RESTRICTED COMMUNICATIONS AT THE UNITED STATES NUCLEAR REGULATORY COMMISSION

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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.

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

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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

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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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> 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

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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

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

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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

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]

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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;

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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

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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

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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

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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

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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); s*ee 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.
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> 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.
>
> 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

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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]

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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

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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

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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

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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

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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.