Due Process and Ex Parte Contacts in Informal Rulemaking

Follow this and additional works at: http://digitalcommons.law.yale.edu/ylj

Recommended Citation
Available at: http://digitalcommons.law.yale.edu/ylj/vol89/iss1/7

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Due Process and Ex Parte Contacts in Informal Rulemaking

Ex parte communications—off-the-record contacts between administrative agencies and parties to agency proceedings—are an important element of the administrative process. Permitting ex parte contacts in certain agency proceedings raises questions of fairness, however, because of the scope it allows for inaccuracy in agency fact-finding, unequal access to agency decisionmakers, and improper political influence. Recognizing these problems, Congress amended the Administrative Procedure Act (APA) in 1976 to prohibit ex parte communications in formal rulemaking proceedings and in agency adjudications.

The permissibility of ex parte contacts in informal rulemaking is an unsettled question, however. The issue has divided the District of Columbia Circuit, and agency regulations still vary widely. This

1. The Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, 1205, 3105, 3344, 5362, 7521 (1976) [hereinafter cited by section number only], defines an "ex parte communication" as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." § 551(14). The terms "ex parte communication" and "ex parte contact" will be used interchangeably in this Note.

2. See, e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1978) (informal contacts the "bread and butter" of administration); J. Freedman, Crisis and Legitimacy 207 (1978) (over 80% of agency actions taken without formal proceedings).

3. See, e.g., Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959), cert. denied, 376 U.S. 915 (1964) (no scrutiny by other parties of factual accuracy of important ex parte contact).

4. See, e.g., Action for Children's Television v. FCC, 564 F.2d 458, 464 (D.C. Cir. 1977) (public interest group excluded from critical meeting between industry representatives and agency decisionmakers).


Ex parte contacts long have been prohibited in the course of agency adjudications. See, e.g., Pillsbury Co. v. FTC, 354 F.2d 952, 964 (5th Cir. 1966) (ex parte contact in adjudicatory proceeding violates procedural due process); Massachusetts Bay Telecasters, Inc. v. FCC, 261 F.2d 55, 66-67 (D.C. Cir. 1958) (secret attempts to influence FCC vitiate licensing proceeding).


8. Agency policies pertaining to ex parte contacts between interested parties and agency decisionmakers fall into four categories: 1) complete prohibition, see, e.g., 16
Note argues that due process requires stringent controls on ex parte communications in informal rulemaking. The Note begins by arguing that procedural due process should apply to informal rulemaking in order to protect significant individual interests otherwise unprotected by effective safeguards. The Note then examines what specific procedures are required by due process, and concludes that ex parte contacts during the comment period should be banned, and any subsequent contacts should be disclosed in the public record.9

I. Ex Parte Contacts and the APA

The APA provides two procedures by which agencies can promulgate "rules":10 formal rulemaking and informal rulemaking. Agencies use formal rulemaking, governed by 5 U.S.C. §§ 556, 557 (1976), when Congress requires that rules be made "on the record after opportunity for an agency hearing."11 Formal rulemaking proceedings ordinarily involve an oral hearing, with cross-examination and rebuttal

C.F.R. § 1.18(c) (1979) (Federal Trade Commission); 2) partial prohibition, with specified exceptions, see, e.g., 14 C.F.R. § 300.2 (1979) (Civil Aeronautics Board); 3) comprehensive disclosure, see, e.g., 16 C.F.R. §§ 1012.1-8 (1979) (Consumer Product Safety Commission); 4) no restrictions, see, e.g., 17 C.F.R. §§ 200.110-114 (1978) (Securities and Exchange Commission). See generally Hager, Agencies Struggle to Define Ex-Parte Rules, Legal Times, July 24, 1978, at 1, col. 2; Ringel, "Ex Parte Contact Becomes Hot Issue, Legal Times, Jan. 29, 1978, at 1, col. 1.

9. This Note considers only ex parte contacts between federal agency decisionmakers and outside parties. Different considerations are involved in deciding whether such contacts should be permitted between agency decisionmakers and agency staff, see Hercules, Inc. v. EPA, 598 F.2d 91, 124-28 (D.C. Cir. 1978) (dictum), or between agency decisionmakers and other Executive branch officials, see Natural Resources Defense Council, Inc. v. Schultz, No. 79-0153 (D.D.C. Jan. 26, 1979). For discussions of these questions, see Bruff, Presidential Power and Administrative Rulemaking, 88 YALE L.J. 451, 500-06 (1979); Peck, Regulation and Control of Ex Parte Communications with Administrative Agencies, 76 HARV. L. REV. 233, 256-62 (1962).

10. A rule is "the whole or a 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." 5 U.S.C. § 551(4) (1976). Although authorities generally agree that the phrase "general or particular applicability" should not be construed as sanctioning adjudication through rulemaking, see, e.g., K. Davis, ADMINISTRATIVE LAW TEXT 125 (3d ed. 1972), courts have permitted agencies to promulgate rules which, though general in form, affect only one or a few parties. See note 63 infra.

11. Section 553(c). Interpretation of this APA provision has proven difficult. The Supreme Court has stated that statutory language besides the phrase "on the record" could trigger formal rulemaking requirements. United States v. Florida E. Coast Ry., 410 U.S. 224, 238 (1973). However, in the view of many courts, see, e.g., Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1250 (D.C. Cir. 1973), and commentators, see, e.g., Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1306-07 (1975), other Supreme Court decisions effectively require Congress to specify formal rulemaking in those terms.
by the parties.\textsuperscript{16} In contrast, informal rulemaking proceedings, governed by section 553, are relatively simple: the agency must publish notice of the proposed rulemaking;\textsuperscript{13} interested parties must be given the opportunity to submit written comments;\textsuperscript{14} and the final rule, when published, must include a brief statement of reasons.\textsuperscript{15}

Congress usually specifies the decisionmaking procedure that an agency is to follow in a given area.\textsuperscript{16} In the absence of a congressional directive, however, an agency seeking to promulgate rules need only follow section 553 procedures.\textsuperscript{17} Informal rulemaking is employed for a vast range of agency decisionmaking, from the very

\begin{enumerate}
\item Section 556(d). The agency may forgo an oral hearing and require that all or part of the evidence be submitted in written form "when a party will not be prejudiced thereby." \textit{Id.}
\item Section 553(b)(3) (notice of proposed rulemaking must be published in \textit{Federal Register} and include "terms or substance of the proposed rule or a description of the subjects and issues involved").
\item Section 553(c).
\item \textit{Id.}
\item See \textit{Note}, \textit{Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard}, 84 \textit{Yale L.J.} 1750, 1751 n.5 (1975). There are two modes of agency decisionmaking besides formal and informal rulemaking: adjudication, and informal agency action, a residual category of decisionmaking not covered by the APA. \textit{Id.}
\item It is often difficult to determine whether or not an agency proceeding is "informal rulemaking." \textit{See}, e.g., Appalachian Power Co. v. EPA, 477 F.2d 495, 500 (4th Cir. 1973) ("idle, and fruitless, to boggle over the appropriate classification"). This Note assumes that agencies are engaged in informal rulemaking if the rulemaking is not required by statute to be "on the record" and Congress has not required special procedures beyond those set out in § 553.
\item In several specified areas, rulemaking is exempted from § 553 requirements: military or foreign policy functions; agency management matters; and matters pertaining to public property, loans, grants, benefits, and contracts. § 555(a). In addition, interpretative rules, general policy statements, and rules of agency procedure are exempted. § 553(b)(A).
\item The agency can also forgo § 553 procedures when it finds for good cause that the procedure is "impracticable, unnecessary, or contrary to the public interest." § 553(b)(B).
\item Beyond these exceptions, exemption from § 553 requirements is allowed only if there is evidence that Congress intended the exemption. \textit{See}, e.g., Environmental Defense Fund, Inc. v. Blum, 458 F. Supp. 650, 656 (D.D.C. 1978).
\item Once the agency has met the minimal requirements set out in § 553, and procedural due process has been satisfied, the agency can in its discretion provide additional procedures. The courts, however, are not permitted to mandate them. \textit{See} Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 542-47 (1978); \textit{cf.} Wright, \textit{The Courts and the Rulemaking Process: The Limits of Judicial Review}, 59 \textit{Cornell L. Rev.} 375, 382-84 (1974) (criticizing previous decisions mandating procedural requirements).
\item When Congress has not specified the mode of agency decisionmaking, agencies can choose whether to use adjudication or rulemaking to formulate general policy. \textit{See}, e.g., NLRB v. Bell Aerospace Div. of Textron, Inc., 416 U.S. 267, 294 (1974) (choice between rulemaking and adjudication is within NLRB's discretion); Robinson, \textit{The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform}, 118 U. Pa. L. Rev. 485, 508 (1970) (judicial limits on agency discretion "almost useless" as to use of rulemaking, "virtually nonexistent" as to use of adjudication).
\end{enumerate}
Ex Parte Contacts

specific, as in the allocation of a single television frequency between two geographic areas, to the more general, as in the setting of emission standards for an industry.

In 1976, Congress amended the APA to prohibit ex parte communications in formal rulemaking proceedings and in agency adjudications, and to require disclosure of prohibited contacts that might occur despite the ban. Congress failed to ban such contacts in informal rulemaking, though it has indicated deep concern over the fairness of rulemaking under section 553. As in formal rule-


The 1976 amendment prohibits interested parties and agency decisionmakers from initiating ex parte communications relevant to the merits. § 557(d)(1)(A)-(B). The prohibition takes effect at such time as the agency designates, but no later than when notice of the proposed rulemaking issues. If an ex parte communication is made prior to, but in anticipation of, notice, the prohibition is deemed to have taken effect when the initiating party learned of the proposed rulemaking. § 557(d)(1)(E).

21. Section 557(d). The agency employee involved in the prohibited contact is required to place in the public file a memorandum setting out the substance of the communication and the response given, and copies of any written communications and responses. § 557(d)(1)(C). Upon receipt of a communication "knowingly made or knowingly caused to be made" in violation of the prohibition, the agency or the administrative law judge may require the party to show why his claim or his interest in the proceeding should not be "dismissed, denied, disregarded, or otherwise adversely affected." § 557(d)(1)(D).


Although the Administration's administrative reform bill currently before Congress, S.755, does not address the problem of ex parte contacts in informal rulemaking, the bill introduced by the chairman of the Judiciary Committee, Senator Kennedy, does. See S.1291, 96th Cong., 1st Sess., 125 Cong. Rec. S7128 (daily ed. June 6, 1979). The bill would require agency decisionmakers to make a record of all communications initiated by outside parties after notice of proposed rulemaking has been issued with respect to a rule that has an annual economic impact of $100 million or more. 125 Cong. Rec. S7129 (daily ed. June 6, 1979).

23. Most statutes passed by Congress between 1962 and 1972 that authorized agency rulemaking required additional procedures beyond the § 553 requirements. See Hamilton, Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking, 60 Calif. L. Rev. 1276, 1314-15 (1972). This trend toward "hybrid rulemaking" reflects congressional dissatisfaction with the fairness
making, however, permitting ex parte contacts in informal rulemaking involves severe costs to fairness and accuracy.

A simple hypothetical may illustrate this point. Suppose that an agency gives notice of proposed rulemaking to regulate television advertising. Among the interested parties are the broadcasters and a public interest group. Both groups submit written comments during the public comment period. After the close of the comment period, however, the broadcasters send the agency new data that supports their position. Shortly thereafter, they have a closed-door meeting with agency decisionmakers, after which key senators privately contact the agency and threaten to cut the agency's appropriations unless the broadcasters' position is adopted in the agency's new rule. The public interest group, unaware of the broadcasters' contacts with the agency, neither seeks nor is offered access to the decisionmakers after the public comment period. Permitting ex parte contacts in this proceeding has clear disadvantages. First, the accuracy of the fact-finding process may suffer in that the agency has not had the benefit of other parties' scrutiny of the arguments and the data submitted by the broadcasters after the close of the comment period. Second, the fairness of the proceeding is compromised because the broadcasters were given a special hearing not accorded the other parties. Finally, the secret political intervention may interfere with the agency's ability to make a reasoned decision based on the statutory criteria.

In 1977, the Court of Appeals for the District of Columbia Circuit dramatically revised the law on the ex parte issue. In an earlier decision, the court had held that "basic fairness" required prohibition of ex parte communications in informal rulemaking proceedings involving "resolution of conflicting private claims to a valuable privilege." The court extended that ruling in Home Box Office,

of § 553 procedures. See, e.g., Hearings on APA Amendments of 1976, before the Subcomm. on Administrative Practice & Procedure of the Senate Comm. on the Judiciary, 94th Cong., 2d Session 180 (1976) (testimony of Federal Bar Association representative) (additional procedures imposed because Congress regards § 553 inadequate to protect public interest); 119 Cong. Rec. 40,429 (1973) (Sen. Mathias) (amendment giving parties right of cross-examination in certain FTC rulemaking proceedings characterized as "due process amendment," "to assure a fair . . . consideration" of issues).


25. This hypothetical draws on two recent cases, Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977), and Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1978).

Ex Parte Contacts

In *Ex Parte Contacts*, Inc. v. FCC, holding that ex parte communications between interested parties and agency decisionmakers were impermissible in all informal rulemaking proceedings. One important rationale for the holding was “the inconsistency of secrecy with fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits.”

The *Home Box Office* rule subsequently was criticized by another panel of the District of Columbia Circuit in *Action for Children's Television v. FCC*. The panel concluded that permitting ex parte contacts in certain section 553 proceedings did not raise “serious questions of fairness,” and declined to apply the *Home Box Office* prohibition. The panel did not, however, overrule *Home Box Office*, nor have subsequent cases.

This line of cases recognized the due process implications of ex parte communications in informal rulemaking. Yet none of the cases applies a systematic due process analysis. Under such an analysis, a

---

28. Id. at 57. The court framed a general rule: Once a notice of proposed rulemaking has been issued, 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 discuss matters relating to the disposition of a [rulemaking proceeding] with any interested private party, or an attorney or agent for such party, prior to the [agency's] decision.” *Id.* at 57. The court quoted the following language from Exec. Order No. 11,920, § 4, 3 C.F.R. 121, 123 (1977) (prohibiting ex parte contacts with White House staff in connection with Presidential approval of international air route allocation). The court held that communications received prior to issue of the notice of rulemaking that are relevant to the merits of the proceeding need not be reported unless they are the basis for subsequent agency action. *Id.* Any ex parte communications received after the notice has been issued must be summarized in writing and placed in the public record for comment by other interested parties. *Id.*
29. *Id.* at 56.
31. *Id.* at 477.
32. *Id.* at 474. The panel held only that the prohibition should not be applied retroactively since it “constitutes a clear departure from established law.” *Id.*
33. *See*, e.g., United States Lines, Inc. v. Federal Maritime Comm'n, 584 F.2d 519 (D.C. Cir. 1978) (relying on *Home Box Office* as basis for prohibiting ex parte contacts in agency proceeding outside APA); National Small Shipments Traffic Conf., Inc. v. ICC, 590 F.2d 345 (D.C. Cir. 1978) (prohibiting ex parte contacts in informal rulemaking conducted pursuant to statutory hearing requirement).
34. Both *Home Box Office*, 567 F.2d at 56-57, and *Action for Children's Television*, 564 F.2d at 474-77, analyze the due process issue in terms of the rule of Sangamon Valley Television Corp. v. United States, 289 F.2d 221, 224 (D.C. Cir. 1961), cert. denied, 376 U.S. 915 (1964). Although the panel in *Action for Children's Television* does briefly discuss balancing of interests, it offers no explanation for its conclusion that the balance should tip against the prohibition announced in *Home Box Office*. See 564 F.2d at 477. In United States Lines, Inc. v. Federal Maritime Comm'n, 584 F.2d 519 (D.C. Cir. 1978), the court prohibited ex parte contacts on the ground that the public has a right “to participate meaningfully in the decisionmaking process.” *Id.* at 540. While there are compelling reasons for recognizing such a right, *see*, e.g., L. Tribe, *American Consti-
court must begin by determining whether due process applies to informal rulemaking. If due process applies, the court then must determine whether ex parte contacts are consistent with the requirements of due process. Such an analysis suggests that ex parte contacts in informal rulemaking should be severely restricted.

II. Procedural Due Process and Informal Rulemaking

Over the past decade, the Supreme Court has proceeded case-by-case in determining whether due process applies to various functions of administrative agencies, and in determining the specific process required. The due process analysis that has emerged should be the point of departure for any examination of the permissibility of ex parte contacts in informal rulemaking.

A. Two Approaches to Procedural Due Process

The Supreme Court has adopted two apparently different approaches to due process in the agency setting, without clarifying the relationship between the two. The approach used most frequently by the Court is the two-step analysis of Goldberg v. Kelly. The first step under the Goldberg analysis is to determine whether process is due in agency decisionmaking, according to whether liberty or property interests are involved. Once it is established that process is due, the next step is to balance the interests of the individual against the interests of the government in order to determine whether pro-
Ex Parte Contacts

procedures currently in use afford the individual's interests adequate protection.39

In the rulemaking context, however, the Court has taken a different approach. The leading case, United States v. Florida East Coast Railway,40 addressed the question whether an agency's use of section 553 procedures in setting "incentive charges" satisfied due process.41 The Court judged the agency function to be "legislative" rather than "adjudicative" in nature,42 and held that consequently due process did not require an oral hearing.43

Goldberg and Florida East Coast Railway apply two different approaches to the threshold question whether process is due.44 Since the Court failed to explain why it applied a different threshold test

---

39. 397 U.S. at 263-66. In Goldberg, the Court held that the absence of an evidentiary hearing prior to termination of welfare benefits exposed the recipient to undue risk. Id. Under the balancing test, existing procedures are generally used as the standard of comparison. See, e.g., Ingraham v. Wright, 430 U.S. 651, 672 (1977) (available common law remedies adequately protect student's liberty interests implicated in corporal punishment); Goss v. Lopez, 419 U.S. 565, 581-83 (1975) (existing procedures inadequate to protect liberty and property interests of suspended students).


41. 410 U.S. at 238. The case arose under the Interstate Commerce Act, 49 U.S.C. § 1(14)(a) (1970), which provides, "The Commission may, after hearing, . . . establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad . . . including the compensation to be paid . . . ." Before reaching the constitutional issue, the Court concluded that the statutory language did not mandate formal rulemaking procedures. Id.

42. 410 U.S. at 245-46. The Court described the legislative-adjudicative dichotomy as "a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." Id. at 245. Many commentators have noted the difficulties with this distinction. See, e.g., Friendly, supra note 11, at 1309-10; Robinson, supra note 17, at 503-04; Nathanson, Book Review, 70 YALE L.J. 1210, 1211-12 (1961).

43. 410 U.S. at 245. The Court relied on Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (Holmes, J.), for the proposition that due process does not require an oral hearing in agency rulemaking of a legislative character. In Bi-Metallic, a taxpayer argued that due process required a state agency to hold an oral hearing before increasing uniformly the assessment of all taxable property in Denver. The Court held there was no constitutional right to a hearing because "[w]here a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption." Id. at 445.

The Court had previously held, in Londoner v. City of Denver, 210 U.S. 373 (1908), that due process required a city council to hold an oral hearing before assessing shares of the cost of local improvements to property-owners on the basis of relative benefit. In Bi-Metallic, the Court distinguished Londoner on the ground that the assessment challenged in the earlier case concerned "[a] relatively small number of persons . . . exceptionally affected, in each case upon individual grounds." 239 U.S. at 446.

44. The Court fails to make clear in Florida East Coast Railway whether the legislative-adjudicative classification test is used to determine whether due process requires an oral hearing, or merely whether due process applies. The latter reading is adopted for the analysis in this Note.
to rulemaking than to other agency functions, it is important to explore the underlying rationale for the threshold inquiry in order to decide which test to apply to informal rulemaking. The function of the threshold inquiry should be to answer two questions: whether there are individual interests at stake that warrant protection, and whether procedure is an appropriate means of protecting them. Of the two threshold tests, that of Florida East Coast Railway better serves this function. The Florida East Coast Railway approach involves classifying agency action as legislative or adjudicative, which requires examining both the individual interests at stake and the non-procedural safeguards protecting them. The first step of the Goldberg analysis, the alternative threshold test, considers only the nature of the relevant individual interests. Thus the Florida East Coast Railway test implicitly addresses both of the threshold issues, the importance of the interests and the need for procedural protection, whereas Goldberg addresses only the former.

Although Florida East Coast Railway uses the preferred threshold test, the decision gives no guidance in determining the procedures required once due process is found to apply. The second step of the Goldberg analysis, balancing of interests, should be used in making that determination. Balancing interests is appropriate because it allows the procedural requirements to be tailored to the particular circumstances.

B. The Threshold Test as Applied to Informal Rulemaking

The essential feature of the Florida East Coast Railway test is the classification of an agency action as legislative or adjudicative in order to determine whether due process applies. Under the test, due process does not apply to legislative agency actions. This approach is grounded on the premise that procedural due process is required in adjudication, but not in legislation. Although laws must meet a minimum standard of rationality in order to satisfy the requirements of substantive due process, the Supreme Court has refused to hold

45. See pp. 203-04 infra (analysis of legislation-adjudication distinction).
that the Constitution requires any procedural "due process of law-making." In adjudication, on the other hand, judges are required to apply rules and principles relevant to resolution of the dispute at hand, and must conform to codified procedural norms.

Before the Florida East Coast Railway test can be applied to informal rulemaking, it is necessary to consider the reasons why procedural due process applies to the judicial process but not to the legislative process.

1. Due Process and the Adjudication-Legislation Distinction

According to the traditional paradigms, courts resolve individual conflicts between particularized interests, whereas legislatures formulate policies of general applicability. No simple characterization of the individual interests at stake in the legislative and judicial processes as "generalized" or "particularized" is possible, however. For example, class suits implicate the common interests of groups, whereas a private bill typically affects only one individual directly. There is, however, one critical difference between the interests at stake in legislation and adjudication: an individual can be singled out for a penalty in adjudication, a possibility foreclosed in the legislative process.

Differences between the legislative and judicial processes with regard to the extent of political control and the nature of the fact-finding reflect the different means by which individual interests are protected. Popular elections provide a means of holding legislators


53. See U.S. Const. art. I, § 9, cl. 3; § 10, cl. 1 (prohibiting bills of attainder). The courts have construed this prohibition broadly with regard to penalization of individuals by the legislature. See, e.g., United States v. Brown, 381 U.S. 437, 447 (1965) (prohibition bars legislative punishment of specifically designated persons or groups); United States v. Lovett, 328 U.S. 303, 315 (1946) (prohibition bars legislative acts that inflict punishment without trial on ascertainable members of a group).
accountable and give politicians a strong incentive to respond to constituent demands.\textsuperscript{54} This check does not exist for federal judges, who are virtually assured of job security and undiminished salary.\textsuperscript{55} Freedom from political control is vital to the judiciary's effective performance of its constitutional function.\textsuperscript{56} In the absence of a direct political check, however, due process serves to restrain the judiciary.

Fact-finding in the legislative and judicial processes also differs markedly. In adjudication, facts must be found by the jury, or, in the absence of a jury, by the judge.\textsuperscript{57} There is, however, no fact-finding requirement for legislatures.\textsuperscript{58} Judicial fact-finding, unlike legislative fact-finding, has binding future effect.\textsuperscript{59} Due process is applied in adjudication to help ensure the accuracy of judicial determinations of fact.

2. \textit{Due Process and Informal Rulemaking}

Although informal rulemaking has elements in common with both legislation and adjudication, it should be classified as adjudicative for purposes of due process analysis. The individual interests at stake and the inadequacy of "external" safeguards dictate that due process apply to informal rulemaking.

Participants in informal rulemaking proceedings have both economic and noneconomic interests at stake.\textsuperscript{60} Rulemaking of general


\textsuperscript{55} U.S. Const. art. III, § 1.

\textsuperscript{56} See, e.g., A. Bickel, The Least Dangerous Branch 197-98 (1962) (system includes mechanisms for insulating judges from politics); The Federalist No. 78 (A. Hamilton), at 465-69 (C. Rossiter ed. 1961) (tenure during good behavior essential to judiciary's independence, to allow it to withstand "legislative encroachments").

\textsuperscript{57} Fed. R. Civ. P. 52(a).

\textsuperscript{58} See Hazard, Representation in Rulemaking, in Law and the American Future 97 (M. Schwartz ed. 1976). The kind of facts that a legislature finds differs from the kind of facts that a court finds; "legislative facts" are typically general and forward-looking, and cannot be conclusively determined. See K. Davis, supra note 10, at §§ 7.03, 15.03. Legislative fact-finding is often perfunctory. See M. Jewell & S. Patterson, The Legislative Process in the United States 417 (1977).


\textsuperscript{60} The fact that Congress has provided certain minimal procedures that agencies must observe in rulemaking suggests that these individual interests warrant procedural protection under the due process doctrine, though obviously it does not settle the question. Much informal rulemaking involves regulation of private economic activity, and such regulation traditionally has triggered the requirements of due process. See, e.g., Nebbia v. New York, 291 U.S. 502, 525-29 (1934). Even an applicant for a benefit has a property interest in the benefit if eligibility rules have been established. See Goldsmith v. Board of Tax Appeals, 270 U.S. 117, 123 (1926). Courts have invoked the due process doctrine in cases involving agency allocations, even though no property interest, narrowly
Ex Parte Contacts

applicability, like legislation, often confers benefits or penalties of an economic nature on a large class of parties. In addition to economic interests, participants have a dignity interest in the proceedings, which includes an interest in "equality of opportunity to be heard." Some rulemaking, though general in form, imposes burdens on one or a few unnamed parties, or deprives them of benefits previously conferred. As in an adjudication, the possibility exists that agency rulemaking will single out selected parties for severe economic losses.

The other point to be considered in deciding whether due process applies is the adequacy of the external, nonprocedural safeguards protecting individual interests. Political control over agency rulemaking is inadequate to protect those interests. Agency decisionmakers are appointed rather than elected, and thus there is no direct political recourse. Although agencies are subject to some measure of congressional and presidential control, such intervention is often cum-

defined, was involved. See Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959), cert. denied, 376 U.S. 915 (1964) (proceeding to allocate television frequency between geographic areas). This suggests that the applicability of the due process doctrine should not be made dependent on "assignment of meaning to the word 'property.'" United States v. Husband R. (Roach), 433 F.2d 1054, 1062 (5th Cir. 1971), cert. denied, 406 U.S. 935 (1972).


63. See, e.g., Hercules, Inc. v. EPA, 598 F.2d 91, 118 (D.C. Cir. 1979) (pollution standards directed at single domestic manufacturer of toxic substance); Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 1306-07 (10th Cir. 1973) (pollution standards directed at single unnamed company). The Supreme Court has not applied the prohibition against bills of attainder to agency rulemaking. See L. Tribe, supra note 34, at 499-500.

64. See Sinaiko, Due Process Rights of Participation in Administrative Rulemaking, 63 Calif. L. Rev. 886, 893 (1975). Political accountability is reduced further by merit selection of agency staff below the top bureaucratic level. Id.

65. See Comment, Ex Parte Contacts in Informal Rule Making, 27 Emory L.J. 293, 317 (1978) (recognizing absence of political recourse but classifying informal rulemaking "legislative").

66. The two major channels of congressional influence are the appropriations process and oversight hearings. See W. Cary, Politics and the Regulatory Agencies 30-45 (1967). Congress also can exercise control over rulemaking through its power to restructure agencies and alter the scope of their statutory authority. See W. Gellhorn & C. Byse, Administrative Law 109-27 (1974). In addition, the Senate must approve presidential appointments to the independent agencies and to certain Executive branch positions. U.S. Const. art. II, § 2, cl. 2.

67. The President appoints "purely executive officers" and members of the independent agencies, though his removal power is limited to the former. See Humphrey's
bersome and ineffective in safeguarding individual interests.68

Judicial review of informal rulemaking also fails to provide an adequate safeguard. Agencies make rules pursuant to statutes. The courts have done little, however, to ensure that Congress will provide clear operational guidelines for rulemaking.69 Thus agencies often make rules with little statutory guidance. The standard of judicial review for informal rulemaking70 is no stricter than the standard applied in review of legislation.71 Moreover, the Supreme Court recently moved toward more restrained judicial scrutiny of agency decisions.72

In the agency rulemaking process, as in the judicial process, no external checks adequately protect the individual interests at stake. Consequently, due process should apply to informal rulemaking.


68. See, e.g., Sinaiko, supra note 64, at 913; Williams, "Hybrid Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. Chi. L. Rev. 401, 405 (1975). The public generally becomes aware of an agency proceeding only when the final result is announced. See Sinaiko, supra note 64, at 895. On occasion, agencies have been forced to withdraw regulations as the result of political pressure. Such instances are rare, however, and have usually involved regulations affecting a large segment of the population. See Williams, supra.


70. See 5 U.S.C. § 706(2) (1976) (court shall hold unlawful any agency action, findings, or conclusions found to be "arbitrary" or "capricious"). Although the Supreme Court has not specifically defined the appropriate standard of review, it tacitly approved the Court of Appeals' use of the "arbitrary and capricious" standard in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 549 (1978).

In the past, there has been considerable uncertainty among commentators as to the appropriate standard of review for informal rulemaking. See, e.g., Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185, 212-14 (1974); Note, supra note 16, at 1756 (1975).

71. The "arbitrary and capricious" standard has been equated with the "rational basis" test applied to legislation. See, e.g., Ethyl Corp. v. EPA, 541 F.2d 1, 34 n.74 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976); Verkuil, supra note 70, at 206-07. But cf. Associated Indus. of N.Y. State, Inc. v. Department of Labor, 487 F.2d 342, 350 (2d Cir. 1973) (dictum) ("arbitrary and capricious" and "substantial evidence" standards are equivalent in practice).

Ex Parte Contacts

III. Ex Parte Contacts and the Requirements of Due Process

Once it is established that due process applies to informal rule-making, an interest-balancing test, derived from Goldberg v. Kelly, is appropriate for determining whether ex parte contacts are compatible with the requirements of due process.

A. Determining the Process Due

The Supreme Court's test for determining the process due in an agency action weighs the governmental interests in efficiency and economy against three countervailing factors: the magnitude of the private interest affected, the risk of erroneous deprivation of that interest, and the probable value of additional safeguards. The government's effectiveness and efficiency may be undercut by imposing additional procedural requirements. In order to avoid this result, the due process determination takes into account the government's interests in "conserving fiscal and administrative resources," and in maintaining flexibility to respond rapidly to changing circumstances.

Rather than evaluating agency procedures in isolation, the balancing approach considers alternative procedures, and assesses whether due process requires their adoption. In order to determine whether ex parte communications in informal rulemaking violate due process, it therefore is necessary to examine the alternatives to the policy of unrestricted contacts.

B. Restricting Ex Parte Contacts in Informal Rulemaking

Permitting ex parte communications in informal rulemaking proceedings benefits the agency because it allows easy access to information relevant to the proceeding. In the event that an agency dis-
covers that it needs information not submitted during the comment period, it can gather that information quickly from the parties.

Permitting unrestricted ex parte contacts involves three major costs: potential inaccuracy in agency fact-finding;79 possible unfairness in giving certain interested parties special access to decisionmakers;80 and the risk of improper political influence.81 These costs must be measured against the cost of restricting ex parte contacts. If the benefits of restriction outweigh the burden involved, then due process requires that contacts be restricted.82

There are two alternatives to permitting unrestricted ex parte contacts: complete prohibition83 and limited restriction. Both alternatives would force parties to state their positions fully during the public comment period. However, complete prohibition of contacts might chill discussions between the agency and parties with whom the agency must consult frequently on a wide range of matters.84 The deterrent effect of the prohibition might be greater than intended and could result in overreliance on agency staff.85

79. Public comment on submissions helps ensure a correct and full presentation of the facts. See, e.g., Nathanson, Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings, 30 Ad. L. Rev. 377, 398 (1978); Note, Ex Parte Contacts with the Federal Communications Commission, 73 Harv. L. Rev. 1178, 1183 (1960).

Nathanson contends, however, that factual arguments made in ex parte contacts are rarely of critical importance. Nathanson, supra, at 398. For a counterexample, see Sngamov-Valley Television Corp. v. United States, 269 F.2d 221, 224 (D. C. Cir. 1959), cert. denied, 187 U.S. 915 (1964) (factual argument in ex parte communication was decisive).

80. See, e.g., Action for Children’s Television v. FCC, 564 F.2d 458, 464 (D.C. Cir. 1977) (public interest group excluded from final closed-door session between FCC chairman and industry officials); Home Box Office, Inc. v. FCC, 567 F.2d 9, 53 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1978) (after close of comment period, agency staff met with broadcast interests 18 times but never met with public interest intervenors). The risk of unfairness is particularly troublesome in light of the widespread view that many agencies are captive to interests they regulate, see, e.g., R. NOLL, REFORMING REGULATION 41 (1971), and thus are vulnerable to ex parte pressures.


83. Ex parte contacts are almost always prohibited in judicial proceedings, to ensure that judges base findings of fact on adversary proceedings, and to insulate judges from external influence or pressure. See ABA Code of Judicial Conduct, Canon 3(A)(4) (1972). Even in judicial proceedings, however, ex parte communications are permitted under certain circumstances. See Fed. R. Civ. P. 65(b) (application for temporary restraining order). But cf. Carroll v. President & Comm’rs of Princess Anne, 393 U.S. 175, 181-83 (1968) (ex parte order invalid if no attempt made to notify adverse party).

84. See S.1289 Hearings, supra note 22, at 179 (testimony of National Association of Manufacturers representative) (ban on ex parte contacts would hinder free flow of information between agencies and business).

If ex parte contacts are restricted rather than prohibited entirely, they should be permitted only when three conditions are met: the public comment period is closed; good cause is shown; and the substance of the communications is subsequently entered in the public record, or "logged." This restricted-contact alternative has many of the advantages of a complete prohibition and few of its shortcomings.

The purpose of the first restriction is to ensure that the public comment procedure is used when it is available. If interested parties know that they can present their cases in private to agency decision-makers following the comment period, they are unlikely to disclose their positions fully in the public proceeding. The aim of the "good cause" requirement is to reduce the possibility of unfairness in the agency's determination of who will be permitted to make late submissions. To show "good cause," a party would have to prove that the information it wished to submit was previously unavailable.

The third restriction, the logging requirement, would eliminate the appearance of impropriety in the agency's discussions with interested parties following the comment period. Logging would enable courts to review agency decisions on the basis of all the information available to the decisionmakers, and would lessen the risk of un-

86. This proposal substantially resembles the rule framed by the court in Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1978), see note 28 supra, except that it permits contacts following the close of the comment period on a showing of good cause, provided the contacts are logged.

87. See Speech by FCC Chairman Richard Wiley to the Federal Communications Bar Association (April 30, 1974), reprinted in Part in S.1289 Hearings, supra note 22, at 100.

88. "Good cause" might be established when conditions change after a delay in the agency's promulgation of a rule, or when new data become available to the parties. A party's dilatoriness in gathering data should not, however, be a sufficient ground for permitting late submissions.

89. The District of Columbia Circuit held in both Home Box Office, Inc. v. FCC, 567 F.2d 9, 54-55 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1978), and United States Lines, Inc. v. Federal Maritime Comm'n, 584 F.2d 519, 541-42 (D.C. Cir. 1978), that ex parte contacts in informal rulemaking frustrate judicial review. However, the Supreme Court by implication has rejected the argument that courts can require agencies to employ additional procedures in order to ensure effective judicial review. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 547 (1978). The Court held, "[T]he adequacy of the 'record' in [informal rulemaking] is not correlated directly to the type of procedural devices employed, but rather turns on whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes." Id. at 547.

The Court in United States Lines reconciled its holding with Vermont Yankee on the ground that the Supreme Court could not have intended to allow agencies to foreclose judicial review where there is statutory provision for such review. 584 F.2d at 542 n.63. Although one commentator has endorsed this reading of Vermont Yankee, see Stewart, Vermont Yankee and the Evolution of Administrative Procedure, 91 HARV. L. REV. 1804, 1816 n.49 (1978), that interpretation runs counter to the Court's argument.

An objection could be raised to a judicially-imposed logging requirement on the basis of dictum in Vermont Yankee implying that nothing beyond § 553 procedures is nec-
disclosed political influence in agency decisionmaking. It would not prevent a member of Congress from expressing his views on a proposed rule, but would require that his comments be on the record, along with the other comments received.

The benefits resulting from these restrictions would outweigh the costs. The logging requirement admittedly creates an administrative burden, but one agency that currently requires contacts to be logged has found the burden not to be great. Moreover, the agency has found that logging has had a minimal chilling effect on agency discussions with interested parties. Although agencies will incur some costs in making "good cause" determinations and in the ensuing litigation, those costs will be partially offset by a reduction in the current volume of litigation challenging rules because of ex parte contacts in the proceedings.

To enable agencies to implement these restrictions, Congress should establish civil penalties for violations by agency staff or interested parties. As part of each rulemaking proceeding, agencies should be required to designate a staff member to make "good cause" rulings on late submissions. If a party contacts the agency after the agency has begun to contemplate rulemaking on an issue, but before the notice of rulemaking has been issued, the contact should be logged.

sary to satisfy the requirements of due process in some informal rulemaking proceedings. 435 U.S. at 542 n.16. The case did not involve the issue of ex parte contacts, however, and many commentators have argued that the opinion should be read narrowly. See, e.g., K. Davis, Administrative Law Treatise § 6.36 (2d ed. 1978); Stewart, supra, at 1821.


91. See S.1289 Hearings, supra note 22, at 171-72 (testimony of Pharmaceutical Manufacturers Association representative) (no chilling effect felt as result of logging at Food and Drug Administration).

92. If the District of Columbia Circuit retreats from the ban announced in Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1978), parties are likely to test the limits of any partial restriction, such as the one set out in Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959), cert. denied, 376 U.S. 915 (1964), where the court held that ex parte contacts were prohibited in proceedings involving "resolution of conflicting private claims to a valuable privilege."

93. See, e.g., Peck, supra note 9, at 271-73 (recommending disqualification of party in allocation proceedings); Note, supra note 79, at 1194-96, 1199 (recommending fine of up to $10,000); cf. Wood v. Strickland, 420 U.S. 308, 322 (1975) (§ 1983 liability for agency officials who "knew or reasonably should have known" that their official action violated others' constitutional rights).

94. One of Nathanson's major objections to such a restriction is that the agency is likely to circumvent it by holding extensive discussions with outside parties before issuing the notice of rulemaking. Nathanson, supra note 79, at 403. This difficulty can be avoided
Ex Parte Contacts

Once the notice has been issued, all ex parte contacts should be logged. The initiating party also should be required to show why his claim should not be adversely affected by his violation of the restrictions on ex parte contacts.95

If judicial review of agency rulemaking discloses that ex parte contacts have not been logged in a proceeding, the court should remand the record to the agency for specification of the source and content of all contacts.96 Other parties should be given the opportunity to respond to the ex parte contacts. This remedy is preferable to that of vacating the proceedings, because the latter remedy merely sends the decision back to the same decisionmakers.97

Restricting ex parte contacts protects individual interests at a cost that is not prohibitive. It improves the fairness of informal rulemaking while preserving its flexibility.98 Because the benefits outweigh the costs, due process requires that ex parte contacts be restricted.99

Conclusion

Turning again to the hypothetical,100 suppose that the agency were to conduct the rulemaking proceeding to regulate television advertising under the proposed restrictions. Because the broadcasters know that they will not have access to agency decisionmakers after the comment period without good cause, they will make their full arguments in the public proceeding. This will allow rebuttal by other parties and ultimately will benefit the agency by permitting a full airing of

by adopting the strategy of § 557(d)(1)(E), see note 20 supra, whereby the prohibition takes effect from the time the initiating party has knowledge of the agency's intention to make a rule.

95. See note 21 supra (similar penalty for violations of ban in formal rulemaking).
96. This procedure was followed in a number of cases. See, e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9, 58 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1978); Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 225 (D.C. Cir. 1959), cert. denied, 376 U.S. 915 (1964).
98. There is widespread agreement as to the importance of not overformalizing informal rulemaking. See, e.g., K. Davis, supra note 10, at 142; S.260 Hearings, supra note 22, at 251-53 (testimony of Administrative Conference of United States representative). Adoption of this Note's analysis would not result in the transformation of informal rulemaking into formal rulemaking. Under the balancing test, the benefits of importing the other procedural components of formal rulemaking, such as cross-examination, into informal rulemaking would not outweigh the costs in terms of flexibility and efficiency.
100. See p. 198 supra.
the issues. Individual members of Congress who wish to express their views can do so by submitting written comments. By applying an objective "good cause" standard, the agency will avoid giving any party preferential treatment in allowing late submissions. In the event the agency requires additional information, it can request it from the parties, but the information must be put in the public record. The restrictions protect the individual interests in the proceeding and increase the likelihood of "reasoned decisionmaking on the merits." \textsuperscript{101}