Ex Parte Contacts in Informal Rulemaking

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Note

Ex Parte Contacts in Informal Rulemaking

I. INTRODUCTION

The agency comes to its decision with built-in biases and a knowledge of facts outside the record, which give the parties the uncomfortable feeling that the decision may have been prejudged. Moreover, it is often felt that the ultimate decision is not based either on the evidence put in record or even on the reasons given in the agency’s opinion. An impression of futility surrounds adjudication, as if the parties were going through an empty ritual which has no appreciable impact on the outcome. This does not imply bad faith or corruption; it simply means that a decision may ultimately be made on political or policy grounds that are unstated.¹

These words, written over a decade ago, summarize a major challenge facing reform-minded individuals in the field of administrative law: guaranteeing a certain degree of fairness and impartiality in adjudicatory proceedings of the federal agencies. In such formal proceedings, the thought that an administrative decision may be made on any basis other than the relative merits as exhibited in the record seems repugnant to the most basic principles of our judicial system. This is particularly true of ex parte communications with members of the agencies.²

It has even been suggested that “[i]t would be hard to find anyone prepared to defend ex parte communications in ‘on-the-record’ [formal] proceedings. It would be rather like finding an advocate for sin.”³ However, ex parte communications in informal rulemaking proceedings under section 553 of the Adminis-

². In one of the leading articles on the subject of ex parte communications, Professor Peck states that “[t]he dedication of American society to an ideal of government under the law and its abhorrence of personalized regulation have been manifested in the concern shown for establishing proper regulation of ex parte communications with the personnel of administrative agencies.” Peck, Regulation and Control of Ex Parte Communications With Administrative Agencies, 76 Harv. L. Rev. 233 (1962).
trutive Procedure Act (APA) have traditionally brought fewer objections, save for those instances in which there were "competing private claims to a valuable privilege." In fact, Professor Davis offers the following endorsement of open communication in informal rulemaking:

"the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure or practice requirements of an agency...") Id. § 551(4). Informal rulemaking procedures are set out in Section 4 of the APA, which provides in part:

(b) General notice of a proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. . . .

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.


This sort of decision-making is often referred to as "notice and comment rulemaking" because of the opportunity for interested persons to express their views on the proposed rule after notice of it has been published. And because the agency must respond with a "concise general statement of basis and purpose," id. § 553(c), in the final rules, it has been said that "[s]ection 553 contemplates that rules will be made through a genuine dialogue between agency experts and concerned members of the public." Wright, The Courts And The Rulemaking Process: The Limits of Judicial Review, 59 CORNELL L. REV. 375, 381 (1974).

There is also a type of rulemaking called "formal rulemaking." 5 U.S.C. § 553(c) (1976) states that "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 [concerning procedures for hearings] of this title apply instead of this subsection."

5. Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959), cert. denied, 376 U.S. 915 (1964). In the initial stage of Sangamon, petitioners unsuccessfully challenged an FCC rulemaking decision to shift the location of a VHF station, transfer two UHF stations, and assign locations for two additional UHF stations. 255 F.2d 191 (D.C. Cir. 1958). The United States Supreme Court, granted certiorari, but vacated and remanded for consideration of evidence of ex parte communications with Commission members, a matter introduced in the government's brief. 358 U.S. 49 (1958). Evidence in that proceeding revealed that after the request for comments and replies had been filed, in accordance with the rules of the Commission, one of the parties to the decision made several representations to the members through letters, luncheons, and personal visits to their offices. The court concluded that since the private approaches were contrary to basic fairness in the rulemaking proceeding, the proceeding
The procedure of administrative rule-making is in my opinion one of the greatest inventions of modern government. It can be, when the agency so desires, a virtual duplicate of legislative committee procedure. More often it is quicker and less expensive. The usual procedure is that prescribed by the Administrative Procedure Act, the central feature of which is publishing proposed rules and inviting interested parties to make written comments. Anyone and everyone is allowed to express himself and to call attention to the impact of various possible policies on his business, activity, or interest. The agency's staff sifts and summarizes the presentations and prepares its own studies. The procedure is both fair and efficient. Much experience proves that it usually works beautifully.

An administrator who is formulating a set of rules is free to consult informally anyone in a position to help, such as the business executive, the trade association representative, the labor leader. An administrator who determines policy in an adjudication is usually inhibited from going outside the record for informal consultation with people who have interests that may be affected. In policy-making through adjudication, either the quest for understanding is likely to be impaired or the tribunal's judicial image is likely to be damaged.\(^6\)

This enthusiasm for open communication in section 553 proceedings has not been universally shared. This note deals with one federal court of appeals' attempt to regulate ex parte communications in informal rulemaking by prescribing procedural safeguards that go beyond the provisions of the APA. For despite the increasing reliance on informal rulemaking in federal agencies,\(^7\) procedural restrictions requiring the development of an agency record in such proceedings\(^8\) and prohibitions of communications not intended for inclusion in that record\(^9\) have been rather limited. Because rulemaking is so broad in scope, ranging from decisions that are general and affect large numbers of persons to those that are more particular,\(^10\) the formulation of concise guidelines for limiting ex parte communications is an especially sensitive, if not impossible, had to be reopened. 269 F.2d 221 (D.C. Cir. 1959). The court was urged to hold that the ex parte contacts did not vitiate the proceeding because it involved informal rulemaking, and not adjudication. The court declined to follow the suggestion, however, because the proceeding "involved not only allocation of TV channels among communities but also a resolution of private claims to a valuable privilege, and... basic fairness requires such a proceeding to be carried on in the open." Id. at 224. Thus, restrictions on ex parte contacts in informal rulemaking proceedings in the past have been applied only where the proceeding takes on the attributes of an adjudication.

7. See Pedersen, Formal Records and Informal Rulemaking, 85 YALE L. J. 38, 38-43 (1975); Wright, supra note 4, at 375-78.
8. Pedersen, supra note 7, at 51.
9. Most agencies do not have restrictions on ex parte communications in informal rulemaking. See note 45 and accompanying text infra.
task. Recently, the Court of Appeals for the District of Columbia demonstrated the great difficulty in attempting to delineate the circumstances under which prohibitions of ex parte contacts should apply in informal rulemaking. Two cases dealing with ex parte communications in section 553 proceedings came before the court in 1977, producing vastly divergent views on the issue. This note will discuss the impact of these decisions and evaluate the position taken in each one.

In Home Box Office, Inc. v. FCC fifteen cases were consolidated to challenge four of the FCC’s orders regulating and limiting the programming of “cablecasting” interests and “subscription broadcast television stations.” The court upheld the orders of the Commission which related to subscription broadcast television, and vacated all the other orders as “arbitrary, capricious, and unauthorized by law.” The subject of ex parte contacts was brought before the court when it received a brief amicus curiae from Mr. Henry Geller, who alleged that there had been numerous ex parte contacts with FCC members after the rulemaking record should have been closed. Geller claimed that the communications were in violation of the doctrine set forth in Sangamon Valley Television Corp. v. United States, and requested the court to “set aside the orders under...

11. The problem has been summarized extremely well: "No one will quarrel with the position that improper ex parte communications should be prohibited. But no one will contend that all ex parte communications are improper. So the real question is 'what constitutes an improper ex parte communication?' In other words—where to draw the line?” Stone, Ex Parte Communications: The Harris Bill, the CAB, and the Dilemma of Where to Draw The Line, 13 AD. L. REV. 141 (1960).


13. 567 F.2d 9 (D.C. Cir.), cert. denied, 98 S. Ct. 111, rehearing denied, 98 S. Ct. 621 (1977). The opinion was “issued as a per curiam, not because it has received less than full consideration by the court, but because the complexity of the issues raised on appeal made it useful to share the effort required to draft this opinion among the members of the panel.” 567 F.2d at 17 n.1.

14. According to D. LeDuc, CABLE TELEVISION AND THE FCC: A CRISIS IN MEDIA CONTROL 233 (1973), cablecasting is a “[t]erm often used synonymously for any nonbroadcast signals carried by a cable system, but more accurately employed to describe only that programming produced and distributed by the cable operator on the channel authorized for such service.”

15. “Subscription broadcast television stations are those with the technical capability to broadcast programs ‘intended to be received in intelligible form by members of the public only for a fee or charge, 47 C.F.R. § 73.641 (b) (1975).” Home Box Office, Inc. v. FCC, 567 F.2d 9, 17 n.3 (D.C. Cir.), cert. denied 98 S. Ct. 111, rehearing denied, 98 S. Ct. 621 (1977).

16. Id. at 18.

17. 269 F.2d 221 (D.C. Cir. 1959). See note 5 supra.
EX PARTE CONTACTS

review here because of procedural infirmity in their promulgation."¹⁸ The court decided not to vacate the rules.¹⁹ Instead, they were left in effect while the record was remanded to the FCC and a specially-appointed hearing examiner to determine whether the ex parte communications had had any effect on their promulgation. If any improper influence is found upon remand, the entire proceeding must be reopened.²⁰

To guide the agencies in the informal rulemaking process, a new theory was developed in Home Box Office for the limitation of ex parte contacts. The court attempted to balance the necessity of preserving administrative freedom in informal rulemaking against the rights of the parties to fairness and due process, and the ability of the courts to review such agency decisions.²¹ The restriction that was decided on by the court forbids ex parte contacts from interested parties or their representatives after the notice for the rulemaking has been issued. Any such communications prior to that time are to be included if they affect the agency decision:

Once a notice of proposed rulemaking has been issued, however, any agency official or employee who is or may reasonably be expected to be involved in the decisional process of the rulemaking proceeding, should "refus[e] to discuss matters relating to the disposition of a [rulemaking proceeding] with any interested private party, or an attorney or agent for any such party, prior to the [agency's] decision . . . ." If ex parte contacts nonetheless occur, we think that any written document or a summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon.²²

The balance is, in some respects, a good general restriction on ex parte contacts in informal rulemaking. The major features of the decision are that it (1) specifies the point in the proceedings at which ex parte communications should cease; (2) requires a special rehearing of the matter to determine the effect of the secret disclosures; (3) removes the uncertainty of who should not receive such communications; (4) indicates who such contacts should not be received from; and (5) mandates disclosure of the information received. These limitations on ex parte

¹⁸. 567 F.2d at 51.
¹⁹. Id. at 58.
²⁰. Id. See text accompanying notes 35-42 infra.
²¹. "On the other hand, we recognize that informal contacts between agencies and the public are the 'bread and butter' of the process of administration and are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness." 567 F.2d at 57.
²². Id. (citation omitted).
communications will be discussed in light of the views set forth in a concurring opinion in *Home Box Office*. In that opinion, it was argued that the holding was too broad if it was to be construed as applying to all rulemaking proceedings, and should only be applied in those proceedings in which there are competing private claims to valuable privileges. In other words, the concurring opinion in *Home Box Office* advocates the approach taken in *Sangamon*.  

Three months after *Home Box Office*, the concurring opinion's position was favored, but not followed, in *Action for Children's Television v. FCC*. The petitioner, Action for Children's Television (ACT), was a non-profit Massachusetts corporation, which had made several proposals to the FCC concerning children's television. Notice of a proposed rulemaking was issued by the FCC pursuant to section 553 to consider ACT's suggestions, but no rule ever resulted from the proceeding. ACT challenged this "inaction" of the FCC, alleging, among other things, that there had been improper ex parte contacts between members of the National Association of Broadcasters and the FCC Chairman. The National Association of Broadcasters had been allowed to present its views to the FCC without an opportunity for the petitioner to respond. Nevertheless, the court determined that the Commission had not abused its discretion. In doing so, the Court signalled an apparent conflict with the previous decision in *Home Box Office*, which purported to apply to every rulemaking proceeding, stating that "if ex parte contacts nonetheless occur, we think that any written document or a summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon." Although the Court in *Action for Children's Television* strongly disagreed with the approach in *Home Box Office* it held "only that *Home Box Office*’s broad proscription is not to be applied retroactively in the case sub judice inasmuch as it constitutes a clear departure from established law when applied to informal rulemaking proceedings such as undertaken in [the present case]." The guidelines for ex parte contacts announced in *Home Box Office* are thus left intact, despite strong disagreement within the circuit.

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23. *Id.* at 61 (MacKinnon, J., concurring).
24. *Id.* at 61-64.
26. *Id.* at 473.
27. 567 F.2d at 57.
28. 564 F.2d at 474.
II. THE NEW GUIDELINES FOR EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING

A. Ex Parte Contacts from Interested Parties and Their Representatives Should Cease after the Notice of Proposed Rulemaking has been Issued

The Home Box Office decision draws the line on ex parte contacts at the point at which notice of a proposed rulemaking is filed, pursuant to section 553 of the APA. Applying the restriction to parties and their representatives only, as the opinion clearly indicates,29 the door is left open for ex parte communications from other sources, which in most instances would be legitimate.30 It is clear that, at a minimum, this time restriction should not apply to non-parties. Arguably, non-parties do not have the same incentive as interested parties to keep abreast of agency policy and proceedings. The notice of a proposed rulemaking would be their first indication of an upcoming decision, and therefore, all of their communications would follow the notice and be in violation of the Home Box Office prohibition if included in the time restriction. For interested parties, however, this holding serves as notice that communications subsequent to the filing are forbidden.

The limitation of the prohibition to parties and their representatives was small consolation to the court in Action for Children's Television, however. There the court claimed that Home Box Office raises "a presumption of agency irregularity"31 when ex parte contacts are made, which far outreaches the number of situations in which it should be applicable. The insertion of a cutoff date for ex parte communications in all rulemaking proceedings does, indeed, raise a presumption that all subsequent communications with the agency are irregular. Because the court in Action for Children's Television would prefer to apply a restriction on ex parte contacts to a smaller number of informal rulemaking proceedings than the Home Box Office test might mandate, its distaste for the "presumption of agency irregularity" is quite understandable; it is simply too broad a standard to apply to remedy the problems it thinks are presented by such communications. The court in Action for Children's Television would presume the existence of irregularity only when the agency record shows some evidence that it "may have materially influenced the action ultimately taken."32 With-

29. 567 F.2d at 57.
30. See text accompanying notes 49-50 infra.
31. 564 F.2d at 476.
32. Id.
out the cloud of such a broad presumption of irregularity, the reviewing courts might find it more practical and less time-consuming to vacate or remand decisions only in those limited situations in which the ex parte contacts appear to have materially affected the action taken.\textsuperscript{33}

It is clear that \textit{Home Box Office} goes far beyond this approach. Even though the public record of that case contained no material which would indicate that the "subscription broadcast rule amendments benefit persons who participated in \textit{ex parte} contacts," the record was nevertheless remanded to the FCC for a special hearing.\textsuperscript{34} Under this presumption of irregularity, virtually every ex parte contact made by an interested party after the notice of a proposed rulemaking is filed will result in a special hearing. This approach is a great deal broader than the approach favored in \textit{Action for Children's Television}, and would require hearings in many more instances.

\section*{B. Irregular Ex Parte Communications will Require a Special Hearing To Determine Their Nature and Source}

When the existence of improper ex parte contacts was al-

\textsuperscript{33} In the past, the court has allowed itself this freedom. \textit{Home Box Office} makes no mention of the earlier decision in \textit{Van Curler Broadcasting Corp. v. United States}, 236 F.2d 727 (D.C. Cir. 1956) (en banc), \textit{cert. denied}, 352 U.S. 935 (1956). In that proceeding, in which the FCC was concerned with the distribution of a large number of VHF and UHF channels, the Commission decided to consider an application for the assignment of one VHF station to an area already served by several UHF stations. Informal rulemaking procedures were followed in the determination. Although the proceeding actually involved competing private claims to a valuable privilege, ex parte contacts during the proceedings were found not to vitiate the decision. \textit{Id.} at 730. A few years later, in \textit{Sangamon Valley Television Corp. v. United States}, 269 F.2d 221 (D.C. Cir. 1959), the \textit{Van Curler} decision was distinguished:

\begin{quote}
The \textit{Van Curler} case is not to the contrary. We there held that \textit{ex parte} "calls and conversations"... did not vitiate an assignment of a particular channel... The Commission's opinion denying the petitioner's request to reopen the record shows that the Commission did not consider these interviews in connection with the particular channel assignment that was before us for review. \textit{Id.} at 224 n.6. \textit{Action for Children's Television} offers the following explanation of the \textit{Van Curler} decision:

\begin{quote}
We do not propose to argue that \textit{Van Curler} stands for the proposition that ex parte contacts always are permissible in informal rulemaking proceedings—they are of course not—but we do think it can be read as supporting the proposition that ex parte contacts do not per se vitiate agency informal rulemaking action, but only do so if it appears from the administrative record under review that they may have materially influenced the action ultimately taken.
\end{quote}
\end{quote}

\textit{564 F.2d} at 476. This interpretation has also been suggested in \textit{Peck}, \textit{supra} note 2, at 241-42.

\textsuperscript{34} \textit{567 F.2d} at 58.
leged in *Home Box Office*, the situation was resolved through the same procedure used in *Sangamon*,

[by remanding] the record to the Commission for supplementation with instructions “to hold, with the aid of a specially appointed hearing examiner, an evidential hearing to determine the nature and source of all *ex parte* pleas and other approaches that were made to” the Commission or its employees after the issuance of the first notice of proposed rulemaking in these docket.\(^{35}\)

The court did not simply void the proceedings and remand them to the Commission for consideration de novo. It would have been impossible to clear the substance of the ex parte communications from the minds of the Commission members, and without a special hearing to make certain that the material was placed in the public file, information “untested by public scrutiny could influence the outcome of future proceedings.\(^{36}\)

Ex parte contacts with members of federal agencies are considered to render the proceedings *voidable*, rather than *void*.\(^{37}\)

Vacating every rulemaking proceeding that is affected by improper ex parte communications has been criticized as extremely time-consuming, costly, and futile:

While the ideal of pure untainted justice might be enhanced by the vacation of every proceeding in which an ex parte communication was made, this solution would be undesirably expensive and time consuming. Moreover, in those cases where an unscrupulous party's objective was vacation of the proceeding, he could accomplish his ends by causing such a communication to be made. Accordingly, the principle legislative proposals have instead attempted to deal with the problem by requiring the giving of publicity to the ex parte communication. Only the unusual case should require disqualification of an agency member. Only such a case, or one resulting in a decision favorable to the communicant, should be subject to automatic vacation.\(^{38}\)

The opinion in *Home Box Office* seems to align fairly well with this view. First of all, the court refused to automatically vacate the proceeding because there was no proof that the communicant benefitted from the ex parte contacts. Second, a special hearing with a specially-appointed hearing examiner was favored because “it [was] not possible . . . to expunge from the Commission’s collective memory what was said to it *ex parte*.”\(^{39}\)

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35. Id. (citation omitted).

36. Id.


38. Peck, *supra* note 2, at 266 (footnotes omitted).

39. 567 F.2d at 58.
Third, the court opted for the alternative of publicizing the information. And fourth, the court cited with approval the action taken in \textit{Sangamon}, which required an automatic vacation because the ex parte communication had been made by one who had benefitted from the rule. 

Under the \textit{Home Box Office} decision, all occurrences of ex parte communications apparently will require a special hearing to determine their nature and source and to see that they are put in the public record. But only in the instances which are unusual or where the contacts obviously benefit the party who made them will there be an automatic vacation and consideration of whether or not to disqualify agency members from further proceedings. This approach seems not to deviate significantly from what has been the practice in the past.

C. Agency Officials and Employees Expected to be Involved in the Decisional Process Should Avoid Receiving Ex Parte Contacts

By stating that "any agency official or employee who is or may reasonably be expected to be involved in the decisional process of the rulemaking proceeding" should refuse to receive ex parte communications, the court in \textit{Home Box Office} clarifies two matters. First of all, any stigma that might surround contacts with such agency members who are not involved with the particular decision in question is removed. Second, the language fills a very large void left by the regulations of some federal agencies. Aside from the fact that most agency regulations concerning ex parte contacts apply only to formal, on-the-record rulemaking proceedings and adjudications, it is important to note that the actual decision-makers are not always included in such prohibitions.

Although one might ques-

\begin{itemize}
\item \textbf{40.} \textit{Id.}
\item \textbf{41.} \textit{Id.}
\item \textbf{42.} 269 F.2d at 224-25.
\item \textbf{43.} 567 F.2d at 57.
\item \textbf{44.} Professor Davis has suggested that "[t]he prohibition 'against ex parte contact' should be limited to ex parte contact with officers who participate in deciding; parties and their representatives probably should be left free to communicate ex parte with officers who have nothing to do with deciding." \textit{K. Davis, Administrative Law Treatise} § 13.12, at 468 (Supp. 1970).
\item \textbf{45.} The regulations of the Civil Aeronautics Board, for example, do not apply to "non-hearing rulemaking matters." 14 C.F.R. § 300.2(a) (1977). Similarly, the regulations of the Nuclear Regulatory Commission, 10 C.F.R. § 2.780(a) (1977), the Securities and Exchange Commission, 17 C.F.R. § 200.62 (1977), and the Federal Power Commission, 18 C.F.R. § 1.27(c) (1977), apply only to proceedings made on-the-record.
\item \textbf{46.} Oddly enough, the Federal Power Commission's restriction applies only to presiding officers and does not apply to other members involved in the decisions. 18 C.F.R. § 1.27(c) (1977).
\end{itemize}
tion the value of any agency ban on ex parte contacts that does
not apply to everyone involved in the decision, the court’s ap-
proach provides an apparent solution to the problem.47

The issue of who should avoid ex parte contacts has not
received as much debate as the other factors listed and dis-
cussed throughout this note. It is probably a safe assumption
that the court in Action for Children’s Television would not
reject the proposal of limiting the ban on ex parte contacts to
the agency personnel who are involved in the decisional proc-
ess. Their complaints would center more around the types of
rulemaking procedures in which these personnel are to be sub-
ject to the restrictions.48

D. Interested Private Parties, Their Attorneys and Agents are Forbidden
from Engaging in Ex Parte Contacts with those Involved in the Deci-
sional Process.

By limiting their prohibition to interested private parties and
their representatives, Home Box Office wisely avoided a host of
considerations that could never be effectively dealt with
through general guidelines applicable to all informal rulemak-
ing proceedings. For example, no broad principle could be
enunciated that would specifically indicate the circumstances
under which sources outside the agencies could properly be
consulted on questions of law, administrative policy, or the
evaluation of record evidence, as opposed to questions of fact. It
has been suggested that there is nothing improper about receiv-
ing outside information on questions of law or policy, or for the
evaluation of factual material already in the record, so long as
new evidence is not put forth for consideration.49 At the same

47. The problem was not too pressing for the court, however, because the
FCC’s regulations, more than any other agency’s, probably provide the
most detailed description of which personnel are not to receive ex parte
communications. 47 C.F.R. § 1.1209 (1976), identifies the following decision-
making personnel in restricted rulemaking proceedings:

(a) The Commissioners and their personal office staffs.
(b) The Chief of the Office of Opinions and Review and his staff.
(c) The Chief Administrative Law Judge, the Administrative Law
Judges, and the staff of the Office of Administrative Law
Judges.
(d) The Chief of the Common Carrier Bureau and his staff [with
some exceptions] . . .
(e) The General Counsel and his staff.
(f) The Chief Engineer and his staff.
(g) The Chief of the Cable Television Bureau and his staff when
participating in proceedings involving service by common car-
riers to cable television systems.
(h) The Chief of the Office of Plans and Policy and his staff.

48. 564 F.2d at 474-78.
49. Peck, supra note 2, at 243-47.
time, however, even this type of contact might be subject to suspicion if it comes from a party who is interested in the outcome of the decision:

A lack of interest in the particular proceeding, while by no means an assurance of accuracy, eliminates concern for the biased presentation which should be subjected to critical examination by opposing interests. Accordingly, there is no justification for shutting off the sources of information which may be so valuable to those charged with the duty of decision.

The fact that only interested parties are discouraged from engaging in ex parte contacts leaves a great deal of flexibility in seeking out opinions of law or policy in the informal rulemaking process. And the absence of interest in the proceeding goes a long way toward relieving the fear of improper influence by the persons consulted.

This broad approach has no effect on communications made by members of Congress or other government officials. Their purpose for communicating with the agencies can range from fairly innocent “status checks” on agency proceedings, to a more active concern for particular decisions. Again, the promulgation of a general rule to affect all such situations would be of great difficulty in the area of informal rulemaking, and especially when it is recalled that there are many who think that even the Home Box Office approach carries the restrictions too far.

The court in Action for Children’s Television was adamantly opposed to the reasoning of Home Box Office because the prohibition against parties and their representatives contacting the agency is a prohibition against all informal rulemaking pro-

50. Id. at 247.
51. Generally such status checks are done for the benefit of constituents. Professor Davis argues that they seem undesirable, as a matter of principle, when they are directed to the people actually making the decision. At the same time, however, he realizes the difficulty in requiring agencies to enact their own regulations to prevent Congressmen from making such inquiries. K. Davis, supra note 44, at 469.
52. In United Airlines v. CAB, 309 F.2d 238 (D.C. Cir. 1962), in which Congressmen were persuaded by American Airlines to write to members of the Civil Aeronautics Board, the court found a violation of the Commission’s rules, but not of such a significant nature as to vitiate the proceedings. In Jarrott v. Scrivener, 225 F. Supp. 827 (D.D.C. 1964), a member of the Board of Zoning Adjustments was told by his immediate supervisor that he had been informed by White House officials that a particular zoning decision for an embassy was in the “national interest.” These contacts “nullified” the decision of the board. See also D.C. Fed’n of Civic Ass’ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971). See generally Peck, supra note 2, at 262-66; Note, Ex Parte Contacts with the Federal Communications Commission, 73 Harv. L. Rev. 1178, 1190 (1960).
ceedings. Every notice of a proposed rulemaking under section 553 of the APA involves parties and their representatives, and to propose such a broad restriction would, in the court's opinion, unduly burden the agencies involved.\textsuperscript{53} The court cited with approval the admonishment in \textit{American Airlines, Inc. v. CAB}:

\textit{[R]ule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy...[and] is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rulemaking.}\textsuperscript{55}

Furthermore, the imposition of the prohibition on all parties in all informal rulemaking procedures is clearly a "departure from established law."\textsuperscript{56}

The advantages of ex parte contacts in informal rulemaking have already been briefly mentioned.\textsuperscript{57} It needs only to be added that section 553's notice-and-comment provisions encourage contacts between the agency and the public, so that the decision-makers will have the benefit of a broader spectrum of views, including those of the parties who will be most affected by a particular rule.\textsuperscript{58} Although a general ban on ex parte contacts in informal rulemaking might aid in eliminating the threat of improper influence, such restrictions would add more formalities to the already overburdened decision-makers, increase the time and cost involved in the exchange of ideas under section 553, and possibly discourage the reliance on public information to a

\textsuperscript{53} Action for Children's Television v. FCC, 564 F.2d 458, 477 (D.C. Cir. 1977).
\textsuperscript{55} 564 F.2d at 477.
\textsuperscript{56} Id. at 474.
\textsuperscript{57} \textit{See} note 6 and accompanying text \textit{supra}.
\textsuperscript{58} Professor Davis, in commenting on proposals by the Administrative Conference for the limitation of ex parte contacts has observed that [t]he recommendations do not apply to any administrative action other than on-the-record proceedings. They do not and they should not affect informal adjudication. Informality does and should mean ex parte contacts. Parties must be free to persuade agency members and staff members, and persuasion includes influence and pressure. No principle yet developed forbids a Congressman, for instance, to influence informal action of an agency. The recommendations do not apply to rulemaking, except when it is done through an on-the-record proceeding. In any rulemaking which is not done through such a proceeding, ex parte contacts are usually affirmatively desirable, for they help the administrators to know what affected parties want. The mainstay of procedure under Section 4 of the Administrative Procedure Act [Section 553] is ex parte comments on tentative drafts of regulations. We want democratic influences on administration and the principal channel of such influences is ex parte contacts.

\textit{K. Davis, supra} note 44, at 467-68.
greater and greater degree. Thus, the balance that is struck between the need for agency freedom and the restriction of improper ex parte contacts will weigh heavily on the continued use of informal rulemaking by the federal agencies, unless it is possible "to restrict the absolute prohibition of ex parte approaches to those situations in which the expected benefits of such a prohibition may outweigh its numerous detrimental effects."

From the time of the first such restriction on ex parte contacts in informal rulemaking in Sangamon, the balance has been struck by limiting the prohibitions to only those instances in which there were "conflicting private claims to a valuable privilege." The court in Sangamon was urged, unsuccessfully, to hold that ex parte communications did not invalidate the proceeding because it was only rulemaking, and not an adjudication. Subsequent interpretations, however, indicate that a situation in which there are competing private claims constitutes an adversary proceeding, which is "in effect an adjudication of the respective rights of the parties vis-a-vis each other." As such, ex parte communications are properly the subject of regulation because the parties to this "quasi-judicial" action are now entitled to protection of their right to due process.

It has been pointed out that "[t]he fundamental due process problem created by ex parte contacts stems from the undisclosed nature of the evidence presented to the board members; further, in light of the failure to disclose, the question is whether the decision flowed from the merits of the case or from extrinsic considerations." This point is not lightly taken in Home Box

59. See Note, supra note 51, at 1184. See Stone, supra note 11, at 141: The problem of improper ex parte communications is one of the most difficult to resolve in the general field of ethics in government. The situation is made more difficult because many proposed solutions would require additional steps in agency action with consequent delays, while at the same time the agencies are being subjected to widespread and critical attacks because of the time taken to complete administrative proceedings. Thus, we find ourselves on the horns of a dilemma which prompts the question "Can we have our cake and eat it too?" Can we on the one hand, have more steps, more judicialization, more due process and, on the other hand, still have more expedition? Some will agree that we can have both. I, for one, disagree.

60. See Note, supra note 52, at 1184.
62. Id. See note 5 supra.
63. Peck, supra note 2, at 240.
65. Note, supra note 37, at 971.
Office, in which the court seizes on the opportunity to justify its restrictions on all rulemaking procedures:

Equally important is the inconsistency of secrecy with fundamental notions of fairness implicit in due process and with the ideal of our reasoned decision-making on the merits which undergirds all of our administrative law. This inconsistency was recognized in Sangamon, and we would have thought that the principles announced there so clearly governed the instant proceeding that there could be no question of the impropriety of ex parte contacts here.6

Protection of due process and fairness has traditionally been the one expected benefit of a restriction on ex parte contacts that can outweigh the detrimental effects on informal rulemaking. But it is clear that at some point the number of interested parties will become so great, or their respective interests so small, that the proceeding will be hard to classify as one of competing private claims to a valuable privilege,67 much less an adjudication of the respective rights of the parties. Where there are no private claims for a valuable privilege, the procedure will deviate from the adjudicatory model. Accordingly, the justification for the ex parte prohibition on the basis of due process and fairness will decrease. Therefore, the court in Home Box Office offered yet another reason for its departure from the old restrictions:

Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those "in the know" is intolerable. Whatever the law may have been in the past, there can now be no doubt that implicit in the decision to treat the promulgation of rules as a "final" event in an ongoing process of administration is an assumption that an act of reasoned judgment has occurred, an assumption which further contemplates the existence of a body of material—documents, comments, transcripts, and statements in various forms declaring agency expertise or policy—with reference to which such judgment was exercised. Against this material, "the full administrative record that was before [an agency official] at the time he made his decision," . . . it is the obligation of this court to test the actions of the Commission for arbitrariness or inconsistency with delegated authority.68

This dedication to the production of a final agency record for purposes of judicial review is what is seen by the court as the mandate of Citizens to Preserve Overton Park, Inc. v. Volpe69—a sweeping grant of power to reviewing courts to require the inclusion in the agency record of virtually all information that went into the decision that is being reviewed.

66. 567 F.2d at 56.
67. Note, supra note 52, at 1184.
68. 567 F.2d at 54 (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)).
In Overton Park an injunction was sought to stop construction of a highway through Overton Park, despite the fact that the Secretary of Transportation had approved funds for the plan. The petitioners claimed that section 4(f) of the Department of Transportation Act of 1966\textsuperscript{70} and section 18(a) of the Federal-Aid Highway Act of 1968\textsuperscript{71} invalidated the Secretary's actions because they both required findings that there be no feasible and prudent alternative to such a project and that all possible planning alternatives be taken to minimize the effects on areas such as Overton Park.\textsuperscript{72} The court decided that it was empowered to review the decision to determine if the narrow range of discretion left by Congress in the Department of Transportation Act and the Federal-Aid Highway Act had been abused by the Secretary.\textsuperscript{73} The litigation affidavits presented to the Court were found to be inadequate for purposes of review;\textsuperscript{74} however, because they did not "constitute the 'whole record' compiled by the agency,"\textsuperscript{75} the court remanded to the district court to review the full administrative record on which the Secretary's decision was based, as required by section 706 of the APA.\textsuperscript{76}

The Court in Overton Park never specified what was to be included in the record for judicial review. And despite the fact that the case was not one concerning informal rulemaking, the court in Home Box Office clearly stated that Overton Park is to be construed to mean that the record shall be made available for a court on review and that the record should consist of information gathered in accordance with the procedures set out by section 553:

\textsuperscript{73} 401 U.S. at 415-16.
\textsuperscript{74} The Court said that the "litigation affidavits were merely 'post hoc' rationalizations." \textit{Id.} at 419. As such, they did not reflect the actual information considered by the administrator. See Rodway v. United States Dep't of Agric., 514 F.2d 809, 816 (D.C. Cir. 1975); Pedersen, \textit{supra} note 7, at 63.
\textsuperscript{75} 401 U.S. at 419.
\textsuperscript{76} 5 U.S.C. § 706 (1976) provides, in part, that
To the extent necessary to a decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. . . .
In making the foregoing determinations, \textit{the court shall review the whole record} or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.
(emphasis added). \textit{See} 401 U.S. at 419-20.
Equally important, an agency must comply with procedures set out in Section 4 [section 553] of the APA. . . . As interpreted by recent decisions of this court, these procedural requirements are intended to assist judicial review as well as to provide fair treatment for persons affected by a rule . . . . To this end there must be an exchange of views, information, and criticism required by the APA, or information subsequently supplied to the public, must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based.77

The background and trends in the proceduralization of informal rulemaking have been documented elsewhere,78 and it is not within the scope of this note to discuss the subject in any detail. It should suffice to point out that there is widespread disagreement over the exact procedures that should be required in informal rulemaking, as the court's opinion in Action for Children's Television amply demonstrates.79 The court in that decision argued that Congress has prohibited ex parte communications in the areas it deems appropriate, and if such broad restrictions on informal rulemaking had seemed desirable, they would have been enacted by now:

That it did not extend the ex parte contact provisions of amended Section 557 to Section 553—even though such an extension was urged upon it during the hearings—is a sound indication that Congress still does not favor a per se prohibition or even a "logging" requirement in all such proceedings.80

To the extent that many proposed restrictions represent an imposition of great burdens on the federal agencies and the infor-

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77. 567 F.2d at 56 (citations omitted). The court also rejects the reasoning of those who believe that section 553 was never intended to serve as an administrative record. For example, the court footnotes an article by Nathanson, Probing the Mind of Administrators: Hearing Variations and Standards of Review Under the Administrative Procedure Act and Other Federal Statutes, 75 COLUM. L. REV. 721 (1975), as being an analysis of the law of the past. Nathanson argues that "Section 553's notice-and-comment provisions were conceived of as instruments for the education of the administrators, especially on questions of policy; there is not the slightest indication that the purpose of the notice and comment proceeding was to develop a record by which a reviewing court could test the validity of the rule which the Administrator finally adopted." Id. at 754-55.

78. See generally Nathanson, supra note 77; Pedersen, supra note 7; Verkuil, Judicial Review of Informal Rule Making, 60 VA. L. REV. 185 (1974); Wright, supra note 4.

79. 564 F.2d at 476-77:

On the other hand, though, we have Citizens to Preserve Overton Park, Inc. v. Volpe . . . —a somewhat Delphic opinion concerning informal administrative action rather than informal rulemaking—which we believe as a practical matter should not be read as mandating that the public record upon which our review is based reflect every informational input that may have entered into the decisionmaker's deliberative process.

80. 564 F.2d at 475 n.28.
mal rulemaking process, more consideration should be given to the types of proceedings in which such restrictions are necessary.

E. When Ex Parte Communications Occur, They Must Be Disclosed in the Public File

Disclosure of the information received through ex parte contacts is the burden that is placed on the administrative process by the prohibition of Home Box Office: "If ex parte contacts nonetheless occur, we think that any written document or a summary of any oral communication must be placed in the public file established for each rule making docket immediately after the communication is received so that interested parties may comment thereon."81 This requirement serves to protect the parties from improper influence and to insure a complete record for judicial review. On the surface, the proposal seems relatively simple, and in some respects, it is. The filing of written documents in the public record presents little problem in subsequent interpretation. But the filing of a summary of each oral communication will result in such problems. When parties are allowed the opportunity to rebut the substance of these oral contacts, the agency must be prepared to take additional testimony to determine relevancy and the accuracy of the summary. In short, the requirement of disclosure could well result in added expense and delay in informal rulemaking.

It is, of course, impossible to measure the extra burden that is placed on agencies by the Home Box Office decision. But the increase in time and expense will bring about other adverse effects. The administrator who is required to prepare a written summary of each ex parte oral communication may develop a tendency to avoid such contacts with sources outside of the agency. When this sort of attitude hinders the exchange of views between decision-makers and the public, much of the theory behind section 553 is lost.82 Perhaps this is why Congress has never taken the initiative and imposed such restrictions on administrators in informal rulemaking.

It thus becomes necessary to evaluate the Home Box Office prohibition in terms of the detrimental effects that it might have on informal rulemaking. Requiring disclosure in every instance of informal rulemaking could result in great delay, more expense and less of a democratic exchange of information. This is a course that Congress clearly has chosen not to follow. The question that remains is whether or not these restrictions are

81. 567 F.2d at 57.
82. K. Davis, supra note 43, at 469; Peck, supra note 2, at 267-68.
EX PARTE CONTACTS

essential for the removal of improper ex parte contacts in informal rulemaking.

III. CONCLUSION

The Home Box Office decision as a practical matter goes a long way toward imposing a general prohibition against ex parte contacts after the notice of a proposed rulemaking has been filed. By specifying that such contacts should cease at that point, the parties to the proceeding are put on notice that subsequent contacts are forbidden. The special hearing to determine the effect of the communication received in spite of the general ban provides an opportunity to prove or disprove their impropriety. On the other hand, clarification of who should not engage in ex parte contacts removes a great deal of the uncertainty in informal rulemaking. Finally, the disclosure of the information received allows interested parties a chance to rebut ex parte communications and provides a complete record for judicial review. All of these elements of the holding in Home Box Office are useful in curbing the occurrence of improper influence, if appropriately applied. But the court in Home Box Office stretches their prohibition of ex parte contacts to all rulemaking proceedings. And in doing so, it far exceeds the number of situations in which these restrictions are practical.

It should be recalled that ex parte communications in informal rulemaking are affirmatively desirable. Section 553 relies on the free exchange of information between the decision-makers and the public, for questions of law or policy, and for substantive questions about the effect of a proposed decision. As the concurring opinion in Home Box Office points out, section 555(b) applies to all sections of the APA, including informal rulemaking, and allows interested parties to make ex parte contacts: "So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with any agency function." Moreover, the increase in time and expense brought about by the requirement of disclosure makes it necessary to limit the restriction to only those instances in which the ex parte communications are improper. By applying its prohibition to all rulemaking proceedings, the court in Home Box Office not only hinders the free exchange of information in

83. 5 U.S.C. § 555(b) (1976).
84. 567 F.2d at 63.
section 553 proceedings, but does so in a manner that appears contrary to the intention of the APA.

It is much more reasonable to limit the application of a general ex parte ban to those situations "where the potential for unfair advantage outweighs the practical burdens . . . such a rule would place upon administrators." The approach taken in Sangamon and Action for Children's Television, that of applying the restrictions only in informal rulemaking procedures in which there are competing private claims to valuable privileges, clearly meets this test. In those situations, in which there is, in effect, an adjudication of the respective rights of the parties, fairness and due process justify the imposition of procedures such as those set forth in Home Box Office. Ex parte contacts in this type of proceeding seriously threaten the rights of the individuals involved, and it is proper that a court should protect these rights. The application of the prohibition in this manner would involve few enough situations that it would not unduly burden the administrative agencies, and at the same time it would not inhibit a large number of legitimate ex parte contacts. When there are no competing claims, and the rulemaking assumes the character of a general policy or procedural determination, due process offers less justification for protecting the rights of the parties with a general ban on ex parte communication.

It is true that there may be many instances of improper ex parte contacts not covered by this approach. But there is room for Congress, the agencies, and even the courts, to step in and remedy those specific situations without resorting to an overall ban on ex parte communications in all rulemaking procedures as Home Box Office mandates. In light of the fact that Congress has chosen not to impose such broad restrictions on section 553 proceedings, the limited approach of Sangamon and Action for Children's Television would appear to be a far better alternative.

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