ARTICLES

GREENLIGHTING ADMINISTRATIVE PROSECUTION

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"Greenlighting" is the process whereby the heads of a combined-function federal regulatory agency determine whether to accept the staff's decision to charge or not charge a target with a violation of law. The charging decision is often the most consequential decision point in a regulatory prosecution and typically sets off a settlement negotiation. Yet the charging decision is unchecked by legislative, executive, or judicial mechanisms. Greenlighting is an important accountability tool with respect to the staff's prosecutorial discretion. It is often used to correct misalignment between the priorities of the agency heads and their staff. Yet greenlighting is controversial because of concern about confirmation bias; having approved a prosecution, the agency heads may be unable to render an unbiased decision when the case returns to them for the final adjudicatory decision.

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INTRODUCTION 229
I. THE ENFORCEMENT PROCESS IN FIVE COMBINED-FUNCTION AGENCIES 231
A. *Securities and Exchange Commission* 231
B. *Federal Trade Commission* 234
C. *Federal Communications Commission* 236
D. *Federal Energy Regulatory Commission* 237
E. *National Labor Relations Board* 241
II. THE MERITS OF GREENLIGHTING 243
A. *Internal Administrative Law* 243
B. *The Case for Greenlighting* 245
1. *Principles of Public Administration* 246
2. *Internal Separation of Powers* 248
3. *The Principal–Agent Problem* 249
C. *The Case Against Agency-Head Greenlighting* 251
1. *Confirmation Bias* 251
I. The Confirmation Bias Problem 251
II. Reasons to Believe that Confirmation Bias Is Not a Serious Problem 253
III. Interviewees' Views on Confirmation Bias 254
IV. Empirical Research on Confirmation Bias 255
2. *Efficiency* 256
D. *Weighing Costs and Benefits* 257
III. LEGALITY OF GREENLIGHTING 258
A. *Due Process* 258
B. *The Administrative Procedure Act* 261
IV. ACCOUNTABILITY MECHANISMS AND GREENLIGHTING 261
A. *Mechanisms that Allow Targets' Input into Charging Decisions* 262
B. *Ability of Target to Communicate with Individual Agency Members* 263
C. *Separation of Functions During Investigation* 265
D. *Delegation to Enforcement Staff in Routine Cases* 266
E. *Disqualification of Agency Heads Who Participated in Charging Decisions* 267
F. *Removal of Agency Heads from Greenlighting: The NLRB Model* 268
G. *Enforcement Guidelines* 271
H. *Peer Review of Prosecution Decisions* 272
I. *Structural Solutions to the Confirmation Bias Problem* 273
CONCLUSION 275

INTRODUCTION

This Article concerns the charging practices of federal regulatory agencies that engage both in law enforcement and adjudication (often referred to as "combined-function" agencies). It focuses on the process by which the staff decides to charge suspected violators ("targets"[1]) and the agency heads' approval[2] of this charging decision—a process I call "greenlighting."[3] Thus, the focus of the Article is on the interaction between staff and agency heads when the agency decides to charge the targets.[4]

The decision to charge is an exercise of prosecutorial discretion by the staff that resembles the charging decision by prosecutors in criminal cases.[5] In both the criminal and administrative justice systems, the charging decision is

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1. The word "target" refers to the private-sector subject of an administrative investigation and prosecution. Numerous other terms are used including "charged party," "respondent," or "defendant."

2. The term "agency heads" refers to the members of the agency.

3. "Greenlighting" is a term often used in the entertainment industry. It refers to a financing or distribution company's executive-level decision to accept a proposal for a film or television show. I also borrowed the greenlight metaphor from Harlow and Rawlings. *See* CAROL HARLOW & RICHARD RAWLINGS, LAW AND ADMINISTRATION 31–40 (William Twining et al. eds., 3d ed. 2004), discussed *infra* note 116.

4. The five agencies I studied have multiple agency heads. However, I believe my findings apply to combined-function agencies that have only a single head. The five agencies are subject to the adjudication provisions of the Administrative Procedure Act (APA). I refer to hearings governed by the APA as "Type A adjudication." The findings of this study appear equally applicable to combined-function agencies outside the APA that also conduct evidentiary hearings, so-called "Type B adjudication." For further discussion of the distinctions between Types A, B, and C adjudication, see MICHAEL ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 15–24 (2019) [hereinafter ASIMOW, OUTSIDE THE APA].

5. It is beyond the scope of this Article to compare the charging process in the administrative and criminal justice systems. A common theme in the literature on criminal prosecution is that the charging decisions of prosecutors (who settle perhaps 95% of their cases) are largely unaccountable. *See generally* Daniel C. Richman, *Accounting for Prosecutors*, *in* PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 40 (Máximo Langer & David Alan Sklansky eds., 2017); Rachel E. Barkow, *Foreword: Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129 (2016) [hereinafter Barkow, *Overseeing Agency Enforcement*]; Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009) [hereinafter Barkow, *Policing of Prosecutors*]; Samuel J. Levine, *Disciplinary Regulation of Prosecutorial Discretion: What Would a Rule Look Like?*, 16 OHIO ST. J. CRIM. L. 347, 347 n.1 (2019); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981); Ellen Podgor, *The Dichotomy Between Overcriminalization and Underregulation*, 70 AM. U. L. REV. 1061, 1093 (2021).

likely to be the most consequential decision point.[6] The vast majority of targets settle enforcement cases after the staff decides to recommend enforcement.[7] A settlement usually requires the target to accede to various unwelcome remedies.[8] For those who settle after being charged, the charging decision is the only agency decision that matters. The agency will probably announce the charging decision through a public press release, ensuring adverse publicity. And, of course, an agency's refusal to charge is equally consequential since it may signal under-enforcement of regulatory norms or industry capture of the agency's enforcement mechanism.

A target may decide not to settle and to contest the charges through the adjudicatory process of a hearing before an administrative law judge (ALJ) and an appeal of the ALJ's decision to the agency heads. The decision to litigate rather than settle carries with it the certainty of heavy attorneys' fees and other litigation costs, as well as a significant drain on executives' time. Of course, there is a better-than-even probability that the target will lose, perhaps becoming subject to more onerous remedies than it might have settled for. Administrative charging decisions and prosecutorial discretion are worthy subjects for inquiry, but they have been understudied.[9]

Part I of this Article describes the charging and greenlighting practices of

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6. *See* Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 125 (2003); Angela J. Davis, *Prosecutors, Democracy, and Race*, *in* PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY, *supra* note 5, at 195–96.

7. See *infra* Part I for a discussion of agency practice. The agencies discussed in Part I settle between 30% and 95% of charged cases before a hearing.

8. *See* Podgor, *supra* note 5, at 1117, 1122–23 (describing settlements as involving fines, robust compliance program creation, and, sometimes, the government's right to continue monitoring for compliance).

9. There is a large and informative literature on the administrative enforcement function, but little of it concentrates on prosecutorial discretion and greenlighting in combined-function agencies. *See generally* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031 (2013); EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK (1982); Barkow, *Overseeing Agency Enforcement*, *supra* note 5; Stephanie Bornstein, *Public-Private Co-Enforcement Litigation*, 104 MINN. L. REV. 811 (2019); John Braithwaite, John Walker & Peter Grabosky, *An Enforcement Taxonomy of Regulatory Agencies*, 9 LAW & POL'Y 323 (1987); Jackson L. Frazier, *Perfecting Participation: Arbitrariness and Accountability in Agency Enforcement*, 96 N.Y.U. L. REV. 2094 (2021); Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929 (2017); Daniel L. Markell & Robert L. Glicksman, *A Holistic Look at Agency Enforcement*, 93 N.C. L. REV. 1 (2014); Max Minzner, *Should Agencies Enforce?*, 99 MINN. L. REV. 2113 (2015); Michael Sant'Ambrogio, *Private Enforcement in Administrative Courts*, 72 VAND. L. REV. 425 (2019); Jodi L. Short, *The Politics of Regulatory Enforcement and Compliance: Theorizing and Operationalizing Political Influences*, 15 REGUL. & GOVERNANCE 653 (2021); Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31 (2017); Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369 (2019).

five combined-function federal agencies. Part II discusses the costs and benefits of greenlighting. Part III discusses the legality of greenlighting under due process and the Administrative Procedure Act (APA). Part IV discusses additional checking mechanisms and suggests best practices for the greenlighting function. The Article then concludes.

I. THE ENFORCEMENT PROCESS IN FIVE COMBINED-FUNCTION AGENCIES

Interviews I conducted provide the primary source of data for this Article. The interviews focused on the charging practices of five important federal combined-function agencies: the Securities and Exchange Commission (SEC), the Federal Trade Commission (FTC), the Federal Energy Regulatory Commission (FERC), the Federal Communications Commission (FCC), and the National Labor Relations Board (NLRB). I conducted interviews with former agency heads and former agency staff members, as well as law professors and private defense lawyers, many of whom were former agency heads or staff. I am most grateful to these interviewees for serving as data sources, and I have promised them anonymity. As a result, citations to interviews will identify the agency concerned and the interviewee by number but will not disclose names or identifying details.

A. Securities and Exchange Commission

The SEC can impose significant monetary sanctions on persons who violate securities laws.[10] The SEC litigates most enforcement cases through in-house administrative litigation rather than by seeking relief in federal courts, since the available monetary remedies are the same in either venue.[11] A recent case decided by the Fifth Circuit invalidates SEC in-house adjudication of civil money penalty cases. *Jarkesy v. SEC*[12] held that in-house SEC enforcement of civil penalties violates the target's right to a jury trial; that the agency's ability to choose between in-house enforcement and federal court enforcement is an invalid delegation of legislative power; and that SEC ALJs are unconstitutionally protected from removal without cause.[13] The *Jarkesy* decision will prevent the SEC from imposing civil money penalties through the use of in-house adjudication; some of its reasoning threatens all federal agency in-house enforcement litigation. The

10. Dodd-Frank Act § 929P(a); 15 U.S.C. §§ 77h-1, 78u-2, 80a-9, 80b-3.

11. Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. PA. J. CONST. L. 45, 53–59 (2016).

12. 34 F.4th 446 (5th Cir.), *reh'g denied*, 51 F.4th 644 (5th Cir. 2022).

13. *Jarkesy*, 34 F.4th at 451.

Article proceeds on the assumption that *Jarkesy* will not be followed in other circuits and will eventually be overturned by the Supreme Court.

The enforcement process begins when the Division of Enforcement (DE) investigates a target. The investigators can initiate investigations and issue subpoenas without agency-head approval.[14] After the DE makes a preliminary determination that the facts justify a charging decision, it generates a detailed "Wells notice" that summarizes its conclusions and recommendations. The target can then file a detailed "Wells submission" in response to the Wells notice.[15]

The Dodd-Frank Act requires the Commission to issue a complaint within 180 days of issuing a Wells notice.[16] As a result, the staff now frequently dispenses with the Wells procedure. Another reason the staff might not utilize the Wells notice is that public companies believe they must disclose issuance of a Wells notice and therefore prefer to avoid it. If the Wells notice is omitted, the staff communicates its intention to recommend issuance of a complaint via an informal memo or phone call and the target can respond with a "white paper."[17] Under either procedure, targets may request access to the Commission's investigative file, and the staff has discretion to disclose information that will assist the target in defending the case.[18] Staff members vary in their willingness to disclose materials in investigative files.[19]

If the staff is not persuaded by the Wells submission or the white paper, it generates an "action memorandum" to the commissioners recommending that the Commission charge the target.[20] The action memorandum is circulated to all operating divisions of the Commission and the general

14. At one time, the Commission had to approve issuance of subpoenas, but that authority has now been delegated to individual investigators. Under current practice, subpoenas must be approved by the Director of Enforcement, but not by the Commission. SEC 1.

15. 17 C.F.R. § 202.5(b)–(c) (2023); SEC, ENFORCEMENT MANUAL § 2.4 (2017) [hereinafter ENFORCEMENT MANUAL].

16. 15 U.S.C. § 78d-5(a)(1). This provision allows the Director of Enforcement to extend the period for an additional 180 days in complex cases. If additional time is needed, the Commission must approve the extension. § 78d-5(a)(2).

17. SEC 1, 7–8. The "white paper" procedure existed before the development of the "Wells notice." As a practical matter, the informal communication may provide as much information as a Wells notice. SEC 8.

18. Section 2.4 of the Securities Exchange Commission's (SEC's) Enforcement Manual provides that the staff should consider whether "access to portions of the file would be a productive way for both the staff and the recipient of the Wells notice to assess the strength of the evidence that forms the basis for the staff's proposed recommendations." ENFORCEMENT MANUAL, *supra* note 15, § 2.4, at 22.

19. SEC 7–8.

20. ENFORCEMENT MANUAL, *supra* note 15, § 2.5.1 at 22–23.

counsel.[21] It contains a comprehensive explanation of the factual and legal foundation of the recommendation and analyzes the strengths and weaknesses of the case. The memorandum summarizes and responds to arguments submitted by respondents in the Wells submission or the white paper and responds to input provided by other Commission offices or the general counsel.[22]

The action memorandum recommends the issuance of a complaint for in-house administrative enforcement ("action instituting proceedings"), to seek enforcement action in federal court, or to make a criminal referral to the Department of Justice (DOJ).[23] If the target and the staff agree to a settlement, the action memorandum contains the proposed settlement. The vast majority of cases settle at some point before hearing.[24] Staff may conduct meetings with commissioners to discuss particular charging recommendations.[25]

When the Chair determines that the charging decision or settlement is ready for full consideration, the five commissioners consider and vote on the matter at a closed meeting.[26] The General Counsel and heads of the relevant SEC divisions are present at this meeting. The commissioners have access to the Wells notice and the Wells submission (or the white paper). Occasionally, the matter will be put over until a later meeting or resolved by seriatim emails.[27] In emergency situations, the "duty officer" (a single commissioner) has the power to authorize enforcement action; the other commissioners will ratify that action at a later time.[28] The Commission approves the vast majority of the charging recommendations in action memoranda, although there is occasionally vigorous discussion of the charging decision and split decisions.[29]

The SEC has a moderate adjudicatory caseload. In the six-month period between October 2021 and March 2022, there were 168 adjudicatory

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21. *Id.*

22. *Id.*

23. *Id.* § 2.5.

24. Interviewees estimated that 70% to 80% of cases are settled before a hearing. SEC 7–8; Barkow, *Overseeing Agency Enforcement*, *supra* note 5, at 1164.

25. SEC 3.

26. *See* ENFORCEMENT MANUAL, *supra* note 15, § 2.5 (detailing the Commission's consideration and seriatim voting).

27. *Id.* § 2.5.2.2, at 23–24.

28. *Id.* § 2.5.2.3, at 24; SEC 1.

29. SEC 1, 2, 4, 7. One current member frequently opposes enforcement. *See* Andrew Ramonas, *SEC's Newest Republican Emerges as One-Woman Party of 'No,'* BLOOMBERG L. (May 8, 2018, 6:40 AM), https://news.bloomberglaw.com/business-and-practice/secs-newest-republican-emerges-as-one-woman-party-of-no/; Andrew Ramonas, *SEC's Peirce Details 'The Why Behind the No' Votes on Enforcement*, BLOOMBERG L. (May 11, 2018, 3:58 PM), https://news.bloomberglaw.com/securities-law/secs-peirce-details-the-why-behind-the-no-votes-on-enforcement.

matters (including actions instituting proceedings) before the SEC, seven cases pending before ALJs (during this period, ALJs rendered one initial decision and disposed of one case through settlement), and thirteen ALJ cases pending at the Commission level.[30]

B. Federal Trade Commission

The FTC's Competition and Consumer Protection bureaus investigate potential enforcement cases without seeking authorization from the full Commission.[31] The staff ordinarily contacts proposed targets to advise them of the general nature of the inquiry. Targets typically meet informally with the staff and the head of the relevant bureau during the investigation and are entitled to submit memoranda (called "white papers") on key issues.[32]

The relevant bureau staff then prepares a "memorandum recommending complaint" that analyzes the factual basis for the recommendation and explains why issuance of a complaint would be in the public interest.[33] If there is a settlement—and the vast majority of cases settle—the memorandum includes the proposed consent decree.[34] In unsettled cases, the commissioners receive the white paper together with additional memoranda from the general counsel and from staff and chiefs of the Bureau of Competition and the Bureau of Economics.[35] The memorandum recommending complaint indicates whether the FTC should seek relief in

30. SEC, RELEASE NO. 94820, REPORT ON ADMINISTRATIVE PROCEEDINGS FOR THE PERIOD OCTOBER 1, 2021 THROUGH MARCH 31, 2022, at 2–4 (2022).

31. Investigations must be approved by the relevant bureau directors and the Bureau of Economics.

32. FTC 4. Many of the details of the Federal Trade Commission's (FTC's) investigatory process were set forth in the FTC Operating Manual, but the Manual was withdrawn and is no longer available online. Much of the investigatory process can now be found, in some form, at 16 C.F.R. pts. 1–4.

33. Numerous authors have expressed discomfort with the FTC's combined-function structure. *See* Carl A. Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383, 418–24 (1964); Terry Calvani, *A Proposal for Radical Change*, 34 ANTITRUST BULL. 185, 202–03 (1989); Comm. on Trade Regul., *Federal Trade Commission Procedure for Issuance of Complaints*, 30 REC. ASS'N BAR CITY N.Y. 213, 213–14 (1975) (recommending creation of separate adjudicatory tribunal); Philip Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEORGETOWN L.J. 777, 810–12 (1971); Keith Klovers, *Three Options for Reforming Part III Administrative Litigation at the FTC*, ANTITRUST L.J. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4270588.

34. In 2014, over 95% of FTC consumer protection cases settled, most within sixty days of issuance of the complaint. *See* Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEGIS. 37, 64 (2018).

35. FTC 1, 5.

federal court. For example, in merger cases, the FTC often seeks an injunction pending the administrative process.

After the staff submits the memorandum, targets have an opportunity to meet individually with the commissioners to persuade them that no complaint should be issued or that the case should be settled. Staff members are usually present at these meetings.[36]

In order to greenlight a complaint, the FTC must determine there is "reason to believe" a violation occurred and that a proceeding would be in the "public interest."[37] A "moving commissioner" is assigned randomly to each case and decides when the charging decision is ready for full Commission consideration.[38] However, a majority of the Commission can bring a matter up for decision despite the moving commissioner's opposition.[39]

The Commission discusses the charging decision in a closed meeting or makes the decision through seriatim communications. The commissioners generally respect and follow the Chair's views of enforcement priorities, particularly since the Chair is in contact with staff during the investigatory process and usually concurs in the staff memoranda.[40] The same process is used for the approval of settlements negotiated by staff. There is an elaborate procedure for public comment on proposed settlements in competition cases.[41]

In 2020, the Commission resolved thirty-six competition cases (twelve merger consent orders, nine merger cases filed, eleven mergers abandoned, three non-merger cases, and one civil penalty).[42] In the consumer protection area, the FTC

36. FTC 1–5. This practice is discussed further *infra* Part IV.B.

37. 15 U.S.C. § 45(b); 16 C.F.R. § 3.11(a) (2021).

38. FTC 1, 4–5.

39. FTC 1, 4–5.

40. FTC 3–5. According to FTC 3, the Chair makes charging decisions unless three commissioners vote to override. In addition, the Chair appoints senior staff members who reflect the Chair's views about enforcement priorities. In July 2022, the FTC decided by a 3–2 vote to *reject* the staff's advice and sue to block Meta from acquiring Within. Adi Robertson, *FTC Staff Reportedly Recommended Against Suing Meta*, THE VERGE (July 29, 2022, 10:32 AM), https://www.theverge.com/2022/7/29/23283641/lina-khan-ftc-meta-within-supernatural-lawsuit-overruled-staff-report. This is an example of the use of the greenlighting process to correct misalignment of agency head and staff priorities. *See infra* text accompanying note 144.

41. *See* Christopher S. Yoo, Thomas Fetzer, Shan Jiang & Yong Huang, *Due Process in Antitrust Enforcement: Normative and Comparative Perspectives*, 94 S. CAL. L. REV. 843, 912–14 (2021); Frazier, *supra* note 9, at 2097–98 (calling for additional public participation in FTC settlement decisions).

42. FTC, STATS & DATA 2020, (2020), https://www.ftc.gov/system/files/attachments/stats-data-2020/annual_highlights_2020_stats_and_data_infographic.pdf.

filed twenty-one administrative cases and fifty-six federal court cases.[43]

C. Federal Communications Commission

The FCC's Enforcement Bureau (EB) investigates a broad range of complaints against licensees, manufacturers of telecommunications equipment, robocallers, and others.[44] The FCC has no formalized process to provide notice to targets and allow them to comment during the investigation process. If the staff concludes that a target should be charged, it prepares a detailed Notice of Apparent Liability (NAL).[45] The NAL can seek a civil money penalty (called a "forfeiture" in FCC parlance) or a licensee sanction (such as revocation).[46]

The staff has delegated authority to issue an NAL for a civil penalty that "does not exceed $100,000 for common carriers and $25,000 for all other entities."[47] NALs that propose greater amounts must be greenlighted by the full Commission.[48] The full Commission must also approve the charging decision in cases involving licensee discipline, other than those with civil penalties. Commission approval is not required for settlements negotiated by staff. The EB might consider about 450 cases a year and issue about 200–300 NALs, most of which are settled. The Commission might exercise its greenlighting function in perhaps twenty to forty enforcement cases per year.[49]

The Chair has substantial authority over whether the staff will issue an NAL in a specific case and when an NAL will be presented to the Commission.[50] The EB does not produce an additional confidential document about the case for the commissioners to consider, but it may conduct ex parte conversations with commissioners or their advisory staffs. Normally, the Commission votes whether to approve the NAL and declare a forfeiture through a system of notational voting, rather than an in-person meeting.[51] The Commission usually greenlights the NAL, although there have been instances where it refused to do so, often

43. *Id.* At the time this Article was written, the FTC had not released its 2021 annual report.

44. FCC, ENFORCEMENT OVERVIEW 4–10 (2020) [hereinafter ENFORCEMENT OVERVIEW].

45. *Id.* at 10–11.

46. *Id.* at 12.

47. *Id.* at 19.

48. FCC 1; ENFORCEMENT OVERVIEW, *supra* note 44, at 19.

49. FCC 4.

50. The statements in this paragraph and the next are based on FCC 1, 3–4.

51. *See, e.g.*, 39 C.F.R. § 6.7 (2023) ("Notation voting consists of the circulation of physical or electronic written memoranda and voting sheets to each member of the Board simultaneously and the tabulation of submitted responses. Notation voting may be used only for routine, non-controversial, or administrative matters.").

resulting from shifts in the membership of the Commission. There are occasional dissents to decisions issuing forfeitures.

If the EB issues an NAL under delegated authority or if the Commission greenlights the NAL, the target can file a detailed response to the NAL. After issuance of an NAL, targets have the opportunity to meet with FCC commissioners separately in meetings attended by enforcement staff.[52] If the FCC members are not persuaded by the target's response to the NAL, they issue a notice of forfeiture.[53]

The FCC does not usually adjudicate civil penalty cases through ALJ hearings (although it has the option to do so). ALJ hearings are provided in licensee discipline cases that seek remedies such as license revocation rather than civil penalties.[54] The agency heads normally decide civil penalty cases through consideration of documents in the file (NAL and response) rather than by trial-type hearings. The FCC does not regard this process as "adjudicatory," so the rules relating to internal separation of functions do not apply.[55] Enforcement staff can and do speak off the record with the commissioners or their advisers at all points in the process. Separation of functions rules do apply, however, to cases sent to an ALJ.[56]

The FCC does not consider civil penalty determinations as adjudicatory because the agency lacks power to collect civil penalties. DOJ must enforce the penalty in federal district court, which provides a de novo hearing.[57] I was told that it is difficult to draw DOJ's interest where the proposed penalty is less than a substantial amount depending on the district and how busy the U.S. attorneys are.[58] Obviously, the FCC's inability to enforce civil penalties through internal adjudication, rather than through federal court litigation controlled by DOJ, detracts from the effectiveness of civil penalties as a regulatory tool. The vast majority of FCC enforcement cases, around 80%, are settled through consent decrees negotiated by the staff before or after the NAL is issued.[59]

D. Federal Energy Regulatory Commission

FERC has power to levy substantial civil penalties (up to $1.3 million per

52. This practice is further discussed in Part IV.B.

53. Details of the Commission's consideration of forfeiture cases are provided in 47 U.S.C. § 503(b)(3)–(4); ENFORCEMENT OVERVIEW, *supra* note 44, at 14–18.

54. ENFORCEMENT OVERVIEW, *supra* note 44, at 21.

55. *Id.* at 30.

56. *Id.* at 21.

57. *Id.* at 17.

58. FCC 1, 4.

59. FCC 1.

violation per day) and can order other remedial sanctions.[60] Its investigative and prosecutorial arm is the Office of Enforcement (OE).[61] OE dismisses most of the cases it investigates as lacking merit and often exercises prosecutorial discretion in declining to pursue borderline cases.[62] Although law enforcement is a relatively small part of FERC's responsibilities, enforcement cases often require OE to apply unsettled law about the manipulation of energy markets.[63] Thus, enforcement cases are often used as policymaking vehicles.[64]

During an investigation, OE staff and counsel for targets are in regular contact.[65] FERC allows targets to communicate in writing with commissioners during the investigative stage and some targets take advantage of this opportunity.[66] If the staff seeks formal investigative authority to issue a subpoena for documents or take a deposition, it must receive authority from the Commission, but this is rarely necessary as targets typically agree to informal investigative discovery.[67]

If OE determines that a violation warranting sanctions occurred, it provides the target with a "preliminary findings letter" that furnishes a detailed description of the staff's findings of fact and its legal theories. The letter may be in the form of a slide deck.[68] The target has an opportunity to submit a brief that responds to the staff's preliminary findings.[69] Attorneys who represent targets subject to enforcement issues believe that the preliminary

60. *See* FED. ENERGY REGUL. COMM'N (FERC), NO. PL08-3-000, REVISED POLICY STATEMENT ON ENFORCEMENT 7–14 (2008) [hereinafter FERC POLICY STATEMENT]; 15 U.S.C. § 717t-1(a).

61. For a summary of FERC's enforcement process, see Total Gas & Power N. Am. v. FERC, 859 F.3d 325 (5th Cir. 2017); Todd Mullins & Chris McEachran, *Adjudication of FERC Enforcement Cases: "See You in Court?,"* 36 ENERGY L.J. 261 (2015); Allison Murphy, Todd Hettenbach & Thomas Olson, *The FERC Enforcement Process*, 35 ENERGY L.J. 283, 291–97 (2014); FERC POLICY STATEMENT, *supra* note 60.

62. 2021 FERC ANN. REP. ON ENF'T 34–37 (2021) [hereinafter 2021 ANNUAL REPORT].

63. FERC 5–6; 2021 ANNUAL REPORT, *supra* note 62.

64. FERC 3, 6.

65. FERC 2–3, 5.

66. The rule permitting targets to communicate with commissioners in writing dates back to 2008. Prior to that time, both oral and written communications were permitted. FERC 1–3, 5–6; Murphy et al., *supra* note 61, at 292–93; FERC POLICY STATEMENT, *supra* note 60, at 9. For further discussion of this practice, see Part IV.B.

67. Generally, the decision whether to use compulsory process is up to the Chair. FERC 6.

68. FERC 5.

69. Murphy et al., *supra* note 61, at 293–94; FERC POLICY STATEMENT, *supra* note 60, para. 32.

statement and the opportunity to respond are quite useful to their clients.[70]

If OE still believes a sanction is warranted, it seeks approval for settlement authority from the agency heads. This practice seems unique to FERC. The submission includes the target's response to the preliminary findings letter.[71] If the Commission approves, staff then pursues settlement negotiations within the parameters set by the Commission.[72] If a settlement is reached, OE seeks agency-head approval of the settlement. At least 90% of cases settle at some point in the process.[73] Interviewees had conflicting opinions about whether the process of granting settlement authority to the staff was worth its costs and delays.[74]

If the parties fail to negotiate a settlement and OE wishes to proceed with an enforcement action, OE provides the subject with notice (referred to as a Rule 1b.19 statement) and a further opportunity to respond within thirty days.[75] The Rule 1b.19 procedure was modeled after the SEC's Wells notice.[76] Rule 1b.19 statements tend to be briefer than the earlier preliminary findings letter. The target has the right to respond to the Rule 1b.19 notice, but the staff is not required to answer the target's response.[77] Some interviewees believe it is redundant to give the target two notices and the opportunity to write two briefs, because by this point, it is unlikely OE will change its views.[78] Others think it is not redundant because investigations often take years to complete, during which time new commissioners are appointed.[79]

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70. FERC 4–5.

71. Murphy et al., *supra* note 61, at 294–95; FERC POLICY STATEMENT, *supra* note 60, para. 35.

72. Murphy et al., *supra* note 61, at 294.

73. FERC 3–6. Cases involving regulated utilities nearly always settle. Cases involving energy market manipulation are less likely to settle. FERC 5.

74. FERC 5 thought the settlement authorization process was a significant check on prosecutorial discretion. FERC 4 and 6 thought it was useful for staff to get an early read from commissioners about the merits of the case. But FERC 5 and 6 thought it was of little utility and contributed to delay in resolving cases.

75. "Such notice shall provide sufficient information and facts to enable the entity to provide a response." 18 C.F.R. § 1b.19 (2023).

76. FERC staff is supposed to disclose exculpatory material that falls under the criminal-law *Brady* standard, Brady v. Maryland, 373 U.S. 83 (1963), but some defense lawyers argue that it does not do so. *See* FERC 2, 5; William S. Scherman, Brandon C. Johnson & James J. Fletcher, *The FERC Enforcement Process: Time for Structural Due Process and Substantive Reforms*, 35 ENERGY L.J. 101, 111–13 (2014). For further discussion, see Part I.A.

77. Scherman et al., *supra* note 76, at 111–13.

78. FERC 2.

79. FERC 3.

If OE is not persuaded by the target's Rule 1b.19 response, it drafts an "Enforcement Staff Report and Recommendation" to the agency heads.[80] This memo includes OE's proposed findings, conclusions, and recommendation that the agency issue an order finding violations and assessing civil penalties. The enforcement staff, the Commission's advisory staff, and the commissioners themselves often negotiate about the content of the report. The charging recommendation is usually approved through notational voting rather than at a formal meeting. It is rare that the agency heads fail to approve the recommendation (since the extensive contacts between staff and agency heads make it likely that the heads concur), but instances of non-approval or dissenting opinions have occurred.[81]

If the agency heads concur with OE's recommendation, FERC issues an Order to Show Cause (OSC), which is the charging document. The target has still another opportunity to respond to the OSC through a formal brief.[82] "The Commission's issuance of an OSC triggers the Commission's ex parte and separation of functions rules . . . ."[83] At that point, the enforcement staff is prohibited from communicating with the heads or their decisional advisers, except on the record.[84]

The applicable procedure from this point forward depends on whether the case involves electricity or gas. In gas cases, the heads refer the case to an ALJ for a trial-type hearing if there are unresolved factual issues. In gas cases heard by an ALJ, the agency heads make the final agency decision.

In electricity cases, a target can elect a different process within thirty days after FERC issues an OSC proposing a civil penalty.[85] An alternative process allows the target to obtain a "review de novo" of the assessment before a federal district court. If the target makes this election, the Commission assesses the penalty after a "paper hearing" (meaning the decision is based on documents in the file).[86] FERC then files an action in district court for an order affirming the civil penalty.[87] The court conducts a trial of the validity of the sanction. In close to 100% of electricity cases, lawyers make this

80. 2021 ANNUAL REPORT, *supra* note 62, at 9.

81. FERC 1–3, 6.

82. *See* Murphy et al., *supra* note 61, at 296. Murphy describes the *Barclay*'s case in which the target used all three opportunities to oppose the charging decision and submitted a total of "850 pages of argument and factual representations."

83. 2021 ANNUAL REPORT, *supra* 62 at 9.

84. FERC POLICY STATEMENT, *supra* note 60, at para. 36. For further discussion of separation of functions and ex parte communications, see Part IV.C.

85. *See* Mullins & McEachran, *supra* note 61; *see also* Total Gas & Power N. Am. v. FERC, 859 F.3d 325 (5th Cir. 2017).

86. *Total Gas & Power*, 859 F.3d at 328.

87. *Id.* at 330.

election because they feel the prospects for success are better before a district court than if the FERC decides the case in-house.[88] In district courts, the Commission has been successful in obtaining favorable pre-trial rulings in support of its enforcement theories, though most cases settle before trial.[89]

E. National Labor Relations Board

The NLRB's General Counsel has exclusive power to decide whether to issue complaints based on charges filed in unfair labor practice (ULP) cases. As a result, the five NLRB board members play no role in those decisions and exercise no prosecutorial function.[90] The General Counsel is appointed by the President and confirmed by the Senate. Whether the President can discharge the General Counsel is currently the subject of federal court litigation.[91]

In one important respect, Board members exercise a prosecutorial function. Board members must greenlight the General Counsel's recommendation to engage in litigation to seek a temporary injunction in a ULP case (so called "10(j) cases").[92] The Board seeks temporary injunctions in cases of irreparable injury or where delay would impede the efficacy of the Board's ultimate remedies.[93] The Board members make greenlighting decisions in 10(j) cases by notational voting rather than in meetings. The Board usually approves the General Counsel's recommendation to seek an injunction, but there are occasional denials, modifications of the proposed petitions, and dissents.[94] Board members also have power to review recommendations made by regional directors in representation cases, such as the determination of appropriate bargaining units, but such cases are not considered prosecutorial.

In addition to controlling charging decisions, the General Counsel manages the agency's staff and its litigation function. Federal court litigation is extensive because the Board must enforce its orders in court, seek injunctions, enforce subpoenas, and engage in numerous other litigation

88. FERC 2, 4–5.

89. FERC 4.

90. Labor Management Relations (Taft-Hartley) Act § 3(d), 29 U.S.C. § 153(d). Whether the National Labor Relations Board (NLRB) model should be carried to other agencies is discussed in Part IV.F.

91. President Biden fired General Counsel Peter Robb who had refused to resign. Various parties before the Board have challenged the legality of cases brought by the Acting General Counsel. So far, these challenges have failed. *See* Exela Enter. Sols., Inc. v. NLRB, 32 F.4th 436 (5th Cir. 2022). The Board has also rejected challenges to Robb's dismissal. *See* Aakash, Inc., 371 N.L.R.B. 46 (2021).

92. 29 U.S.C. § 160(j).

93. NLRB 3.

94. *Id.*

matters.

The NLRB prosecutorial process begins when an outside party (either an employer, a union, or an individual) files a ULP "charge" with a regional office.[95] The regional office allows the charged party to file a position statement setting forth its version of the case. NLRB regional directors make the initial charging decisions.

During the investigation, the charged party has informal opportunities to influence the charging decision through meetings with regional office investigators.[96] If the regional director declines to issue a complaint, the charging party can appeal to the Office of Appeals, a review section of the general counsel's office.[97] In cases involving unsettled legal issues, the regional director may seek advice from the general counsel's Division of Advice. During the advice-giving process, the target can file a brief and argue its position.

During FY 2021, the Board received 15,081 ULP charges and found about one-third to have merit.[98] Regional offices issued 678 complaints. The Board sought 10(j) temporary injunctions in nine cases and issued 136 decisions in contested ULP cases. These figures were likely depressed by the COVID-19 pandemic, as the figures from earlier years were considerably higher.[99] Well over 90% of the NLRB's cases settle after issuance of a complaint.[100] NLRB ALJs are particularly active in promoting settlements; often a different ALJ is assigned to the case to mediate it.[101]

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95. *Unfair Labor Practice Charges Filed Each Year*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/intake/unfair-labor-practice-charges (last visited May 9, 2023).

96. NLRB 3.

97. NLRB 1–3.

98. NLRB 3. The statistics in this paragraph are derived from the NLRB's 2021 Performance and Accountability Review and its Case Activity reports. 2021 NLRB ANN. PERFORMANCE AND ACCOUNTABILITY REP. 17, 28 (2021) [hereinafter 2021 NLRB ANNUAL REPORT].

99. In FY 2016, for example, the NLRB received 21,326 unfair labor practice (ULP) charges. Regional offices issued 1,272 complaints. The Board decided 295 contested ULP cases and approved twenty-nine requests to seek 10(j) temporary injunctions. 2016 NLRB ANN. PERFORMANCE AND ACCOUNTABILITY REP. 13, 23, 56 (2016) [hereinafter 2016 NLRB ANNUAL REPORT]. The much lower number of 10(j) requests in 2021 reflected the policy preferences of the General Counsel. NLRB 3.

100. NLRB 1–3. Most settlements are informal; the charging party withdraws the charge after the charged party offers an acceptable resolution.

101. NLRB 2. In 2021, NLRB administrate law judges (ALJs) issued 112 decisions and settled 444 ULP cases. *See* 2021 NLRB ANNUAL REPORT, *supra* note 98, at 18.

II. THE MERITS OF GREENLIGHTING

As discussed in Part I, the enforcement process in combined-function agencies begins with an investigation conducted by agency staff members who suspect a private-sector target with wrongdoing.[102] If the investigators conclude that the law and facts support the issuance of a complaint, they report their conclusion to agency prosecutors. In the agencies I studied, other than the NLRB, the prosecutors lack power to issue complaints on their own. Instead, they must request the agency heads to greenlight the case by authorizing the issuance of a complaint, initiating federal court action, or making a criminal referral to DOJ. In most cases, the staff and the target have agreed to a settlement before the greenlighting stage, but agency heads must approve the settlement.

Part II discusses the greenlighting function. It situates greenlighting as an accountability mechanism and as "internal administrative law" (Part A). It then discusses the arguments for and against the practice (Parts B and C). It then concludes that the benefits of greenlighting outweigh the costs (Part D).

A. Internal Administrative Law

This Article discusses charging decisions by federal combined-function administrative agencies and the mechanisms by which prosecutorial discretion in such agencies is checked. As a practical matter, no external Judicial, Legislative, or Executive Branch accountability mechanisms[103] constrain agency enforcement discretion.[104] Unlike most state and local criminal prosecutors, agency prosecutors and agency heads are not subject to checks through either periodic or recall elections.

The judiciary cannot review charging decisions because they are not "final order[s]."[105] Moreover, charging decisions are typically unreviewable

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102. For discussion of the division of power between investigators and agency prosecutors, see Van Loo, *supra* note 9.

103. There is a vast literature on the subject of accountability in administrative law and public administration. *See* THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY (Mark Bovens et al. eds., 2014); ELIZABETH FISHER & SIDNEY A. SHAPIRO, ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW 66–100 (2020); Richman, *supra* note 5; Michael Asimow, Gabriel Bocksang Hola, Marie Cirotteau, Yoav Dotan & Thomas Perroud, *Between the Agency and the Court:* Ex Ante *Review of Regulations*, 68 AM. J. COMP. L. 332 (2020); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2120–34 (2005).

104. Sohoni, *supra* note 9, at 42–47; Lemos, *supra* note 9, at 968–79 (discussing absence of executive and legislative accountability mechanisms for constraining enforcement).

105. *See* FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 246 (1980) (holding that FTC's "reason to believe" greenlighting determination is not a final order and thus unreviewable).

because they are committed to agency discretion.[106] In any case, most administrative enforcement cases settle instead of being adjudicated to a final agency decision, leaving nothing for courts to review. For cases litigated to a final decision by the agency heads, relatively few are judicially reviewed since the review process is so slow and costly and various deference doctrines make reversal unlikely.[107] If the case is judicially reviewed, the court considers the merits of the decision, not the preliminary decision to charge. Even a successful judicial assault on an agency enforcement decision often produces only a remand that allows the agency to reconsider the case and come to the same conclusion. Nor does Congress or the President exert any meaningful control over enforcement discretion in individual cases; indeed, it would be improper for those bodies to interfere in a pending adjudicatory process.[108]

The charging process is largely concealed from the public and targets. An agency can close the meeting at which it considers whether to take enforcement action[109] (in fact, at most agencies, these decisions are made by notational voting,

106. Administrative Procedure Act, 5 U.S.C. § 701(a)(2); Heckler v. Chaney, 470 U.S. 821, 821–22 (1985); *In re* Nat'l Nurses United, 47 F.4th 746, 755 (D.C. Cir. 2022) (noting how and whether OSHA enforces a regulation is committed to agency discretion); Pub. Citizen, Inc. v. FERC, 7 F.4th 1177, 1195–96 (D.C. Cir. 2021) (describing how the FERC decision to terminate market-manipulation investigation is not judicially reviewable even though its substantive decision in the same case was held to be arbitrary); Citizens for Resp. & Ethics in Wash. V. FEC, 993 F.3d 880, 894 (D.C. Cir. 2021) (stating how the court cannot review the Federal Election Commission's (FEC's) deadlocked decision not to prosecute, even though primarily based on a question of law, because it was also based on prosecutorial discretion); Lemos, *supra* note 9, at 990–92.

107. In addition to the costs and delays inherent in the judicial review process, regulated parties often fear that seeking judicial review of an enforcement decision could trigger reprisals from agencies with which they must maintain a good relationship. Asimow et al., *supra* note 103, at 359.

108. The Executive Branch could, of course, influence or overturn an agency's prosecutorial guidelines, *see infra* text accompanying notes 211–216 (discussing guidelines), or impose its own enforcement priorities, at least on Executive Branch agencies. It could also seek to dictate enforcement priorities by manipulating the agency's budget and through the process of appointing agency heads or high-level staff. *See, e.g.*, Zachary S. Price, *Politics of Nonenforcement*, 65 CASE W. L. REV. 1119 (2015). However, Executive involvement with individual enforcement decisions is rare. Andrias, *supra* note 9; Memorandum from Dana Remus, Couns. to the President, White House Off. (July 21, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/White-House-Policy-for-Contacts-with-Agencies-and-Departments.pdf. Congress could also influence or overturn an agency's prosecutorial guidelines, but congressional interference in a pending adjudication is improper and could be a due process violation. Pillsbury Co. v. FTC, 354 F.2d 952, 954–55, 963–64 (5th Cir. 1966).

109. 5 U.S.C. § 552b(c)(10).

not in meetings). Staff memoranda recommending enforcement are exempt from Freedom of Information Act (FOIA) disclosure.[110]

Because no external checking mechanisms exist, agencies should generate internal checks on the prosecutorial process.[111] Such checking practices are referred to as "internal administrative law,"[112] meaning procedures created by the agency itself that the agency is not legally required to provide. Such procedures might limit the discretion of agency heads or staff, allow monitoring by superiors of staff discretionary decisions, or provide protections for regulated parties and regulatory beneficiaries.

B. The Case for Greenlighting

The greenlighting function has important structural advantages as an accountability mechanism.[113] For a number of reasons, the agency heads, rather than the staff, should make the call when the agency's enforcement caseload is small enough to allow them to do so.[114]

As pointed out earlier, from the point of view of the target of administrative enforcement, the charging decision is often the most important procedural event in the entire regulatory process. If the heads believe a case brought to them by prosecutors is weak or ill-advised, or does not align with agency-head priorities, the case should be stopped before it goes any further. In such cases, the target should not be forced to agree to a settlement, and the agency should not embark on the costly adjudication process.

However, the argument for greenlighting goes well beyond protecting

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110. § 552(b)(5); NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). One former agency member told me the Chair concealed critical information about the charging process, even from that member. FCC 2.

111. *See* Barkow, *Overseeing Agency Enforcement*, *supra* note 5, at 1131–38.

112. There is a rich literature on internal administrative law, but none of it concentrates on the problem of checking enforcement discretion. *See* Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 427 (2015); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017); Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 884–88 (2009); Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside Out*, 65 U. MIAMI L. REV. 577 (2011).

113. The necessity of agency-head approval of charging decisions was recognized as far back as the *1941 Report of the Attorney General's Committee on Administrative Procedure*, which formed the rationale for Congress's enactment of the APA in 1946. *See* Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 978–79 (1991).

114. Of course, if the caseload does not permit agency heads to practice greenlighting, Congress or the agency should devise other accountability mechanisms. Gifford, *supra* note 113, at 992–1000; *see infra* Part IV.H.

private interests. An agency must adopt prosecutorial priorities since its resources will never be adequate to prosecute every case that might involve a regulatory violation.[115] It is appropriate for agency heads, rather than staff, to make the call on the allocation of limited enforcement resources. Even more significant, combined-function agencies use adjudication for policymaking, and choosing which cases to prosecute is an essential element of the policymaking process. This Section explores the arguments in favor of greenlighting in greater detail.

1. Principles of Public Administration[116]

Accepted principles of public administration suggest that agency heads must supervise staff decisionmakers in hierarchical government agencies that exercise delegated power.[117] Supervision ensures that the staff implements the priorities of agency heads and that agency norms and practices are respected.[118] Agency-head supervision is particularly vital when it concerns functions like charging decisions that are unconstrained by external judicial, executive, legislative, or political checks.[119] Of course, supervision can take many forms, but greenlighting is one effective method of accomplishing it.

The agency-head approval process serves other goals identified by public administration scholars. William Simon identifies a set of practices described as "post-bureaucratic organization."[120] These practices depart from the

115. For discussion of the centrality of resource allocation and priority-setting, see Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 16–24 (2008); Bornstein, *supra* note 9, at 859–62 (discussing diminishing budgetary resources for enforcement).

116. Legal scholars often urge that public administration principles be incorporated in administrative law. The primary concern of public administration theory is to make government institutions work competently and efficiently. In contrast, the primary concern of administrative law theory is to impose constraints upon administrative functions that favor regulated parties. *See* FISHER & SHAPIRO, *supra* note 103, 66–100; HARLOW & RAWLINGS, *supra* note 3 (distinguishing redlight and greenlight theories).

117. Indeed, Professor Metzger has argued that agency heads are constitutionally obligated to supervise the staff. Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1890–99 (2015).

118. *Id.* at 1907 ("Supervision is also intimately tied to policy priorities and an agency's resource allocations.").

119. *See supra* Part I.A.

120. *See* William H. Simon, *The Organization of Prosecutorial Discretion*, *in* PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY, *supra* note 5, at 175–76; William H. Simon, *The Organizational Premises of Administrative Law*, 78 LAW & CONTEMP. PROBS., nos. 1 & 2, 2015, at 62 [hereinafter Simon, *The Organizational Premises*]; Charles F. Sabel & William H. Simon, *The*

traditional choice between professionalism (that allows professionals such as prosecutors to exercise unconstrained discretion) and strict hierarchical bureaucratic control. Post-bureaucratic administration entails transparency and a requirement of justification for staff discretionary decisions, representation of stakeholders, and multi-disciplinary group decisionmaking for evaluating discretionary decisions.[121]

Simon observes that post-bureaucratic administrative innovation has had little impact on the criminal prosecution process.[122] However, greenlighting exemplifies post-bureaucratic administration. Greenlighting requires professional prosecutors to explain and justify their charging decisions and makes these decisions transparent to agency heads. The notice-and-comment process that precedes greenlighting exposes prosecutors to the opinions of stakeholders such as targets or victims. Greenlighting entails a multi-disciplinary collegial discussion among the agency heads. Greenlighting encourages agencies to adopt prosecution guidelines.[123] It enables the heads to monitor prosecution decisions and to adjust their priorities when there is a change in the markets the agency regulates or when the priorities of the agency heads change.

There is another way that greenlighting serves important principles of public administration. As practiced in most agencies, greenlighting requires staff prosecutors to produce a confidential and candid memorandum to the agency heads. These memos explain the factual, legal, and policy rationales for charging a target or settling the dispute. They analyze strategic concerns such as evidentiary weak points or political implications. SEC prosecutors

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Duty of Responsible Administration and the Problem of Police Accountability, 33 YALE J. ON REGUL. 165, 167 (2016) (noting that post-bureaucratic organization "emphasize[s] provisional and easily revised plans, monitoring designed to induce learning as well as compliance, and systematic reassessment on the basis of experience").

121. *See* Simon, *The Organizational Premises*, *supra* note 120, at 69 (describing how, in a post-bureaucratic organization, administrative agents have discretion to depart from a prescribed plan, but they must explain their departure, which may prompt review of their conduct and the plan itself).

122. *See* Sable & Simon, *supra* note 120, at 168 (revealing that although post-bureaucratic elements are pervasive in police reform, there are ambiguities in how post-bureaucratic reform has been employed to secure civil rights compliance).

123. *See infra* Part IV.G. (discussing how agencies can adopt enforcement guidelines to elucidate enforcement priorities and criteria, which lead to more consistent charging decisions); *see, e.g.*, Michael Ellement, *Labor Law in 3(d): Reexamining the General Counsel of the NLRB as an Independent Prosecutor of Labor Violations*, 29 A.B.A. J. LAB. & EMP. L. 477, 489 (2014) (noting that the NLRB General Counsel frequently issues memoranda to direct regional offices on how they should proceed on particular legal issues and to signal to employers, employees, and unions the General Counsel's views on substantive labor law).

file "Action Memos;" FTC prosecutors file "Memoranda Recommending Complaint;" and FERC prosecutors produce the "Enforcement Staff Report and Recommendation." The process of preparing such memoranda is likely to improve the staff's decisionmaking process. Staff members realize they will have repeated interactions with the agency members and are anxious to preserve their credibility by writing thorough and balanced memoranda.

Still another advantage of greenlighting is that in multi-member agencies, the greenlighting function compels agency heads to make a collective and collegial deliberative decision about prosecution priorities.[124] Multi-member agency heads must be politically balanced and are likely to have different skill sets and backgrounds. As a result, the collective agency-head decision about enforcement priorities and charging decisions may be better than leaving that decision to prosecutors (as in the criminal law process) or to the General Counsel (as in the case of the NLRB). This assumes, of course, that the agency's caseload permits collective decisions about prosecution (as it probably does not in the case of the NLRB). This pluralistic decisionmaking process is one of the advantages of multi-headed agencies, and it applies to enforcement decisionmaking and other administrative functions such as rulemaking or final adjudicatory decisions.[125]

2. Internal Separation of Powers

The greenlighting function is an example of "administrative separation of powers" as described by Jon Michaels.[126] Michaels described three distinct and competitive interests at play in agency decisionmaking.[127] The three are the agency heads, the agency staff, and outsiders to the agency (including both regulated parties and beneficiaries of the regulatory scheme).[128] These

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124. *See* Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 260 (1988) (asserting that multi-member commissions are "collegial bodies" that engage in "consensual, reflective and pluralistic" decisionmaking).

125. *See id.* at 259–63 (explaining that the collegial decisionmaking within multi-member commissions are "more concerned with the values of fairness, acceptability and accuracy than with the single dimension of efficiency"); FTC 3. Some scholarship deprecates the value of deliberation in multi-member agencies, especially in the present hyper-polarized political environment. Ganesh Sitaraman & Ariel Dobkin, *The Choice Between Single Director Agencies and Multimember Commissions*, 71 ADMIN. L. REV. 719, 738–55 (2019).

126. Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 229–32 (2016).

127. *See id.* at 229 ("[A]dministrative power is divided principally among three sets of rivalrous actors . . . .").

128. *See id.* (explaining that the three actors with administrative power are "politically

three interests engage in constant rivalrous competition in the course of a variety of administrative functions.[129] Michaels points out the parallels between this internal separation of powers and the traditional system of external separation of powers and checks and balances between the Legislative, Executive, and Judicial Branches of government.[130]

Applying Michaels' analysis to charging decisions, the agency's investigators and prosecutors take the initiative to uncover violations and prioritize them. They make the initial decision whether to prosecute, settle, or abandon the cases. The staff is checked by the agency heads who must greenlight the staff's decision. In practice, the heads almost always support the staff's determinations, but the need for agency-head approval constrains prosecutorial decisions.[131] Regulatory targets can also substantially influence the notice-and-comment system employed in many agencies, which is discussed in Part III of this Article. Thus, the three interests identified by Michaels engage in a competitive struggle within the adjudicatory process, with the same positive effects as traditional inter-branch checks and balances. Because, as discussed above, external separation of powers has almost no influence over charging decisions,[132] internal separation of powers seems to be an attractive alternative.

3. The Principal–Agent Problem

Prosecutorial decisions or settlements can represent a principal–agent problem if the preferences and priorities of staff prosecutors fail to align with those of the agency heads. Misalignment of prosecutorial priorities between agency and staff can produce either over- or under-enforcement.

Agency prosecutors sometimes want to over-enforce by pushing the envelope to pursue targets they perceive as wrongdoers, even if the evidentiary basis for doing so is questionable or the legal theory is not well supported by existing precedent.[133] The staff may pursue a "crackdown" by allocating resources to a particular class of cases the heads do not support.[134]

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appointed agency leadership," "politically insulated career civil service," and "a large and diverse civil society").

129. *See id.* at 243 (observing that the three administrative rivals are "engaged in their own exercises of horizontal checking, balancing, and collaborating").

130. *See id.* at 230–31.

131. See *infra* Part II.B.3 for a discussion of the sentinel effect.

132. *See infra* Part III.B.1 (asserting that internal supervision, collaboration, and transparency are vital principles of public administration because agency charging decisions are otherwise unchecked by Judicial, Executive, Legislative, or political checks).

133. SEC 5–7; FERC 3.

134. *See* Sohoni, *supra* note 9, at 55–63.

Prosecutors may be overcharging to force the target to settle.[135] Agency attorneys may have their future careers in mind rather than the public interest.[136] The staff may wish to use resources unwisely by concentrating on trivial cases that are easier to win or to run up the numbers.[137] Thus, the requirement that the agency heads greenlight a charging decision helps to rectify possible misalignment of priorities between staff and agency heads. Such misalignment issues have sometimes surfaced in NLRB ULP enforcement, where the General Counsel, rather than the agency heads, controls charging decisions.[138] In an interesting recent development, the FTC heads voted (3–2) to sue to block Meta's acquisition of Within, *rejecting* the staff's recommendation not to attack the acquisition.[139] This vote reflects misalignment between agency heads and staff that would produce under-enforcement and was rectified by a positive greenlighting determination.

In addition to correcting the misalignment of priorities, greenlighting creates what is sometimes called a "sentinel effect." The sentinel effect means that people make different decisions when those decisions are subject to check than when they are not.[140] The sentinel effect exists because the staff is well acquainted with the enforcement preferences of the chair and the other agency heads. The heads may have made these preferences clear in discussions with prosecutors, or the prosecutors may discern these preferences from their experience with past greenlighting events. Staff prosecutors might not advance proposed complaints if they think the agency heads might reject or narrow them or even that there might be a contentious discussion and a split vote at the commission level. I frequently asked interview subjects a counterfactual question: If greenlighting did not exist, and the staff was free to choose prosecution targets, would the pattern of prosecutions look different than it does now? Most interviewees answered affirmatively. They believed the staff would have been more aggressive in choosing prosecution targets if their charging decisions were not subject to greenlighting.[141]

Agency-head approval obviously is less effective as a check on under-enforcement (as opposed to over-enforcement) since the heads may not see

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135. Barkow, *Overseeing Agency Enforcement*, *supra* note 5, at 1163–64.

136. *See* Lemos, *supra* note 9, at 952–56; Sohoni, *supra* note 9, at 67–69.

137. SEC 6; FTC 5.

138. NLRB 3; *see* Ellement, *supra* note 123, at 483–86, 490–93; *supra* Part I.E; *infra* Part IV.F.

139. Robertson, *supra* note 40.

140. *See* Asimow et. al, *supra* note 103, at 354–55.

141. All eight of the SEC interviewees answered affirmatively, as did FERC 5; FCC 2, 4; and FTC 5. *See also* BARDACH & KAGAN, *supra* note 9, at 34.

cases on which the staff has passed.[142] In particularly important cases, a staff recommendation *not* to charge may enter the greenlighting process and enable the agency heads to reject the staff's decision by increasing the level of enforcement, as occurred in the FTC's decision to sue Meta discussed above.[143] In less important cases, informal communications between the chair and the general counsel often address the under-enforcement problem.[144]

C. The Case Against Agency-Head Greenlighting

1. Confirmation Bias

I. The Confirmation Bias Problem

A number of observers of the administrative enforcement process are troubled by the problem of confirmation bias because the greenlighting process requires agency heads to discharge both prosecutorial and judicial functions in the same case.[145] As a result, the heads may be unable to render an unbiased final adjudicatory decision when a case they greenlighted returns to them for the final agency decision.[146] The famous *1941 Report of the Attorney General's*

142. *See* Barkow, *Overseeing Agency Enforcement*, *supra* note 5, at 1148; Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620, 1628 (2018). Indeed, excessive checks and balances may lead to under-enforcement because front-line investigators and prosecutors are sometimes discouraged by the many hoops they must jump through. BARDACH & KAGAN, *supra* note 9, at 39–44.

143. *See supra* Part II.B.3.

144. SEC 8.

145. *See, e.g.*, Andrew N. Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. MICH. J. L. REFORM 103 (2018); Edward H. Fleischmann, *Toward Neutral Principles: The SEC's Discharge of its Tri-Functional Administrative Responsibilities*, 42 CATH. U. L. REV. 251 (1993); Special Comm. to Study the Role of the Fed. Trade Comm'n, *Report of the ABA Antitrust Section*, 58 ANTITRUST L.J. 43, 119 (1989); ABA Comm. on Fed. Regul. of Sec., *Report of the Task Force on the SEC Administrative Law Judge Process*, 47 A.B.A. BUS. L. 1731, 1732 (1992) [hereinafter *ALJ Task Force*]; Daniel R. Walfish, *The Real Problem with SEC Administrative Proceedings, and How to Fix It*, FORBES (July 20, 2015, 7:55 AM), https://www.forbes.com/sites/danielfisher/2015/07/20/the-real-problem-with-sec-administrative-proceedings-and-how-to-fix-it/.

146. *See* Vollmer, *supra* note 145, at 135–36 (noting that empirical studies support the conclusion that charging officials lack the neutrality needed to determine the merits of cases in which they made an initial charging decision). Another type of bias that might be called "institutional bias" exists independently of the confirmation bias that might be induced by greenlighting. Institutional bias means that agency heads are likely to believe in strong enforcement of the regulatory statute for which they are responsible. They probably wish to support the hard work of their prosecutorial and investigative staff by validating those lower-

Committee on Administrative Procedure identified the problem of confirmation bias and offered a suggestion to partially remedy the problem.[147]

"Institutional bias" exists independently of confirmation bias, and both can operate when agency heads make the final decision in an enforcement case. Institutional bias means that agency heads are likely to believe in strong enforcement of the regulatory regime for which they are responsible. They probably wish to support the hard work of their prosecutorial and investigative staff by validating those lower-level decisions. Institutional bias is inevitably present in combined-function agency enforcement proceedings, but confirmation bias adds an additional concerning element.

Confirmation bias might manifest itself in different ways. For example, the agency heads may be reluctant to overturn an ALJ's decision against the target because doing so would suggest the heads were wrong to have greenlighted the complaint in the first place and thus, wasted agency resources.[148] The converse problem also exists—commissioners who voted against greenlighting a complaint may be reluctant to uphold an ALJ's decision against the target because doing so might suggest their earlier vote was wrong.[149]

There is another way greenlighting could produce confirmation bias. Agency heads might rely on ex parte information, opinions, and anecdotes communicated to them by the prosecutorial staff in meetings that occurred before and during the greenlighting process.[150] This information might predispose them to decide the case against the private party.[151] Yet some of this material likely will not appear in the record of the hearing conducted by the ALJ. That record should form the exclusive basis on which the heads make the final adjudicatory decision. This form of confirmation bias becomes more severe as the number and intensity of contacts between prosecutorial staff and agency heads increase. In FERC, for example, such communications apparently occur

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level decisions. *See* Elman, *supra* note 33, at 810. Institutional bias is inevitably present in combined-function agency enforcement proceedings, but confirmation bias adds an additional concerning element.

147. *See infra* Part IV.D.

148. Elman, *supra* note 33, at 810; Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 53 (1969). Posner and Elman offer no empirical support for these assertions, which were tossed off briefly in long articles criticizing the FTC for other reasons.

149. SEC 8.

150. *See* Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 766–70 (1981) [hereinafter Asimow, *When the Curtain Falls*].

151. *See id.* at 767 (noting that predecisional conferences between agency heads and adversaries are essential when the agency exercises combined functions of investigation, prosecution, and adjudication).

frequently over a course of years during the investigatory process.[152]

The drafters of the APA were concerned by the problems of confirmation bias, and they instituted a system of internal separation of functions to protect against it. Under § 554(d) of the APA, agency staff members who played a significant adversarial role in a case as prosecutors, investigators, or advocates are prohibited from serving as adjudicatory decisionmakers or as off-the-record advisers to adjudicatory decisionmakers in the same case.[153] Congress had two rationales for imposing internal separation of functions. First, an adversarial staff member's prosecutorial or investigative work may have infused a "will to win" that distorts the adversary's ability to serve as an impartial decisionmaker or adviser.[154] Second, the adversary may have been exposed to information about the facts of the case or other information about the target and its behavior that do not find their way into the adjudicatory record. As discussed above, these are the two ways that greenlighting might also create confirmation bias at the agency-head level.[155]

However, for reasons to be discussed, the APA excludes agency heads from internal separation of functions.[156] The APA allows the heads to take part in both the prosecutorial and adjudicatory phases of the case. This statutory exception creates a risk that agency heads may be subject to confirmation bias.

II. Reasons to Believe that Confirmation Bias Is Not a Serious Problem

In theory, the differences in agency-head decisionmakers' prosecutorial and adjudicative roles should greatly reduce the risk that confirmation bias affects their decisions. For example, the burden of proof at the two stages is different. The greenlighting decision is based on probable cause to believe that a violation of law has occurred. An adjudicatory decision against the target must be supported by a preponderance of the evidence in the record—a far more demanding decisional standard.[157]

There are important differences in the cognitive processes employed in carrying out the prosecutorial and adjudicatory tasks. When they vote to

152. FERC 2; *see* Scherman et al., *supra* note 76, at 114–15; Mullins & McEachran, *supra* note 61, at 284–85.

153. *See* Administrative Procedure Act, 5 U.S.C. § 554(d).

154. Grolier, Inc. v. FTC, 615 F.2d 1215, 1220 (9th Cir. 1980).

155. *Id.* at 1219–20.

156. *See infra* Part III.B.

157. *See* FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 241 (1980) (noting issuance of complaint requires only a reason to believe a violation has occurred and is a threshold determination that further inquiry is warranted); Steadman v. SEC, 450 U.S. 91, 96–103 (1981) (establishing that 5 U.S.C. § 556(d) requires an agency to establish its case by preponderance of the evidence).

greenlight a complaint, the agency members know they are relying on a one-sided ex parte staff presentation of the evidence in favor of charging. Often, the staff has accepted the credibility of outsider witnesses for purposes of deciding to charge the target. The final adjudicatory decision, on the other hand, occurs after a trial-type adversarial hearing that will test the credibility of witnesses. The ALJ produces a reasoned opinion based on the evidence presented during the hearing. The agency heads are limited by the exclusive record rule to consider only the evidence introduced at the hearing.[158] Whether the differences in the decisionmaking process at the two stages make any practical difference, however, is disputed. In any event, many targets and their attorneys are not impressed by the differences between the prosecutorial and adjudicatory stages. They complain that their prosecutors have turned around to act as their judges.

The confirmation bias problem arises rather infrequently. Most greenlighted cases settle—very few of them make it all the way to a final decision by the agency heads.[159] And of those cases that traverse the entire process, confirmation bias is seldom a problem because of the high turnover rate of agency heads. The heads who are called upon to make the final decision are usually not the same people who greenlighted the case years before. But those agency heads who remain in their job for more than a couple of years are likely to see cases a second time.

III. Interviewees' Views on Confirmation Bias

In my interviews, most former agency heads said they did not believe they were personally affected by confirmation bias, but they were aware of the issue.[160] Indeed, some said they barely remembered the meetings at which they greenlighted the complaints. They pointed to the differences between the greenlighting and adjudication decisions that are discussed above, such as the exclusive record and differences in burden of proof. They observe that a failure to take account of evidence and arguments developed during the ALJ hearing would invite disaster on judicial review.[161] Needless to say, however, such interview data is not very reliable. Nobody likes to admit they might have been biased. Moreover, some former agency heads stated that they found the situation uncomfortable,[162] and others acknowledged it created an appearance of bias even though they believed they were not

158. 5 U.S.C. § 556(e).

159. Barkow, *Overseeing Agency Enforcement*, *supra* note 5, at 1163–64.

160. SEC 1, 6; FTC 5; NLRB 3.

161. FTC 5.

162. SEC 4; FTC 3–4; FCC 1–2.

personally subject to confirmation bias.[163]

Some former agency staff members believe confirmation bias is a serious problem.[164] Other former staff members who are now in the defense bar disagree; they do not see confirmation bias as a problem with which they are concerned.[165] Again, data from staff interviews is mostly meaningless on this issue; there is no way a former staff person could know whether the agency heads were biased in deciding cases that the staff members had been involved in prosecuting.

IV. Empirical Research on Confirmation Bias

Attempted empirical research on the existence of confirmation bias based on win rates is inconclusive. This is hardly surprising given the elusive character of psychological phenomena such as confirmation bias. Clearly, there are many other variables that predict win rates, most of them more important than confirmation bias.

Most of the empirical work on this issue concerns the FTC. The most comprehensive study of the issue covered all FTC agency-head administrative decisions between 1977 and 2016 (a total of 145 cases).[166] It suggests that confirmation bias is not a major problem if it exists at all. When the same Commission majority both authorized the complaint and decided the case, the FTC dismissed 33% of the cases. When a different majority voted out the complaint and made the final decision, the FTC dismissed only 27% of the cases.[167]

Several other studies of FTC decisionmaking point in the opposite direction, but they are based on a shorter time period and consider only limited portions

163. SEC 2, 6.

164. SEC 3; FTC 2; FCC 3.

165. SEC 5, 7–8; FTC 1; FCC 4.

166. Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp*, 12 J. COMPETITION L. & ECON. 623, 630–31 (2016). Overall, the FTC agency heads dismissed 40% of the competition cases that reached them for final decision, but dismissed only 9% of the consumer protection cases, suggesting that the final decision stage is not a rubber stamp process in competition cases. In an additional 13% of cases in which it imposed liability, the Commission struck some of the allegations, counts, or respondents, suggesting that it engaged in careful analysis.

167. *Id.* at 638. Ohlhausen cautions that this conclusion is only suggestive as many other factors are in play, such as changes in antitrust doctrine and the rigor of recent FTC decisions at the time of her survey as compared to the past. In more recent years, there have been many fewer cases decided by the FTC agency heads, case selection has been more rigorous, the percentage of complaint dismissals is much lower, and the rate of affirmance by the federal courts is higher.

of the FTC's work. One study of FTC merger decisions between 1950 and 2011 indicated that confirmation bias does exist. When three, four, or five commissioners who made the final decision also participated in the charging decision, the FTC enjoyed a greater win rate than in situations where zero, one, or two commissioners participated in both decisions.[168]

Other studies simply infer bias from the fact that the agency wins most of the cases decided at the Commission level.[169] However, this analytical method is suspect given that the FTC is a law enforcement agency with discretion to select only strong cases to prosecute and where most of the cases settle. Agency decisionmakers are naturally subject to institutional bias; it is not surprising they would uphold most or all of the ALJ decisions that come to them, whether or not confirmation bias also exists.[170]

2. Efficiency

A second disadvantage of the greenlighting system is based on efficiency concerns. The greenlighting process can be quite time-consuming for agency heads, especially if they are conscientious about reading the complete files. Another efficiency concern is that the need for greenlighting at the agency-head level can prolong settlement negotiations or increase the time between the prosecutorial decision to charge and the commencement of an agency hearing. Thus, greenlighting may contribute to the problem of administrative delay.

At the SEC, for example, action memos may run fifty to seventy-five pages in length and perhaps five to ten of them are circulated each week. In

168. Nicole Durkin, *Rates of Dismissal in FTC Competition Cases from 1950-2011 and Integration of Decision Functions*, 81 GEO. WASH. L. REV. 1684, 1684, 1686 (2013). Durkin's study concerned only competition cases, not consumer-protection cases, and counted only "merits" dismissals, excluding non-merits decisions. The dismissal rate was 21% in the 1950s, 14% in the 1960s, 18% in the 1970s, 38% in the 1980s, 18% in the 1990s, and 0% in 2000–2011. *Id.* at 1699. The majority of the dismissals were "straddle" cases, meaning they were brought under a president from one party but decided under a president from the opposing party. *Id.* at 1700.

169. *See* A. Douglas Melamed, Comment Letter on Workshop Concerning Section 5 of the FTC Act 14–17 (Oct. 14. 2008), https://www.ftc.gov/sites/default/files/documents/public_comments/section-5-workshop-537633-00004/537633-00004.pdf (questioning impartiality of the FTC heads based on high percentage of agency wins); Joshua Wright, *Supreme Court Should Tell FTC to Listen to Economists, Not Competitors on Antitrust*, FORBES (March 14, 2016, 11:00 AM), https://www.forbes.com/sites/danielfisher/2016/03/14/supreme-court-should-tell-ftc-on-antitrust/?sh=2aeb69af7c16. Wright states that "the FTC has ruled for itself in 100 percent of its cases over the past three decades." *Id.* A claim refuted by Ohlhausen, *supra* note 166, at 626–28 nn.10–13, 632.

170. *See supra* note 145 and accompanying text (discussing the difference between institutional and confirmation bias).

addition, the Wells responses or white papers are often lengthy, and some commissioners read them in full.[171] Greenlighting is considered at formal SEC meetings, which are sometimes contentious. Thus, a substantial portion of the time of SEC commissioners is devoted to enforcement matters.

Agencies that handle the greenlighting function through notational voting spend less time in meetings, but the members must still read the lengthy files (although no doubt many of them have time only to read the executive summaries). At FERC, the agency heads make greenlighting decisions in several stages. Each stage generates lengthy memos, but voting is generally done through a notational process rather than in-person meetings.[172] The same is true at the FCC where enforcement matters are seldom taken up during commission meetings.[173]

SEC interviewees estimated that perhaps 40% or more of agency heads' time is taken up in enforcement matters, including, but not limited to, charging decisions and settlement approvals.[174] At FERC, estimates were much lower, perhaps closer to 10%, because relatively few enforcement cases make it that far.[175] One former FTC commissioner estimated spending half of work time on enforcement issues but thought the time investment was well worth it.[176]

Obviously, agency heads pay a substantial opportunity cost to achieve this level of involvement in enforcement issues.[177] This is time the heads could devote to other important responsibilities such as rulemaking, ratemaking, liaisons with other agencies, study of the problems faced by the industry, development of policy, or consideration of adjudicatory records at the time of final decision.

D. Weighing Costs and Benefits

Weighing the cases for and against greenlighting, my conclusion is that the greenlighting function is valuable and should be preserved in agencies where the caseload permits it. Greenlighting produces substantial advantages in terms of public administration norms, such as the need for accountability of staff, improved supervision of staff, the sentinel effect, and the benefits of internal separation of powers. Greenlighting also mitigates the principal–agent problem. I believe these benefits outweigh the problems of confirmation bias and inefficiency, but this Article will suggest further checks and balances in Part IV that could alleviate both concerns.

171. SEC 1, 3, 4, 6, 8.
172. FERC 4.
173. FCC 1, 4.
174. SEC 1–4, 6, 8.
175. FERC 5.
176. FTC 5.
177. SEC 1; FTC 3, 5.

III. LEGALITY OF GREENLIGHTING

This Part discusses the arguments that greenlighting violates due process or the APA.

A. Due Process

Andrew Vollmer argues that the SEC denies a target due process when the agency heads greenlight a complaint and later issue the final agency decision.[178] I disagree with Vollmer's analysis. The Supreme Court has consistently rejected constitutional attacks that arise out of the structure of combined-function administrative agencies.

The leading case on this issue is *Withrow v. Larkin*.[179] In *Withrow*, the Supreme Court assumed that the heads of a state medical licensing agency had personally investigated a physician's conduct, authorized the filing of a criminal complaint against the physician, and then adjudicated a revocation of his license. The Court unanimously rejected the physician's due process claim. It held that agency heads could exercise the functions of both investigation and adjudication in the same case, absent particularized facts indicating that the heads had prejudged the case.[180] The Court pointed out that there is no incompatibility between the agency filing a complaint based on probable cause and rendering a subsequent adjudicatory decision in favor of the target when the evidence fails to establish a statutory violation.[181] The *Withrow* Court was obviously concerned that a contrary decision would cast doubt on the practices of countless federal, state, and local licensing agencies.

The *Withrow* decision is supported by the principle of necessity—if the agency heads were disqualified by their involvement in prosecution, there would be no way to adjudicate the case and thus, no way to revoke the doctor's license. *Withrow* is consistent with several earlier Supreme Court decisions that held agency adjudicatory decisionmakers are not biased simply by reason of their involvement in earlier agency proceedings.[182]

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178. Vollmer, *supra* note 145, at 105–07, 154.

179. 421 U.S. 35 (1975); *see* Michael Asimow, Withrow v. Larkin, *in* LEADING CASES IN ADMINISTRATIVE LAW (Matthew Wiener, Jeremy Graboyes & Anna Shavers eds.) (forthcoming 2023).

180. *Withrow*, 421 U.S. at 58.

181. *Id.* at 57.

182. FTC v. Cement Inst., 333 U.S. 683, 726–27 (1948); Hortonville Joint School Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482, 494, 496–97 (1976). In *Cement Institute*, the Court said, "If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another." *Cement Institute*, 333 U.S. at 702.

Under *Withrow,* it seems clear that due process is not violated when agency heads greenlight a charging decision and later make the final adjudicatory decision in the same case, absent some further evidence they had prejudged the issues. Since *Withrow*, federal courts have consistently rejected arguments that agency heads who exercised overlapping functions could not fairly adjudicate a case.[183]

Despite this authority, Vollmer argues that due process is violated when agency heads greenlight and later adjudicate the same case.[184] His analysis is based on *Williams v. Pennsylvania*.[185] *Williams* was a death penalty case in which Ronald Castille had previously served as a prosecutor. Castille later became a justice on the Pennsylvania Supreme Court and voted to uphold the death penalty in the same case he helped prosecute.[186] The Supreme Court held that this combination of functions violated due process.[187]

It seems plain that *Williams* is distinguishable from the administrative greenlighting issue. It is shocking and inexplicable that a justice on a state supreme court would not disqualify himself in a case he had prosecuted. It is a gross breach of judicial ethics for a judge to decide a case in which the judge served as counsel in an earlier phase of the case, let alone a death penalty case.[188] The *Williams* scenario is likely a situation that will never

183. *See, e.g.*, Simpson v. Off. of Thrift Supervision, 29 F.3d 1418, 1424–25 (9th Cir. 1994) (rejecting a claim of due process violation because an agency head both approved prosecution and then decided the case after an ALJ decision); Marine Shale Processors v. EPA, 81 F.3d 1371, 1385 (5th Cir. 1996) (finding no due process violation when an EPA regional administrator denied a permit application, then adjudicated the same issue); Blinder, Robinson & Co. v. SEC, 837 F.2d 1099, 1101, 1107 (D.C. Cir. 1988) (finding that the SEC was not prohibited from adjudicating a case because it earlier prosecuted a civil case against same party). A good example of the prevailing law on whether agency heads should be disqualified because of playing multiple roles is Zen Magnets, L.L.C. v. Consumer Prod. Safety Comm'n, 968 F.3d 1156 (10th Cir. 2020). *Zen Magnets* held that due process is not violated when agency heads adopt a product safety regulation about the dangers of small magnets and then adjudicate the same issue. *Id.* at 1167. The agency heads made various statements at the time of the rulemaking about the dangers of the product, but the court considered the agency heads to be carrying out their role (meaning they were performing agency functions as opposed to some non-agency function) and the statements did not indicate they had prejudged the issue. *See id.* at 1167–69.

184. Vollmer, *supra* note 145, at 107.

185. 136 S. Ct. 1899 (2016).

186. *Id.* at 1904.

187. *Id.* at 1908–09.

188. See THE MODEL CODE OF JUD. CONDUCT r. 2.11 (AM. BAR ASS'N 1990), which dictates that:

A judge shall disqualify himself or herself in any proceeding in which the judge's

recur. It easily fits into the *Withrow* exception for particularized facts that reveal prejudgment. In contrast, there is no breach of judicial ethics nor any particularized facts indicating prejudgment when an agency head greenlights a prosecution, then decides the case. Such an action is routine, generally accepted, and has occurred in countless cases.

By concentrating only on the SEC, Vollmer fails to deal with the systemic effect of holding that greenlighting plus adjudication is a due process violation. Such a decision would have an enormously disruptive effect on the state and federal administrative process because greenlighting is so common, particularly in licensing agencies. The Supreme Court is reluctant to decree due process principles that would have widespread effect of this kind.[189] Such a decision would also have the effect of holding unconstitutional the agency-head exception in § 554(d) of the APA,[190] a step the Supreme Court would be reluctant to take. The *Williams* decision does not offend the principle of necessity because the Pennsylvania Supreme Court could have decided the case if Castille had recused himself. In contrast, a decision preventing all agency heads who had greenlighted a prosecution from deciding the case would frequently immobilize the agency for lack of a quorum, therefore making it impossible to render a final decision. Thus, Vollmer's argument that greenlighting at the SEC or elsewhere violates due process is not persuasive.

Vollmer argues that to solve the due process problem, an agency member who voted to greenlight a case should be disqualified from voting on the final decision.[191] Whether that proposal should be adopted as a matter of policy is discussed below.[192]

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impartiality might reasonably be questioned, including . . . (6) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding . . . .

Id.

189. See Richardson v. Perales, 402 U.S. 389, 410 (1971), which upheld the Social Security Administrative practice whereby an ALJ is responsible for developing the facts in a disability case and then deciding the case. "Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity." *Id.*

190. *See infra* Part III.B.

191. Vollmer, *supra* note 145, at 107.

192. *See infra* Part IV.E.

B. The Administrative Procedure Act

Section 554(d) of the APA imposes a separation of functions requirement that prevents a staff member involved in an investigation of a case from serving as an adjudicator in the same case (or a substantially related one) or as an adviser to the adjudicator.[193] However, § 554(d) does not apply "(C) to the agency or a member or members of the body comprising the agency."

This agency-head exception was inserted because Congress felt that application of separation of functions to the agency head would damage the agency's ability to conduct law enforcement.[194] As a result, according to a number of cases, the APA allows agency heads to engage in a prosecution function such as greenlighting, then participate in the agency's final adjudicatory decision.[195] The *Withrow* decision contains a dictum confirming that the APA permits agency heads to engage in investigation and prosecution in the same case they adjudicate.[196]

IV. ACCOUNTABILITY MECHANISMS AND GREENLIGHTING

Part II of this paper discussed the fundamental rationales for the

193. *See* Asimow, *When the Curtain Falls*, *supra* note, 150 at 761.

194. *See* Grolier, Inc. v. FTC, 615 F.2d 1215, 1220 (9th Cir. 1980) (citing H.R. REP. NO. 79-1980, at 262 (1946)) ("The exemption from 554(d) was created only for those positions in which involvement in all phases of a case is dictated 'by the very nature of administrative agencies, where the same authority is responsible for both the investigation-prosecution and the hearing and decision of cases.'").

195. In Env't Def. Fund v. EPA, 510 F.2d 1292 (D.C. Cir. 1975), Judge Leventhal wrote:

> [Congress] 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.

Id. at 1305; *see also* Air Prods. & Chems., Inc. v. FERC, 650 F.2d 687, 709–10 (5th Cir. 1981) (finding that the APA agency-head exception allows prosecutorial staff to meet with agency heads in deciding to issue complaint).

196. Withrow v. Larkin, 421 U.S. 35, 56 (1975) ("It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law."). The APA does not, however, allow an attorney-adviser to the agency head to later serve as an ALJ in the same case in which the adviser materially participated in a greenlighting decision. *Grolier*, 615 F.2d at 1220. The APA probably does not allow agency heads to be advised ex parte by adversarial staff members when the heads are considering the final adjudicatory decision. *See* Asimow, *When the Curtain Falls*, *supra* note 150, at 766.

greenlighting function. Agency-head review of charging decisions serves as an accountability mechanism that promotes public administration values and helps to correct principal–agent misalignments. Nevertheless, Part II acknowledged concerns about greenlighting because of possible confirmation bias and efficiency issues. This Part discusses accountability mechanisms that might be employed in connection with the greenlighting process and that might alleviate these concerns. There are, of course, structural changes that would address these concerns, such as eliminating combined-function agencies, but such options are beyond the scope of this Article.[197]

A. Mechanisms that Allow Targets' Input into Charging Decisions

As discussed in Part I, the SEC, FTC, FERC, and NLRB employ pre-charging notice-and-comment procedures.[198] These formalized procedures invite targets to submit memoranda designed to dissuade the staff from charging them and supplement the informal interchange between the target's attorneys and agency enforcement staff that routinely occurs during the investigation process. In general, target lawyers value these pre-charging procedures as opportunities to dissuade the staff from seeking a Commission greenlight, to improve their position in settlement negotiations, and to influence the agency heads not to greenlight the complaint.

In particular, the SEC's Wells notice, and informal notice-white paper procedures are well established.[199] SEC commissioners told me they and their advisory staff take Wells responses or white papers seriously.[200] These submissions sometimes persuade the SEC heads that issuance of a complaint is contrary to their policy priorities, that the case is weak, or that the complaint should be narrowed. Defense lawyers appreciate the Wells and white paper process and often use it to extract more information from the staff than might otherwise be disclosed and to improve their prospects for settlement.[201] My interviewees expressed unanimous support for the Wells or white paper procedures.[202]

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197. *See infra* Part IV.I. (discussing possible structural changes to agency adjudication process).

198. *See supra* Parts I.A, B, D, E. Similarly, the Consumer Product Safety Commission staff issues a "Notice and Opportunity to Respond and Advise" (NORA) to targets before recommending that a violation be charged. *Lifecycle of an Enforcement Action*, CONSUMER FIN. PROT. BD., https://www.consumerfinance.gov/enforcement/life-cycle-of-enforcement-action/ (last visited May 9, 2023).

199. *See supra* Part I.A.A.

200. SEC 1, 5.

201. SEC 5.

202. SEC 1–8.

FERC provides two distinct opportunities for the target to influence the charging decision.[203] The target can respond both to the staff's "preliminary findings memorandum" and to its Rule 1b.19 memorandum. Both agency heads and private lawyers favor the pre-charging notice-and-comment procedures, however, several believe that the Rule 1b.19 procedure is redundant since it duplicates the preliminary findings memorandum and response.[204]

The regional offices of the NLRB that investigate ULP charges offer targets the ability to file a position paper in response to the charge. Targets also have the opportunity to meet with regional staff and, in cases where there is an appeal against the charge or refusal to charge, with regional directors and the General Counsel if the latter agrees to the meeting.[205]

The FCC does not provide a formalized notice-and-comment system prior to issuance of an NAL. The target can file a detailed response after the staff issues the NAL. The response is intended primarily for the benefit of the commissioners who will be called on to greenlight the complaint and, later, will adjudicate it.[206]

In my opinion, the notice-and-comment procedure employed by the SEC, FTC, FERC, and NLRB during the pre-charging phase of enforcement is useful and should be considered best practice. The formalized ability to comment contributes to a sense by private parties that they are being treated fairly and helps them decide whether to settle. The process facilitates reasoned decisionmaking by the enforcement staff and helps the agency heads produce an informed greenlighting decision. It furthers what Michaels called administrative separation of powers.[207] I would not, however, recommend agencies provide two separate opportunities of this kind, as occurs at FERC. A double notice-and-comment procedure seems redundant and increases costs for both targets and agencies without corresponding benefit.

B. Ability of Target to Communicate with Individual Agency Members

Several agencies permit targets to communicate with the agency heads prior to their greenlighting decision. After the FTC staff recommends issuance of a complaint, the target is entitled to meet separately with each of the five commissioners to attempt to dissuade them from greenlighting the

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203 *See supra* Section I.A.D.

204. FERC 2, 4, 5, 6. One interviewee thought the procedure was useful because of the long delays that occur in FERC enforcement; by the time the Rule 1b.19 memo issues, the composition of the agency heads has often changed, and private lawyers have an opportunity to influence the new commissioners. FERC 3.

205. These procedures are described in Part I.E.

206. These procedures are described in Part I.C.

207. *See* Michaels, *supra* note 126, at 229.

complaint. Commission staff are usually present at these meetings. Because no complaint has been issued, the APA's ban on outsider ex parte communications to agency decisionmakers is not applicable.[208] A similar practice of meetings between targets and commissioners exists at the FCC but is employed less often than at the FTC.[209]

Several FTC interviewees support the FTC's ex parte meeting procedure.[210] Former FTC commissioners found these meetings enlightening, since they are otherwise exposed mostly to the staff's arguments before greenlighting the complaint.[211] The meetings tend to offset criticisms that the commissioners are out of touch and removed from practicalities.[212] Some private lawyers, including former FTC staff, think the meetings can be a useful vehicle to persuade a commissioner that the case is weaker than the staff says it is.[213] At times, the commissioners can broker settlements. Other private lawyers refer to the FTC meetings as "last rites" and think they are a costly waste of time.[214] My interviewees were also skeptical about the value of meetings between targets and FCC commissioners, which they regarded as useless.[215]

Staff members and former heads at other agencies were unenthusiastic about the FTC's and FCC's one-on-one practice.[216] I agree with their criticisms. These meetings seem wasteful of the precious time of both the agency heads and staff members.[217] The process is costly for clients who must pay their lawyers to engage in numerous separate meetings, even though it is unlikely the meetings will have much practical impact. The meetings can worsen confirmation bias because the heads learn still more about the case at the pre-complaint stage, including material that might never become part of the record.[218]

FERC permits targets to submit written, but not oral, communications to the agency heads during the investigation process. This approach, a holdover from prior practice existing before the FERC acquired civil penalty authority, is less time-consuming and costly than the ex parte in-person meetings conducted by the FTC and FCC. Some FERC practitioners send

208. Administrative Procedure Act, 5 U.S.C. § 557(d)(1)(E).

209. FCC 4.

210. FTC 1–5.

211. FTC 5.

212. FTC 5.

213. FTC 1, 3, 5.

214. FTC 2.

215. FCC 2, 4.

216. SEC 1–8; FERC 5–6.

217. FCC 4 thought each meeting took about an hour.

218. FTC 2; *see* Elman, *supra* note 33, at 788–89 (confirming that there is no public record for the basis of the Commission's decision, leaving much of the reasoning secret).

letters to the commissioners frequently; others never do. Whether such communications are useful to targets or to FERC is debatable. Some interviewees thought the letters might prompt the recipients to communicate with the staff to better understand the issues.[219] Others thought the practice was counter-productive because such communications might prejudice the staff against a target that attempted to go over their heads.[220]

C. Separation of Functions During Investigation

William Scherman and his co-authors proposed changes to FERC's ex parte communication and separation of functions rules.[221] Under the existing FERC rules, as in most agencies, ex parte communications to decisionmakers or their advisers either by outsiders or by adversarial staff members, such as prosecutors and investigators, are prohibited after FERC makes a charging decision by issuing an OSC. However, such communications can and do occur before the agency decides to charge.[222]

Under Scherman's proposal, these prohibitions would apply at an earlier stage of the proceeding, perhaps when the Rule 1b.19 notice issues (meaning staff has decided to recommend charging the target). His article expressed concern about the fairness of allowing the staff unfettered access to the Commission during the investigatory and greenlighting phases of the case while the ability of targets to communicate with agency heads is limited to written submissions.[223] Under Scherman's proposal, meetings between the staff and agency heads concerning greenlighting would be on the record rather than ex parte and the target could participate in such meetings. In a subsequent article, members of the FERC staff and outside lawyers strongly criticized Scherman's proposal.[224]

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219. FERC 3–4.

220. FERC 5.

221. Scherman, *supra* note 76, at 114–15.

222. 18 C.F.R. §§ 2201, 2202 (2023). See *supra* text accompanying note 193 for a discussion of separation of functions. The APA rule prohibiting ex parte communications by outsiders to agency adjudicators goes into effect when the proceeding is noticed for hearing, but it can come into force earlier if the agency so designates. Administrative Procedure Act, 5 U.S.C. § 557(d)(1)(E). The separation of functions rule prohibits adversaries from participating or advising in any ALJ decision or agency review, but staff adversaries can communicate with agency heads off the record in connection with the greenlighting decision. *Id.* § 554(d); *see also supra* Part III.B.

223. *See supra* Part IV.B. (discussing how FERC permits targets to communicate with the agency heads in writing before they have greenlighted the case).

224. *See* Murphy et al., *supra* note 61, at 299–302; Mullins & McEachran, *supra* note 61, at 285–86.

Most interviewees opposed Scherman's proposal, whether at FERC or at other agencies. The interviewees believe the staff needs to conduct a candid and robust discussion with agency members about whether to greenlight a case. If the target's representatives were present or if the discussion was on the record, staff could not level with the agency heads about the weaknesses in the case, the political or policy issues it creates, or the terms on which it might be settled.[225] The need for candid discussion about charging is the reason for the Sunshine Act exemption of meetings devoted to initiation of litigation.[226]

D. Delegation to Enforcement Staff in Routine Cases

The *1941 Report of the Attorney General's Committee on Administrative Procedure* (the Report) expressed concern with the problem of confirmation bias resulting from greenlighting.[227] To alleviate the problem, the Report suggested that agencies delegate to staff the decision to issue a complaint in cases that raise only applications of well-established legal principles.[228] Such cases might present difficulties of proof but would otherwise be routine. Delegation of the charging decision in routine cases would not inhibit the agency's use of adjudication for policymaking. However, in cases raising important policy issues or those that involve extension of existing precedents or new departures, the agency heads should be responsible for making the charging decision.[229]

Such delegations are in effect at several agencies. The FCC staff has power to charge civil penalties below a certain amount ($100,000 for common carriers, $25,000 for others), so that the commissioners need not consider the majority of penalty cases.[230] At FERC, penalties arising from reliability violations that are assessed by an industry self-regulatory process can be processed without agency-head involvement.[231] In the NLRB, over 90% of complaints processed by regional offices involve routine, well-settled applications of law, and are filed without any involvement of the General Counsel or the General Counsel's staff, even though, in theory, the General

225. SEC 1–7; FERC 1, 3, 5–6; FTC 1–3.

226. *See* 5 U.S.C. § 552b(c)(10).

227. OFF. OF ATT'Y GEN., DOJ, FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 55–57 (1941).

228. *Id.* at 56.

229. *See* Auerbach, *supra* note 33, at 418–24. This was the practice in the NLRB before the 1947 legislation stripping agency heads of power over the charging process. Board members spent one morning per week considering questions relating to issuance of complaints in non-routine cases. Seymour Scher, *The Politics of Agency Organization*, 15 W. POL. Q. 328, 331 (1962).

230. ENFORCEMENT OVERVIEW, *supra* note 44, at 19.

231. FERC 6.

Counsel is responsible for all NLRB prosecution decisions.[232]

Delegation to staff of complaint issuance in routine cases is a good idea, especially in agencies with substantial enforcement caseloads. Delegation would reduce the number of cases in which confirmation bias is a concern because the agency heads would never see them before the final adjudicatory stage. Delegation should also be efficiency-enhancing by reducing the amount of time the heads need to spend on enforcement decisions. Thus, agency heads could adopt procedural rules setting forth classes of cases the staff could initiate on its own. Of course, such rules are possible only if allowed by statute because some statutes require agency-head approval of every complaint.[233]

Nevertheless, most of the interviewees opposed delegation to the staff of complaint issuance. They thought it would be difficult to identify precisely which cases are routine or unimportant.[234] At FERC, relatively few enforcement cases are litigated rather than settled; the remaining cases tend to involve policy questions.[235] Even if the case turns on evidentiary issues rather than disputed legal questions, these evidentiary issues may be controversial and of fundamental importance, especially in competition and securities cases. Even routine cases involve the expenditure of resources and can create precedents that may have important effects on the regulated industry. Former commission members think that complaints in routine cases should be approved by politically responsible agency heads in light of the importance of the cases to the particular parties[236] and the sentinel effect.[237] Private lawyers want the commission-level bite at the apple, even if the case seems routine.

E. Disqualification of Agency Heads Who Participated in Charging Decisions

Agency members who voted to greenlight a case could be disqualified from voting on the final adjudicatory decision. Andrew Vollmer, who was a former SEC staff member, has strongly advocated this proposal.[238]

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232. NLRB 3.

233. This appears to be the case with the FTC. *See supra* Part I.B. The SEC has power to delegate any function to the staff, but a single commissioner can bring any delegated matter to the Commission for review. 15 U.S.C. § 78d-1(a), (b). One former SEC staff member thought a delegation system could work but suggested that the staff should obtain approval from a duty commissioner in routine cases rather than from the full Commission. SEC 5.

234. SEC 1–4, 6, 8.

235. FERC 5.

236. SEC 3; FTC 4.

237. SEC 4. *See supra* text accompanying note 140 (discussing the sentinel effect).

238. *See* Vollmer, *supra* note 145. Vollmer also argued that due process is violated when a member votes on a case in which the member greenlighted prosecution. *See supra* Part III.A.

One practical problem with Vollmer's proposal is that such disqualifications might render the agency unable to muster a quorum to vote on the final decision, causing the decision in the case to be suspended indefinitely. This would not frequently occur, given the rapid turnover of agency heads, but it would occasionally happen, especially during presidential transitions when the confirmation process causes substantial delays in filling vacancies. Virtually everyone I interviewed opposed this proposal, including many who now serve in the defense bar.[239]

More fundamentally, Vollmer's proposal would force agency heads (at least those who have not decided to leave the agency in the near future) to make a difficult choice. Should they disqualify themselves from greenlighting a case to preserve the ability to vote on the final decision, or should they retain the greenlighting function and give up their vote on the final adjudicatory decision? Some former agency heads who answered this question said they would opt-out of the charging decision because of the importance of being able to make policy through the adjudicatory decision.[240] Others said they would opt-out of the final decision because the charging decisions are so important and so much more numerous than cases that survive all the way to the end of the adjudicatory process.[241]

As argued above, participation of agency heads in the charging decision is valuable as a check on prosecutors and as an element of policymaking. It would be unfortunate if commissioners opted out of that function. And it would be equally unfortunate if some were disqualified from participating in the final decision process. That process involves collegial effort and compromise of diverse policy perspectives and often entails establishing agency policy for the future.[242] In my view, these structural concerns are more important than preventing confirmation bias.

F. Removal of Agency Heads from Greenlighting: The NLRB Model

Since passage of the Taft-Hartley Act in 1947, NLRB members lack the power to make charging decisions in ULP cases.[243] Instead, the General Counsel makes the charging decisions and is politically accountable for them. Much has been written about the NLRB's separation of prosecutorial and adjudicatory functions.[244] Several articles have recommended that other

239. SEC 1–2, 6–7; FERC 5–6; FTC 1–5; FCC 2.

240. SEC 1.

241. FTC 3; SEC 6.

242. SEC 6; FTC 4–5.

243. *See supra* Part I.E.

244. *See generally* Jonathan D. Rosenblum, *A New Look at the General Counsel's Unreviewable*

combined-function enforcement agencies follow the NLRB model.[245]

Although NLRB members play no prosecutorial role in most ULP cases, the separation of prosecution and adjudication is incomplete. The members decide whether to approve the General Counsel's recommendation that the Board seek a temporary injunction in ULP cases (so-called "10(j) cases").[246] Thus, under the NLRB model, the agency heads greenlight the particularly sensitive temporary injunction cases but not the more routine and far more numerous ULP complaints in which no injunction is sought.

NLRB regional offices file between 800 and 1,200 ULP complaints each year.[247] This heavy caseload would make it practically impossible for the NLRB agency heads to be meaningfully involved in charging decisions.[248] The agency heads see between ten and one hundred 10(j) cases each year, which is a more manageable task.[249] Limiting the Board's greenlighting function to 10(j) cases makes sense because 10(j) cases are more significant than routine ULP cases.[250] The Board seeks an injunction when the conduct being enjoined may inflict serious injury that could not be remedied by a later adjudicatory decision.[251] For example, the Board might seek a temporary injunction against employer violations that interrupt a union-organizing campaign.[252] An injunction is appropriate in such cases because, otherwise, the adjudicatory decision would occur long after the momentum behind the organizing campaign dissipated.[253]

Confirmation bias remains a potential issue in 10(j) cases because Board

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Discretion Not to Issue a Complaint Under the NLRA, 86 YALE L.J. 1349 (1977); Scher, *supra* note 229, at 328–34 (discussing 1947 politics of Taft-Hartley Act adoption).

245. *See* Calvani, *supra* note 33, at 206–07; Verkuil, *supra* note 124, at 267; *ALJ Task Force*, *supra* note 145, at 1737.

246. NLRB 2–3. These approvals are usually secured through notational voting, not at an in-person meeting. *See supra* text accompanying notes 92–94.

247. 2021 NLRB ANNUAL REPORT, *supra* note 98, at 17; 2016 NLRB ANNUAL REPORT, *supra* note 99, at 13.

248. Prior to the Taft-Hartley Act, the Board reviewed regional director decisions to charge or not charge only in cases involving important or unique legal issues. Scher, *supra* note 229, at 331.

249. *See 10 Year Record of 10(j) Activity*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/injunction-litigation/10-year-record (last visited May 9, 2023).

250. *See* Robert Iafolla, *Labor Board Goes to Federal Court: 10(j) Injunctions, Explained*, BLOOMBERG L. (Nov. 29, 2022, 5:15 AM), https://news.bloomberglaw.com/daily-labor-report/labor-board-goes-to-federal-court-10j-injunctions-explained.

251. 2021 NLRB ANNUAL REPORT, *supra* note 98, at 26.

252. *See* Iafolla, *supra* note 250.

253. NLRB 3; *see* Iafolla, *supra* note 250.

members exercise both prosecution and adjudicatory functions in those cases.[254] My interview subjects doubted that the problem was serious because the General Counsel's written request for Board approval of the injunction accepts the credibility of the complainant and does not include much of the factual and evidentiary material that the prosecutors have assembled.[255] When a 10(j) case comes to the Board after an ALJ decision, the record looks completely different than it did at the complaint stage because it contains the respondent's evidence and the ALJ's credibility determinations.[256]

The separation of prosecution and adjudication at the NLRB in ULP cases can create principal-–agent problems when the views of the General Counsel and the Board members misalign. These principal-–agent problems arise most frequently when presidential administrations change and the 3–2 political balance on the board switches, while the General Counsel holds over.[257] The General Counsel may refuse to issue complaints in cases that the heads would have prosecuted.[258] Alternatively, the General Counsel may issue complaints that the heads would not have authorized.[259] Since most cases settle (at least 90%), the Board never has an opportunity to pass on the policy issues raised in settled cases.[260]

One example of this sort of conflict arises out of the General Counsel's valuable advice-giving function. If the General Counsel disagrees with Board-made law and hopes to change it, the General Counsel can advise charging parties to file particular types of charges and regional offices to issue complaints in those cases. Of course, the Board makes the final call and can reject the General Counsel's initiative. Charging parties may participate in ALJ hearings and can introduce witnesses and arguments supporting their view, perhaps disagreeing with the General Counsel's approach. On the other hand, the Board will be unable to change existing law if the General Counsel disagrees and declines to charge cases raising the issue.[261]

Another area in which the General Counsel and the agency heads might

254. NLRB 2–3.

255. NLRB 2–3.

256. NLRB 2–3.

257. NLRB 1–3.

258. *See* Ellement, *supra* note 123, at 492–93 (citing the refusal by the General Counsel to enforce union shop provisions in the 1950s when the Board members could only resort to public criticism of the General Counsel's decision not to charge these cases).

259. *See id.* at 491 (describing a set of cases in which the General Counsel in the 1950s believed that ULPs should be prosecuted even if they have only minor effect on interstate commerce, while the Board members disagreed).

260. *See Facilitate Settlements*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/what-we-do/facilitate-settlements (last visited May 9, 2023).

261. NLRB 3.

come into conflict arises in judicial enforcement. Unlike other independent agencies, the Board's attorneys handle litigation for the Board through the Court of Appeals.[262] Conflict might arise when the general counsel is called on to enforce a Board decision in court with which the General Counsel disagrees (as could occur after a change in presidential administration, where the General Counsel is a holdover).[263] Such problems have occurred in the past but not in recent years.[264]

An additional problem with the independent General Counsel is that it creates a duplicate power center within the agency. The General Counsel is a de facto agency head whose practical power may well exceed those of the five NLRB members. Particularly during periods of budget stringency and uncertainty—as have occurred in recent years—the Board and the General Counsel have disagreed about management and budgetary issues, such as how to both make the necessary budget cuts and allocate limited resources.[265] A recent example of General Counsel-Board conflict resulted from differences of opinion about replacement of the Board's outmoded IT system. In addition, the General Counsel makes staff hiring decisions (except for the Board members' personal staffs). General Counsel hiring decisions have given rise to conflict with Board members.[266]

In my interviews, I found little enthusiasm for the NLRB model in other federal combined-function agencies. Most interviewees favored having the agency heads make charging decisions, both in the interest of constraining prosecutors and articulating policy.[267] They were concerned by the problem of the general counsel being out of sync with the agency heads and the creation of a competing power center.[268] They feared that an independent general counsel might increase partisanship.[269] A minority of interviewees were open to the idea.[270]

G. Enforcement Guidelines

One way to reduce administrative prosecutorial discretion is by adopting

262. Ellement, *supra* note 123, at 494.

263. *Id.* at 494–96.

264. *Id.* at 493–96; NLRB 3.

265. Ellement, *supra* note 123, at 491–92.

266. *See id.* at 492–93; NLRB 1, 3.

267. FTC 1–3, 5; SEC 2, 5–8. SEC 1 was open to the idea, but only if agency heads could remove the General Counsel without cause.

268. SEC 5–6.

269. SEC 2, 5.

270. SEC 3.

guidance documents that establish enforcement priorities and criteria.[271] As conditions in the regulated industry change, or as new agency heads with different priorities are appointed, the guidelines can and should be updated.[272] Such guidelines provide readily available guidance for both staff and agency heads and help to assure more consistent charging decisions. A concern with making such guidelines publicly available, as they must be under FOIA,[273] is that they can undermine deterrence by informing the regulated industry of what cases are unlikely to be prosecuted.

Nevertheless, federal agencies have found it feasible to establish prosecution guidelines that at least suggest the factors that prosecutors and investigators should consider. The FCC adopted guidelines for upward and downward adjustment of forfeiture penalties.[274] The NLRB Division of Advice furnishes detailed guidance to regional offices about enforcement criteria and policies in ULP cases.[275] In addition, the general counsel adopted detailed case-handling instructions (publicly available) to regional offices about every aspect of processing ULP, representation, and compliance proceedings.[276] A useful FERC guideline lists the factors that staff should consider in deciding whether to open an investigation.[277]

H. Peer Review of Prosecution Decisions

Another approach to limiting and checking administrative prosecutorial discretion is to institute a system of peer review of charging decisions. Peer review is common in post-bureaucratic public administration, such as the

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271. Magill, *supra* note 112, at 866–67, 901; Barkow, *Overseeing Agency Enforcement*, *supra* note 5, at 1154–59; Sohoni, *supra* note 9, at 82; Vorenberg, *supra* note 5, at 1562–65; Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971). Agencies are not required to provide pre-adoption notice-and-comment with respect to general statements of policy, of which enforcement guidelines would be a paradigmatic example. Administrative Procedure Act, 5 U.S.C. § 553(b)(A). Guidelines should be flexible and leave room for discretion at both staff and agency-head levels to avoid being treated as legislative rules that can only be adopted or revised with prior notice-and-comment.

272. *See* Texas v. United States, 14 F.4th 332, 337–40 (5th Cir. 2021). This decision overturned a district court decision that had enjoined immigration enforcement guidelines adopted on the first day of the Biden Administration. The court construed several federal statutes to allow the agency to exercise enforcement discretion and issue enforcement guidelines.

273. 5 U.S.C. § 552(a)(1)(D).

274. ENFORCEMENT MANUAL, *supra* note 15, at 17–19.

275. Ellement, *supra* note 123, at 489.

276. *Id.* at 489–90; NLRB 3.

277. FERC POLICY STATEMENT, *supra* note 60, at 9.

"mortality-morbidity" reviews of adverse events that occur in hospitals.[278] The idea is that a team of staff prosecutors and investigators would conduct a periodic review of a sample of prior decisions by the staff to charge or not to charge. The objective of such peer review is to enhance the learning of staff decisionmakers about the prosecutorial decisionmaking process and to achieve more consistency for future decisions. The team would ascertain whether prior charging decisions led to successful and cost-effective outcomes and whether these decisions complied with the agency's prosecutorial guidelines and procedural requirements.

I. Structural Solutions to the Confirmation Bias Problem

There are a number of possible structural changes to the organization of combined-function agencies that would remove the possibility of confirmation bias. Except for considering the NLRB model that stripped agency heads of greenlighting power,[279] I have not explored these options. The other options are beyond the scope of this Article and most of them do not seem politically feasible.[280]

For example, Congress might require all enforcement adjudication be situated in federal court rather than being conducted through internal agency adjudication,[281] or that a target would have the right to remove an administrative enforcement case to federal court (as occurs in the case of FERC),[282] or that the agency must bring a de novo federal court action to collect a civil penalty (as in the case of the FCC).[283]

Another set of options, often referred to as external separation of functions, calls for creation of an adjudicatory tribunal, which is common in other former British colonies, either for specific agencies (as in Canada) or

278. *See supra* text accompanying note 120.

279. *See supra* Part IV.F.

280. Similarly, this Article does not consider proposals for enhanced Executive Branch oversight of enforcement decisions (like the Office of Management and Budget's control over rulemaking) or increased congressional supervision of the enforcement function.

281. *See* Mullins & McEachran, *supra* note 61. There are numerous examples of enforcement agencies that lack adjudicatory power, such as the Equal Employment Opportunity Commission in cases of non-governmental employment discrimination or the Wage and Hour Division of the Department of Labor. The Fifth Circuit recently decided that the SEC could not constitutionally conduct in-house civil penalty adjudication and must bring such cases in federal court. *See supra* text accompanying note 12 (discussing *Jarkesy v. SEC*).

282. *See supra* Part I.D.

283. *See supra* Part I.C.

for all enforcement agencies (as in Australia and the United Kingdom).[284] Under the tribunal model, an enforcement agency engages in rulemaking, investigation, and prosecution, but a separate agency makes the resulting adjudicatory decision. The United States employs tribunals in worker safety, mining safety, and federal taxation cases. Many states situate adjudication in separate tribunals in their unemployment compensation and workers' compensation systems.[285]

Still another approach is delegation of the internal appeal function to an appellate review board, such as the Environmental Appeals Board,[286] or to a judicial officer, which occurs in the Department of Agriculture.[287] The delegation could cover certain classes of cases that are likely to present only factual issues, or it could cover all enforcement cases. The agency heads might retain discretionary review power over decisions of the intermediate review board or judicial officer in cases presenting important policy issues.[288] Delegations of final decisional authority are quite common in the administrative state,[289] and might be attractive for agencies with substantial caseloads or serious backlogs at the agency-head level. Delegation of the power to make the final adjudicatory decision would promote efficient use of the limited time of the agency heads and reduce delays in making final decisions. Such delegation would also limit the number of cases subject to potential confirmation bias.

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284. *See* Michael Asimow, *Five Models of Administrative Adjudication*, 63 AM. J. COMPAR. L. 3 (2015); Michael Asimow & Jeffrey Lubbers, *The Merits of "Merits" Review: A Comparative Look at the Australian Administrative Appeals Tribunal*, 28 WINDSOR Y.B. ACCESS TO JUST. 261, 262–63 (2010).

285. *See* Gifford, *supra* note 113; Verkuil, *supra* note 124, at 268–69; Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1254–64 (1974).

286. *See* ASIMOW, OUTSIDE THE APA, *supra* note 4, at 146–48.

287. *See Office of the Judicial Officer (OJO)*, U.S. DEP'T OF AGRIC., https://www.dm.usda.gov/ojo/ (last visited May 9, 2023).

288. *See* Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 61–72 (2023) (arguing that the normative case for agency-head review is limited); CHRISTOPHER J. WALKER & MATTHEW LEE WIENER, ADMIN. CONF. U.S., AGENCY APPELLATE SYSTEMS (2020); ACUS Recommendation 68-6, Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency, 38 Fed. Reg. 19,783 (July 23, 1973); ACUS Recommendation 83-3, Agency Structures for Review of Decisions of Presiding Officers under the Administrative Procedure Act, 48 Fed. Reg. 57,461 (Dec. 30, 1983).

289. *See* Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251 (1996); Ronald A. Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 B.U. L. REV. 1, 12–13 (1986); Verkuil, *supra* note 124, at 268–69.

CONCLUSION

Combined-function enforcement agencies should engage in greenlighting if their caseload permits them to do so. Greenlighting means that the agency head, including all the heads of a multiple-member agency, is responsible for approval of charging decisions made by the staff. The greenlighting process assures that the choice of enforcement targets aligns with the priorities of the agency head and is a wise allocation of scarce enforcement resources. Greenlighting is a powerful accountability mechanism to control the exercise of prosecutorial discretion—a problem that pervades the world of criminal and administrative prosecution.

Agencies engaged in greenlighting should require the staff to engage in a structured written notice-and-comment process, whereby targets can attempt to persuade the staff not to charge them. In addition, when the staff seeks agency-member approval of a charging decision, it should generate a detailed memorandum. This document should set forth the facts uncovered by the investigation and applicable legal analysis to assist the members in the greenlighting process.

Because greenlighting may present problems of confirmation bias and inefficiency, agencies should consider whether their enforcement docket includes classes of cases that are sufficiently routine that the charging decision can be delegated to the staff or that the final adjudicatory decision could be delegated to a judicial officer or a review board. Agencies should also consider adopting guidelines that set forth priorities for exercising its prosecutorial discretion and instituting a peer-review process at the staff level. With these refinements, combined-function agencies should continue to employ the greenlighting process when it is practicable to do so.