

## CASE NOTE

### Ex Parte Contacts in Informal Rulemaking: *Home Box Office, Inc. v. FCC* and *Action for Children's Television v. FCC*

During the last decade, the use of informal rulemaking as a vehicle for the shaping of federal administrative policy has increased sharply.<sup>1</sup> This trend has been accompanied by greater judicial scrutiny,<sup>2</sup> and occasional judicial supplementation,<sup>3</sup> of the informal rulemaking procedure provided by section 553 of the Administrative Procedure Act (APA).<sup>4</sup> The courts have sought, by closer review, to ensure that there will be full public access to and understanding of informal rulemaking proceedings, and that agency decisions will be suitably framed for judicial review. Yet, although proper regulation of ex parte contacts with agency officials is important for public access and reviewability, judicial control of such contacts has seldom been attempted.

In recent decisions, however, two panels of the District of Columbia Circuit Court of Appeals have considered the proper role of ex parte contacts in rulemakings governed by section 553. In *Home Box Office, Inc. v. FCC*<sup>5</sup> the court, following the trend toward judicial augmentation of section 553 procedures, imposed strict limits on ex parte contacts. Its holding would require that once an agency has issued a notice of proposed rulemaking pursuant to section 553, ex parte contacts must be avoided; if they occur, they are to be exposed on the public record.<sup>6</sup> In contrast, the decision of the panel in *Action for Children's Television*

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1. See, e.g., Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111 (1972); Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975); Wright, *Court of Appeals Review of Federal Regulatory Agency Rulemaking*, 26 AD. L. REV. 199, 201-202 (1974).

2. See generally Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974).

3. See, e.g., *Portland Cement Assn. v. Ruckelshaus*, 486 F.2d 375, 392-94 (D.C. Cir. 1973); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1258-59 (D.C. Cir. 1973); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 649 (D.C. Cir. 1973).

4. 5 U.S.C. § 553 (1970). See text accompanying notes 46-48 *infra*.

5. *Home Box Office, Inc. v. FCC*, No. 75-1280 (D.C. Cir. March 25, 1977), cert. denied, 46 U.S.L.W. 3216 (U.S. Oct. 4, 1977) (No. 76-1724).

6. *Id.*, slip op. at 97-98.

v. FCC<sup>7</sup> would preserve the traditional flexibility of informal rulemaking by prohibiting ex parte contacts only in proceedings where private interests are "competing for a valuable privilege."<sup>8</sup>

The restrictive rule announced by the *Home Box Office* panel is without legal foundation and, if strictly applied, would unduly hamper the informal rulemaking process. The permissive rule endorsed by the *Action for Children's Television* panel, however, would not adequately protect the process from abuse by private interests. This Note will review the two cases and discuss the reasoning used by the courts. It will then argue that a proper balance between the congressionally mandated flexibility of the informal rulemaking process and the need for public access and reviewability requires a different standard. Ex parte contacts should be permitted in informal rulemaking, subject to a requirement that when the contact conveys "new information" not previously placed in the public record, the substance of the communication must be made available to the public for further comment.

## I

### THE DECISIONS

In *Home Box Office, Inc. v. FCC*, the D.C. Circuit overturned Federal Communications Commission rules promulgated to control programming on pay cable television systems.<sup>9</sup> The agency's notices of proposed rulemaking had suggested that its pay cable proceedings were open to ex parte contacts.<sup>10</sup> Consequently, during the final weeks

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7. *Action for Children's Television v. FCC*, No. 74-2006 (D.C. Cir. July 1, 1977), *rehearing denied* (D.C. Cir. Aug. 24, 1977).

8. *Id.*, slip op. at 33.

9. Pay cable, also known as subscription cablecasting, involves the closed-circuit cable television system distribution of nonbroadcast programming. The cable television system subscriber is charged an additional program or channel fee beyond the regular monthly fee for the system's television signal reception service. Pay cable may either be undertaken by the cable system operator or by an independent entrepreneur who contracts with the system operator for the distribution of his programming. First Report and Order, 52 F.C.C.2d 1, 2 (1975), *reconsideration denied*, Memorandum Opinion and Order, 54 F.C.C.2d 797 (1975). Approximately 400,000 American homes have pay cable or extensive program-originating service on cable. STAFF OF SUBCOMM. ON COMMUNICATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., 2d Sess., *CABLE TELEVISION: PROMISE VERSUS PERFORMANCE* 17 (Subcomm. Print 1976). The pay cable rules at issue here grew out of a rulemaking docket that the FCC had established in 1972. See Notice of Proposed Rule Making, 35 F.C.C.2d 893 (1972). Early stages of the proceeding were marked by congressional intervention on behalf of broadcast industry interests. See BROADCASTING, March 4, 1974, p. 6.

10. The notices stated: "In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it in addition to the specific comments invited by this Notice." Notice of Proposed Rule Making, 35 F.C.C.2d 893, 899 (1972); Further Notice of Proposed Rule Making, 48 F.C.C.2d 453, 463

between the last oral argument and the Commission's decision, representatives of potentially affected interests—including the broadcast, cable, professional sports, and motion picture industries—engaged in extensive lobbying of the Commission decisionmakers.<sup>11</sup> The rules finally adopted by the agency were a carefully drawn compromise that restricted the availability of popular feature films and major sporting events on pay cable systems.<sup>12</sup>

The court of appeals, in a lengthy per curiam opinion,<sup>13</sup> concluded that the rules were in excess of the FCC's statutory authority,<sup>14</sup> unsupported by the record,<sup>15</sup> inconsistent with the first amendment,<sup>16</sup> and more expansive than necessary to further the asserted government interest.<sup>17</sup> The court also objected to the Commission's ex parte

(1974). In contrast, where the Commission specifies a prohibition of ex parte contracts, its notice of proposed rule making states: "All submissions by parties to this proceeding or persons acting on behalf of such parties, must be made in written comments, reply comments, or other appropriate pleadings." See, e.g., Notice of Proposed Rule Making, Table of Assignments, FM Broadcast Stations (Bangor, Maine), 40 Fed. Reg. 2828 (1975).

11. See, e.g., BROADCASTING, March 10, 1975, p. 6; *id.*, March 17, 1975, p. 10.

12. The Commission's originally proposed restrictions on pay cable's use of film material were retained in part, but relaxed to satisfy the cable and motion picture interests, and restrictions on the carriage of specific sports events were added to satisfy the broadcast and professional sports interests. The result was that pay cable operators were prohibited from airing (1) feature films more than three, but less than ten, years old; (2) specific sports events (e.g., the World Series) shown on broadcast television within the previous five years; and (3) more than a minimum of regular season sports events that had not been broadcast in any of the five previous years. See 47 C.F.R. § 76.225 (1975), *as amended*, Second Report and Order, 35 RAD. REG. 2d (P & F) 767 (1975).

13. The panel explained that the opinion was issued 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." Home Box Office, Inc. v. FCC, slip op. at 9 n.1.

14. Home Box Office, Inc. v. FCC, slip op. at 34-48. See also Hoffer, *The Power of the FCC to Regulate Cable Pay-TV: Jurisdictional and Constitutional Limitations*, 53 DEN. L.J. 477, 482-489 (1976); Comment, *Regulation of Pay-Cable and Closed Circuit Movies: No Room in the Wasteland*, 40 U. CHI. L. REV. 600, 609-616 (1973).

15. Home Box Office, Inc. v. FCC, slip op. at 48-60.

16. *Id.* at 67-77. See also Hoffer, *supra* note 14, at 490-97; Barrow, *Program Regulation in Cable TV: Fostering Debate in a Cohesive Audience*, 61 VA. L. REV. 515, 525-32 (1975); Note, *Cable Television and Content Regulation: The FCC, The First Amendment and The Electronic Newspaper*, 51 N.Y.U. L. REV. 133, 143-47 (1976).

17. Home Box Office, Inc. v. FCC, slip op. at 77-83. The government interest that the pay cable rules were purportedly designed to serve was the prevention of competitive bidding between operators of cable systems and "free" television, so that the viewing audience would not be forced to pay a fee in order to see popular film and sports programming. See generally R. NOLL, M. PECK, & J. MCGOWAN, *ECONOMIC ASPECTS OF TELEVISION REGULATION* 129-50 (1970); Posner, *The Appropriate Scope of Regulation in the Cable Television Industry*, 3 BELL J. ECON. & MGT. SCI. 98, 105-06, 118-23 (1972).

meetings with lobbyists. It expressly declined to draw conclusions about the effect of the meetings upon the agency's decision, noting only that the record was consistent "with often-voiced claims of undue industry influence over Commission proceedings."<sup>18</sup> The court pointed, however, to evidence indicating that some industry representatives had expressed their actual positions only in the ex parte meetings, and not on the record. The court noted that these private communications might have provided the basis for the agency's ultimate decision,<sup>19</sup> and suggested that their absence from the record on appeal violated the requirement, first articulated by the Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*,<sup>20</sup> that a reviewing court must be presented with "the full administrative record that was before [an agency official] at the time he made his decision."<sup>21</sup> In addition, the court noted that the failure to place the agency's negotiations on the record had denied the court the benefit of an "adversarial discussion among the parties" in the forum below.<sup>22</sup> This, the court suggested, violated the spirit, if not the letter, of recent decisions of the Circuit specifying the procedural safeguards to be observed in informal rule-making.<sup>23</sup> Finally, the secrecy of the contacts was held inconsistent with "fundamental notions of fairness implicit in due process," and with "the idea of reasoned decisionmaking on the merits which undergirds all of our administrative law."<sup>24</sup>

The court found support for this last conclusion in an earlier D.C. Circuit decision, *Sangamon Valley Television Corp. v. United States*.<sup>25</sup> *Sangamon* involved an FCC informal rulemaking to reassign a television channel. During the proceeding, one of the parties made an off-the-record written submission of certain crucial data to the Commission. The court of appeals found this contact sufficient to vitiate

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18. *Home Box Office, Inc. v. FCC*, slip op. at 88. Information submitted to the court showed that between the close of oral argument on October 25, 1974, and the adoption of the First Report and Order on March 20, 1975—a period in which the rulemaking record should have been closed while the FCC was deciding what rules to promulgate—"broadcast interests met some 18 times with Commission personnel, cable interests some nine times, motion picture and sports interests five times each, and 'public interest' intervenors not at all." *Id.* at 87-88.

19. *Id.* at 88-89. Later in the opinion the court cited Richard E. Wiley, former Chairman of the FCC, for a similar proposition: "Compromises, fall-back positions, and the so-called 'real facts' are often reserved for supplemental filings and, perhaps, subsequent visits to Commission offices." *Id.* at 94 n.123, quoting Remarks of Richard E. Wiley, Chairman, FCC, F.C.C. Mimeo 21343 (April 30, 1974), p. 4.

20. 401 U.S. 402 (1971).

21. *Home Box Office, Inc. v. FCC*, slip op. at 90, quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

22. *Home Box Office, Inc. v. FCC*, slip op. at 91.

23. See cases cited note 3 *supra*.

24. *Home Box Office, Inc. v. FCC*, slip op. at 94.

25. 269 F.2d 221 (D.C. Cir. 1959).

the agency's decision. It remanded with the brief comment that, because the proceeding "involved . . . resolution of conflicting private claims to a valuable privilege,"<sup>26</sup> namely the use of a television channel, basic fairness to the parties required that none be permitted ex parte contacts with the government body that was to resolve their competing claims. The *Home Box Office* court found *Sangamon* controlling because the pay cable proceedings under review similarly involved the "resolution of conflicting private claims to a valuable privilege."

The court, however, did not limit its holding to such proceedings. Relying loosely on the authority of *Sangamon* and on purported expressions of congressional and executive policies disfavoring ex parte contacts,<sup>27</sup> the court argued that the restrictions adopted in *Sangamon* should be imposed as a matter of fairness in all informal rulemakings. The court therefore formulated a strict standard to govern ex parte contacts in such proceedings: Once a notice of proposed rulemaking is issued, ex parte contacts dealing with the rulemaking are prohibited;<sup>28</sup> if such contacts occur, all written documents and a written summary of any oral communication must be placed in a public file so that interested parties can respond.<sup>29</sup> Because the court did not have before it the content of those ex parte contacts that may have influenced the decisionmaking process under review, it remanded the rulemaking record to the FCC with instructions to hold "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."<sup>30</sup>

In *Action for Children's Television v. FCC*, the D.C. Circuit affirmed the FCC's decision not to promulgate specific rules governing advertising and programming practices for children's television. The

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26. *Id.* at 224.

27. The putative declaration of congressional policy was the Government in the Sunshine Act, Pub. L. No. 94-409, § 2, 90 STAT. 1241 (Sept. 13, 1976), opening meetings of federal agencies to the public; the executive action was Executive Order 11920, 12 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 1040 (1976), barring all ex parte contacts with White House staff by those seeking to influence allocation of international air routes. See *Home Box Office, Inc. v. FCC*, slip op. at 95-97.

28. The court did not prohibit communications received prior to the issuance of a formal notice of proposed rulemaking, since informal contacts at this early stage are part of the "bread and butter" of the administrative process. *Id.*, slip op. at 97.

29. *Id.*, slip op. at 98.

30. *Id.*, slip op. at 100. Judge MacKinnon concurred specially in the disposition of the case, but objected to the majority's rule as overly restrictive. He urged that the ban on ex parte contacts ought to be limited solely to rulemakings involving "competing private claims to a valuable privilege or selective treatment of competing business interests of great monetary value." *Id.*, Opinion Concurring Specially Filed by Judge MacKinnon May 20, 1977, slip op. at 7.

Commission's decision resulted from a rulemaking proceeding<sup>31</sup> initiated by Action for Children's Television (ACT), a nonprofit organization aimed at improving the quantity and quality of television programming for children. During the rulemaking proceeding, ACT proposed to the Commission several major changes in children's programming practices, including mandatory elimination of all sponsorship and commercial content and a requirement that all television licensees provide a minimum amount of age-specific programming for children. Public support for these proposals was substantial.<sup>32</sup>

In an apparent response, the broadcast industry undertook a limited program of self-regulation, reinterpreting and revising the Code of the National Association of Broadcasters so as to prohibit the use of certain potentially deceptive programming and advertising practices.<sup>33</sup> The Code changes were negotiated in private meetings with the Chairman of the FCC. These meetings, like those in *Home Box Office*, took place after the final oral argument in the rulemaking proceeding; ACT and other participants had no opportunity to respond to the industry's assertions. In reaching its decision not to promulgate rules, the Commission expressed satisfaction with industry efforts at self-regulation.<sup>34</sup> ACT appealed on two grounds; it charged that the agency's failure to promulgate rules was arbitrary and capricious, and that its failure to solicit public comment on the industry's proposed reforms epitomized " 'abuse of the administrative process' " and rendered the extensive comment-gathering stage " 'little more than a sop.' " <sup>35</sup>

The court of appeals rejected both claims.<sup>36</sup> In dismissing the procedural claim, the court looked only to the express provisions of section 553. Judge Tamm, writing for a unanimous panel, distinguished two cases which had imposed stricter judge-made procedural safeguards in informal rulemakings.<sup>37</sup> Applying the literal statutory specifications he found that, although ACT had not received an opportunity to challenge the industry's self-regulatory proposals, it had on the whole been given the "reasonable opportunity" to offer comments,

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31. See Notice of Inquiry and Notice of Proposed Rule Making, 28 F.C.C.2d 368 (1971).

32. See Children's Television Report and Policy Statement, 50 F.C.C.2d 1, 2 (1974).

33. See *Action for Children's Television v. FCC*, slip op. at 7-9.

34. Children's Television Report and Policy Statement, *supra* note 32, at 13; see also BROADCASTING, June 17, 1974, p. 4; *id.*, July 29, 1974, p. 22.

35. *Action for Children's Television v. FCC*, slip op. at 17-18.

36. *Id.*, slip op. at 38-40.

37. *Id.*, slip op. at 21-22 n.19. The cases distinguished were *Mobil Oil Corp. v. FCC*, 483 F.2d 1238 (D.C. Cir. 1973) and *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973).

criticisms, and proposals that the statute required.<sup>38</sup> Moreover, the court found that the failure to include the substance of the ex parte contacts in the administrative record did not deprive it of a basis for effective review, since the record fully explained the agency's decision to rely on self-regulation.<sup>39</sup> The court concluded that the decision not to invite public comment on the industry proposals, although perhaps "impolitic," was within the Commission's discretion.<sup>40</sup>

The court avoided a direct conflict with the *Home Box Office* decision by holding that, since the rule of that case was "a clear departure from established law when applied to informal rulemaking proceedings," it should not be applied retroactively.<sup>41</sup> It then undertook to demonstrate the absence of any basis, in statute or case law, for the *Home Box Office* standard. Judge Tamm pointed out that Congress had recently acted to curb ex parte contacts in certain administrative proceedings, but had failed to impose limits on such contacts in section 553 proceedings.<sup>42</sup> In addition, he argued that the *Home Box Office* panel's reliance on *Sangamon Valley Television Corp.* and *Citizens to Preserve Overton Park* was misplaced. *Sangamon*, he claimed, could not be read to support a ban on all ex parte contacts during informal rulemakings. In his view, *Sangamon's* reasoning assumes a proceeding that involves "competing private claims to a valuable privilege"; the possibility in all informal rulemakings of conflict among interested parties does not suffice to support the application of *Sangamon's* reasoning to all such proceedings.<sup>43</sup> In addition Judge Tamm argued that, as a practical matter, *Overton Park* should not be read as requiring that "the public record . . . reflect every informational input that may have entered into the decision-makers' deliberative process."<sup>44</sup> Balancing the practical need to preserve

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38. *Action for Children's Television v. FCC*, slip op. at 23-25.

39. *Id.*, slip op. at 26.

40. *Id.*, slip op. at 28.

41. *Id.*, slip op. at 31.

42. *Id.*, slip op. at 31-32 n.28.

43. *Id.*, slip op. at 33. The court cited with approval remarks by Henry Geller, counsel for ACT, that "*Sangamon* . . . should be applicable only where there are conflicting claims by private industry entities to a valuable privilege, and not to rule making procedures where conflict stems from the participation of listener or other public groups." *Id.*, slip op. at 37 n.30. The court criticized the *Home Box Office* panel's use of *Sangamon* in light of *Courtaulds (Alabama) Inc. v. Dixon*, 294 F.2d 899 (D.C. Cir. 1961). *Courtaulds* involved an FTC rulemaking to define the generic category "rayon." Although the proceeding involved a number of ex parte contacts, the court refused to apply the *Sangamon* rule. It instead distinguished that case, viewing it as disanalogous because it involved an allocation of "a license to be available to only one competing applicant," *id.* at 904 n.16. Relying on this dubious characterization, the ACT court viewed *Courtaulds* as limiting *Sangamon's* bar to informal rulemakings with "adjudicatory overtones." *Action for Children's Television, Inc. v. FCC*, slip op. at 34 n.9.

44. *Id.*, slip op. at 36.

the simplicity and flexibility of the informal rulemaking process against the need to preserve due process protections, the court concluded that the line prohibiting ex parte contacts should be drawn to accord with *Sangamon's* focus on proceedings that involve "competing private claims to a valuable privilege";<sup>45</sup> ex parte contacts should be barred only in informal rulemakings of this character.

## II

### INFORMAL RULEMAKING: THE TRADITIONAL MODEL AND JUDICIAL INNOVATION

Informal rulemaking under section 553 involves a simplified agency decisionmaking process. When an agency decides to adopt rules informally, it is required by statute to publish a detailed notice of the proposed rulemaking in the Federal Register.<sup>46</sup> Interested parties must then be given an opportunity to submit comments on the proposed rules.<sup>47</sup> Finally, when the rules are adopted, the agency must concurrently publish a "concise general statement of their basis and purpose," which becomes part of the record of the proceeding.<sup>48</sup>

As compared with the trial-type proceedings that were once the mainstay of agency decisionmaking,<sup>49</sup> informal rulemaking has several important advantages. First, it allows for the promulgation of rules of prospective applicability.<sup>50</sup> Second, because the informal procedure is simplified, it permits speedier and less costly resolution of contested issues of law and policy.<sup>51</sup> Third, the provision for written submissions during rulemaking proceedings allows broader public participa-

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45. *Id.*, slip op. at 36-37.

46. 5 U.S.C. § 553(b) (1970). The notice must include (1) a statement of the time, place, and nature of the 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. *Id.*

47. *Id.* § 553(c). Such participation may include the submission of written data, views, or arguments with or without the opportunity for oral presentation. *Id.*

48. *Id.*

49. See Robinson, *The Making of Administrative Policy: Another Look at Rule-making and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

50. See Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 189 (1974).

51. The formal procedures set forth in sections 556 and 557 of the APA, 5 U.S.C. §§ 556, 557 (1970), make adjudications and rulemakings that must be on the record extremely burdensome on agency time, staff, and money. See Wright, *supra* note 2, at 376. These procedures require a hearing examiner, allocation of the burden of proof, submission of evidence, the right of cross-examination, and the development of an evidentiary record. 5 U.S.C. § 556 (1970),



tion.<sup>52</sup> Fourth, because agencies are not narrowly limited to a decision "on the record," informal rulemaking allows them better to draw upon the expertise of staff members and outside parties.<sup>53</sup>

Traditionally, courts reviewing informal agency actions relied solely on the provisions of the APA to ensure full development of the record and obedience to statutory limits on agency discretion. Informal rulemaking proceedings that were in literal compliance with the statutory notice and comment requirements of section 553 routinely passed judicial muster.<sup>54</sup> Review of the decision itself was also narrowly confined to the statutorily prescribed inquiry as to whether the agency action was "arbitrary, capricious, or not otherwise in accordance with law."<sup>55</sup> To a degree this deference was compelled by the language of the statute. More fundamentally, the courts recognized and sought to preserve the flexibility and efficiency of the informal rulemaking model.<sup>56</sup>

Apparently, judicial treatment of ex parte contacts in informal proceedings was also deferential to congressional intent. The provisions of the APA governing informal rulemaking, in sharp contrast to those governing adjudications and rulemakings required to be made "on the record,"<sup>57</sup> do not attempt to regulate off-the-record communications between the parties and the agency. The express congressional purpose to permit broad agency reliance on factors not present in the record<sup>58</sup> also suggests that a permissive approach is appropriate. The scarcity of cases in which the issue has been litigated indicates that courts have tended to follow this view.<sup>59</sup>

52. See Price, *Requiem for the Wired Nation; Cable Rulemaking at the FCC*, 61 VA. L. REV. 541, 553 (1975); Verkuil, *supra* note 50, at 189.

53. See U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 31-32 (1947); Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 754-55 (1975); Verkuil, *supra* note 50, at 187.

54. See, e.g., *American Airlines, Inc. v. CAB*, 359 F.2d 624, 629 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966); *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 343 (D.C. Cir. 1968).

55. See, e.g., *Camp v. Pitts*, 411 U.S. 138 (1973); *United States v. Allegheny Ludlum Steel Corp.*, 406 U.S. 742 (1972) (requiring only that the rules be reasonable). The "arbitrary, capricious" standard is set forth in section 706(2)(A) of the APA. 5 U.S.C. § 706(2)(A) (1970). Although section 706 is not expressly applicable to informal rulemaking, it has been widely assumed to establish the standard of judicial review for such proceedings. Verkuil, *supra* note 50, at 206.

56. See note 54 *supra*.

57. Section 554(d)(1) of the APA states that the hearing examiner in a trial-type adjudication may not "consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate." 5 U.S.C. § 554(d)(1) (1970).

58. See Nathanson, *supra* note 53, at 754-55.

59. Prior to *Home Box Office*, only two published decisions considered the regu-

*Sangamon Valley Television Corp. v. United States*<sup>60</sup> represents a notable exception to the general trend. Yet, the suggestion in *Sangamon* that ex parte contacts should be barred from those informal rulemakings that involve "conflicting private claims to a valuable privilege" has had minimal impact. A likely reason for this is the lack of support for the proposition in recognized policies of statutory or judge-made law. Section 553 provides no express warrant for a ban on such contacts, and reviewing courts, until recently, expressed no dissatisfaction with the procedural safeguards expressly provided by statute. In addition, the *Sangamon* court's apparent limitation of its ban to claims involving a property-like interest<sup>61</sup> suggests an unarticulated view that due process requires stricter procedural protections for such interests than the protections imposed by statute. The doctrinal soundness of this view is, however, dubious. Although reviewing courts have often found that the Constitution requires special procedural safeguards in administrative adjudications, they have consistently refused to impose, as a matter of due process, procedural safeguards in informal rulemaking beyond the provisions of section 553.<sup>62</sup>

The two decades since *Sangamon* have been marked by a shift in the balance between agency decisionmakers and reviewing courts. Review of the factual basis for agency decisions has become markedly more stringent.<sup>63</sup> A number of courts have gone further, to require that agencies engaged in informal rulemaking observe procedural requirements not specified in the statute.<sup>64</sup> The Supreme Court's decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*<sup>65</sup> illustrates the trend toward more careful factual review. There, the Court considered an informal decision of the Secretary of Transportation to permit construction of an interstate highway through a city park. The Court held that while the traditional "arbitrary and capricious" standard of review remained appropriate for such an informal action, a

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lation of ex parte contacts in informal rulemakings. See *Courtaulds (Alabama) Inc. v. Dixon*, 294 F.2d 899 (D.C. Cir. 1961); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959).

60. 269 F.2d 221 (D.C. Cir. 1959).

61. See generally Reich, *The New Property*, 73 YALE L.J. 733, 783-85 (1964).

62. See generally Wright, *supra* note 2, at 385-86; Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 HARV. L. REV. 782, 785-90 (1974).

63. See, e.g., *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 705 (2d Cir.) (Lumbard, J., concurring), *cert. denied*, 423 U.S. 827 (1975); *Synthetic Organic Chem. Mfrs. Ass'n v. Brennan*, 503 F.2d 1155, 1158 (3d Cir. 1974), *cert. denied*, 420 U.S. 973 (1975); *Associated Indus. v. United States Dep't of Labor*, 487 F.2d 342, 349-50 (2d Cir. 1973) (Friendly, J.). See generally Pedersen, *supra* note 1, at 46-50.

64. See cases cited note 3 *supra*.

65. 401 U.S. 402 (1971).

reviewing court was nonetheless required to conduct a "searching and careful" inquiry into the facts, and to determine "whether the [agency] decision was based on a consideration of the relevant factors."<sup>66</sup> Because the "whole record" compiled by the agency was not before the Court, the case was remanded to the District Court for "plenary review" of the decision.<sup>67</sup> Lower courts have subsequently interpreted *Overton Park* as encouraging intensive review of the rulemaking record.<sup>68</sup>

*Portland Cement Association v. Ruckelshaus*<sup>69</sup> exemplifies the judicial expansion of procedural requirements for informal rulemaking. *Portland Cement* involved a rulemaking to determine the feasibility of particulate emission control standards proposed by the Environmental Protection Agency (EPA). Crucial test data, on which the EPA relied, were not placed in the record until late in the public comment period. Moreover, the EPA did not formally respond in the record to an industry study that had challenged the reliability of the data on which the ultimate standard was based.<sup>70</sup> In remanding to allow further comment, the D.C. Circuit established the broad principle that where information "material to" the basis of a proposed rule is not disclosed to the public at the time the rule is issued, it must be disclosed "as it becomes available, and the public must be given a formal opportunity to comment."<sup>71</sup> The court imposed upon the EPA a further duty to respond to all public comments that cast significant doubt upon the validity of the empirical evidence on which the agency based its rule.<sup>72</sup> An agency, the court suggested, has "a continuing duty to take a 'hard look' at the problems involved in its regulatory task . . . . [T]hat includes an obligation to comment on matters identified as potentially significant by the court order remanding for further presentation."<sup>73</sup>

The broader scope of substantive review and the imposition of procedural standards have been criticized as unduly burdening the informal

66. *Id.* at 416.

67. *Id.* at 420.

68. See Pedersen, *supra* note 1, at 48-49. Section 553 of the APA, however, unlike the applicable statute in *Overton Park*, does not require specific findings or a full administrative record. See Verkuil, *supra* note 50, at 212.

69. 486 F.2d 375 (D.C. Cir. 1975).

70. *Id.* at 392.

71. *Id.* at 394.

72. *Id.* at 393.

73. *Id.* at 394. Other decisions have required expanded adversary procedures in informal rulemakings. See, e.g., *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 649 (D.C. Cir. 1973) (remand ordering the agency to provide for public challenge to the methodology adopted by the agency, including "reasonable cross-examination as to new lines of testimony"); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1258-59 (D.C. Cir. 1973) (remand ordering the agency to "provide some mechanism for interested parties to introduce adverse evidence and criticize evidence introduced by others") (italics in original).

rulemaking process with adjudicatory restraints.<sup>74</sup> On balance, however, the limited intrusions sanctioned by the courts appear justified by the importance of the issues raised in modern rulemaking and by the difficulties that attend judicial review of such proceedings. Review of informal rulemaking generally serves two important purposes. First, it guarantees agency fidelity to the substantive standards established by Congress.<sup>75</sup> Second, it helps to ensure that the agency remains directly accountable to Congress<sup>76</sup> and to its "constituency" for its actions, by airing its decisions in a neutral public forum. Judicial review forces the agency to justify its actions, expose its reasoning, and consider, in good faith, all the relevant information and contending views before it.<sup>77</sup>

The performance of these reviewing functions in the context of many modern rulemaking proceedings is extremely important. The issues raised in informal rulemakings increasingly touch vital and politically sensitive social and economic interests.<sup>78</sup> Yet agencies are usually insulated from the direct political pressure that can be brought to bear on Congress. Moreover, agencies are often insulated from congressional pressure. They are rarely brought before Congress and forced to justify the substantive policies they have chosen, and congressional budgetary power is seldom used as a mechanism to control agency decision-making.<sup>79</sup> Where an agency is not subject to direct political control or to congressional scrutiny, review by the courts may be the only effective means of control over agency discretion. Where such an agency is deciding important questions of policy, review by courts is even more crucial.

The nature of many informal rulemakings, however, makes judicial review difficult. Agencies often act under broad delegations of

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74. See, e.g., *FitzGerald, Mobil Oil Corp. v. Federal Power Commission and the Flexibility of the Administrative Procedure Act*, 26 AD. L. REV. 287, at 296, 299 (1974). The effectiveness of these measures has also been questioned. See Williams, "Hybrid Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401 (1975).

75. See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971); I K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.03 (1958).

76. See Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1376 (1977).

77. *Id.*; Wright, *supra* note 2, at 379-81.

78. See, e.g., *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597-98 (D.C. Cir. 1971) (Bazelon, C.J.): "[C]ourts are increasingly asked to review administrative action that touches on fundamental personal interests in life, health, and liberty. These interests have always had a special claim to judicial protection, in comparison with economic interests at stake in a rulemaking or licensing proceeding."

79. See Letter of Theodore J. Lowi to the Editor, *Wall St. J.*, Nov. 21, 1977, at 23; Bruff & Gellhorn, *supra* note 76, at 1437.

congressional power that leave reviewing courts with little legislative guidance.<sup>80</sup> In the absence of such guidance, courts cannot meaningfully ensure agency fidelity to congressional intent. Judicial review can still guarantee that the agency remains accountable for its actions to the public. The only practical means, however, to preserve such accountability is to impose judicially a requirement that the agency be thorough and candid in handling empirical information submitted for consideration during the rulemaking process. The procedural requirements sanctioned by recent cases can be justified as efforts to impose such a standard.<sup>81</sup>

### III

#### EX PARTE CONTACTS: DEVELOPING AN APPROPRIATE LIMITATION

None of the recent decisions deals directly with the problem of ex parte contacts in informal rulemakings. It is apparent, however, that extensive agency reliance upon information generated by ex parte communications may raise the precise concerns expressed in those cases. First, ex parte contacts may lead to the introduction of evidence that could decisively influence the agency's ultimate decision. If that evidence is not on the record, a reviewing court may be unable to perform the "searching and careful" inquiry into the "full record" required by *Overton Park*.<sup>82</sup> Second, the use of ex parte contacts to introduce important evidence may eliminate the opportunity for other interested parties to respond that *Portland Cement*<sup>83</sup> indicates may be essential to effective judicial review. Unless the logic of the recent cases is to be rejected altogether, these considerations strongly suggest that some judicial regulation of ex parte communications is both necessary and appropriate in all informal rulemaking. The permissive approach of *Action for Children's Television* therefore appears unsound.

It is doubtful, however, that the decisions authorizing greater scrutiny of informal rulemaking should be read to support the stringent

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80. See K. DAVIS, *supra* note 76, §§ 2.04, 2.05.

81. See, e.g., *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238 (D.C. Cir. 1973); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973). As other commentators have noted, the underlying theory of these cases is that

[i]n any case where a rulemaking proceeding involves a contested issue of fact which has a vital bearing on the reasonableness of the rule and which is readily susceptible to taking of evidence, an agency may well abuse its discretion if it fails to conduct an evidentiary hearing even in an area where no statutory right to an adjudication is involved.

Claggett, *Informal Action—Adjudication—Rulemaking: Some Recent Developments in Administrative Law*, 1971 DUKE L.J. 51, 78. See also Wright, *supra* note 2, at 384.

82. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971).

83. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 402 (D.C. Cir. 1973).

limitation on ex parte contacts proposed by the *Home Box Office* panel. Throughout the recent development of rulemaking review, courts have sought to preserve, wherever possible, the broad procedural flexibility of the statutory scheme, by limiting their modification of agency procedures to instances where the reliability of the ultimate decision was in question.<sup>84</sup> Similarly, although the courts have been concerned with ensuring that the substance of the agency decision is fully debated before the agency and adequately justified on the record, they have avoided involvement with the off-the-record process by which the agency reaches its final decision.<sup>85</sup>

Under the *Home Box Office* rule, once a notice of proposed rulemaking is issued, an agency would be required to choose between a total ban on ex parte contacts and full disclosure in the rulemaking record. To ban all such contacts would severely limit the agency's capacity to explore regulatory problems and solutions in informal settings. A complete prohibition might also limit the freedom of the agency to deal with ongoing programs related to the subject matter of the rulemaking. Special efforts would be required to assure that the administrators involved in the rulemaking were insulated from day-to-day policy discussions. Although such compartmentalization might be possible at lower levels of agency staffs, it is highly unlikely that it could effectively be enforced at higher levels, since there are very few higher level decisionmakers who are not also involved in day-to-day policy discussions.<sup>86</sup>

More probably, agencies following the *Home Box Office* rule would choose instead to place a summary of all informal communications in the record. This procedure would, by exposing such contacts,

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84. See, e.g., *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973) (reliability of methodology); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 630-31 (D.C. Cir. 1973) (reliability of methodology).

85. See, e.g., *Industrial Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974) (McGowan, J.):

With respect to some of those [factual] questions, the evidence was such that the task consisted of evaluating the data and drawing conclusions from it. The court can review that data in the record. . . . But some of the questions involved in the promulgation of these standards . . . by their nature require basic policy determinations rather than resolution of factual controversies. Judicial review of inherently legislative decisions of this sort is obviously an undertaking of different dimensions.

*Id.* at 474-75. See also *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 336 (D.C. Cir. 1968); Wright, *supra* note 2, at 391-93.

86. Suppose, for example, that the FCC issued a notice of proposed rulemaking that dealt with the administration of the fairness doctrine, a statutory rule that requires broadcasters to present contrasting viewpoints to controversial issues that are aired. Under the restriction imposed by *Home Box Office*, no party could then contact an agency staff member to discuss the proceeding while it was underway. The fairness doctrine, however, is a regulatory policy that the FCC oversees on a daily basis. If the teaching of *Home Box Office* is to be effective, all discussions of fairness doctrine cases

increase the fairness of the rulemaking. But the costs would be substantial. First, requiring that all ex parte contacts be reported would place a tremendous administrative burden on the staff responsible for the rulemaking, and could tend to fill the record with information of doubtful interest and utility to interested parties or to a reviewing court.<sup>87</sup> The resulting cost and complexity would run directly counter to section 553,<sup>88</sup> and to express judicial statements aimed at preserving the flexibility of the informal rulemaking process.<sup>89</sup> More important, the exposure of the inner workings of the agency's decisionmaking process to the public and the courts could stifle the open exchange of views that has traditionally been regarded as a strength of the informal rulemaking model.

In rejecting the values of efficiency, flexibility, and political responsiveness, the *Home Box Office* panel has acted in a manner clearly contrary to the policies that underlie section 553. In effect, the decision "burn[s] the house to roast the pig."<sup>90</sup> The conception of the informal rulemaking process expressed in recent cases suggests, however, that some limits to ex parte contacts are necessary. Extension of the rationale of *Portland Cement* to informal rulemakings involving ex parte communications provides an appropriate standard. Ex parte contacts should generally be permitted in informal proceedings. But if an off-the-record communication involves empirical information or proposals "material to the subject at hand"<sup>91</sup> that have not already been presented during the public proceedings, then the agency should be required to incorporate the substance of the communication into the rulemaking record, and provide an opportunity for interested parties to respond.

This standard would promote the integrity of the informal rulemaking process. It would ensure that all material information before an agency, whether presented in public or private meetings, is made available for public criticism and comment. Each participant in the rulemaking proceeding would thus be guaranteed equal access to infor-

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pending before the Commission would have to be insulated from ex parte contacts in order to insure that the rulemaking proceeding remains "untainted." Since as a practical matter major rulemaking decisions are in the same hands as important day-to-day matters, effective insulation would be difficult.

87. See Pedersen, *supra* note 1, at 80-81.

88. See Wright, *supra* note 2, at 376, 381-82.

89. See, e.g., *American Airlines, Inc. v. CAB*, 359 F.2d 624, 629 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966): "[R]ulemaking is a vital part of the administrative process, particularly adapted to and needful for the sound evaluation of policy . . . [and] is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making."

90. *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (Frankfurter, J.).

91. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973).

mation before the agency decisionmakers. Judicial review would be facilitated as well. Courts would be presented with administrative records that included all information necessary for the effective performance of the reviewing function. They would not be forced to speculate as to whether an agency reached its conclusions by ignoring the public notice and comment provisions of section 553 in favor of presentations made after the rulemaking record had closed.

Equally important, the proposed standard would not impair agency flexibility. Unlike the rule of *Home Box Office*, this rule would preserve the agency's freedom to discuss issues already raised in the record with interested parties after public comments have been filed.<sup>92</sup> New interpretations of data or criticisms of proposals already on the record would be permitted in off-the-record meetings with agency officials. Thus, the avowedly political concerns to which an agency must be responsive<sup>93</sup> could still be adequately communicated.

Implementation of the proposed rule would flow naturally from the enforcement of the guidelines set forth in *Overton Park* and *Portland Cement*. It would ensure that reviewing courts are confronted with the "full record" necessary for the "searching and careful" review required by *Overton Park*, and that interested parties are given the opportunity, required by *Portland Cement*, to comment on all new information. The sanction for failure to place new matter in the record would be a remand from the reviewing court. There would thus be a strong incentive for both the agency and the participants to comply. Moreover, opposing parties would be in a position to police agency avoidance through the use of discovery under agency rules and the Freedom of Information Act.<sup>94</sup>

### CONCLUSION

The informal rulemaking process is carefully designed to be efficient and politically responsive. Respect for the legislature's decision to place those values ahead of strict procedural fairness strongly counsels against adoption of the broad ban on ex parte communications

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92. In the wake of the *Home Box Office* decision, the FTC has issued regulations prohibiting ex parte contacts during informal rulemaking proceedings conducted by the agency. See BROADCASTING, Sept. 5, 1977, p. 40.

93. See Scalia, *Two Wrongs Make a Right*, AEI J. ON GOV'T AND SOC., July/August 1977, p. 40.

94. For a detailed treatment of agency discovery under the Freedom of Information Act, see Pedersen, *supra* note 1, at 82-88; see also Verkuil, *supra* note 50, at 225 n.183. Even if some contacts would escape detection through a discovery system, this risk would not be obviated under a rule barring all ex parte contracts.



proposed in *Home Box Office*. If ex parte contacts are used to introduce empirical information or proposals not already on the record, however, they may severely hamper effective judicial review, reduce the political accountability of the agency, and diminish the incentive for public participation in the informal rulemaking process. Protection of those interests requires that the substance of all communications containing such matter be fully reported on the public rulemaking record.

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