] Broadly stated, these two kinds of restrictions on communications are primarily intended to ensure—both in reality[100] and in the perception of the

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separation-of-functions topic, but instead discusses it within the "ex parte" topic). My primary goal is to summarize and explain the NRC's *actual* practice regarding restricted communications. For that reason, this Article adopts the Commission's own definitions of these two terms, and I will leave to another author the task of exploring, within the larger administrative law context, the terms' confusing array of definitions.

99. *See infra* note 136.

100. *See* U.S. ATTORNEY GENERAL, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 53-56 (1947) [hereinafter ATTORNEY GENERAL'S MANUAL], *republished in* ACUS, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK at 119-22 (2d ed. 1992); ACUS 1981 Draft Recommendations, *supra* note 94; *see also* Texas Utilities Elec. Co. (Comanche Peak Steam Elec. Station, Units 1 and 2), LBP-84-36, 20 N.R.C. 928, 930, *vacated on other grounds*, LBP-84-48, 20 N.R.C. 1455 (1984):

> Ex parte, extra-judicial information will not be relied upon in any manner by the Board. To do so would reduce the hearing to something less than the adversary proceeding required by the Atomic Energy Act. Fundamental principles of fairness require that all parties be aware of the content of information presented to the Board, be given the opportunity to test its reliability or truthfulness, and be given the opportunity to present rebuttal testimony if deemed necessary.

Candor requires me to offer the following "aside" regarding the objectivity (or lack thereof) of the ATTORNEY GENERAL'S MANUAL. The Supreme Court, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, indicated that the *Attorney General's Manual* is entitled to "some deference" due to the Department of Justice's role in drafting the APA. 435 U.S. 519, 546 (1978). Justice Scalia has gone even further, describing the *Manual* as "the Government's own most authoritative interpretation of the APA . . . which we have repeatedly given great weight." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 218 (1988) (Scalia, J., concurring). As Justice Scalia suggests, the *Manual* has, by now, come to be regarded as the definitive "legislative history" of the APA, 5 U.S.C. §§ 551-706 (2000). But this is not necessarily so:

> The APA resulted from a compromise between those in Congress (and academia): [W]ho believe[d] that performance within the same body of the functions of investigator, prosecutor, judge and legislator violates basic postulates of Anglo-Saxon jurisprudence and those who espouse[d] the pragmatic and iconoclastic view that to impose such a conceptualistic restriction upon administrative bodies would be to negate entirely the efficiency of the administrative process.

Scanlan, *supra* note 22, at 63; *see also id.* at 74; Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 453 (1986) ("[T]he compromise . . . engenders the basic tensions that plague administrative law today."); Shepherd, *supra* note 27, at 1560, 1662-65; Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World,* 72 CHI. KENT L. REV. 987, 987 n.3 (1997) (describing the APA "as a defensive compromise by those committed to the New Deal").

Because the APA was developed through off-the-record negotiations, however, the statute has little "legislative history" in the normal sense of the term. The *Manual* was actually prepared as an "advocacy piece," *not* as a neutral analysis or a compilation of legislative information. It has even been described as "a transparently one-sided, post hoc interpretation of a done deal." Shepherd, *supra* note 27, at 1683. The *Manual* was written in the expectation that the federal courts would ultimately be asked to interpret the general and *intentionally ambiguous* language of the APA.

> As the bill's enactment became imminent, each party to the negotiations over the bill attempted to create legislative history – to create a record that would cause future reviewing courts to interpret the new statute in a manner that would favor the party. The parties to the negotiations recognized that little official legislative history would accompany the bill. The bill had sprung not from public debate in Congress, as other bills had, but from months of private, off-the-record negotiations. Each party sought to create a favorable account of the

parties and the public—the independence of the presiding officers and the fairness of the hearing process.[101] The second of these goals—fairness—encompasses the following four subsidiary purposes: to preclude decisionmakers from (i) receiving biased advice from staff members or other persons whose involvement in the case has compromised their own objectivity,[102] (ii) considering extra-record evidence,[103] (iii) prejudging a

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> negotiations . . . .
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> . . .
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> The parties attempted to manufacture legislative history because the bill was ambiguous. The ambiguity was intentional . . . . Ambiguity was essential to reaching agreement. Without it, no agreement could have occurred . . . . [T]he parties intentionally included ambiguous provisions that courts would later interpret. Each party then hoped that the courts would resolve the ambiguities in the party's favor. Instead of agreeing on specific provisions, the parties agreed to a game of roulette in which the courts spun the wheel . . . .
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> . . .
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> After the APA became law, groups whom the Act would affect sought to present their interpretations quickly, in time to influence courts that would interpret the Act. For example, . . . the attorney general issued a long monograph [the *Manual*] that interpreted each of the bill's provisions. As before, the attorney general interpreted the act in a manner that suppressed to a minimum the bill's limits on agencies.

Id. at 1662-66; *see also id.* at 1682-83. Professors Scanlan's, Shapiro's and Shepherd's articles, *supra*, present excellent descriptions of this conflict and the statutory language that came out of it.

101. *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822-25 (1986) (implying that the appearance of impropriety disqualified a judge); Elec. Power Supply Ass'n v. FERC, 391 F.3d 1255, 1259 (D.C. Cir. 2004) (fair decisionmaking and the prevention of the appearance of impropriety are "the two distinct interest served by the Sunshine Act"); Utica Packing Co. v. Block, 781 F.2d 71, 78 (6th Cir. 1986) ("With regard to judicial decisionmaking, whether by court or agency, the appearance of bias or pressure may be no less objectionable than the reality.") (quoting D.C. Federation of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1246-47 (D.C. Cir. 1971); PATCO v. FLRA, 685 F.2d 547, 563 (D.C. Cir. 1992) ("Disclosure [of ex parte communications] is important in its own right to prevent the appearance of impropriety from secret communications in a proceeding that is required to be decided on the record.").

Finally, no actual harm results from an ex parte (or, presumably, separation-of-functions) violation if an adjudicator or adjudicatory employee receives information of which he or she was already aware, or of which the potentially aggrieved party was already aware, but such prior knowledge does not cure any resulting damage to the appearance of impartiality. Abramson, *supra* note 93, at 1346, 1361-62.

102. *See* Withrow v. Larkin, 421 U.S. 35, 57 (1975) (referring to "adjudicators . . . so psychologically wedded to their complaints [which they had issued in their investigative capacity] that they would consciously or unconsciously avoid the appearance of having erred or changed position"); Scalia, *supra* note 22, at vii (the "will to win . . . is the touchstone of adversariness"); ATTORNEY GENERAL'S MANUAL, *supra* note 100, at 123 ("[I]n the interest of fair procedure, [the APA] . . . excludes from . . . 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 that they may be 'disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions.'" (quoting ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 56 (1941) [hereinafter AG FINAL REPORT]); ACUS Draft Recommendations: Separation of Functions in Agency Proceedings, 45 Fed. Reg. 68,949, 68,950 (Oct. 17, 1980) [hereinafter ACUS 1980 Draft Recommendations]. The ACUS 1980 Draft Recommendations were ultimately rejected by ACUS in its Plenary Session. *See* Scalia, *supra* note 22, at v & n.1.

case,[104] and (iv) being called upon to evaluate their own previous conclusions.[105]

Although less frequently mentioned by the courts and scholars, there are four additional goals—the third through sixth goals described below—underlying the restricted-communications rules. The third goal is transparency, or openness, in government.[106] The fourth is to ensure the public's rights to attend and participate in agency adjudicatory proceedings and to have access to agency adjudicatory records—rights that would be compromised if an agency could base its decisions on communications to which the public lacked access.[107] The fifth goal is, in a sense, merely the

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103. *See, e.g.*, Louisiana Ass'n of Indep. Producers v. FERC, 958 F.2d 1101, 1112 (D.C. Cir. 1992) (per curiam); *see also* Shulman, *supra* note 22, at 365 (noting one of "the aims of the separation of functions provision [in the APA is to] . . . preclud[e] interpolation from facts not on the record but gleaned from an ex parte familiarity with the case") (emphasis omitted). The bar against considering extra-record evidence does not, however, preclude an adjudicator taking official notice of information, as long as the parties are given an opportunity to respond. *See* ADJUDICATION GUIDE, *supra* note 79, at 130. *See generally* 10 C.F.R. § 2.337(f) (2006) (regarding official notice).

104. *See* Shulman, *supra* note 22, at 387 (noting the federal courts' test for prejudgment is whether "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"); *see also* Note, *Ex Parte Contacts Under the Constitution and Administrative Procedure Act*, 80 COLUM. L. REV. 379, 385, 388 (1980) [hereinafter Note, *Ex Parte Contacts*] (asserting that a pre-existing preference for a particular policy or legal standard is insufficient, without more, to disqualify a decision-maker or adjudicatory employee).

105. *See* Allison, *supra* note 22, 1179-80 (addressing an adjudicator's presumed difficulty in reevaluating a legal theory to which s/he has subscribed publicly in writing); 28 U.S.C. § 47 (2000) (prohibiting a federal judge from participating in the appellate review of his or her earlier decision). The Commission's current practices and procedures do not present the possibility that the Commission or Licensing Board would review its own decision "on appeal." However, courts and commentators generally condemn such practices. *See, e.g.*, Pregent v. New Hampshire Dep't of Employment Sec., 361 F. Supp. 782 (D. N.H. 1973) ("[T]he 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."), *vacated on other grounds*, 417 U.S. 903 (1974); Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657, 659 n.13 (1996) (citing Judge Robert Bork's commitment, at his unsuccessful Supreme Court confirmation hearings in 1987, "that, if confirmed, he would not sit in cases involving his own prior decisions"). This condemnation has not, however, been directed to an adjudicatory body's entertaining motions for reconsideration. *See, e.g.*, 10 C.F.R. § 2.345 (2006), and its predecessor, 10 C.F.R. § 2.771 (now rescinded).

106. *See* Government in the Sunshine Act, 5 U.S.C. § 557(d) (2000); Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1027 (D.C. Cir. 1978) (stating that there is an expectation that the administrative process is infused with "openness, explanation, and participatory democracy"). *But see* Preston, *supra* note 25, at 651-52 (discussing the shortcomings of the openness doctrine).

107. *See, e.g.*, United States Lines v. Fed. Mar. Comm'n, 584 F.2d 519, 539-40 & n.58 (D.C. Cir. 1978) (the public should be afforded meaningful participation in such proceedings and that ex parte communication and agency secrecy effectively deprive the public of this participation); Portland Audubon Soc'y v. Engdangered Species Comm'n, 984 F.2d 1534, 1542-43 (9th Cir. 1993); Glenn T. Carberry, *Ex Parte Communications in Off-The-Record Administrative Proceedings: A Proposed Limitation on Judicial Innovation*, 1980 DUKE L.J. 65, 74, 80 ("[T]he right of public participation granted to interested persons in section 553 of the Administrative Procedure Act.").

flip-side of the fourth: to ensure that the agency, when making decisions, has the fullest advantage provided by adversarial discussion amongst the parties.[108] Finally, the sixth is to ensure that any federal court reviewing an agency decision is fully informed of the entire factual and policy basis of that decision, and has access to all private contacts and documents pertaining to the agency's decision.[109]

A. Constitutional Due Process Restrictions Germane to Ex Parte and Separation-of-Functions Communications

For due process reasons, a decision resulting from an adjudication should be based only upon information about which all parties have had notice and an opportunity to offer their views.[110] Unfortunately, federal case law applying this rule to administrative proceedings is both "uncertain and conflicting."[111] The uncertainty and conflict are largely attributable to the fact that the federal courts, when applying this rule, use the due process balancing test that the Supreme Court established in *Mathews v. Eldridge*.[112] The very nature of the *Mathews* balancing test—or for that

108. *See* Carberry, *supra* note 107, at 83 (interpreting *Home Box Office v. Fed. Communications Comm'n*, 567 F.2d 9, 55 (D.C. Cir. 1977)); *cf.* Note, *Ex Parte Contacts, supra* note 104, at 381 (arguing that this same purpose would support banning ex parte communications in informal rulemakings).

109. *See, e.g.*, *United States Lines*, 584 F.2d at 540-41 (declaring that ex parte contacts "foreclose effective judicial review"); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 981 (1980); Henry J. Birnkrant, Note, *Ex Parte Communication During Informal Rulemaking*, 14 COLUM. J. L. & SOC. PROBS. 269, 270 (1979); Preston, *supra* note 25, at 651 (suggesting that *Vermont Yankee* seriously undermined the lower courts' ability to rely upon the "record adequate for review" doctrine to justify a participant's right to rebut ex parte communications in informal rulemaking proceedings, but that the doctrine may still retain some viability).

110. *See United States Lines*, 584 F.2d at 539-41 (holding that denying meaningful information from the public and conducting secret ex parte communications violate "the basic fairness concept of due process"); NRC, Proposed Rule, Informal Hearing Procedures for Materials Licensing Adjudications, 52 Fed. Reg. 20,089, 20,091 (proposed May 29, 1987) (stating that even though not statutorily required, a failure to adhere to the ex parte and separation-of-functions prohibitions of the APA (§§ 5 U.S.C. 554(d), 557(d)) to informal adjudications, "can in some circumstances have due process implications"); Note, *Ex Parte Contacts*, *supra* note 104, at 382-88.

111. Asimow, *supra* note 74, at 781 & n.111 (also citing several conflicting examples where the courts have applied the ex parte rule in contradictory ways); *cf.* Withrow v. Larkin, 421 U.S. 35, 51 (1975) (noting that "the growth, variety, and complexity of the administrative processes" have complicated the unanswered question of "whether and to what extent distinctive administrative functions should be performed by the same persons . . . [and] have made any one solution highly unlikely"); ADJUDICATION GUIDE, *supra* note 22, at 120-21; Shulman, *supra* note 22, at 380 (observing that the separation-of-functions "limitations required by the due process clause for initial licensing and other proceedings remain unclear").

112. 424 U.S. 319 (1976); *see also* Citizens Awareness Network v. United States, 391 F.3d 338, 354 (1st Cir. 2004) (addressing the primacy of the *Mathews* balancing test).

matter, any balancing test—precludes the application of any absolute rules regarding mandatory reversal of agency orders[113] and therefore carries with it the potential for the above-mentioned uncertainty and conflict.

Specifically, courts weigh "the interest of the private party that would be affected by the agency's action, the risk of error inherent in a combination of functions[,] and the probative value of separation of functions, including the fiscal and administrative burden that would be entailed."[114] The weight to be given to the first of these three factors depends on the nature of the liberty or property interest at issue. While some interests are strongly protected by the Due Process Clause, some are weakly protected, and others are not protected at all.[115] The weight given to the second and third factors—risk of error and probative value—turns on the degree of adversarial involvement in the process; the extent to which the issue on which advice was given involves adjudicative fact, legislative fact,[116] law or policy; whether the issue is critical to the result of the proceeding and is disputable; and whether the adjudicatory system is adversarial or inquisitorial.[117] Issues particularly relevant to the burdens associated with the third factor include any delay that might be caused by the administrative proceeding, any financial costs associated with additional procedures, and, finally, the risk that an agency might impose costly and unnecessary procedural burdens on itself and the parties to avoid the risk of a reviewing court imposing some inchoate additional procedures on the agency.[118]

Regarding separation of functions, the Supreme Court unanimously held that the legislature's mere combination of adjudicatory and prosecutorial functions within a single licensing agency does not, without more, deny licensees due process.[119] Indeed, any other result would impose costly and

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113. *See* ADJUDICATION GUIDE, *supra* note 22, at 115 (addressing ex parte communications in informal adjudication and factors precluding per se guidelines to reversing decisions of such proceedings).

114. Asimow, *supra* note 74, at 780 (construing *Mathews*, 424 U.S. at 319); *see also* Preston, *supra* note 25, at 658.

115. Asimow, *supra* note 74, at 781.

116. *See* Shulman, *supra* note 22, at 357 n.21 (explaining that legislative facts are "ordinarily general and do not concern the immediate parties") (citing 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 15.03, at 353 (1958)).

117. *See* Shulman, *supra* note 22, at 357 n.21; *see also* Allison, *supra* note 22, at 1197-1214 (discussing the difference in the effects of, as well as the appropriate remedies for, ex parte communications on factual vs. legal or policy matters).

118. *See* Preston, *supra* note 25, at 658 (identifying the key risks and associated costs related to the use of a balancing test and safeguarding due process in informal adjudication processes); *see also* Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 547 (1978) (highlighting the potential that an agency's concern about a court's imposition of its own procedures could induce the agency to "adopt full adjudicatory procedures in every instance").

119. Withrow v. Larkin, 421 U.S. 35, 58 (1975) (finding that although an initial charge and ultimate adjudication have different purposes, the fact that the same agency makes

highly disruptive adjustments on government agencies[120] and would contravene the "principle of necessity" applicable in the federal administrative law context where Congress has charged an agency with investigative, negotiating, prosecutorial and adjudicatory responsibilities.[121] However, the combination of functions *below* the level of the "agency head" (e.g., the Commissioners and Chairman at the NRC) pose greater constitutional concerns. Courts addressing this variation on the theme often provide only vague reasoning when deciding to exclude certain agency representatives from the adjudicatory process.[122] The more helpful guidance regarding both separation-of-functions and ex parte communications generally comes not from the court's due process decisions but from the statutes and regulations (and their associated case law) imposing boundaries on an agency's communications. It is to those sources of law that I now turn.

B. Statutory and Regulatory Restrictions Germane to Ex Parte Communications

The APA, including its restricted communications restrictions, clearly applies to certain kinds of NRC adjudications—specifically, proceedings involving the licensing of uranium enrichment facilities,[123] enforcement proceedings, and "program fraud civil penalty" cases.[124] Although the NRC has repeatedly denied that the "on the record" requirements of the APA, including the APA's ex parte and separation-of-functions

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them, even on matters that are related, does not give rise to a procedural due process violation); *see also* Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482, 497 (1976) (holding that the Due Process Clause did not require a decision to terminate by a school board to be reviewed by any other agency even though the board was involved in events leading to the decision); Federal Trade Comm'n v. Cement Inst., 333 U.S. 683, 702-03 (1948); 2 DAVIS & PIERCE, ADMINISTRATIVE LAW TREATISE § 9.9, at 98 (3d ed. 1994) ("[The Supreme] Court has never held an adjudicatory regime unconstitutional on the basis that the functions were insufficiently separated."); Asimow, *supra* note 74, at 782 (asserting that [a]bsent a strong, particularized showing that an individual agency member has prejudged adjudicatory facts, or is infected with pecuniary or personal bias, the courts reject claims that due process is violated by an institutional combination of functions", i.e. "combinations at the top level of the agency that occur because of the way the legislature structured the agency") (footnotes omitted).

120. Asimow, *supra* note 74, at 783, 787.

121. *Id.* at 783-84, 787 (reviewing the combination of functions which are essential for an agency to operate and the associated costs thereof); *see also infra* Part III.B (regarding the "agency head" exception to separation-of-functions restrictions).

122. Asimow, *supra* note 74, at 787 (discussing the vague reasons courts have used as a legal foundation to disqualify agency members as a result of their conflicting agency responsibilities).

123. 42 U.S.C. § 2243(b)(1) (2000) (mandating that "[t]he Commission shall conduct a single adjudicatory hearing on the record" for proceedings regarding the licensing of uranium enrichment facilities).

124. 5 U.S.C. § 554(d)(2) (2000) (imposing communications restrictions on individuals involved in "investigative or prosecuting functions"—a phrase that logically encompasses the Commission's enforcement and program fraud civil penalty responsibilities).

requirements, apply to NRC reactor and materials licensing proceedings,[125] the Commission has nevertheless based its own "restricted communications" requirements upon those set forth in the APA.

Two different provisions of the APA address the definition of "ex parte communication." The older of the two provisions—§ 551(14)—defines the term as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter."[126] The Sunshine Act later amended a different APA provision—§ 557—to limit the scope of the ex parte bar in adjudicatory and rulemaking hearings. Under the amended § 557, the bar covers only communications between an "interested person[[127]] *outside* the agency" and adjudicatory personnel within the agency.[128]

If an "adjudicatory employee" involved in an adjudicatory proceeding receives a prohibited ex parte communication, § 557(d)(1)(C) requires the employee to place in the public docket of the relevant proceeding a copy of the communication, or a summary of it if the communication was oral, along with a copy of any written responses, or a summary of any oral response.[129] Section 557(d)(1)(D) addresses the possible penalties for ex parte communication.[130] Section 557(d)(1)(E) specifies that the ex parte prohibitions shall take effect no later than the time a proceeding is noticed for hearing or the time an adjudicatory employee learns that it will be noticed.[131] Section 557(d)(2) states that the ex parte provision does not constitute authority to withhold information from Congress.[132]

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125. *See, e.g.*, Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 N.R.C. 232, 247-56 (1982) (holding that the AEA does not mandate formal, trial-type hearings in materials license proceedings), *aff'd*, City of West Chicago v. NRC, 701 F.2d 632, 641-45 (7th Cir. 1983); Curators of the Univ. of Mo., CLI-95-1, 41 N.R.C. 71, 119 (1995) ("The formal on-the-record hearing provisions of the APA do not apply to the Commission's informal proceedings such as those addressing materials license amendment applications."); Power Reactor Dev. Co., 1 AEC 128, 156 (1959) (quoting with approval a statement by the AEC General Manager that "section 5(c) of the Administrative Procedure Act requiring separation of functions does not apply to proceedings involving initial licensing. . . ."); NRC, Final Rule, Informal Hearing Procedures for Materials Licensing Adjudications, 54 Fed. Reg. 8269, 8270 (Feb. 28, 1989) (stating that subpart L procedures governing informal adjudications are not subject to the APA's formal hearing requirements).

126. 5 U.S.C. § 551(14) (2000).

127. For a discussion of the term "interested person," *see infra* note 160 and accompanying text.

128. 5 U.S.C. § 557(d)(1)(a) & (b); *see also* 10 C.F.R. § 2.4 (2006).

129. 10 U.S.C. § 557(d)(1)(C) (2000).

130. *Id.* § 557(d)(1)(D) (2000).

131. *Id.* § 557(d)(1)(E) (2000).

132. *Id.* § 557(d)(2) (2000).

Subsections 2.347(a)-(d) replaced, without substantive change, subsections 2.780(a)-(d)) of the Commission's procedural rules.[133] The former provisions track closely the language of Section 557(d) regarding ex parte communications. Subsection 2.347(e) (formerly § 2.780(e)) provides that the prohibitions are triggered either when the notice of hearing, or some other comparable order, is issued or when a Commission adjudicatory employee has knowledge that a notice of hearing (or comparable order) will be issued. The same subsection also provides that the prohibitions will cease to apply to issues relevant to a decision when the time expires for Commission review of that decision. Under subsection 2.347(a) (formerly § 2.780(a)), if the subject of a communication between a party and adjudicatory personnel is not "relevant to the merits of the proceeding," then it is unaffected by the ex parte bar. Finally, subsection 2.347(f) (formerly § 2.780(f)) provides four more exemptions to the prohibitions: (i) communications permitted by statute or regulation; (ii) communications regarding the procedural status of a proceeding, (iii) matters pending before a court or another agency, or (iv) generic issues involving public health and safety or another of the Commission's statutory responsibilities not associated with the resolution of the adjudicatory proceeding.

C. Statutory and Regulatory Restrictions Germane to Separation of Functions

Separation-of-functions restrictions apply to communications between an agency employee who acts in an adjudicatory role in a formal, on-the-record proceeding and another agency employee who acts in an adversarial role in the same or a factually-related proceeding, except where the latter acts as either witness or counsel. The APA prohibits an employee presiding over the reception of evidence from consulting with a person or party on a fact at issue, unless the employee provides all parties with notice of and opportunity to participate in such consultation.[134] In effect, this section creates, or at least seeks to create, a "Chinese Wall" protecting

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133. 10 C.F.R. § 2.347(a)-(d) (2006). Section 2.347 was promulgated in January of 2004 but has been the subject of virtually no NRC case law. This Article therefore examines the case law interpreting that section's predecessor, § 2.780. This Article does the same regarding § 2.348 (the current separation-of-functions regulation), which is equally lacking in precedent, and its predecessor, former § 2.781. As of April 2007, the only two NRC decisions mentioning § 2.347 or 2.348 offered no analysis. *See* DOE (High-Level Waste Repository), CLI-04-20, 60 N.R.C. 15, 19 (2004); United States Dep't of Energy (High-Level Waste Repository), at 4-5 (July 14, 2004), *available at* ADAMS Accession No. ML041960442 .

134. 5 U.S.C. § 554(d) (2000).

agency decisionmakers from off-the-record presentations by staff members with an adversarial "take" regarding the facts of the case or how to decide the case.[135]

The purposes of § 554(d), which are similar to the purposes of the APA's bar against ex parte communications on the merits, include preventing "biased" investigative or prosecuting members of agency staff from advising the agency's adjudicators.[136] Because the prohibition in § 554(d)(2) refers solely to those involved in "investigative or prosecuting functions," it would arguably apply only in the Commission's enforcement and program fraud civil penalty cases.[137] Yet the Commission has chosen to expand the prohibition beyond the minimum requirements set down in the APA. Indeed, the NRC denies that the "on the record" requirements of the APA apply to NRC reactor and materials licensing proceedings.[138] The NRC regulations use the broader term "litigating" rather than the APA's narrower term "prosecuting."[139] The Commission has treated the word "litigating" as including both prosecutorial (i.e., accusatory or enforcement) and licensing (i.e., non-accusatory) matters.

But regardless of whether the staff is considered to be involved in "litigating" or "prosecuting," the question governing the applicability of the separation-of-functions rule is still the same: whether the staff member developed a "will to win" or a psychological commitment to achieving a particular result.[140]

Another question, equally relevant but virtually unaddressed by courts and legal scholars, is whether the staff member would be influenced by fear of adverse effects on his or her job status, job security, opportunities for

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135. Asimow, *supra* note 74, at 766 n.36; Shulman, *supra* note 22, at 377.

136. Asimow, *supra* note 74, at 770 n.54; Shulman, *supra* note 22, at 370. Admittedly, § 554(d) & (d)(1) uses the term "ex parte" quite broadly to refer to communications from an adjudicatory employee to any "person or party" on a fact at issue. This language clearly includes persons or entities both inside and outside the Commission. However, as the Commission has chosen in its own rules to apply a more restrictive definition of the term "ex parte," I am ignoring this particular facet of the statute. *See supra* note 97.

137. 5 U.S.C. § 554(d)(2) (2000). For a detailed discussion of what the terms "investigating" and "prosecuting" do and do not mean, see Davis, *supra* note 22, at 616-25.

138. *See supra* note 125.

139. 10 C.F.R. § 2.348(a) (2006); 10 C.F.R. § 2.781(a) (rescinded); Memorandum from H.H.E. Plaine, General Counsel, NRC, to Commissioners, NRC, SECY-85-328, Draft Federal Register Notice Proposing Revisions to the Commission's Ex Parte and Separation of Functions Rules, at 9-10, 18 (Oct. 15, 1985), *available at* ADAMS Accession No. ML061220084. *See generally* Allison, *supra* note 22, at 1165-66 (drawing attention to deficiencies in the word "prosecutorial" and recommending instead the word "advocatory"—a recommendation I adopt in this Article); ADJUDICATION GUIDE, *supra* note 22, at 120 n.72 (preferring the terms "adversary" and "adversary functions" in lieu of the APA's terms "investigative or prosecuting functions").

140. *See supra* note 102.

promotions or plum assignments, working conditions, opportunities for continuing education, and future professional relationships and *esprit de corps* with colleagues and supervisors[141]—in sum, the "will to please."

Section 554(d) further provides that adjudicatory personnel shall not report to, or be supervised by, anyone involved in the agency's investigative or prosecutorial functions. But it also provides, implicitly in one case, that its separation-of-functions restrictions *need not apply* to:

(i) members of a Commission, also known as the "agency head exception";
(ii) formal and informal rulemakings;
(iii) initial license applications;
(iv) by strong inference, licensees' applications for modifications of licenses;[142] and
(v) proceedings involving the rates, facilities or practices of public utilities or carriers.[143]

Even assuming that the "on the record" requirements of the APA apply to the Commission, an assumption the Commission has consistently rejected,[144] the first two of these exceptions would still clearly apply to the NRC and thereby relieve the agency of any statutorily-imposed separation-of-functions restrictions. These are discussed at some length in subparts III.B.1 and III.C.1-2 of this Article.

The third, fourth and fifth exceptions are inapplicable to the NRC. For reasons of policy and resource allocation—and perhaps also for reasons of litigation risk avoidance[145]— since 1962 the Commission has chosen not to

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141. See, for example, John R. Allison's statement:

> [S]uperior-subordinate relationships . . . may mean that the subordinate is economically dependent on the superior because of the control the latter has over the employment of the former. Thus, there is a very real possibility that authority relationships may cause a decision maker to have an economic stake in a particular outcome. Even if the subordinate has civil service status or other insulation, the superior may control working conditions, professional reputation, and opportunities for advancement.

Allison, *supra* note 22, at 1190 (footnote omitted); *see also* Asimow, *supra* note 74, at 789 n.151 (regarding fear). These interrelated subjects of fear, loyalty, esprit de corps, ambition, and the "will to please" are also addressed *infra* at notes 305, 407, 420, 453, and 488, together with their accompanying texts. For some unfathomable reason, very few legal scholars have addressed the general issue of fear and the "will to please," or have touched on it lightly. It is essentially a ripe topic for a law review article.

142. This inference is grounded primarily in § 551 of Title 5 (the APA), which defines the term "licensing" to include "amendment . . . of a license." 5 U.S.C. § 551(9) (2000). For further support for this statutory inference, see Shulman, *supra* note 22, at 360-61 & n.42; Davis, *supra* note 22, at 639-40 & n.73; ATTORNEY GENERAL MANUAL, *supra* note 100, at 117-19.

143. 5 U.S.C. § 554(d)(2)(A)-(C) (2000); Asimow, *supra* note 74, at 777; ATTORNEY GENERAL'S MANUAL, *supra* note 100, at 117-19.

144. *See supra* note 125.

145. A memorandum attached to a letter from Nunzio J. Palladino, the former NRC Chairman, to Rep. Tom Bevill addresses litigation risk avoidance:

avail itself of the third and fourth ("initial license application" and "license modification") exceptions to the APA's prohibition—at least to the extent they might even arguably apply to reactor applicants.[146] Instead, the Commission has chosen to apply the separation-of-functions statutory prohibition to *all* "formal" adjudicatory proceedings—including both initial license applications and license amendment applications for nuclear reactors—despite the Commission's longstanding position that its "formal" adjudications are not on-the-record proceedings that are subject to the APA.[147]

> [T]he litigative risk involved is considerable. The legislative history of [the initial licensing exception] provision indicates that it was based on the view that initial licensing is similar to rulemaking in that policy rather than factual issues are primarily involved and the proceedings are not accusatory in form. Most NRC reactor licensing proceedings are not similar to rulemaking in that they involve not policy issues but sharply controverted factual issues. Thus they do not appear to fit the rationale for the initial licensing exception. Our General Counsel advises that, to his knowledge, no agency currently uses this exception to permit unrestricted communication between agency decisionmakers and staff members involved in the review or presentation of evidence.
>
> Moreover, the Commission decision which relied on information received off-the-record from the staff would be subject to reversal for violating the APA provision that "[t]he transcript of testimony and exhibits, together [with] all papers and requests filed in the proceeding, constitutes the exclusive record for decision" in formal agency adjudications. 5 U.S.C. § 556(e). Such information would have to be placed in the record and other parties given an opportunity to controvert it.
>
> Finally, the ex parte provision does not contain an exception for initial licensing. Consequently, the ex parte restriction discussed above would continue to apply regardless of the initial licensing exception to the separation of functions rule. That is, members of the staff could not both serve as advisors to the Commission and engage in informal communication with license applicants. Thus, the staff's current review practices would have to be significantly altered in order for the Commission to take full advantage of the initial licensing exception to the separation of functions provision of the APA.

Palladino, *supra* note 98; *accord* Plaine, *supra* note 98, at 5-7.

146. As discussed later in this Article, applications for non-reactor licenses and non-reactor license amendments are among the kinds of cases processed under the agency's *informal* adjudicatory rules, 10 C.F.R. Part 2, Subparts C and L, and are therefore, for this additional reason, not subject to the APA's restrictions on communications. *See generally* Pension Benefit Guar. Corp. v. LTC Corp., 496 U.S. 633, 653-56 (1990) (extending the holding and reasoning of *Vermont Yankee* to the context of informal adjudication).

147. *See* NRC, Final Rule, Revision to Ex Parte and Separation of Functions Rules Applicable to Formal Adjudicatory Proceedings, 53 Fed. Reg. 10,360, 10,361 (Mar. 31, 1988); SECY-80-130, *supra* note 98, at 48. Even had the Commission continued its pre-1962 practice of taking advantage of the licensing exceptions, the principles of fairness underlying the Due Process Clause of the Constitution nevertheless would suggest that the Commission should adopt at least *some* sort of separation-of-functions restrictions. *See* ATTORNEY GENERAL'S MANUAL, *supra* note 100, at 121; SECY-80-130, *supra* note 98, at 51 n.111, 57. Indeed, a strong case can be made (and has been) for the proposition that Congress never intended the initial licensing exemption to apply where the licensing proceeding raises sharply contested factual questions and is accusatory in nature. *See* Scanlan, *supra* note 22, at 77; Shulman, *supra* note 22, at 358-61. Although Congress believed some time ago "that initial license proceedings resemble rulemakings because policy concerns rather than factual disputes predominate, modern day agencies do more factfinding [sic] than policymaking in individual licensing cases." Shulman, *supra* note 22, at 385 (citing NRC practice as an example); *see also* Edles & Nelson, *supra* note 77, at 323

The fifth exception ("proceedings involving the rates, facilities or practices of public utilities or carriers") is inapplicable to the Commission for reasons other than, and therefore in addition to, this longstanding Commission position. The language of § 554(d) exempting "proceedings involving rates, *facilities, or practices of public utilities*" (emphasis added) could, if read literally, be construed to include the Commission's licensing and enforcement activities regarding power reactors owned by electric utilities. Such a reading would render unnecessary other language in the same section of the statute (i.e., the express exclusion of licensing applications) and also would be inconsistent with the legislative history suggesting that the language was directed instead at regulation by ratemaking agencies.[148]

Section 2.348 (and, before this section, former § 2.781) of the Commission's procedural regulations largely track the separation-of-functions provisions of § 554. Subsection (a) of this regulation bars any employee involved in an investigatory or litigating capacity from participating in, or advising an adjudicatory employee about, an initial or final decision on any disputed issue[149] in a proceeding,[150] except as a witness or counsel in the proceeding, through written communication

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(addressing the first half of Professor Shulman's quotation immediately above); Scanlan, *supra* note 22, at 77.

148. *See* ATTORNEY GENERAL'S MANUAL, *supra* note 100, at 117-19; *see also* 4 STEIN, MITCHELL & MEZINES, *supra* note 77, at 33-40 to 33-41 (noting that this exemption applies to ratemaking activities and is consistent with the APA's treatment of ratemaking as a kind of rulemaking, 5 U.S.C. § 551(4) (2000)); Nathanson, *supra* note 22, 35 ILL. L. REV. at 932 ("[R]ate regulation is, in part at least, legislative in character; it is concerned with the formulation of a rule for the future; it is frequently part of a continuous system of policy formulation and administration."); *cf.* ADJUDICATION GUIDE, *supra* note 22, at 125 n.88 ("The rationale behind th[is] exemption[] is that . . . various determinations relating to rates, facilities or practices are more like rulemaking than adjudication because they are dominated by policymaking concerns.").

149. The ex parte regulation, § 2.347, applies to communications that are "relevant to the merits of the proceeding," while the separation-of-functions regulation, § 2.348, refers to disputed issues. But despite the differing language, the Commission intended no distinction between these two terms. The Commission stated that the former term should be interpreted as applying to "the elements of 'controversy' and 'matters at issue.'" NRC, Final Rule, Revision to Ex Parte and Separation of Functions Rules Applicable to Formal Adjudicatory Proceedings, 53 Fed. Reg. 10,360, 10,361 (Mar. 31, 1988).

150. Although the rule does not expressly so state, its clear implication is that the separation-of-functions restrictions are inapplicable both to uncontested proceedings and to uncontested matters in contested proceedings. *See generally* Miscellaneous Amendments, 31 Fed. Reg. 12,774, 12,775 (Sept. 30, 1966) ("[Permitting] consultation and communications between Commissioners and presiding officers . . . on the one hand, and the regulatory staff, on the other hand, in initial licensing proceedings other than contested proceedings."). This implication also comports with common sense and the principal purposes of the APA's restrictions, namely, to ensure fairness of the hearing process and independence of the presiding officers.

served on all parties and placed in the record of the proceeding, or through oral communication made after reasonable prior notice to all parties and with all parties being given a reasonable opportunity to respond.

Subsection (b) provides that the prohibition does not apply in the following contexts. The prohibition is inapplicable to the four kinds of communications specified in subsection (f) or (i) communications permitted by statute or regulation;[151] or communications regarding (ii) the procedural status of a proceeding;[152] (iii) matters pending before a court or another agency;[153] or (iv) generic issues involving public health and safety or another of the Commission's statutory responsibilities not associated with the resolution of the adjudicatory proceeding.[154] Neither does it apply to communications to or from Commissioners, members of their personal staffs, adjudicatory employees in the NRC's OGC (and, although not expressly stated, also OCAA),[155] and SECY employees regarding (i) the initiation or direction of an investigation or an enforcement proceeding,[156] (ii) supervision of agency staff to ensure compliance with the Commission's policies and procedures,[157] (iii) staff priorities and schedules or the allocation of Commission resources,[158] or (iv) general regulatory, scientific or engineering principles that are useful for an understanding of the issues in a proceeding and are uncontested in the proceeding.[159]

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151. I have found no case law explicitly addressing this regulatory exception.

152. *See infra* note 209 and accompanying text.

153. *See infra* Part III.B.3.c (addressing matters pending before a court). My research has uncovered no NRC or federal case law addressing this exception insofar as it applies to one agency's communications regarding matters pending before another agency, but the logic of the exception would appear to apply to this latter kind of communication, too.

154. *See infra* notes 223-24 and accompanying text (discussing Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-3, 17 N.R.C. 72, 73-74 (1983)).

155. The Commission has taken the position that the "agency head" exception should apply to the Commissioners' personal advisors, including Commission-level offices that "have a primary responsibility for advising the Commission itself on technical, legal, and policy matters." NRC, Proposed Rule, Revision to Ex Parte and Separation of Functions Rule Applicable to Formal Adjudicatory Proceedings, 51 Fed. Reg. 10,393, 10,398 n.7 (proposed Mar. 26, 1986), *approved sub silentio* NRC, Final Rule, 53 Fed. Reg. 10,360 (Mar. 21, 1988). This position does not appear to have been challenged in any of the comments on the proposed rule and, thus, no further mention is made of it in the Statement of Consideration for the final rulemaking. This position is currently reflected in 10 C.F.R. § 2.348(b)(2) (2006), just as it was in its now-rescinded predecessor, 10 C.F.R. § 2.781(b)(2) (2004). However, as OCAA did not yet exist at the time the Commission promulgated § 2.781(b)(2), the regulation understandably did not list OCAA among the offices subject to the "agency head" exception. Although OCAA has never been added to the list (most likely due to oversights in both the 1991 and 2004 rulemakings), it is nevertheless analogous to the other advisory offices specified in § 2.781(b)(2), as it advises the Commission on legal matters. 51 Fed. Reg. at 10,398 n.7. OCAA thus falls within the scope of this exemption.

156. *See infra* Parts III.B.1.a, III.B.1.c, III.B.3.e.

157. *See infra* Part III.B.1.

158. *See infra* Part III.B.1.b.

159. I have found no case law explicitly addressing this exception.

Subsections 2.348(c) and (d) (and former § 2.781(c) and (d)) provide that an adjudicatory employee must follow the same steps to document a prohibited intra-agency communication as are provided in § 2.347 (or former § 2.780) for prohibited ex parte communications; that the prohibitions begin to apply either when the notice of hearing is issued, when the Commission employee has reason to believe that he or she will be involved in an investigative or litigating function, or when a Commission adjudicatory employee has knowledge that a notice of hearing will be issued; and that the prohibitions will cease to apply to issues relevant to a decision when the time expires for Commission review of that decision.

Subsection (e) of these two regulations provides that non-prohibited communications may not serve as a conduit for prohibited communications under either §§ 2.347 or 2.348 (or former § 2.780 or 2.781). Finally, subsection (f) provides that if an initial or final decision rests on fact or opinion obtained as a result of a communication authorized by § 2.348 (or former § 2.781), then the substance of the communication must be specified in the record and every party must have the opportunity to challenge its validity.

III. DISCUSSION

A. Issues Regarding Ex Parte Restrictions

1. Regulatory Exceptions to Ex Parte Restrictions

Sections 2.347(a) and (f) (and former §§ 2.780(a) and (f)) of the Commission's regulations set forth five exceptions to the ex parte rule.

a. Matters Not at Issue in a Proceeding

Under section 2.347(a) (and former § 2.780(a)), if the subject of a communication between a party and adjudicatory personnel is not "relevant to the merits of the proceeding," then it is unaffected by the ex parte bar between the Commission's adjudicatory personnel and "interested persons" outside of the Commission.[160] It is important to recognize, however, that

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160. 10 C.F.R. § 2.347(a) (2006); *see* Metro. Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-5, 17 N.R.C. 331, 332 (1983) (stating that the communications did not concern a "substantive matter at issue in [the] proceeding" and therefore were not prohibited ex parte communications). The Commission was quoting an earlier version of § 2.780(a) that has subsequently been replaced with the phrase "relevant to the merits of the proceeding." However, in changing the phraseology, the Commission gave no indication that it intended to change the meaning of the old § 2.780(a), nor would such a change be consistent with the purpose of the ex parte restrictions. Rather, the Commission was merely conforming the language of its regulations to the language of the Sunshine Act. 5 U.S.C. § 557(d)(1)(A), (B) (2000); *see* NRC, Final Rule, Revision to Ex Parte and Separation of Functions Rules Applicable to Formal Adjudicatory Proceedings, 53 Fed. Reg. 10,360,

the term "relevant to the merits," as used here and in § 557(d)(1)(B) of Title 5, is not synonymous with relevant to a "fact in issue" (as used in § 554(d)(1) of Title 5). The term "relevant to the merits" includes legal and policy issues as well as factual ones.[161]

A logical corollary to this exception is that the ex parte restrictions are likewise inapplicable to communications between an "interested person" and members of staff who are *not* adjudicatory personnel in the proceeding, which is the subject of the communication.[162] However, in response to comments in the 1988 restricted-communications rulemaking, the Commission declined to permit an interested person to communicate with an adjudicatory employee about matters that are at issue in a proceeding but about which the employee is not advising the Commission.[163]

A second corollary to the exception is that ex parte restrictions cannot logically apply to an enforcement adjudication that has not yet begun.[164] Consequently, pre-notice communication between decisionmakers and future litigants is permissible. As explained in Part III.A.2.g *infra*, the same is true in licensing proceedings.

b. Communications Permitted by Statute or Regulation

i. Communications from Congress

The only kind of communication that falls squarely within this second exception is that between a Commissioner and a member of Congress. The APA imposes no limitations on such communication, and § 557 in fact specifies that it does not constitute authority to withhold from Congress information obtained through ex parte communications.

10,361 (Mar. 31, 1988).

161. ADJUDICATION GUIDE, *supra* note 22, at 109.

162. *See, e.g.*, Kansas Gas & Elec. Co. (Wolf Creek Generating Station, Unit 1), ALAB-784, 20 N.R.C. 845, 883-84 n.161 (1984) (involving communication between licensee and NRC non-adjudicatory staff); Public Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 N.R.C. 253, 269 (1978) (involving communications between non-adjudicatory staff and the applicant, as well as non-parties); 10 C.F.R. § 2.102(a) (2006) (providing that the staff may request other parties to confer informally with it during a proceeding); *cf.* Southern Calif. Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 N.R.C. 346, 378-79 (1983) ("[N]othing in the Commission's ex parte rules . . . precludes conversations among parties [NRC staff, FEMA and the applicant], none of whom is a decisionmaker in the licensing proceeding.").

163. NRC, Final Rule, Revision to Ex Parte and Separation of Functions Rules Applicable to Formal Adjudicatory Proceedings, 53 Fed. Reg. 10,360, 10,362 (Mar. 31, 1988); *see also* SECY-88-43, *supra* note 97, at 5-6.

164. Cincinnati Gas & Elec. Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-83-4, 17 N.R.C. 75, 76 (1983) ("[T]he ex parte rule is not properly invoked where in an enforcement matter the licensee is complying with staff's order and has not sought a hearing, nor is a petition for an enforcement action sufficient to invoke the provisions of 2.780.").

Moreover, federal case law makes clear that, at least in a rulemaking context, Commissioners and members of Congress may communicate with each other as long as (i) the members of Congress are not applying pressure to decide a matter based on factors not previously made relevant by Congress through enactment of a statute and (ii) the agency's determination is not affected by such extraneous considerations.[165] Indeed, regarding this same rulemaking context, the United States Court of Appeals for the District of Columbia Circuit stated that:

> We believe it entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking, so long as individual Congressmen do not frustrate the intent of Congress as a whole as expressed in statute, nor undermine applicable rules of procedure. Where Congressmen keep their comments focused on the substance of the proposed rule . . . administrative agencies are expected to balance Congressional pressure with the pressures emanating from all other sources. To hold otherwise would deprive the agencies of legitimate sources of information and call into question the validity of nearly every controversial rulemaking.[166]

But the line between appropriate and inappropriate ex parte communication is drawn differently in adjudicatory proceedings than in rulemakings. The difficulty in adjudications lies in determining where to draw the line between appropriate congressional oversight of agency decisionmaking and overzealous participation that is detrimental to the agency's ability to act fairly. This line is drawn conservatively in a traditional adjudicatory context or in a quasi-adjudicatory context involving "conflicting private claims to a valuable privilege"—congressional communications must be treated the same as any other ex parte communications.[167] In those contexts, the Commission strictly applies the

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165. Sierra Club v. Costle, 657 F.2d 298, 408-09 (D.C. Cir. 1978); *see also* Pillsbury v. FTC, 354 F.2d 952, 964 (5th Cir. 1966) (involving a congressional hearing at which legislators probed the Commissioners' decisional process in a pending case); Orangetown v. Ruckelshaus, 740 F.2d 185, 188 (2d Cir. 1984); RULEMAKING GUIDE, *supra* note 22, at 19, 20, 349-51; EDLES & NELSON, *supra* note 77, at 328, 330-31; LUBBERS, *supra* note 98, at 239.

166. *Sierra Club*, 657 F.2d at 409-10. Courts have conceded that:

> Legislative attention to agency decisions is not only permissible but desirable, given that agencies do not have direct political accountability . . . . Courts examining quasi-legislative agency decisions have rejected the appearance of bias standard, recognizing that not all congressional . . . contact with the agency taints the agency decision . . . Communications between Congress and agencies help to guarantee the political accountability of unelected agency decisionmakers (citations omitted).

Sokaogon Chippewa Cmty. v. Babbitt, 929 F. Supp. 1165, 1174 (W.D. Wis. 1996); *see also* Ctr. for Sci. in the Pub. Interest v. Dep't of the Treasury, 573 F. Supp. 1168, 1178-79 (D.D.C. 1983).

167. *See Sokaogon Chippewa Cmty.*, 929 F. Supp. at 1174 (providing an excellent

ex parte rule and files a copy of the congressional correspondence in the appropriate case's docket file.[168]

One licensing board, however, stretched this principle beyond the breaking point. The Board in a Perry nuclear power plant reactor licensing proceeding at least *implied* that congressional contacts with NRC staff who are acting in an "initial decisionmaking" capacity are subject to the same ex parte constraints as apply to the Board itself.[169] In that proceeding involving an application to suspend the antitrust conditions of two nuclear power plant licenses, Ohio Edison (one of the licensees) raised with the Board the question whether (1) a legislative proposal by Senator Howard M. Metzenbaum that the NRC not suspend or modify any antitrust provision contained in the Perry Plant's operating license, (2) the debate on the floor of the Senate regarding this issue, and (3) any related correspondence between the legislative branch and the NRC staff constituted "congressional interference" that compromised the actual or apparent impartiality of NRC staff in connection with their consideration of Ohio Edison's application for modification of the antitrust provisions in its license. Ohio Edison argued that if the answer to this question was "yes," then the Board and the Commissioners should give no weight to staff's recommendation against suspending the antitrust conditions.[170]

Based on "the Staff's initial role in this instance as a decisionmaker (albeit administrative rather than adjudicatory) charged with acting in accordance with the public interest," the Board declined to dismiss Ohio Edison's allegations of improper congressional influence upon staff. But

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summary of the law on this matter).

168. *See, e.g.*, Letter from Annette L. Vietti-Cook, Secretary, NRC, to Rep. Jim Saxton (Feb. 14, 2006), *available at* ADAMS Accession No. ML060470249 (regarding *Oyster Creek Nuclear Generating Station*); Letter from Luis A. Reyes, Exec. Dir. for Operations, to Rep. Christopher Shays (Dec. 8, 2005), *available at* ADAMS Accession No. ML053550578 (regarding *Louisiana Energy Serv.*, Docket No. 70-3103-ML); Letter from Annette L. Vietti-Cook, Secretary, NRC, to Rep. Dennis Kucinich (June 30, 2005), *available at* ADAMS Accession No. ML051870380 (regarding *Private Fuel Storage*, Docket No. 72-22-ISFSI). This may well be an area where the Commission provides more due process than is required; at least one scholar concludes that the current judicial standard for determining whether to reverse such an agency action is the flexible *Mathews v. Eldridge* three-factor balancing test rather than the more rigid "appearance of bias" test. *See* ADJUDICATION GUIDE, *supra* note 22, at 116.

169. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 N.R.C. 229, 256-68 (1991) [hereinafter *Perry*]. The Board in *Perry* considered Ohio Edison's claims at face value—bias, prejudgment and legislative interference. *Id.* at 255-58. The Board did not go so far as to find a violation of the ex parte bar, and indeed stated that ex parte restrictions "seemingly were not applicable to [the NRC Staff's] review." *Id.* at 257 n.90. Yet despite the Board's references to bias and its tentative acknowledgment of the bar's inapplicability to the Staff, the Board nonetheless treated Ohio Edison's claim essentially as an ex parte violation.

170. *Id.* at 255 & n.83.

the Board acknowledged that, given the importance of congressional oversight, it had considerable reservations about admitting these issues, and it therefore limited the scope of Ohio Edison's discovery regarding them.[171]

With all due respect to the Licensing Board, I consider this decision incorrect as to the restricted-communications issue. First, the staff was not acting in an adjudicatory role at the time it received the congressional communications.[172] Consequently, the staff members who received the communications were not adjudicatory personnel for purposes of the ex parte rule. Because the staff members were not adjudicatory personnel, they were free to communicate with other parties and non-parties.[173] Second, as the Commission has often pointed out, "the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than the adequacy of the NRC staff performance."[174] Consequently, the only issue properly before the Board was the antitrust issue, not the tainted or untainted nature of the staff's views on that issue. Third, consistent with Congress's oversight responsibilities, it is appropriate as a general matter for United States Representatives and Senators to communicate regularly with the NRC regarding pending proceedings.[175]

ii. Analogous Treatment of Communications from the White House and the Office of Management and Budget

At least as early as 1971, the White House has involved itself in agency rulemakings.[176] No express statutory exemption exists for such contacts, but this kind of communication nonetheless raises many of the same ex parte issues regarding political pressure as do congressional communications[177]—e.g., potential for frustration of congressional

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171. *Id.* at 257-58, 260.

172. *Cf.* S. Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 N.R.C. 346, 378-79 (1983) ("The fact that a final FEMA finding is entitled to a rebuttable presumption does not convert that agency into a decisionmaker in Commission licensing proceedings."), *aff'd sub nom.* Carstens v. NRC, 742 F.2d 1546 (D.C. Cir. 1984). *A fortiori*, the fact that the NRC staff offers the Board a recommendation that is not entitled to a rebuttable presumption necessarily fails to convert the Staff into a decisionmaker.

173. *See* Pub. Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 N.R.C. 253, 269 (1978); *see also supra* Part II.A.1.a; *infra* Part III.A.2.e.

174. NRC, Final Rule, Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989); *see also* Curators of the Univ. of Mo., CLI-95-1, 41 N.R.C. at 121 & n.67; Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 N.R.C. 177, 186 (1989).

175. *See supra* note 168.

176. ACUS Recommendation No. 88-9, Presidential Review of Agency Rulemaking, 54 Fed. Reg. 5207, 5208 (Feb. 2, 1989) [hereinafter ACUS Recommendation 88-9]; LUBBERS, *supra* note 98, at 19-29.

177. Sokaogon Chippewa Cmty. v. Babbitt, 929 F. Supp. 1165, 1173, 1175 (W.D. Wis. 1996) ("Courts examining *quasi-legislative* agency decisions have rejected the appearance of bias standard, recognizing that not all congressional or presidential contact with the

mandates, reduction of regulators' incentive to act independently, thereby undermining the APA rulemaking process, and creation of undisclosed conduits for information from private individuals or groups.[178] For that reason, I include here a discussion of agency-White House communications, despite the absence of an express statutory exemption covering such communications. Although communications from the White House and Congress share quite a number of issues, the former kind of communication also presents issues not relevant to congressional communications. For instance, contacts with the White House may raise "executive privilege" questions.[179] Some doubt remains as to whether the White House participants in ex parte communications should be considered "interested persons outside the agency."[180]

According to ACUS, agencies in rulemaking proceedings should be free to receive written or oral communications from the White House, the Office of Management and Budget (OMB), and other agencies regarding *policy* matters,[181] though the agency should still place a copy or summary of such communications in the public record after the publication of the proposed or final rule, or after the termination of the rulemaking proceeding.[182] As for *factual* matters, however, the agency should promptly place a copy or summary of the communication in the public rulemaking file.[183] ACUS also recommended that agencies "alleviate

agency taints the agency decision."). *See generally* EDLES & NELSON, *supra* note 77, at 331-32; O'REILLY, *supra* note 98, at 230-35; Verkuil, *supra* note 109, at 944. For examples of White House involvement in agency decisionmaking, see Verkuil, *supra* note 109, at 944-47, involving OSHA, EPA and the Department of the Interior. For a lengthy list of articles and cases addressing the President's role in regulatory process, see Michael A. Bosh, *The "God Squad" Proves Mortal: Ex Parte Contacts and the White House after Portland Audubon Society*, 51 WASH. & LEE L. REV. 1029, 1032-33 (1994). *See generally* ACUS Recommendation 88-9, *supra* note 176, at 5208 (recognizing that some of the issues associated with Presidential review of agency rulemaking "are analogous to congressional involvement in agency rulemaking").

178. RULEMAKING GUIDE, *supra* note 22, at 343.

179. Verkuil, *supra* note 109, at 958-62. The scope of that privilege is, however, circumscribed by due process considerations. *Id.* at 982; *see also* Bosh, *supra* note 177, at 1076-79, 1081-83.

180. Verkuil, *supra* note 109, at 968 n.139 (citing 5 U.S.C. § 557(d)(1)).

181. LUBBERS, *supra* note 98, at 233-34 & n.32 (citing ACUS Recommendation No. 80-6, Intragovernmental Communications in Informal Rulemaking Proceedings, 45 Fed. Reg. 86,407 (Dec. 31, 1980)); RULEMAKING GUIDE, *supra* note 22, at 344-45 (addressing ACUS Recommendations 80-6 and 88-9).

182. ACUS Recommendation 88-9, *supra* note 176, at 5208; *see also* RULEMAKING GUIDE, *supra* note 22, at 344-45 (regarding ACUS Recommendation 88-9); LUBBERS, *supra* note 98, at 233-34 (citing ACUS Recommendation 88-9).

183. ACUS Recommendation 88-9, *supra* note 176, at 5208; RULEMAKING GUIDE, *supra* note 22, at 344; LUBBERS, *supra* note 98, at 233-35 (citing ACUS Recommendations 80-6 and 88-9).

'conduit' concerns by identifying and making public every communication that contains or reflects comments from persons outside the government, regardless of content."[184]

The policy reasons supporting presidential involvement in the rulemaking process are strong. The president has a constitutional duty to ensure that the agencies and departments properly execute the laws.[185] The president is also responsible for coordinating the actions of different agencies, resolving conflicts among different agencies' rules, and implementing national priorities through the rulemaking process.[186] ACUS suggested that these factors should, "as a matter of principle," apply even to independent agencies,[187] but this has not been the White House's or OMB's practice as to NRC rulemakings.[188]

For practical reasons, the federal courts have been reluctant to interfere with intergovernmental communications from the president to departments or agencies.[189] As the D.C. Circuit stated in *Sierra Club* (involving an informal rulemaking):

> Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House.[190]

The difficulty lies, as it does with congressional communications, in determining where to draw the line between appropriate presidential oversight of agency rulemaking and overzealous participation which undermines the agency's ability to act fairly.

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184. RULEMAKING GUIDE, *supra* note 22, at 344-45 & n.39 (regarding ACUS Recommendations 80-6 and 88-9).

185. *See* U.S. CONST. art. II, § 3 ("[H]e [or she] shall take care that the Laws be faithfully executed.").

186. *See* Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1978); *see also* Bosh, *supra* note 177, at 1071-73 ("By virtue of an accountability to a national constituency, the President should be able to use his broad policy perspective to assist regulatory agencies with policy determinations . . . [particularly in] a dispute between two executive agencies that are both trying to carry out statutory mandates.") (footnotes omitted).

187. ACUS Recommendation 88-9, *supra* note 176, at 5208.

188. OMB review of the Commission's rulemakings is limited to matters involving information collection requirements under the Paperwork Reduction Act, 44 U.S.C. §§ 3501-3531 (2000). *See* Letter from Lando W. Zech, Jr., Chairman, NRC, to Sen. Alan K. Simpson (Mar. 17, 1988) (on file at NRC Public Document Room, 11555 Rockville Pike, Rockville, MD 20852, Document Accession No. 8804210195) ("OMB's review of proposed information collections have not had any significant impact on the Commission's regulatory programs or activities.").

189. *See* LUBBERS, *supra* note 98, at 237; RULEMAKING GUIDE, *supra* note 22, at 347-49.

190. *Sierra Club*, 657 F.2d at 406.

Courts and scholars have generally drawn that line in a way that permits White House communications regarding informal rulemakings affecting a large number of people or entities,[191] but not regarding either adjudicatory administrative proceedings[192] or rulemakings of a quasi-adjudicatory nature, such as those involving conflicting private claims to a valuable privilege.[193] In these latter contexts, presidential communications, like those from Congress, must be treated the same as any other ex parte communications. In that context, the Commission would presumably follow its analogous practice regarding congressional correspondence, in that it would apply the ex parte rule and file a copy of the White House correspondence in the appropriate case's docket file.

Similar issues present themselves in agency-OMB communications as in agency-White House contacts. This is understandable given that OMB is a White House entity.[194] For instance, "agency discussions with OMB are permissible even if they induce changes in an agency rule, as long as the agency can justify its rule 'entirely by reference to the record before it.'"[195]

But communications from OMB are also governed by two additional documents: a Reagan-era memorandum from David Stockman to the Heads of Executive Departments and Agencies, dated June 11, 1981,[196] and

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191. *See* ADJUDICATION GUIDE, *supra* note 22, at 108 n.33 (stipulating that any communication from the White House staff "'not intended to influence the result of a specific adjudication,' should not be considered 'relevant to the merits'").

192. *See* Myers v. United States, 272 U.S. 52, 135 (1926) ("[D]uties of a quasi-judicial character [could be] imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control."); Audubon Soc'y v. Engdangered Species Comm., 984 F.2d 1534, 1545-47 & n.27 (9th Cir. 1993) (citing *Myers*, 272 U.S. at 62, and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), for the proposition that political pressure from the President may be inappropriate in formal adjudications and concluding that the President and his staff are subject to the APA's ex parte communication ban; the court added that "if the President and his staff were exempted, the purpose of the statute would be severely undermined"); Orangetown v. Ruckelshaus, 579 F. Supp. 15, 20 (S.D.N.Y. 1984) ("The decisions of administrative agencies may be challenged if 'unlawful factors have tainted the agency's exercise of its discretion' . . . This includes improper political considerations.") (citations omitted), *aff'd*, 740 F.2d 185, 188 (2d Cir. 1984); *see also* Verkuil, *supra* note 109, at 950 ("[W]hen the White House [seeks] to influence the conduct and outcome of litigation, there is nothing in the relationship between the executive agency and the President that should override the due process interests.").

193. *See Sierra Club*, 657 F.2d at 400 (quoting Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959)); ACUS Recommendation 88-9, *supra* note 176, at 5208 ("[N]ot all agency rules or categories of rules may be appropriate for . . . presidential review. Exempt categories include . . . rulemaking that resolves conflicting private claims to a valuable privilege.").

194. *See* RULEMAKING GUIDE, *supra* note 22, at 418.

195. PIERCE, *supra* note 88, at 484 (quoting New Mexico v. EPA, 114 F.3d 290 (D.C. Cir. 1997)).

196. Memorandum from David Stockman, Director, OMB, to the Heads of Executive Departments and Agencies (June 11, 1981), *reprinted in* OMB, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT 618 (1990-91).

President Clinton's Executive Order No. 12,866.[197] Mr. Stockman explained in his memorandum that any documents sent to OMB or the President's Task Force on Regulatory Relief (Task Force)[198] should also be sent to the relevant agency,[199] and that any material received or developed by OMB or the Task Force and then forwarded to the relevant agency should be "identified as material appropriate for the whole record of the agency rulemaking."[200] The meaning of this last phrase is a bit murky, though I assume it means that the material should be placed in the public record of the rulemaking. The Stockman memorandum was ambiguous in another respect as well—although clearly applicable to written communications, it never stated whether its directive applied also to oral ones.[201]

OMB's role in agency rulemaking was sufficiently controversial that Congress in 1986 considered limiting OMB's monitoring role.[202] OMB and Congress eventually reached an accommodation, with OMB "reaffirming certain previously established procedures and . . . establishing additional transparency procedures for [rulemaking] reviews."[203] This accommodation provided the basis for ACUS's Recommendation 88-9 three years later requiring strict openness in OMB's reviews, and for President Clinton's subsequent Executive Order in 1993.[204] In that Executive Order, President Clinton required agencies to make publicly available all submissions from OMB and identify all changes made in the rule at OMB's behest.[205] The Executive Order further provided that OMB—or, more particularly, its subsidiary organization, the Office of Information and Regulatory Affairs—must forward all outside communications to the relevant "agency within 10 days, invite agency

197. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993), *reprinted in* RULEMAKING GUIDE, *supra* note 22, at app. B.

198. The Task Force, chaired by then-Vice President George H. W. Bush, included Cabinet Secretaries and other high-level government officials, and gave advice to the President and OMB. Its mission was to "review pending regulations, study past regulations with an eye towards revising them and recommend appropriate legislative remedies." Meyer v. Bush, 981 F.2d 1288, 1289-90 (D.C. Cir. 1993). The Task Force was active during two periods of the Reagan Administration—from 1981-83 and 1986-89. *Id.* at 1290.

199. RULEMAKING GUIDE, *supra* note 22, at 345-46 (quoting a memorandum issued by the Reagan Administration setting forth such requirements).

200. *Id.* at 346 (quoting the Stockman Memorandum, *supra* note 196).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*; LUBBERS, *supra* note 98, at 236.

205. *See id.* In contrast, during the Reagan Administration, OMB reviews were conducted "in secret, generally orally," and resulted in no signed document "that could reasonably be considered a directive." Alan Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 267 (1986).

officials to any meetings held with outsiders, . . . maintain a public log of all such contacts[, and a]t the end of the proceeding, . . . make [publicly] available all documents exchanged with the agency."[206]

c. Communications Regarding Procedural Matters

The ex parte restrictions are, as written, applicable solely to substantive communications and do not apply to merely procedural discussions between adjudicatory personnel and a party.[207] Nevertheless, as the Commission's now-defunct Atomic Safety and Licensing Appeal Board[208] wisely pointed out, even procedural ex parte communications, such as conference calls that include fewer than all parties, "are to be avoided except in the case of the most dire necessity."[209] According to the Appeal Board, "even if all of the participants scrupulously adhere to both the letter and the spirit of section 2.780(a) during the course of the call—an absolute imperative in all circumstances—the mere fact that there are non-participating parties is an incubator of possible suspicion and doubt."[210]

Moreover, interested persons will occasionally use a status request as "an indirect or subtle effort to influence the substantive outcome" of a proceeding.[211] Likewise, outside persons may use a status request of other

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206. RULEMAKING GUIDE, *supra* note 22, at 347. These provisions were included to sidestep judicial rulings that FOIA exemptions protect such interagency communications from disclosure. *Id.* at 347 n.44 (citing Wolfe v. Dep't of Health & Human Servs., 839 F.2d 768 (D.C. Cir. 1988)).

207. *See* Puerto Rico Water Res. Auth. (North Coast Nuclear Plant, Unit 1), ALAB-313, 3 N.R.C. 94, 96 (1976) [hereinafter *North Coast*] (information having an impact on a prehearing conference schedule; information regarding dates for responding to outstanding pleadings); *see also* Public Serv. Co. of N.H. (Seabrook Station, Units 1 and 2) (unnumbered Licensing Board decision), 18 N.R.C. 1201, 1203, *aff'd on other grounds*, ALAB-749, 18 N.R.C. 1195 (1983); *cf.* Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-3, 17 N.R.C. 72, 73-74 (1983) (regarding separation of functions: status reports by staff to the Commission). *See generally* PATCO v. FLRA, 685 F.2d 547, 563, 565 nn.38-41 (D.C. Cir. 1992) (noting that status requests, discussions of the status of settlement efforts, discussions regarding filing deadlines, and general background discussions are not prohibited); EDLES & NELSON, *supra* note 77, at 327.

208. The Atomic Safety and Licensing Appeal Board was an intermediate appellate body within the NRC, somewhat akin to the United States Courts of Appeals in the federal judicial system. The Commission abolished the Appeal Board in 1991. But despite its defunct status, the Appeal Board's decisions still carry precedential weight. *See* Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 N.R.C. 55, 59 n.2 (1994).

209. *North Coast*, 3 N.R.C. at 96.

210. *Id.* at 96. *See generally* Note, *Achievement of Judicial Effectiveness Through Limits on Judicial Independence: A Comparative Approach*, 31 N.C. J. INT'L L. & COM. REG. 255, 283-84 (2005).

211. *PATCO*, 685 F.2d at 563 (quoting S. REP. No. 94-354, at 37); Peck, *supra* note 22, at 247 ("[S]tatus or procedural inquiries may either directly or by implication bring pressure to bear upon the merits in particular proceedings."); Note, *Ex Parte Communications in Rulemaking: Home Box Office and Action for Children's Television*, 1978 ARIZ. ST. L.J. 69, 96-97 (discussing the problem of ex parte status requests and, as a remedy, recommending against allowing them).

procedural discussion as a subterfuge to "secretly pass along [their] comments to employees who will later assist the adjudicators deciding the case."[212] Either way, a particular party could gain a "tactical advantage" over its adversaries.[213] In such instances, the adjudicatory personnel receiving the purported status request should treat the communication as an improper ex parte contact.[214]

Although Commission case law does not address situations where a party communicates with the adjudicator regarding a *contested* procedural issue, such communication logically would be barred by the ex parte restrictions despite its procedural nature.[215] This is because it would contravene the purpose underlying those restrictions, which is to ensure fairness of the hearing process and the independence of the adjudicators.[216]

d. Matters Pending Before a Court or Another Agency

My research has revealed no Commission case law addressing the exception for matters pending before a court or another agency. The Commission's regulations, however, do provide that the Commission, including its representatives in OGC, can participate in confidential contacts such as settlement negotiations with outside parties to a lawsuit that is related to an adjudication pending at the Commission.[217] Similarly,

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212. Shulman, *supra* note 22, at 378.

213. The American Bar Association Model Code of Judicial Conduct bars ex parte communications, except:

> Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
>
> (i) the judge reasonably believes that no party will gain a *procedural or tactical advantage* as a result of the ex parte communication, and
>
> (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

AM. BAR ASS'N, MODEL CODE OF JUDICIAL CONDUCT Canon 3.B(7)(a), *available at* http://www.abanet.org/cpr/mcjc/canon_3.html (emphasis added.); *see also* AM. BAR ASS'N, DRAFT CODE OF JUDICIAL CONDUCT, Rule 2.10(A)(1)(a), *available at* http://www.abanet.org/judicialethics/redlinetocurrentcode.pdf.

214. *PATCO*, 685 F.2d at 563, 568. In that proceeding, the Court suggested that a call from an outside party expressing his view on the possibility of a settlement and urging the decision-maker to act expeditiously on the case might constitute just such a subtle effort. *Id.* at 568.

215. *See generally* Abramson, *supra* note 93, at 1363 ("[F]orbidden communications may extend . . . to matters of . . . the merits of non-substantive issues . . . ."). "The definition of an ex parte communication supports this interpretation, for it includes any communication of information in which adversary counsel would be interested." *Id.*; *see* Sheila Reynolds, *Protecting Due Process: Avoiding Ex Parte Communications*, 73 J. KAN. BAR ASS'N 8 (May 2004); MODEL CODE OF JUDICIAL CONDUCT, *supra* note 213, Canon 3.B(7)(a). For examples of permissible and prohibited procedural communications, see Jack M. Weiss, *Trial Practice: It depends on the Meaning of 'Ex Parte,'* 20 ABA GEN. PRAC. MAG. (Sept. 2003), *available at* www.abanet.org/genpractice/magazine/2003/sep/exparte.html.

216. *Cf. supra* Part III.A.1.a (addressing the applicability of the ex parte bar to uncontested matters).

217. 10 C.F.R. § 2.347(f)(3) (2006); *see also* 10 C.F.R. § 2.780(f)(3) (rescinded).

the Federal Communications Commission has ruled that "a private discussion with Commissioners about the possibility of the Commission's seeking Supreme Court review of an adverse decision by the court of appeals was . . . a discussion between co-litigants and hence not an improper ex parte communication."[218] Likewise, the D.C. Circuit decided in *Louisiana Association of Independent Producers v. Federal Energy Regulatory Commission* that the APA's ex parte prohibition did not cover meetings between parties and deciding officials to discuss pending court cases.[219]

e. Communications Regarding Generic Issues Involving Public Health and Safety or Another of the Commission's Statutory Responsibilities Not Associated with the Resolution of the Adjudicatory Proceeding

The applicability of this particular exception generally turns on whether the person communicating with NRC adjudicatory personnel is considered an "interested person" as the APA uses that term. As noted above, an ex parte contact is an oral or written communication between an "interested person" (or persons) outside the agency and adjudicatory personnel within the agency. The term "interested person" includes not only parties, but also the "participants" referenced in 10 C.F.R. § 2.3 (and former § 2.715(c)): states, counties, municipalities, or agencies thereof.[220] Indeed, the legislative history of the APA indicates that Congress intended the term to refer to *any* individual or group "with an interest in the agency proceeding that is greater than the general interest the public as a whole may have," and includes, but is not limited to, "parties, competitors, public officials, and nonprofit or public interest organizations and associations with special interest in the matter regulated."[221] Both legislative history and judicial

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218. Peck, *supra* note 22, at 248.

219. 958 F.2d 1101, 1111 (D.C. Cir. 1992) (per curiam).

220. *See* NRC, Final Rule, Revision to Ex Parte and Separation of Functions Rules Applicable to Formal Adjudicatory Proceedings, 53 Fed. Reg. 10,360, 10,363 (Mar. 31, 1988).

221. PATCO v. FLRA, 685 F.2d 547, 562 (D.C. Cir. 1992) (citing H.R. REP. NO. 94-880, pt. 1, at 19-20 (1976)); EDLES & NELSON, *supra* note 77, at 326.1 ("Presumably, interested persons include anyone with an interest in a proceeding greater than the general interest the public as a whole may have."). However, the Commission does not include within "interested persons" any "member of the public at large who makes a casual or general expression of opinion about a pending [formal] proceeding." NRC, Proposed Rule, Revisions to Ex Parte and Separation of Functions Rules Applicable to Formal Adjudicatory Proceedings, 51 Fed. Reg. 10,393, 10,396 (proposed Mar. 26, 1986).

One example of such "casual or general expression" is the "form postcard" or "form letter" which some citizen groups encourage their members to send to the Commission. In *Louisiana Energy Services*, Docket No. 70-3070, the Presiding Officer received 2,311 of these, and the Commission 702—all expressing the senders' opposition to Louisiana Energy Services' materials license application. The Presiding Officer in that informal proceeding treated his 2,311 postcards and letters as the equivalent of limited appearances (rather than as ex parte communications), forwarded them to SECY for inclusion in the official docket,

interpretation of the underlying statutory language explain that the term "interested person" should be construed broadly.[222]

Although most persons communicating with adjudicatory personnel will fall clearly inside or outside the scope of § 2.780 as "interested persons," the Commission has twice faced situations in which an individual's or organization's status as an "interested person" has been questionable. Both of these instances involved the submission to the Commission of documents addressing issues of health and safety that were broader than, but nevertheless encompassed, adjudicatory issues then pending before the Commission.

The Commission first dealt with this situation in *Three Mile Island*.[223] There, the Commission rejected the argument that staff had violated the ex parte rules[224] by sending the Commission three SECY Papers addressing proposed emergency response capability requirements for *all* nuclear power plants. The Commission reasoned that those documents addressed "general health and safety problems and responsibilities of the Commission" under the then-existing § 2.780(d)(2) (later rephrased at § 2.780(f)(4), and now found at § 2.347(f)(4)).

The Commission later addressed a similar situation in *Limerick*,[225] where intervenors had moved to disqualify the licensee's law firm and to reopen the record for further proceedings on the ground that one of the firm's attorneys had violated the Commission's ex parte rule. In *Limerick*, the Washington Legal Foundation (WLF) had submitted to the Commission and the Appeal Board a copy of a "working paper" addressing offsite emergency planning for nuclear power plants. The working paper addressed a number of issues specific to the Limerick Station and was

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and sent the parties a copy of his forwarding memorandum (but not copies of the letters and postcards). The Commission's 702 cards and letters were likewise included in the official docket, provided to the appropriate staff, placed in the NRC's Public Document Room, and individually acknowledged by SECY. They were not, however, served on the parties. *See* Memorandum from John C. Hoyle, Secretary, NRC, to the Commissioners, NRC, Letters from the Public Concerning the Louisiana Energy Services Proceeding (Oct. 2, 1997) (on file at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD 20852, Document Accession No. 9908190055).

222. *See* Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1544 (9th Cir. 1993) (explaining that to fulfill the statutory purposes of the APA's ex parte provision, "we must give the provision a broad scope rather than a constricted interpretation"); *PATCO*, 685 F.2d at 562 (noting the term "interested person" was intended to have a broad scope); H.R. REP. No. 94-880, pt. 1, at 19-20 (1976) ("'[I]nterested person' is intended to be a wide, inclusive term.").

223. Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-3, 17 N.R.C. 72, 73-74 (1983) [hereinafter *Three Mile Island*].

224. Although this case, strictly speaking, involved the separation-of-functions rather than the ex parte restrictions, I include it in the ex parte portion of this Article because the Commission in *Three Mile Island* expressly construed a predecessor to the current ex parte regulation.

225. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 and 2), CLI-86-18, 24 N.R.C. 501, 505 (1986) [hereinafter *Limerick*].

authored by one of Philadelphia Electric Company's attorneys in the *Limerick* proceeding. Although the Commission was able to rule on the intervenors' motions without resolving the issue whether the WLF was an "interested person outside the agency" under the APA's § 557(d)(1)(A), the Commission nonetheless noted in *dictum* that a nonparty such as WLF might not qualify as an "interested person."[226]

The Commission's dictum in *Limerick* appears at least questionable, given the D.C. Circuit's ruling on a similar issue in *PATCO*. In the latter proceeding, the court was presented with the issue whether communications between a member of the Federal Labor Relations Authority (FLRA) and a prominent labor leader, Albert Shanker, regarding the merits of a pending FLRA proceeding constituted an ex parte communication prohibited by the APA. Shanker claimed that such communications were acceptable because he was not an "interested person" as that term is used in the APA. The court rejected Shanker's position on the ground that, as the president of a major labor organization, he had a special and well-known interest in both the union movement and the developments in public-relations labor law.[227] The court also indicated that Mr. Shanker's prior statements to the press regarding the FLRA administrative proceeding did not give him license to conduct ex parte communications with a FLRA decisionmaker on the merits of the case.[228] The court explained that the FLRA member should have promptly terminated the discussion and, if Mr. Shanker persisted in discussing his views of the case, the member "should have informed him in no uncertain terms that such behavior was inappropriate."[229]

One final point regarding communications on generic issues deserves at least brief attention. The Commission, when promulgating an earlier version of what is now § 2.347(f)(4), explained that "off the record communications regarding generic matters are not to be presented or used as a basis for resolving issues in a formal, 'on the record' proceeding." The Commission further indicated that

> a communicator's attempt to associate a communication purportedly relating to a generic matter with the resolution of matters in a proceeding or an adjudicator's association of an otherwise proper communication on generic matters with the resolution of issues in a formal proceeding would

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226. *Limerick*, 24 N.R.C. at 505 & n.1, 506.
227. *See PATCO*, 685 F.2d at 569-70.
228. *See id.* at 570 n.48.
229. *Id.* at 571. It is unclear whether the Commission was aware of the *PATCO* decision, issued three years before the Commission's *Limerick* memorandum and order, and whether the Commission simply chose not to follow *PATCO*, as would be the Commission's right.

> make those communications subject to the ex parte or separation of functions restrictions and require that the agency take appropriate measures, such as public disclosure of the communication . . . .[230]

Of course, if the subject is clearly unrelated to any adjudication, then the "interested person" issue does not arise.[231]

2. *Applicability* Vel Non *of the Ex Parte Restriction to Specific Kinds of Proceedings or Communications*

a. *Informal Adjudicatory Proceedings*

The Commission, in the preamble to its proposed rule establishing the Commission's Subpart L informal adjudicatory hearing procedures, offered the following observation as to the applicability of the restricted-communications rules to informal proceedings:

> Despite the lack of any statutory requirement that the Commission apply the ex parte and separation of functions prohibitions of the Administrative Procedure Act . . . to informal adjudications,[232] these prohibitions can in some circumstances have due process implications. *See* Bethlehem Steel Corp. v. EPA, 638 F.2d 994, 1008-10 (7th Cir.), *cert. denied*, 447 U.S. 921 (1980); United States Lines v. FMC, 584 F.2d 519, 536-42 (D.C. Cir. 1978). The crux of judicial concern in this regard is that the decision resulting from the adjudication should not be based upon information about which the parties have not had notice and a chance to provide their views. *Bethlehem Steel Corp.*, 638 F.2d at 1009-10; *United States Lines*, 584 F.2d at 540-41. Proposed § 2.1215(c) addresses this concern by providing that an initial decision can only be based upon information with respect to which all parties have had notice and an opportunity to comment.[233]

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230. NRC, Final Rule, Revision to Ex Parte and Separation of Functions Rules Applicable to Formal Adjudicatory Proceedings, 53 Fed. Reg. 10,360, 10,363 (§ II.H.5) (Mar. 31, 1988).

231. *See* La. Ass'n of Indep. Producers v. FERC, 958 F.2d 1101, 1111 (D.C. Cir. 1992) (per curiam) (ruling that the APA's ex parte prohibition did not cover meetings between parties and deciding officials to discuss industry problems).

232. The Commission's initial conclusion regarding the APA ex parte bar's inapplicability to informal proceedings is also implied in the title of the Commission's later rulemaking amending its restricted communications regulations: NRC, Final Rule, Revision to Ex Parte and Separation of Functions Rules Applicable to *Formal* Adjudicatory Proceedings, 53 Fed. Reg. 10,360 (Mar. 31, 1988) (emphasis added).

233. NRC, Proposed Rule, Informal Hearing Procedures for Materials Licensing Adjudications, 52 Fed. Reg. 20,089, 20,091 (proposed May 29, 1987). The provision referenced as "proposed section 2.1215(c)" was later moved to section 2.1251(c) and now appears at section 2.1210(c). *See* NRC, SECY-87-88, REVISED PROPOSED RULE ON INFORMAL HEARING PROCEDURES FOR MATERIALS LICENSING ADJUDICATIONS 5 (Apr. 1, 1987), *available at* ADAMS Accession No. ML061220091. This latter regulation provides that:

> [T]he informal adjudication must be based upon information in the public record with respect to which all parties have been given reasonable prior notice. To

The Commission's first conclusion above, that the APA's ex parte restrictions do not apply to informal proceedings, was reiterated inferentially in the Commission's 1989 Final Subpart L Rule, where the Commission stated that its Subpart L procedures are not subject to the APA's formal hearing requirements.[234] This conclusion is a sound one. It is consistent with both Commission and federal court precedent that "the formal on-the-record hearing provisions of the APA do not apply to the Commission's informal proceedings."[235] Nothing in the 2004 revisions to Subpart L suggests any change in the Commission's position on this matter.[236]

However, the clarity of the Commission's position on this matter was muddied a bit in 1990, when the Commission in a Subpart L proceeding, *Rockwell International Corp.*, offered the following comment suggesting the contrary view—that informal proceedings *were* subject to ex parte restrictions. Addressing the use of settlement judges in both formal and informal proceedings, the Commission noted that:

> [I]n view of the fact that a settlement judge might engage in ex parte discussions and form a judgment on the merits of a party's position during the course of negotiations, the settlement judge's communications and dealings with the presiding officer on the merits of issues and the parties' positions *will have to be circumscribed*.[237]

> implement this suggestion, . . . [we have proposed] that an initial decision must be based upon the record, which is to include all information submitted in the proceeding with respect to which all parties have been given reasonable prior notice.

Id. Professor Asimow stops short of reaching the Commission's conclusion. He asserts that, although the APA bars outsider ex parte contact in *formal* proceedings, the Act nevertheless leaves unclear whether such communications are prohibited in *informal* adjudications. Asimow, *supra* note 74, at 762.

234. NRC, Final Rule, Informal Hearing Procedures for Materials Licensing Adjudications, 54 Fed. Reg. 8269, 8270 (Feb. 28, 1989).

235. Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 N.R.C. 232, 247-256 (1982), *aff'd*, City of West Chicago v. NRC, 701 F.2d 632, 641-45 (7th Cir. 1983); Curators of the Univ. of Mo., CLI-95-1, 41 N.R.C. at 119; *see also* 2 DAVIS & PIERCE, *supra* note 119, at 390. *See generally* Verkuil, *supra* note 109, at 970 & n.149 ("[Informal adjudication] . . . is virtually unbounded by APA-imposed procedures."); ADJUDICATION GUIDE, *supra* note 22, at 114 ("The APA adjudication provisions do not apply to informal adjudication."); Breger, *supra* note 22, at 359 ("The drafters of the APA purposely eschewed any attempt to establish minimum procedural requirements for most 'informal agency action.'").

236. 10 C.F.R. Part 2, Subpart L, as well as the NRC's entire procedural scheme for hearings, was revised substantially in 2004. *See* NRC, Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004). Because the new rule introduced no changes in the Commission's practices and procedures relevant to this Article, I will refer regularly to the "old" Subpart L rules. *See, e.g.*, *infra* Part III.A.2(a).

237. Rockwell Int'l Corp. (Rocketdyne Div.), CLI-90-5, 31 N.R.C. 337, 340-41 (1990) (emphasis added). *See generally* Davis, *supra* note 22, at 646-49. *Rockwell Int'l Corp.* is another example of the Commission referring to the ex parte bar when discussing what was really a separation-of-functions issue.

One could argue that the italicized mandatory language in that comment would have been unnecessary had the Commission considered informal proceedings to be exempt from the APA's ex parte restrictions, but I do not believe that the Commission intended this comment to overturn its prior conclusion reached both through the rulemaking process and in the *West Chicago* proceeding. The Commission in *Rockwell* never offered any rationale to support reversing its prior oft-stated position. It seems particularly unlikely that the Commission would reverse itself on such an issue without expressly acknowledging that it was doing so. I believe that the Commission was instead probably contemplating the due process or fundamental fairness implications of discussions between settlement judge and trial judge[238] and was referring merely to its own ex parte regulations, which it promulgated despite the absence of any such requirement in the APA.[239]

b. Initial Licensing Proceedings and License Modification Proceedings

There is some dispute as to whether the APA exempts "initial licensing" proceedings, and perhaps, as a corollary, "license modification" proceedings, from ex parte restrictions. The APA lists initial licensing as an exception when addressing separation-of-functions restrictions,[240] and some have argued that the APA's ex parte restrictions are inapplicable at least to initial licensing proceedings.[241] Others assert the contrary.[242]

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238. For an example where an adjudicator's communications with an outside party was held to violate due process, see Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224-25 (D.C. Cir. 1959). However, only two years later, the D.C. Circuit greatly limited the applicability of *Sangamon. See* Courtaulds, Inc. v. Dixon, 294 F.2d 899, 904-05 n.16 (D.C. Cir. 1961) (construing the holding in *Sangamon* strictly, and distinguishing between quasi-adjudicatory and non-adjudicatory rulemakings); 2 KOCH, *supra* note 25, § 6.12, at 326; Richards, *supra* note 22, at 74; Carberry, *supra* note 107, at 77 & n.71; *see also* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 655 (1989) (reversing a lower court decision ruling that the concept of "fundamental fairness" justified requiring the federal agency to satisfy procedural requirements that were not included in the APA).

239. Agencies are free to "grant additional procedural rights in the exercise of their discretion," over and above those specified in the APA. *See* Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 524, 546 (1978).

240. *See supra* notes 145-47 and accompanying text (discussing the Commission's decision not to avail itself of these two statutory exceptions).

241. Shulman, *supra* note 22, at 354 ("The Chief Counsel's Report noted that, although not required by the APA, the NRC's ex parte rules apply to initial licensing cases") (citing NRC, OFFICE OF CHIEF COUNSEL, REPORT OF THE OFFICE OF CHIEF COUNSEL ON THE NUCLEAR REGULATORY COMMISSION 40 (1979)).

242. SECY-80-130 sets forth the following chain of logic by which this conclusion is reached:

> It is stated in § 557(d)(1) that the ex parte provision applies "in any agency proceeding which is subject to subsection (a) of this section." Subsection (a) of § 557 states that "[t]his section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title." In § 556(a) it is stated that "this section [i.e., § 556] applies, according to the

But this disagreement, to the extent it applies to NRC proceedings, is really much ado about nothing. When the Commission promulgated its own ex parte rules, it did not exempt these initial licensing and license modification proceedings from those rules.[243] When the Commission was faced with the issue of whether those rules apply to matters in controversy regardless of whether the issue was raised by a party or *sua sponte* by a presiding officer, the Commission concluded that, at least in "formal adjudicatory hearing[s]" involving reactor "operating license[s]," the restrictions apply regardless of who raises the issue.[244] Because of the similarity of initial licensing and license modification proceedings involving nuclear power reactors,[245] one can logically assume this same conclusion also applies to the latter kind of case.

c. Certification Proceedings

The Commission has addressed the question of whether the restricted communications rules apply to rulemaking-type design certification proceedings.[246] In the NRC's notices of proposed rulemakings involving certification of three new designs for nuclear power plants in the 1990s, the Commission announced that it was considering the application of certain communication restrictions to proceedings involving certification of standard plant designs *if* a hearing were requested on those certifications. Specifically, the Commission stated that it

> will communicate with interested persons/parties, the NRC staff, and the licensing board . . . only through docketed, publicly-available written communications and public meetings. Individual Commissioners may communicate privately with interested persons and the NRC staff;

> provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section." In § 554(c), it is expressly stated 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" must be an opportunity afforded interested parties. This initial licensing exemption, which appears in subsection (d) of § 554, does not affect the reach of subsection (c) of § 554.
>
> Hence, through this chain of references, the ex parte provisions in § 557(d) 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.

SECY-80-130, *supra* note 98, at 72-73 (footnote omitted).

243. Shulman, *supra* note 22, at 354 ("The Chief Counsel's report noted that . . . the NRC's ex parte rules apply to initial licensing cases.") (citing NRC, OFFICE OF CHIEF COUNSEL, *supra* note 241).

244. NRC, Final Rule, Revision to Ex Parte and Separation of Functions Rules Applicable to Formal Adjudicatory Proceedings, 53 Fed. Reg. 10,360, 10,361 (Mar. 31, 1988); *see also* SECY-88-43, Proposed Final Rule Revising Agency Procedures Governing Ex Parte Communications and Separation of Functions, at 3-4 (Feb. 11, 1988) (on file at NRC Public Document Room, 11555 Rockville Pike, Rockville, MD 20852, Document Accession No. 8802170361).

245. *See* Davis, *supra* note 22, at 639-40 & n.73.

246. *See* 10 C.F.R. pt. 52 (2006).

> however, the substance of the communication shall be memorialized in a document which will be placed in the [Public Document Room] and distributed to the licensing board and relevant parties.[247]

In those same three notices of proposed rulemaking, the Commission also indicated that unless those certifications become subject to an adjudicatory hearing under 10 C.F.R. Part 2, Subpart G, the Commission's separation-of-functions restrictions would not apply. NRC staff would therefore be available to assist the Licensing Board in any manner that the Board saw fit.

As it turned out, no one sought a hearing in any of these three design certification proceedings. The Commission subsequently amended its regulations to provide that any hearings in design certification proceedings would be legislative rather than adjudicatory.[248] Under current NRC procedural rules, if the Commission chooses to hold such a legislative-type hearing, then the ex parte restrictions would apply, but the separation-of-functions restrictions would not, except where the hearing addresses an issue certified by a presiding officer to the Commission. Even then, the separation-of-functions restrictions would apply only with respect to the contested issue.[249] This explains why the proposed rule for the Commission's 2005 design certification rulemaking did not include any separation-of-functions discussion.[250]

The Commission also addressed the question of whether the restricted communications rules apply to proceedings involving the certification of gaseous diffusion plants. In 10 C.F.R. § 76.72(c), the Commission declares that, with one exception, those rules do not apply:

> There are no restrictions on ex parte communications or on the ability of the NRC staff and the Commission to communicate with one another at any stage of the regulatory process, with the exception that the rules on ex parte communications and separation of functions set forth in 10 CFR 2.347 and 2.348 apply to proceedings under 10 CFR Part 2 for imposition of a civil penalty.

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247. NRC, Proposed Rule, Standard Design Certification for the System 80+ Design, 60 Fed. Reg. 17,924, 17,944 (proposed Apr. 7, 1995); NRC, Proposed Rule, Standard Design Certification for the U.S. Advanced Boiling Water Reactor Design, 60 Fed. Reg. 17,902, 17,921 (proposed Apr. 7, 1995); NRC, Proposed Rule, AP600 Design Certification, 64 Fed. Reg. 27,626, 27,632 (proposed May 20, 1999). These rulemakings culminated in the following three final rules: (1) Standard Design Certification for the System 80+ Design, 62 Fed. Reg. 27,840 (May 21, 1997); (2) Standard Design Certification for the U.S. Advanced Boiling Water Reactor Design, 62 Fed. Reg. 25,800 (May 12, 1997); and (3) AP600 Design Certification, 64 Fed. Reg. 72,002 (Dec. 23, 1999).

248. NRC, Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2215 (Jan. 14, 2004).

249. 10 C.F.R. § 2.1509 (2006).

250. *See* NRC, Proposed Rule, AP1000 Design Certification, 70 Fed. Reg. 20,062 (Apr. 18, 2005).

d. Mandatory Hearings

Another context in which the Commission addressed the applicability of restricted-communications rules is mandatory hearings regarding uncontested COLs and their subset, uncontested ESPs.[251] Although none of the regulatory exceptions to the ex parte bar explicitly include these two kinds of uncontested mandatory hearings,[252] the Commission nonetheless concluded in 1988 that those restrictions do not apply.[253]

But—and this is a *big* "but"—the Commission went on to state that once a matter is in "controversy" or "at issue" in an operating license proceeding—whether raised by the NRC Staff, the applicant, or *sua sponte* by the presiding officer—then the ex parte rule would apply *as to that issue*.[254] Regardless of whether the outside communications were barred under the ex parte rule, the presiding officer should place any communications with outside entities on the record. Otherwise, the presiding officer would be improperly basing his or her decision on information not contained in the record. Thus, although the Commission has stated that the ex parte bar does not apply in at least some circumstances involving uncontested mandatory hearings, nevertheless the Commission's requirement that decisions be based entirely on record evidence can reasonably be read to impose de facto the requirement anyway.

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251. An application for an early site permit is an optional first step in obtaining a construction permit. It concerns solely the site, not the design, of a nuclear power plant. *See* Clinton ESP-1, CLI-05-17, 62 N.R.C. at 38-48; Clinton ESP-2, CLI-05-29, 62 N.R.C. at 806 n.24 (2005) (observing in *dictum* that, where an applicant itself chooses to address alternative energy sources (e.g., gas, coal, hydro-electric), then that issue becomes material to the adjudication).

There is, however, some momentum behind a recent proposal by former-Commissioner James Curtiss to seek congressional rescission of the "mandatory hearing" requirement for COLs. Chairman Klein, Commissioner McGaffigan, and Commissioner Merrifield have embraced at least the general idea. *See* Merrifield, *supra* note 10, at 1; Jenny Weil, *NRC Commissioners Debate Need for Mandatory New Plant Hearings*, NUCLEONICS WK., Oct. 19, 2006, at 6-7; Michael Knapik, *McGaffigan Said He Sees Merit in Eliminating Mandatory Hearings*, INSIDE NRC, Oct. 2, 2006, at 16.

252. *See* 10 C.F.R. §§ 2.347(f), 2.348(b) (2006).

253. The preamble to the NRC's final rule on ex parte contacts stated:

> Accordingly, in the context of a statutorily mandated construction permit proceeding in which no intervenor has sought to contest the application, private communications to adjudicatory employees from interested persons outside the agency relating to matters that are not the subject of controversy in the proceeding between the applicant and the NRC staff would not be considered ex parte.

NRC, Final Rule, Revision to Ex Parte and Separation of Functions Rules Applicable to Formal Adjudicatory Proceedings, 53 Fed. Reg. 10,360, 10,361 (Mar. 31, 1988).

254. *See id.* There may be points where it is difficult to determine whether the NRC Staff and the applicant are in agreement and therefore whether a matter is in "controversy" or "at issue."

The rule is the same regarding the separation-of-functions bar. Section 2.348(a) of the Commission's rules expressly imposes this bar on the parties regarding "any disputed issue." In promulgating the 1988 rule that preceded that section, the Commission offered the following dispositive statement:

> It should be added that the term "disputed issue" as it is used in the separation of functions provision relating to NRC staff contacts with a presiding officer also would be interpreted in a mandatory construction permit proceeding without intervening interested persons, to include only those matters that are the object of dispute between the applicant and the NRC staff and, in any operating licensing proceeding, those "sua sponte" issues properly raised by a presiding officer.[255]

The Commission's conclusion also makes sense for another reason unaddressed in the agency's 1988 rulemaking. The legislative histories of the Price-Anderson Act (containing the mandatory hearing requirement for construction permit applications), the Administrative Procedure Act (containing the ex parte and separation-of-functions restrictions), and the Act's relevant amendments contain no indication that Congress intended to impose those restrictions in *uncontested* construction permit proceedings.[256] This is not surprising, given that the application of those restrictions would lead to the following absurd result.

Sections 2.347 and 2.348 of the Commission's procedural regulations activate the ex parte and separation-of-functions restrictions once "the person responsible for the communication has knowledge that [a notice of hearing] will be [issued]." But in a construction permit or early site permit proceeding, the affected NRC staff, the applicant and any potential intervenors will know from the very moment the applicant files its permit application that the agency will issue a notice of hearing regarding that application because such a hearing is required under the AEA.[257] In all such cases, the restrictions would become effective immediately upon the filing of the application[258] and would consequently preclude the agency's investigative and litigating staff from *ever* providing the Commission with *pre*-adjudicatory advice on *any* issues that a licensing board might subsequently raise in such an uncontested proceeding.[259] This result would

255. *Id.*
256. Shulman, *supra* note 22, at 379 n.120 (noting that it is unlikely that Congress wanted ex parte restriction to apply).
257. *See id.* at 380 n.121.
258. *Cf. id.*
259. For a general example, see the NRC's response to Nevada's Yucca Mountian petition:

> The main point of separation of functions, and indeed of the bar on ex parte contacts, is to ensure that all parties are aware of any information any one of them presents to the presiding officer, and that parties are given an opportunity to test

contravene the accepted legal principle that agency heads, here the NRC Chairman and Commissioners, be able to consult with their staffs regarding *pre*-adjudicatory matters.[260] Ironically, the result would also ban communications on *far more* issues in uncontested proceedings—where Congress apparently never intended the bans to apply—than would be precluded in contested ones—where Congress clearly intended them to apply.[261] In an additional ironic twist, the result would preclude Commissioners from having access to such communications in one of the few kinds of proceedings where the chances would be quite high that neither the NRC staff nor the applicant is tainted by a "will to win" in a proceeding.[262]

Indeed, just as staff members would not be tainted either by involvement in pre-adjudicatory activities such as a non-adversarial public hearing conducted prior to the start of an adjudication or by the preparation of a study that would assist the agency to prepare for a non-adversarial public hearing,[263] then, by the same logic, staff members likewise should not be

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> that information and to present rebuttal testimony. In the present inchoate circumstances—in which there are neither named judges, nor parties who have established standing before those judges, nor contentions that those parties have persuaded the judges meet the standards for admission into the litigation—the only way to implement the separation is simply to cut off any discussion between the staff and the Commission on *any* issue that *might* come up at a hearing.

NRC, U.S. NUCLEAR REGULATORY COMMISSION RESPONSE TO THE STATE OF NEVADA'S PETITION ON PROCEDURES FOR THE YUCCA MOUNTAIN LICENSING HEARING 10, *appended to* Letter from Edward McGaffigan, Jr., Acting Chairman, NRC, to Nevada Attorney General Brian Sandoval (July 8, 2003) [hereinafter Commission Response to Nevada Petition], *available at* ADAMS Accession No. ML031631253 (emphases in original)

260. Indeed, the Commission has already addressed this point, albeit in the context of the *Yucca Mountain* application:

> [T]he separation of functions imposes resource burdens on the agency, because it must assign separated staff to advise the Commissioners on the issues in the litigation. The agency is experienced in planning for and bearing this burden. However, it is not a burden that should be extended for the length of the *long prelude to the anticipated hearing* on the Yucca Mountain application.

Id. at 11 (emphasis added).

261. As a matter of logic, the following Commission statement from *Clinton ESP-I*, CLI-05-17, 62 N.R.C. 5, 35-36 (2005), regarding different review standards for contested and uncontested issues, applies equally well to different standards for restricted communications:

> [The Commission's] longstanding practice of treating contested and uncontested issues differently is grounded in sound policy . . . efficient case management and prompt decisionmaking . . . . The use of a deferential review standard for uncontested issues supports these policies of promptness and efficiency. If only a portion of the proceeding's issues are in dispute, it makes no sense . . . to proceed as if the entire adjudication is contested, with consequently greater demands on the parties and [Commission's] time and resources.

262. *See supra* note 102. I consider it unlikely that the NRC Staff and the applicant would disagree on an issue in an uncontested mandatory hearing on a COL or ESP application, as the Staff and applicant generally resolve their differences prior to the filing of the application.

263. *See* Asimow, *supra* note 74, at 770.

tainted if they consult with Commissioners or adjudicatory employees in a non-adversarial hearing on an unopposed COL application or ESP application. As the Commission pointed out in a different context—the pre-adjudicatory phase of *Yucca Mountain*—policy questions may arise prior to issuance of the hearing notice stemming from the need to implement judicial decisions requiring changes in agency regulations or policies. In such situations, "[t]he Commission and its staff should remain able to discuss those issues . . . , without having to worry about whether [they] . . . are, as section 2.781(a) puts it, 'associated with the resolution of any proceeding . . . .'"[264] This reasoning is, as a matter of logic, equally applicable to proceedings involving COL and ESP applications. Likewise, as the Commission indicated with regard to the triggering event for the mandatory hearing for *Yucca Mountain*, "neither [10 C.F.R. § 2.780(e) nor 10 C.F.R. § 2.781(d)] says that its bar falls in place when a party expresses an intent to file an application, or when a party is under a legal obligation to file an application. Neither intent nor obligation add[s] up to performance."[265]

e. Section 2.206 Petitions

The Commission does not consider either the ex parte or the separation-of-functions restrictions to apply to its communications with staff regarding § 2.206 petitions for enforcement action. In *Yankee Atomic Elec. Co.*, the Commission rejected a request that it not communicate with NRC staff and ruled that the restrictions of § 2.780 (now § 2.347) on ex parte communications do not attach until a notice of enforcement hearing or other comparable order is issued.[266] The Commission also noted that § 2.206(c) "specifically provides that the Commission retains the power to consult with the Staff on a formal or an informal basis regarding the institution of [enforcement] proceedings."[267]

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264. Commission Response to Nevada Petition, *supra* note 259, at 11. The citation quoted should have been to 10 C.F.R. § 2.781(b)(1)(iv) (2003), which is now 10 C.F.R. § 2.348 (b)(1)(iv).

265. *Id.* at 10.

266. Yankee Atomic Elec. Co. (Yankee Rowe Nuclear Power Station), CLI-91-11, 34 N.R.C. 3, 6 (1991), (citing 10 C.F.R. § 2.780(e)(1)(i) (now § 2.347(e)(1)(i))); *see also* Cincinnati Gas & Elec. Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-83-4, 17 N.R.C. 75, 76 (1983) (regarding communications between NRC Region III staff and the licensee: "the ex parte rule is not properly invoked where in an enforcement matter the licensee is complying with staff's order and has not sought a hearing, nor is a petition for an enforcement action sufficient to invoke the provisions of 2.780").

Although the Commission in *Yankee Rowe* erred in applying the ex parte regulations to a request involving only separation-of-functions communications, the Commission's mistake constituted merely harmless error, given that the ex parte and separation-of-functions standards and purposes are quite similar.

267. *Yankee Rowe*, CLI-91-11, 34 N.R.C. at 6-7.

f. Proceedings Before a Settlement Judge

As noted above, the Commission has approved the use of settlement judges in both formal and informal proceedings, 10 C.F.R. §§ 2.759 and 2.1241 (both rescinded), but has noted that, "in view of the fact that a settlement judge might engage in ex parte discussions and form a judgment on the merits of a party's position during the course of negotiations, the settlement judge's communications and dealings with the presiding officer on the merits of issues and the parties' positions will have to be circumscribed."[268] This restriction is consistent with the current "settlement" regulation, § 2.338, which prohibits a settlement judge from "discuss[ing] the merits of the case with the Chief Administrative Judge or any other person,"[269] presumably including the presiding officer. The APA's restricted communications rules do not strictly apply in informal proceedings,[270] so the Commission appears here to have exercised its right to adopt standards stricter than those imposed by Congress in the APA.[271]

g. Communication Between Adjudicators and Potential External Parties During the Pre-Adjudicatory Phase of a Proceeding

Prior to the time the Commission became aware of the possibility of a *Yucca Mountain* adjudication, the agency rarely spoke to the permissibility *vel non* of this particular kind of pre-adjudicatory communication. The closest the Commission appears to have come was its ruling that the ex parte restrictions are inapplicable "where in an enforcement matter the licensee is complying with staff's order and has not sought a hearing, nor is a petition for an enforcement action sufficient to invoke the provisions of 2.780."[272]

The Commission has, however, spoken to the issue many times in the context of the impending *Yucca Mountain* adjudication. The Commission indicated in a 2004 order that the ex parte and separation-of-functions rules

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268. Rockwell Int'l Corp. (Rocketdyne Div.), CLI-90-5, 31 N.R.C. 337, 340-41 (1990).

269. 10 C.F.R. § 2.338(b)(2)(iii) (2006).

270. In fact, one settlement judge in an informal proceeding specifically stated that the ex parte rules do not bind him when he is acting in that capacity. *See* CFC Logistics, Inc. (Materials License), at 1 n.1 (Licensing Board June 28, 2004), *available at* ADAMS Accession No. ML041820045.

271. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 312-13 (1979) (stating that "[i]t is within an agency's discretion to afford parties more procedure" than provided in the APA).

272. Cincinnati Gas & Elec. Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-83-4, 17 N.R.C. 75, 76 (1983). The General Counsel made similar statements in 1998 regarding communications to the Commissioners about the possible restart of the Millstone-3 facility: essentially reiterating the provisions of 10 C.F.R. § 2.780 (now § 2.347) that the ex parte bar applies only when notice of hearing has been issued or the communicator has knowledge that such a notice will be issued. *See* Letter from Karen D. Cyr, General Counsel, NRC, to Robert A. Backus, Esq. (Apr. 15, 1998), *available at* ADAMS Accession No. ML061220105; Letter from Karen D. Cyr, General Counsel, NRC, to Nancy Burton, Esq. (Apr. 15, 1998), *available at* ADAMS Accession No. ML061220108.

would apply to the pre-adjudicatory phase of the *Yucca Mountain* proceeding to the extent that such communications involved matters before the pre-adjudicatory presiding officer (PAPO) or the Commission.[273] And in its response to a petition from the State of Nevada, the Commission described the circumstances that would trigger the ex parte (and also separation-of-functions) restrictions in licensing proceedings *other than* those involving a high level waste repository:

> [T]hese bars fall in place either when a notice of hearing has been issued, or when a party to a communication "has knowledge that a notice of hearing . . . will be issued . . . ." *See* 10 C.F.R. 2.780(e) and 2.781(d). Ordinarily the "notice of hearing" is the notice issued by an Atomic Safety and Licensing Board *after the Board has ruled on what issues will be considered at a hearing* on a license application, for only then is it known that there will be a hearing.[274]

But the Commission then went on to explain the different trigger point for *Yucca Mountain* and any other high level waste repository proceedings:

> [T]he licensing of a high-level waste repository presents a special case, for section 2.101(f)(8) of the Commission's regulations mandates a hearing on the application. . . . [S]ection 2.101(f)(8) . . . requires that the notice of hearing be issued earlier, along with the notice that the application for the repository has been accepted for review.[275]

The issue of whether (and how) to apply the restricted communications rules to *Yucca Mountain* has been before the Commission for quite some time, though this issue had a much lower profile than it does today. At least as early as 1988, the Commission and its staff were engaging in "frequent and open interaction" with Nevada regarding the proposed high level waste repository.[276] At a meeting with Nevada representatives late that year, the Commission encouraged them to meet with the Commission in the future, "assuming no ex parte requirements are in existence."[277]

As the anticipated filing of DOE's Yucca Mountain application became more imminent, Nevada became increasingly concerned about the application of the ex parte rules—not to Nevada but instead to DOE. In

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273. United States Dep't of Energy (High-Level Waste Repository), CLI-04-20, 60 N.R.C. 15, 19 (2004) ("The ex parte and separation of functions rules (10 C.F.R. §§ 2.347 and 2.348, respectively) shall apply to those limited matters falling within the PAPO's jurisdiction and to appeals to the Commission of PAPO rulings."); *see also* DOE (High-Level Waste Repository), *available at* ADAMS Accession No. ML041960442 at 4-5 (July 14, 2004).

274. Commission Response to Nevada Petition, *supra* note 259, at 9-10 (emphasis added).

275. *See id.* at 10. The Yucca Mountain adjudication is thus similar to the mandatory COL and ESP hearings discussed *supra* notes 251-65 and accompanying text.

276. *See* Staff Requirements Memorandum, "Meeting with State of Nevada on High Level Waste Program" at 1 (Dec. 12, 1988), *available at* ADAMS Accession No. ML040540706.

277. *Id.*

2002, Nevada complained informally to the Commission that the NRC staff was regularly meeting with DOE in contravention of the agency's ex parte restrictions.[278] The Commission responded that "interactions between NRC staff and any applicant or prospective applicant, such as DOE, are *not* governed by the Commission's ex parte rule" and that its meetings with DOE "are routinely noticed to the public so that interested persons have the opportunity to attend and participate."[279] The Commission further observed that it was already mailing the minutes of its staff's meetings with DOE to Nevada and that Nevada frequently sent representatives to those meetings.[280] Independent of this exchange of correspondence, the NRC's Office of the Inspector General investigated Nevada's charges of ex parte violations and likewise concluded that "the NRC staff and DOE representatives were not involved in prohibited ex-parte communications, that excluded Nevada State representatives and members of the public[,] because the Yucca Mountain licensing process was not in the adjudicatory phase."[281]

Dissatisfied with the Commission's response, Nevada next took the more formal route of filing a petition asking the Commission to confirm that "NRC employees and outside persons clearly now have 'knowledge that a notice of hearing . . . will be issued,' the triggering event for the application of NRC's ex-parte and separation of functions rules."[282] In response, the Commission again rejected Nevada's position, first offering this general rebuttal:

> Nevada's reading of these rules, specifically the phrase "has knowledge that a notice of hearing will be issued," is neither practicable nor legally sound. . . . [N]either [10 C.F.R. § 2.780(e) nor 10 C.F.R. § 2.781(d)] says that its bar falls in place when a party expresses an intent to file an application, or when a party is under a legal obligation to file an application. Neither intent nor obligation add[s] up to performance. If obligation did, DOE would already have filed its application, under the

278. Letter from Frankie Sue Del Papa, Attorney General, State of Nevada, to Richard A. Meserve, Chairman, NRC 4 (Sept. 18, 2002), *available at* ADAMS Accession No. ML022750484.

279. Letter from William D. Travers, Executive Dir. for Operations, NRC, to Frankie Sue Del Papa, Attorney General, State of Nevada 1 (Dec. 10, 2002) (emphasis added), *available at* ADAMS Accession No. ML022800613.

280. *See id.*

281. NRC Office of the Inspector General, Semiannual Report, 15 NUREG-1415, No. 2, (Oct. 1, 2002–Mar. 31, 2003), at 18 (Mar. 31, 2003), *available at* ADAMS Accession No. ML031920600.

282. State of Nevada, "Petition by Nevada to Establish Procedures for a Fair and Credible Yucca Mountain Licensing Hearing" 24 (Apr. 2003), *available at* ADAMS Accession No. ML030990550. *See generally* EDLES & NELSON, *supra* note 77, at 327 ("[A]n applicant may not simply discuss matters with decisionmakers in advance of filing an application where the application is so controversial that a hearing is inevitable.").

> schedule laid out in section 114(b) of the Nuclear Waste Policy Act. We do not yet *know* that a notice of hearing *will* be issued.
>
> Any other reading of "has knowledge" or "will be issued" . . . erodes the distinction between the adjudication and other aspects of the licensing review and thus tends, without sufficient justification, to introduce to those other aspects some of the cost and other burdens entailed in adjudication.[283]

Then the Commission explained with greater specificity why it viewed Nevada's ex parte position as incorrect:

> Thus far we have focused mainly on communications between the staff and the Commission, but something of the same arguments can be made about communications between the Commission and outside parties, but with an added dimension of indeterminacy, and an added element of enforcement. First, the indeterminancy: Not only is it not clear under Nevada's proposal just what issues could not be discussed, it is also not clear who could not discuss them. Nevada, of course, states its intention to intervene in the licensing proceeding, but we do not know that it will, nor do we know who else will. Who then would be barred from ex parte contacts with the Commission? Nevada proposes that "interested persons" would be barred, but which persons are "interested" when there is as yet no notice of hearing? Moreover, who besides the Commissioners would now be "adjudicatory employees?" NRC employees frequently change [job] positions, and thus some employees might be called "adjudicatory" today but not when a notice of hearing is issued, and vice versa. Second, enforcement: The ex parte rule provides for enforcement against outside parties who violate the prohibition. In some circumstances, the Commission may enforce the prohibition by dismissing a claim or interest. It is difficult to imagine how such enforcement would work so long before the hearing. Again, in the case of any high-level waste repository, the Commission has agreed to apply the ex parte prohibitions during the relatively short time between the notice of docketing and the licensing board's notice of an actual hearing,[[284]] but the Commission cannot reasonably be expected to apply the restrictions before the notice of docketing goes out.[285]

Nevada raised its same objections subsequent to the Commission's issuance of its Response to Nevada's petition,[286] but the Commission's

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283. Commission Response to Nevada Petition, *supra* note 259, at 10.

284. This appears to be yet another example of the Commission providing more procedural rights than are mandated under the APA. *See generally* Chrysler Corp. v. Brown, 441 U.S. 281, 312-13 (1979) ("It is within an agency's discretion to afford parties more procedure" than provided in the APA).

285. Commission Response to Nevada Petition, *supra* note 259, at 11.

286. *See, e.g.*, Letter from Robert R. Loux, Executive Director, Office of the Governor, State of Nevada, to Chairman and Commissioners, NRC 1 (Apr. 22, 2004), *available at* ADAMS Accession No. ML041211012.

position has remained the same.[287] The Commission has, however, imposed the ex parte (and separation-of-functions) restrictions to any issues falling within the jurisdiction of the PAPO and to any appeals from the PAPO's rulings.[288]

h. Communication Between Adjudicators and Potential External Parties During the Post-Adjudicatory Phase of a Proceeding

Subsection 2.347(e)(2) provides that the ex parte prohibitions cease to apply to issues relevant to a decision when the time expires for Commission review of that decision. Section 2.348(d)(2) provides the same point of termination for separation-of-functions restrictions.

B. Issues Regarding Separation-of-Functions Restrictions

1. Agency Head "Exemption" for Chairman and Commissioners

Because the Chairman and Commissioners, who serve, collectively, as the "agency head" of the NRC, have power to initiate adjudicatory proceedings, they necessarily have the related responsibility for determining the adjudicatory policy pursuant to which those adjudications are undertaken. According to the Attorney General's Committee on Administrative Procedure, they would "have at 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."[289]

To take into account these "residual powers," the APA expressly exempts from the separation-of-functions prohibition all involvement of the Chairman and Commissioners in adjudicatory actions.[290] The Commission has also interpreted this exception to apply to the personal advisors of the Chairman and Commissioners.[291] The Chairman, Commissioners and their personal advisors are free to supervise lower-level decisionmakers[292] and

287. *See, e.g.*, Letter from Nils J. Diaz, former-Chairman, NRC, to Robert R. Loux, Executive Director, Office of the Governor, State of Nevada 1 (May 27, 2004), *available at* ADAMS Accession No. ML041350153.

288. *See* DOE (High-Level Waste Repository Pre-Application Matters), CLI-04-20, 60 N.R.C. 15, 19 (2004); *see also* DOE (High-Level Waste Repository: Pre-Application Matters), ASLBP No. 04-829-01-PAPO Nev-1 (July 14, 2004), *available at* ADAMS Accession No. ML041960442, at 4-5.

289. Asimow, *supra* note 74, at 765-66 (quoting AG FINAL REPORT, *supra* note 102, at 57). The Attorney General's Final Report laid the foundation for the APA.

290. 5 U.S.C. § 554(d)(2)(C) (2000).

291. The "agency head" exception should apply to Commissioners' personal advisors. *See* 10 C.F.R. § 2.348(b)(2) (2006); 10 C.F.R. § 2.781(b)(2) (1988) (rescinded). *See generally supra* note 155 and accompanying text (discussing the offices and individuals that fall within the "agency head" exception).

292. Shulman, *supra* note 22, at 367. The Commission generally supervises its boards by issuing Memoranda and Orders containing guidance. For examples of the Commission

the agency's participants in the litigation, as well as "personally to investigate, prosecute, advocate, advise adjudicators, and render final judgments."[293]

But the permissible lines of communication with NRC investigatory or prosecutorial staff go in only one direction. This exception does not permit off-the-record communications from adversaries within the agency to the Commissioners or Chairman regarding contested matters in an adjudication. Any other result would undermine § 554(d)'s prohibition against investigators or prosecutors participating in agency review of an adjudicatory decision.[294]

a. Communication Between Adjudicators and Adversarial Staff During the Pre-Adjudicatory Phase of a Proceeding

Both the Commission and the federal judiciary have ruled that the separation-of-functions restrictions are inapplicable where an adjudication has not yet begun.[295] Thus, to determine the permissibility of pre-adjudicatory communications between Commissioners (or other adjudicatory personnel) and adversarial staff, one must first determine

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offering guidance in *pending* proceedings, see U.S. Army (Jefferson Proving Ground), CLI-05-23, 62 N.R.C. 546, 548-50 (2005) (affirming the Presiding Officer's decision to reinstate a proceeding previously dismissed without prejudice, but instructing the Board to use the Commission's revised rules of procedure to expedite the proceeding); Tennessee Valley Auth. (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 N.R.C. 160, 215 (2004) (providing guidance on mitigation of penalties in whistleblower cases); Private Fuel Storage (Indep. Spent Fuel Storage Installation [ISFSI]), CLI-03-5, 57 N.R.C. 279, 284 (2003) (directing the Board to consider various procedural devices to expedite the "aircraft crash consequences" hearing). For examples of the Commission providing guidance for *future* proceedings, see Exelon Generation Co., L.L.C. (Clinton ESP), CLI-05-17, 62 N.R.C. 5, 49-50 (2005); Yankee Atomic Elec. Co. (Yankee Rowe), CLI-05-15, 61 N.R.C. 365, 382 (2005) (instructing future boards to consider the clarifications set forth in the Commission's order); Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 N.R.C. 21, 29-31 (2004) (addressing added precautions for making safeguards information available to expert witnesses). For examples of the Commission pressing its boards to move cases more expeditiously, see Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-11, 58 N.R.C. 130 (2003) (inquiring why the Board had not handled the proceeding more expeditiously); Private Fuel Storage (ISFSI), CLI-03-5, 57 N.R.C. at 284 (directing the Board "to make every effort to wind up the consequences hearing no later than December of this year").

293. Asimow, *supra* note 74, at 766 (emphasis omitted). This authority, in addition to being derived from the Commission's "residual powers" mentioned above, also stems (at least as to the Chairman) from his or her inherent authority to direct all activities of the Commission.

294. *See id.*

295. *See* Yankee Atomic Elec. Co. (Yankee Rowe Nuclear Power Station), CLI-91-11, 34 N.R.C. 3, 6-7 (1991) ("10 C.F.R. § 2.206(c) specifically provides that the Commission retains the power to consult with the Staff on a formal or informal basis regarding the institution of [enforcement] proceedings."); N. Ind. Pub. Serv. Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 N.R.C. 429, 431-32 (1978), *aff'd*, Porter County Chapter of the Izaak Walton League of Am., Inc. v. NRC, 606 F.2d 1363 (D.C. Cir. 1979); *see also* Shulman, *supra* note 22, at 370-71, 387.

when the adjudication begins. The regulations provide some assistance in answering the related question: when does the adjudication *not* begin? Section 2.348(d)(1)(i) of the Commission's procedural regulations clearly precludes NRC personnel who are involved in an adjudicatory proceeding from communicating with adjudicatory personnel regarding a case *after* the Commission has issued a notice of hearing.

However, the regulations are, of necessity, less clear regarding the point at which those restrictions become applicable to *pre-notice* communications. Section 2.348(d)(1)(ii) provides that the separation-of-functions restrictions come into play when an NRC officer or employee who is, or has reasonable cause to believe that he or she will be, engaged in the performance of an investigative or litigating function learns that a notice of hearing will be issued. Because investigative or litigating functions are adversarial by their nature, the permissibility of pre-notice communications may also turn on whether the staff has, at the time of the communication, already become an "adversary" and therefore has a "will to win."[296]

Members of an agency's staff become adversarial as soon as they "participate personally in developing or presenting evidence or argument before agency decisionmakers on behalf of or against a party in a particular case, or one that is factually related."[297] Thus, staff members' adversarial

296. *See supra* note 102.

297. Asimow, *supra* note 74, at 770; *see also* ACUS 1981 Draft Recommendations, *supra* note 95, at 26,487-88.

To the extent that 5 U.S.C. § 554(d) bears on Commission adjudications, staff adversaries may not discuss the facts of a case with, or offer advice regarding the appropriate decision in the case to, any agency employees adjudicating that case or a factually related case. Although the definition of "factually related cases" is unsettled, it appears to refer only to those cases that are based on "a common nucleus of operative fact," such as license revocation proceedings against both a company and an employee of the company, arising out of a single violation. Asimow, *supra* note 74, at 765 n.27 (quoting Giambanco v. INS, 531 F.2d 141, 150 n.4 (3d Cir. 1976) (Gibbon, J., dissenting)); *see also* ATTORNEY GENERAL'S MANUAL, *supra* note 100, at 57; SECY-80-130, *supra* note 98, at 80. It apparently does not refer to two cases with similar (but not connected or identical) underlying facts, and involving different parties. Asimow, *supra* note 74, at 765 n.27 (discussing the unsettled nature of the definition of "factually related case"). The ATTORNEY GENERAL'S MANUAL provides the following gloss on the meaning of the term "factually related case:"

> The phrase "factually related case" connotes a situation in which a party is faced with two different proceedings arising out of the same or a connected set of facts. For example, a particular investigation may result in the institution of a cease and desist proceeding against a party as well as a proceeding involving the revocation of his license. The employee of the agency engaged in the investigation or prosecution of such a cease and desist proceeding would be precluded from rendering any assistance to the agency, not only in the decision of the cease and desist proceeding, but also in the decision of the revocation proceeding. However, they would not be prevented from assisting the agency in the decision of other cases (in which they had not [been] engaged either as investigators or prosecutors) merely because the facts of these other cases may form a pattern similar to those which they had theretofore investigated or prosecuted.

involvement at *any* stage of an investigation or adjudication should preclude them from thereafter consulting with the adjudicators, at least as to the issue or issues in which they were previously involved. Indeed, the ACUS staff suggested in a draft recommendation that "whether . . . involvement occurs before or after the matter is designated for a hearing should not be determinative" of the restrictions' applicability.[298] Such a conclusion is consistent with one of the primary purposes of the separation-of-functions bar: excluding from the decisionmaking process any staff members whose "will to win" might taint their ability to participate impartially in the decisionmaking process. Such prior adversarial involvement would naturally tend to create in the staff member a predisposition favoring the staff's position and would thereby (at least appear to compromise) the staff member from giving impartial advice to the adjudicators.[299]

By contrast, mere contact with either the case itself or adversaries participating in the case does not, without more, make a staff member "adversarial" for purposes of the separation-of-functions bar.[300] This is because such staff members are not sufficiently close to the case to have the "will to win" that characterizes an adversary. For example, a staff member would not be tainted either by involvement in pre-adjudicatory activities such as a non-adversarial public hearing conducted prior to the start of an adjudication or by the preparation of a study that would assist the agency to prepare for a non-adversarial public hearing.[301] Similarly, an employee participating as an advocate in a contested early site permit proceeding presumably would be free to become an adjudicatory employee in the subsequent combined-license proceeding—the issues are sufficiently different in the two proceedings that the employee presumably would not have a predisposition favoring the NRC staff's position in the latter

ATTORNEY GENERAL'S MANUAL, *supra* note 100, at 120 n.6; *see also* Scanlan, *supra* note 22, at 75; Shulman, *supra* note 22, at 365 n.59.

298. *See* ACUS 1980 Draft Recommendations, *supra* note 102.

299. *Cf.* Asimow, *supra* note 74, at 770 & n.56; ACUS 1981 Draft Recommendations, *supra* note 95; ACUS 1980 Draft Recommendations, *supra* note 102, at 68,950. Regarding the appearance of impropriety, *see supra* note 101.

300. *See* 2 DAVIS & PIERCE, *supra* note 119, § 9.8, at 78-79 (explaining that an adjudicator can be disqualified for prejudgment of, but not mere exposure to, adjudicative facts); Shulman, *supra* note 22, at 373.

301. *See* Asimow, *supra* note 74, at 770.

adjudication.[302] The "will to please" issue, however, could still pose a problem.[303]

Under this reasoning, the involvement of the Chairman, commissioners, or their assistants in a pre-adjudicatory determination of whether to bring an enforcement action would not later preclude them from deciding the same case on the merits.[304] Indeed, legal authority strongly supports the conclusion that such pre-adjudicatory consultation by the Chairman, commissioners. and their assistants with adversarial staff is permissible,[305]

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302. *Cf.* Memorandum from H.H.E. Plaine, General Counsel, NRC, to the Commissioners, NRC, SECY-86-39, at 20 (Feb. 3, 1986), *available at* ADAMS Accession No. ML061220088 (opining that construction permit proceedings and license operating proceedings are not "factually related" for purposes of restricted communications, unless a factual determination litigated in the construction permit proceeding was somehow being subjected to relitigation in the operating license proceeding). The distinction Mr. Plaine draws is analogous to the distinction between ESP and COL proceedings because the issues resolved in an ESP case need not be relitigated in a subsequent COL proceeding.

303. *See supra* note 141 and accompanying text.

304. *See* Withrow v. Larkin, 421 U.S. 35, 55 (1975) ("The mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing."); SECY-80-130, *supra* note 98, at 120; Asimow, *supra* note 74, at 772 n.62; Shulman, *supra* note 22, at 387. This result is also consistent with the Commission's "residual powers" (discussed *supra* p. 66). Unfortunately, § 554(d) of Title 5 is silent as to this issue. 5 U.S.C. § 554(d) (2000). *See* Scalia, *supra* note 22, at vi-vii.

One scholar, however, has questioned whether agency staff members, not being nominated by the President and confirmed by the Senate, have not been subjected to the rigors of public scrutiny that would entitle them to the presumption of fairness. Shulman, *supra* note 22, at 387 n.166. Frankly, I am at a loss to see any causal connection between the presumption of fairness and the nomination/confirmation process. For instance, Administrative Law Judges and the NRC's Administrative Judges are generally accorded this presumption, yet they are neither nominated by the President nor confirmed by the Senate.

305. *See* SECY-80-130, *supra* note 98, at 90; Shulman, *supra* note 22, at 38.

> 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.
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> 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.

Envtl. Def. Fund v. EPA, 510 F.2d 1292, 1305 (D.C. Cir. 1975) (footnote omitted). Moreover,

> The practice of reviewing the recommendations of the investigatory staff of the FERC and then ordering a formal investigation is clearly within the exception to the APA. The courts have also uniformly held that this feature does not make out an infringement of the due process clause of the Fifth Amendment.

even though it carries a slight risk of tainting, or at least appearing to taint, the Commission's final decision. This risk is quite small because the Commission, like any other adjudicator, has, and regularly exercises, the ability to later disregard what it heard earlier in the pre-adjudicatory phase of a case.[306] Moreover, the Commission may be particularly willing to take this small risk in situations where the number of agency staff with expertise in an issue is small and the issue is complex, important or precedent-setting.[307] Such a trade-off would not contravene the parties' right to due process.[308] To the contrary, "[c]oncerns that procedural protections might interfere with protection of the public is a critical element in due process analysis."[309] Indeed, two organizations investigating the Three Mile Island accident in 1979 reached the same conclusion independently—that "the [C]ommissioners' inability to consult freely and privately with staff members could easily deny them access to information and ideas they might need to better protect public health and safety."[310]

In many (perhaps most) instances, however, refraining from pre-adjudicatory communication with advocatory staff costs the Commission

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Air Prods. & Chem., Inc. v. FERC, 650 F.2d 687, 709-10 (5th Cir. 1981) (citations omitted); *see also* Kennecott Copper Corp. v. FTC, 467 F.2d 67, 79 (10th Cir. 1972); FTC v. Cinderella Career and Finishing Sch., Inc., 404 F.2d 1308, 1315 (D.C. Cir. 1968) [hereinafter *Cinderella I*] (concluding that there was no due process violation by the Commission's press release that arguably gave the appearance of prejudgment); R.A. Holman & Co. v. SEC, 366 F.2d 446, 455 (2d Cir. 1966); Pangburn v. CAB, 311 F.2d 349, 356-58 (1st Cir. 1962); 4 STEIN, MITCHELL & MEZINES, *supra* note 75, § 33.02[3], at 33-37; Davis, *supra* note 22, at 644-45.

306. *See generally* Davis, *supra* note 22, at 645 (footnore omitted) ("[A]ny [administrative] adjudicator . . . who is worth his salt, can maintain the scales of justice in even balance and still . . . authorize the institution of administrative proceedings.").

307. Asimow, *supra* note 74, at 776. Also,

> 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 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-adjudicatory 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.

Shulman, *supra* note 22, at 390.

308. Shulman, *supra* note 22, at 392 ("[T]here are no due process problems with the commissioners consulting privately with and supervising the investigators during [an] investigation, at least until a formal hearing is ordered.").

309. *Id.* at 391.

310. *Id.* at 390-91. The referenced bodies are U.S. President's Commission on the Accident at Three Mile Island and the NRC's Special Inquiry Group, Three Mile Island. *See id.* at 354 nn.7, 12.

nothing and enables it to satisfy the "Caesar's wife" test ("not only innocent but above suspicion").[311] Because few budding proceedings involve matters meriting the Commission's pre-adjudicatory attention, little is lost as a result of such restraint. For those few proceedings in which pre-adjudicatory involvement by the Commission may be appropriate, the Commission has such a large and experienced legal staff that it usually has no problem finding "untainted" attorneys in either OCAA or the advisory side of OGC. The Commission also has such a sufficiently large and experienced technical staff that it generally has no difficulty finding qualified and untainted adjudicatory employees.

Adjudicators such as the commissioners are neither disqualified from sitting on cases involving points of law, policy, or legislative fact on which they have previously taken a position[312] nor prohibited from engaging in

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311. *See id.* at 390; *see also* 28 U.S.C. § 455(a) (2000) ("Any . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."); *supra* note 101. The opinion in *Marty's Floor Covering Co. v. GAF Corp.* described section 455(a) as the "'Caesar's wife' principle." 604 F.2d 266, 269 (4th Cir. 1979); Kathleen Kerr, Recent Development, *Ex Parte Communications in a Time of Terror*, 18 GEO. J. LEGAL ETHICS 551, 553 (2005) ("Judges are expected to recuse themselves if they even give the impression of partiality through ex parte communications."); Comment, *Ex Parte Contacts with the Federal Communications Commission*, *supra* note 25, at 1179 n.5 ("Even if it leads to no actual impropriety, the suspicion aroused by such . . . informal contacts may impair the respectability of an agency's quasi-judicial processes."); Davis, *supra* note 22, at 409 (footnote omitted) ("So long as detached and informed opinions differ as to what is justice, one objective in a democratic society is to appear to do justice . . . . [A] regulatory program is not likely to be successful without a prevailing attitude of confidence and co-operation on the part of the regulated parties.").

There is, however, a small contrary body of case law stating that "the appearance of impropriety standard is not applicable to administrative law judges." Bunnell v. Barnhart, 336 F.3d 1112, 1114 (9th Cir. 2003) (citations omitted). The courts' rationales for this position apply equally well to the NRC Licensing Board's Administrative Judges (though their relevance to other decisionmaking personnel is more questionable). First, "ALJs must be presumed to be persons of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." Harline v. DEA, 148 F.3d 1199, 1204 (10th Cir. 1998) (internal quotation marks omitted). Second,

> [u]nder 28 U.S.C. § 451, the recusal based upon the appearance of impropriety applies only to Supreme Court Justices, magistrate judges, and judges of the courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior. [ALJs] do not fall within this statute.

Bunnell, 336 F.3d at 1115 (internal quotation marks omitted). Third, the federal regulation governing recusal of ALJs speaks only of actual prejudice, not the appearance of prejudice. *Id.* (citing 20 C.F.R. § 404.940). For a good discussion of the current controversy over "the appearance of impropriety" issue, see John P. Ratnaswamy, *Ethics: The Appearance of Impropriety Standard in the ABA's Model Code of Judicial Conduct*, THE BENCHER 3 (Mar./Apr. 2007).

312. *See* 2 DAVIS & PIERCE, *supra* note 119, § 9.8, at 83, 86-87; Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 493 (1976) ("[A] decision-maker [is not] disqualified simply because he has taken a position, even in public, on a policy issue related to a dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'"); *see also* Asimow, *supra* note 22, at 774-75.

communications with parties regarding matters of policy or legislative fact.[313] Likewise, the advisors to adjudicators, including the commissioners' assistants, should be permitted to discuss with their commissioners matters of law, policy, or legislative fact on which the advisors have previously taken a position.

Finally, the Commission focused on this very separation-of-functions issue when considering pre-adjudicatory communications in *Yucca Mountain*. Its analysis is worth quoting at length:

> [I]t would be extraordinary now [in 2003], well over a year in advance of the possible filing of an application, let alone the staff's "docketing" of the application (that is, the staff's declaration that the application is complete and acceptable for processing (*see* 10 C.F.R. [§] 2.101(f)), to bar the staff from discussing with the Commissioners "any disputed issue" in the hearing. For one thing, we do not even know what the disputed issues are until contentions have been admitted into the hearing. . . . We therefore do not, strictly speaking, know in fact which communications would be barred by the rule on separation of functions. The main point of separation of functions, and indeed of the bar on ex parte contacts, is to ensure that all parties are aware of any information any one of them presents to the presiding officer, and that parties are given an opportunity to test that information and to present rebuttal testimony. In the present inchoate circumstances—in which there are neither named judges, nor parties who have established standing before those judges, nor contentions that those parties have persuaded the judges meet the standards for admission into the litigation—the only way to implement the separation is simply to cut off any discussion between the staff and the Commission on *any* issue that *might* come up at a hearing.
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> In the case of any high-level waste repository, where . . . the circumstances require that the "notice of hearing" issue sooner than is usual, the Commission is willing to abide by such a broad separation for the relatively short period of time between the notice of docketing and the time the licensing board issues the usual notice of hearing. But that is already an earlier separation than the Administrative Procedure Act would require for proceedings under its provisions on adjudications. *See* 5 U.S.C. § 554(d). Further than this the Commission cannot reasonably be expected to go. The NRC is a small agency, given only limited resources to carry out its functions. As Nevada recognizes, the separation of functions imposes resource burdens on the agency, because it must assign separated staff to advise the Commissioners on the issues in the litigation. The agency is experienced in planning for and bearing this burden. However, it is not a burden that should be extended for the

313. *See* 1 DAVIS & PIERCE, *supra* note 119, § 8.4, at 391.

> length of the long prelude to the anticipated hearing on the Yucca Mountain application. But most important, policy questions may still arise between now and the notice of hearing—perhaps, but not exclusively, as a result of implementation of any judicial decisions that would require the NRC to make changes in its regulations or policies. The Commission and its staff should remain able to discuss those issues as they normally would, without having to worry about whether the issues are, as section 2.781(a) puts it, "associated with the resolution of any proceeding" under the rules governing the conduct of formal hearings (10 C.F.R. Part 2 Subpart G).[314]

It may well turn out that the Commission's above-described approach eventually results in parties raising questions as to the presence or appearance of bias, the need to disclose information publicly in order to comply with the "exclusive record rule," and the need for either recusal or disqualification. The Commission has, however, made a conscious decision that the advantages of having access to all its staff outweigh the risks inherent in addressing those questions once the *Yucca Mountain* proceeding begins.

b. Consultation Between the Chairman and/or Commissioners and Staff Adversaries Concerning Collateral Functions

The Chairman and Commissioners are free to discuss with adversary staff members a pending or proposed rulemaking proceeding, even though the issues in the staff's adjudication and the rulemaking overlap.[315] Similarly, staff adversaries may advise the Chairman and Commissioners to launch investigations or adjudications similar to the ones in which the staff is currently a participant.[316] Further examples of permissible communication include discussions with staff adversaries regarding: the Commission's budget, proposed legislation, Congressional testimony, and non-adversarial public meetings—any one of which may deal with issues similar to, or related to, those being addressed in the litigation.[317] Although the "agency head" exception does not countenance off-the-record communications to obtain advice or evidence from staff on how to decide a pending case, the exception does allow contacts "in the course of preliminary decisions by agency heads to launch an investigation, issue a complaint, designate a matter for hearing, add new parties to an ongoing case, reopen a closed case, or decide what issues will be adjudicated in a

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314. Commission Response to Nevada Petition, *supra* note 259, at 10-11.

315. *See* SECY-80-130, *supra* note 98, at 93-94; Shulman, *supra* note 22, at 391 n.193; ADJUDICATION GUIDE, *supra* note 22, at 123.

316. *See supra* notes 304-05 and accompanying text.

317. *See* Asimow, *supra* note 74, at 768; Shulman, *supra* note 22, at 391-92 n.193; ACUS 1981 Draft Recommendations, *supra* note 94; ACUS 1980 Draft Recommendations, *supra* note 102.

case or what remedies sought."[318] The rationales underlying the permissibility of such communications are that the APA, to the extent it is applicable, prohibits only participation and advice in the "decision, recommended decision or agency review" of an adjudication[319] and that "the adjudicatory and non-adjudicatory . . . 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 private interests."[320]

Such discussions regarding collateral functions should not, however, be used to circumvent the proscription in § 554(d)(2) of Title 5. There is no "bright line" separating appropriate and prohibited communications, so the communicants must consider "[t]he totality of circumstances surrounding the consultation" when determining whether a particular line of discussion is permissible.[321] These circumstances should include the extent to which the facts in the accusatory adjudication overlap the facts in the collateral function, the communicants' expressed purpose for the consultation, whether the consultation is advocatorial or informational, and the need for the consultation.[322]

Courts have declined to find that an agency acted improperly when, for example, the agency head reviewed extra-record information in determining whether to authorize a pesticide cancellation proceeding when a related suspension proceeding was already pending;[323] when the agency initiated administrative proceedings to determine sanctions for conduct that was the subject of a lawsuit brought by the agency and in which the agency rejected a settlement offer by the defendant;[324] when the agency had private communications with its prosecutorial staff in connection with its decision whether to grant a party's motion to reopen a closed proceeding;[325] and when agency staff consulted with the agency head about the framing of charges in a proceeding.[326]

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318. Asimow, *supra* note 74, at 767 (citations omitted); *see also* PATCO v. FLRA, 685 F.2d 547, 567 (D.C. Cir. 1992) ("[D]iscussions regarding the initiation of proceedings and the filing of charges violate neither the Administrative Procedure Act nor due process of law."); ADJUDICATION GUIDE, *supra* note 22, at 124-25; Davis, *supra* note 22, at 644-45.

319. 5 U.S.C. § 554(d) (2000).

320. AG FINAL REPORT, *supra* note 102, at 58.

321. Shulman, *supra* note 22, at 373. *See generally* Mathews v. Eldridge, 424 U.S. 319, 321 (1976).

322. Shulman, *supra* note 22, at 373. *See generally Mathews*, 424 U.S. at 321.

323. Envtl. Def. Fund, Inc. v. EPA, 510 F.2d 1292, 1304-06 (D.C. Cir. 1975).

324. Blinder, Robinson & Co. v. SEC, 837 F.2d 1099, 1104-07 (D.C. Cir.1988).

325. RSR Corp. v. FTC, 656 F.2d 718, 722-24 (D.C. Cir. 1981).

326. *See Envtl. Def. Fund, Inc*., 548 F.2d at 1006 n.20 (involving discussions between agency prosecutors and the agency head about broadening the charges in a pending enforcement proceeding; no unfairness resulted because the court's order recognized defendant's right to present additional evidence).

c. The Chairman's and the Commissioners' Control over Pending Commission Adjudications

The Chairman's or commissioners' control over pending litigation between the initiation of litigation and the Commission's ultimate review of a presiding officer's final decision is particularly important where the case involves novel or highly complex issues (e.g., *Yucca Mountain* and the early COL adjudications), where the duration of the case is expected to be lengthy (e.g., *Yucca Mountain*), and where the Commission expects to devote considerable resources to the proceeding (e.g., *Yucca Mountain* and the COL proceedings). In such cases, a rigid separation of the Commission from the staff adversaries would preclude the Commission from altering the course of litigation to reflect changing Commission policy, or to allocate effectively the Commission's resources (e.g., by dropping or settling a case).[327] Congress, however, anticipated this problem by drafting § 554(d) to preclude adversaries from advising an agency head, but not vice versa. This one-way communication is attributable to the fact that the Commission is the agency head and thus performs both judicial and advocatorial roles, while NRC staff adversaries perform only the latter role.[328] Consequently, even in those adjudications governed by the APA, the Chairman and Commissioners are free to instruct staff adversaries off the record,[329] though for reasons of due process and fairness, they should limit as much as possible any discussion with staff adversaries regarding the particular facts of the case.[330]

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327. *See* Shulman, *supra* note 22, at 372 n.91 (describing the need to conform an agency's litigation positions to its policy changes); 2 DAVIS & PIERCE, *supra* note 119, § 9.9, at 97 (stating that the APA permits an agency head to decide whether to investigate or prosecute a case and how much resources to expend in such activities); Plaine, *supra* note 139, at 19-20.

328. *See* Shulman, *supra* note 22, at 392-93 (describing Professor Davis's views).

329. Asimow, *supra* note 74, at 768-69; Shulman, *supra* note 22, at 373; SECY-80-130, *supra* note 98, at 95-99, 121 n.194. Given the Commission's freedom to instruct staff off the record in accusatory cases, i.e., involving allegations of misconduct, or of regulatory or statutory violations, such as an enforcement action (*see* Shulman, *supra* note 22, at 394 n.203 (describing Professor Davis' views); SECY-80-130, *supra* note 98, at 121 n.194, the Commission should, *a fortiori*, be free to offer instructions in non-accusatory cases such as licensing actions initiated by a licensee or applicant—despite the possibility that the staff may be advocating a particular viewpoint opposed by a party in the proceeding. *Cf.* SECY-80-130, *supra* note 98, at 123. This conclusion is further bolstered by the Commission's decision not to differentiate between accusatory and non-accusatory formal adjudications when applying the restricted-communications rules. *See* NRC, Final Rule, Revision to Ex Parte and Separation of Functions Rules Applicable to Formal Adjudicatory Proceedings, 53 Fed. Reg. 10,360, 10,361 (Mar. 31, 1988). However, it is worth noting that, in the analogous area of rulemaking (also a non-accusatory form of proceeding), the courts are far from unanimous regarding the due process implications of off-the-record contacts between agency staff and agency decision-makers. *See* SECY-80-130, *supra* note 98, at 128; discussion *infra* Part III.C.

330. Shulman, *supra* note 22, at 373 n.93; SECY-80-130, *supra* note 98, at 121 n.194.

There is, however, court precedent supporting the opposite view, finding due process violations where the same individual engaged in both adjudicatory and prosecutorial duties in accusatory proceedings.[331] For this reason, the Commission and other agencies have been advised to take "a middle course":[332]

> 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 [i.e., staff advocates]. 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.[333]

In addition to direct private communication with the staff, the Chairman and Commissioners have other means at their disposal by which to control the direction of a pending proceeding. They may, for instance, communicate with the staff on the record, so that other parties will have an opportunity to respond. They may convene a public meeting and invite all parties. They may also rule on an interlocutory appeal, or take *sua sponte* review of a presiding officer's procedural or substantive orders.[334] These means of controlling ongoing litigation avoid any appearance of impropriety, lessen the chance that the staff adversaries may inadvertently slip into an advocacy role before the Commission,[335] and provide a ready remedy if the staff does so.

d. Consultation Between a Member of the Personal Staff of the Chairman and/or Commissioners and Adversaries Prior to Joining the Personal Staff

In the last fifteen years, the NRC's Chairmen and Commissioners have almost invariably chosen Commission employees for their personal staffs. On occasion, these personal staff members face situations where

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331. *See* Shulman, *supra* note 22, at 392-93 nn.196, 197.
332. *Id.* at 393.
333. *Id.*
334. *See supra* note 292.
335. *See* Asimow, *supra* note 74, at 769-70.

adjudicatory cases in which they previously served adversary roles come before the Commission for appellate review. This is particularly true for Commissioners' legal assistants, who are often drawn from the ranks of OGC's litigation teams. This kind of situation presents the questions whether and the extent to which these personal staff members should recuse themselves for reasons of separation of functions, bias or prejudgment, or the appearance of bias or prejudgment.[336]

i. APA

One line of legal thought posits that such staff members *must* recuse themselves from involvement in *all* kinds of review of their prior cases. The theory is supported by the APA as interpreted in the Ninth Circuit's controversial decision in *Grolier, Inc. v. FTC*, a case involving an administrative law judge who, prior to his appointment as an ALJ, served as a legal advisor to a Federal Trade Commission (FTC) Commissioner. The court held that the ALJ could, pursuant to the APA, be disqualified from a proceeding if he had participated as the Commissioner's advisor in discussions about whether to issue a complaint against a party in the proceeding at issue. The court raised concerns about the possibility that the ALJ may have been exposed to extra-record facts during the predecisional discussions. The court, however, did not go so far as to impute to the Commissioner's advisor knowledge of all investigative and prosecutorial activities undertaken by the FTC during his tenure as advisor.[337]

Professor Asimow appropriately criticized *Grolier* when he complained that:

> This reasoning threatens serious interference with the advisory function since it could well disqualify staff members, such as the General Counsel or a member of his staff, from participating in predesignation conferences and later advising upper and lower level decisionmakers (or actually deciding the case if the individual became an agency head) unless the dual roles were mandated by the "very nature of administrative agencies." Similarly, the *Grolier* decision might disqualify an attorney-advisor from advising an ALJ or an intermediate review board. It might disqualify a decisional advisor who had any casual contact with the facts, such as by answering a technical question without becoming enmeshed as an adversary or receiving an ex parte contact from an outsider.[338]

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336. *See supra* note 101 (regarding the appearance of bias or impropriety).

337. Grolier, Inc. v. FTC, 615 F.2d 1215, 1221 (9th Cir. 1980); *see also* Gibson v. FTC, 682 F.2d 554, 562-63 (5th Cir. 1982). *Cf.* Twigger v. Schultz, 484 F.2d 856, 860-61 (3d Cir. 1973) (concluding that the Department of the Treasury violated the separation-of-functions bar in § 554(d) where its enforcement decision was based on a record compiled by a departmental employee engaged in prosecutorial and investigatory activities).

338. Asimow, *supra* note 74, at 771 (footnotes omitted).

According to Professor Asimow, mere exposure to factual information about a respondent should be insufficient, in and of itself, to taint a person as an "adversary" for APA purposes, and thereby to disqualify the person from participating or advising in adjudicatory decisions.[339] Professor Asimow believes that, for disqualification, the agency employee must also have taken on some role that would likely cause the employee to identify with a party and instill in him or her the "will to win."[340] Finally, Professor Asimow points out that, although § 554(d) specifically prohibits an ALJ ("an employee who presides at the reception of evidence pursuant to section 556") from having ex parte access to factual information, § 554(d) imposes no such limitations on decisional advisors.[341]

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339. *See also supra* notes 300 and 304 and accompanying text. Case law outside the Ninth Circuit supports Professor Asimow's conclusion. *See, e.g.*, Faultless Div., Bliss & Laughlin Indus., Inc. v. Sec'y of Labor, 674 F.2d 1177, 1183 (7th Cir. 1982) ("Mere familiarity with legal or factual issues involved in a particular case does not, in itself, evince an adjudicator's biased predisposition."). Also,

> [w]ithin the context of public administrative law and procedure, a claimant or litigant is not denied a constitutionally guaranteed fair hearing before an impartial tribunal simply because the agency factfinders or decisionmakers may have had some prior knowledge or even preliminary participation in the case or even though they may have formed some tentative ideas as to the merits of the controversy about to be decided.

Hirrill v. Merriweather, 629 F.2d 490, 496 (8th Cir. 1980) (citations omitted); *see also* Klinge v. Lutheran Charities Ass'n, 523 F.2d 56, 63 (8th Cir. 1975) (determining that at a hearing to expel a doctor from the staff of a hospital, the doctor was not entitled to a panel made up of outsiders or doctors who had never heard of the case and who knew nothing about the facts of it or what they supposed the facts to be); *see also* Ostrer v. Luther, 668 F. Supp. 724, 735 (D. Conn. 1987) ("[S]ome prior knowledge of or thoughts about a case does not automatically imply an inability in the administrative fact finder to render an impartial decision."). *See generally* 2 DAVIS & PIERCE, *supra* note 119, § 9.8, at 78, 79 (asserting that "an adjudicator [] . . . can be disqualified" for prejudgment of, but not mere exposure to, adjudicative facts); Shulman, *supra* note 22, at 386 & n.163 (citing Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482, 493 (1976)).

340. Asimow, *supra* note 74, at 771-72; *see also Grolier*, 615 F.2d at 1220.

341. Asimow, *supra* note 74, at 772 n.64; *see also* Greenberg v. Bd. of Governors of the Fed. Reserve Sys., 968 F.2d 164, 166-67 (2d Cir. 1990). In *Greenberg*, the Second Circuit ruled that an ALJ need not recuse himself merely because his law clerk had previously participated in the investigation of the case pending before the ALJ. *See id.* at 167. The court explained that, to merit the disqualification of the ALJ, the court must find that the ALJ's clerk must have participated in both the prosecuting and judging functions. *See id.* The court concluded that the clerk lacked this required dual participation because he had handled only administrative matters for the ALJ and had provided no substantive input in the case. *See id.* Similarly, the Tenth Circuit ruled in *Adolph Coors Co. v. FTC* that a Commissioner need not recuse himself where an attorney-advisor on his personal staff had been involved in the investigation and prosecution of a case that was pending before the Commissioner, so long as the attorney-advisor did not discuss the merits of the case with the Commissioner. 497 F.2d 1178, 1189 (10th Cir. 1974). The D.C. Circuit issued a similar ruling in *Press Broadcast Co. v. FCC*, 59 F.3d 1365, 1369 (D.C. Cir. 1995). There, the court found that ex parte contacts with the Mass Media Bureau (a subsidiary adjudicatory office within the FCC) did not taint the FCC's own decisionmaking process. *See id.* This was because the content of the ex parte communications never reached the ultimate decision-makers (the full FCC). *See id.*

Presumably, if a Commissioner's legal or technical assistant has previously worked on an adjudication, the advisory responsibilities as to that matter would be assigned instead to one

Although Professor Asimow was concerned with the *Grolier* ruling regarding a Commissioner's advisor who became an ALJ, much of his logic applies equally to the situation of a staff adversary who later becomes a Commissioner's assistant, or a member of either OCAA or an advisory section of OGC. Applying *Grolier*'s reasoning to these latter situations would "threaten[] serious interference with the advisory function" and would appear unnecessary in light of Congress's decision not to impose on decisional advisors a prohibition on access to extra-record factual information.

ii. Due Process

Nevertheless, there remains the question whether such counseling might, under limited circumstances, run afoul of the due process rights of the parties.[342] The United States Courts of Appeals for the D.C., Sixth and Ninth Circuits have seen due process problems in the following potentially analogous situations.

In *Trans World Airlines v. CAB*, the D.C. Circuit considered the situation in which a member of the Civilian Aeronautics Board had previously signed a brief in a case he later adjudicated as a Board member. Although this brief addressed different issues than those involved in the proceeding he later adjudicated, the court still concluded that he should have disqualified himself from sitting in judgment in the later proceeding. The court ruled that

> [t]he fundamental requirements of fairness in the performance of [quasi-judicial] 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.[343]

Four years later, the same court ruled in *Amos Treat & Co. v. SEC* that it "would be tantamount to that denial of administrative due process against which both the Congress and the courts have inveighed" to permit a Securities and Exchange Commission (SEC) Commissioner to engage as an adjudicator in a proceeding in which he had, as an SEC Division Director, initiated an investigation, weighed its results, and perhaps recommended the filing of charges.[344]

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of the Commissioner's other technical or legal assistants or executive assistant, or to another Commissioner's legal or technical assistant, or even to a staff member who does not work in a Commissioner's office but who is still on the advisory side of the "Chinese Wall."

342. Regarding this question, see 4 STEIN, MITCHELL & MEZINES, *supra* note 75, § 33.02[2], at 33-39 to 33-47.

343. 254 F.2d 90, 91 (D.C. Cir. 1958).

344. 306 F.2d 260, 266-67 (D.C. Cir. 1962); *see also* SECY-80-130, *supra* note 98, at 121-22 n.195. The D.C. Circuit ruled a short time later in *Texaco, Inc. v. FTC* that the Chairman of the FTC was disqualified from joining in a Commission order because, while a

Similarly, the Sixth Circuit ruled in *American Cyanamid Co. v. FTC* that the Chairman of the FTC could not sit as a fact-finder in a matter that he had previously investigated in his capacity as Chief Counsel and Staff Director for a Senate subcommittee, which had investigated many of the same legal and factual issues that were later before the Commission.[345] The court relied on the very active role the FTC Chairman had played as Chief Counsel in conducting the investigation, the depth of the Subcommittee's investigation into the *precise factual issues* that were later presented to the Commission in the adjudication at issue, and the uncontroverted evidence indicating that the Chairman had formed conclusions about those same factual issues.[346]

The Ninth Circuit, in *American General Insurance Co. v. FTC*, faced a situation where an FTC Commissioner who had actively participated as counsel in court proceedings involving the same parties and the same dispositive issue subsequently authored the Board's opinion on the same case. The Ninth Circuit held that the Commissioner should have disqualified himself, based on his prior involvement in the proceeding.[347]

However, all but the last of these decisions were issued prior to the Supreme Court's decision in *Withrow*,[348] which, as noted earlier, ruled that a combination of investigatory and adjudicatory functions in an administrative agency was not per se a denial of administrative due process. The Court also ruled that to show such a denial, a party must demonstrate that the combination interferes with the "honesty and integrity" of the adjudicator and that there is "such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."[349] The 1994 edition of Professor

case involving Texaco was pending before the FTC, he had given a speech from which a disinterested observer could hardly fail to conclude that he had in some measure decided in advance against Texaco. *See* 336 F.2d 754, 760 (1964), *vacated and remanded on other grounds*, 381 U.S. 739 (1964). Although the ruling in *Texaco* turns on the apparent bias of the Chairman rather than on any violation of restricted communications rules, the rules for recusal based on bias are basically the same as those for recusal based on separation of functions.

345. 363 F.2d 757, 767 (6th Cir. 1966).

346. *But cf.* Safeway Stores, Inc. v. FTC, 366 F.2d 795, 802 (9th Cir. 1966) (declining to make a similar ruling regarding the same Chairman, where his involvement in a Senate Subcommittee investigation was much less active).

347. 589 F.2d 462, 465 & n.11 (9th Cir. 1979).

348. 421 U.S. 35 (1975).

349. 421 U.S. at 47. See also the following post-*Withrow* decisions: Washington v. Harper, 494 U.S. 210, 231-35 (1990); Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431, 1437 (9th Cir. 1986); Utica Packing Co. v. Block, 781 F.2d 71, 77 (6th Cir. 1986); Morris v. City of Danville, 744 F.2d 1041, 1044 (4th Cir. 1984); Porter County Chapter of the Izaak Walton League of Am. v. NRC, 606 F.2d 1363, 1371 (D.C. Cir. 1979); Ostrer v. Luther, 668 F. Supp. 724, 733 (D. Conn. 1987).

Compare those cases with the following pre-*Withrow* Court of Appeals decisions: Kennecott Copper Corp. v. FTC, 467 F.2d 67, 80 (10th Cir. 1972) (establishing the rule that a Commissioner must be disqualified if he or she has prejudged the case or has given the

Davis's treatise on Administrative Law opines that the *Amos Treat* decision is inconsistent with *Withrow*, and has not been followed.[350] Probably as a result of *Withrow*, federal courts currently apply a "very deferential" abuse of discretion standard when reviewing agency decisionmakers' determinations not to recuse themselves on bias or prejudgment grounds.[351]

Self-recusals by commissioners are rare. For instance, Commissioner Gregory B. Jaczko removed himself for one year from a decisionmaking role in all adjudicatory matters directly or indirectly involving the proposed Yucca Mountain High-Level Waste Repository.[352] By contrast,

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reasonable appearance of having prejudged it); Cinderella Career & Finishing Sch., Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970) (defining the test of prejudgment in an adjudicatory proceeding as whether "a disinterested observer" would conclude that the decision-maker had "in some measure adjudged the facts as well as the law of a particular case in advance of hearing it;" such prejudgment constitutes a violation of due process) (quoting Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir. 1959)); FTC v. Cinderella Career & Finishing Sch., Inc., 404 F.2d 1308, 1315 (D.C. Cir. 1968); *Texaco*, 336 F.2d at 760.

Two other pre-*Withrow* decisions by United States District Courts likewise have indirectly suggested the same result. In *Pregent v. New Hampshire Dep't of Employment Security*, a federal trial court in New Hampshire indicated, in dictum, that such communications would pose due process problems:

> If the Chairman of the Appeal Tribunal did have prior involvement in a claimant's case, either in the investigatory, fact-finding or decision-making state, we would regard such prior official contact as disqualifying and as violative of due process . . . . E.g., if 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.

361 F. Supp. 782, 797 & n.24 (D.N.H. 1973). A federal trial court in Delaware reached the same conclusion, quoting the above language with approval. King v. Caesar Rodney Sch. Dist., 380 F. Supp. 1112, 1119 (D. Del. 1974).

350. *See* 2 DAVIS & PIERCE, *supra* note 119, § 9.8, at 83, § 9.9, at 101; *see also* National Rifle Ass'n v. United States Postal Serv., 407 F. Supp. 88, 92 n.3 (D.D.C. 1976) (quoting an earlier edition of Professor Davis's treatise, which said that *Amos Treat* is an "extreme case" standing for a proposition with "a rather limited future, if any").

351. *See* Mississippi Indus. v. FERC, 808 F.2d 1525, 1567 (D.C. Cir. 1987).

352. *See, e.g.*, United States Dep't of Energy (High Level Waste Repository: Pre-Application Matters), CLI-06-5, 63 N.R.C. 143, 143 n.1 (2006); United States Dep't of Energy (High Level Waste Repository: Pre-Application Matters) CLI-05-27, 62 N.R.C. 715, 715 n.1 (2005); NRC, AFFIRMATION SESSION 1 (2005), *available at* ADAMS Accession No. ML051720244 ("Out of an abundance of caution, Commissioner Jaczko elected to abstain from voting on this order in light of his decision not to make public statements regarding Yucca Mountain for one-year from January 21, 2005."). In light of his decision not to participate in the Yucca Mountain proceeding, Commissioner Jaczko likewise declined to vote on two Memoranda and Orders involving Private Fuel Storage's application to construct and operate an independent spent fuel storage installation. *See* Private Fuel Storage, L.L.C., (ISFSI), CLI-06-03, 63 N.R.C. 19, 19 n.1 (2006); Private Fuel Storage, L.L.C., CLI-05-12, 61 N.R.C. 345, 355 n.38 (2005).

Commissioner McGaffigan more recently declined to recuse himself in *Louisiana Energy Services*.[353]

The two Commissioners' decisions are distinguishable. Commissioner Jaczko recused himself prior to participating in *Yucca Mountain*, while Commissioner McGaffigan had already participated in the *Louisiana Energy Services* adjudication by the time he declined self-recusal.[354] Moreover, Commissioner Jaczko agreed to recuse himself while under Congressional pressure prior to the Senate's confirmation of his nomination;[355] Commissioner McGaffigan, on the other hand, was under no such pressure, having already been confirmed for his third term as a Commissioner. Finally, as a general matter, the rules and precedent governing recusal of judges do not apply to all facets of Commissioners' responsibilities. After all, they serve simultaneously as judges, executives and legislators.

Most recently, Commissioner Merrifield, who had just announced that he would not seek a third term as Commissioner, took the novel task of employing a private attorney as a "firewall" to screen post-Commission employment opportunities. This approach protects him from contacts with NRC licensees and applicants and thereby enables him to avoid at least most risks of ex parte communications and the need for recusal.[356]

e. Consultation Between a Member of the Personal Staff of the Chairman and/or Commissioners and Adversaries After Leaving the Personal Staff

This issue arose in 1982 when a technical assistant to the Chairman became the Deputy Executive Director for Operations. The Office of the General Counsel advised him that neither the Commission's separation-of-functions nor ex parte rules would preclude him from communicating with staff or outside entities regarding matters on which he had worked while a member of the Chairman's staff. OGC went on, however, to warn that "[c]onsiderations of fairness would . . . preclude [him] from revealing, or using as a basis for advice or recommendations, any information gained as

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353. Louisiana Energy Servs. (National Enrichment Facility), Decision on the Motion of Nuclear Information and Resource Service and Public Citizen for Disqualification of Commissioner (June 2, 2006), *available at* ADAMS Accession No. ML061540004; *see also* Michael Knapik, *McGaffigan Won't Heed NIRS Motion Asking He Step Aside in LES Case*, INSIDE NRC, MAY 29, 2006, at 7.

354. Knapik, *supra* note 353.

355. Jenny Weil & Steven Dolley, *NRC Chairman-designate, Dale Klein, Heads Toward Senate Confirmation*, INSIDE NRC, MAY 29, 2006, at 1, 18 (2006) ("Jaczko, [Senator Harry] Reid's former appropriations director and science policy advisor, promised to recuse himself from decisions related to Yucca Mountain for his first year on the commission . . . [that] ended January 21[, 2006].").

356. Jenny Weil, *Merrifield Plans New Career After June 2007 Departure from NRC*, INSIDE NRC, Oct. 30, 2006, at 1.

a result of [his] access to confidential Commission or Commission-level office discussions, meetings, or memoranda concerning contested matters in adjudicatory proceedings."[357]

2. Applicability Vel Non *of the Separation-of-Functions Restriction to Specific Kinds of Proceedings*

a. Informal Adjudicatory Proceedings

Section 554(d) of Title 5 applies only to certain formal adjudications—those that a federal statute requires to be conducted on the record.[358] Consequently, § 554(d) does not apply to licensing proceedings conducted under the Commission's informal hearing rules.[359] A reason for this inapplicability is that they are non-accusatory proceedings.[360]

357. Memorandum from Trip Rothschild, Acting Assistant General Counsel, NRC, to Jack W. Roe, Deputy Executive Director for Operations, NRC (Sept. 20, 1982), *available at* ADAMS Accession No. ML061220065.

358. 5 U.S.C. § 554(a) (2000).

359. 2 DAVIS & PIERCE, *supra* note 119, § 9.9, at 94 ("The APA contains no statutory restrictions on combining functions when an agency engages in 'informal adjudication.'"); ATTORNEY GENERAL'S MANUAL, *supra* note 100, at 116 ("[Section 554] applies only to cases of adjudication 'required by statute to be determined on the record after opportunity for an agency hearing.'"); Bosh, *supra* note 177, at 1030 n.8.

Both Commission and federal court precedent make clear that "the formal on-the-record hearing provisions of the APA do not apply to the Commission's informal proceedings such as those addressing materials license amendment applications." Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 N.R.C. 232, 247-56 (1982), *aff'd*, City of West Chicago v. NRC, 701 F.2d 632, 641-45 (7th Cir. 1983) (discussing this issue in great detail and concluding that the AEA does not mandate formal, trial-type hearings in materials license proceedings); Curators of the Univ. of Mo., CLI-95-1, 41 N.R.C. at 119. *See generally* Union of Concerned Scientists v. NRC, 920 F.2d 50, 53 (D.C. Cir. 1990) ("[The AEA] nowhere describes the content of a hearing or prescribes the manner in which this 'hearing' is to be run."). The Commission takes the same position as to informal licensing proceedings for nuclear power reactors under the current (2004) Part 2 procedures, but the federal courts have yet to face that question.

Finally, the Commission has expressly stated in a rulemaking that its informal adjudications are not subject to the APA's formal hearing requirements. NRC, Final Rule, Informal Hearing Procedures for Materials Licensing Adjudications, 54 Fed. Reg. 8269, 8270 (Feb. 28, 1989); NRC, Proposed Rule, Informal Hearing Procedures for Materials Licensing Adjudications, 52 Fed. Reg. 20,089, 20,091 (proposed May 29, 1987) ("[There are no] statutory requirements that the Commission apply the *ex parte* and separation of functions prohibitions of the Administrative Procedure Act . . . to informal adjudications.").

360. Regarding the inapplicability of the separation-of-functions restrictions to non-accusatory cases, see Shulman, *supra* note 22, at 374; Asimow, *supra* note 74, at 772; and SECY-80-130, *supra* note 98, at 85-88, all of which present the argument that staff members who are involved as witnesses or advocates in a non-accusatory (i.e., non-prosecutorial) case may advise the agency decision-makers, but that staff involved in an accusatory case may not do so; *see also* ACUS 1981 Draft Recommendations, *supra* note 95, at 26,487-88. *But see* SECY-80-130, *supra* note 98, at 142-43 (indicating that although Congress in the APA did not find the element of unfairness sufficiently great to bar private communications between staff advocates and decision-makers in non-accusatory proceedings, the "inherent unfairness" rationale underlying Congress's 1976 adoption of a formal ex parte ban on such communications with persons outside federal agencies (5 U.S.C. § 557(d)) would seem to apply equally to communications with staff advocates);

The Commission is, of course, free to expand the scope of its own separation-of-functions regulations beyond the bounds required by the APA so as to include such proceedings—just as it did in 1962 when it chose to apply separation-of-functions restrictions to reactor licensing proceedings. The Supreme Court has made clear that agencies are free to "grant additional procedural rights in the exercise of their discretion."[361] The Commission is also free to apply such constraints on a case-by-case basis.

The Commission rejected the first of these options—expansion of scope of separation-of-functions regulation—in 1985. When preparing what ultimately became its 1989 Subpart L procedural rules governing informal adjudications, the Commission seriously considered whether to apply both ex parte and separation-of-functions constraints to such proceedings, but decided against expressly doing so at the *trial* level.[362] Instead, the Commission included language in 10 C.F.R. § 2.1251(c) to the effect that an initial decision must be based only on information in the official record or facts officially noticed, and that the record must include all information submitted in the proceeding with respect to which all parties have been given reasonable prior notice and an opportunity to comment.[363]

Shulman, *supra* note 22, at 374 n.97 (suggesting that there might be due process problems if an agency staff member who consults with the decisionmakers thereafter participates or advises in the decision), 384-85 & n.154 (noting that due process considerations apply to both accusatory and non-accusatory proceedings).

> Although § 554 is inapplicable to informal adjudications, the court [in *Bethlehem Steel Corp. v. EPA*, 638 F.2d 994 (7th Cir. 1980)] 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 . . . 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.

Id. at 392 n.193 (citation and internal quotation marks omitted).

361. Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 524 (1977); *see also id.* at 546 (arguing that an examination of the congressional record indicates that Congress intended for agencies rather than the courts to determine when extra procedural devises should be employed).

362. *Cf.* NRC, SECY-85-227, Proposed Rule on Informal Hearing Procedures for Materials Licensing Adjudications 17 (June 26, 1985), *available at* ADAMS Accession No. ML061220073. The Commission unanimously disapproved the Notice of Proposed Rulemaking. *See* Comments of Commissioner Lando W. Zech Jr. (July 17, 1985), *available at* ADAMS Accession No. ML061220077 (articulating the Commissioner's belief that the proposed rule unnecessarily created separation-of-function restrictions).

While in the process of promulgating its 1987 restricted communications regulations, the Commission subsequently concluded that there were no "statutory requirements that the Commission apply the ex parte and separation of functions prohibitions of the Administrative Procedure Act . . . to informal adjudications." NRC, Proposed Rule, Informal Hearing Procedures for Materials Licensing Adjudications, 52 Fed. Reg. 20,089, 20,091 (proposed May 29, 1987).

363. The 2004 amendments to Subpart L did not alter the Commission's stance in this respect. *See supra* note 236 and accompanying text.

At the *appellate* level, the Commission applied the separation-of-functions restrictions in informal proceedings and appointed ten adjudicatory employees in Subpart L materials licensing cases,[364] two in Subpart L proceedings involving reactor operators' challenges to their failing grades on a Senior Reactor Operator examination,[365] and two in a materials license case that fell under the Commission's new Subpart C regulations governing informal adjudications.[366] All other adjudicatory employees advised the Commission in the more-formal hearing proceedings under Subpart G.[367] The principal purpose of using such appointees is to avoid separation-of-functions problems. It seems likely that had the Commission viewed those restrictions as completely inapplicable, it would not have considered the appointment of those adjudicatory employees necessary. On the other hand, the Commission's appointment of the adjudicatory employees could also be construed as merely an exercise of caution. The Commission has not spoken directly to this matter.

In promulgating its procedural regulations governing informal adjudications, the Commission retained the option of applying the separation-of-functions restrictions on a case-by-case basis. It can exercise its plenary authority and impose such restrictions in an informal adjudication if it chooses, or it can do so in response to a petition.[368] In

364. Hydro Res., Inc., *available at* ADAMS Accession No. ML063050637 (Nov. 1, 2006) (appointing two employees); Hydro Res., Inc., *available at* ADAMS Accession No. ML053250472 (Nov. 21, 2005); Hydro Res., Inc., *available at* ADAMS Accession No. ML041610258 (June 9, 2004) (appointing two); Nuclear Fuel Serv., Inc., *available at* ADAMS Accession No. ML030770757 (Mar. 18, 2003); Hydro Res., Inc., 65 Fed. Reg. 7074 (Feb. 11, 2000) (appointing two); Curators of the Univ. of Mo., 58 Fed. Reg. 34,103 (June 23, 1993); Curators of the Univ. of Mo., 58 Fed. Reg. 32,736 (June 11, 1993).

365. Ralph L. Tetrick, 62 Fed. Reg. 24,515 (May 5, 1997); Michel Philippon, 65 Fed. Reg. 6245 (Feb. 8, 2000).

366. Louisiana Energy Servs. (National Enrichment Facility), *available at* ADAMS Accession No. ML062060420 (July 24, 2006) (appointing two); Louisiana Energy Servs. (National Enrichment Facility), *available at* ADAMS Accession No. ML053250494 (Nov. 21, 2005).

367. *See, e.g.*, Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), *available at* ADAMS Accession No. ML051330171 (issued May 13, 2005); Dominion Nuclear Conn. (Millstone Nuclear Power Station, Unit 2), 68 Fed. Reg. 40,407 (July 11, 2003); Dominion Nuclear Conn. (Millstone Nuclear Power Station, Unit 2), 66 Fed. Reg. 66,689 (Mar. 27, 2001); Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), 64 Fed. Reg. 3320 (Jan. 21, 1999); Cleveland Elec. Illuminating Co., (Perry Nuclear Power Plant, Unit 1), 61 Fed. Reg. 34,450 (July 2, 1996) (appointing two); Advanced Med. Sys., Inc., 58 Fed. Reg. 59,493 (Nov. 9, 1993) (suspension proceeding); Advanced Med. Sys., Inc., 57 Fed. Reg. 52,799 (Nov. 5, 1992) (civil penalty proceeding); Louisiana Energy Serv. (Claiborne Enrichment Ctr.), 56 Fed. Reg. 64,818 (Dec. 12, 1991) (two notices); Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), 54 Fed. Reg. 50,296 (Dec. 5, 1989); Vermont Yankee Nuclear Power Corp., 54 Fed. Reg. 37,174 (Sept. 7, 1989); Philadelphia Elec. Co. (Limerick Generating Station, Units 1 and 2), 54 Fed. Reg. 35,267 (Aug. 24, 1989); Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), 53 Fed. Reg. 44,687 (Nov. 4, 1988) (appointing two).

368. Under the now-rescinded procedural regulations, such a petition would have been

deciding whether to apply the restrictions, the Commission would need to balance the advantages and disadvantages of their application in the specific proceeding then under consideration per *Mathews v. Eldridge*.[369]

On the one hand, the application of the separation-of-functions constraints (i) protects the neutrality of the decisionmakers by screening out advice from staff members whose degree of involvement in a proceeding is likely to impair their objectivity;[370] (ii) "enhance[s] the parties' confidence in the impartiality of the decisionmaker and the overall fairness of the proceeding;"[371] (iii) protects the decisionmaker from receiving off-the-record factual information even from a staff member *uninvolved* in the case,[372] if that staff member were somehow in a position to learn such information; and (iv) benefits the staff advocate, whose communications with external parties could otherwise, at least arguably, be severely constrained by the Commission's application of its ex parte rules or by similar due process considerations.[373]

On the other hand, the constraints may (i) preclude decisionmakers from obtaining advice from the best-qualified staff; (ii) interfere with the agency head's ability to control important cases, set policy, and become aware of emergency problems; (iii) cause serious delays, costly duplication of staff, and confusion about what communications are permissible; and (iv) interfere with other agency functions which are carried on concurrently with the proceeding in question.[374]

Despite this latter list of disadvantages, at least one scholar—Professor Shulman—favors generally disqualifying agency advocates from advising decisionmakers in non-accusatory (informal) proceedings, on due process grounds.[375] He suggests that the Commission instead use alternative mechanisms such as on-the-record briefings of the decisionmakers and an expansion of the adjudicatory advisory staff.[376] Given the Commission's budgetary constraints, Professor Shulman's latter suggestion hardly seems viable—at least for now.

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filed under 10 C.F.R. § 2.1239(b). Current procedural regulations provide this same opportunity to petition the Commission for a rule waiver. 10 C.F.R. § 2.335(b) (2000).

369. *See* Shulman, *supra* note 22, at 397-98.

370. ACUS 1980 Draft Recommendations, *supra* note 102, at 68,950; *see also* ACUS 1981 Draft Recommendations, *supra* note 95; Shulman, *supra* note 22, at 405-06.

371. ACUS 1981 Draft Recommendations, *supra* note 95, at 26,487; *see also* Shulman, *supra* note 22, at 398, 406.

372. *See id.* at 401.

373. *Id.* at 406.

374. ACUS 1980 Draft Recommendations, *supra* note 102, at 68,950; *see also* ACUS 1981 Draft Recommendations, *supra* note 95, at 26,487; Shulman, *supra* note 22, at 401 n.226, 406. Regarding the unavailability of advice from the best-qualified staff, see Shulman, *supra* note 22, at 406.

375. *See* Shulman, *supra* note 22, at 398; *cf. id.* at 406.

376. *See id.* at 398.

One final observation on this subject is in order. The NRC staff is, from time to time, not a party to informal adjudications under 10 C.F.R. Part 2, Subpart L, and has yet to become a party in any Subpart M license transfer proceeding. In these contexts, the staff can freely advise the Commission on matters related to those adjudications. For instance, the staff sent the Commission a memorandum in a Subpart L case, advising that it intended to permit the United States Army to delay indefinitely the decommissioning of its Jefferson Proving Ground, a military ordnance testing facility.[377] At the time the NRC staff proffered this memorandum, an NRC Presiding Officer was adjudicating a related Subpart L proceeding, to which the staff was not a party. The adjudication and the staff's memorandum involved the same NRC license, the same licensee and the same facility. The decommissioning approach at issue in the adjudication (restricted release) was, however, quite different from the indefinite-delay approach that the staff was separately proposing to the Commission. Ultimately, the latter approach rendered the former moot, and the Presiding Officer dismissed the proceeding.[378]

b. Export License Proceedings

Export license applicants are not entitled to an on-the-record hearing pursuant to § 554(a). Consequently, their license proceedings are not subject to the separation-of-functions restrictions of § 554(d)(2).[379]

c. Uncontested Proceedings

Under § 2.347(e) (former § 2.780(e)), the separation-of-functions restrictions do not come into play until a notice of hearing or similar order is issued, or a Commission employee becomes aware that such a notice or order will be issued. But uncontested proceedings, by their very nature, do not generate a hearing that can be "noticed." Therefore, separation-of-functions restrictions do not apply to those proceedings,[380] with the possible exception of construction permit and early site permit applications discussed above in Part III.A.2.d.

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377. NRC, SECY-03-0031, Jefferson Proving Ground Decommissioning Status 1 (Mar. 3, 2003), *available at* ADAMS Accession No. ML023430018.
378. U.S. Army (Jefferson Proving Ground Site), LBP-03-28, 58 N.R.C. 437 (2003).
379. Shulman, *supra* note 22, at 372 & n.89. *Cf.* SECY-80-130, *supra* note 98, at 50 n.110.
380. The APA also supports this conclusion. *See* Shulman, *supra* note 22, at 379 n.120.

3. Applicability Vel Non *of the Separation-of-Functions Restriction to Specific Kinds of Communications*

a. Communications Between/Among Agency Adjudicators

The separation-of-functions restriction in the APA refers only to adjudicators' consultations with individuals performing investigative or prosecutory functions, not to their consultations with other adjudicators. Consequently, even in cases governed by the APA, this restriction does not prohibit such communications. Moreover, § 554(d)(2)(C) expressly exempts from the separation-of-functions prohibition any communications by a Commissioner—whose responsibilities include those of an appellate adjudicator—with another Commissioner or, taken to its logical extreme, even with a board member.[381] However, as noted above, public Memoranda and Orders are the Commission's medium of choice for communicating with its boards.[382]

There may, however, be due process concerns. Neither the APA nor NRC procedural regulations prohibit a licensing board member from seeking policy guidance from colleagues who are not assigned to the case[383] or from Commissioners on cases that are not yet on appeal to the Commission.[384] But where a case is actually on appeal to the Commission, communication between a Commissioner and a member of the Licensing Board who decided the case is, at best, an unsettled area of law.[385] It therefore presents a riskier situation.[386] The advantages of such

381. *See* 5 U.S.C. § 554(d)(2)(C) (2000) (providing that § 554 "does not apply . . . to the agency or a member or members of the body comprising the agency").

382. *See supra* note 292.

383. *See* Shulman, *supra* note 22, at 366, 374, 401-02 n.227, 409-10 (noting that such communications are similar to the conversations that a judge has with his own law clerks or a commissioner consulting a technical expert on his personal staff); Abramson, *supra* note 93, at 1377. *Cf.* MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(c) (2004) (permitting a judge to consult with other judges of the same court); Steven Lubet, *Ex Parte Communications: An Issue in Judicial Conduct*," 74 JUDICATURE 96, 100 (1990). But there still remains the risk that if two judges are contemporaneously deciding factually related cases, one of those judges could inadvertently inject off-the-record facts into the other's mind. Shulman, *supra* note 22, at 410.

384. Shulman, *supra* note 22, at 400-02 n.227; SECY-80-130, *supra* note 98, at 137. However, in the latter situation, the Commission must be careful not to prejudge the merits of the case being discussed. Shulman, *supra* note 22, at 400-02 n.227, 410; *cf.* SECY-80-130, *supra* note 98, at 139-40 (drawing similar conclusion regarding members of the Commission's now-defunct Appeal Board). Regarding the analogous area of the Commission issuing policy guidance to the Board prior to the beginning of any adjudication, see Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-1, 43 N.R.C. 1, 5-10 (providing guidance to the Licensing Board regarding four issues that petitioners sought to place in contention), *aff'd in part and rev'd in part*, CLI-96-7, 43 N.R.C. 235 (1996).

385. *See* Shulman, *supra* note 22, at 401-04.

386. *See id.* at 366 n.65, 401-02 (discussing the due process dangers associated with allowing a higher level adjudicator assigned to a case to consult with a lower level decisionmaker who has already rendered a decision in that case).

consultation are significant, especially in complex cases such as the anticipated adjudication in *Yucca Mountain*, "with masses of technical data."[387] The board members who judge the case will have presumably considered the issues from all perspectives, perhaps even more so than the parties and their counsel.[388] By tapping into the knowledge and insight of one or more board members who have already grappled with the facts and issues, the Commission could address issues on appeal in a more informed, quicker, and more focused manner.[389]

However, there are disadvantages to such a consultation between a Commissioner and a board member. One disadvantage is that the communication would go against at least the spirit of the Commentary on Canon 3(B)(7) of the American Bar Association's Model Code of Judicial Conduct, which states that "[i]f communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties." Neither the Commissioners nor the board members are, strictly speaking, subject to the Canon. Still, the Canon does carry the "power to persuade if lacking the power to control."[390]

Another disadvantage is that the board member is likely to be "psychologically wedded" to his or her board's position as presented in the LBP order and will, quite naturally, wish not to be reversed on appeal.[391] The board member might emphasize those portions of the record that support the board's decision and downplay those that do not.[392] He or she might also, off the record, defend his or her decision with justifications not in the LBP order.[393] The board member should, therefore, not be considered a source of unbiased advice.[394] Even assuming communications regarding *policy* are permissible under such circumstances, similar communications regarding an issue of *fact* or *law* would still be problematic if not downright improper.[395] There is, of course, the additional risk that such communications would *appear* unfair.[396]

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387. *See id.* at 402 (highlighting the government efficiency interest in allowing for such communication in complex cases).
388. *See id.* at 402, 411.
389. *See id.* at 402, 410-11 (observing that in complex cases, significant benefits can result from such consultations, despite any appearance of unfairness).
390. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).
391. *See* Shulman, *supra* note 22, at 402, 411.
392. *See id.* at 402.
393. *See id.* at 402 n.228.
394. *See id.* at 402; SECY-80-130, *supra* note 98, at 138-39.
395. *See* Asimow, *supra* note 74, at 762-63 & n.20, 769 n.50; 5 U.S.C. § 554(d) (2000); Alex Rothrock, *Ex Parte Communications with a Tribunal: From Both Sides*, 29 COLO. L. 55, 56 (2000) ("[I]t is improper for a trial judge to supply facts or case law ex parte to an appellate judge concerning a pending or impending proceeding before the appellate court.") (footnotes omitted).
396. Shulman, *supra* note 22, at 410.

The *Attorney General's Manual* concluded that the benefits of applying separation-of-functions limitations to communications between the trial and appellate level adjudicators outweighed the corresponding burdens, and it therefore encouraged such communication.[397] Nevertheless, the Commission has not followed the Attorney General's lead on this question. Prior to the abolition of the Appeal Board, the Commission's rules prohibited a presiding officer from consulting with a member of the Appeal Board on any fact at issue in cases that could be appealed to the Appeal Board—even in uncontested licensing proceedings.[398] The Commission, in its 1988 Final Rule regarding restricted communications, reaffirmed this position.[399]

b. Communications with Staff Witnesses

The APA does not address the issue whether a decisionmaker may consult with an agency staff member who has previously testified as a witness,[400] and the authorities are split on the question. Professor Davis considers such communications acceptable on the grounds that the witness is not presenting the case for the agency and would not necessarily "become absorbed" in the staff's position in the case or learn off-the-record facts, which he or she could then reveal in advising the decisionmaker.[401] Professor Asimow takes a similar but narrower position, arguing that witnesses who do nothing more than answer technical questions (either at a hearing or to adversaries as they prepare their case) need not be

397. *Id.* at 410 & n.251 (citing ATTORNEY GENERAL'S MANUAL*, supra* note 100, at 127) (discussing the benefits of communications, including improved accuracy of decisionmaking).

398. *See* 10 C.F.R. § 2.719(c) (1988) (rescinded) ("[I]n adjudications in which an appeal from the initial decision may be taken to the Atomic Safety and Licensing Appeal Board, the presiding officer shall not consult any member of the Atomic Safety and Licensing Appeal Panel on any fact in issue."); 10 C.F.R. pt. 2, app. A, § IX(c) (1988) (rescinded) ("[M]embers of atomic safety and licensing boards for particular proceedings shall not consult on any fact at issue in those proceedings—whether contested or uncontested—with members of the Appeal Board Panel.").

399. Revision to Ex Parte and Separation of Functions Rules Applicable to Formal Adjudicatory Proceedings, 53 Fed. Reg. 10,360, 10,362 (Mar. 31, 1988).

400. *See* Scalia, *supra* note 22, at vi-vii; Shulman, *supra* note 22, at 367. However, the ATTORNEY GENERAL'S MANUAL interprets § 554(d) as permitting a hearing officer to "obtain advise from or consult the agency personnel not engaged in investigative or prosecuting functions in that or a factually related case." Shulman, *supra* note 22, at 375, (quoting ATTORNEY GENERAL'S MANUAL, *supra* note 100, at 127).

401. *See* Davis, *supra* note 22, at 649, 651-53 (maintaining that specialists who have served as witnesses have been cross-examined regarding their positions, enhancing their credibility and competence as adjudicative advisors relative to other staff specialists); *see also* Shulman, *supra* note 22, at 367 & n.67, 399-400; SECY-80-130, *supra* note 98, at 84-85 and 131-32. The Supreme Court cited Professor Davis' position with approval in *Withrow v. Larkin*. *See* 421 U.S. 35, 56-57 n.24 (1975).

disqualified from later offering advice to a decisionmaker, assuming that their testimony is uncontroverted and that they do not take a substantial role in advocating or preparing one side of the case.[402]

By contrast to Professors Davis's and Asimow's view that the glass is half-full, Professor Shulman considers it half-empty. He posits that a staff witness *may* be at least as wedded psychologically to the staff's litigation position as the staff counsel. Therefore, if staff counsel are precluded from advising decisionmakers, staff witnesses likewise should be barred.[403] Professor Shulman agrees with Professors Davis and Asimow only to the following extent: if a staff witness is a "non-advocate," i.e., not tainted by a "will to win", then the witness' private advice to a decisionmaker would not offend due process.[404] He and Professor Davis also agree that "allowing adjudicators to seek advice from an expert who has testified and been subjected to cross-examination may be more fair [*sic*] than permitting adjudicators to consult experts who may have strong views which have not been subjected to vigorous public scrutiny."[405]

The issue of communication with NRC staff witnesses strikes me as one best resolved on a case-by-case basis, using the *Mathews v. Eldridge* balancing test. The principal factor should be the extent to which the staff witness has become an advocate for the staff's litigating position on the fact or issue about which the witness is testifying—the closer the witness comes to becoming an advocate, the less appropriate his advising a decisionmaker. Other significant factors would include the appearance of impropriety—i.e., how would the parties ever know whether the adjudicator and the witness had discussed controversial issues—the "will to please," fear of retribution, and *esprit de corps*.[406]

I would be negligent if I closed my discussion of this topic without alluding to a notable instance where the Commission took an extraordinary step to avoid any appearance of bias *vis-à-vis* expert witnesses in DOE's *Yucca Mountain* proceeding. In the 1980s, the Commission became concerned that its future use of expert witnesses from the DOE National Laboratories could suggest bias, given that those witnesses were on the payroll of the *Yucca Mountain* applicant. To avoid this appearance of bias, the Commission established its own federally funded research and

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402. Asimow, *supra* note 74, at 801.
403. *See* SECY-80-130, *supra* note 98, at 131-32; *see also* Shulman, *supra* note 22, at 367, 400, 406 (referring specifically to the NRC). *But see* Letter from Kenneth Culp Davis to Leonard Bickwit, Jr., at 2 (Mar. 19, 1980) (on file at NRC Public Document Room, 11555 Rockville Pike, Rockville, MD 20852, Document Accession No. 8005130601) (asserting that Professor Shulman, in SECY-80-130, ignored the Supreme Court's unanimous adoption of Professor Davis' position in the Court's *Withrow* decision).
404. Shulman, *supra* note 22, at 400, 406.
405. *Id.* at 367 & n.67, 399-400, 407; Davis, *supra* note 22, at 653 & n.113.
406. *See supra* note 141 and accompanying text.

development center (the Center for Nuclear Waste Regulatory Analysis) to provide the Commission with unbiased expert advice on the technical issues in the *Yucca Mountain* proceeding.[407]

c. Communications with Agency's Lawyer in Related Judicial Proceeding

Although § 554(d) of Title 5 is silent as to this kind of communication,[408] an attorney representing or advising the Commission in a *judicial* proceeding should not be treated as an adversary for purposes of determining whether that attorney is barred from advising the agency in a related administrative proceeding. The *Attorney General's Manual* provides that "[t]he general counsel's participation in rule making and in court litigation would be entirely compatible with his role in advising the agency in the decision of adjudicatory cases subject to [the APA]."[409] Logically, this position would apply to the NRC Solicitor as the agency's chief appellate-court lawyer and subordinate attorneys.

d. Communications with Adjudicatory Employees Regarding Matters on which They are Not Advising the Commission

The ex parte and separation-of-functions bans apply even regarding matters at issue in a proceeding but on which the adjudicatory employee is not advising the Commission. In the NRC's 1988 rulemaking to amend the ex parte and separation-of-functions regulations, the Commission rejected a commenter's proposal that ex parte communications with adjudicatory employees be permitted on subjects about which the employee was not advising the Commission. The Commission reasoned that the APA, the *Attorney General's Manual*, and federal case law all support the application of both the ex parte and separation-of-functions bars under such circumstances.[410] By contrast, the separation-of-functions prohibition does not apply to such communications between an investigatory or advocatorial employee and an adjudicatory employee in a case that is factually unrelated to the one before the latter employee.[411] Cases with fact patterns that are

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407. *See* NRC, SECY-85-338, Sponsorship of a Federally Funded Research and Development Center (FFROC) for Waste Management Technical Assistance and Research at 2 (Dec. 5, 1985), *available at* ADAMS Accession No. ML040510126.

408. Scalia, *supra* note 22, at vii.

409. ATTORNEY GENERAL'S MANUAL, *supra* note 100, at 130 n.8; *see also* ADJUDICATION GUIDE, *supra* note 22, at 123 (decisionmakers may consult with advocates on matters unrelated to the pending adjudication—such as pending rulemakings or pending judicial litigation); Asimow, *supra* note 74, at 777 (reasoning that the attorney in the judicial matter would not have developed a psychological commitment to the agency's position).

410. NRC, Final Rule, Revision to Ex Parte and Separation of Functions Rules Applicable to Formal Adjudicatory Proceedings, 53 Fed. Reg. 10,360, 10,362 (Mar. 31, 1988); *see also* SECY-88-43, *supra* note 97, at 5-6.

411. EDLES & NELSON, *supra* note 77, at 322.

merely similar to a case under adjudication do not constitute factually related cases.[412]

e. Communications of Former Adjudicatory Employees with NRC Staff Regarding Litigation or Investigations

The Commission has declined to take a position on whether a former adjudicatory employee in a proceeding may shed his or her adjudicatory role, return to a staff position and become a litigator or investigator in the same proceeding. Although the Commission saw no APA or due process bar to such an arrangement, it nevertheless concluded that the considerable breadth of its own personnel resources rendered a decision on this matter unnecessary, and that the Commission could address the matter later on a case-by-case basis, if necessary.[413]

The restricted communications bars would, at first glance, appear inapplicable. After all, the most frequently mentioned purpose of those bars is to protect the independence of the adjudicators by preventing someone on the adjudicatory side of the Chinese Wall from receiving information or advice from someone on the advocatory side of that Chinese Wall. Communications from a former adjudicatory employee have no adverse effect—indeed, no effect at all—on the retention of the adjudicator's independence.

The same cannot be said regarding the second main goal of the restricted communications prohibitions: to ensure the fairness of the hearing process. Such fairness would be compromised if one party can gain "insider information" on such matters as how the adjudicator is approaching the case, what issues the adjudicator considers critical, and which way the adjudicator is leaning on those issues.

f. Indirect Communications

Another unsettled "advocatorial" issue is the extent to which a supervisor, colleague, or subordinate of a staff adversary is barred from communicating with the Commission's decisionmakers regarding the merits of a proceeding.[414] As a relevant Joint Committee Report indicated:

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412. *Id.*; *see also* Marshall v. Cuomo, 192 F.3d 473, 484 (4th Cir. 1999); ATTORNEY GENERAL'S MANUAL, *supra* note 100, at 120 n.6 ("The employee of the agency . . . would not be prevented from assisting the agency in the decision of . . . cases (in which they had not [been] engaged either as investigators or prosecutors) merely because the facts of these other cases may form a pattern similar to those which they had theretofore investigated or prosecuted."); ADJUDICATION GUIDE, *supra* note 22, at 124 n.86.

413. NRC, Final Rule, Revision to Ex Parte and Separation of Functions Rules Applicable to Formal Adjudicatory Proceedings, 53 Fed. Reg. 10,360, 10,362 (Mar. 31, 1988).

414. ADJUDICATION GUIDE, *supra* note 22, at 123 n.81 (describing—in an understatement—the issue of whether the separation-of-functions ban applies to an

> Other employees in the same bureau as those litigating or investigating the case, including employees with overall supervisory responsibility for the investigator or litigator, are *not automatically barred* by the amendment from a later decisionmaking role. The applicability of this ban to such employees will *depend on all the circumstances*.[415]

This mushiness stems from the ambiguity of § 554(d) of Title 5, which imposes the separation-of-functions bar on an agency employee "*engaged in the performance* . . . of investigative or prosecuting functions for an agency . . . ." (emphasis added). This language obviously encompasses those who perform such functions, but it leaves open the question whether Congress also intended to include those in an actual supervisory, titular supervisory, subordinate, or collegial relationship to those who perform such functions.[416]

In draft recommendations, the ACUS staff floated the idea that a staff member should not be disqualified from advising an agency head solely by reason of the staff member's status as a supervisor, colleague, or subordinate of an adversary in a *non-accusatory* proceeding (such as a licensing case).[417] But the ACUS staff did suggest that subordinates and immediate supervisors of adversaries be subject to separation-of-functions constraints in all *accusatory* cases.[418] This distinction is fine in theory, but I question its usefulness in the NRC context, given the clearly adversarial nature of so many of the NRC's non-accusatory licensing cases.

By contrast, Professor Asimow (at least in 1981) would extend ACUS's proposed ban to all members of the same prosecuting office as the attorney on a case—i.e., not only supervisors and subordinates but also colleagues. He reasoned that an uninvolved prosecutor who, as an adjudicatory employee, furnishes the decisionmaker with advice that contradicts his office's position in the case would risk undermining the office's *esprit de corps* and might well fear that the case's prosecutor would retaliate in the future.[419] Professor Asimow appeared, however, to have modified this position by 2003, when he asserted that people become advocates only if they are "significantly and personally involved in adversary functions."[420]

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advocate's supervisors and subordinates as "not completely resolved").

415. Asimow, *supra* note 74, at 774 n.74 (quoting S. REP. No. 96-1018, pt. 1, at 85 (1980)) (emphasis added); *see also* SECY-80-130, *supra* note 98, at 70, 134.

416. *See* Scalia, *supra* note 22, at vi.

417. ACUS 1981 Draft Recommendations, *supra* note 95, at 26,488; ACUS 1980 Draft Recommendations, *supra* note 102, at 68,950.

418. ACUS 1981 Draft Recommendations, *supra* note 95, at 26,488; *see also* Shulman, *supra* note 22, at 366 (citing ATTORNEY GENERAL'S MANUAL, *supra* note 100, at 130).

419. Asimow, *supra* note 74, at 789 n.151.

420. ADJUDICATION GUIDE, *supra* note 22, at 122.

i. Uninvolved Supervisors

There is some judicial authority for the proposition that an immediate but uninvolved supervisor should be barred from rendering an adjudicatory decision. In *Columbia Research Corp. v. Schaffer*, the eminent Judge Learned Hand of the Second Circuit disqualified the Post Office General Counsel from rendering an appellate decision in a mail fraud case—on the ground that the subordinate prosecutor might select only those cases that would meet with the General Counsel's approval and that the General Counsel would therefore be judging a case he had indirectly prosecuted.[421] The NRC's current policy of permitting uninvolved supervisors—such as the agency's General Counsel—to advise adjudicatory personnel[422] in formal adjudications[423] is arguably inconsistent with at least the spirit of Judge Hand's position. In the NRC's Statement of Consideration to its 1988 Final Rule on restricted communications, the Commission noted that

> a member of the NRC staff who was not involved in conducting or supervising the technical review of an application that is the subject of an adjudicatory proceeding or the litigation of a matter before a[] . . . Board can serve as a confidential advisor to the Commission with respect to the application and the merits of the adjudication.[424]

Fortunately for the NRC, however, the Second Circuit appears to have subsequently abandoned Judge Hand's ruling. Eight years after *Columbia Research*, the same court issued *R.A. Holman & Co. v. SEC*, allowing a former prosecution supervisor to serve as a decisionmaker as long as he had not personally been involved in the prosecution of the same[425] or a factually-related case.[426] This holding rejects, albeit *sub silentio*, the premise in *Columbia Research* that an uninvolved supervisor may be considered to have indirectly prosecuted a case brought by his subordinates. Moreover, the D.C., Third and Ninth Circuits have each issued decisions reaching results similar to that in *Holman*.[427]

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421. *See* 256 F.2d 677, 679 (2d Cir. 1958); *see also* Trans World Airlines v. CAB, 254 F.2d 90, 91 (D.C. Cir. 1958).
422. *See* 10 C.F.R. § 2.4 (2006) (defining "investigative or litigating function"); NRC, SECY-85-328, Draft Federal Register Notice Proposing Revisions to the Commission's Ex Parte and Separation of Functions Rules, 12 (Oct. 15, 1985), *available at* ADAMS Accession No. ML061220084. Apparently, at one time the Commission had a more conservative policy that was consistent with Judge Hand's position. *See* Asimow, *supra* note 74, at 801 n.206.
423. As noted in Part III.A.2.a *supra*, the ex parte and separation-of-functions restrictions do not apply to informal adjudications.
424. NRC, Final Rule, Revision to Ex Parte and Separation of Functions Rules Applicable to Formal Adjudicatory Proceedings, 53 Fed. Reg. 10,360, 10,361 (Mar. 31, 1988).
425. *See* 366 F.2d 446, 452-53 (2d Cir. 1966); *see also* SEC v. R.A. Holman & Co., 323 F.2d 284, 285-86 (D.C. Cir. 1963).
426. Shulman, *supra* note 22, at 400.
427. American Gen. Ins. Co. v. FTC, 589 F.2d 462, 465 & n.11 (9th Cir. 1979) (stating

Judge Hand's reasoning in *Columbia Research* has also been challenged by some in academic circles. For instance, Professors Edles and Nelson note that

> [t]he strength of the court's construction of the APA is compromised . . . by its express holding that the real evil involved was the agency's failure to publish a regulation advising third parties of the relationship between the prosecutor and the judge, and its apparent willingness to allow the combination of functions as long as the public is advised.[428]

Professor Asimow also considers the decision unsound because prosecutors regularly select cases based on whether they are of a type generally approved by the decisionmaker. Moreover, according to Professor Asimow, reasons of practicality favor a decisionmaker having access to supervisory personnel, especially in unusually complex or important proceedings.[429] The NRC's adjudications frequently fall within one or the other of these categories. The upcoming new COL proceedings and the *Yucca Mountain* case will clearly fall under both.

Although such supervisors would probably have developed views about policy issues, those opinions would not, without more, make the supervisors (or, for that matter, any other advisor or decisionmaker)

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that "[m]ere general supervisory authority *in vacuo*, prior to initiation of the specific case, does not disqualify," but also noting that Supreme Court Justices who previously served as Attorneys General have uniformly declined to participate in cases that had been pending before the Department of Justice during their tenures as Attorneys General); Grolier, Inc. v. FTC, 615 F.2d 1215, 1221 (9th Cir. 1980) (noting that exposure to facts must be actual rather than potential to make an advisor an adversary); Au Yi Lau v. INS, 555 F.2d 1036, 1043 (D.C. Cir. 1977) (holding that he may serve as a decisionmaker because an uninvolved supervisor of advocates neither performed nor supervised any investigative or prosecutorial activities in the case at bar or in any other case arising out of the same transaction); Giambanco v. INS, 531 F.2d 141, 145 n.7 (3d Cir. 1976); San Francisco Mining Exch. v. SEC, 378 F.2d 162, 168 (9th Cir. 1967) (explaining in dictum that the supervisor of prosecutors of stock issuers was not disqualified from deciding a case brought against a stock exchange). *See generally* Stephen R. Melton, *Separation of Functions at the FERC: Does the Reorganization of the Office of General Counsel Mean What It Says?*, 5 ENERGY L.J. 349, 353-55 (1984).

428. EDLES & NELSON, *supra* note 77, § 11.3, at 322-23.

429. Asimow, *supra* note 74, at 774-75.

biased.[430] The D.C. Circuit's statement in *Lead Industries Ass'n* about agency decisionmakers is at least inferentially informative here:

> Agency decisionmakers are appointed precisely to implement statutory programs, and so inevitably have some policy preconceptions. . . . As Professor Davis has pointed out: "A Trade Commissioner should not be neutral on anti-monopoly policies, and a Securities and Exchange Commissioner should not be apathetic about the need for government restrictions."[431]

The D.C. Circuit likewise opined elsewhere that "an agency should not apologize for being predisposed to implementing the goals that Congress has set for it. To call such an attitude 'bias' . . . misses this central point."[432] From these rulings, one can extrapolate that an uninvolved supervisor's preconceptions about policy issues in a proceeding are insufficient to disqualify him or her from advising an agency adjudicator.

Finally, the uninvolved supervisor's lack of prior involvement in the case would presumably preclude that supervisor from introducing extra-record factual information into the decisionmaking process,[433] although it would not preclude the supervisor from tending, out of loyalty, to favor his or her subordinates' position,[434] particularly if their position stemmed from his or her own.

In sum, both current Commission practice and the current wisdom from the judiciary and academia are that an uninvolved supervisor is free to act as—and therefore, *a fortiori*, to consult with—a decisionmaker in a proceeding that his or her subordinate is prosecuting.

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430. Cinderella Career & Finishing Sch., Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970) (articulating the test of prejudgment in an adjudicatory proceeding as whether "a disinterested observer" would conclude that the decision-maker had "in some measure adjudged the facts as well as the law . . . in advance of hearing" the case)*; see also* Hortonville Joint Sch. Dist. No.1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 493 (1975) ("[A] decisionmaker is not disqualified simply because he has taken a position, even in public, on a policy issue related to a dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'"); Kennecott Copper Corp. v. FTC, 467 F.2d 67, 80 (10th Cir. 1972); Skelly Oil Co. v. Fed. Power Comm'n, 375 F.2d 6, 18 (10th Cir. 1967) ("[N]o basis for disqualification arises from the fact or assumption that a member of an administrative agency enters a proceeding with advance views on important economic matters in issue."), *aff'd in part and rev'd in part sub nom*. Permian Basin Area Rate Cases, 390 U.S. 747 (1968); 2 DAVIS & PIERCE, *supra* note 119, § 9.8, at 83, 86-87 (stating that an adjudicator is not disqualified from sitting in judgment on a case merely because he or she has previously taken a position on an matter of law, policy or legislative fact at issue in the proceeding).

431. Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1179 (D.C. Cir. 1980) (quoting KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 12.01, at 247 (3d ed. 1972)).

432. Association of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1169 n.38 (D.C. Cir. 1979) (quoting William F. Pedersen Jr., *The Decline of Separation of Functions in Regulatory Agencies*, 64 VA. L. REV. 991, 994 (1978)).

433. Asimow, *supra* note 74, at 801-02 & n.207; Melton, *supra* note 427, at 355-56.

434. *See* Shulman, *supra* note 22, at 408, 409.

ii. Involved Supervisors

The result is, of course, the exact opposite for a supervisor who *has* been personally involved in the prosecution of a case—he or she would be disqualified from advising the decisionmaker.[435] As noted in the immediately preceding section of this Article, the Commission explained in the Statement of Consideration to its 1988 Final Rule on restricted communications that

> a member of the NRC staff who was *not involved* in conducting or supervising the technical review of an application that is the subject of an adjudicatory proceeding or the litigation of a matter before a[] . . . Board can serve as a confidential advisor to the Commission with respect to the application and the merits of the adjudication.[436]

The clear "negative pregnant" implication of this statement is that an *involved* supervisor should not serve as such an advisor. This interpretation is also consistent with the Commission's decision to define "investigative or litigating function" as including "[p]ersonal participation in . . . supervising an investigation; or . . . [p]ersonal participation in . . . supervising the planning, development or presentation of testimony, argument, or strategy in a proceeding."[437]

But the analysis cannot end there. The key question remains: at what point is a supervisor considered to have become "personally involved" in a case? In *Amos Treat*, the D.C. Circuit barred an SEC division supervisor, who later became an SEC commissioner, from deciding a case that he had *helped to develop* as division supervisor. The court found that initiating an investigation, weighing its results and recommending the filing of charges constitutes sufficient personal involvement to justify disqualification.[438] From this ruling, it would logically follow that a supervisor who had been similarly involved in a case could not *advise* a decisionmaker regarding the case.[439] However, the Supreme Court's subsequent *Withrow v. Larkin* decision has rendered doubtful the current precedential value of *Amos Treat*. As noted above, the Supreme Court held in *Withrow* that "[t]he *mere exposure to evidence* presented in non-adversary investigative

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435. *See id.* at 366, 378 n.117, 400, 408.

436. NRC, Final Rule, Revision to Ex Parte and Separation of Functions Rules Applicable to Formal Adjudicatory Proceedings, 53 Fed. Reg. 10,360, 10,361 (Mar. 31, 1988) (emphasis added).

437. 10 C.F.R. § 2.4 (2006); *see also* Plaine, *supra* note 139, at 12.

438. *Compare* Amos Treat & Co. v. SEC, 306 F.2d 260, 266 (D.C. Cir. 1962) (holding that allowing the adjudication of a case after such participation would amount to a denial of due process), *with* R.A. Holman & Co., Inc. v. SEC, 366 F.2d 446, 452-53 (2d Cir. 1966) (deciding that the Commissioner's involvement in the agency before his appointment did not amount to performance of investigative or prosecuting functions). For a discussion of *Holman*, see Part III.B.3.f.i *supra*.

439. *See* Shulman, *supra* note 22, at 366 n.64. *See generally* ATTORNEY GENERAL'S MANUAL, *supra* note 100, at 124.

procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing."[440] But even after *Withrow*, the question still remains: where is the dividing line between "mere exposure to evidence" and helping to develop the case?

Even if a supervisor had merely been involved in the investigation of a case and had not decided whether to prosecute the case, the supervisor should likely still be barred from advising the decisionmaker. Whether or not the supervisor may have prejudged the case, he or she was nevertheless exposed to extra-record evidence that might, or might be perceived to, taint the advice given to the decisionmaker.[441] Moreover, this conclusion is consistent with the late Chief Justice Rehnquist's memorandum on disqualification in *Laird v. Tatum*, where he stated that a supervisory official should be disqualified "if he either signs a pleading or brief" or "if he actively participated in any case even though he did not sign a pleading or brief."[442] The late Chief Justice's position is presumably just as applicable to NRC legal supervisors who formally associated themselves with their staff's position by including their name on the staff pleading.[443]

Furthermore, a staff supervisor's advice to a decisionmaker would certainly give the *appearance* of impropriety,[444] for the opposing party would have no way of knowing the extent of the supervisor's involvement without deposing the decisionmaker, or the supervisor, or both—a headache that the NRC and its personnel would presumably prefer to avoid.[445] In my view, these precedents and negative factors collectively far outweigh the principal justification (however true it may be) for allowing even a minimally involved supervisor to advise a decisionmaker—that the supervisor must be presumed to be a person of integrity and capable of ignoring extra-record information with which he or she previously came in contact.[446]

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440. 421 U.S. 35, 55 (1974) (emphasis added); *see* 2 DAVIS & PIERCE, *supra* note 119, § 9.8, at 83 (describing *Amos Treat* as "inconsistent with *Withrow*").

441. SECY-80-130, *supra* note 98, at 82; Shulman, *supra* note 22, at 366, 409. However, Professor Shulman draws a distinction between the unbarred supervisor who "merely oversee[s] an initial investigation before a decision to prosecute" and the barred supervisor who "directs an investigation without actually bringing the case to prosecution." Shulman, *supra* note 22, at 366. But query whether this is a distinction without a difference or, at the very least, a conceptual distinction that would be quite difficult to parse in the real world.

442. 409 U.S. 824, 828 (1972); *see also id.* at 831-39; *cf.* American Gen. Ins. Co. v. FTC, 589 F.2d 462, 465 & n.11 (9th Cir. 1979) (noting that Supreme Court Justices who previously served as Attorneys General have uniformly declined to participate in cases that had been pending before the Department of Justice during their tenures as Attorneys General).

443. *See* Shulman, *supra* note 22, at 400-01.

444. *Id.* at 401, 408.

445. *See* Melton, *supra* note 427, at 355.

446. *Id.* at 356; Shulman, *supra* note 22, at 409; *see also* Carberry, *supra* note 107, at 72 n.34 ("Although the problem of agency deference to the interests of regulated industries is

The NRC General Counsel currently avoids this problem by exempting herself from any supervisory duties in licensing and enforcement cases. The chain of review in those cases proceeds through Associate General Counsel for Hearings, Enforcement and Administration, and ends with the Deputy General Counsel.

iii. Subordinates

Although the issue remains unsettled,[447] a subordinate of a supervisor who is an adversary in a proceeding should probably refrain from advising the decisionmaker. This approach is consistent with the spirit of the APA, which forbids a judge in a *formal* adjudication from being a subordinate of an investigator or litigator.[448] Even if the subordinate has been uninvolved in the investigation or trial of such a case, and even if he or she offers advice privately (so that the supervisor does not learn its content),[449] he or she may still feel compelled to support the supervisor's positions in the case[450] due to loyalty,[451] ambition, fear, or a combination of the three,[452] i.e., the "will to please." Even a neutral advisor may have been previously exposed to extra-record evidence that could unfairly affect his or her advice to the decisionmaker.[453] Finally, the subordinate's involvement would present at least the appearance of impropriety and would therefore fail the, admittedly nonbinding, "Caesar's wife" test.[454]

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well established, . . . there is a point at which the public must rely upon trust if the administrative system is to continue functioning effectively and attracting competent individuals to public service positions.").

447. ADJUDICATION GUIDE, *supra* note 22, at 123 n.81; Shulman, *supra* note 22, at 406-07. *Cf.* Allison, *supra* note 22, at 1194 n.143 (citing dictum in Columbia Research Corp. v. Schaffer, 256 F.2d 677, 679 (2d Cir. 1958), stating that the authority relationship would violate the APA if the complainant were the General Counsel and the adjudicatory official were the Assistant General Counsel).

448. 5 U.S.C. § 554(d)(2) (2000). The APA does not impose this restriction on informal adjudications.

449. Shulman, *supra* note 22, at 407-08.

450. *Id.* at 401 n.226, 407; Asimow, *supra* note 74, at 775.

451. A subordinate would be placed in a potentially difficult position of serving two masters. Shulman, *supra* note 22, at 407, 412; *cf.* Luke 16:13 ("No servant can serve two masters. Either he will hate one and love the other, or he will be devoted to one and despise the other.").

452. Allison, *supra* note 74, at 1190 (footnote omitted):

> [S]ubordinate-[s]uperior [r]elationships . . . may mean that the subordinate is economically dependent on the superior because of the control the latter has over the employment of the former. Thus, there is a very real possibility that authority relationships may cause a decision maker to have an economic stake in a particular outcome. Even if the subordinate has civil service status or other insulation, the superior may control working conditions, professional reputation, and opportunities for advancement.

See also Asimow, *supra* note 22, at 789 n.151 (discussing prosecutors who offer advice favorable to the defendant).

453. Shulman, *supra* note 22, at 408.

454. Asimow, *supra* note 74, at 776; Shulman, *supra* note 22, at 408.

iv. Colleagues

The Sixth Circuit in *Utica Packing Co. v. Block*[455] indirectly addressed the issue of whether a colleague of a trial attorney litigating a case on behalf of the agency may later advise the agency's adjudicator on that case. One of the parties in the case argued that the adjudicator should have disqualified himself because his legal assistant's immediate supervisor also supervised the division responsible for prosecuting the defendant in the enforcement proceeding at bar. The Court ruled that:

> In order for [10 U.S.C.] § 554(d) to cause disqualification where the adjudicator was not actually a prosecutor or investigator in the case or a factually related one, the person challenging his right to adjudicate has the burden of showing that some past involvement has acquainted him with ex parte information or engendered in him an unjudgelike "will to win."[456]

This "will to win" test would appear equally applicable in NRC administrative adjudications.

C. Rulemaking Proceedings

As a general matter, rulemakings address policy issues, while adjudications deal with the privileges, rights, and liabilities of individual entities or persons.[457] As a result, the rules associated with the ex parte and separation-of-functions bars (both of which are addressed in this Part of the Article) are generally quite different for rulemaking than for adjudication.

1. Informal Rulemakings[458]

Neither the APA nor the Commission's rulemaking regulations contain any ex parte or separation-of-functions prohibitions that are applicable to informal rulemaking proceedings.[459] Prior case law to the contrary has been severely limited, if not overruled outright, and is no longer followed.[460] Although various court of appeals decisions held, as late as

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455. 781 F.2d 71 (6th Cir. 1986).
456. *Id.* at 76.
457. *But see, e.g.*, Courtaulds Alabama, Inc. v. Dixon, 294 F.2d 899, 904-05 n.16 (D.C. Cir. 1961) (noting that some informal rulemakings have adjudicatory overtones and therefore must be treated differently for ex parte purposes); *see also* Davis, *supra* note 22, at 626-30 (discussing the sometimes murky distinction between adjudication and rulemaking).
458. For an excellent analysis of the interface between restricted communications and informal rulemaking, see RULEMAKING GUIDE, *supra* note 22, at 335-55.
459. *See, e.g.*, 5 U.S.C. § 553 (2000); 10 C.F.R. § 2.802 (2006); Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1540 n.15 (9th Cir. 1993); Alaska Factory Trawler Ass'n v. Baldridge, 831 F.2d 1456, 1467 (9th Cir. 1987); Sierra Club v. Costle, 657 F.2d 298, 400 (D.C. Cir. 1981); Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1179 n.151 (D.C. Cir. 1980) (citations omitted); Hercules, Inc. v. EPA, 598 F.2d 91, 124-25 (D.C. Cir. 1978) (citing the ATTORNEY GENERAL'S MANUAL, *supra* note 100) (citations to legislative history omitted); 2 DAVIS & PIERCE, *supra* note 119, § 7.6, at 334 & § 8.4, at 390.
460. *See* Action for Children's Television v. FCC, 564 F.2d 458, 474 (D.C. Cir. 1977)

1978, that due process requires more than the minimal procedures mandated by the APA, the Supreme Court's *Vermont Yankee* decision called into serious question the continuing validity of those holdings—especially to the extent they may be applicable to the NRC, one of whose informal rulemakings was at issue in *Vermont Yankee*.[461]

Due process does not necessarily require separation of functions in informal rulemakings.[462] The reasons are numerous and simple. First, the main purpose of at least most rulemakings is to permit the agency to educate itself,[463] and the goal of fairness is considerably less important than in administrative adjudications.[464]

(describing Home Box Office Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977), which takes a contrary position, as a "clear departure from established law"). *See generally* Michael E. Ornoff, *Ex Parte Communications in Informal Rulemaking: Judicial Intervention in Administrative Procedures*, 15 U. RICH. L. REV. 73, 93 (1980); Pierce, *supra* note 88, at 678-79; Richards, *supra* note 22, at 70-71, 86, 89; Verkuil, *supra* note 109, at 976, 980 & n.203, 981; Note, *Ex Parte Communication During Informal Rulemaking*, *supra* note 109, at 269, 277, 284-85 & nn.92, 103.

461. *See* EDLES & NELSON, *supra* note 77, § 11.4, at 330 (indicating that the *Home Box Office* doctrine has been limited to its facts); LUBBERS, *supra* note 98, at 226-28 (describing how the "sweeping generalizations" in *Home Box Office* were rejected in *Sierra Club*, *Marshall*, *Hercules*, and *ACT*); RULEMAKING GUIDE, *supra* note 22, at 336-38 (similar discussion); Allison, *supra* note 22, at 1207-08 n.167 ("[T]he *Home Box Office* court's addition of procedural requirements (ex parte prohibition) not founded upon a statutory requirement probably has not survived the Supreme Court's decision in *Vermont Yankee* . . . , unless the particular proceeding is dominated by adjudicative characteristics despite its label of informal rulemaking."). It should, however, be recognized that *Vermont Yankee* involved neither an ex parte communication nor information withheld from parties. Preston, *supra* note 25, at 648, 650.

462. LUBBERS, *supra* note 98, at 240; Shulman, *supra* note 22, at 395-96 & n.206-208. *But see* Preston, *supra* note 25, at 631-34 (suggesting that despite the absence of a legal entitlement necessary for a restricted communications prohibition based strictly on "due process," rulemaking participants may nonetheless have a "quasi-due process right" based on congressional intent).

463. *See Sierra Club*, 657 F.2d at 401 ("[Such communications may] spur the provision of information which the agency needs."); Ablard, *supra* note 22, at 475:

> Part of [federal agencies'] work is legislative in nature, and it is these legislative functions which require and justify ex parte contacts to obtain the expert advice of members of the staffs and the views of the industries which are regulated. In the performance of their legislative functions, it would be a mistake to exclude the agencies from these views. Congress cannot legislate in a vacuum and the agencies certainly can not be expected to do so.

See also Richards, *supra* note 22, at 69-70. This is probably why the "requirement that a decision be adequately supported by record evidence still allows non-public information (factual or policy-based) to play a decisive role in the agency's actual decision to adopt a particular [rulemaking] alternative, as long as the public record contained adequate support for the agency's explanation of its decision." William D. Araiza, *Judicial and Legislative Checks on Ex Parte OMB Influence over Rulemaking*, 54 ADMIN. L. REV. 611, 619 (2002) (footnote omitted).

464. *See* P. Coast European Conf. v. United States, 350 F.2d 197, 205 (9th Cir. 1965). *See generally* Shulman, *supra* note 22, at 357-58.

Second, private communications between the Commission and interested persons outside the agency (members of the public, the Executive branch or Congress)[465] may be helpful in developing compromise positions that could alleviate the need for later judicial appeals of the rule being promulgated.[466] In this respect, ex parte contacts in informal rulemakings have been described as "affirmatively desirable, for they help the administrators to know what affected parties want."[467] Similarly, Professor Davis supported the use of ex parte contacts in rulemakings, analogizing it to legislation, via the following rhetorical questions: "If Congress considers a bill [in open committee hearings and in floor debates,] would the court call the public discussions a sham if lobbyists talk to some congressmen before the votes are taken? Or is competition of the lobbyists with each other often the essence of democracy?"[468] Justice Antonin Scalia has likewise offered his support:

> An agency will be operating politically blind if it is not permitted to have frank and informal discussions with members of [the legislature] and the vitally concerned interest groups; and it will often be unable to fashion a politically acceptable (and therefore enduring) resolution of regulatory problems without some process of negotiation off the record.[469]

Third and fourth, such communications "may enable the agency to win needed support for its program [and] reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future . . . ."[470] Fifth, the kind of bias that generally surfaces in a rulemaking proceeding involves matters of law, policy, or legislative fact—rather than adjudicative fact—and therefore falls more into the realm of expert policy advice than biased counseling on matters of conduct or blameworthiness so often inherent in adjudications.[471] Sixth, one of the

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465. *See supra* notes 165-206 and accompanying text (regarding executive and legislative branch communications).

466. RULEMAKING GUIDE, *supra* note 22, at 340; ACUS, A GUIDE TO FEDERAL AGENCY RULEMAKING 223-28, 243-46 (2d ed. 1991); *Sierra Club*, 657 F.2d at 404-10 (regarding agency meetings with the president, the White House staff, and a senator).

467. Ornoff, *supra* note 460, at 76 n.17 (quoting 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 13.12, at 467 (1970 Supp.)).

468. Ornoff, *supra* note 460, at 91 n.80 (quoting 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 6:18, at 534 (2d ed. 1978 & 1979)*; see also* Carberry, *supra* note 107, at 85; *supra* Part III.A.1.b.i. However, Professor Davis' analogy does not apply to quasi-adjudicatory rulemaking proceedings*. See* Carberry, *supra* note 107, at 100.

469. 2 KOCH, *supra* note 25, § 6.12[3], at 329-30 (quoting Antonin Scalia, *Two Wrongs Make a Right: The Judicialization of Standardless Rulemaking*, 1 REG. 38, 41 (1977)).

470*. Sierra Club*, 657 F.2d at 401.

471. La. Ass'n of Indep. Producers v. FERC, 958 F.2d 1101, 1113 (D.C. Cir. 1992); Shulman, *supra* note 22, at 357; 1 DAVIS & PIERCE, *supra* note 119, § 7.6, at 336. Indeed, even in litigation, an adjudicator would not be disqualified from sitting in judgment on a case merely by the fact that he or she had previously taken a position on an matter of law, policy, or legislative fact at issue in the proceeding, nor would he or she be prohibited from engaging in communications with parties regarding matters of policy or legislative fact.

essential advantages of informal rulemaking is the "freedom to avoid the confines of a formal record in addressing policy issues."[472] And seventh, the alternative of requiring all restricted communications to be placed in the informal rulemaking's public record would be both costly and time-consuming.[473]

However, the ex parte or separation-of-functions exception for informal rulemakings is not absolute. There are three, or possibly four, situations in which the "informal rulemaking" exception would not apply and the restricted-communications bar would come into effect. Although most authorities and courts do not explicitly so state, the basis for such exceptions must be the Due Process Clause rather than the APA, since the latter's restricted-communications provisions do not govern informal rulemakings.

The first situation would occur where the staff serves as a conduit for improper ex parte presentations from persons outside the Commission.[474] The second involves the due process issue of prejudgment,[475] specifically

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1 DAVIS & PIERCE, *supra* note 119, § 8.4, at 391 & § 9.8, at 83.

472. Birnkrant, *supra* note 109, at 302; *see also* Brotman, *supra* note 26, at 1330 ("The informal rulemaking process is carefully designed to be efficient and politically responsive. Respect for the legislature's decision to place those values ahead of strict procedural fairness strongly counsels against adoption of the broad ban on ex parte communications . . . ."); Am. Airlines v. CAB, 359 F.2d 624, 629 (D.C. Cir. 1966):

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

473. *See* ACUS Recommendations: Ex Parte Communications in Informal Rulemaking Proceedings (Recommendation No. 77-3), 42 Fed. Reg. 54,251, 54,253 (Oct. 5, 1977) [hereinafter ACUS Recommendation 77-3]; RULEMAKING GUIDE, *supra* note 22, at 341; Carberry, *supra* note 107, at 92 (decrying the possibility that agency administrators would be required "to summarize and record for comment every phone call received, every newspaper article read, and every relevant personal experience had with an industry"); Birnkrant, *supra* note 109, at 307; Steven R. Andrews, Note, *Ex Parte Contacts in Informal Rulemaking*, 57 NEB. L. REV. 843, 853 (1978); Brotman, *supra* note 26, at 1329:

> [R]equiring that all ex parte contacts be reported would place a tremendous administrative burden on the staff responsible for the rulemaking, and could tend to fill the record with information of doubtful interest and utility to interested parties or to a reviewing court. The resulting cost and complexity would run directly counter to section 553 [of Title 5], and to express judicial statements aimed at preserving the flexibility of the informal rulemaking process (footnotes omitted).

474. *See* 10 C.F.R. § 2.348(e) (2006); United Steel Workers of Am. v. Marshall, 647 F.2d 1189, 1214 n.27 (D.C. Cir. 1980); LUBBERS, *supra* note 98, at 233-34 (citing ACUS Recommendation 80-6, *supra* note 180, at 86,407 and stating, "the Conference advised agencies to alleviate 'conduit' concerns by identifying and making public every communication that contains or reflects comments from persons outside the government, regardless of content"); Richard A. Nagareda, Comments, *Ex Parte Contacts and Institutional Roles: Lessons from the OMB Experience*, 55 U. Chi. L. Rev. 591, 607 (1988) ("Congress and outside critics have assailed OMB [Office of Management and Budget] as a mere 'conduit' of unrecorded ex parte information.") (footnote omitted); Verkuil, *supra* note 109, at 950-52 (regarding industry's use of White House advisors as conduits).

475. The D.C. Circuit in *Association of National Advertisers, Inc. v. FTC*, 627 F.2d

where there is "a clear and convincing showing of an unalterably closed mind on a matter critical to the disposition of the proceeding."[476]

The third situation is an informal rulemaking that resolves conflicting private claims to a valuable privilege or determines the specific rights of a person.[477] For instance, the D.C. Circuit has ruled that the ex parte bar was applicable when a federal agency was resolving conflicting private claims to the valuable privilege of a television channel.[478] In such a situation, an ex parte communication could prejudice the interests of competitors for the channel's license.[479] Likewise, the Supreme Court offered a similar test that subsumes the D.C. Circuit's test: "when an agency makes a quasi-judicial determination by which a very small number of persons are exceptionally affected, in each case upon individual grounds, . . . additional procedures may be required in order to afford aggrieved individuals due process."[480] Such situations would also call into play the distinction

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1151, 1157 (D.C. Cir. 1979), referred to the test quoted in the sentence associated with this footnote as "the prejudgment standard required by due process."

476. Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1180 (D.C. Cir. 1980) (citing *Ass'n of Nat'l Advertisers*, 627 F.2d at 1162-65, 1170-81); *see also* content of *supra* note 104 (regarding prejudgment); FTC v. Cement Inst., 333 U.S. 683, 701 (1948) (rejecting a trade association's claim of FTC bias on the ground that the prior statements of the Commissioners "did not necessarily mean that [their] minds . . . were irrevocably closed"). *But cf. Lead Indus. Ass'n*, 647 F.2d at 1180 n.153 (citing *Ass'n of Nat'l Advertisers*, 627 F.2d at 1181 (MacKinnon, J., dissenting in part)) (proposing a test that would require a showing by the preponderance of the evidence that there was substantial prejudgment or bias on any critical fact that must be resolved in the formulation of a rule). Also, compare the above stringent test for the rulemaking context with the more lenient test for the adjudicatory context as set forth in *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970); whether "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" (quoting Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir. 1959), *cert. denied*, 361 U.S. 896 (1959)). Thus, the proponent of a motion to disqualify not only has to show more in a rulemaking proceeding than in an adjudication, but also has to meet a higher standard of proof: "clear and convincing" evidence in the rulemaking context, as compared with "substantial evidence" in the adjudicatory context. *Compare Lead Indus. Ass'n*, 647 F.2d at 1170, 1174, *with id.* at 1160-61, respectively.

477. United Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1211, 1215 (D.C. Cir. 1981); *see also* Courtaulds, Inc. v. Dixon, 294 F.2d 899, 904-05 n.16 (D.C. Cir. 1961) (ruling that some informal rulemakings have adjudicatory overtones and therefore must be treated differently for ex parte purposes).

As a practical matter, the Commission rarely, if ever, conducts such quasi-adjudicative rulemakings. In such situations, the Commission could prohibit its staff from playing an advocatorial role, thereby precluding any possibility of biased staff advising the Commission in a manner prejudicial to the interests of a particular party.

478. *See* Action for Children's Television v. FCC, 564 F.2d at 475-76 & n.29, 477 (D.C. Cir. 1977).

479. *Cf.* Hawaiian Tel. Co. v. FCC, 589 F.2d 647, 654 n.13 (D.C. Cir. 1978) (finding no prejudice to competitors); Western Union Int'l, Inc. v. FCC, 568 F.2d 1012, 1019 (2d Cir. 1977).

480. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 542 (1978) (internal quotations omitted); *cf.* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (holding that a rulemaking involving few individuals may give rise to due process rights that do not apply to rulemakings that affect many individuals); Preston, *supra* note 25, at 633, 653-54 (listing exceptions to the *Vermont Yankee* ruling).

between interested parties presenting information ex parte on legal or policy issues and those presenting facts or evidence.[481] But the Commission rarely faces this kind of situation in its rulemakings.

The possible fourth situation is similar to, and perhaps merely a more general judicial paraphrase of, the third. It arises when an agency's consideration of an ex parte communication raises "serious questions of fairness"—a cryptic phrase offered several times by the D.C. Circuit.[482] The test for this standard is, according to the court, whether the ex parte communication "'gave to any interested party advantages not shared by all.'"[483] Such a test is so broad that it could easily render the informal rulemaking exception a nullity. The vague nature of the standard and the enormous breadth of its associated test may explain why the courts, including the D.C. Circuit itself, have been reluctant to rely on it as grounds for finding ex parte violations in rulemaking proceedings. Moreover, it is at least questionable whether the fourth exception—and, for that matter, the third—have survived the implication in *Vermont Yankee* that the minimal requirements of the APA are sufficient to satisfy the requirements of due process.[484]

To muddy the waters further, the D.C. Circuit's seminal decision regarding this cryptic test—*Sangamon*—was unclear as to whether the distinguishing characteristic triggering the "fairness" rights was the existence of "conflicting claims to a valuable privilege" or the presence of

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481. *See* Andrews, *supra* note 473, at 853.

482. *See Action for Children's Television*, 564 F.2d at 477; Home Box Office, Inc. v. FCC, 567 F.2d 9, 56 (D.C. Cir. 1977); *see also* Sangamon Valley Television Corp. v. United States, 269 F.2d at 224 (stating that the ex parte bar applies if (i) it resolves conflicting private claims to a valuable privilege and (ii) "basic fairness requires such a proceeding to be carried on in the open"); National Small Shipments Traffic Conf. v. ICC, 590 F.2d 345, 351 (D.C. Cir. 1978) (stating that fairness requires a prohibition of ex parte communication even in a case that falls under the ratemaking exception of the APA).

This potential fourth exception appears to have originated not in *Sangamon* but rather in *Morgan v. United States*, 304 U.S. 1, 18-19 (1937), where the Supreme Court ruled that in quasi-judicial administrative proceedings affecting liberty or property interests, fundamental fairness (based on due process considerations) requires all parties to have an opportunity to know and respond to the claims of the other party. However, the current precedential value of *Morgan*'s ban on ex parte communications in *informal* rulemakings is questionable, as the rulemaking at issue in that proceeding would today likely be categorized as a *formal* rulemaking under § 4(a) of the Government in the Sunshine Act, 5 U.S.C. § 557(d). *See* Richards, *supra* note 22, at 73-74 & n.57. At the time the Supreme Court issued *Morgan*, the distinction between formal and informal rulemakings did not yet exist. *Id.* at 85.

483. *Action for Children's Television*, 564 F.2d at 475, 477 (quoting *Home Box Office*, 567 F.2d at 56 (quoting Courtaulds, Inc. v. Dixon, 294 F.2d 899, 905 (D.C. Cir. 1961))); *see also* Birnkrant, *supra* note 109, at 281.

484. *See, e.g.*, Birnkrant, *supra* note 109, at 290; Preston, *supra* note 25, at 623.

a small number of participants.[485] In any event, most of the D.C. Circuit's post-*Sangamon* decisions have confined that case's ruling to situations involving conflicting claims to a valuable privilege.[486]

Finally, as to all four exceptions, a number of *policy* considerations at least arguably support an agency's application of restricted-communications provisions in the context of an informal rulemaking, even though Congress has not mandated such action. The application of these provisions to informal rulemakings could reduce insider influence, yield new sources of information, and heighten the level of acceptance for the final rule.[487] Conversely, a refusal to apply those provisions can result in the following "parade of horribles": (i) such communications contravene the principle of an accountable government; (ii) interested persons will be unable to respond to such off-the-record comments; (iii) reviewing courts would have an incomplete record on judicial appeal; (iv) interested people may be dissuaded from filing comments at all if they believe that their opponents have privileged access to agency decisionmakers;[488] and (v) staff members who were "unduly committed to a particular point of view" or who had a "will to please"[489] might distort public comments and other information when summarizing the record for the decisionmaker.[490]

The logical solution to the first four items in the parade of horribles is simply to place all written ex parte communications in the informal rulemaking's public docket file and require that written summaries of oral ex parte communications be prepared and placed in the public docket file.[491] But as ACUS stated so well, the fifth item is not so easily addressed:

> The opportunity of interested persons to reply could be fully secured only by converting rulemaking proceedings into a species of adjudication in which such persons were identified, as parties, and entitled to be, at least constructively, present when all information and arguments are assembled in a record. In general rulemaking, where there may be thousands of interested persons and where the issues tend to be broad

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485. *See* Preston, *supra* note 25, at 636-37.
486. *See id.* at 638 & n.120.
487. RULEMAKING GUIDE, *supra* note 22, at 339-40; LUBBERS, *supra* note 98, at 229.
488. RULEMAKING GUIDE, *supra* note 22, at 339; LUBBERS, *supra* note 98, at 229; ACUS Recommendation 77-3, *supra* note 473, at 54,253.
489. *See* RULEMAKING GUIDE, *supra* note 22, at 353-54; *supra* note 141 and accompanying text.
490. LUBBERS, *supra* note 98, at 242-43; RULEMAKING GUIDE, *supra* note 22, at 353-54.
491. *See* ACUS Recommendation 77-3, *supra* note 473, at 54,253; *see also* RULEMAKING GUIDE, *supra* note 22, at 341; LUBBERS, *supra* note 98, at 230-31. Written summaries of oral communications could, however, lead to collateral administrative litigation. Parties may seek to challenge the accuracy or completeness of the summary, which could lead to depositions and testimony—just the kind of time-consuming and costly adjudicatory quagmire that Congress in the APA was trying to avoid in the informal rulemaking context. *See* Andrews, *supra* note 473, at 860.

> questions of policy with respect to which illumination may come from a vast variety of sources not specifically identifiable, the constraints appropriate for adjudication are nei[t]her practical nor desirable.[492]

Professor Jeffrey Lubbers has, however, offered a general suggestion on how agencies should avoid the fifth item:

> To assure itself of the accuracy or completeness of rulemaking staff representations, as well as to increase public confidence in the fairness of the process, an agency should consider placing in the record any documents written by the staff that summarize or characterize the information in the rulemaking record. This procedure can provide a check to minimize the chances of distortion of public comments and other information in the record by staff members who may have become unduly committed to a particular point of view.[493]

Even though the APA's restricted-communications provisions have generally not applied to informal rulemakings, and even though the Supreme Court has advised *judicial* restraint in imposing procedural requirements beyond those expressly specified in the APA,[494] the Supreme Court also made clear that *agencies* are free to "grant additional procedural rights in the exercise of their discretion."[495] The Commission did exactly that when promulgating its Design Certification rulemaking for Westinghouse Electric's design for the AP600 reactor. The Commission stated in its Proposed Rule that, regardless of whether it adopted formal rulemaking procedures for the AP600 rulemaking, it would apply

> certain elements of the ex parte restrictions in 10 CFR 2.780(a) . . . . [T]he Commission will communicate with interested persons/parties, the NRC staff, and the licensing board with respect to the issues covered by the hearing request only through docketed, publicly-available written communications and public meetings. Individual Commissioners may communicate privately with interested persons and the NRC staff; however, the substance of the communication shall be memorialized in a document which will be placed in the [Public Document Room] and distributed to the licensing board and relevant parties.[496]

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492. ACUS Recommendation 77-3, *supra* note 473, at 54,253.

493. RULEMAKING GUIDE, *supra* note 22, at 353-54.

494. Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 524 (1978); *see also* Ass'n of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1166 (D.C. Cir. 1979).

495. *Vermont Yankee*, 435 U.S. at 524; *see also id.* at 546; Preston, *supra* note 25, at 634 (regarding similar Congressional intent that the APA "rights . . . are merely 'an outline of minimum essential rights'" (citation omitted)) and 660 n.278 ("The legislative history, part of which was quoted in *Vermont Yankee*, supports the view that, where public policy interests are at stake, it is up to the agency to determine if the procedures used should extend beyond the minimum set by the [APA]."); Birnkrant, *supra* note 109, at 287.

496. NRC, Proposed Rule, AP600 Design Certification, 64 Fed. Reg. 27,626, 27,632 (proposed May 20, 1999); *see also* Staff Requirement Memorandum from Samual J. Chilk, Secretary, NRC, to William C. Parler, General Counsel, NRC, SECY-92-381, Rulemaking

On this same matter, the D.C. Circuit's advice in dictum to the Environmental Protection Agency in *Hercules* seems equally applicable to the NRC:

> The fact that the attorneys who represented the staff's position at the administrative hearing were later consulted by the judicial officer who prepared the final decision possibly gives rise to an appearance of unfairness, even though the consultation did not involve factual or policy issues.[497]

The D.C. Circuit in *Hercules* urged agencies and Congress to "proscribe post-hearing contacts between staff advocates and decisionmakers" and suggested the disclosure of such contacts.[498] In enunciating this dictum, the Court relied on Senator McCarren's remark that "it is the feeling of the committee that, where cases present sharply contested issues of fact, agencies should not as a matter of good practice take advantage of the exemptions [in 5 U.S.C. § 554(d)(A)-(C)]."[499]

A number of federal agencies and departments have taken the court's advice—either voluntarily or perforce. For instance, the 1980 Amendments to the Federal Trade Commission Act require the FTC "to place a verbatim record or summary of ex parte contacts in the rulemaking record."[500] The Consumer Product Safety Commission requires open agency meetings and public disclosure of communications: "[n]otice must be given of virtually all meetings between agency employees and outside persons; the public may attend any meeting; and summaries are kept of all meetings and telephone conversations between agency employees and

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Procedures for Design Certification, at 2 (Apr. 30, 1993), *available at* ADAMS Accession No. ML003760303.

497. Hercules, Inc. v. EPA, 598 F.2d 91, 127 (D.C. Cir. 1978); *see also* AT&T v. FCC, 449 F.2d 439, 453 (2d Cir. 1971) (explaining that it was "ill-advised" for an FCC staff member who took an adversary position at the hearing and introduced evidence, to participate later as an advisor to the Commission regarding its final decision in a ratemaking proceeding). In support of its dictum, the Second Circuit in *AT&T* quoted with approval Professor Davis' comment that

> something is wrong with a system in which evidence is taken and findings are made on the record and yet counsel who are trying to win for one point of view are allowed to participate in the decision. * * * Even if the theory of this kind of rate making is that it is rule making and not adjudication, those who are trying to win for one side should not participate in the final decision. At the time of final decision the Commission should be insulated from contamination by the advocates.

Id. (quoting KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 13.02, at 458 (1970 Supp.)) (alteration in the original).

498. 598 F.2d at 127 (emphasis omitted); *see also* RULEMAKING GUIDE, *supra* note 22, at 353-54 (noting that such a procedure can provide a check to reduce the chances of distortion of the record by staff members). For instance, in *Louisiana Ass'n of Indep. Producers v. FERC*, the D. C. Circuit praised the Federal Energy Regulatory Commission for placing into the public record summaries of its oral communications with the industry representatives in a pipeline certification case (which is a kind of rulemaking proceeding). *See* 958 F.2d 1101, 1112 (D.C. Cir. 1992).

499. *Hercules*, 598 F.2d at 127 (quoting 92 CONG. REC. 2159 (1946)).

500. RULEMAKING GUIDE, *supra* note 22, at 341 (citing 15 U.S.C. § 57a(j)).

interested persons."[501] The Department of Agriculture has a policy of avoiding ex parte communications during rulemakings, and if such communications do occur, then "the agency official is to draft a memorandum detailing the communications for inclusion in the rulemaking record."[502]

2. Formal Rulemakings

The APA's separation-of-functions restrictions do not apply to formal rulemakings[503]—a procedure that the Commission has rarely used.[504] By contrast, due process requires that ex parte restrictions apply to formal rulemakings,[505] though not prior to the issuance of a notice of proposed rulemaking.[506] A separation-of-functions challenge to a formal rulemaking likewise will generally fail when proffered on due process grounds,[507] for constitutional due process does not apply to *non*-quasi-adjudicatory rulemakings.[508] At one point, however, the Commission at least implied

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501. *Id.* at 342 (citing 16 C.F.R. pt. 1012).

502. *Id.* at 343.

503. *Id.* at 351 ("[I]n formal rulemaking proceedings . . . , the Act leaves the hearing officer entirely free to consult with any other member of the agency's staff."); EDLES & NELSON, *supra* note 77, § 4.6, at 81 (observing that separation of functions is inapplicable to formal and informal rulemaking); Asimow, *supra* note 74, at 777 (noting that section 554 applies only to formal adjudication).

504. The Commission and its predecessor (the AEC) have used formal rulemaking procedures only twice—in Mixed Oxide Fuel, CLI-77-33, 6 N.R.C. 861 (1977), and CLI 78-10, 7 N.R.C. 711 (1978), and in Emergency Core Cooling Sys., CLI-73-39, 6 A.E.C. 1085, 1086 (1973). Indeed, formal rulemaking has generally "fallen into disrepute." Araiza, *supra* note 463, at 628; *see also* LUBBERS, *supra* note 98, at 5 ("[F]ormal rulemaking procedures . . . are seldom used except in ratemaking, food additives cases, and other limited categories of proceedings."); Breger, *supra* note 22, at 347 ("Formal rulemaking, whatever its conceptual virtue in ensuring due process, has failed in practice because it emphasizes trial-type procedures that are not suited for exploration of the general characteristics of an industry.").

505. *See* Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1540 n.13, 1541 n.19 (9th Cir. 1993); Orangetown v. Ruckelshaus, 740 F.2d 185, 188 (2d Cir. 1984); Sierra Club v. Costle, 657 F.2d 298, 400 (D.C. Cir. 1981); Araiza, *supra* note 463, at 627; LUBBERS, *supra* note 98, at 225 n.1; Peck, *supra* note 22, at 251; Preston, *supra* note 25, at 627, 628 n.43, 651; Richards, *supra* note 22, at 67-68, 74.

506. *See* Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir. 1977) (holding that a total ban on ex parte contacts applies once the agency issues the notice of proposed rulemaking); Preston, *supra* note 25, at 639-40 & n.132 (describing Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393-95 (D.C. Cir. 1973), as "in effect transplanting [section 553's] required statement of basis and purpose from the published rule to the notice of rulemaking"); Richards, *supra* note 22, at 74.

507. *See* AT&T v. FCC, 449 F.2d 439, 455 (2d Cir. 1971) (commenting that cases generally reject the idea that a combination of judicial and adversary functions is a denial of due process); 4 STEIN, MITCHELL & MEZINES, *supra* note 75, § 33.02[3], at "33-31".

508. *Compare* Araiza, *supra* note 463, at 629 ("Constitutional due process does not apply to rulemaking."), *with* Richards, *supra* note 22, at 74 (citing Morgan v. United States, 304 U.S. 1, 18-19 (1938), for the proposition that, in quasi-judicial administrative proceedings affecting liberty or property interests, "the due process clause [forms] the basis for control on ex parte contacts").

the contrary. In its Proposed Rules for three recent design certifications, the Commission stated:

> Unless the formal procedures of 10 CFR Part 2, subpart G are approved for a formal hearing in the design certification rulemaking proceeding, the NRC staff will *not* be a party in the hearing and separation of functions limitations will *not* apply. The NRC staff may assist in the hearing by answering questions . . . put to it by the licensing board, or to provide additional information, documentation, or other assistance as the licensing board may request.[509]

The implication of the Commission's double-negative is that, if formal procedures *were* approved, then separation-of-functions limitations *could* apply.

D. Remedies for Violations of the Commission's Ex Parte and Separation-of-Functions Regulations

When various United States Courts of Appeals have needed to prescribe remedies for prohibited communications affecting agency actions, those courts' choice of remedies has generally been governed by their interest in confirming or reestablishing the integrity and the fairness of the administrative process, as well as by equitable considerations. For instance, a court may consider

> the gravity of the communications, whether they influenced the agency's ultimate decision, whether the party making the improper contact benefited from the ultimate decision, whether the contents of the communication were unknown to opposing parties, and whether vacation of the agency's decision and remand for a new proceeding would serve a useful purpose.[510]

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509. NRC, Proposed Rule, Standard Design Certification for the System 80+ Design, 60 Fed. Reg. 17,924, 17,944 (proposed Apr. 7, 1995) (emphases added); NRC, Proposed Rule, Standard Design Certification for the U.S. Advanced Boiling Water Reactor Design, 60 Fed. Reg. 17,902, 17,921 (proposed Apr. 7, 1995) (emphases added); NRC, Proposed Rule, AP600 Design Certification, 64 Fed. Reg. 27,626, 27,632 (proposed May 20, 1999) (emphases added); *see also* Staff Requirements Memorandum from Samuel J. Chilk, Secretary, NRC, to William C. Parler, General Counsel, NRC, "SECY-92-381 – Rulemaking Procedures for Design Certification," at 2 (Apr. 30, 1993), *available at* ADAMS Accession No. ML003760303.

510. ADJUDICATION GUIDE, *supra* note 22, at 114 n.55 (citing PATCO v. FLRA, 685 F.2d 547, 564-65 (D.C. Cir. 1982)); *see also* Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-18, 24 N.R.C. 501, 506 (1986) (citing *PATCO*, 685 F.2d at 564-65); Freeman Eng'g Assoc., Inc. v. FCC, 103 F.3d 169, 184 (D.C. Cir. 1997); Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431, 1436 (9th Cir. 1986); *Home Box Office*, 567 F.2d at 58-59; *PATCO*, 685 F.2d at 571-72 (applying the factors and finding the majority of the ex parte communication to be both unrelated and uninfluential to the case).

The Commission's response to such a communication should be premised on those same kinds of factors. And common sense rather than mechanical rules should determine the appropriate remedy.[511]

A decisionmaker or adjudicatory advisor need not disqualify him- or herself if contacted by an interested outside party regarding a contested issue in an adjudicatory or quasi-adjudicatory proceeding.[512] Nor, as a general rule, does the agency's decision need to be vacated.[513] Rather, the normal remedy for such a situation is for the individual to place the prohibited written communication—or, in the case of oral communications, a written summary of the conversation—in the NRC's adjudicatory record, as provided by 5 U.S.C. § 557(d)(1)(C) and 10 C.F.R. § 2.347(c)[514] and to serve copies on all parties.[515] The remaining parties could then be offered the opportunity to comment on the contents of the communication.[516] "As in the [F]irst [A]mendment area, the proper remedy . . . is more speech, not

511. *See PATCO*, 685 F.2d at 565.

512. Indeed, if disqualification were the remedy, a party could easily eliminate unsympathetic decision-makers merely by initiating ex parte communications with them. *See* 2 KOCH, *supra* note 25, at 322. For a good general discussion of the need for disqualification in the rulemaking context, see LUBBERS, *supra* note 98, at 257-61.

513. *See Southwest Sunsites*, 785 F.2d at 1436; *PATCO*, 685 F.2d at 564 & n.31; Peck, *supra* note 22, at 266 ("[W]here an unscrupulous party's objective was vacation of the proceeding, he could accomplish his ends by causing . . . [an ex parte] communication to be made.").

514. *See* Plaine, *supra* note 139, at 23, *available at* ADAMS Accession No. ML061220084; *see also* Letter from Andrew L. Bates, Acting Secretary, NRC, to Alexander P. Murray, NRC Staff (May 4, 2005), *available at* ADAMS Accession No. ML051290410 (informing an NRC staff member that his letter regarding the construction authorization of the mixed-oxide fuel fabrication facility addresses issues that could become issues in an adjudication and that SECY is therefore placing the letter in the adjudicatory record); Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-5, 43 N.R.C. 53, 55-56 (1996); Hydro Res., Inc., Docket No. 40-8968-ML, slip op. at 2 n.2 (Licensing Board Sept. 13, 1995), appended as Exhibit 6 to Duke Cogema Stone & Webster, Docket No. 70-0398-ML, *available at* ADAMS Accession No. ML012280162. *See generally* Comment, *Ex Parte Contacts with the Federal Communications Commission*, *supra* note 25, at 1193 (noting that placing ex parte communications in the record will deter such activity); Birnkrant, *supra* note 109, at 279, 283.

515. *See* Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), 24 N.R.C. at 505; *see also* Philadelphia Elec. Co. (Limerick Generating Station, Units 1 and 2), ALAB-840, 24 N.R.C. 54, 57 n.1, *vacated on other grounds*, CLI-86-18, 24 N.R.C. 501 (1986). *See generally* Allison, *supra* note 22, at 1208-09; Birnkrant, *supra* note 109, at 279; Comment, *Ex Parte Contacts with the Federal Communications Commission*, *supra* note 25, at 1193; Peck, *supra* note 22, at 266. Commissioners have regularly taken this step when subjected to ex parte communications from members of the House of Representatives or the Senate. *See, e.g.*, Memorandum from Lando W. Zeck, Jr., Commissioner, NRC, to Samuel J. Chilk, Secretary, NRC, "Summary of Conversation with Congressman Hochbrueckner" (May 22, 1987), *available at* ADAMS Accession No. ML061220102; *see also supra* note 168 and accompanying text.

516. *See* Note, *Ex Parte Communication During Informal Rulemaking*, *supra* note 109, at 279. *Cf.* Peck, *supra* note 22, at 267 (posing the question of whether other parties to the proceeding should have an opportunity to rebut the substance of the ex parte communication on the theory that its effect cannot otherwise be eradicated, but opposing this solution as unwise and impractical, at least in the informal rulemaking context).

silence."[517] This approach avoids having to address the Commission's, or a Licensing Board's, inability to expunge from its collective memory what was said to it ex parte.[518] Even if the illicit communication is "discovered too late for the other parties to rebut it without demanding a rehearing,[519] a disclosure requirement alerts the others to their opportunity of claiming prejudice, eases their burden of proof on that issue, and brings upon the communicant appropriate disapprobation."[520]

In situations where the scope or details of the ex parte communication are not completely set forth on the record or where their impact on the adjudicator's decision is not completely known, the Commission or board may wish to grant appropriate discovery to the injured party or parties,[521] or request a detailed explanation from those involved in the communication at issue.[522] Also, the Commission may choose to remand the ex parte issue to the presiding officer or Licensing Board for an evidentiary hearing.[523]

In those few "egregious cases"[524] where further remedy is appropriate, the Commission may impose sanctions on the interested party or counsel that initiated the improper communication if such submission renders the party or counsel guilty of "disorderly, disruptive, or . . . contemptuous conduct."[525] Alternatively, the Commission may, under § 557(d)(1)(D),

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517. Richard A. Nagareda, *Ex Parte Contacts and Institutional Roles: Lessons from the OMB Experience*, 55 U. CHI. L. REV. 591, 623 (1988) (citing Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

518. *See* Home Box Office, Inc. v. FCC, 567 F.2d 9, 58 (D.C. Cir. 1977).

519. *See* Peck, *supra* note 22, at 268 (proposing that, in such situations, federal agencies be given authority to reopen the record to receive additional evidence). *See generally* 10 C.F.R. § 2.326 (2006) (addressing "motions to reopen").

520. Comment, *Ex Parte Contacts with the Federal Communications Commission*, *supra* note 25, at 1193.

521. *See* Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1549-50 (9th Cir. 1993); Sokaogon Chippewa Cmty. v. Babbitt, 929 F. Supp. 1165, 1176 (W.D. Wis. 1996); 2 KOCH, *supra* note 25, at 322.

522. *See generally* Abramson, *supra* note 93, at 1346, 1361.

523. *See Portland Audubon Soc'y*, 984 F.2d at 1549-50; WORZ, Inc. v. FCC, 268 F.2d 889, 890 (D.C. Cir. 1959) (remanding the case to the FCC for an evidentiary hearing); Massachusetts Bay Telecasters, Inc. v. FCC, 261 F.2d 55, 66-67 (D.C. Cir. 1958). *See generally* Comment, *Ex Parte Contacts with the Federal Communications Commission*, *supra* note 25, at 1193, 1194-96.

524. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-18, 24 N.R.C. 501, 505 (1986).

525. 10 C.F.R. § 2.314(c) (2006); 10 C.F.R. § 2.713(c) (1988) (rescinded); *see also* Limerick, *supra* note 225, at 505. *Cf.* Allison, *supra* note 22, at 1209 & nn.170-71 (referring to state court judges being reprimanded, censured or disqualified from sitting on a particular case but, because no bad motives had been shown, not removed from office). *See generally* 5 U.S.C. § 556(d) (2000); PATCO v. FLRA, 685 F.2d 547, 564 n.30 (D.C. Cir. 1982); Peck, *supra* note 22, at 271-72 (referring to permanent disbarment from practice before the agency or temporary disqualification from such practice); Stone, *supra* note 22, at 144, 147-48 (referring to the Civil Aeronautics Board's ability to disqualify, either temporarily or permanently, any violator from practicing or appearing before the agency).

Given the paucity of NRC case law addressing sanctions for the violation of the NRC's restricted communications rules, the reader may wish to peruse, for comparative purposes, the following decisions where attorneys were chastised or disciplined for other

require the party to show cause why its "claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected" because of the improper communication.[526] Even if a party is not disqualified or its interest "otherwise adversely affected," the Commission could still consider the party's illicit behavior in that or future licensing proceedings as evidence of that party's character.[527]

However, all of these more draconian remedies are appropriate "only when [a] party made the illegal contact knowingly."[528] They would therefore appear to be inapplicable to most situations involving restricted communications.[529] These remedies should also be inapplicable if they *in*

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kinds of errors: Nuclear Mgmt. Co. (Palisades Nuclear Plant), LBP-06-10, 63 N.R.C. 314, 382-88 (2006) (Additional Statement of Administrative Judge Ann Marshall Young), *aff'd*, CLI-06-17, 63 N.R.C. 727 (2006); Nuclear Mgmt. Co. (Monticello Nuclear Generating Plant), CLI-06-6, 63 N.R.C. 161, 164 n.18 (2006); Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 N.R.C. 32, 38-39 & n.5 (2006) & CLI-04-36, 60 N.R.C. 631, 643-44 (2004); Houston Power & Lighting Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 N.R.C. 595, 627, *aff'd*, ALAB-849, 24 N.R.C. 523 (1986); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-85-45, 22 N.R.C. 819, 827-28 (1985); Pacific Gas and Elec. Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 N.R.C. 45, 54 (1983); Wisconsin Elec. Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-62, 14 N.R.C. 1747, 1760 (1981); Metro. Edison Co. (Three Mile Island Nuclear Station, Unit No. 2), ALAB-474, 7 N.R.C. 746, 748-49 (1978); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-417, 5 N.R.C. 1442, 1445 (1977); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-332, 3 N.R.C. 785, 788 (1976); Northern Ind. Pub. Serv. Co. (Bailly Generating Station, Nuclear-1), ALAB-204, 7 AEC 835, 837-38 (1974); Louisiana Power & Light Co. (Waterford Steam Elec. Station, Unit 3), ALAB-121, 6 AEC 319 (1973).

526. 5 U.S.C. § 557(d)(1)(D) (2000); *see also* Limerick, *supra* note 225, at 504-05 (citing 5 U.S.C. § 557(d)(1)(D)); Jacksonville Broad. Corp. v. FCC, 348 F.2d 75, 78-79 (D.C. Cir. 1965) (disqualifying a party committing an ex parte violation from competing for a broadcasting license); WKAT, Inc. v. FCC, 296 F.2d 375, 382-83 (D.C. Cir. 1961); Limerick, *supra* note 225, at 505 (citing 5 U.S.C. § 557(d)(1)(D)); EDLES & NELSON, *supra* note 77, § 11.4, at 327 & n.83; 2 KOCH, *supra* note 25, § 6.12, at 322-23; Peck, *supra* note 22, at 272 ("With respect to the parties themselves, . . . disqualification in the proceeding or forfeiture of a privilege or benefit may be used effectively."); Stone, *supra* note 22, at 147-48 (referring to the CAB's authority to deny a violator the relief it seeks in a case).

527. *See generally* Peck, *supra* note 22, at 273.

528. *PATCO*, 685 F.2d at 567 n.42 (quoting S. REP. NO. 94-354, at 39 (1975)); *see* Rodgers Radio Commc'n Serv., Inc. v. FCC, 593 F.2d 1225, 1233-34 (D.C. Cir. 1978) (affirming the FCC's decision to strike an ex parte letter from the record but not to reject the associated petition for reconsideration); ADJUDICATION GUIDE, *supra* note 22, at 113 n.52 (stating that an agency should not require a showing why his or her claim should not be dismissed, denied, etc., "where the violation was clearly inadvertent"); Birnkrant, *supra* note 109, at 277 n.50 (emphasis in original):

> An agency may rule against a party because the proceeding was tainted by ex parte communication, but only when the party knowingly made the illegal contact. If the agency views an *inadvertent* contact as having irrevocably affected the decision-making process, the agency is limited to creating a new record.

See also Note, Ex Parte *Contacts Under the Constitution and Administrative Procedure Act*, *supra* note 104, at 387 (addressing the issue of deciding against the party who made an ex parte communication in an informal rulemaking).

529. *See PATCO*, 685 F.2d at 564 ("Congress did not intend . . . that an agency would require a party to 'show cause' after every violation or that an agency would dismiss a party's interest more than rarely."); *Limerick*, *supra* note 225, at 504-07.

any way impair the Commission's ability to protect public health and safety, common defense and security, or the environment.[530]

In the most extreme situations, an improper communication may necessitate vacating a Board or Commission decision.[531] However, to merit so drastic a remedy, the communication must taint the decision-making process so badly as to make the ultimate judgment unfair either to an innocent party or to the public interest that the agency is charged with protecting.[532] One example of such a situation exists when "the ex parte contacts are of such severity that an agency decision maker should have disqualified himself."[533] Another example is the "corrupt tampering with the adjudicatory process" through the use of threats or promises.[534] In deciding whether the ex parte communication requires so extreme a remedy, the Commission should consider the factors set forth in the Adjudication Guide. The Commission should also consider whether the advantages in terms of "efficiency and . . . accuracy . . . so outweigh resulting negative fairness perceptions that admittedly improper ex parte communications should remain unremedied."[535]

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530. *See* 10 C.F.R. § 2.347(d) (2006) ("[T]he Commission or other adjudicatory employee presiding in a proceeding may, *to the extent consistent with . . . the policy of the underlying statutes*, require the party to show cause why its claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the violation.") (emphasis added). *See generally* Comment, *Ex Parte Contacts with the Federal Communications Commission*, *supra* note 25, at 1194 ("[W]hen the public interest may bear no relation to the character of the communicant . . . the public should not be punished for the private party's wrong, and the fact of the improper approach should be irrelevant.").

531. *See* Note, Ex Parte *Contacts Under the Constitution and Administrative Procedure Act*, *supra* note 104, at 387 (1980) (arguing for initiation of a new rulemaking proceeding in such an instance). *But see* Peck, *supra* note 22, at 266:

> While the ideal of pure untainted justice might be enhanced by the vacation of every proceeding in which an ex parte communication was made, this solution would be undesirably expensive and time consuming . . . . [I]n those cases where an unscrupulous party's objective was vacation of the proceeding, he could accomplish his ends by causing such a communication to be made.

Compare Jarrott v. Scrivener, 225 F. Supp. 827, 836 (D.D.C. 1964) (invalidating board order), *and* Jacksonville Broad. Corp. v. FCC, 348 F.2d 75, 80 (D.C. Cir. 1965) (declaring an administrative proceeding void due to ex parte communication with a commissioner, and requiring an entirely new proceeding to be held), *with* Braniff Master Executive Council v. CAB, 693 F.2d 220, 227 (D.C. Cir. 1983) (declining to invalidate agency decision), *and* United Air Lines v. CAB, 309 F.2d 238, 241 (D.C. Cir. 1962) (same).

532. *See PATCO*, 685 F.2d at 564, 571. *See generally* Marathon Oil Co. v. EPA, 564 F.2d 1253, 1265 (9th Cir. 1977) ("[T]o constitute fatal error, it must appear that an administrative agency's journey outside the record [in reaching a decision] worked substantial prejudice." (quoting United States v. Pierce Auto Freight Lines, 327 U.S. 515, 530 (1946)); NLRB v. Johnson, 310 F.2d 550, 552 (6th Cir. 1962).

533. *PATCO*, 685 F.2d at 565 n.33; *see Jacksonville Broad. Corp.*, 348 F.2d at 77-78 (referring to the issue whether an FCC commissioner should have disqualified himself); *id.* at 82 (Burger, C.J., concurring in part and dissenting in part) (setting forth the facts of the ex parte communication at issue).

534. *PATCO*, 685 F.2d at 571.

535. Allison, *supra* note 22, at 1213-14 n.179. Throughout his Article, Professor Allison touches on the need for this kind of balancing act when determining the remedy (if any) for

In addition, if a presiding officer—i.e., a member of the Licensing Board, rather than a Commissioner or an appellate adjudicatory employee—receives the prohibited communication, the Commission may wish to consider the extent to which the prohibited communication renders impossible any meaningful Commission review.[536] Such a situation would be analogous to that faced by the D.C. Circuit in *PATCO*:

> Where facts and argument "vital to the agency decision" are only communicated to the agency off the record, the court may at worst be kept in the dark about the agency's actual reasons for its decision . . . . At best, the basis for the agency's action may be disclosed for the first time on review. If the off-the-record communications regard critical facts, the court will be particularly ill-equipped to resolve in the first instance any controversy between the parties. Thus, effective judicial review may be hampered if ex parte communications prevent adversarial decision of factual issues by the agency.[537]

If a Commissioner or other adjudicatory employee either willingly receives the prohibited communication or neglects to report its receipt, and is motivated by a flagrant disregard for the NRC's regulatory restrictions, that person could—in extreme situations—be removed from office.[538] Less serious violations would justify his or her disqualification from the adjudication[539] or, perhaps, disciplinary action.[540] The APA is less than

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ex parte communications (and other potential or actual sources of bias).

536. *See* Home Box Office, Inc. v. FCC, 567 F.2d 9, 54-55 (D.C. Cir. 1977). *But cf.* Action for Children's Television v. FCC, 564 F.2d 458, 474-76 (D.C. Cir. 1977) (rejecting the rationale in *Home Box Office* that the Court's need for an adequate administrative record supports the ex parte ban, at least in a rulemaking context).

537. *PATCO*, 685 F.2d at 564-65 & n.32 (internal citations omitted); *see* United States Lines v. Fed. Mar. Comm'n, 584 F.2d 519, 539, 541-42 (D.C. Cir. 1978); *see also* Lubet, *supra* note 383, passim; Richards, *supra* note 22, at 92-95; Verkuil, *supra* note 109, at 981 ("The purpose of whole-record review and the attendant ex parte contact restriction is to ensure that the courts are aware of the factual and policy basis for the rule and that all private contacts and documents pertaining to the rule are available for judicial evaluation."); Birnkrant, *supra* note 104, at 380-81, 385.

538. *See* Lubet, *supra* note 383, passim; Peck, *supra* note 22, at 271 ("The agency member or employee who has encouraged ex parte communications, or, if the statute so provides, failed to report and publicize a communication received, should be subject to removal from office."); Comment, *Ex Parte Contacts with the Federal Communications Commission*, *supra* note 25, at 1195 (citing Humphrey's Ex'r v. United States, 295 U.S. 602, 632 (1935)). *See generally* Allison, *supra* note 22, at 1209 & nn.170-71.

In addition, Professor Peck has gone so far as to advocate criminal penalties for those involved in more extreme ex parte communication. *See* Peck, *supra* note 22, at 268-71; *see also* Ablard, *supra* note 22, at 476 (regarding Congressional consideration of a bill that would subject a willful violator "to a fine of not more than $10,000 or imprisonment for not more than one year, or both"). But this criminal penalty approach has gone nowhere. For though the Senate at one point considered legislation that would impose potential penalties of a fine or imprisonment for improper ex parte communication, those bills died in committee. *See* Note, *Ex Parte Communication During Informal Rulemaking*, *supra* note 109, at 305-06 & n.232.

539. *See* 5 U.S.C. § 556(a) (2000); Comment, *Ex Parte Contacts with the Federal Communications Commission, supra* note 25, at 1195. *See generally* Allison, *supra* note 22, at 1209 nn.170-71.

clear as to whether a commissioner may be involuntarily disqualified by a vote of fellow commissioners, and federal agencies have split on the question.[541] Nevertheless, the Commission's own practice has been for individual commissioners to have the final word on their own disqualification (i.e., recusal).[542] This practice is supported by common sense and the weight of legal authority.[543] The disqualification of one commissioner by his or her colleagues would certainly cause a great deal of internal friction amongst those commissioners.[544] Also, there seems to be no good reason to accord the averments of the NRC's highest administrative officers any less credence than those of a federal judge or Justice, who determines his or her own disqualification.[545]

The Commission, Licensing Board, Presiding Officer, or other adjudicatory employee may be able to avoid the remedy issue entirely if the record demonstrates that the complaining party has waived his or her right to object to the prohibited communication. The Second Circuit reached just such a conclusion in *International Paper Co. v. Federal Power Commission*.[546] In that proceeding, a party's counsel was a former high-ranking lawyer for the Federal Power Commission and was intimately familiar with the Commission's practice of permitting its General Counsel to participate in the administrative litigation of a proceeding and then advise the Commission on how it should ultimately resolve the same proceeding. Counsel had waited to object to such separation-of-functions communications until after the administrative record had closed. The Court concluded that, under those circumstances, the party had effectively waived all objections to the violations of the separation-of-functions bar.

Of course—and this is a good note on which to close—the most effective approach to dealing with improper communications is to prevent their occurrence in the first place. Regarding such prevention, here are a few suggestions—some obvious, others less so:

- When a licensing board visits a facility that is the subject of litigation before it, the Board's members should require that each party in that proceeding be invited to attend the tour.[547]

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540. *See* Peck, *supra* note 22, at 262. *See generally* Allison, *supra* note 22, at 1209 & nn.170-71.

541. *See* ADJUDICATION GUIDE, *supra* note 22, at 99 n.1; Comment, *Ex Parte Contacts with the Federal Communications Commission*, *supra* note 25, at 1195 & n.96.

542. *See supra* notes 352-56 and accompanying text. The Licensing Board takes the same approach. *See* Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station) (Aug. 30, 2006), *available at* ADAMS Accession No. ML062420487.

543. *See* Comment, *Ex Parte Contacts with the Federal Communications Commission*, *supra* note 25, at 1195.

544. *See id.*

545. *See id.* at 1195-96 & n.97.

546. 438 F.2d 1349, 1357-58 (2d Cir. 1971).

547. *See* Private Fuel Storage, L.L.C. (ISFSI), LBP-03-30, 58 N.R.C. 454, 472 n.25

- Boards and Commissioners can create their own firewalls by "appointing someone else to screen written and electronic communications."[548]
- A board that is concerned about potential improper communications could appoint a settlement judge who, not being involved in a decisionmaking role, would not be bound by the ex parte and separation-of-functions restrictions in communicating with parties.[549]
- Attorneys should not seek "advisory opinions" on hypothetical issues from Commissioners, judges, or other adjudicatory employees and the latter group of personnel should refuse to offer such opinions.
- Any adjudicatory employee, licensing board member or Commissioner should refuse, or indicate an unwillingness, to engage in improper conversations regarding adjudications.[550]
- Attorneys should advise their clients and witnesses of the restricted-communications rules.
- Attorneys and clients should avoid socializing with adjudicators or adjudicatory employees during the pendency of a contested case, in order to avoid any appearance of impropriety.
- Finally, attorneys and adjudicators should arrange for opposing counsel to be on the telephone line when calling a decisionmaker regarding anything other than uncontested procedural matters.[551]

(2003):

> Commission adjudicators have long employed site visits as a way of assisting in reaching sound decisions. *See, e.g.*, Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 N.R.C 33, 84 (1977). There is certainly no doubt as to the propriety of a site visit where, as here, all parties not only concurred in the idea of conducting such a visit but also participated in it.

See also Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit No. 3), LBP-00-26, 52 N.R.C. 181, 189 (2000), *aff'd on other grounds*, CLI-01-10, 53 N.R.C. 353 (2001); Dairyland Power Coop. (La Crosse Boiling Water Reactor), LBP-80-2, 11 N.R.C. 44, 49-50, *aff'd on other grounds*, ALAB-617, 12 N.R.C. 430 (1980), *vacated in part as moot on other grounds*, ALAB-638, 13 N.R.C. 374 (1981); Allison, *supra* note 22, at 1218-19. Professor Allison would also require the decision-maker to report in writing his observations, allow the parties to comment on them, place both the observations and comments in the official record, and ultimately explain what effect (if any) the site visit had on his conclusions. *See id.* at 1219-20.

548. Abramson, *supra* note 93, at 1361; *see also id.* at 1346.

549. *See* Private Fuel Storage (ISFSI), LBP-02-7, 55 N.R.C. 167, 202, *rev'd on other grounds*, CLI-02-20, 56 N.R.C. 147 (2002); *see also supra* note 356 and accompanying text.

550. *See* Memorandum from Karen D. Cyr, General Counsel, NRC, to Commissioners, NRC, SECY-99-166, "Comments on NRC's Sunshine Act Notice," at 3 n.2 (June 29, 1999), *available at* ADAMS Accession No. ML992800057 ("Commissioner who meets one-on-one with agency stakeholders has to be prepared to cut off discussions that threaten to stray into impermissible areas, such as those covered by the Commission's ex parte regulations."); *see also supra* note 229 and accompanying text.

551. *See* Rothrock, *supra* note 395, at 59.

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RECENT DEVELOPMENTS

OCC INTERPRETS THE NATIONAL BANK ACT TO PERMIT BANKS TO OWN HOTELS AND WINDMILLS

MICHAEL S. EDWARDS*

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I. INTRODUCTION

The Office of the Comptroller of the Currency[1] (OCC) is the primary regulator of national banks. National banks are commercial banks that are chartered by the federal government instead of by a state.[2] Many in the banking industry consider the national bank charter to be the most desirable form of bank because of the charter's broad powers, including preemption of state laws.[3] These powers are not without limitation; Congress has restricted the powers of national banks in order to limit the economic risks banks face and to protect the economy.[4] A large and longstanding body of jurisprudence has interpreted the National Bank Act to restrict the business activities of national banks to activities closely related to the traditional banking powers specifically authorized by the Act, such as taking deposits

1. *See* 12 U.S.C. §§ 1-14 (2000) (describing the structure and operations of the Office of the Comptroller of the Currency (OCC), which is a bureau within the Department of the Treasury); *see also* National Bank Act, 12 U.S.C. §§ 21-216d (2000) (outlining the statutory structure of national bank regulation).

2. *See* HOWELL E. JACKSON & EDWARD L. SYMONS, JR., REGULATION OF FINANCIAL INSTITUTIONS 38-39 (1999) (relating that Congress created the national bank charter during the Civil War in an effort to develop a national currency to replace and devalue state banknotes—which were state-chartered, bank-issued paper currencies used by the Union and the Confederacy—as well as to market federal bonds and create federal depositories to further the war effort).

3. *See* Robert C. Eager & C.F. Muckenfuss, III, *Federal Preemption and the Challenge to Maintain Balance in the Dual Banking System*, 8 N.C. BANKING INST. 21, 26 (2004) (theorizing that OCC's broad powers of federal preemption over state law give federal charters such an advantage over state-chartered banks—that must follow the laws of any state in which they operate—in today's interstate banking environment that it seems highly unlikely that any large, interstate banks with federal charters would convert their charters to state charters).

4. *See* JACKSON & SYMONS, *supra* note 2, at 117-22 (stating that "portfolio shaping rules" are the dominant regulatory restriction for banks and other depository institutions because of public concerns about financial intermediaries taking excessive risks, concerns about limiting the risks faced by the Federal Deposit Insurance Corporation and other federal deposit insurers, and concerns that excessive risk-taking by banks will lead to disruptions in the nation's money supply and payments system). Congress restricted banks' ownership of real estate to that necessary to transact its business because of numerous antebellum bank failures. *Id.* An additional public policy concern behind the National Bank Act's prohibitions on banks owning stocks or taking equity interests in commercial enterprises is to assure a high level of economic neutrality when banks lend to competing borrowers. *Id.*

and makings loans.[5] These traditional powers specifically listed in the National Bank Act, as well as closely related "incidental powers," comprise the "business of banking."[6]

National banks' traditional business activities previously have not included owning hotels or windmill electrical turbines.[7] Restrictions on the business activities of banks chartered by the U.S. government have existed since at least the 1780s.[8] The Civil War-era National Bank Act restricted the business activities of national banks to a few, express banking activities and a broader grant of "incidental powers": Those unenumerated powers necessary to the accommodation of the banks' business.[9]

OCC has faced numerous challenges to its administrative interpretations regarding the business activities provisions of the National Bank Act since the nineteenth century.[10] Most recently, three interpretive letters that

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5. *See* Arnold Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1972) (holding that operating a travel agency was not closely related to the "business of banking" and thus was not a valid incidental power of national banks); *see also* OCC Interpretive Letter No. 1053 at 2 (Jan. 31, 2006), http://www.occ.treas.gov/interp/mar06/int1053.pdf (claiming that permitting banks to own hotels was in furtherance of the banks' banking operations).

6. 12 U.S.C. § 24(7) (2000) (listing the express powers of national banks as discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; receiving deposits; buying and selling exchange, coin, and bullion; loaning money on personal security; obtaining, issuing, and circulating notes; dealing in certain securities; and those incidental powers necessary for the bank to conduct its business); *see* JACKSON & SYMONS, *supra* note 2, at 127-31 (noting that there are three approaches regarding what incidental powers fall within the "business of banking," and that the courts have generally followed the so-called "middle view" that permissible incidental powers must be closely related to the Act's express powers).

7. *Cf., e.g.*, *Arnold Tours*, 472 F.2d at 432 (holding that operating a travel agency was not closely related to the expressly permitted business activities in the National Bank Act to be a permissible national bank business activity); Cockrill v. Abeles, 86 F. 505, 512 (8th Cir. 1898) (explaining that the National Bank Act's real estate power did not authorize a national bank to own a cotton mill).

8. JACKSON & SYMONS, *supra* note 2, at 33 (noting that the 1787 charter of the Bank of North America, an early federally-chartered bank, prohibited the bank from trading in merchandise and from owning more real property than was necessary for its place of business or for loan collateral).

9. *See* 12 U.S.C. §§ 24, 29 (2000) (listing the permissible business activities and real estate powers of national banks); *Arnold Tours*, 472 F.2d at 432 (holding that a bank activity is permissible as an "incidental power" under the National Bank Act if the activity is convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act); JACKSON & SYMONS, *supra* note 2, at 127-31 (identifying three interpretations of the term "business of banking"). These interpretations are: (1) the "narrow view," which limits banking powers to those specifically enumerated in the National Bank Act or other banking statutes; (2) the "broad view," which interprets the express powers of the Act as examples, arguing that the "business of banking" should be redefined as society's financial services needs change; and (3) the "middle ground view," which permits banks to perform an express power and not-expressly-prohibited activities that are within the principled scope of the expressly permitted banking activities. *Id.* The "middle ground view" theorizes that Congress chose not to expressly define the "business of banking" because deposit taking, credit granting, and credit exchange take myriad forms. *Id.* at 130.

10. 12 U.S.C. §§ 24, 29 (2000); *see* NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-57 (1995) [hereinafter NationsBank v. VALIC] (upholding

permit certain national banks to own hotels or windmills have led to public outcry and have forced OCC to respond to scrutiny from private industry[11] and from the U.S. House of Representatives Subcommittee on Government Management, Finance, and Accountability.[12]

OCC First Senior Deputy Comptroller and Chief Counsel Julie L. Williams authored the three opinion letters.[13] These statutory interpretations in letter form are legislative in nature and receive *Chevron* deference even though they do not go through public notice and comment or formal rulemaking.[14] Copies of two of the three letters posted on the OCC's website have been redacted so that the names of the institutions in question are not included.[15] The *American Banker*, however, reported the names of the institutions.[16] The three institutions named were: PNC Bank in Pittsburgh, Pennsylvania; Bank of America in Charlotte, North Carolina; and Union Bank of California, based in San Francisco.[17]

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the OCC's interpretation of the National Bank Act to permit national banks to sell annuities); Merchants' Bank v. State Bank, 77 U.S. (10 Wall.) 604, 650-52 (1870) (holding that national banks may, as an incidental power, engage in the practice of certifying checks); Indep. Ins. Agents of Am., Inc. v. Hawke, 211 F.3d 638, 645-46 (D.C. Cir. 2000) (holding that an OCC interpretation permitting national banks to sell crop insurance was manifestly contrary to the National Bank Act under *Chevron* step one, and also unreasonable); *Arnold Tours*, 472 F.2d at 432 (claiming that OCC cannot interpret the National Bank Act to permit banks to own travel agencies as a "business of banking" activity).

11. *See* OCC Interpretive Letter No. 1053 (Jan. 31, 2006), http://www.occ.treas.gov/interp/mar06/int1053.pdf (dismissing concerns raised by Thomas M. Stevens, President of the National Association of Realtors, in a comment letter that thoroughly criticized OCC Interpretive Letters Nos. 1044, 1045, and 1048 as being invalid under the National Bank Act and inconsistent with OCC rules).

12. *See* Testimony of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, OCC, before the Subcommittee on Government Management, Finance, and Accountability (Sept. 27, 2006), *available at* http://www.occ.treas.gov/ftp/release/2006-105b.pdf .

13. OCC Interpretive Letter No. 1044 (Dec. 5, 2005), http://www.occ.treas.gov/interp/dec05/int1044.pdf; OCC Interpretive Letter No. 1045 (Dec. 5, 2005), http://www.occ.treas.gov/interp/dec05/int1045.pdf; OCC Interpretive Letter No. 1048 (Dec. 21, 2005), http://www.occ.treas.gov/interp/JAN06/int1048.pdf; *see* 12 U.S.C. § 29 (2000) (defining the power of national banks to own real estate).

14. *See* United States v. Mead Corp., 533 U.S. 218, 231 n.13 (2001) (holding that certain agencies, such as OCC, with a long tradition of pre-*Chevron* era deference to their interpretations receive *Chevron* deference for interpretations that do not go through notice and comment or formal rulemaking); *VALIC*, 513 U.S. at 256-57 (applying *Chevron* to an OCC interpretive letter).

15. *See* OCC Interpretive Letter No. 1044 (redacted); OCC Interpretive Letter No. 1045 (redacted); OCC Interpretive Letter No. 1048 (unredacted).

16. Barbara A. Rehm, *Firm, But Not Specific, On Banks in Real Estate*, AM. BANKER, Jan. 23, 2006, at 1, 3.

17. *Id.* at 3.

A. OCC Interpretive Letter No. 1044: PNC Bank

OCC Interpretive Letter No. 1044 approved PNC Bank's plan to build a new building in Pittsburgh with twelve floors of office space, a five-floor hotel, and thirty-two condo units.[18] PNC's building would be the third building in its corporate headquarters complex.[19] The hotel portion of the proposed building would include 158 hotel rooms.[20] The total office space in the building would be 360,000 square feet, however, PNC would only occupy approximately 100,000 square feet.[21] OCC stated that PNC would only occupy "approximately 25% of the available office space," but that PNC anticipates that its occupancy of the office space may increase over time.[22] PNC believes that persons on bank-related business will occupy only 10% of the hotel rooms on a yearly basis, but that PNC may occupy a larger percentage of the room "during certain times throughout the year."[23] The bank also plans to use the hotel's conference facilities when it needs additional meeting space.[24]

B. OCC Interpretive Letter No. 1045: Bank of America

OCC Interpretive Letter No. 1045 approved Bank of America's plan to develop a 150-room Ritz-Carlton Hotel as part of the "premises" of Bank of America's new headquarters in Charlotte—a city that already has approximately 30,000 hotel rooms.[25] The bank would remain the sole owner of the real estate, would own all improvements, would hire an independent contractor to build the hotel, and would contract with a national hotel chain—Ritz-Carlton—to manage the hotel.[26] The bank estimates that it will use more than 50% of the occupied rooms of the hotel to lodge out-of-area bank employees, bank directors, selected vendors, shareholders, bank customers, and other visitors.[27] The letter states that, "[b]ased on the projection that the hotel would maintain 75% occupancy [on average], the bank would use more than 37.5% of the total rooms on an annual basis."[28]

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18. *Id.*
19. OCC Interpretive Letter No. 1044, at 1.
20. *Id.* at 2.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 2-3.
25. OCC Interpretive Letter No. 1045 (Dec. 5, 2005), http://www.occ.treas.gov/interp/dec05/int1045.pdf at 3-4; Rehm, *supra* note 16, at 3.
26. OCC Interpretative Letter No. 1045 at 1.
27. *Id.* at 2.
28. *Id.*

C. OCC Interpretive Letter No. 1048: Union Bank of California

OCC Interpretive Letter No. 1048 approved Union Bank's proposal to invest in a limited liability company (LLC) that plans to build wind turbine electrical generators.[29] As part of the investment plan, Union Bank would acquire approximately 70% of the equity interest in the LLC.[30] The remaining interest would be retained by the promoters and managing members of the LLC.[31] The bank would receive a portion of the LLC's profits.[32]

As part of the plan, the LLC would acquire either a leasehold interest or an easement in the underlying real estate on which the wind turbines would be built.[33] The bank's interest in the LLC would be held for the minimum ten year period required by the IRS to qualify the investment for Section 45 Tax Credits.[34] OCC Interpretive Letter No. 1048 also announces a new, "federal definition" of the term "real estate" that preempts state law.[35]

II. INTERPRETATION OF THE NATIONAL BANK ACT

OCC's recent letters unreasonably interpret the real estate powers of national banks. OCC's statutory interpretations should not be valid under *Chevron* step two because the letters' legal reasoning has no basis in the National Bank Act, ignores the weight of relevant case law on national banks' powers under the Act, and relies on dicta from cases on subjects far removed from the question of whether national banks may engage in the lodging or energy businesses.

One significant flaw in OCC's legal reasoning is that OCC's analyses focus solely on selected cases interpreting 12 U.S.C. § 29, the section of the National Bank Act that empowers national banks to hold real estate. OCC's letters ignore the jurisprudence of 12 U.S.C. § 24(7), the section of the National Bank Act that defines the "business of banking"—the express and incidental powers of national banks—as well as at least one case that interprets what is now § 29.[36] A plain reading of § 24(7) and § 29 shows that the two sections of the National Bank Act are interrelated because § 29 allows national banks to hold real estate "as shall be necessary for its

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29. OCC Interpretive Letter No. 1048 at 1 (Dec. 21, 2005), http://www.occ.treas.gov/interp/JAN06/int1048.pdf.
30. *Id.*
31. *Id.*
32. *Id.* at 2.
33. OCC Interpretive Letter No. 1048 at 2 (Dec. 21, 2005), http://www.occ.treas.gov/interp/JAN06/int1048.pdf.
34. *Id.*
35. *Id.* at 5.
36. *See* Cockrill v. Abeles, 86 F. 505, 512 (8th Cir. 1898) (holding that the National Bank Act's real estate power did not authorize a national bank to own a cotton mill).

accommodation in the transaction of its business"[37] and § 24(7) authorizes "all such incidental powers as shall be necessary to carry on the business of banking . . . ."[38]

The United States Supreme Court has held that a term like "business" must be accorded a uniform interpretation across a statute even if the express terms of the statute appear to give it a different meaning in one section of a statute than in another.[39] The original version of the National Bank Act used the terms "business of banking" and "business" interchangeably throughout the Act, giving the appearance of congressional intent to refer to the "business of banking" when referring to "business" in § 29(1).[40] It logically follows that the cases interpreting the terms "necessary to carry on the business of banking" in § 24(7)[41] also apply to the requirement that something be "necessary for its . . . accommodation in the transaction of its business" referred to in § 29(1), the latter of which relates to national bank real estate ownership.[42]

In essence, OCC has chosen to ignore that the "business" referred to in § 29 is the business of banking, even though the relevant language of both sections dates back to the original 1864 version of the National Bank Act (then known as the National Currency Parity Act).[43] Neither owning a hotel nor owning electricity-generating windmills are necessary to the accommodation of the business of banking. Statutory interpretations permitting national banks to own hotels and windmills are unreasonable because the National Bank Act—and the relatively large body of law interpreting the Act—do not provide any legal basis for a claim that the business of lodging or the business of energy are necessary to the transaction of the business of banking under the National Bank Act.

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37. 12 U.S.C. § 29(1) (2000).

38. 12 U.S.C. § 24(7) (2000).

39. *See* Gustafson v. Alloyd Co., 513 U.S. 561, 568-74 (1995) (stating that the Court has a duty to construe statutes, not isolated provisions, and holding that the term "prospectus" in the Securities Act of 1933 legally had a single meaning even though a reading of the statute, as well as SEC interpretations, indicated that "prospectus" had a different meaning in one section of the Securities Act than it did in another).

40. *See* National Currency Parity Act Ch. 106, §§ 3, 5, 8, 12, 14, 15, 16, 17, 24, 28(1), 29, 40, 13 Stat. 99, 100-01, 103-05, 107, 111 (1864) (using the terms "business" and "business of banking" interchangeably).

41. 12 U.S.C. § 24(7) (2000); *see* NationsBank v. VALIC, 513 U.S. 251, 256-57 (1995); Indep. Ins. Agents of Am., Inc., v. Hawke, 211 F.3d 638, 640 (D.C. Cir. 2000); Arnold Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1972).

42. 12 U.S.C. § 29(1).

43. *Compare* National Currency Parity Act § 8, Ch. 106, 13 Stat. 99, 101 (1864) (presently codified as amended at 12 U.S.C. § 24(7)) ("All such powers as shall be necessary to carry on the business of banking . . . ."), *with* National Currency Parity Act Ch. 106 § 28(1), 13 Stat. at 107 (presently codified as amended at 12 U.S.C. § 29(1)) ("A national bank may purchase, hold, and convey real estate . . . as shall be necessary for its . . . accommodation in the transaction of its business.").

A. Standard of Agency Deference

Section 29 limits the real estate power of national banks to only four purposes: (1) such as shall be necessary for its accommodation in the transaction of its business; (2) such as shall be mortgaged to it in good faith by way of security for debts; (3) such as shall be conveyed for the satisfaction of debts; and (4) such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.[44] OCC rules permit banks to own premises for the temporary lodging of bank officers, employees, or customers in areas where suitable commercial lodging is not readily available.[45]

OCC receives *Chevron* deference for its interpretations of the National Bank Act in Interpretive Letters Nos. 1044, 1045, and 1048, even though the interpretations are from a letter that is neither the product of adjudication nor a result of notice and comment.[46] Under *Chevron* step one, the court examines whether the statutory language at issue clearly expresses Congress's intent. If the statute is silent or ambiguous, the court applies *Chevron* step two and defers to the agency's interpretation of the statute if it is reasonable and consistent with the statute's purpose.[47] An agency's interpretations of its ambiguous rules are accorded deference unless the interpretation is plainly erroneous or inconsistent with the regulation.[48]

The terms "business of banking" and "necessary" are ambiguous as used in the National Bank Act.[49] OCC's interpretations of the National Bank Act in OCC Interpretive Letters Nos. 1044, 1045, and 1048 must be considered "reasonable" under *Chevron* step two to be valid because they interpret these ambiguous terms.[50] Most cases interpreting the incidental

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44. 12 U.S.C. § 29.

45. 12 C.F.R. § 7.1000(a)(2)(v) (2006).

46. *See* United States v. Mead Corp., 533 U.S. 218, 231 n.13 (2001); *VALIC*, 513 U.S. at 256-57; *cf.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982-83 (2005) (holding that a court's prior judicial constructions of a statute under *Chevron* step one only trump an agency's construction otherwise entitled to *Chevron* deference if the prior court decisions hold that the statute is unambiguous and leaves no room for agency discretion). *But cf. Mead*, 533 U.S. at 231-34 (holding that interpretive letters generally do not receive *Chevron* deference, only *Skidmore v. Swift & Co.* persuasiveness deference); Christensen v. Harris County, 529 U.S. 576, 586-87 (2000). *See generally* Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944) (stating that agency interpretations receive deference if the court finds them persuasive).

47. Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984); *see VALIC*, 513 U.S. at 256-58, 258 n.2 (applying *Chevron* to defer to OCC's interpretation of the language of 12 U.S.C. § 24(7) authorizing the "sale of securities," and holding that § 24(7) did not prohibit the sale of annuities because OCC's determination was within the reasonable bounds of dealings in financial instruments).

48. *Christensen*, 529 U.S. at 588; Auer v. Robbins, 519 U.S. 452, 461 (1997).

49. *See* 12 U.S.C. §§ 24(7), 29(1) (2000) (using the terms "business of banking" and "business" without expressly defining those terms).

50. *See Chevron*, 467 U.S. at 843 ("[I]f the statute is silent or ambiguous with respect to

powers in § 24(7) of the National Bank Act are essentially *Chevron* step two cases—even if they predate *Chevron*—because the incidental powers definition in § 24(7) has been ambiguous since the Act's inception.[51]

OCC's interpretation of its rule on national bank ownership of lodging, 12 C.F.R. § 7.1000, should not receive *Chevron* deference because OCC's interpretation is likely inconsistent with the rule. The rule only allows a national bank to operate lodging if there are no suitable commercial alternatives in the area, such as in a sparsely-populated rural area.[52] OCC Interpretive Letters Nos. 1044 and 1045 are clearly inapposite to 12 C.F.R. § 7.1000 because cities such as Charlotte, North Carolina and Pittsburgh, Pennsylvania have suitable, existing commercial lodging.

B. The "Business of Banking"

The hotel and wind-energy business activities that OCC authorized are not reasonable interpretations of the National Bank Act because those business activities do not meet the standards for acceptable national bank incidental powers established in *Arnold Tours, Inc. v. Camp*;[53] *NationsBank v. VALIC*,[54] and other cases interpreting the "business of banking" under the National Bank Act. Under the *Arnold Tours* standard, a national bank's activity is authorized as an incidental power necessary to carry on the business of banking if the activity is convenient or useful in connection with performance of one of the bank's express powers under the National Bank Act; any activity for which this connection does not exist is not authorized.[55]

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the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *cf.* OCC Interpretive Letter No. 1044 (Dec. 5, 2005), http://www.occ.treas.gov/interp/dec05/int1044.pdf (interpreting the National Bank Act to permit a bank to own a hotel and develop condominiums and office space as part of its headquarters); OCC Interpretive Letter No. 1045 (Dec. 5, 2005), http://www.occ.treas.gov/interp/dec05/int1045.pdf (permitting a national bank to own a hotel as part of its headquarters); OCC Interpretive Letter No. 1048 (Dec. 21, 2005), http://www.occ.treas.gov/interp/JAN06/int1048.pdf (permitting a national bank to own a majority equity interest in an electricity-generating windmill farm).

51. *See VALIC*, 513 U.S. at 256-57 (permitting national banks to sell annuities); Arnold Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1972) (holding that national banks may not operate travel agencies). Although the Supreme Court recently clarified in *Brand X*, 545 U.S. at 982-83, that agencies do not need to abide by court decisions under *Chevron* step one unless the court has found the statute at issue to be unambiguous, the *Brand X* case should not apply to OCC's interpretations. *Brand X* should not apply because most business of banking cases are inherently *Chevron* step two cases even if they predate *Chevron*.

52. *See* 12 C.F.R. § 7.1000(a)(2)(v) (2006) (permitting national banks to own lodgings for bank personnel in areas where suitable commercial alternatives are not available).

53. 472 F.2d 427 (1st Cir. 1972).

54. 513 U.S. 251 (1995).

55. *Arnold Tours*, 472 F.2d at 432; *accord* Wells Fargo Bank, N.A. v. Boutris, 419 F.3d 949, 960 (9th Cir. 2005); Indep. Ins. Agents of Am., Inc. v. Hawke, 211 F.3d 638, 640 (D.C. Cir. 2000); First Nat'l Bank v. Taylor, 907 F.2d 775, 778 (8th Cir. 1990); Sec. Indus. Ass'n v. Clarke, 885 F.2d 1034, 1044-45, 1047 (2d Cir. 1989); Ass'n of Bank Travel Bureaus, Inc.

Although numerous circuit courts of appeal have accepted the *Arnold Tours* standard to determine what business activities are permissible incidental powers under the National Bank Act,[56] the Supreme Court applied *Chevron* to OCC's interpretations of the Act.[57] The D.C. Circuit has concurrently applied both *Arnold Tours* and *Chevron* to OCC's interpretations of the Act.[58] The following four cases are those most relevant to the question of whether OCC can reasonably interpret § 29(1) to permit national banks to own hotels, or interpret § 24(7) and § 29 to permit national banks to own windmills.

1. Arnold Tours

In *Arnold Tours*, OCC interpreted the National Bank Act to permit national banks to operate full-scale travel agencies.[59] Travel agencies challenged OCC's letter of interpretation, asserting that OCC had exceeded its statutory authority under § 24(7) of the National Bank Act. The travel agencies argued that operating full-scale travel agencies was not an incidental power permitted under § 24(7).[60]

The court stated that the most reliable gauge of what encompasses the term "the business of banking" is the express powers of national banks as set out in the National Bank Act.[61] The court noted that past decisions had held that activities permissible under the "incidental powers" provision of

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v. Bd. of Governors, 568 F.2d 549, 552-53 (7th Cir. 1978); Ass'n of Data Processing Servs. v. Fed. Home Loan Bank Bd. (FHLBB), 568 F.2d 478, 485-87 (6th Cir. 1977).

56. *See* sources cited *supra* note 55. The impact of *Arnold Tours* and *VALIC* is not limited to interpretation of the National Bank Act and extends even to some non-bank financial institutions. For example, the National Credit Union Administration uses *Arnold Tours* and *VALIC* to define the limits of the incidental powers of federally-chartered credit unions. *See* Federal Credit Union Incidental Powers Activities, 66 Fed. Reg. 40,845, 40,845-59 (Aug. 21, 2001) (to be codified at 12 C.F.R. pt. 721) (using *Arnold Tours* and *VALIC* to determine the permissible incidental powers of federal credit unions, including the power to own real estate, even though federal credit unions are chartered under the Federal Credit Union Act, 12 U.S.C. §§ 1751-1791k (2000), and are not banks); *see also Ass'n of Bank Travel Bureaus*, 568 F.2d at 552-53 (applying *Arnold Tours* to Federal Reserve Board administrative interpretations); *Ass'n of Data Processing Servs.*, 568 F.2d at 485-87 (applying *Arnold Tours* to define the incidental powers of Federal Home Loan Banks chartered under the Federal Home Loan Bank Act of 1932, 12 U.S.C. §§ 1421-1449 (2000)).

57. In *VALIC*, 513 U.S. at 258-59 n.2, the Court stated:

> We expressly hold that the "business of banking" is not limited to the enumerated powers in § 24 Seventh and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated. The exercise of the Comptroller's discretion, however, must be kept within reasonable bounds. Ventures distant from dealing in financial investment instruments—for example, operating a general travel agency—may exceed those bounds.

58. *See Indep. Ins. Agents*, 211 F.3d at 640 (holding that an OCC interpretation permitting national banks to sell crop insurance was not valid under *Chevron* or *Arnold Tours*).

59. 472 F.2d at 428.

60. *Id.* at 428, 431.

61. *Id.* at 431.

§ 24(7) were activities that were directly related to one or another of a national bank's express powers.[62] These prior decisions also demonstrated that an incidental power is authorized under § 24(7) if it is convenient and useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act.[63]

In analyzing whether operating a travel agency was an incidental power connected to the express powers of national banks, the court noted that there were instances where banks have provided regular customers with travel tickets or information as a good will service since at least 1865.[64] The court stated, however, that there is a fundamental difference between supplying customers with financial and informational services helpful to their travel plans and developing a clientele which looks to the bank not as a source of general financial advice and support, but as a travel management center whose business is unrelated to the business of banking.[65] Travel agency operation is therefore not a permissible incidental power under the National Bank Act.

2. NationsBank v. VALIC

In *NationsBank v. VALIC*, the Court noted that the business of banking is not limited to the enumerated powers in § 24(7), and that OCC therefore has discretion to authorize non-enumerated powers so long as they are reasonably within the bounds of financial instruments.[66] Operating a travel agency, for example, exceeds those bounds.[67] The sale of annuities, however, was not outside those bounds because annuities can be structured as securities and the National Bank Act permits national banks to deal in securities.[68]

3. Independent Insurance Agents v. Hawke

In *Independent Insurance Agents v. Hawke*, insurance trade associations challenged an OCC letter ruling allowing a national bank to serve as an agent for crop insurance.[69] OCC ruled that the sale of crop insurance was within the business of banking under 12 U.S.C. § 24(7) for three reasons: (1) crop insurance is similar to credit-related insurance that banks may offer because it is a "logical outgrowth" of the lending power, (2) crop insurance benefits farmers and banks by mitigating risk, and (3) the risks

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62. *Id.*
63. *Id.* at 432.
64. *Id.* at 433-34.
65. *Id.* at 433.
66. 513 U.S. 251, 258-59 n.2 (1995).
67. *Id.*
68. *Id.* at 261-63; *see* 12 U.S.C. § 24(7) (2000) (permitting national banks to purchase securities on behalf of their customers but not for the institution's own investment).
69. 211 F.3d 638, 642 (D.C. Cir. 2000).

are similar to those already borne by banks under 12 U.S.C. § 92 or elsewhere.[70] OCC also ruled that, even if the sale of crop insurance was not within the business of banking, it was "incidental" to banking.[71]

The D.C. Circuit rejected OCC's interpretation.[72] The court held that the sale of crop insurance violated the National Bank Act because Congress had enacted 12 U.S.C. § 92—permitting banks to sell insurance in towns with a population less than 5,000—and enacting § 92 would not have been necessary had § 24(7) permitted banks to sell insurance.[73] Under the first step of *Chevron*, the court held that Congress did not permit the OCC to authorize the sale of crop insurance.[74] The court also held that even though the term "incidental" in § 24(7) was inherently ambiguous, it was not ambiguous within the meaning of *Chevron.*[75] The D.C. Circuit also stated that OCC's interpretation of § 24(7) was unreasonable because if the sale of crop insurance was "incidental" to banking under § 24(7), there would be no way of distinguishing crop insurance from other general forms of insurance.[76]

4. Cockrill v. Abeles

In *Cockrill v. Abeles*, a national bank had taken title to a cotton mill.[77] The bank established a corporation, Little Rock Cotton Mills, to operate the mill and hold it in trust for the bank.[78] The bank wholly owned Little Rock Cotton Mills and four of the bank's trustees became directors of the corporation.[79] After the bank went into receivership, the receiver took action to indemnify the trustees for the bank's losses involving the cotton mill. The receiver sought to indemnify the bank's trustees, arguing that the bank's ownership of the mill was not authorized under the bank's power to hold real estate necessary for the convenient transaction of its business.[80]

The court held that even though the bank directors had the power to take title to the mill if they thought that doing so was in the bank's best interest, it was not permissible for the bank to continue to hold the mill and operate it through an agent.[81] Although the court stated in dicta that the bank might

70. *Id.*
71. *Id.*
72. *Id.* at 645.
73. *Id.*
74. *Id.* at 645-46.
75. *Id.* (invoking the doctrine of *expressio unius est exclusio alterius*).
76. *Id.* at 645.
77. 86 F. 505, 507 (8th Cir. 1898).
78. *Id.*
79. *Id.*
80. *Id.* at 510-11; *see* 12 U.S.C. § 29(1) (2000) (permitting national banks to own real estate as necessary for the transaction of the banks' business).
81. *Id.* at 511-12.

lease the mill to a third party to operate,[82] owning and operating the mill would impermissibly subject the bank to risks inherent in the milling business, rather than the banking business.[83] Even the most liberal view of the implied powers of national banks would not permit a national bank to engage in a non-banking business like manufacturing.[84]

The OCC interpretations of the National Bank Act permitting national banks to own hotels and windmills are closely analogous to cases like *Arnold Tours* and *Cockrill v. Abeles* because those cases also addressed situations where national banks engaged in lines of business that were far removed from traditional banking activities.

III. DISCUSSION OF OCC'S INTERPRETIVE LETTERS

OCC's interpretive letters permitting national banks to own hotels and windmills do not reasonably interpret the National Bank Act and are inconsistent with OCC rules. The interpretations ignore well-accepted jurisprudence interpreting the Nationabecause the hotell Bank Act's incidental powers provision, contradict the express language of at least one OCC rule, and misrepresent the holdings of several cases. Although OCC supplied lengthy justifications, discussed in detail below, nothing contained in those letters establishes a nexus between the banks' ownership of hotels and electrical generators and the specifically enumerated powers of national banks contained in 12 U.S.C. § 24(7).[85] Much of OCC's analyses of these issues focused on a "percentage occupation" test that has no basis in the National Bank Act or case law.[86] Neither the hotel business nor the windmill business involves financial instruments, as required by the

82. *Id.* at 512.
83. *Id.*
84. *Id.*
85. Arnold Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1972) (holding that a bank activity is permissible as an "incidental power" under the National Bank Act if the activity is convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act).
86. *See, e.g.*, Testimony of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, OCC, before the Subcommittee on Government Management, Finance, and Accountability, at 5-7 (Sept. 27, 2006), *available at* http://www.occ.treas.gov/ftp/release/2006-105b.pdf (claiming that the courts have looked to the percentage occupancy of the premises in conjunction with banking purposes, and listing as authority *Wirtz v. First National Bank & Trust Co.*, 365 F.2d 641 (10th Cir. 1966); *Wingert v. First National Bank*, 175 F. 739 (4th Cir. 1909); and *Perth Amboy National Bank v. Brodsky*, 207 F. Supp. 785 (S.D.N.Y. 19462)). *But see Wirtz*, 365 F.2d at 641 (finding the percentage occupancy of a complex by a national bank as a fact unrelated to court's holding on an employment law matter); *Wingert*, 175 F. at 741-42 (permitting a bank to lease five floors of a six floor building to third parties as office space, but not using or alluding to a percentage occupancy standard); *Brodsky*, 207 F. Supp. at 787-88 (rejecting the claim of a financially troubled national bank that it could break an otherwise valid lease under the theory that the lease was *ultra vires* under the National Bank Act).

Supreme Court in *VALIC*.[87] OCC's letters rely on archaic cases, none of which post-date *Chevron* or the First Circuit's 1972 opinion in *Arnold Tours* OCC principally relied on dicta from an 1878 case, *National Bank v. Matthews*,[88] and dicta from a 1902 case, *Brown v. Schleier*.[89]

A. OCC Interpretive Letter No. 1045: Bank of America

Bank of America's development and operation of a Ritz-Carlton hotel as part of its headquarters complex is not a permissible activity for a national bank under the National Bank Act. The project violates OCC rules and is not a valid incidental activity for a national bank because the hotel business has no connection to the express powers of national banks under the Act. OCC's interpretation is unreasonable based on prior judicial holdings regarding interpretations of the National Bank Act in *Arnold Tours*,[90] *VALIC*,[91] *Independent Insurance Agents v. Hawke*,[92] and *Cockrill v. Abeles*.[93]

1. OCC's Legal Argument in Interpretive Letter No. 1045

OCC's analysis in Interpretive Letter No. 1045[94] is flawed because it ignores most case law interpreting the National Bank Act, misinterprets OCC rules, and misconstrues several cases that interpret 12 U.S.C. § 29.[95] None of the cases OCC cited support its interpretation of the National Bank Act that a bank may own a hotel, even if the hotel has a high percentage occupation of bank customers, officers, or directors. OCC Interpretive Letter No. 1045 does not make any statement or finding that Bank of America's ownership of the hotel is necessary because alternative suitable commercial lodging is not readily available, as the OCC rules and the plain language of 12 U.S.C. § 29(1) require.[96] OCC relied on several cases,

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87. NationsBank v. VALIC, 513 U.S. 251, 258 n.2 (1995) (holding that the banking powers expressly enumerated in the National Bank Act are not exclusive, but that national banks' incidental business activities must be confined to dealing with financial instruments).
88. 98 U.S. 621 (1879).
89. 118 F. 981 (8th Cir. 1902).
90. 472 F.2d 427 (1st Cir. 1972).
91. 513 U.S. 251 (1995).
92. 211 F.3d 638, 640 (D.C. Cir. 2000).
93. 86 F. 505, 512 (8th Cir. 1898).
94. *See* OCC Interpretive Letter No. 1045 (Dec. 5, 2005), http://www.occ.treas.gov/interp/dec05/int1045.pdf (permitting a bank to build a hotel as part of its Charlotte, North Carolina headquarters complex); *see also* Rehm, *supra* note 16, at 3 (identifying the Charlotte, North Carolina bank as Bank of America).
95. *See, e.g.*, Nat'l Bank v. Matthews, 98 U.S. 621 (1878); Wirtz v. First Nat'l Bank & Trust Co., 365 F.2d 641 (10th Cir. 1966); Wingert v. First Nat'l Bank, 175 F. 739 (4th Cir. 1909), *appeal dismissed*, 223 U.S. 670 (1912); Brown v. Schleier, 118 F. 981 (8th Cir. 1902), *aff'd*, 194 U.S. 18 (1904).
96. *See* 12 U.S.C. § 29(1) (2000) (requiring that a bank's ownership of realty be necessary to its business); 12 C.F.R. § 7.1000(a)(2)(v) (allowing investment in realty to be used as temporary lodging in areas where such lodging is not available).

discussed in detail below, that do not reasonably justify statutory interpretations of the National Bank Act to permit banks to operate hotels.

i. National Bank v. Matthews

OCC relied on dicta from *National Bank v. Matthews* stating that the purpose of the restriction on a national bank's power to own real estate is to keep the capital of banks from flowing in the channels of daily commerce, to deter banks from speculating in real estate, and to prevent the accumulation of large masses of property that would be held by the bank in mortmain.[97] OCC Interpretive Letter No. 1045 styles this dicta as a three-part weighing factors test.[98]

However, this section of the opinion is dicta because *Matthews* ruled on the ability of a national bank to foreclose on a mortgaged property.[99] The issue before the Court was whether a deed of trust[100] qualified as a mortgage within the meaning of what is now 12 U.S.C. § 29(2),[101] and therefore could be enforced for the benefit of a national bank.[102] The bank never had title to the property at issue, but could purchase it in a foreclosure sale under the deed of trust that the bank had acquired as part of a mortgage loan.[103]

The property's owner challenged the bank's right to foreclose on his property as *ultra vires* because of the National Bank Act's restriction on a bank's power to own real estate.[104] The Court stated that the purpose of the restriction on the real estate power was to keep the capital of banks from flowing in the channels of daily commerce, deter banks from speculating in real estate, and prevent the accumulation of large masses of property that would be held by the bank in mortmain, not to prohibit foreclosure on mortgages made in good faith.[105] The Court held that the deed of trust was equivalent to a direct mortgage and that the bank could take title to the property because a mortgage taken to secure a loan in the course of banking operations was not prohibited by the National Bank Act.[106]

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97. 98 U.S. at 626.
98. *See* OCC Interpretive Letter No. 1045 at 3.
99. 98 U.S. at 625-26.
100. BLACK'S LAW DICTIONARY 423 (7th ed. 1999) (defining a "deed of trust" as an arrangement that resembles a mortgage but involves conveying title to a trustee as security until repayment of the loan, thereby permitting bypass of judicial foreclosure).
101. *Compare* 12 U.S.C. § 29(2) (2000) (permitting national banks to make mortgages but making no reference to deeds of trust), *with* Nat'l Currency Parity Act, Ch. 106 § 28(2), 13 Stat. 99, 108 (1864) (remaining virtually unchanged since 1864).
102. *See Matthews*, 98 U.S. at 624 (holding that a deed of trust qualified as a "mortgage" within the meaning of the statutory provision now codified at 12 U.S.C. § 29(2)).
103. *See id.* at 625 (noting that the bank held neither legal or equitable title).
104. *See id.* at 626 (refusing to accept *ultra vires* as a valid defense).
105. *Id.*
106. *Id.* at 627-29.

Matthews does not provide a test for determining whether a power is permitted under § 29(1). The issue of whether a national bank can foreclose on mortgages under 12 U.S.C. § 29(2)[107] hinges on the definition of the term "mortgage," whereas the OCC interpretation that 12 U.S.C. § 29(1) permits the building and owning of hotels is an interpretation of the broader grant of power that a National Bank may own property "as shall be necessary for its accommodation in the transaction of its business."[108]

ii. Brown v. Schleier

OCC Interpretive Letter No. 1045 quotes the following passage from *Brown v. Schleier*:

> When an occasion arises for an investment in real property for either of the purposes specified in the statute [securing an eligible business location, to secure debts, or to prevent loss at court-ordered execution sales, *Brown*, 118 F. at 984,] the [N]ational [B]ank [A]ct permits banking associations to act as any prudent person would act in making an investment in real estate, and to exercise the same measure of judgment and discretion. The act ought not to be construed in such a way as to compel a national bank, when it acquires real property for a legitimate purposes, to deal with it otherwise than a prudent landowner would ordinarily deal with such property.[109]

Brown is a case regarding standing. In *Brown*, a bank leased real estate from a private third party, and then erected a building on the leased premises that it did not contemplate immediately using to accommodate the transaction of business, as required by the National Bank Act at that time.[110] After the bank went into receivership, the bank's private party receiver brought an action against the property's lessor, alleging that the bank's lease was in violation of the bank's charter and the National Bank Act, and arguing that the lessor was consequently jointly liable with the bank's directors for all damages that the bank's creditors had sustained in consequence of the lease's execution.[111] The court stated that there was

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107. *See* 12 U.S.C. § 29(2) (2000) (permitting national banks to grant mortgages).

108. 12 U.S.C. § 29(1). *See* Indep. Ins. Agents of Am., Inc. v. Hawke, 211 F.3d 638, 645-46 (D.C. Cir. 2000) (rejecting the OCC's argument that it can authorize any national bank incidental powers activity so long as the activity is a "logical outgrowth" of the express power granted in the National Bank Act because a logical outgrowth test would allow national banks to be able to incrementally expand their field of legally permissible business activities without congressional action).

109. OCC Interpretive Letter No. 1045 (Dec. 5, 2005), http://www.occ.treas.gov/interp/dec05/int1045.pdf (bracketed passage in original); s*ee* Brown v. Schleier, 118 F. 981, 984 (8th Cir. 1902), *aff'd*, 194 U.S. 18 (1904).

110. *See* 118 F. 981, 983 (8th Cir. 1902); *see also* Act of Feb. 25, 1927, Pub. L. No. 69-639, § 3, 44 Stat. 1224, 1227 (1927) (removing the term "immediate").

111. *Brown*, 118 F. at 983-84. In dicta, the court stated that the National Bank Act was framed with a view of preventing national banks from investing their funds in real property, except when it becomes necessary to do so for the purposes of securing an eligible business

nothing in the National Bank Act prohibiting a bank from making leases so long as the bank acts in good faith, especially when the lease had been made ten years prior to the filing of the action and the OCC had taken no enforcement action against the bank regarding the lease.[112] The court, however, denied the receiver relief on other grounds, holding that the receiver was a private party and that only OCC had standing to challenge the validity of the bank's actions.[113]

Brown v. Schleier's substantive holding does little to support OCC's conclusion that *Brown* authorizes Bank of America to build and operate a hotel as part of its headquarters because *Brown*'s holding was based on standing.[114] All of the statements in the case regarding property use are dicta.[115] Even if one accepts the premise that the National Bank Act does not prohibit a bank from leasing excess capacity, the *Brown* dicta does not indicate that the bank's real estate power is exempt from the necessity and "business of banking" restrictions of the National Bank Act.[116] The *Brown* decision's precedential value is its holding that the OCC—not a private receiver—had standing to challenge the validity of the bank's real estate activities after a bank had become insolvent.[117]

iii. Wirtz v. First National Bank and Trust Co.

Wirtz v. First National Bank and Trust Co. is not a case about banking powers; rather, the issue at bar was whether the Fair Labor Standards Act applied to engineers, electricians, carpenters, and painters who worked for

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location, securing debts, or preventing a loss at execution sales under judgments or decrees that have been rendered in their favor. *Id.* The court also stated that the National Bank Act does not preclude a national bank from leasing part of its home office or branches if the office or branch is located in a city where property values are high and not leasing excess capacity, even for non-banking activities, would be an imprudent business decision, so long as the bank acted in good faith. *Id.*

112. *Id.* at 983-86.

113. *Id.* at 987-88.

114. *Id. But see* OCC Interpretive Letter No. 1053 at 3 (Jan. 31, 2006), http://www.occ.treas.gov/interp/mar06/int1053.pdf (claiming that *Brown v. Schleier* is the leading case on leasing bank premises and that *Brown* does not require that bank premises only be developed on property long-held by the bank).

115. *See Brown*, 118 F. at 983-88 (basing the court's holding on standing even though the opinion includes an extensive policy discussion regarding national bank real estate ownership).

116. *See* 12 U.S.C. §§ 24(7), 29(1) (2000) (requiring that the incidental powers of national banks—whether regarding real estate or other banking activities—be "necessary" to the business of banking); *see also, e.g.*, Arnold Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1972) (holding that a bank activity is permissible as an "incidental power" under the National Bank Act if the activity is convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act).

117. *See Brown*, 118 F. at 987-88. *But see* Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 494-95 (1998) (holding that the competitors of a depository institution have standing to challenge the statutory interpretations of that institution's regulator so long as the competitors have suffered a redressible injury-in-fact).

a real estate management company owned by a national bank.[118] Although the opinion notes that the bank, First National Bank and Trust Company, occupied 20.7% of the office complex managed by the bank-owned real estate management company, the bank's percentage occupancy was in no way related to the court's holding that the employees of the management company fell within the jurisdiction of the Fair Labor Standards Act.[119] *Wirtz* is a case about the applicability of federal labor laws; the bank's percentage occupancy is merely a fact recounted in the opinion that is unrelated to the holding.[120]

OCC Interpretive Letter No. 1045's responsive parenthetical explaining *Wirtz* as "recognizing bank's authority to occupy 20.7% of office complex and lease remaining space as excess premises"[121] is a misstatement because the *Wirtz* holding had nothing to do with percentage occupation. The *Wirtz* decision is confined to labor law and does not establish a rule on percentage occupation or even address percentage occupation as a legal issue.

iv. Wingert v. First National Bank

In *Wingert v. First National Bank*, a bank wanted to tear down its three-story building and replace it with a six-story building.[122] The bank used the first floor of the original building and leased the upper two floors to tenants.[123] The bank planned a similar arrangement for the new building, whereby the bank would use the first floor and lease the upper five floors to tenants.[124] OCC had written the bank a letter approving the new building,[125] relying on dicta from *Brown v. Schleier*.[126] Although one of the bank's directors brought suit challenging the new building's construction as a violation of the National Bank Act's real estate powers limitation, the court upheld the construction on the grounds that OCC's interpretation of its statue was a "common sense interpretation."[127] The *Wingert* holding does support the position that a bank may lease those parts

118. *See* 365 F.2d 641, 642-43 (10th Cir. 1966).
119. *See id.* at 643-45 (stating in passing that the national bank occupied approximately 20% of the building, but not using the bank's percentage occupancy of the building in the opinion's legal reasoning on a labor law matter).
120. *See id.* (holding that the Fair Labor Standards Act applied to management personnel as well as ordinary workers, which is a legal issue wholly unrelated to a bank's percentage occupancy of a building).
121. OCC Interpretive Letter No. 1045 at 3 (Dec. 5, 2005), http://www.occ.treas.gov/interp/dec05/int1045.pdf.
122. *See* Wingert v. First Nat'l Bank, 175 F. 739, 740 (4th Cir. 1909).
123. *Id.*
124. *Id.*
125. *Id.* at 741.
126. *See id.* (relying on dicta in *Brown v. Schleier*, 118 F. 981, 983-84 (8th Cir. 1902)); *cf. supra* notes 109-17 and accompanying text.
127. *Wingert*, 175 F. at 741.

of its building that it does not use for banking business to third parties as office space. *Wingert*, however, does not address the ability of a national bank to own a hotel or establish a "percentage occupation" test.

v. 12 C.F.R. § 7.1000

OCC Interpretive Letter No. 1045 also attempts to justify Bank of America's Ritz-Carlton project as being permissible under the National Bank Act even though the letter conflicts with the express terms of an OCC rule.[128] OCC claims that the list of permitted real estate holdings listed in 12 C.F.R. § 7.1000(a)(2) is not exclusive.[129] Although the preamble to the proposed rule supports that position,[130] the rule itself does not state that the list is non-exclusive and does not permit banks to own lodgings except in areas where commercial lodgings are unavailable.[131] The preamble to the final rule also does not state that the list is non-exclusive and, even though OCC Interpretive Letter No. 1045 claims that the preamble to the final rule does say that the list is non-exclusive, OCC apparently abandoned the non-exclusivity statement when it promulgated the rule's final version.[132]

OCC's interpretation of 12 C.F.R. § 7.1000 likely will not receive deference because the rule is unambiguous.[133] The preamble to the proposed version of 12 C.F.R. § 7.1000 states that the permitted activities listed in that rule are not exclusive;[134] however, the rule itself is not ambiguous, and the preamble to the final rule did not state that the list was not exclusive.[135] While there may not be suitable commercial alternatives

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128. *See* Christensen v. Harris County, 529 U.S. 576, 588 (2000) (holding that an agency only receives *Auer v. Robbins* deference for interpretations of its ambiguous regulations); *see also* Auer v. Robbins, 519 U.S. 452, 461 (1997). *Compare* 12 C.F.R. § 7.1000(a)(2)(v) (2006) ("Property for the use of bank officers, employees, or customers, or for the temporary lodging of such persons in areas where suitable commercial lodging is not readily available, provided that the purchase and operation of the property qualifies as a deductible business expense for Federal tax purposes."), *with* OCC Interpretive Letter No. 1045 (Dec. 5, 2005), http://www.occ.treas.gov/interp/dec05/int1045.pdf (permitting the bank to own a hotel in downtown Charlotte; a major city with ample lodging alternatives).

129. *See* OCC Interpretive Letter No. 1045 at 2-3 n.2 (claiming that the list of permitted activities in 12 C.F.R. § 7.1000 is non-exclusive even though neither the rule itself nor the preamble to the final rule supports this proposition).

130. *See* Interpretive Rulings, 60 Fed. Reg. 11,924, 19,925 (proposed Mar. 3, 1995) (to be codified at 12 C.F.R. pts. 7 and 31) (proposing a non-exclusive list of real estate considered to be a bank premises for purposes of 12 U.S.C. § 29).

131. *See* 12 C.F.R. § 7.1000(a)(2)(v) (2006) (limiting national bank ownership of lodgings to circumstances that likely only occur in isolated, rural areas).

132. *Compare* Interpretive Rulings, 61 Fed. Reg. 4849, 4850 (Feb. 9, 1996) (to be codified at 12 C.F.R. pts. 7 and 31) (failing to state that the list of permissible activities is non-exclusive), *with* OCC Interpretive Letter No. 1045 at 2 n.2 (claiming, incorrectly, that the preamble to the final rule stated that the list of permissible activities was non-exclusive).

133. An agency's interpretations of its ambiguous rules are accorded deference unless the interpretation is plainly erroneous or inconsistent with the regulation. *See Christensen*, 529 U.S. at 588; *Auer*, 519 U.S. at 461.

134. *See* 60 Fed. Reg. 11,924, 19,925 (proposed Mar. 3, 1995).

135. *See* 61 Fed. Reg. 4849, 4850 (Feb. 9, 1996).

in rural, sparsely populated areas, Charlotte, North Carolina is a thriving metropolitan area with ample commercial lodging. Ownership of a Ritz-Carlton is plainly inconsistent with 12 C.F.R. § 7.1000 under these facts because Charlotte, North Carolina has over 30,000 hotel rooms.[136] Therefore, suitable commercial lodging alternatives to Bank of America's Ritz-Carlton exist locally.[137] Even if OCC's interpretation of 12 C.F.R. § 7.1000 as a non-exclusive list is accorded deference, Bank of America's building and owning a Ritz-Carlton in downtown Charlotte plainly conflicts with the rule.

2. Analysis of Letter No. 1045 Under Arnold Tours *and* VALIC

Although owning a hotel may be convenient and useful to Bank of America,[138] the hotel business is not necessary to the business of banking because offering lodging to the public is not related to the express powers of national banks in 12 U.S.C. § 24(7). Even though 12 U.S.C. § 29 codifies the national banks' real estate power, § 29(1) only authorizes banks to hold real estate as necessary to its business. Therefore § 29(1) implicates the business of banking defined in § 24(7). The "necessary" to business requirement of § 29 mirrors the "necessary" to business requirement of § 24(7) and the *Arnold Tours* standard.[139]

A national bank owning a hotel likely does not qualify as the business of banking under *Arnold Tours* because owning a hotel is not related to the business of making loans, taking deposits, buying and selling exchange, coin, or bullion, discounting promissory notes, or any other express power.[140] Owning and operating a hotel is much more similar to operating a travel agency than the business of banking. Travel agencies regularly

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136. *See* Rehm, *supra* note 16, at 3.
137. *Cf.* 12 C.F.R. § 7.1000(a)(2)(v) (2006).
138. *Cf.* Arnold Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1972) ("[A] national bank's activity is authorized as an incidental power, 'necessary to carry on the business of banking,' within the meaning of 12 U.S.C. § 24, Seventh, if it is convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act.").
139. *See* Gustafson v. Alloyd Co., 513 U.S. 561, 568-74 (1995) (holding that the meaning of a term in a statute must be read to be consistent throughout even if a plain reading of a statute would appear to give it one meaning in certain provisions and another meaning in different provisions). *Compare* 12 U.S.C. § 24(7) (2000) ("To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking . . . ."), *and Arnold Tours*, 472 F.2d at 432 ("[A] national bank's activity is authorized as an incidental power, 'necessary to carry on the business of banking" . . . if it is convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act."), *with* 12 U.S.C. § 29(1) ("A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others: First. Such as shall be necessary for its accommodation in the transaction of its business . . . .").
140. *See* 12 U.S.C. § 24(7) (2000).

make hotel reservations for their clients so that they will have lodging during their travels. Hotel customers do not look to the hotel to provide financial services, but rather look to the hotel as a source of lodging. Both a hotel and a travel agency engage in aspects of the travel business, but neither engage in the business of banking or the business of financial instruments.

Bank of America using the Ritz-Carlton hotel chain as its agent to operate the hotel does not make the bank's ownership of the hotel permissible if the bank's direct ownership or operation of the hotel itself is not permissible.[141] By simply owning the hotel, the bank exposes itself to the risks inherent to the hotel industry. A hotel building can be used for lodging, or possibly be converted to apartments or condos at additional expense, but is not suited for other purposes.

Only a few chains operate luxury hotels in the United States. Most would be hesitant to take over a struggling hotel because the hotel business depends on location to attract lodgers. Office space is a safer asset than a hotel because any type of business that requires an office may use it. Considering the shallow pool of potential tenants and the stigma that likely attaches to a struggling hotel location, the same policy reasons for prohibiting a bank from employing an agent to operate a mill held in trust would apply to a bank building a luxury hotel and leasing it to a hotel chain.[142]

B. Interpretive Letter No. 1044: PNC Bank

OCC Interpretive Letter No. 1044 approved PNC Bank's plan to build a new headquarters building in Pittsburgh with twelve floors of office space, a 158-room five-floor hotel, and thirty-two condo units.[143]

1. OCC's Legal Argument in Interpretive Letter No. 1044

OCC's justification in OCC Interpretive Letter No. 1044 for approving PNC's plan for expanding its headquarters is substantially similar to OCC's justification for approving Bank of America's Ritz-Carlton project as permissible under the National Bank Act in Interpretive Letter No. 1045. In Interpretive Letter No. 1044, OCC only cited three cases, *National Bank v. Matthews*, *Brown v. Schleier*, and *Perth Amboy National Bank v. Brodsky*.[144]

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141. *See* Cockrill v. Abeles, 86 F. 505, 511-12 (8th Cir. 1898) (holding that the National Bank Act did not permit a bank to own a cotton mill even though a separate business entity operated the mill).

142. *See id.* at 512 (stating that cotton mill ownership had impermissibly exposed the insolvent national bank to the risks of the milling industry).

143. *See* OCC Interpretive Letter No. 1044 at 2 (Dec. 5, 2005) http://www.occ.treas.gov/interp/dec05/int1044.pdf; Rehm, *supra* note 16, at 3.

144. *See* Nat'l Bank v. Matthews, 98 U.S. 621 (1878); Brown v. Schleier, 118 F. 981 (8th Cir. 1902), *aff'd*, 194 U.S. 18 (1904); Perth Amboy Nat'l Bank v. Brodsky, 207 F.

Perth Amboy National Bank v. Brodsky is a district court case from 1962 involving a bank that sued the landlord of its headquarters building to void the lease as *ultra vires* under the National Bank Act.[145] In 1954, the bank entered into a sale-and-lease-back arrangement with the landlord, in which the bank sold its headquarters to the landlord and leased it back to the bank.[146] Moving for summary judgment, the bank argued that the court should void its lease because the lease was so unfair that the bank must not have acted in good faith when making the lease, and that the leased premises were larger than what was actually necessary for the reasonable accommodation of the bank's business.[147] The district court followed the *Brown v. Schleier* dicta and denied summary judgment to the bank because the *Brown* dicta interpreted 12 U.S.C. § 29 to allow a national bank to lease larger premises than necessary and because the issue of good faith was an issue of material fact for the jury to decide at trial.[148]

OCC cited *Brodsky* as support for its position that "the courts have recognized that it is appropriate for a bank to maximize the utility of its banking premises."[149] OCC's citation to *Brodsky* does not include the name of the court, but OCC's reliance on a district court case from 1962 is misplaced because the facts of *Brodsky* were very different from the PNC hotel ownership situation. First, *Brodsky* involved the bank's lease for premises to be used for banking business, not for commercial lodging. Second, the bank was suing its landlord to attempt to withdraw from an otherwise valid lease by arguing that the lease was *ultra vires*. Although the *ultra vires* doctrine was well accepted in the ninteenth century, courts in the twentieth century were generally suspicious of business entities that, as in *Brodsky*, argued that they should be able to withdraw from otherwise valid contracts that they had entered into by claiming that the contract was *ultra vires*.[150] Third, the only part of *Brodsky* that supports OCC's position that the courts have recognized the appropriateness of banks to maximize the utility of its banking premises is the district court's reliance on the dicta from *Brown v. Schleier*.

Supp. 785 (S.D.N.Y. 1962).

145. *See Brodsky*, 207 F. Supp. at 786 (noting that the bank attempted to avoid liability for the unexpired term of the lease).

146. *Id.*

147. *Id.*

148. *Id.* at 787-88.

149. OCC Interpretive Letter No. 1044 at 3 (Dec. 5, 2005) http://www.occ.treas.gov/interp/dec05/int1044.pdf.

150. *See generally* ROBERT W. HAMILTON, THE LAW OF CORPORATIONS IN A NUTSHELL 97-98 (2000) (noting that the 1950 and later Model Business Corporations Acts did not permit corporate property transfers to be invalidated even if they were *ultra vires*).

None of the cases that OCC cites in Interpretive Letter No. 1044 involve a bank operating a hotel or otherwise engaging in the business of lodging. Although *Brown v. Schleier* and *Brodsky* support the contention that a bank may lease office space in its building, these cases do not support the contention that a bank may own a hotel and contract with a national hotel chain to manage that hotel for it. As in OCC Interpretive Letter No. 1045, OCC Interpretive Letter No. 1044 falls well short of reasonably interpreting the National Bank Act.

2. Analysis of Letter No. 1044 Under Arnold Tours *and* VALIC

The hotel that PNC plans to add to its headquarters should not be permissible under the National Bank Act and OCC rules. Under the *Arnold Tours* and *VALIC* standards discussed in Part II.A of this Article, *supra*, the PNC hotel is not permissible for the same reasons that Bank of America's Ritz-Carlton is not permissible: The business of hotels is not related to the express powers of national banks or to financial instruments. Therefore, the hotel business is not a permitted incidental power under the National Bank Act.

In addition, PNC believes that persons on bank-related business will occupy only 10% of the hotel rooms on a yearly basis, but that PNC may occupy a larger percentage of the rooms during certain times throughout the year. This percentage is substantially lower than the 37.5% bank-related occupancy that Bank of America speculates that its Ritz-Carlton will have. OCC's acceptance of only 10% occupancy under its "percentage occupancy" test makes OCC's application of this so-called test appear to be arbitrary and capricious. If only 10% occupancy is acceptable, what percentage would be too low?

The percentage occupancy issue is likely moot, however, because—even if "percentage occupancy" is a valid inquiry—percentage occupancy should not permit a bank to enter lines of business that would otherwise not be permissible under the National Bank Act.

C. OCC Interpretive Letter No. 1048: Union Bank of California

OCC Interpretive Letter No. 1048 impermissibly authorized Union Bank of California in San Francisco to finance and acquire a 70% equity interest in an LLC that will establish an electrical wind-turbine farm to generate electricity. Although OCC justified the financing of the project under the lending power of national banks under § 24(7)[151] as well as the ability of banks to hold real estate under § 29,[152] OCC Interpretive Letter No. 1048 is

151. *See* 12 U.S.C. § 24(7) (2000) (permitting national banks to make loans).
152. *See* 12 U.S.C. § 29 (2000) (permitting national banks to own real estate necessary to the transaction of its business).

devoid of references to the jurisprudence of § 24(7).[153] OCC's interpretation in this letter is not reasonable because owning windmills is not necessary to the business of banking or related to any of the express powers of national banks. Permitting national banks to own electricity generating windmills also subjects banks to the economic perils of the energy market, which is contrary to public policy.

1. OCC's Legal Argument in Interpretive Letter No. 1048

OCC's justification for its approval of Union Bank's investment in the energy industry primarily cites other OCC letters as precedent.[154] OCC Interpretive Letter No. 1048's analysis of 12 U.S.C. § 24(7) is devoid of any reference to cases such as *Arnold Tours* or *VALIC*.[155] The only sources of law that OCC cites in the section of the letter analyzing § 24(7) are prior interpretive and rulings letters,[156] and the 1879 case *National Bank v. Matthews*.[157] A later OCC interpretive letter[158] and OCC testimony before Congress[159] claimed another case, *M&M Leasing Corp. v. Seattle First National Bank*,[160] as authority. *M&M Leasing Corp.* permits national banks to lease personal property under the lending power enumerated in the National Bank Act if the lease is the functional equivalent of a loan, but does not address whether a bank may own real estate or enter the energy business.[161]

Although OCC justified the bank's acquisition of an equity interest in the windmill farm under the lending power, styling equity ownership as permissible under a bank's powers to make loans is not reasonable because debt and equity ownership are fundamentally different. A bank's business involves assuming a debt to its depositors by accepting their deposits and

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153. *See* OCC Interpretive Letter No. 1048 (Dec. 21, 2005), http://www.occ.treas.gov/interp/JAN06/int1048.pdf; *see also*, *e.g.*, NationsBank v. VALIC, 513 U.S. 251, 258-59 n.2 (1995); Arnold Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1972); *cf.* M&M Leasing Corp. v. Seattle First Nat'l Bank, 563 F.2d 1377, 1383-85 (9th Cir. 1977) (authorizing a bank to lease personal property to customers under the lending power so long as the leases did not impose significant financial risks and were the functional equivalent of a loan).

154. *See* OCC Interpretive Letter No. 1048 at 4 nn.4-5 (citing OCC Interpretive Letter dated Nov. 4, 1994, OCC Interpretive Letter No. 867 (*reprinted on* June 1, 1999), and OCC Interpretive Letter No. 966 (May 12, 2003)).

155. *See* OCC Interpretive Letter No. 1048 at 2-3.

156. *See id.*; *see also* Corporate Decision No. 99-07 (May 26, 1999); Corporate Decision No. 98-17 (Mar. 23, 1998); Unpublished OCC Interpretive Letter from Horace G. Sneed, OCC Senior Attorney (Nov. 4, 1994).

157. 98 U.S. 621 (1879).

158. *See* OCC Interpretive Letter No. 1053, at 7 (Jan. 31, 2006), http://www.occ.treas.gov/interp/mar06/int1053.pdf.

159. Testimony of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, OCC, before the Subcomm. on Gov't Mgmt., Finance, and Accountability, at 9 (Sept. 27, 2006), *available at* http://www.occ.treas.gov/ftp/release/2006-105b.pdf.

160. 563 F.2d 1377 (9th Cir. 1977).

161. *See id.* at 1382-85.

selling loan products in which the borrower assumes a debt to the bank. Equity interests are ownership interests, not loans. Following the logic of OCC Interpretive Letter No. 1048, OCC could justify national banks investing in almost any sort of business venture as long as the bank could have alternatively offered a loan rather than purchased an equity investment.

OCC's analysis of 12 U.S.C. § 29 in Interpretive Letter No. 1048 only cites to one case—namely, the dicta in *Union National Bank v. Matthews* where the Supreme Court outlined three policy reasons behind § 29's restrictions on banks owning real estate.[162] OCC again styled the dicta as a weighing factor test even though these "factors" are not related to the holding of the case.[163]

OCC Interpretive Letter No. 1048 also contains a discussion of California state law from which OCC concludes that it can use federal preemption to set aside California's definition of the term "real estate" and replace it with a "federal definition" that had not previously existed.[164] The fact that OCC focused more of the legal analysis of this letter on federal preemption of the definition of "real estate" then on justifying this arrangement under the National Bank Act is notable because this allowed OCC to make a more convincing argument for preempting state law than for justifying the reasonableness of its statutory interpretation.

2. Analysis of Letter No. 1048 Under Arnold Tours *and* VALIC

The Union Bank of California windmill farm situation is very similar to the mill-ownership situation in *Cockrill v. Abeles*.[165] The wind energy project uses wind turbines to generate electricity to be sold through long-term contracts.[166] The bank will finance the project and acquire approximately 70% of the equity in the LLC that will operate the windmills and receive a portion of the LLC's profits (if any).[167]

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162. *See* Nat'l Bank v. Matthews, 98 U.S. 621, 626 (1878) (claiming—without any citations to legislative history—that Congress's three policy reasons behind the restriction on national bank real estate ownership were: (1) keeping the banks' capital flowing in the daily channels of commerce; (2) deterring banks from embarking in unsafe and unsound real-estate speculation; and (3) preventing, banks from holding property in mortmain); OCC Interpretive Letter No. 1048 at 5 (Dec. 21, 2005), http://www.occ.treas.gov/interp/JAN06/int1048.pdf (reiterating the same policy reasons).

163. OCC Interpretive Letter No. 1048 at 5; *see Matthews*, 98 U.S. at 626.

164. *See* OCC Interpretive Letter No. 1048 at 5 (discussing the problems of employing various state definitions of "real estate" for the purposes of § 29).

165. *See* 86 F. 505, 512 (8th Cir. 1898) (denying national banks the power to engage in the milling business on public policy grounds).

166. OCC Interpretive Letter No. 1048 at 1.

167. *See id.* at 1-2 (delineating that the bank will be paid income provided by the project's revenues and section 45 Tax Credits).

Essentially, Union Bank is making an investment in windmills. These windmills generate electrical power. Although the windmills are called "turbines," they operate in exactly the same manner as a windmill: Wind turns the structure's rotors to generate mechanical energy to be used in manufacturing. In this instance, the manufacturing process converts mechanical energy into electrical energy.

Although OCC justifies Union Bank's financing of this project under the lending power,[168] Union Bank is making an investment. The bank is acquiring a 70% equity interest in the company in exchange for its money and will receive profits, not interest. The bank, therefore, possesses an equity interest in the company and qualifies as an owner, not a lender, because a lender would have a debt owed by the company. Even though this owner versus lender bifurcation would be muddied if the bank received repayment of principle with interest rather than a percentage of the profits (if any), the simple fact that the bank receives equity—not debt—likely violates the restrictions on the lending power in § 24(7) of the National Bank Act in and of itself because this "loan" is not a loan in fact.[169] The equity interest is not collateral to secure the loan; the equity interest is outright ownership.[170]

Although the OCC letter states that the bank's ownership in the windmills will be limited to ten years and that the bank will be "repaid" at regular intervals with part of the LLC's profits, the bank will be tied to the LLC through majority ownership and the ability of the bank to recoup its capital investment masquerading as a "loan" depends on the business climate in the energy industry years from now. As the bank's interest is equity, not debt, if the LLC fails, the bank likely will lose its investment because the bank does not have liquidation priority over the LLC's creditors in a bankruptcy.[171] Even prior to bankruptcy, LLC investments, like limited partnership investments, are typically illiquid (although the available facts do not indicate the degree of liquidity of Union Bank's investment)—a fact that would also likely impair the bank's ability to recoup its investment if there is a downturn in the energy industry. In short, the investment is unsafe and unsound for a national bank and the OCC should not permit it because of the risks such investments pose.[172]

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168. *See* 12 U.S.C. § 24(7) (2000) (listing lending as an express power of national banks).

169. *Cf.* SEC v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946) (defining most passive allocations of money for profit as investment contracts—not loans—especially if the investment includes an equity ownership interest).

170. *Cf.* 12 C.F.R. §§ 32.2(k), 34.3(a) (2006) (defining the lending power and delineating when a national bank may secure a loan with real estate).

171. *See* 11 U.S.C. § 726(a) (2000) (giving a debtor's equity owners a bankruptcy liquidation priority subordinate to all creditors).

172. *See* JACKSON & SYMONS, *supra* note 2, at 117-22 (discussing how portfolio-shaping

The differences between the businesses of electricity-generating windmills and cotton-generating mills are slight when compared to a bank's business. Neither qualifies as necessary to the business of banking under the *Arnold Tours* standard because operating a cotton mill or electrical plant is not related to any of the express powers of national banks under 12 U.S.C. § 24(7). Neither qualifies as the business of banking under the *VALIC* standard because the businesses of cotton manufacturing and electricity generation do not involve financial instruments except as used in general commerce. Nearly all forms of business associations have securities to represent debt or equity in the company. Holding that issuing securities to raise capital qualifies as the business of banking would allow national banks to conduct all manners of business unrelated to banking.

Like the bank in *Cockrill*, Union Bank will own majority control in the business association operating the impermissible business. Also like in *Cockrill*, the business association is engaged in manufacturing. The fact that the Union Bank project's LLC will generate electrical energy, rather than processed cotton, is immaterial because neither the cotton nor energy industries are related to the express powers of national banks. The fact that the LLC will own the wind turbines, rather than hold them in trust for the bank as the mill corporation did in *Cockrill*, is immaterial because the bank will have indirect ownership of the turbines through its 70% equity interest in the LLC.

The wind turbine project will expose the bank to the dangers inherent in the energy industry. The Enron scandal demonstrated that the energy industry is volatile and that vast sums of book capital in energy companies can vanish in a short time. In fact, Enron even owned a wind energy operation similar to the one that OCC permitted Union Bank to own.[173] The same policy reasons used to justify the prohibition of a bank operating a mill in *Cockrill* apply to the Union Bank wind turbine project because electricity-generating windmills are no more related to the business of banking than a cotton mill and pose at least as many risks to the bank.

IV. CONCLUSION

Hotel and energy business activities are not permissible national bank activities. The National Bank Act places strict limits on a national bank's ability to own real estate and engage in business activities usually reserved for general commerce. These restrictions are intended to protect the banking system and—by extension—the public's savings and the economy

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rules prohibit unsafe and unsound bank investments).

173. *See* Claudia H. Deutsch, *Investors are Tilting Toward Windmills; G.E. Sees Much to Like in Alternative Energy*, N.Y. TIMES, Feb 15, 2006, at C8 (stating that General Electric purchased Enron's windmill operation after Enron's collapse).

at large. There is no basis in the National Bank Act or the numerous cases interpreting the Act for a statutory interpretation permitting banks to enter the lodging business or the energy business, even on a limited basis.

By permitting national banks to enter the lodging and energy industries, OCC has gone far beyond what Congress intended when it adopted what is now 12 U.S.C. § 29 during the Civil War. OCC's interpretive letters ignore virtually all cases interpreting the National Bank Act and instead rely on dicta from archaic opinions unrelated to hotels or windmills. The three OCC Interpretive Letters conspicuously omit all modern statutory interpretation cases involving the National Bank Act, such as the *Arnold Tours* or *VALIC* lines of cases.

These three letters demonstrate the pitfalls of extending *Chevron* deference in judicial review to legislative interpretations that do not undergo notice and comment proceedings. OCC can issue suspect statutory interpretations using this interpretive letter procedure, knowing that the chances of a judicial challenge are low because few members of the public read the letters. Even those who read the letters know that successfully challenging an OCC interpretive letter will be difficult and costly because OCC receives *Chevron* deference. Administrative procedures such as OCC's interpretive letters that receive *Chevron* deference without public notice and comment breed suspect administrative interpretations—that border on being arbitrary and capricious—because the agency knows that the chances of judicial review are lower than in notice and comment rulemaking.

OCC's Interpretive Letters Nos. 1044, 1045, and 1048 permit national banks to engage in activates beyond those that Congress intended and beyond what the courts have held are permissible interpretations of the National Bank Act. OCC's Interpretive Letters Nos. 1044, 1045, and 1048 are not reasonable interpretations of the National Bank Act, and therefore should not be valid under *Chevron* step two.

SUPERVISING THE PENTAGON: COVERT ACTION AND TRADITIONAL MILITARY ACTIVITIES IN THE WAR ON TERROR

JOEL T. MEYER*

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INTRODUCTION

The primary tools of American foreign policy include military force, diplomacy, and foreign aid. But when those tools are unavailable or inapplicable to a particular problem, policymakers traditionally have turned to covert action.[1] The statutory definition of covert action, stipulated in the

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1. *See, e.g.*, JOHN J. CARTER, COVERT ACTION AS A TOOL OF PRESIDENTIAL FOREIGN POLICY: FROM THE BAY OF PIGS TO IRAN-CONTRA 222 (2006) (noting that "[a]n important part of the allure of covert action is that it seems to offer presidents a 'silver bullet' with which they can strike any enemy or defend any friend with perfect anonymity"); JOHN JACOB NUTTER, THE CIA'S BLACK OPS: COVERT ACTION, FOREIGN POLICY, AND DEMOCRACY 38-39 (2000) (discussing the institutional attractions of covert action as an alternative to military or diplomatic options, such as the fact that covert action provides a "simple, or 'clean,' solution to a problem," particularly for presidents who lack experience with foreign

Intelligence Authorization Act, Fiscal Year 1991 (Intelligence Act), is "an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly . . . ."[2]

The legal controls on covert action are the product of an extensive combination of executive direction and statutory requirements.[3] The Intelligence Act, however, limits the types of actions that are subject to this regulatory scheme, explicitly exempting "traditional . . . military activities or routine support to such activities."[4] Then-Secretary of Defense Donald Rumsfeld argued that the war in Afghanistan demonstrated the effectiveness of special operations forces (SOF) in the war on terror, and he aggressively sought greater authority to use SOF without following Intelligence Act procedures by interpreting the "traditional military activities" exception expansively.[5] The Bush Administration describes the "war on terror" as a traditional war and, thus, all activities in the war on terror qualify as traditional military activities.[6]

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policy); Marcus Eyth, *The CIA and Covert Operations: To Disclose or Not to Disclose—That is the Question*, 17 BYU J. PUB. L. 46-54 (2003) (examining the use of covert action by policymakers throughout American history, including President George Washington's requests to Congress for appropriations of over $1 million for secret intelligence activities, the creation of the Office of Strategic Services (OSS) during World War II and the Central Intelligence Agency (CIA) after the war, and the many CIA-led covert actions during the Cold War).

2. Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, 105 Stat. 429 (codified at 50 U.S.C. § 413b(e) (2000)). Other resources provide slightly different definitions of covert action. *See, e.g.*, CARTER, *supra* note 1, at 8 (defining covert action as "clandestine activity designed to influence foreign governments, events, organizations or persons in support of presidential objectives without the role of the United States government being apparent or acknowledged") (internal citations omitted); NUTTER, *supra* note 1, at 73 ("[C]overt action is an act, operation, or program intended to change the political policies, leaders, institutions, or power structure of another country, performed in a way that the covert actor's role is hidden or disguised, and if that role is discovered, the actor can deny responsibility."); W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION: PRACTICES, CONTEXTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW 13 (1992) (explaining that the factual meaning of a covert action is an action accomplished in ways unknown to some parties, while the normative meaning is an action that is per se unlawful in the way it has been accomplished).

3. *See* REISMAN & BAKER, *supra* note 2, at 120 (detailing the statutory requirements for covert action—most importantly, the necessity of a presidential "Finding" and congressional notification—and the executive requirements, including CIA and White House review mechanisms); ALFRED CUMMING, CONG. RESEARCH SERV., STATUTORY PROCEDURES UNDER WHICH CONGRESS IS TO BE INFORMED OF U.S. INTELLIGENCE GATHERING ACTIVITIES, INCLUDING COVERT ACTIONS 5-6 (2006), http://www.fas.org/sgp/crs/intel/m011806.pdf (describing the statutory parameters by which the president may report covert action to Congress).

4. 50 U.S.C. § 413b(e)(2).

5. *See* Seymour M. Hersh, *The Coming Wars: What the Pentagon Can Now Do in Secret*, NEW YORKER, Jan. 24, 2005, at 41 (reporting that the President has signed a "series of findings and executive orders" authorizing various Special Forces actions and effectively placing the war on terror under the control of the Pentagon).

6. Jennifer D. Kibbe, *The Rise of the Shadow Warriors*, 83 FOREIGN AFF. 102, 108-09

Congress has begun to deal with this loophole by requiring the Secretary of Defense to authorize any special forces operations conducted pursuant to funding provided in the 2004 defense authorization bill.[7] This Article argues, however, that Congress should extend statutory regulation on covert action to include all actions apparently undertaken by the Pentagon that implicate the same policy concerns as do traditional covert actions. Part I defines covert action and its statutory scope. Part II outlines the types of operations SOF allegedly have undertaken and how they fit into the legal framework which regulates covert action. Finally, Part III recommends that Congress include these alleged SOF activities among the types of actions subject to regulation.

I. COVERT ACTION

A. The Nature of Covert Action

The defining characteristic of a covert action is the secrecy of its sponsor. Indeed, the fact of its occurrence may be public—for example, an American agent placing a propaganda article in a foreign newspaper—but the fact of United States sponsorship of the operation would remain secret. On the other hand, a clandestine operation is defined by the secrecy of the operation itself. However, should the operation be discovered, United States sponsorship would be apparent.[8]

(2004). Some legal experts argue that the president has virtually unlimited authority through the Authorization of the Use of Force that Congress passed in response to the attacks on September 11, 2001, as long as the president determines that a target has some connection to al Qaeda. In addition, some Pentagon lawyers contend that because of the September 11th attacks, all of the war on terror is an act of self-defense and, therefore, a traditional military activity that does not require reporting to Congress. *Id.*

7. *See* ALFRED CUMMING, CONG. RESEARCH SERV., COVERT ACTION: LEGISLATIVE BACKGROUND AND POSSIBLE POLICY QUESTIONS 3 n.9 (2006), *available at* http://www.fas.org/sgp/crs/intel/RL33715.pdf (describing § 1208 of Pub. L. No. 108-375 (2004), which authorizes $25 million for the Secretary of Defense "to provide support to 'foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating ongoing military operations by United States special operations forces to combat terrorism'"). To use this authority, the Secretary must "notify the congressional defense committees expeditiously" of the use of that authority. *Id.*

8. *See, e.g.*, DEP'T OF DEF., DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 89 (2006), *available at* http://www.dtic.mil/doctrine/jel/doddict/ (providing a definition of "clandestine operation" which places an emphasis on the concealment of the operation, rather than the identity of the sponsor like in a covert operation); Kibbe, *supra* note 6, at 104 (defining covert action as being "rooted in the notion of deniability" while "clandestine refers to the secrecy of the operation itself"); NUTTER, *supra* note 1, at 73 (defining covert action as an action where the "actor can deny responsibility" and a clandestine action as an action "in which the deed itself is hidden, so that only the people carrying out the action know that it is taking place"). An example of a clandestine, rather than covert, operation is a secret nighttime raid carried out by uniformed American soldiers—if the enemy discovered the soldiers, it would be obvious from the uniforms that the United States had sponsored the action.

By statute and executive order, primary responsibility for conducting covert operations traditionally has been granted to the Central Intelligence Agency (CIA).[9] Even before the CIA's founding in 1947,[10] there were several notable examples of American presidents employing covert action. In 1843, President Tyler dispatched an agent to Great Britain to meet privately with British opposition groups to attempt to influence public opinion there without disclosing that he was a representative of the U.S. government.[11] Similarly, in 1869, President Grant sent an agent, again without disclosure, to central and western Canada to encourage public sentiment for the separation of that region and for union with the United States.[12] Those examples of covert action fall under the categories of propaganda[13] and political action,[14] but experts have identified three other types of covert action:[15] asset development,[16] economic warfare,[17] and paramilitary action.[18] While the nature of each type of action is beyond the scope of this Article, a brief explanation of paramilitary action will be useful, as it is the type most commonly associated with covert action.[19]

Capture or assassination is a common and notorious form of paramilitary action.[20] Public information on CIA assassination attempts indicates that

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9. *See* 50 U.S.C. § 403-3(d)(5) (2000) (announcing the famous "Fifth Function" of the CIA director—to "perform such other functions and duties related to intelligence affecting the national security as the President or the National Security Council may direct"). This provision has been interpreted as giving statutory authorization for the conduct of covert operations. REISMAN & BAKER, *supra* note 2, at 118; *see also* Exec. Order No. 12,333, 3 C.F.R. § 200 (1982) (naming the CIA as the lead agency in conducting covert operations unless the President finds that another agency is better equipped for the operation).

10. *See* CIA, ABOUT THE CIA (last visited Mar. 6, 2007) https://www.cia.gov/cia/information/info.html (noting that the CIA was founded in 1947 when President Truman signed the National Security Act).

11. STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 423 (3d ed. 2002).

12. *Id.*

13. *See* NUTTER, *supra* note 1, at 84 (explaining that propaganda and disinformation is "simply any information used to influence someone to do something").

14. *See id.* at 79 (explaining that political action usually involves "political advice, psychological operations . . . , subsidies to important individuals and organizations, non-monetary subsidies, and political training," all of which is "designated to directly influence political processes, decisions, and institutions").

15. *See id.* at 75 (listing five types of covert action). *But see* Eyth, *supra* note 1, at 55 (dividing covert action into only three categories: political action, propaganda and disinformation, and paramilitary action).

16. *See id.* at 76 (explaining that asset development most commonly involves a "single individual who holds some position that is or could be useful to a covert operation").

17. *See id.* at 89 (describing economic warfare as "a euphemism for vandalism, pillaging, and destruction of opposing economic targets").

18. *See id.* at 91 (listing assassination, sponsorship of coup d'etat, and support of guerrilla movements as the most notorious types of paramilitary action). Other types of paramilitary action include "providing intelligence to a friend or client (which they might use to make their own violence more successful)," and terrorist operations such as anonymous bombing, hijacking civilian aircraft, and hostage seizures. *Id.* at 90.

19. *Id.* at 90-91.

20. *See id.* at 91 (listing assassination of political enemies as one of the three types of paramilitary options that are most associated with covert action).

agents have worked actively to assassinate at least two heads of state,[21] and have been involved in three other assassination plots.[22] Executive Order 12,333 declared assassination illegal,[23] but scholars who have explored the domestic legal constraints on assassination in the context of the war on terror have found significant loopholes and flexibility that make the ban less than absolute.[24] Because the ban is contained in an executive order, it can be suspended by the president or revoked by a subsequent executive order.[25] Further, the term "assassination" was defined vaguely in Executive Order 12,333, leaving open various possibilities that would not violate the ban on assassination.[26]

The Final Report of the National Commission on Terrorist Attacks Upon the United States details elaborate pre-9/11 U.S. government efforts to employ covert action to counter the threat posed by Osama bin Laden and al Qaeda.[27] In 1996, when the Clinton Administration began to recognize that bin Laden was a considerable threat, the CIA created a special "bin Laden unit" to analyze intelligence on and plan operations against bin Laden.[28] This unit followed bin Laden from Sudan to Afghanistan, a move

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21. *See* SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 94-465, at 255 (1975) [hereinafter CHURCH COMMITTEE REPORT] (listing the two heads of state as Congo Premier Patrice Lumumba and Cuban dictator Fidel Castro); NUTTER, *supra* note 1, at 111-14.

22. *See* CHURCH COMMITTEE REPORT, *supra* note 21, at 256 (listing CIA involvement in plots to assassinate Rafael Trujillo of the Dominican Republic, Ngo Dinh Diem of South Vietnam, and Rene Schneider of Chile).

23. *See* Exec. Order No. 12,333, 3 C.F.R. § 200, 213 (1982) ("No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.").

24. *See, e.g.*, Jonathan Ulrich, Note, *The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism*, 45 VA. J. INT'L L. 1029, 1036 (2005) (explaining that that the president may waive or rescind Executive Order 12,333 if he so desires, and may target a terrorist leader in anticipatory self-defense); William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 725 (2003) (explaining that if the president clarified that a targeted killing of a terrorist leader was in anticipatory self-defense, it would be allowable under U.S. law, and, further, that the president may waive or rescind Executive Order 12,333 banning assassination if he so desires); Daniel B. Pickard, *Legalizing Assassination? Terrorism, The Central Intelligence Agency, and International Law*, 30 GA. J. INT'L & COMP. L. 1, 34-35 (2001) (concluding that assassinating known terrorists (who are not state leaders) in a foreign nation by CIA personnel arguably is not prohibited under U.S. or international law).

25. See Ulrich, *supra* note 24, at 1036 (arguing that the president has all the authority he needs to circumvent the assassination ban during a time of war).

26. See Banks & Raven-Hansen, *supra* note 24, at 725 (arguing that a targeted killing of a terrorist leader, like Osama bin Laden, in anticipatory self-defense would not be illegal).

27. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 108-34 (2004).

28. *See id.* at 109 (describing the establishment of the bin Laden unit as beginning with a "terrorist financial links unit," but the unit's focus was narrowed to bin Laden himself when the officer selected to run the unit noticed a "recent stream of reports about bin Laden and something called al Qaeda").

that the unit's leader felt represented an advantage for the CIA, which knew the terrain well from its days of involvement in the anti-Soviet insurgency.[29] These covert associations led to the generation of near real-time intelligence about bin Laden's activities in Afghanistan,[30] although senior administration officials never received intelligence from these sources strong enough to support the authorization of a capture operation against bin Laden.[31]

B. Statutory Controls on Covert Action

Congress implemented the primary statutory provision on CIA covert action as part of the Intelligence Act.[32] Part (a) of § 413b requires the president to make certain findings before authorizing a covert action.[33] These determinations must be set forth in a presidential finding.[34] Paragraph (b) of § 413b requires the Director of Central Intelligence and the heads of all agencies involved in the action to keep the intelligence committees of Congress "fully and currently informed of all covert actions . . . ."[35] Section 413b(c)(2) allows the president to notify only the so-called "Gang of Eight," which includes the House and Senate majority and minority leaders, and the chair and ranking members of the House and Senate Intelligence Committees, when the president determines that it is essential to "meet extraordinary circumstances affecting vital interests of the United States."[36]

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29. *See id.* at 110 (adding that although the CIA had abandoned Afghanistan after the Soviet withdrawal, "case officers had reestablished old contacts while tracking down Mir Amal Kansi, the Pakistani gunman who had murdered two CIA employees in January 1993").

30. *See id.* (detailing that by the fall of 1997, the bin Ladin unit had "roughed out a plan for these Afghan tribals to capture bin Laden and hand him over for trial either in the United States or in an Arab country").

31. *See id.* at 112-14 (noting that even though bin Ladin unit Director "Mike" thought the capture plan was "the perfect operation," Counterterrorist Center officers estimated that the operation only had a thirty percent chance of success, causing senior officers at the CIA to forego the operation).

32. 50 U.S.C. § 413b (2000).

33. *See* 50 U.S.C. § 413b(a) (forbidding the president from authorizing a covert action by any "departments, agencies, or entities of the United States Government" unless that action "is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States . . .").

34. *See id.* (requiring that the president's determination of necessity be set forth in a written finding "as soon as possible" or within forty-eight hours of making the decision).

35. *See* 50 U.S.C. § 413b(b)(1) (requiring the heads of all departments, agencies, and entities of the U.S. government involved in a covert action to "keep the [congressional] intelligence committees fully and currently informed of all covert actions which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, including significant failures . . ."); *see also* 50 U.S.C. § 413b(c)(2) (allowing congressional notification to be limited to the Speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and other members included by the president in extraordinary circumstances).

36. *See* CUMMING, *supra* note 3, at 5 (noting that the president may, when he

Paragraph (e) of § 413b defines the types of actions subject to this statutory provision.[37] The definition also specifies activities that are explicitly excluded from this definition, and it is the second of these exclusions that provides an opening for Pentagon activity.[38] This exclusion states that "traditional diplomatic or military activities or routine support to such activities"[39] are not included within the purview of § 413b.[40]

C. Traditional Military Activities and Legislative Intent

The committee reports related to the Intelligence Act provide some detail regarding Congress's intent in exempting traditional military activities and routine support to such activities from the covert action reporting requirements.[41] The exact language states that if an activity "immediately precede[s] or take[s] place during the execution of a military operation" and is executed under a military commander, the activity falls outside of the covert action reporting requirements.[42]

A gray area arises, however, when an apparent military operation is not ongoing or does not immediately follow the activity—in other words, when an activity is undertaken well in advance of a military operation.[43] For

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determines it is necessary to meet extraordinary circumstances, report a covert action to the "Gang of Eight" and "any other member or members of the congressional leadership that the President may designate").

37. *See* 50 U.S.C. § 413b(e) (defining the applicable covert actions as "an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly . . .").

38. *See id.* (defining activities that are not covert action as "(1) activities the primary purpose of which is to acquire intelligence, traditional counterintelligence activities, traditional activities to improve or maintain the operational security of United States Government programs, or administrative activities; (2) traditional diplomatic or military activities or routine support to such activities; (3) traditional law enforcement activities conducted by United States Government law enforcement agencies or routine support to such activities; or (4) activities to provide routine support to the overt activities . . .").

39. 50 U.S.C. § 413b(e)(2).

40. *See* H.R. REP. NO. 101-928, at 28-29 (1989) (Conf. Rep.) (indicating that traditional military activity includes military activities undertaken by military personnel under the command of a "United States military commander . . . which *immediately precede or take place during the execution of a military operation*" that is publicly acknowledged) (emphasis added); S. REP. NO. 101-358, at 55 (1990) (stating that whether activities undertaken well in advance of a possible military operation constitute "routine support" to such an operation depends on whether "support to a possible military contingency operation involves other than unilateral efforts by U.S. agencies in support of such operation, to include covert U.S. attempts to recruit, influence, or train foreign nationals, either within or outside the target country, to provide witting support to such an operation, should it occur").

41. S. REP. NO. 101-358, at 53-56; H.R. REP. NO. 101-928, at 27-29. *See generally* William E. Conner, *Reforming Oversight of Covert Actions After the Iran-Contra Affair: A Legislative History of the Intelligence Authorization Act for FY 1991*, 32 VA. J. INT'L L. 871, 905-06 (1992) (arguing that the Intelligence Act was a response to the Iran-Contra Affair, in that the main changes prescribed by a piece of legislation that later became the Intelligence Act were "direct consequences" of the Iran-Contra affair).

42. H.R. REP. NO. 101-928, at 29.

43. *Id.*

such an activity to be exempted from the covert action reporting requirements of § 413b, it would have to be considered "routine support to a traditional military activity."[44] The Senate Report on the Intelligence Act details its views on what might constitute routine support, such as providing clandestine assistance to persons who may be involved in an acknowledged military operation.[45] The report also identifies examples of "other-than-routine" support, such as the recruitment and training of foreign nationals to participate in a U.S. military contingency operation.[46]

II. SOF ACTIVITY IN THE WAR ON TERROR

A. Alleged SOF Activities

Early in 2003, then-Secretary of Defense Donald Rumsfeld called for an expanded role for SOF in the war on terror, saying "[t]he global nature of the war, the nature of the enemy and the need for fast, efficient operations in hunting down and rooting out terrorist networks around the world have all contributed to the need for an expanded role for the Special Operations Forces."[47] Special Operations Command (SOCOM) in Tampa, Florida is the hub of the military's efforts in the war on terror,[48] and comprises SOF units, including the Army Rangers and Green Berets, the Navy SEALs, and the Air Force Special Operations Command.[49] SOCOM also contains the Joint Special Operations Command (JSOC), which is the command at the

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44. *Id.*

45. *See* S. REP. NO. 101-358, at 54 (suggesting that routine support to traditional military activities could include such activities as "providing false documentation, foreign currency, special communications equipment, maps, photographs, etc., to persons to be involved in a[n acknowledged] military operation"). It could also include the "caching," procurement, or storage of equipment to be used in an acknowledged operation. *Id.* at 54-55.

46. *See id.* at 55 (describing "other-than-routine" support as including "clandestinely recruiting and/or training of foreign nationals . . . to participate in and support a U.S. military contingency operaiton [sic]" and "clandestine efforts to influence foreign nationals [or officials] of the target country to take . . . action[] in the event of a U.S. military contingency operation . . .").

47. Paul de la Garza, *The Shadow Warriors*, ST. PETERSBURG TIMES, Apr. 28, 2003, at 1A. *See generally* Michael McAndrew, *Wrangling in the Shadows: The Use of United States Special Forces in Covert Military Operations in the War on Terror*, 29 B.C. INT'L & COMP. L. REV. 153, 156-57 (2006) (describing the Department of Defense's rationale for using special operations forces (SOF) in the war on terror, including that SOF's elite training and greater numbers makes them more effective than either conventional military forces or CIA paramilitary troops).

48. *See* Kibbe, *supra* note 6, at 110-12 (explaining that because former-Secretary of Defense Rumsfeld believed the Special Forces would play a central role in combating terror, SOCOM was given lead responsibility for the military aspects of the war on terror); *see also* Gil Klein, *Special Operations Is Getting Special Attention*, TAMPA TRIB., Aug. 10, 2003, at 4 (reporting that then-Secretary of Defense Rumsfeld had announced that Special Operations Command in Tampa could both plan its own operations and call on the other military commands for assistance when needed).

49. *See* Kibbe, *supra* note 6, at 109 (listing the most important elements of Special Operations Command).

heart of the planning and execution of the non-traditional SOF activities.[50] Many observers believe JSOC comprises three primary units that the Pentagon does not publicly acknowledge:[51] the Army's Delta Force,[52] the Naval Special Warfare Development Group (DEVGRU),[53] and the Air Force's 24th Special Tactics Squadron. Experts believe that JSOC's primary mission is to identify and destroy terrorists and terror cells around the world.[54] To meet these needs, defense personnel likely are already operating overseas using false names and nationalities.[55]

In 2004, President Bush reportedly signed a series of classified findings and executive orders authorizing SOF units to conduct secret operations against suspected terrorist targets in as many as ten Middle Eastern and South Asian countries, the identities of which have not been publicly released.[56] Pentagon leaders apparently run these operations free from the legal controls imposed on CIA covert operations, without having to report

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50. *See id.* at 109-10 (describing Joint Special Operations Command (JSOC) as a "smaller" command that "specializes in 'black' direct-action operations such as hunting terrorists and rescuing hostages"). *See generally* Sean D. Naylor, *SpecOps Unit Nearly Nabs Zarqawi*, ARMY TIMES, Apr. 28, 2006, *available at* http://www.armytimes.com/legacy/new/1-292925-1739387.php (describing the role of Task Force 145, made up of forces from JSOC units, in chasing Abu Musab al-Zarqawi in Iraq).

51. *See, e.g.*, Kibbe, *supra* note 6, at 110 (listing the three units she believes are part of JSOC). *But see* Joint Special Operations Command (JSOC) http://www.globalsecurity.org/military/agency/dod/jsoc.htm (last visited Mar. 18, 2007) (listing nine units as part of JSOC: 1st Special Forces Operational Detachment - Delta, Intelligence Support Activity (ISA), Naval Special Warfare Development Group (SEAL Team Six), 24th Special Tactics Squadron, Joint Communications Unit (JCU), Joint Aviation Unit, Technical Intelligence Unit, Task Force 11, and Signals Intelligence Branch); ANDREW FEICKERT, CONG. RESEARCH SERV., U.S. SPECIAL OPERATIONS FORCES (SOF): BACKGROUND AND ISSUES FOR CONGRESS 4 (2006), http://www.fas.org/sgp/crs/natsec/RS21048.pdf (listing five units believed to be part of JSOC: the Army's Delta Force, the Navy's SEAL Team Six, the 75th Ranger Regiment, the 160th Special Operations Aviation Regiment, and the Air Force's 24th Special Tactics Squadron).

52. *See generally* 1st Special Forces Operational Detachment (Airborne) Delta, http://www.globalsecurity.org/military/agency/army/sfod-d.htm (last visited Mar. 18, 2007) (describing Delta Force, the full name of which is the Army's 1st Special Forces Operational Detachment-Delta, which has the primary goal of conducting "missions requiring rapid response with surgical applications of a wide variety of unique skills, while maintaining the lowest possible profile of U.S. involvement"). Delta Force was secretly created in 1977 in response to the increasing terrorist threat during the 1970s to specialize in hostage rescue, barricade operations, and reconnaissance. *Id.*

53. *See* Naval Special Warfare Development Group, http://www.globalsecurity.org/military/agency/navy/nswdg.htm (last visited Mar. 18, 2007) (describing DEVGRU as possessing responsibility for "U.S. counterterrorism activities in a maritime environment," and estimating that there are about 200 operators in the Group).

54. FEICKERT, *supra* note 51, at 4; *see also* Barton Gellman, *Secret Unit Expands Rumsfeld's Domain*, WASH. POST, Jan. 23, 2005, at A1 (describing the increased activities of JSOC under Rumsfeld in the war on terror and the legal interpretations the Pentagon has used to support this expanded activity).

55. Gellman, *supra* note 54.

56. *See* Hersh, *supra* note 5, at 41 (describing the authority President Bush gave to Secretary Rumsfeld, and stating that the public does not know the countries for which covert operations have been approved).

to Congress.[57] These new orders reportedly will enable SOF to set up "action teams" to find and eliminate terrorist organizations in countries with which we are not at war.[58]

One recent example of this activity involved SOF operations in Ethiopia and Somalia.[59] Following the Ethiopian military offensive in early 2007, a task force from JSOC planned direct strikes against terrorist suspects who had fled to southern Somalia.[60] U.S. forces launched attacks from bases in Ethiopia into southern Somalia to find and kill high-value terrorist leaders.[61] A report described these operations as examples of a more aggressive strategy that involves dispatching SOF troops around the world to hunt high-level terrorism suspects, a task formerly in the CIA's domain but that President Bush has now assigned to the Pentagon.[62]

Another recent news article reported increased efforts at the highest levels of the current Bush Administration to counter the potential Iranian threat by authorizing covert operations against Shiite interests across the Middle East.[63] The alleged covert operations, conducted in Iran, as well as Lebanon and Syria, are reportedly being conducted without any reporting to Congress.[64] Notwithstanding the exact details of these alleged activities, it is clear that the Pentagon is aggressively pursuing its authority to conduct SOF missions that skirt the line between covert action and traditional military actions.[65]

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57. *See id.* (quoting a high-ranking official as saying that the Pentagon does not call it "covert ops," but rather "black reconnaissance" so as to distance it from CIA actions that require reporting).

58. *See id.* at 42-43 (describing the Pentagon's plans to recruit locals in target countries into action teams to find and eliminate terrorist organizations); *see also* Gellman, *supra* note 54 ("[T]he Defense Department sometimes has to work undetected inside 'a country that we're not at war with, if you will, a country that maybe has ungoverned spaces, or a country that is tacitly allowing some kind of threatening activity to go on.'").

59. *See* Michael R. Gordon & Mark Mazzetti, *U.S. Used Base in Ethiopia to Hunt Al Qaeda in Africa*, N.Y. TIMES, Feb. 23, 2007, at A1 (describing SOF collaborations with the Ethiopian military and operations that SOF forces undertook in Somalia from bases in Ethiopia).

60. *See id*. (reporting that American forces used intelligence from Ethiopian and U.S. sources to plan operations). Those operations involved two AC-130 gunships transported to a small airport in eastern Ethiopia; SOF troops, in conjunction with the Kenyan military, setting up positions along the Somalia-Kenya border to catch fleeing terrorists; a Navy flotilla in the Indian Ocean searching for ships that might be carrying fleeing terrorist suspects; planes based in Djibouti; and F-15 planes based in Qatar. *Id.*

61. *See id.* (reporting that the U.S. Government carried out these direct attacks using the legal authority that President Bush gave the military in a "classified directive that gave the military the authority to kill or capture senior Qaeda operatives if it was determined that the failure to act expeditiously meant the United States would lose a 'fleeting opportunity' to neutralize the enemy . . .").

62. *Id.*

63. *See* Seymour M. Hersh, *The Redirection*, NEW YORKER, Feb. 25, 2007, at 54 (describing the Bush Administration's new strategy to counter growing Iranian influence in the region as a result of failing U.S. efforts in Iraq).

64. *See id.* at 65 ("The Bush Administration's reliance on clandestine operations that have not been reported to Congress and its dealings with intermediaries with questionable agendas have recalled [the Iran-Contra scandal].").

65. *See* Gellman, *supra* note 54 (reporting that "[t]hose missions, and others

B. On the Line Between Covert Action and Traditional Military Activities

The Pentagon easily can show that an SOF action is being taken in a country in which an acknowledged military operation will "immediately"[66] follow or already exists. Because military forces must be assembled for—and planning must take place months in advance of—an overt military operation, ample evidence would exist to show that an overt action would immediately follow a proposed secret action.[67] It is also relatively straightforward, however, for the Pentagon to claim that acknowledged military operations may occur in a target country sometime in the future. Particularly in this age of terror—where military forces are deployed, or plausibly could be deployed, to virtually any country in the world[68]—the Pentagon easily can claim that future overt military engagements are likely to arise nearly anywhere.

When conducting operations that are "well in advance"[69] of a future overt operation, the issue becomes whether the operations are "routine" or "other-than-routine."[70] Whether these alleged SOF actions are traditional military activities or covert actions ultimately will depend on whether the activities can be reasonably categorized as routine.[71] The wide latitude for interpretation of what constitutes "routine support," however, suggests that this regulatory framework is not up to the task of providing sufficient oversight of a military aggressively expanding its role in a global conflict such as the war on terror that, by definition, has no end date.[72]

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contemplated in the Pentagon, skirt the line between clandestine and covert operations" because covert actions are subject to "stricter legal requirements").

66. H.R. REP. NO. 101-928, at 29 (1989) (Conf. Rep.).

67. *See, e.g.*, MICHAEL R. GORDON & GENERAL BERNARD E. TRAINOR, COBRA II: THE INSIDE STORY OF THE INVASION AND OCCUPATION OF IRAQ 75-82 (2006) (describing in detail the many iterations of war planning that occurred in the U.S. government in the months preceding the 2003 invasion of Iraq, including extensive discussion of how to "flow" troops to the region and political planning to gain access to various ports in the region, most notably in Turkey, to facilitate the arrival of American forces to prepare for attack and also for bases on the Iraqi border to use as launching points for inserting SOF, Army, and Marine forces into Iraq). *See generally* Bruce Berkowitz, *Fighting the New War*, 2002 HOOVER DIG. 39, 43 (arguing that "[t]he rule of thumb [U.S. leaders should use when deciding when to use covert action] should be whether the United States plans to send armed forces into combat" because, otherwise, we are using the same tactics and methods as the terrorists, and it is important to maintain clear distinctions between the United States and terrorists).

68. *See, e.g.*, ANDREW FEICKERT, CONG. RESEARCH SERV., U.S. MILITARY OPERATIONS IN THE GLOBAL WAR ON TERRORISM: AFGHANISTAN, AFRICA, THE PHILIPPINES, AND COLOMBIA 1 (2005), *available at* http://www.fas.org/sgp/crs/natsec/RL32758.pdf (describing the global nature of the military deployments required in fighting the war on terrorism, and focusing on the deployments in the four regions that have been particularly crucial to that fight thus far).

69. H.R. REP. NO. 101-928, at 29.

70. S. REP. NO. 101-358, at 54-55 (1990).

71. *See* H.R. REP. NO. 101-928, at 29 (stipulating that any activity that constitutes routine support to traditional military activity is not covert action and is thus exempt from existing reporting requirements).

72. *See generally* Roger Cohen, *No Clear Victory, or End, to U.S. 'War on Terror'*, INT'L HERALD TRIB., Dec. 21, 2005, at 2 (arguing that there can be "no clear moment of

III. REGULATING SOF OPERATIONS

A. The Need for Regulation

The Senate Report on the Intelligence Act indicates a key policy reason for regulating other-than-routine support to traditional military activities.[73] When the Pentagon undertakes an activity that is routine in nature, such activities do not need close oversight from Congress.[74] However, activities that are beyond such routine responsibilities, by definition, create new "substantial policy issue[s]"[75] and call for increased congressional oversight because they become operations with objectives independent of those of an acknowledged military operation.[76]

Furthermore, experts have noted that the need to regulate covert actions derives from their very nature: Their deniability precludes the type of accountability required of a government in a democratic society.[77] The democratic system, premised on the ability of the public to debate the policies of the government and to hold the government accountable for its actions, cannot function when the government hides its actions from public view.[78] The executive's expanded ability to conduct covert operations,

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victory" in the war on terror, no moment when Osama bin Laden will surrender or when al Qaeda is "vanquished," and arguing that because the Bush Administration has defined this as an endless war, it is particularly important that it be cautious about the war powers it asserts because the "talk of the 'exceptional' nature of such measures becomes meaningless"); *Experts Fear 'Endless' Terror War*, MSNBC, July 9, 2005, http://www.msnbc.msn.com/id/8524679/ (quoting experts such as former CIA Osama bin Laden tracker Michael Scheuer, University of North Carolina's Cynthia Combs, and Bruce Hoffman of the RAND Corp. as saying that al Qaeda has the capacity to wage an endless war because of its adaptable "virtual network" organizational structure and its self-sustaining cycle of recruitment). This article also reported on a survey of "longtime students of international terrorism" which predicted that "the world has entered a long siege in a new kind of war" and that "al Qaeda is mutating in a global insurgency, a possible prototype for other 21st-century movements, technologically astute, almost leaderless . . . compartmentalized groupings, in touch electronically but with little central control." *Id.*

73. *See* S. REP. NO. 101-358, at 55 (stating that when an activity is other-than-routine, "the risks to the United States and the U.S. element involved have, by definition, grown to a point where a substantial policy issue is posed, and because such actions begin to constitute efforts in and of themselves to covertly influence events overseas (as well as provide support to military operations)").

74. *See* H.R. REP. NO. 101-928, at 29 (stipulating that routine support to traditional military activities is not subject to covert action reporting requirements).

75. S. REP. NO. 101-358, at 55.

76. *See* Berkowitz, *supra* note 67, at 43-44 (arguing that covert action should be regulated closely because it is more similar to the type of fighting utilized by the terrorists, and that by fighting as they do, the United States undermines its credibility and effectiveness in the war on terror).

77. *See, e.g.*, Kibbe, *supra* note 6, at 104 ("Because covert operations are hidden from the public, neither the thinking behind such missions nor their consequences can be publicly debated."); Berkowitz, *supra* note 67, at 42 (arguing that because covert actions "hide the visible signs of U.S. responsibility . . . we need special provisions to maintain control, oversight, and accountability through other—classified—channels").

78. *See* ROBERT D. BEHN, RETHINKING DEMOCRATIC ACCOUNTABILITY 9 (2001) (arguing that the reason we worry about holding government officials accountable "through

combined with a highly charged political climate, endangers Congress's ability to provide effective oversight of covert action because the intelligence community conducts these operations without Congress's knowledge.[79] With the Pentagon aggressively asserting its role in the war on terror under a cloud of secrecy, the need for accountability extends to these actions regardless of whether they are technically "covert" under the Intelligence Act because the new SOF actions raise the same policy and political concerns as covert actions.[80]

In fact, Congress has recognized the need for regulation of SOF activities before.[81] During the debates over the Intelligence Authorization Act for Fiscal Year 2004, the Senate Intelligence Committee consulted with Stephen Cambone, the Undersecretary of Defense for Intelligence, and tentatively agreed that SOF activities in countries where there is not a publicly acknowledged American military presence would not be excluded

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compliance with tightly drawn rules and regulations" is that we fear they will abuse their power, so, "as citizens, we seek to constrain the behavior of public officials, to limit their discretion, to prevent them from abusing their power"); MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 7 (2002).

> [E]xecutive privilege . . . lacks any constitutional foundation, that the Framers of the Constitution were too fearful of executive branch tyranny to have allowed for such a power, that Congress and the public have a 'right to know' and a need to know what the executive is doing, and that the right to withhold information has become a convenient cloak for presidents who abuse their powers.

ROZELL, *supra*, at 7. *But see* MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY 21 (1994) (summarizing the primary argument in favor of executive privilege, writing that although the Framers did intend to limit executive power, they did not intend to destroy it altogether; rather, they "sought to devise institutional mechanisms to counterbalance the abuse of power," and "[t]he case for executive privilege is based on the view that such a presidential power has clear constitutional, political, and historical underpinnings").

79. *See* CARTER, *supra* note 1, at 223 (arguing that in our system which depends on a "pro-active Congress to effectively limit usurpations of power by the executive[,]" a shifting "domestic political climate" combined with "the intelligence community's expanded capacity for covert action, renders the apparatus of congressional oversight designed in the 1970s ineffective as a constraint on executive abuses of power").

80. *See generally* Eyth, *supra* note 1, at 61-71 (debating the idealist and pragmatist approaches to regulation of covert action in a democratic society). The idealist argues that unilateral covert actions—those carried out only by the executive branch with no oversight—do not serve the essence of democracy because democracy depends on the consent of the governed, who are unable to consent if they do not have sufficient information. *Id.* at 61-62. The pragmatist argues, first, that the national security interests of the state alone justify covert actions even if they may blur absolute democratic principles. *Id.* at 63. Second, because the public's interest is represented through presidential elections in which voters can observe how a candidate would conduct his foreign policy, a pragmatist argues a president's orders to carry out covert actions do serve democratic principles. *Id.* at 64. The author concludes that "the balance weighs in favor of allowing the executive to conduct covert operations without the need to receive permission from another source . . ." *Id.* at 71; *see also* William M. Arkin, Op-Ed., *The Secret War*, L.A. TIMES, Oct. 27, 2002, at M1 (arguing that "[t]hough covert action can bring quick results, because it is isolated from the normal review processes it can just as quickly bring mistakes and larger problems").

81. *See* Bill Gertz, *Congress to Restrict Use of Special Ops*, WASH. TIMES, Aug. 13, 2003, at A1 (discussing the congressional debate over whether to require reporting for certain SOF actions).

from covert action reporting as traditional military activities.[82] The House version did not contain such a provision, however, and the statute regulating SOF action apparently was never adopted.[83]

Congress has, however, implemented a separate change, requiring the President or Secretary of Defense to authorize any Special Operations Command led mission, as part of the National Defense Authorization Act for Fiscal Year 2004.[84] The law also gives the Secretary of Defense $25 million through 2007 to provide support to "foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating ongoing military operations by United States special operations forces to combat terrorism," however, the law states that it does not grant authority to conduct covert operations.[85] Further, the law requires the Secretary of Defense to notify congressional defense committees of such operations.[86]

B. A Means of Regulation

One alternative means of regulating SOF activities in the war on terror imvolves Congress to modifying the statutory definition of covert action in the Intelligence Act to encompass potential SOF activities, an option that Congress already has considered, as described above.[87] A better option, however, would be for Congress to create a new statutory scheme of regulation with its own definition of the types of activities subject to congressional regulation.

The first option has the benefit of involving only cosmetic changes to an existing regulatory structure. Congress could effect this change with legislation modifying the current definition of the types of actions that are subject to covert action regulatory requirements.[88] The downside of this option is that SOF activities may be arguably clandestine rather than covert.[89] Attempting to fit those SOF activities that may be clandestine but

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82. *See id.* (reporting that the new regulation would require a presidential "finding" for SOF activities conducted in a country without an acknowledged American military presence).

83. *See id.* (detailing that conferees would discuss this issue in a hearing to be held following publication of the article and that the author, after examining news reports and public sources after the fact, found no report of any such requirement of a presidential finding when deploying SOF in countries with no acknowledged American military presence).

84. *See* CUMMING, *supra* note 7, at 3 n.9 (noting that, while Congress has not modified the covert action statute, it has addressed some of the related issues through other legislation, such as the fiscal year 2004 defense authorization law).

85. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392 (codified as amended in the U.S. Code).

86. *Id.*

87. *See* Gertz, *supra* note 81 (describing legislation that Congress considered to regulate SOF activities).

88. *See* 50 U.S.C. § 413b(e) (2000) (giving the current definition of covert action).

89. *See generally* Kibbe, *supra* note 6, at 104 (describing the difference between covert and clandestine operations).

not covert into a law establishing regulation of covert action may leave an opportunity for the avoidance of the very congressional regulation that such a change would attempt to preclude. In other words, if Congress placed oversight of these SOF actions under covert action regulation, the Pentagon could still ignore the system by arguing that its operations are clandestine rather than covert.

The second alternative creating a new regulatory scheme for all such activities in the war on terror is more desirable. Indeed, Congress has begun to implement this alternative as part of the National Defense Authorization Act for Fiscal Year 2004—however that is not sufficient. The terms of this law only apply specifically to SOCOM-led operations, and this limitation opens as many loopholes as it may close. This language would allow the structure of an operation to be altered slightly to place another military command in the lead to avoid the reporting requirement while still implicating the same policy concerns. Congress ought to draft more inclusive language that creates the best chance of requiring reporting of all operations that implicate such policy concerns. The well-established system of regulating covert action may be an instructive model; indeed, large portions of the statutory requirements for a new bill may be copied wholesale from § 413b. However, a new law would reflect the fact that whether the activities are technically covert action or SOCOM-led, is largely irrelevant. This is a class of activities that needs to be regulated, and a new law would provide for such regulation.

The problem, however, is that, because of both the classified nature of these SOF activities and the fact that there are many "black" budgetary sources from which money can be drawn to fund such activities, Congress will encounter difficulty when attempting to track accurately the full range of Pentagon operations.[90] This argument creates a major obstacle to Congress's ability to craft a new law that, while not overly broad, still requires reporting of SOF activities that skirt the line between covert action and traditional military activity. Congress, however, managed to construct a definition of covert action for the Intelligence Act despite this difficulty and should be able to do so again in a new law.

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90. *See* Hersh, *supra* note 63, at 65 (quoting a Pentagon consultant as saying that a major difficulty in the oversight of covert operations is that "[t]here are many, many pots of black money, scattered in many places and used all over the world on a variety of missions . . ." and suggesting that the same is the case for the budgetary chaos in Iraq, where billions of dollars are unaccounted).

CONCLUSION

Covert action has long played a prominent role in American foreign policy,[91] but never more so than in the current war on terror.[92] Accordingly, Pentagon leaders have claimed increasingly broad authority to conduct activities that are on the line between covert action and traditional military activities. The Pentagon has reportedly done this with little or no consultation with Congress.[93]

The regulations on covert actions under the Intelligence Act point toward a possible regulatory scheme for SOF activities that may or may not be technically covert actions. Most likely, the second alternative for regulation—adopting a new set of regulations for SOF activities with a new definition of the types of activities the regulations would cover—would be most effective in sealing the loopholes in the current regulatory scheme. This new regulatory structure would serve the purposes of democratic accountability and, ultimately, the welfare of the nation.

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91. *See* NUTTER, *supra* note 1, at 47 (giving a brief history of covert action, both before and after the founding of the CIA and characterizing covert action "as American as apple pie").

92. *See generally* Arkin, *supra* note 80 (describing the rationale of senior Bush Administration officials that "the magnitude of the [terrorist] threat requires, and thus justifies, aggressive new 'off-the-books' tactics").

93. *See* Gellman, *supra* note 54 (discussing the types of operations the Pentagon is alleged to run and its intention to do so with minimal congressional oversight).