

# Jawboning Administrative Agencies: Ex Parte Contacts by the White House\*

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Considerable attention has recently focused on the proper role of the President in the coordination of agency policymaking. In this period of staggering inflation, conflicts have arisen between the White House, struggling to implement a uniform policy of regulatory cost cutting, and the agencies, whose strong views about their individual missions foster resistance to budget cuts. These conflicts raise questions about the scope of the President's power to affect administrative outcomes and his ability to intervene behind the scenes during the regulatory process.

The decision arena usually pits White House advisors, whose concern is principally with the economy, against agency officials whose health, safety, and environmental rules inevitably contribute to the inflationary spiral. When these protagonists cannot reach compromises, the President may umpire the event. This intervention is a variation on the long-standing practice of presidential "jawboning."<sup>1</sup> In its current form, however, the focus is not on the inflationary practices of private industries, such as steel, but on the regulatory costs of public entities, such as the Environmental Protection Agency (EPA). In both situations, the President may have the power to act directly, but he prefers for political reasons to cajole, persuade, or arbitrate.

The debate about the appropriateness of this assertion of presidential power inevitably engages the legislative and judicial branches. Congress is concerned with which of the three branches will have primary oversight of administrative

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The death of Harold Leventhal was a great shock to all of us in the administrative law field. He was one of that small number of thoughtful judges who dealt with the subject matter in a fresh and challenging way, regularly producing opinions worthy of casebook and treatise immortality. He was also a good friend and an amiable interrogator who relished lively discussion and was never reluctant to seize or reject controversial positions. My guess is that the topic of this Article would in time have produced from him an opinion of characteristic insight and incisiveness. (A hint of how he might have treated this issue appears in his remarks before the Environmental Law Institute Colloquium, see note 109 *infra*.) It is hard to believe that we will not again have the benefit of the Leventhal view.

1. "Jawboning" became part of the political lexicon when President Kennedy sought to restrain prices and wages in the steel industry. William Safire notes that President Carter prefers the phrase "moral suasion" to send the same message. See W. Safire, *Safire's Political Dictionary* 346 (1978). Recently, however, the press characterized President Carter's attack on Mobil Oil Corporation for its failure to make refunds as a "public jawboning campaign." See *New Orleans Times-Picayune*, Mar. 29, 1980, at 11.

policy. Recently, in an effort to regain control of administrative decisionmaking, Congress has adopted the techniques of the legislative veto, sunset laws, and more extensive budgetary review. It is currently debating proposed legislation that would intensify these controls as well as formally expand the President's control over agency policymaking.<sup>2</sup>

For the judiciary, the question is whether the President and his advisors should be subject to newly unveiled rules on *ex parte* contacts in informal decisionmaking that have formerly been applied only to private interests. Forceful claims have been made that the agencies should be free of "interference" from all outsiders, including those who work in the executive office buildings.<sup>3</sup> The White House, quite naturally, regards the label "outsider" as a contradiction of its institutional responsibilities, which, by their nature, must be exercised in private.

It would not be surprising if Congress soon brings these matters to a legislative conclusion. It is equally likely that the judicial review questions will be addressed by the courts. It is thus a propitious time to study and evaluate the institutional and constitutional issues that surround the current debate. This Article discusses the constitutional sources of presidential power to control agency policymaking. It also suggests the devices available to Congress to limit White House intervention. The core of the Article analyzes judicial decisions imposing restrictions on *ex parte* contacts in formal rulemaking and adjudication, and concludes that these restrictions should not automatically be extended to private involvement in informal rulemaking, let alone presidential involvement. Finally, the Article evaluates several proposals for regulating White House contacts and offers its own recommendations.

## I. OVERVIEW

### A. *The Decisionmaking Context*

The Carter Administration has had confrontations with agency policymakers over health, safety, and environmental rules proposed by executive agencies that White House economic advisors consider more costly than necessary to achieve what they view as a tolerable level of benefits. This White House intervention in the agency decision process has produced dismay among the participants and, in some instances, consternation among the regulators as well. The three rules that have attracted the most attention involved the regulation of cotton dust, ozone levels, and strip mining. The events surrounding the promulgation of these rules provide an illustrative factual predicate for the larger institutional concerns they raise.

1. *Cotton Dust*. In 1978, the Occupational Health and Safety Administration (OSHA) of the Department of Labor promulgated regulations establishing a

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2. See text accompanying notes 211-29 *infra*.

3. See Memorandum by Robert Rauch, Environmental Defense Fund, 1 (Sept. 5, 1978).

permanent health standard limiting exposure to cotton dust.<sup>4</sup> After extensive public comments and the creation of an informal rulemaking record in excess of 100,000 pages,<sup>5</sup> the agency decided that it was "technically and economically feasible" for the industry to reduce exposure to cotton dust by set limits within a four-year implementation period.

During the rulemaking proceeding, but after the close of the public comment period, Charles Schultze, the head of the Council of Economic Advisors (CEA), speaking with the President's concurrence, expressed to Labor Secretary Ray Marshall the Administration's concerns about the inflationary impact of the standards.<sup>6</sup> Marshall objected to this interference,<sup>7</sup> but a compromise was later reached when the President brought both principals together in the Oval Office.<sup>8</sup> When the final rule was announced on June 19, 1978, Secretary Marshall and Chairman Schultze held a joint press conference, where Secretary Marshall attested to the Administration's concern for promulgating regulations that are effective without being inflationary.<sup>9</sup> Although the AFL-CIO challenged the standard in court, it confounded expectations by failing to press objections to the President's role before the District of Columbia Circuit.<sup>10</sup>

2. *Ozone*. The EPA has also come in for its share of external pressure. Under the Clean Air Act, the Agency is required to set national air quality standards for major cities. After consultations with Alfred Kahn of the Council of Wage and Price Stability, Charles Schultze, and White House science advisor Frank Press, the Administrator of the EPA, Douglas Costle, announced a reduction in the standard for ozone levels.<sup>11</sup> Immediately following this action, Costle received directions from the President's economic advisors concerning the issuance of regulations under the Clean Water Act. In a strong clash of views, Costle ultimately wrote Kahn a letter stating why the EPA's toxic effluent control program was proceeding properly.<sup>12</sup> The White House press secretary had perhaps precipitated that exchange by inviting EPA officials who were allegedly

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4. Standard for Occupational Exposure to Cotton Dust, 43 Fed. Reg. 27,350-99, as amended, *id.* at 28,473-74, 35,032-35, 56,893-94 (1978) (codified in 29 C.F.R. § 1910.1043 (1979)).

5. The agency provided 90 days for written comments and held informal hearings in three cities for 14 days. Comments were submitted by 263 persons, and 109 participated in the hearings. See *AFL-CIO v. Marshall*, 617 F.2d 636, 647 (D.C. Cir. 1979).

6. See DeMuth, *The White House Review Programs*, 4 Regulation 13, 19 (Jan./Feb. 1980).

7. On May 24, 1978, Secretary Marshall wrote to the President objecting to interference by the CEA and the Council on Wage and Price Stability, 6 Occupational Safety & Health Rep. (BNA) 54 (1978).

8. On June 7, 1978, the Secretary and Eula Bingham met with President Carter, U.S. Dep't of Labor, News Release, June 8, 1978. See Clark, *When the President Tries to Regulate*, Nat'l L.J., Dec. 16, 1978, at 2029; U.S. Dep't of Labor, News Release, June 19, 1978, at 2.

9. *Id.*

10. The court of appeals substantially upheld the rule against a variety of industry challenges. *AFL-CIO v. Marshall*, 617 F.2d 636 (D.C. Cir. 1979).

11. Originally set at .08 parts per million, the final standard announced on Jan. 20, 1979, was .12 parts per million. The practical effect of the rule was to judge as "clean" the smog levels of 10 to 20 cities that would have had to reduce pollution under the old standard. Wash. Post, Jan. 21, 1979, at A1.

12. Letter from Douglas Costle to Alfred Kahn, Feb. 23, 1979, reprinted in *Legal Times of Wash.*, Mar. 5, 1979, at 23-24.

dissatisfied with Administration involvement to resign.<sup>13</sup> At this point strong criticism about White House interference was heard from Senator Edmund Muskie.<sup>14</sup> Congress became involved in other ways, too, characteristically speaking with several voices. According to reports, Costle was subjected to "hard-ball arm-twisting" from coal-state senators to relax the EPA air pollution rules for coal power.<sup>15</sup> This suggests that presidential interference in agency policymaking is not the only issue; Congress also finds intervention to be a necessary technique, either directly or by use of the White House as a surrogate intervenor. The ozone regulations are now being appealed, and the issue of White House staff intervention is before the District of Columbia Circuit.<sup>16</sup>

3. *Strip Mining*. In another controversial case, the Secretary of the Interior, through the Office of Surface Mining Reclamation and Enforcement (OSM), promulgated permanent rules regulating surface mining.<sup>17</sup> The OSM had initially proposed stringent rules after a notice and comment rulemaking proceeding. During the comment period, the Council of Economic Advisors submitted comments concerning the inflationary impact of the rules.<sup>18</sup> Thereafter, the Council continued to meet with representatives of the Department before the rules were announced by the Secretary. During this postcomment period the OSM announced that it was reopening the administrative record to permit inclusion of all oral and written comments between the Council and outside parties.<sup>19</sup> The purpose of the notice was to assure the public that the Council would comply with the strictures against *ex parte* contacts that the agency imposed on itself and would not become a "conduit" for private comments. Public interest participants sought to enjoin this process, but relief was denied in *Natural Resources Defense Council v. Schultze*.<sup>20</sup>

After the closed meetings between the Council and the Department and the issuance of the regulations, the public interest plaintiffs sought to discover what discussions had taken place and what documents had been introduced.<sup>21</sup> The court denied the motion for discovery, but it did order the Council to produce any documents obtained from outsiders that had not been included in the record.<sup>22</sup> After the final rules were promulgated,<sup>23</sup> plaintiffs sought judicial re-

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13. See Wash. Post, Feb. 23, 1979, at A14. The headline read: "If you don't like it, get out, White House tells EPA staff."

14. Wash. Post, Feb. 27, 1979, at A2.

15. Wash. Post, May 5, 1979, at A1. Among the tactics employed was a letter from coal-state senators to President Carter requesting his intervention on behalf of the coal industry.

16. *American Petroleum Inst. v. Costle*, No. 79-1104 (D.C. Cir., filed Nov. 9, 1979). See also *American Petroleum Inst. v. Costle*, 609 F.2d 20 (D.C. Cir. 1979) (*per curiam*) (related case).

17. 43 Fed. Reg. 29,012 (1978).

18. See Department of Justice Memorandum on Legality of "Ex Parte" Contacts, Jan. 19, 1979, reprinted in *Legal Times of Wash.*, Jan. 29, 1979, at 32-33.

19. 44 Fed. Reg. 1355 (1979).

20. 12 *Envir. Rep.* (BNA) 1737 (D.D.C. 1979). The injunction was denied for lack of a showing of irreparable harm.

21. *In re Permanent Surface Mining Regulation Litigation*, 13 *Envir. Rep.* (BNA) 1586 (D.D.C. 1979).

22. The purpose of the limited discovery was to "ensure that the record is complete" for judicial review. *In re Permanent Surface Mining Regulation Litigation*, 13 *Envir. Rep.* (BNA) 1586, 1597 (D.D.C. 1979).

23. 44 Fed. Reg. 14,902 (1979) (final version codified at 30 C.F.R. ch. 7 (1979)).

view in the district court on the ground that the Council's involvement tainted the postcomment decision process, rendering the resulting rule arbitrary and capricious. The plaintiffs did not make the bold assertion that any involvement by the CEA in the postcomment decision process was forbidden, but only that the Council was disqualified from participating in this particular case because it had not properly purged the influence of postcomment contacts with private parties.<sup>24</sup>

These three situations offer different levels of White House involvement. The top level—direct involvement by the President with cabinet-level officers—was seen in the cotton dust rulemaking. In that proceeding and in the ozone rulemaking, there was also a second level of involvement, between top White House policy advisors and top agency officials. In the strip mining proceedings, the principal contacts were between the aides and assistants of each of the officials involved. This level of contacts, although occurring most frequently, arguably bears a heavier burden of justification since it is more removed from direct presidential control. In order to assess the proper scope of presidential involvement in agency policymaking, it is important first to emphasize why the President does intervene, and second, to record the valid public concerns such activity produces.

### B. *The Accountability Problem*

President Carter was hardly embarking on a new undertaking as he tried to make the administrative process more responsive to the executive branch, which, in turn, is accountable to the electorate. What stands out is the notable lack of success of previous administrations in controlling policymaking by administrative agencies. By their nature and organization independent agencies have long resisted policy control by the President.<sup>25</sup> In recent years even the executive agencies, which have reason to be instinctively loyal to the President, have been subjected to executive accountability efforts.<sup>26</sup> The task facing President Carter

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24. The more extreme position—that all White House involvement with the agency is forbidden after the comment period—has been advocated by the Environmental Defense Fund, see Rauch Memorandum, *supra* note 3, at 39-40, and will undoubtedly be argued to the courts in some future rulemaking.

25. During the Roosevelt Administration the independent agencies were labelled a "headless fourth branch of government" by the Brownlow Committee. The solution suggested was to remove "nonjudicial" functions from the independent agencies and place them under executive agency control. A similar kind of reform was advocated by the Ash Council during the Nixon Administration. The President's Advisory Council on Executive Organization, *A New Regulatory Framework* 13-17 (1971). The solution there recommended was replacing collegial commissions with single administrators, who presumably would be more accountable. See generally J. Freedman, *Crisis and Legitimacy—The Administrative Process and American Government* 8-9 (1978).

The problem of the accountability of collegial bodies arises in regard not only to their relationship to the executive branch, but also to their ability to discharge their statutory missions. This aspect of the problem was emphasized recently in connection with the Nuclear Regulatory Commission's failure to respond effectively to the Three Mile Island accident. Both the Kemeny Commission, appointed by President Carter, and the Rogovin investigation, sponsored by the NRC, recommended a reorganization from a commission format to a single chief executive in order to achieve effective management. See *N.Y. Times*, Jan. 25, 1980, at A13. See also note 116 *infra*.

26. Efforts include the Nixon Administration's controversial "quality of life" review, under which the executive Office of Management and Budget (OMB) passed on environmental regulations,

was more awesome than in the past, however. In the 1970's, when Congress created a maze of new environmental, health, and safety standards, placing complicated responsibilities upon new and existing agencies, it created presidential accountability problems of an order of magnitude different from those faced in earlier times.<sup>27</sup>

The Carter Administration attempted to coordinate agency policymaking in a variety of ways. The President issued Executive Order 12,044,<sup>28</sup> requiring each agency to establish a semiannual agenda of significant regulations under development; to expand upon traditional procedural requirements for rulemaking;<sup>29</sup> and to identify and carefully evaluate the need for "significant regulations," including less costly alternative approaches.<sup>30</sup> "Major rules," defined as those having an impact upon the economy of \$100 million or more, are to be subjected to a "regulatory analysis" that contemplates a careful study of alternatives and their relative cost effectiveness. The latter requirement is reminiscent of the Ford Administration's "inflation impact statement,"<sup>31</sup> but it does not reflect a total commitment to cost-benefit analysis.

The Carter Administration also established an interagency organization called the Regulatory Council.<sup>32</sup> The role of the Council is twofold. Its first task is to collect agency information about major pending and proposed rules and publish it semiannually in the Regulatory Calendar.<sup>33</sup> Its second, more substan-

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and the "inflation impact statement" required of executive agencies during the Ford presidency. See J. Quarles, *Cleaning Up America* 117-42 (1976); Exec. Order No. 11,821, 3 C.F.R. § 203 (1974), reprinted in 12 U.S.C. § 1904 (1976).

27. To take but one example, the Council on Environmental Quality estimates that the cost of complying with environmental regulations will grow from \$19 billion to \$52 billion (in 1977 dollars) by 1986. See C. Schultze, Testimony on H.R. 3263 before the House Judiciary Committee, at 4 (Nov. 7, 1979).

28. 43 Fed. Reg. 12,661 (1978), codified in 3 C.F.R. 152 (1979). The order was first published in draft form for public comment. 42 Fed. Reg. 59,740 (1977). During this period the President asked whether the order should be extended to the independent agencies. After receiving adverse comments, the President ultimately exempted independent agencies from mandatory compliance with the order to avoid a "confrontation with Congress." 43 Fed. Reg. 12,670 (1978). At least one respected scholar has indicated that the President has the constitutional power to extend the procedural requirements of the order to independent agencies. See Bruff, *Presidential Power and Administrative Rulemaking*, 88 *Yale L.J.* 451, 498-99 (1979).

29. The order enhances public participation in the rulemaking process by requiring advance notice of proposed rules, a 60-day comment period, and open conferences and public hearings.

30. Significant regulations are to be determined by their impact upon those regulated and by their "direct and indirect effects . . . including the effect upon competition." Exec. Order No. 12,044, § 2(e), codified in 3 C.F.R. 153 (1979).

31. See note 26 *supra*.

32. The Regulatory Council consists of the heads of all executive departments and agencies and those independent agency heads who desire to participate on a voluntary basis.

33. The second Regulatory Calendar, issued on Nov. 28, 1979, described 130 rules. It is a measure of how "unaccountable" regulatory policymaking had been that before this calendar was published no one was able to tell the President how many rules were promulgated annually. Conversation with Richard Neustadt, White House staff member (November 1979). It is remarkable that the agencies themselves never thought it in their interest to collect such information.

The Regulatory Council now estimates that the number of rules promulgated annually is in excess of 7,000. R. Neustadt, *Regulatory Reform—The President's Program I* (1979). This report estimates that there are about 2,000 rules each year with significant impact, as defined in note 30 *supra*, and more than 100 with major economic effects, see text accompanying note 31 *supra*.

tive, task is to serve as a prescreening body for proposed rules, allowing agencies to coordinate rulemaking to avoid duplication of effort or contradictions of policy.<sup>34</sup> The Council is currently studying regulations with multiple agency impact that affect the coal, steel, automobile, and housing/home financing industries.<sup>35</sup>

Another rulemaking review organization, established by the Administration in 1977, is the Regulatory Analysis Review Group (RARG), composed of representatives from all economic and regulatory agencies and chaired by the Council of Economic Advisors. The function of RARG is to scrutinize the regulatory analyses of fifteen to twenty proposed major rules each year and file a public report in the relevant rulemaking record during the comment period.

Between the prerulemaking functions of the Regulatory Council and the analysis and commentary function of RARG, the Carter Administration created coordinating bodies that achieve results similar to those attained by the OMB "quality of life" review used in the Nixon and Ford Administrations, but without the same political costs.<sup>36</sup> The Carter Administration solutions are dominated by the agencies rather than OMB, and the critical analyses are offered for public comment. Thus, much of the concern over secret White House policymaking is reduced. But even with these policy coordination techniques, the present Administration still believes that continuing off-the-record White House involvement in the rulemaking process is crucial.<sup>37</sup>

### C. *The Public Concerns*

No one quarrels with the need of the President and his advisors to coordinate policymaking by administrative agencies. Rising inflation has made this need all the more pressing, because the cost of government social regulations enters directly into the wage- and price-setting mechanisms of the economy. Coordination efforts that increase the efficiency of these regulations will conserve resources for other uses and reduce inflationary pressures.<sup>38</sup> Viewed from this perspective, participation by the President directly or through expert economic advisors promotes regulatory efficiency.<sup>39</sup>

Nevertheless, there are valid public concerns about how and to what extent the White House should shape regulatory policy. Highly charged White House intervention poses a danger of frustrating the will of Congress as expressed in

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34. One example was the successful coordination among five agencies that regulate carcinogens resulting in the uniform cancer regulatory policy announced in September 1979.

35. See R. Neustadt, *supra* note 33, at 4.

36. "Quality of life" review by OMB during the Nixon administration was blamed for undermining many environmental regulations. See Office of Management and Budget Plans Critical Part in Environmental Policymaking, *Faces Little External Review*, 7 *Envir. Rep. (BNA)* 693 (1976).

37. R. Neustadt, *supra* note 33, at 15.

38. See C. Schultze, *Testimony*, *supra* note 27, at 5-6.

39. The CEA's economists are acknowledged to be among the most capable in government service. Thus, a case for White House oversight can be made simply in terms of effective use of talent.

legislation establishing an agency and defining its mission.<sup>40</sup> The danger is not that express mandates precluding or compelling consideration of economic efficiency will be compromised.<sup>41</sup> The problem is more subtle. White House efficiency experts may have an unwelcome effect upon administrators who implement legislation that has a primary focus on social benefit but is silent about balancing other economic interests. To what extent does Congress have a right to expect agency decisionmakers to be "singleminded" in their fidelity to the announced objectives of the legislative scheme? Will responsible bureaucrats retain their regulatory independence when they receive vigorous pressure from White House advisors with a laudable, but not congressionally emphasized, mission?

Related to this concern is the fear that strong policymaking from within the White House will reduce incentives for regulators to act responsibly, which will in turn ultimately reduce the quality of administrative appointments.<sup>42</sup> Moreover, some believe that intervention by White House policymakers may not produce better policy, simply because White House staff members are not necessarily better policymakers than agency personnel.<sup>43</sup>

Finally, separation of powers concerns, as they relate to the integrity of government, are implicated when White House actions reflect the interests of private industry in emphasizing a cost-minimization regulatory policy. Powerful private lobbies, increasingly frustrated in obtaining preferential access to administrators, can be expected to use White House political advisors to achieve

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40. These concerns were expressed vigorously by Senator Muskie during the White House negotiations with EPA over the ozone regulations. See note 14 and accompanying text *supra*.

41. If Congress can make its intent absolutely clear, the agencies and the White House are bound to respect it. For example, the Delaney clause, 21 U.S.C. § 348(c)(3)(A) (1976), establishes a *per se* rule prohibiting all food additives that induce cancer when ingested by man or animal. Thus, even a trace of cancer in a laboratory animal that has been fed saccharin has triggered the ban. See generally P. Verkuil & D. Boies, Public Control of Business 725-27 (1977); Comment, Implementing the Anticancer Clauses of the Food, Drug and Cosmetic Act, 44 U. Chi. L. Rev. 817 (1977). The Endangered Species Act of 1973, 16 U.S.C. § 1536 (1976), is another example. The Supreme Court interpreted it as placing an "incalculable value" upon endangered species, and thus did the snaildarter halt the Tellico dam. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978). Another telling example of the effect of congressional specificity is the Clean Air Act, 42 U.S.C. § 1857 (1976), which contains no requirement of economic or technological feasibility and therefore precludes the judicial imposition of cost-benefit analysis. See *Union Elec. Co. v. EPA*, 427 U.S. 246 (1976).

Similarly, if Congress establishes a statutory scheme that mandates consideration of economic efficiency, neither the White House nor the implementing agency is free to ignore the relevance of cost-benefit calculations. An example is the recent struggle by the courts with the cost-benefit requirements for regulating toxic substances imposed in the Occupational Safety and Health Act, 29 U.S.C. § 655(b)(5) (1976). See *American Petroleum Inst. v. Occupational Safety & Health Admin.*, 581 F.2d 493 (5th Cir. 1978), *aff'd sub nom. Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 48 U.S.L.W. 5022 (1980).

42. For these reasons, Judge Friendly, in his influential 1962 Holmes Lecture, reacted negatively to a suggestion that the White House issue "policy guides" to the FCC. H. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* 153 (1962). Judge Friendly was commenting upon a proposal made in Redford, *The President and the Regulatory Commissions* (Nov. 17, 1960) (unprinted report on file at the Bureau of the Budget). See generally Byse, *Comments on a Structural Reform Proposal: Presidential Directives to Independent Agencies*, 29 *Ad. L. Rev.* 157, 158-60 (1977).

43. H. Friendly, *supra* note 42, at 153-54.



equivalent clout.<sup>44</sup> The expressed fear is that government regulation will be co-opted by private groups through the intercession of the White House.

A classic instance of this tendency occurred during the Nixon Administration in the initial days of the EPA. John Quarles, the first chief legal officer of EPA, was summoned by White House assistant Peter Flanigan to explain a court action EPA was bringing against polluters in Galveston Bay.<sup>45</sup> Flanigan first instructed Quarles to distribute to EPA officials a statement by President Nixon that American industry not be made "the whipping boy" of environmentalists.<sup>46</sup> Flanigan then read a letter to the President from one of the targets of EPA's case, complaining angrily about the adverse effect the EPA order would have on his plant's operation. Before long the White House had involved itself directly in the EPA's litigation strategy. Quite understandably, this precipitated a strong congressional reaction against both the White House and the EPA.<sup>47</sup>

Institutional concerns of the judiciary are also implicated by White House intervention. What should the role of the courts be when reviewing administrative rulemaking that has been subjected to White House oversight? Agency policymaking usually occurs after informal rulemaking proceedings, which are subject to procedural requirements and judicial review.<sup>48</sup> Reviewing courts are increasingly expressing the view that they can fulfill their institutional role only if they know the basis for the agency decision.<sup>49</sup> This desideratum has led the courts on review to peruse a "record" of information, comments, and contacts

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44. William T. Coleman, a former Secretary of Transportation, has recently characterized this danger in strong language:

Even more 'ominous' is the so-called White House political advisor, whose role is never clearly defined in public but whose bias may simply be the position that will most ensure reelection of the President. His advice will be tailored to achieve the support of a particular constituency at a time when politically desirable or to enhance the President's appeal in a region of the country. Such an advisor—immune from public scrutiny and congressional accountability, free from the constraints of agency decision-making processes, and removed from the advice of experts in the bureaucracy—is not in a position to make a meaningful balancing choice among competing national goals.

ABA Commission on Law and The Economy, *Federal Regulation: Roads to Reform* 157 (1979). Mr. Coleman dissented from a recommendation of the ABA Commission that the President have the power, subject to procedural constraints, to override the policy decisions of regulatory agencies. This proposal is discussed at notes 208 & 211-22 and accompanying text *infra*.

Judge Friendly, despite his original fears, which were similar to those of Mr. Coleman, see note 42 *supra*, changed his position and supported the recommendation, arguing that "[s]omeone in Government, and in the short run that someone can only be the President, must have power to make the agencies work together rather than push their own special concerns to the point that the country becomes ungovernable." *Id.* at 163.

45. The story is well told in J. Quarles, *supra* note 26, at 60-69. EPA had brought suit in Houston against the ARMCO Steel Company. *Id.* at 61.

46. *Id.* at 63.

47. In a House oversight hearing Representative Reuss suggested to EPA witness Quarles that Flanigan's involvement in EPA litigation was "akin to a 'fix.'" *Id.* at 74.

48. See 5 U.S.C. §§ 553, 706 (1976).

49. See, e.g., *Ethyl Corp. v. EPA*, 541 F.2d 1, 33-37 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976). See generally Pedersen, *Formal Records and Informal Rulemaking*, 85 *Yale L.J.* 38 (1975).

that occurred during the rulemaking process.<sup>50</sup> By extension of this reasoning, White House contacts and comments may be subject to "record" treatment as well.

These institutional apprehensions, which arise from the pattern of checks and balances that informs our constitutional system, cannot be lightly dismissed, but they must be viewed against the necessity of coordinated policymaking and accountable officials in an increasingly complex system of government regulation. Each of the public concerns postulates a distrust of government that has a basis in fact but may be excessive as it relates to policy control by the White House. In the co-optation situation, for example, the assumption is that White House advisors are or will become conduits for private viewpoints. If they do, as in the Quarles-Flanigan incident, executive "interference" in ongoing agency adjudication can be ferreted out. But there may be other situations in which White House involvement actually contributes to sound policymaking in agencies where some private interests have already achieved control of decisionmakers. The courts will still need to distinguish the different interests at stake when contacts are not privately inspired but are generated by contacts within government itself. Ultimately the question is whether or not the White House is to be part of the agency decision process. And if it is, what are the limits of appropriate involvement? These questions can be answered only after examining the President's executive power under the Constitution.

## II. THE PRESIDENTIAL POWER TO CONTROL AGENCY POLICYMAKING

Article II of the Constitution admonishes the President to "take Care that the Laws be faithfully executed"<sup>51</sup> and gives him the power to supervise his subordinates by requiring "the Opinion, in writing, of the principal Officer in each of the executive Departments."<sup>52</sup> He is assured of some control over policy through the ability to appoint "Officers of the United States,"<sup>53</sup> a category that includes cabinet officers and related high officials. The important message to be gleaned from these provisions is that the executive power is not shared—it is all placed in the President. The idea of a "plural executive," or a President with a council of state, was considered but rejected by the Constitutional Convention.<sup>54</sup> The Convention chose to risk the potential for tyranny inherent in placing power in one person to gain the advantage of accountability fixed

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50. It has also come to mean that the procedures of informal rulemaking—notice, comment, and statement of reasons—will be enforced as if they were being applied in an adjudicative context. See Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 *Iowa L. Rev.* 713, 729-33 (1977).

51. U.S. Const. art. II, § 3.

52. *Id.* § 2, cl. 1.

53. *Id.* § 2, cl. 2. In *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976) the Court concluded that any appointee exercising "significant authority" pursuant to federal law was an "officer of the United States."

54. See A. Schlesinger, *The Imperial Presidency* 382-86 (1973).

on a single source.<sup>55</sup> Accountability is a crucial aspect of the executive power as expressed in article II.

The general grants of executive power in article II are, however, inadequate to answer the more specific question of the scope of the President's authority over those of his subordinates who make administrative policy. To resolve this question, the inquiry must focus on the President's removal power, a subject not treated explicitly in the Constitution, and on the inherent power to control subordinates implied by the executive responsibilities contained in article II. Finally, consideration must be given to the President's need to control his subordinates in private, through the application of executive privilege.

#### A. *The Power to Remove*

The President's power to control policy begins with his appointment of those subordinates who formulate policy in the first instance, since the appointment and confirmation process is the best method for achieving policy coordination. Not all appointments work out, however, and thus the power to remove may be equally necessary to achieve desired results. The classic "removal" cases that form the basis for constitutional analysis need only be briefly reviewed here for the light they shed on the President's inherent power to control policymaking by agencies.<sup>56</sup>

In *Myers v. United States*,<sup>57</sup> the Supreme Court held that an attempted congressional limitation upon the President's power to remove an executive official was unconstitutional, thus assuring President Wilson absolute power to remove a postmaster.<sup>58</sup> Finding the power to remove subordinates to be inherent in the executive function,<sup>59</sup> the Court indicated that the principal qualification on this power related to those who exercise "duties of a quasi-judicial character."<sup>60</sup> *Humphrey's Executor v. United States*<sup>61</sup> presented the question whether President Roosevelt could remove an FTC commissioner (a nonexecutive officer) without complying with a statutory for-cause requirement. The Court answered in the negative, again highlighting the quasi-judicial responsibilities of the official involved.<sup>62</sup> *Humphrey's Executor* also modified the broad dicta of *Myers* by conceding congressional control over subordinates in the "independent"

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55. As Professor Schlesinger states: "In the case of high crimes and misdemeanors, who, to put it bluntly, was to be impeached?" *Id.* at 386.

56. Professor Harold Bruff has recently done an excellent job of analyzing the removal cases. See Bruff, *supra* note 28, at 475-83. See also *The Constitution of the United States of America—Analysis and Interpretation*, 82d Cong., 2d Sess. 457-81 (E. Corwin ed. 1953).

57. 272 U.S. 52 (1926).

58. Congress had provided by statute that postmasters were to have four-year terms and could be removed by the President only with the Senate's advice and consent. *Id.* at 107.

59. *Id.* at 117.

60. *Id.* at 135.

61. 295 U.S. 602 (1935).

62. The Court feared that a failure to respect congressional restrictions on the removal of FTC commissioners could lead to similar nonstatutory removals of ICC commissioners and even court of claims judges. *Id.* at 629.

agencies.<sup>63</sup> In *Weiner v. United States*,<sup>64</sup> the Court reemphasized the significance of quasi-judicial duties in preventing President Eisenhower from removing without cause a member of the War Claims Commission, even though Congress had not imposed any restrictions on removal.<sup>65</sup>

Under the limits established in these cases, the commissioners of independent agencies, which traditionally engaged in adjudication, are most likely to be secure from presidential removal without cause. This protection, however, is not so clear-cut today, due to the expanding policymaking roles of agencies such as the FTC.<sup>66</sup> If Congress continues to authorize independent agencies to make important policy decisions, it has to affect their traditional independence from executive control. Commissioners of adjudicative agencies who also formulate policy through rulemaking are increasingly placed in the awkward position of having to be neutral in any adjudications that result from the application of this policy. If one is willing to accept the proposition that a commissioner can be "less unbiased" in rulemaking matters than in adjudications,<sup>67</sup> it is not difficult to foresee a revival of the movement to limit independent agencies to an adjudicative role or to replace them with other bodies less likely to be compromised by a duality of roles.<sup>68</sup>

As these agencies devote more resources to promulgating rules, future Presidents may want to control their rulemaking practices while conceding congressional primacy in the area of adjudication.<sup>69</sup> The manner in which Presidents will be able to exercise control may be limited, however. For example, it is doubtful whether *Humphrey's Executor* can be construed to permit removal of FTC commissioners for poor policymaking.<sup>70</sup> So long as Congress has vested policymaking and adjudicative authority in the same personality, it would be difficult to determine whether the President was exercising his removal power because of policymaking failures or because of adjudicative lapses. Moreover,

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63. The designation of an agency as "independent" usually flows from the presence of statutory characteristics such as a for-cause removal restriction and a collegial commission-type organization. For a listing of agencies that the Carter administration considers independent, see 44 Fed. Reg. 11,389 (1979).

64. 357 U.S. 349 (1958).

65. *Id.* at 354-56. This holding presumably extends to the statutes governing other independent agencies such as the FCC, the SEC, and the Federal Energy Regulatory Commission, where Congress has not mentioned removal.

66. When *Humphrey* was a commissioner, the FTC was a purely adjudicatory agency. Until 1964, the agency took the position that it did not possess substantive rulemaking power. See *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 693-94 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974). Today, however, the FTC devotes a large share of its resources to making policy through the promulgation of rules. 15 U.S.C. § 57a (1976).

67. See *Association of Nat'l Advertisers, Inc. v. FTC*, No. 79-1117 (D.C. Cir. Dec. 27, 1979), cert. denied, 100 S. Ct. 3011 (1980) (reversing the disqualification of FTC chairman Pertschuk in the rulemaking for advertising during children's television shows).

68. This trend could lead to revived proposals for an administrative court, an idea that has never gained much support from Congress or the bar. See discussion at note 25 *supra*.

69. Congress has recently been dealing harshly with the FTC over its rulemaking practices. See generally Gellhorn, *The Wages of Zealotry: The FTC Under Siege*, 4 Regulation 33 (Jan./Feb. 1980).

70. Congress granted the FTC substantive rulemaking power in 1975, but it did not amend the removal power. Hence it could be argued that the for-cause limitation was to apply to rulemaking as well as adjudication.

because rulemaking is more akin to legislating than to executing the laws, the case for congressional control over the tenure of commissioners who function both as policymakers and adjudicators remains strong.<sup>71</sup>

This does not mean that the President's removal power over independent commissioners is nonexistent. In the first place, *Humphrey's Executor* stands virtually alone as a precedent limiting presidential power.<sup>72</sup> Secondly, it should not be overlooked that the President's power to remove for cause is itself a significant tool of executive control whose contours have not been identified, simply because no President has yet tried to remove independent commissioners in this fashion. Undoubtedly, however, the threat to do so remains a potent method of achieving resignations from unwanted commissioners. In addition, it is not clear what kind of hearing and what burden of proof would be required to establish cause in the particular case.<sup>73</sup> Furthermore, one might speculate that Presidents have in the past and will in the future require resignations signed in advance before they appoint people to independent commissions.<sup>74</sup> By this method a President could circumvent any for-cause removal problem that might arise at a later time.

Moreover, some statutes establishing independent agencies authorize the President to appoint the chairman and place no restrictions on his power to remove that person as chairman.<sup>75</sup> This power is limited in that all the President

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71. Whatever the constitutional power may suggest, it is unlikely as a political matter that a President would want to challenge the long-held assumption that independent commissioners are secure from removal. Professor Cary considers it politically untenable that Congress would permit the President to make commissions subordinate to executive departments. W. Cary, *Politics and the Regulatory Agencies* 20 (1967).

72. In *Morgan v. Tennessee Valley Auth.*, 28 F. Supp. 732, 737 (E.D. Tenn. 1939), aff'd, 115 F.2d 990 (6th Cir. 1940), cert. denied, 312 U.S. 701 (1941), the district court approved President Roosevelt's removal of a member of the TVA and the Sixth Circuit affirmed. Despite the presence of a statutory removal scheme, and despite the recent decision in *Humphrey's Executor*, the court identified as incidental to the appointment power an executive power to remove that could be circumscribed only by precise and unmistakably clear legislative action. In *Lewis v. Carter*, 436 F. Supp. 958 (D.D.C. 1977), the district court denied a preliminary injunction sought by an EEOC commissioner against his removal, although it acknowledged that *Humphrey's Executor* might impose some restraints upon removal. Also, it must not be forgotten that both *Humphrey's Executor* and *Wiener* were cases seeking lost salary, rather than reinstatement. See L. Tribe, *American Constitutional Law* 189 (1978) (the power to reinstate should be available if needed).

73. There would also have to be substantive tests devised to determine whether the vague standards constituting "cause" for removal—"inefficiency, neglect of duty, or malfeasance in office," to take the FTC example, 15 U.S.C. § 41 (1976)—were met in the particular removal situation.

74. President Coolidge is reported to have attempted to circumvent for-cause removal restrictions by demanding a signed resignation from an independent commissioner before he received his commission of reappointment. See E. Corwin, *The President—Office and Powers 1787-1957*, at 95 & n.87 (1957).

75. This is the case for the older independent agencies, such as the FTC, FCC, SEC, and NLRB. The power to remove chairmen without cause is not universally recognized, however, and thus may not be constitutionally based; other statutes condition the President's removal power by limiting it to removal for cause. See, e.g., the provision governing the Federal Reserve Board, whose chairman is intended to be independent of the President on matters of monetary policy. 12 U.S.C. § 242 (Supp. II 1978). Other statutes fix the chairman's tenure, see, e.g., 15 U.S.C. § 2053 (1976) (Consumer Product Safety Comm'n). Nonetheless, the President can make effective use of his power to remove the chairman when he believes an agency's policy functions are being managed poorly. For example, calling for "fresh leadership," the President recently removed the NRC chairman,

can do is return the particular chairman to the status of commissioner until his or her term expires.<sup>76</sup> Despite this limitation, the power suggests an ability to control agency policy by the use of removal or by the threat of it. This is one of the few techniques available to the President for increasing the accountability of independent agencies that does not brook confrontation with Congress.

### B. *The Power to Control*

The power to control subordinates who make policy is at the core of any presidential effort to achieve accountability. The word "control" has several meanings in this context. In one sense it reflects the process of management control, which demands that the executive speak with one voice and imposes a structure on decisionmaking that includes clearing major policy matters with the White House. For the independent agencies, however, the word is better translated as "cajole," since this is as far as the President can go if he is to retain the support of Congress. "Control" also implies that the President may on occasion actually make decisions himself, even though the decisionmaking responsibility is nominally placed in the hands of subordinates.

In some matters the President has the constitutional responsibility to decide, even though he may act through subordinates. Thus, some cabinet officers are notable for a lack of independence. Certainly this is the case with the Secretary of State,<sup>77</sup> as evidenced by recent events culminating in the resignation of Secretary Cyrus Vance when he disagreed with a major presidential policy decision. And, since the administration of Andrew Jackson,<sup>78</sup> it has been clear that the

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giving that position to another commission member for the duration of the term, at which time the President could designate a new chairman from outside the agency. See White House Press Release, Dec. 7, 1979, at 1.

76. A commissioner removed as chairman may remain on the commission if his or her term has not expired. Therefore, the President's power to reappoint a new chairman may be restricted to those who currently sit. In the case of cabinet officers, of course, the President is free to appoint anyone he chooses as a replacement.

77. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall conceded that the President's decision power was absolute in the "political field" of foreign affairs. *Id.* at 166. As a consequence, the Secretary of State has no "independence" in the formulation of relations with foreign governments, and Congress could not constitutionally reallocate this inherently executive responsibility by statutory manipulation. Also, under *Elrod v. Burns*, 427 U.S. 347 (1976), which sanctions the patronage discharge of "policymaking" officials because they may be in a position to "thwart the goals of the in-party," *id.* at 367, the Secretary of State would presumably be first on the list of vulnerable policymakers who could so "thwart" presidential policy. This aspect of *Elrod* was not compromised by *Branti v. Finkel*, 100 S. Ct. 1287 (1980), in which the Court rejected the patronage discharge of two assistant public defenders.

78. The classic situation arose when Andrew Jackson ordered the district attorney to discontinue condemnation proceedings on behalf of the United States concerning the jewels of the Princess of Orange. The jewels had been imported into the United States without payment of duty and, while condemnation proceedings were pending, the President learned that they had been stolen from the House of Orange and decided to return them. In an opinion by Attorney General Taney, it was said that the President, under his power faithfully to execute the laws, could order the Attorney General to dismiss the prosecution and return the jewels. The district attorney might ignore this order at his peril, since the President could replace him with someone agreeable to dismissal. The President could not, however, order the dismissal himself. 2 Op. Att'y Gen. 482, 489 (1831).

President has the right to control the prosecutorial discretion of the Attorney General.<sup>79</sup> This power is subject to limits, however. Once a prosecution begins, the due process clause forbids interference in the decision process by the President or any outsider. But the President may control the prosecution and remove the Attorney General if he or she refuses to prosecute or refuses to dismiss a prosecution.

Many decisions made by executive officers, even those operating in areas traditionally controlled solely by the President, spring from statutory authority granted by Congress. While the President may desire to control this kind of decisionmaking, Congress can place limits upon his power to do so.<sup>80</sup> There is no question, for example, that Congress has the right to enact environmental legislation and to place the final decision on implementation of the Clean Air Act in the Administrator of the EPA. The President cannot simply usurp that decision as part of his executive function. However, any President interested in achieving coordination of policymaking would maintain that there is a difference between deciding for a subordinate and exercising management control over the decision process. In the former case the subordinate acts solely as a convenience to the executive branch; in the latter the subordinate has a decisional role assigned by Congress.

There are several ways for the President to ensure management control without usurping the decision process. The most emphatic method is to threaten subordinates with removal if they do not cooperate. As Jody Powell put it to the leaders of the EPA: If you don't do as the President says, you can look for work elsewhere.<sup>81</sup> But removal is a doomsday machine; it can be both an overwhelming and an inadequate device for controlling or formulating policy. Like the principle of massive retaliation in defense policy, removal is such an extreme solution that it is, as a practical matter, unavailable in the ordinary course. Moreover, where the subordinate sought to be removed has strong supporters in Congress or among influential interest groups, it is too costly politically to utilize as a policymaking instrument. As a result many Presidents would rather suffer occasional insubordinations than risk continual confrontations.

To be effective, the power to remove must imply the lesser power to counsel subordinates privately and to consult before the axe falls. Any other analysis

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79. Directly under the Attorney General is the Office of the Solicitor General, whose function is to reflect the position of the United States before the Supreme Court and to coordinate—and often override—agencies' understandings of the government's position. See, e.g., *Train v. Colorado Public Interest Research Group*, 426 U.S. 1 (1976), where the Solicitor General decided which agency should have jurisdiction to control discharges of radioactive materials into navigable waters, and then argued its position to the Court. It has never been suggested that this coordination function, which is clearly executive in nature, should not be placed in the hands of the President and Attorney General.

80. In *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973), the court held that President Nixon could not legally discharge the Special Prosecutor, Archibald Cox, because of a valid Department of Justice regulation that limited such discharge to situations in which the special prosecutor was guilty of an "extraordinary impropriety." Had there been no such regulation, the President's power to fire presumably could not have been successfully challenged. Cf. *L. Tribe*, *supra* note 72, at 19 (arguing that Congress could constitutionally by legislation insulate a special prosecutor from presidential removal). See also *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610-12 (1838).

81. See note 13 and accompanying text *supra*.

would render the President a helpless giant when it comes to coordinating the policymaking functions of his subordinate officers. Not only does the removal power suggest authority to oversee policymaking, but the article II power to require the written opinion of subordinates also implies an ability to confer and discuss policy matters.

Ultimately, this power to control, coordinate, or guide the policymaking of subordinates may be the only way to keep agencies accountable to the executive branch and the electorate. The basic message of *Myers* is that under article II the President "may properly supervise and guide"<sup>82</sup> the decisions of administrative officers.

As a theoretical matter, this constitutional authority to control policy should extend to chairmen of independent agencies over whom the President has the power of appointment and removal.<sup>83</sup> In a collegial body of five or more commissioners, conferences with the chairman will not ensure totally coordinated policymaking. But the "executive role" of independent agency chairmen is considerable, especially in personnel and budget matters, and it is also said to dominate policy decisions that arise in the rulemaking process.<sup>84</sup> If, for example, the President wants the chairman of the ICC or the CAB to emphasize deregulation as part of a rulemaking program, he should be free to appoint officials with those views, to meet with them privately about those matters during their stewardship, and to remove them as chairmen if they fail to deliver.

### C. *The Need for Consultative Privacy*

Assuming the President has executive power to control the policymaking of cabinet officers, related executive officials, and, to a lesser extent, chairmen of independent agencies, the question remains to what degree should contacts with these officials remain private and beyond the scrutiny of the public? The President's right to consult with White House staff and advisors and their right, in turn, to meet privately with White House staff subordinates on behalf of the President are also implicated by this question. To answer this inquiry it is necessary to examine the scope of executive privilege as well as the scope of White House staff consultative privacy when Congress has not legislated on the matter.

1. *The President's Privilege.* In *United States v. Nixon*,<sup>85</sup> the Supreme Court carved out a privilege of confidentiality for conversations between the President and his staff, reasoning that they "must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. . . . The privilege is fundamental to the operation of Government and inextricably rooted in the separa-

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82. 272 U.S. at 52.

83. Professor Cary reports that when he was chairman of the SEC he met frequently with Presidents Kennedy and Johnson on policy matters. See W. Cary, *supra* note 71, at 13-26.

84. See D. Welborn, *Governance of Federal Regulatory Agencies* 137 (1977). Professor Welborn also suggests that the chairman's power will increase as agencies have to deal with the effect of the sunshine law on formal meetings. *Id.* at 168 n.2. See also Zamir, *Administrative Control of Administrative Action*, 57 *Calif. L. Rev.* 866 (1969).

85. 418 U.S. 683 (1974).



tion of powers under the Constitution."<sup>86</sup> This privilege should apply equally when presidential staff and advisors seek to confer in private with cabinet officers and administrators of executive agencies, for they also need "to explore alternatives" in setting policy. The ability to function effectively protected by the separation of powers extends to the entire executive branch. As the *Nixon* Court pointed out, "[H]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."<sup>87</sup>

Private discussions between the President and his advisors concerning the relationship of inflation or energy policy to problems of the environment, safety, or health fall under this privacy umbrella. Discussions on these subjects during a cabinet meeting would be especially sensitive, but other meetings among the President, cabinet officers, and senior advisors, such as the discussions with Marshall and Schultze about the cotton dust rules, should be protected for similar reasons. So long as the President is directly involved in the discussions, the need for an executive privilege is strong.

The executive privilege relating to control of administrative officials is not unbridled. One restraint on secret policymaking by the President is inherent in the concept of separation of powers, requiring no judicial intervention. If the public is worried about the veil of secrecy cloaking all discussions between a President and his cabinet officers, the established practice of cabinet members going before Congress to answer questions can serve as an antidote. This separation of powers mechanism, reflected in early practice under the Constitution,<sup>88</sup> checks the exercise of executive privilege by subjecting the decisions of executive agency officials to public scrutiny. Of course, its effectiveness is dependent upon electing a President who honors the tradition, something that is not guaranteed to occur.<sup>89</sup>

Another check on the use of the presumptive executive privilege emerges from the *Nixon* case. The Court emphasized that the privilege is limited by countervailing constitutional interests, such as due process.<sup>90</sup> The overriding interest in that case was the needs of the criminal justice system. A comparable interest emerges from the present inquiry, although it is grounded in civil, rather than criminal, process. The due process limitation in *Nixon* comes into play if a President seeks to go beyond coordination of policy to control of outcomes in adjud-

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86. *Id.* at 708 (footnote omitted). The Court went on to state that outside of the national security context the privilege was presumptive rather than absolute, and that it must yield to legitimate interests of the "adversary system of criminal justice." This due process interest was present because President Nixon attempted to invoke executive privilege to defeat compliance with a judicial subpoena in a criminal proceeding. This dark side of *United States v. Nixon* should not arise in the kind of policymaking coordination discussed in this Article.

87. *Id.* at 705 (footnote omitted).

88. See E. Corwin, *supra* note 74, at 296; A. Schlesinger, *supra* note 54, at 390 (asserting that this practice made for "openness and responsibility in government").

89. President Nixon was accused of engaging in a "calculated disparagement of the cabinet" by shifting responsibility to White House aides and then cloaking these aides with executive privilege when they were called upon to testify before Congress. A. Schlesinger, *supra* note 54, at 252-53.

90. 418 U.S. at 709.

cation.<sup>91</sup> This distinction between rulemaking and adjudication helps to confine the executive privilege doctrine and should discourage future Presidents from seeking to exploit the privilege beyond the policymaking context. For example, if a President intervened to direct the issuance of a television license to a campaign contributor, those participating in the licensing process could raise a due process objection<sup>92</sup> that might move a court to require any presidential conversations with the FCC commissioners to be placed in the record. A similar situation can arise in connection with executive officials, even though cabinet officers and departmental heads are likely to find that their policymaking function is larger than their adjudicative one;<sup>93</sup> if it does arise, as it did in the Quarles-Flanigan situation, when the White House sought to influence the conduct and outcome of litigation, there is nothing in the relationship between the executive agency and the President that should override the due process interests.

2. *The White House Advisor's Privilege.* The situation is different when it is the President's advisors who want to engage in privileged communications with cabinet officers, executive agency heads, or other agency officials. Although this is the most frequent kind of contact,<sup>94</sup> it is not clear that this type of "presidential" involvement deserves the same article II protection.

The executive privilege undoubtedly has a "vertical effect," since its purpose is to protect conversations between the President and his advisors, cabinet officials, and administrators. It is not so readily apparent, however, whether the privilege has a "horizontal effect" between White House staff and agency staff. The protections that allow some congressional check on secret decisionmaking by cabinet officers do not apply to presidential aides. White House staff members are not subject to Senate confirmation, nor do they traditionally appear before congressional committees. For these reasons the extension of executive privilege to the staff must be separately justified.

An argument in favor of the horizontal effect is that the President does not have the individual capacity to control the bureaucracy personally. If he cannot rely on his staff to carry out most executive policy, he cannot discharge his responsibilities under article II. Under this analysis the President instructs his White House staff on administration priorities, but turns over to them the actual

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91. This raises the traditional distinction between rulemaking and adjudication offered by Justice Holmes in *Bi-Metallic Inv. Co. v. Colorado*, 239 U.S. 441 (1915), which plays off the due process interest established for informal adjudication in *Londoner v. Denver*, 210 U.S. 373 (1908).

92. See *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959); Peck, *Regulation and Control of Ex Parte Communications with Administrative Agencies*, 76 *Harv. L. Rev.* 233 (1962).

93. Independent agency commissioners often perform a role similar to appellate court judges in that they regularly review adjudications by administrative law judges who work in their agencies. This role is rarely played by executive agency heads or cabinet officials. See text accompanying notes 67-68 *supra*.

94. In the strip mining rule, for example, the major contact was between White House and CEA staff and lower officials of the Department of the Interior who worked in the Office of Surface Mining. See notes 17-24 and accompanying text *supra*.

contact with subordinates in the agencies. Some case law recognizes the practical necessity of this view.<sup>95</sup>

The fear often expressed, however, is that White House staff may use their positions to pursue agendas of their own that only vaguely reflect presidential direction.<sup>96</sup> By cloaking these political messengers with a privilege of secrecy, anonymous government by unaccountable bureaucrats is encouraged. This view suggests that presidential accountability can be as easily frustrated as vindicated by the unrestrained use of White House staff. Unfortunately, most of the proposals to guard against these consequences are themselves fraught with valid apprehensions. Nevertheless, differential treatment between the vertical and horizontal effects of the privilege need not offend article II.

The basic question is whether Congress could constitutionally require White House staff contacts with agency subordinates to be made on the record or even prohibit them altogether. It would in all likelihood be unconstitutional under *United States v. Nixon* for Congress to attempt by legislation to deprive the President of his executive privilege in private vertical dealings with staff and cabinet officers. The President is not involved, however, in a horizontal exchange of views. Thus, if one extended the privilege automatically to cover such dealings, there would be no way, absent written delegation, to determine if in fact the White House staff was executing a previously discussed presidential policy or creating one of its own. For this reason the *Nixon* privilege could be viewed as personal to the President in dealings with subordinates.<sup>97</sup> In short, personal presidential contact makes the privilege available; lack of direct contact renders it unavailable.

While this is a burdensome interpretation for the modern presidency, it would reflect the importance the President attaches to a particular contact and provide a check against the abuse of executive privilege, limiting its scope to those minimum contacts that are essential to the functioning of the executive branch. Under this analysis secret policy coordination would take place only at the presidential level; if it were given lesser status, it could not share in the executive's privilege.

But this minimalist approach unrealistically restrains the making of executive policy. It is obvious that no President can personally direct domestic policy and still discharge the other responsibilities of the office. A President should at least have the power to convert a contact between his staff and agency subordi-

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95. In *Myers v. United States*, 272 U.S. 52, 117 (1926), Chief Justice Taft recognized that in order to execute the laws the President must be able to "select those who were to act for him under his direction."

96. Many of the points made by William T. Coleman are applicable here, see note 44 and accompanying text *supra*.

97. *Nixon* involved only the issue of the confidentiality of conversations between the President and his close advisors. 418 U.S. at 703. It therefore did not deal directly with the confidentiality of the advisors' communications with other executive officials. In discussing the scope of executive privilege, however, the Court referred to "Presidential communications" in a way that could encompass communications between a presidential advisor and agency subordinates. The Court also showed concern for a "President and those who assist him." *Id.* at 708. The question ultimately to be resolved is whether the privilege of White House advisors and agency subordinates "relates to the effective discharge of the President's powers." If so, it has a constitutional base. *Id.* at 711.

nates into a "presidential communication" by explicit instructions in advance. Written delegation to staff must be able to serve the same function as a direct presidential contact if presidential policy coordination is to be effective. Where there is no explicit delegation, however, the constitutional basis for a privilege of confidentiality is weakened. In this situation congressional limitations upon executive confidentiality may be strong enough to override a generalized claim of executive privilege.<sup>98</sup>

However, there are no congressional enactments that seek to test the limits of executive privilege in this manner, and so this potential constitutional crisis has not arisen. Practically speaking, White House staff members are virtually unrestrained by legislation in their dealings with agency staff on policy matters.<sup>99</sup> One wants to read the lack of rules in this area as indicating that Congress does not believe it is desirable to restrict the private contacts of White House staff. Although extracting meaning from congressional silence is a treacherous activity, it cannot be avoided in this case, because the relative competence of one branch to confine the activities of the other is at stake. *Youngstown Sheet & Tube Co. v. Sawyer*<sup>100</sup> teaches that where Congress has been silent, the President has considerable room to assert his executive power. As Justice Jackson stated in his famous concurrence:

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures of independent presidential responsibility.<sup>101</sup>

In this "zone of twilight," the critical inquiry is whether congressional silence on the subject of White House staff activity is the product of informed consent. The next section discusses the various approaches Congress has taken to control the executive branch, short of direct limitations upon the "executive" privilege of White House staff.

98. In order to protect against policymaking by unchecked and unaccountable political assistants, Congress might want to pass legislation limiting the use of the executive privilege to contacts made directly by the President or by those working under his explicit delegation. Since this issue could be determined by a court in camera, there is no clear reason why the *Nixon* case would render it unconstitutional.

99. One possible exception is § 307(d)(4)(B)(ii) of the Clean Air Act Amendments of 1977, 42 U.S.C.A. § 7607(d)(4)(B)(ii) (1979), which requires that all written comments to the EPA by the White House, including OMB, be placed in the rulemaking docket. But these written comments are specifically excluded from the record upon which judicial review is based, 42 U.S.C.A. § 7607(d)(7)(A) (1979). These sections do not mention oral contacts, and EPA has taken the position that such interchanges with White House staff do not need to be recorded. The reach of these provisions is currently being tested. See *American Petroleum Inst. v. Costle*, No. 79-1104 (D.C. Cir., filed Nov. 19, 1979).

100. 343 U.S. 579 (1952).

101. *Id.* at 637. In a footnote at the end of this paragraph, Jackson asks the reader to "compare" *Myers* and *Humphrey's Executor*. This is a cryptic message, but it does indicate that the focus of Jackson's concern in text was upon the presidential removal cases.

### III. THE CONGRESSIONAL POWER TO RESTRAIN WHITE HOUSE CONTROL OF AGENCY POLICYMAKING

Congress is not powerless to restrain the President or his staff in dealing with administrative agencies. Under our scheme of separation of powers Congress can frequently check presidential power through legislation. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court recognized that presidential powers interact with those of Congress, so that when Congress has expressed its will in a manner incompatible with presidential action, the executive power is "at its lowest ebb."<sup>102</sup> As a result, the President has rarely deemed it advisable to contradict an express legislative will. If Congress passes a statute designed to achieve a stated objective, it does not matter whether the particular decision-maker is an independent agency or an executive agency or whether the President "controls" the decision; Congress's will is to be respected.

Congress has frequently legislated on matters related to executive control of decisionmaking, although mostly in an indirect manner. The most common areas of legislation are the budgetary process, the delegation of statutory duties, and procedural restraints upon agency policymaking. A review of this experience should help to determine whether or not congressional silence on the legitimacy of horizontal contacts between White House and agency staffs is informed.

#### A. *The Budgetary Process*

In the early years of the administrative state, Congress dealt directly with each agency on its annual budget requests, thus maintaining substantial control over agency activities, including policymaking. This was, however, a costly and cumbersome process, and in 1921, with the passage of the Budget and Accounting Act,<sup>103</sup> which granted the President the power to submit an annual budget for executive agencies to Congress, considerable practical control over administrative policymaking shifted to the executive branch. A further shift occurred when the Act was amended to include independent commissions and boards within the President's budgetary control.<sup>104</sup> Today, the Office of Management and Budget (OMB) exercises central control over agency budgets, and frequently over their policies as well.<sup>105</sup>

But Congress still retains considerable control over the budgetary process and could withdraw agencies from OMB jurisdiction should it perceive the need to do so. Indeed, Congress has recently seen fit to retain direct budgetary control

102. *Id.* at 637.

103. Pub. L. No. 67-13, 42 Stat. 20 (1921) (codified at scattered sections of 31 U.S.C. (1976)).

104. Section 2 of the original act had defined "department or establishment" to include "executive department [or] independent commission." *Id.* § 2. The 1939 amendment added the phrase "independent regulatory commission or board" as a reaction against uncertainties caused by the *Humphrey's* decision. See 31 U.S.C. § 2 (1976); 84 Cong. Rec. 2315 (1939) (remarks of Representative Warren).

105. In 1970 the Bureau of the Budget, which had earlier been transferred from the Treasury Department to the Executive Office of the President, became OMB. Reorganization Plan No. 2 of 1970, 84 Stat. 2085.

over certain independent agencies.<sup>106</sup> By this ebb and flow of control over agency budgets, Congress demonstrates a willingness both to accede to and to check presidential control over administrative policymaking. Since Congress also has recourse to the General Accounting Office and the recently created Congressional Budget Office, there is little reason to believe that it is helpless in the face of executive manipulation of the budgetary process.<sup>107</sup> If the proposal now being discussed for a regulatory budget ever becomes a reality, Congress will be in a position to monitor closely the impact of regulation upon the public.<sup>108</sup>

### B. *The Delegation Process*

Congress exercises influence over administrative policymaking simply by deciding where to place administrative responsibility. For example, Congress can blunt the fear of excessive executive interference by assigning a particular statutory duty to an independent agency. The meaning to be given to a congressional choice of the independent agency format has never been clearly established. But the structure of these agencies does suggest a congressional design to insulate their decisions from presidential politics. For example, by balancing the membership of these agencies between the two political parties and by creating fixed terms that may exceed a President's term of office, Congress has indicated that these agencies should function outside the realm of politics and perhaps within some abstract mold of balanced or rational decisionmaking.<sup>109</sup>

Thus, if Congress has been able to restrict executive and White House staff influence over administrative policymaking by establishing an independent agency, a reverse inference may presumably be drawn when Congress creates an executive agency. By choosing to christen an executive agency as the policymaking vessel, Congress makes a considered judgment about the need for stronger executive and political control. Indeed, a fair reading of the removal cases suggests that if Congress places a policymaking responsibility in an executive branch agency, it cannot keep the President from exercising his duty to control

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106. For example, Congress has exempted the Consumer Product Safety Commission, the ICC, and the Commodities Futures Trading Commission from OMB budget review. See 15 U.S.C. § 2076(k) (1976); 31 U.S.C. § 11(j) (1976); 7 U.S.C. § 4a(h) (1976).

107. As demonstrated by the recent struggle over executive impoundment of appropriated funds, Congress can be an effective advocate of its own budgetary interests. When President Nixon asserted an inherent power to impound funds appropriated for government programs, Congress passed the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified in part at 31 U.S.C. §§ 1400-1407 (1976)), which severely restricted the President's use of impoundments. See also *Local 2677, Am. Fed'n of Gov't Employees v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973) (finding no inherent presidential impoundment power).

108. The regulatory budget would allow Congress to set upper limits on the costs of regulations imposed on the private sector, and to divide these costs among the various agencies. See generally DeMuth, *The Regulatory Budget*, 4 *Regulation* 29 (Mar./Apr. 1980) (approving concept in abstract but questioning feasibility of implementation).

109. The independent agencies are organized to be free from executive control. Their members are not only entitled to fixed terms with for-cause removal restrictions, but they are selected on a bipartisan basis. See discussion by Leventhal, J., *Environmental Law Institute Colloquium*, Spring 1979, at 95 (F. Anderson ed.).

the subordinate decisionmaker.<sup>110</sup> Any attempt to do so would run afoul of the President's power under article II.

A different aspect of the problem of White House staff influence over executive agency subordinates arises when Congress places the decision locus not in an independent commission, but in the President himself. This occurs when Congress wants the President to have direct responsibility and control over certain significant policies. Tariff decisions fall into this mold,<sup>111</sup> as do policy decisions involving such matters as the routes for the Alaska pipeline<sup>112</sup> and for international airlines<sup>113</sup> and export licenses for nuclear material.<sup>114</sup>

The issue is not simply a tug-of-war for decisionmaking control between Congress and the President. In some matters Congress grants the President direct decisional responsibility rather than protecting its prerogatives through the insulative device of an independent agency. In others it chooses to place responsibility in executive agencies, presumably aware of the consequences of that choice for presidential control.<sup>115</sup> Conversely, the President may not always want direct political responsibility and will favor a grant of authority to an executive or even an independent agency.<sup>116</sup>

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110. Congress still retains the discretion, however, not to grant rulemaking power to executive agencies or to do so only with formal procedures. See text accompanying notes 135-37 *infra*.

111. The Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590, established a Tariff Commission, which made recommendations to the President that he could accept or reject as he saw fit without judicial oversight. See *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940). Today these recommendations are made by the International Trade Commission. See 19 U.S.C. §§ 2251-2253 (1976).

112. The decision on the pipeline was to be made by the President subject to congressional review. See 15 U.S.C. §§ 719e,f (1976).

113. 49 U.S.C. § 1461 (1976). See also Exec. Order No. 11,920, 41 Fed. Reg. 23,665, 23,666 (1976) (prohibiting private *ex parte* contacts with White House staff while route certifications are before the President).

114. See the Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, 92 Stat. 120 (1978) (codified at 22 U.S.C. §§ 3201-3282 (Supp. II 1978)). Congress vacillated on the question of who should have political control of this sensitive area, shifting the locus of decisionmaking power first from the State Department to an independent agency, the Nuclear Regulatory Commission, and then back to executive control by the President. The NRC continues to have a role, albeit more limited. If the State Department approves an export license, the NRC may then render its opinion. If it disapproves of the State Department action, the President may overrule, but then the matter is laid before Congress for 60 days, during which time that body can veto the presidential decision.

115. Congress has also tried to have it both ways in a single delegation. The Department of Energy Organization Act was designed to unify energy policy in a cabinet-level executive agency. Congress, however, decided that the functions of price setting for natural gas, formerly performed by the Federal Power Commission, should be retained by a new independent agency, the Federal Energy Regulatory Commission, located within DOE. Opponents of deregulation feared placing price-setting power in the hands of cabinet officials and preferred the protections that would be available with a collegial body, such as the Sunshine Act, see text accompanying notes 123-30 *infra*. For a good discussion of the political infighting that led to this Jonah-in-the-whale compromise, see *Byse*, *The Department of Energy Organization Act: Structure and Procedure*, 30 Ad. L. Rev. 193, 198-203 (1978).

116. This situation occurred recently when the President failed to endorse the Kameny Commission's recommendation that nuclear power safety responsibilities be removed from the NRC and placed in a single administrator subject to greater presidential control. See President's Remarks in Response to the Report of the Commission on the Accident at Three Mile Island, 15 Weekly Comp. of Pres. Docs. 2202 (Dec. 7, 1979). The President had earlier opposed the merger of the NRC into the Department of Energy "[b]ecause public concerns about the safety of nuclear power are so serious." President's Energy Reorganization Message to Congress, 35 Cong. Q. 404 (1977).

Sometimes, however, Congress has recognized that it delegated too much responsibility directly to the President. For example, President Truman once complained that looking over and signing papers on his desk "takes 3 hours every night."<sup>117</sup> Congress responded by passing the Presidential Subdelegation Act of 1951,<sup>118</sup> which permitted the delegation of more than 400 duties then imposed on the President.<sup>119</sup> Most of the listed duties seem trivial;<sup>120</sup> some, however, involve responsibilities for Indian affairs and the use and exploitation of government land that would hardly be taken lightly today.<sup>121</sup>

Perhaps the most interesting aspect of the Act for present purposes is that it specifically preserves the President's "inherent right" to delegate without express authorization.<sup>122</sup> Congress thus appears to recognize that the President has power under article II to delegate duties to his own staff and other executive officials that cannot be monitored by Congress through the publication requirements of the Subdelegation Act. Arguably, Congress also recognizes the President's need to delegate supervisory responsibilities over executive officials to the White House staff without public notice of the delegation. At a minimum, the Act reflects a long-standing congressional concern with the burdens on the presidency and an acceptance of the theory of inherent power to manage executive branch policymaking.

### C. *The Use of Procedures*

Congress has achieved a certain degree of control over the activities of the White House staff simply by imposing procedural requirements upon the administrative agencies they seek to influence. These requirements govern public meetings, access to documents, and procedural rights in rulemaking.

In the Government in the Sunshine Act<sup>123</sup> Congress has required collegial agencies (those that have two or more appointed members) to open their meet-

117. See S. Rep. No. 1867, 81st Cong., 2d Sess. 1, reprinted in [1950] U.S. Code Cong. Serv. 2931.

118. Pub. L. No. 82-248, 65 Stat. 712 (1951) (codified at 3 U.S.C. § 301-303 (1976)).

119. The act provides that "[s]uch designation and authorization shall be in writing, shall be published in the Federal Register, shall be subject to such terms, conditions, and limitations as the President may deem advisable, and shall be revocable at any time by the President in whole or in part." *Id.*

120. S. Rep. No. 1867, *supra* note 117, at 4-6, [1950] U.S. Code Cong. Serv. at 2934-37.

121. *Id.* (examples 19-28). These responsibilities are now vested in the Secretary of the Interior. Over the years Presidents from Truman to Carter have used this act to delegate by executive order literally hundreds of duties. See note following 3 U.S.C.A. § 301 (1977 & Supp. 1980).

122. 3 U.S.C. § 302 (1976) provides:

This Chapter shall not be deemed to limit or derogate from any existing or inherent right of the President to delegate the performance of functions vested in him by law, and nothing herein shall be deemed to require express authorization in any case in which such an official would be presumed in law to have acted by authority or direction of the President.

123. Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 552b (1976)). See generally R. Berg & S. Klitzman, *An Interpretive Guide to the Government in the Sunshine Act* (1978).



ings to public scrutiny.<sup>124</sup> The policy of the Act is to make public the decision process of collegial bodies. It thus ensures that independent agencies are unlikely to be influenced by private White House staff contacts during the informal rulemaking process.<sup>125</sup>

The reach of the Sunshine Act is a potentially delicate issue. By limiting its coverage to collegial bodies, Congress focused primarily on the independent agencies, which are organized on that basis. Congress thus avoided the larger issue of its constitutional power to require executive agencies under the President's control to be open to public scrutiny. There are, however, a few agencies covered by the Act that do not fit the traditional molds. The Council on Environmental Quality,<sup>126</sup> a three-member body appointed by the President with the advice and consent of the Senate, advises the President on national policies relating to improvement of the environment. The Council avoided a potential confrontation between Congress and the President when it enacted sunshine regulations.<sup>127</sup> The Council of Economic Advisors,<sup>128</sup> on the other hand, has refused to promulgate sunshine rules, relying primarily on the fact that it is part of the Executive Office of the President.<sup>129</sup> Even if the Sunshine Act is eventually limited to independent agencies, it remains a significant congressional tool for regularizing the administrative process and reducing the potential influence of *ex parte* contacts by the White House.<sup>130</sup>

The Freedom of Information Act (FOIA),<sup>131</sup> which makes government records publicly available upon request, also serves as a congressional device for publicizing the decisional processes of administrative agencies. It is now possible for any interested person to obtain written communications between White House staff and personnel of both independent and executive agencies<sup>132</sup> unless there is

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124. There are ten specified exceptions to this open meetings requirement, 5 U.S.C. § 552b(c) (1976). In general these exceptions track those contained in the Freedom of Information Act, 5 U.S.C. § 552(b) (1976).

125. Indeed, the exceptions to open meetings by collegial bodies may not even apply to *formal* rulemaking proceedings. For example, exemption 10 relates to "the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing." Although it is obviously not adjudication, formal rulemaking does involve a determination on the record after opportunity for an agency hearing. The legislative history is in conflict on whether formal rulemaking is within the exemption. See R. Berg & S. Klitzman, *supra* note 123, at 27-28. At least one commission has decided that it is within the exemption. See 42 Fed. Reg. 13,288 (1977) (Postal Rate Comm'n).

126. The Council was established by the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified in relevant part at 42 U.S.C. §§ 4321, 4342 (1976)).

127. See 42 Fed. Reg. 8673 (1977) (proposed rules); 42 Fed. Reg. 20,818 (1977) (final rules).

128. The Council was established by the Employment Act of 1946, Pub. L. No. 79-304, 60 Stat. 23 (1946) (codified in relevant part as amended at 15 U.S.C. § 1023 (1976)). It is composed of three members appointed by the President with the advice and consent of the Senate.

129. Discussion by author with CEA staff, December 1979.

130. The Sunshine Act also amended the APA by adding a restriction against *ex parte* contacts to the formal adjudication and rulemaking requirements. 5 U.S.C. § 557(d)(1) (1976). See also 5 U.S.C. § 551(14) (defining "ex parte communications"). See generally text accompanying notes 138-39 *infra*.

131. 5 U.S.C. § 552 (1976).

132. The CEA maintains that it is not an "agency" for purposes of FOIA coverage. The Council relies upon legislative history of the FOIA that exempts the President's immediate staff or units in

a specific exemption from disclosure, such as the narrow exemptions incorporating confidentiality requirements emanating from the concept of executive privilege.<sup>133</sup> Practically, the increasing public disclosure of White House staff memoranda to agency officials will mean that written White House contacts are less likely to be secret. In effect, the FOIA has become a method for public participation in the political process of agency policymaking.<sup>134</sup>

A third congressional technique for controlling White House contacts with agency personnel is the utilization of procedures imposed by the Administrative Procedure Act (APA). Congress is free to control White House influence over agency rulemaking by mandating that rules be promulgated according to the formal rulemaking requirements of the APA,<sup>135</sup> which ensures that factual and policy matters arising in a rulemaking are subject to full hearings and on-the-record judicial review based on the substantial evidence test.<sup>136</sup> Just as locating a substantive program in an independent agency reduces the degree of White House staff contact and control, imposing formal procedures reduces the possibility that nonrecord contacts will affect the outcome of administrative decisions, because it is difficult to see how secret contacts by the White House could materially affect a decision made with this kind of formality. Since Congress can extend the formal rulemaking process to executive as well as independent agencies,<sup>137</sup> the use of procedures is a means of asserting control over executive policymaking that might not be achievable in a more direct manner.

In 1976 Congress amended the APA explicitly to forbid *ex parte* contacts in formal rulemaking.<sup>138</sup> While there was no indication that Congress was directing this amendment at contacts by the President or the White House staff,<sup>139</sup> the action reflects strong congressional concern about the problem of *ex parte* communications. With this addition, which bolsters the record restrictions of formal

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the Executive Office whose sole functions are to assist the President. S. Conf. Rep. No. 93-1200, 93d Cong., 2d Sess. 15, reprinted in [1974] 3 U.S. Code Cong. & Ad. News 6285, 6293.

133. Exemptions 1 (national defense files), 5 (inter- and intra-agency memoranda), and 7 (investigatory records) are likely to include executive branch communications. See 5 U.S.C. § 552(b) (1976). In 1974 and 1976 Congress amended the Act to limit the scope of exemptions 1 and 7. Pub. L. No. 93-502, § 2, 88 Stat. 1561 (1974); Pub. L. No. 94-409, § 5(b), 90 Stat. 1241 (1976). See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *EPA v. Mink*, 410 U.S. 73 (1973). President Ford vetoed the 1974 amendment to exemption 1 because of executive privilege concerns, 120 Cong. Rec. 36,243-44 (1974), but Congress overrode his veto, *id.* at 36,622, 36,865.

134. See Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1667, 1670 (1975).

135. 5 U.S.C. §§ 553, 556-557 (1976).

136. *Id.* § 706.

137. The Food and Drug Administration, for example, is an executive agency that has long been required to follow formal rulemaking procedures. 21 U.S.C. § 355(h) (1976). See generally *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973).

138. Pub. L. No. 94-409, § 4, 90 Stat. 1241 (1976). The prohibition against *ex parte* communications was added to § 557 of the APA, which applies both to formal rulemaking and to adjudication.

139. The prohibition against *ex parte* communications applies to any "interested person outside the agency." 5 U.S.C. § 557(d)(1) (1976). This definition appears to be focused on private persons who stand to benefit from the agency rulemaking. While White House staff members may be "outside the agency," they are not likely to be "interested persons" in this sense.

rulemaking, it is doubtful that any agency conducting formal rulemaking proceedings would be comfortable with secret contacts from the White House staff.

Congress can also specify procedures for individual agency rulemaking proceedings by organic legislation, as it has done recently with the FTC and the Consumer Product Safety Commission.<sup>140</sup> For these agencies Congress has created a category of hybrid rulemaking that blends informal and formal rulemaking.<sup>141</sup> The on-the-record limitations of formal rulemaking are somewhat relaxed, but the role of the courts on judicial review is greater than it is for informal rulemaking.<sup>142</sup> It is questionable how much congressional control of ex parte contacts ought to be implied by the existence of a hybrid procedure. Since Congress has not employed formal rulemaking directly, the legislative concern with ex parte communications does not appear to be so substantial. These statutory variations demonstrate that Congress can and will impose restrictions on informal rulemaking when it perceives the need to do so, and these restrictions may or may not include explicit ex parte provisions.<sup>143</sup> Under these circumstances, there is little need to construe congressional silence as favoring a blanket prohibition against ex parte contacts.

This analysis suggests that when Congress permits an agency to promulgate rules pursuant to "pure" informal rulemaking, it has considered and rejected other alternatives that would more effectively restrain the White House. This interpretation is buttressed by Congress's decision in 1976 not to extend the ex parte communications provision to informal rulemaking.<sup>144</sup> Congress undoubtedly realizes the current tensions that arise when the White House staff intervenes in agency policymaking. If Congress wants to restrict this practice to its constitutional minimum, it can do so by employing formal rulemaking. Failure to impose formal procedures suggests that Congress realizes that the White House necessarily plays a political role in formulating agency policy. One need only recall the events surrounding the strip mining and ozone rules<sup>145</sup> to realize that Congress itself may want to intervene in the political process of rulemaking, either directly or through the President. In other words, Congress understands the

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140. See, e.g., Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, tit. II, § 202(a), 88 Stat. 2193 (1975) (codified at 15 U.S.C. § 57a (1976)); Consumer Product Safety Act, Pub. L. No. 92-573, § 9, 86 Stat. 1215 (1972) (codified at 15 U.S.C. § 2058 (1976)). See generally Verkuil, *The Emerging Concept of Administrative Procedure*, 78 *Colum. L. Rev.* 258, 317-19 (1978).

141. See Verkuil, *Judicial Review of Informal Rulemaking*, 60 *Va. L. Rev.* 185 (1974); Williams, "Hybrid Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 *U. Chi. L. Rev.* 401 (1975).

142. The Occupational Safety and Health Act, for example, provides for § 553 informal rulemaking with judicial review of the whole record according to the substantial evidence standard. 29 U.S.C. § 655(b) (1976). The courts have been struggling with the contradiction inherent in this requirement of on-the-record review of a nonrecord proceeding. See *Industrial Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467, 472-76 (D.C. Cir. 1974).

143. While Congress is free to experiment with ex parte restrictions in rulemaking that affect the White House, it must of course respect the powers of control conferred by article II on the President or his delegates, including the confidentiality requirements of executive privilege. To date, however, Congress has not sought to restrain the President directly and the issue has not been posed.

144. See text accompanying note 179 *infra*.

145. See notes 11-24 and accompanying text *supra*.

political nature of rulemaking, and it may prefer to leave the President and the White House free to control agencies whose decisional independence can cause political problems for everyone.<sup>146</sup>

#### IV. THE JUDICIAL POWER TO CONTROL EX PARTE CONTACTS BY THE WHITE HOUSE

The preceding discussion demonstrates that the President and the White House staff have legitimate privacy interests in coordinating and controlling agency policymaking that Congress cannot or, as a practical matter, would not abrogate. But Congress is not the only branch that evaluates the role of the executive in administrative decisionmaking—the courts supervise agency decisions on judicial review. While this supervision usually involves interpreting the will of Congress as it pertains to control of the executive, the courts increasingly are creating common law and due process standards of acceptable administrative decisionmaking. These standards, while not necessarily directed at the executive branch, inevitably affect presidential powers of coordination.

The most vivid example is the recently developed judicial doctrine that extends prohibitions against *ex parte* contacts from the formal process to the informal process,<sup>147</sup> which includes both informal rulemaking<sup>148</sup> and informal adjudication.<sup>149</sup> To date the development of standards for *ex parte* communications has been limited to nonrecord contacts by private parties. However, respected legal commentary<sup>150</sup> and extrajudicial musings by influential federal judges<sup>151</sup> reveal an inclination to extend the restriction on *ex parte* contacts to

146. In hearings on regulatory reform legislation designed to structure the President's control over agency policymaking, Senator Percy posed the dilemma as follows: "How do we come to a national policy if the President of the United States can't intervene in a case . . . where [administrative] action might totally contradict a Presidential goal and mandate for the country on something as important as energy." Regulatory Reform Legislation: Hearings on S. 262, S. 755, S. 93 and Other Regulatory Reform Legislation Before the Senate Comm. on Governmental Affairs, 96th Cong., 1st Sess., pt. 2, at 118 (1979) [hereinafter cited as Senate Hearings].

147. See *United States Lines, Inc. v. FMC*, 584 F.2d 519 (D.C. Cir. 1978) (informal adjudication); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977) (informal rulemaking). Cf. *Action for Children's Television v. FCC*, 564 F.2d 458, 474-77 (D.C. Cir. 1977) (limiting *Home Box Office* to rulemakings involving "valuable privileges"). See also *Hercules, Inc. v. EPA*, 598 F.2d 91 (D.C. Cir. 1978) (regulating intra-agency contacts).

148. This procedure is governed by § 553 of the APA, 5 U.S.C. § 553 (1976).

149. This category of decisionmaking is virtually unbounded by APA-imposed procedures.

150. See Bruff, *supra* note 28, at 503-05. Others have discussed the subject from a more outcome-oriented perspective. See R. Rauch, *supra* note 3; Senate Hearings, *supra* note 146, at 134-51 (testimony of Alan B. Morrison). (Both Rauch and Morrison rely upon Bruff for much of their constitutional analysis.) See also Department of Justice Memorandum, *supra* note 18.

151. Judge David Bazelon had the following exchange with Senator Ribicoff during hearings on the regulatory reform legislation:

Chairman Ribicoff. Should [the *ex parte* communications prohibition] apply to the President and his advisors as well as the public?

Judge Bazelon. I would say so. That may be a hard one to swallow, but this is an area where courtesy doesn't extend to risking the integrity of the administrative process.

Senate Hearings, *supra* note 146, at 8.

the President and the White House. The courts are likely to be called upon to resolve this issue before long.

Before evaluating the application of restrictions to White House contacts, the judicial extension of limitations upon *ex parte* contacts to private participants in the informal process should be separately considered, because it is not uncontroversial.<sup>152</sup> The serious step of restricting White House communications, which has profound implications for the policy coordination plans of the executive branch, should be taken only if it is clear that the step of extending *ex parte* contacts to private participants is a sound one. Even if the first step is valid, however, the second step should presumably not be taken if the purpose of and justification for nonrecord contacts by the White House can be differentiated from contacts by private persons in informal rulemaking generally. This section reviews the soundness of the *ex parte* contact idea in informal decisionmaking and then evaluates its extension to the White House in light of the executive and congressional interests discussed earlier.

#### A. *The Application of Ex Parte Contact Principles to Informal Decisionmaking*

The making of policy usually occurs in an environment less structured than adjudication because the questions involved transcend individualized interests and the methods of resolving them resist formal standards of proof. Policymaking implies selecting a particular rule or course of action from among several possible choices. If the policymaking framework is a rulemaking, the APA creates an informal process that tries to assure a measure of rationality while recognizing the need for decisional flexibility. But the framework may also encompass "executive" decisions that establish policy by granting exemptions, commencing prosecutions, or approving grants, licenses, or expenditures. In these latter cases the APA is virtually silent on procedures,<sup>153</sup> and thus an "informal adjudication" format has emerged. Historically, judicial doctrine accepted these categories of informal policymaking unless due process interests intervened.<sup>154</sup> Recently, however, the courts on judicial review have looked more carefully at these decisions and their procedures. Relying on the Supreme Court's decision in

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In a colloquium sponsored by the Environmental Law Institute, Judge J. Skelly Wright indicated he was also inclined to extend the restrictions on *ex parte* contacts to the White House. See ELI Colloquium, *supra* note 109, at 90-99. See also Wright, *Commentary: Rulemaking and Judicial Review*, 30 *Ad. L. Rev.* 461 (1978).

152. See *Association of Nat'l Advertisers, Inc. v. FTC*, 617 F.2d 611, 633 (D.C. Cir. 1979) (concurring op. of Wright, J.) (describing the law on *ex parte* contacts as unsettled). See also Carberry, *Ex Parte Communications in Off-the-Record Administrative Proceedings: A Proposed Limitation on Judicial Innovation*, 1980 *Duke L.J.* 65; Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 *Ad. L. Rev.* 377 (1978).

153. The one potential exception is § 555(e), which is being read cautiously to impose a statement of grounds for denial upon agency officials. See *Dunlop v. Bachowski*, 421 U.S. 560 (1975); see generally Verkuil, *supra* note 140, at 315-17.

154. See, e.g., *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959), in which the court imposed an *ex parte* contact restraint upon informal rulemaking because the procedure affected important private rights of a VHF television station.

*Citizens to Preserve Overton Park, Inc. v. Volpe*,<sup>155</sup> courts have searched for a record supporting the informal decision and scrutinized its contents closely. This close look has exposed weaknesses in the policymaking process and led to the imposition of record-building procedures similar to those in the formal decision process. The prohibition against ex parte contacts is in this sense a procedure to ensure a better record, and the cases have imposed it equally upon informal rulemaking and informal adjudication. Arguably, however, the justifications for the restrictions vary with the particular decision context.

In *Home Box Office, Inc. v. FCC*,<sup>156</sup> the Court of Appeals for the District of Columbia Circuit remanded cable television rules promulgated pursuant to informal rulemaking procedures for a special hearing on the source and nature of all ex parte contacts.<sup>157</sup> In holding that all ex parte contacts should be forbidden, the court rejected traditional views about informal rulemaking. It stated that

implicit in the decision to treat the promulgation of rules as a "final" event in an ongoing process of administration is an assumption that an act of reasoned judgment has occurred, an assumption which further contemplates the existence of a body of material—documents, comments, transcripts, and statements in various forms declaring agency expertise or policy—with reference to which such judgment was exercised. . . . As a practical matter, *Overton Park*'s mandate means that the public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings.<sup>158</sup>

This reliance upon *Overton Park* as the basis for rejecting the view that informal rulemaking is a nonrecord proceeding was questioned by Judge MacKinnon in a belated special concurrence.<sup>159</sup> Shortly after this separate opinion was issued, a panel of the District of Columbia Circuit that included Judge MacKinnon decided *Action for Children's Television (ACT) v. FCC*.<sup>160</sup> This opinion refused to apply *Home Box Office*'s ex parte contact restraints to a rulemaking that did not involve the grant of valuable privileges.<sup>161</sup> The *ACT* court perceived a problem in drawing lines between all the types of sources that might influence a decisionmaker. Noting Congress's apparent intent to permit some ex parte contacts, the court chose to "draw that line at the point where the rulemaking proceedings involve 'competing claims to a valuable privilege.' It is at that point where the potential for unfair advantage outweighs the practical

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155. 401 U.S. 402 (1971). *Overton Park* involved informal adjudication; namely, a decision by the Secretary of Transportation on whether to expend federal funds for a highway through a state park.

156. 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

157. *Id.* at 58.

158. *Id.* at 54 (footnotes omitted).

159. *Id.* at 62. Judge MacKinnon filed his concurrence more than a month after the opinion appeared.

160. 564 F.2d 458 (D.C. Cir. 1977).

161. *Id.* at 474. See also *United Steelworkers of America v. Marshall*, No. 79-1048 (D.C. Cir. Aug. 15, 1980).

burdens, which we imagine would not be insubstantial, that such a judicially conceived rule would place upon administrators."<sup>162</sup>

The same court decided *United States Lines, Inc. v. FMC*,<sup>163</sup> which applied the ex parte contacts restraints outlined in *Home Box Office* to informal adjudication.<sup>164</sup> The court relied not only on *Overton Park* and its expansive record requirement but upon concepts of due process as well, stating that "[t]he inconsistency of secret ex parte contacts with the notion of a fair hearing and with the principles of fairness implicit in due process has long been recognized."<sup>165</sup>

Several questions emerge from these cases. First, what does *Overton Park* require as it relates to ex parte contacts? Does it make a difference whether the administrative action is informal rulemaking or adjudication? Second, to what extent has the Supreme Court's more recent decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*,<sup>166</sup> limiting courts to the procedures outlined in the APA, precluded the use of ex parte contact restrictions in informal decisionmaking?

1. *Overton Park and Ex Parte Contacts*. The Supreme Court's opinion in *Overton Park* signaled a new era in judicial review. At issue was a definition of the scope of review contemplated by the "arbitrary or capricious" standard of the APA.<sup>167</sup> The Court, while nodding toward the traditional presumption of regularity accorded administrative decisions, subjected an informal adjudication to "a thorough, probing, in-depth review" and a "searching and careful" independent inquiry into the facts. Relying on the "whole record" requirement of the APA,<sup>168</sup> the Court held that the administrative record that was before the Secretary must be presented to the reviewing court to enable it to undertake its independent evaluation. The Court emphasized however, that formal administrative findings were not required.

While it is a dramatic case, *Overton Park* is only part of the picture. The Supreme Court also expounded standards of review for informal adjudication in *Camp v. Pitts*,<sup>169</sup> emphasizing that if, unlike the situation in *Overton Park*, a

162. 564 F.2d at 477 (citations omitted). After these cases there is some doubt as to the reach of *Home Box Office*. Since Judge MacKinnon concurred in that case and participated in *ACT*, he may have viewed *Home Box Office* as a valuable-privilege case similar to *Sangamon Valley*. It has been pointed out, however, that the pay cable rules at issue in *Home Box Office* were much more general in their focus than the license determination in *Sangamon*. See Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 Va. L. Rev. 169, 227-30 (1978).

163. 584 F.2d 519 (D.C. Cir. 1978).

164. The challenged administrative action involved the issuance of an exemption from the anti-trust laws for joint service agreements under § 15 of the Shipping Act, 46 U.S.C. § 814 (1976). This was "informal adjudication" only because the Federal Maritime Commission and the court on review interpreted the statutory "hearing" requirement as not necessitating formal adjudication under §§ 554 and 556-557 of the APA. Compare *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir.), cert. denied, 439 U.S. 824 (1978) (holding that a "hearing" requirement triggers formal adjudication).

165. 584 F.2d at 539.

166. 435 U.S. 519 (1978).

167. 5 U.S.C. § 706(2)(A) (1976).

168. Section 706 of the APA, which apparently is applicable to all of the scope-of-review provisions, states: "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706 (1976).

169. 411 U.S. 138 (1973).

“contemporaneous explanation” for the challenged action exists, the propriety of the administrative findings must be evaluated in light of the record already made.<sup>170</sup> *Camp*, therefore, qualifies *Overton Park* by requiring the reviewing court to confine itself to the administrative record if one exists—the court cannot independently build a record.

Despite this apparent qualification, courts have not relied on *Camp* to moderate the message of *Overton Park*.<sup>171</sup> The courts of appeals have eagerly extended *Overton Park* to the informal rulemaking arena without discussing either its relevance in those situations or the *Camp* reservations.<sup>172</sup> In informal rulemaking, both a “contemporaneous explanation” and an administrative record are likely to exist in the form of a “concise statement of basis and purpose” and the comments and other information received in connection with the rulemaking proceeding. There simply is no *Overton Park* problem of post-hoc rationalization and there is almost certain to be more of an explanation and record than the *Camp* Court found tolerable.

On these grounds alone, one might temper the demands of *Overton Park* in the context of informal rulemaking rather than use the case as a justification for more intensive review. Even though the courts of appeals have not yet so reacted, there are indications that the Supreme Court may be on the verge of reducing the application of *Overton Park* in the informal rulemaking setting. In *Vermont Yankee*, the Court cited *Camp* in discussing the appropriate standard of review of informal rulemaking.<sup>173</sup> The Court also mentioned *Overton Park*, however, so it may be difficult to establish what it will ultimately hold with regard to review of informal rulemaking.<sup>174</sup> There is little doubt, however, that the expectations set forth in *Overton Park* with respect to the administrative record are more appropriate in the informal adjudication setting. Most of the matters that arise in adjudications are more susceptible to findings and record analysis than are the polycentric policy questions found in rulemaking.<sup>175</sup> It is

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170. *Id.* at 143. The Court added that if the finding was not sustainable on the administrative record then the decision must be remanded to the agency for further consideration; in no event was the court itself to build the required record. *Id.* at 142.

171. A quick (Lexis) count of the federal cases that cite *Overton Park* since 1971 totals 1,155. *Camp* has been cited only 184 times since 1973. Thus, on the basis of citations it appears that *Overton Park* has virtually eclipsed *Camp* as the precedent for the standard of review.

172. See, e.g., *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1975), cert. denied, 426 U.S. 941 (1976).

173. The Court stated that:

We have made it abundantly clear before that when there is a contemporaneous explanation of the agency decision, the validity of that action must “stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the Comptroller’s decision must be vacated and the matter remanded to him for further consideration.”

*Camp v. Pitts*, 411 U.S. 138, 143 (1973).

435 U.S. at 549.

174. *Id.* at 549 n.21. In *Strykers Bay Neighborhood Council, Inc. v. Karlen*, 100 S.Ct. 497, 502 (1980) (Marshall, J., dissenting), Justice Marshall complained that the Court had ignored *Overton Park* in reversing a determination that an environmental decision by HUD was arbitrary and capricious.

175. For example, the decision to grant a license to operate branch banks involved in *Camp* affected a valuable individual privilege, thus triggering due process concerns. Due process was not



difficult to understand why an informal rulemaking process that satisfies the findings and record requirements of *Camp* should run afoul of *Overton Park*.

This analysis has implications for the ex parte contact cases. If courts rely on *Overton Park* to prohibit such contacts, the prohibition should occur only in those situations where *Overton Park*, as modified by *Camp*, is offended. Informal adjudication cases with due process aspects are one such situation. Thus, in *U.S. Lines* the court was on secure ground in imposing a structure upon the existing informal record through a restriction on ex parte contacts. The antitrust exemption sought in *U.S. Lines* is a privilege of economic significance awarded to an individual company, much like the branch bank application sought in *Camp*. Even if the *Camp* Court was satisfied with a less carefully constructed administrative record, it does not seem unreasonable to provide a more secure one, especially where the problem of ex parte contacts is explicitly raised.<sup>176</sup>

When it comes to "pure" informal rulemaking that does not involve valuable privileges, the ex parte contact restriction is less justifiable. *Home Box Office* is such a situation. The FCC made a record constructed from the extensive comments it received, and it also made findings in its concise statement of basis and purpose. It is true that extensive ex parte communications occurred, but they were engaged in by all sides and apparently were of value to the commissioners.<sup>177</sup> The major complaint of the court was that these off-record contacts made the agency's findings a "fictional account" of the actual decisionmaking process that "must perforce" be arbitrary. But the record envisaged by *Overton Park* and *Camp* is not so rigorously defined,<sup>178</sup> and the standard of review not so readily offended. If it were, it is doubtful that Congress would have provided for informal rulemaking procedures that specifically excluded the very ex parte contact restrictions the *Home Box Office* court sought to read in on review.<sup>179</sup> It should not be forgotten that informal rulemaking involves "interested persons," rather than "parties" in the usual adjudicative sense of the term. The concept of "ex parte" implies a different decisional structure from that involving mere "in-

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implicated in *Overton Park*, however, because rather than raising a specific individual interest, the plaintiffs were merely asserting a "right" to a more agreeable environment. Although this right may enjoy congressional recognition, it does not rise to the level of rights protected by the due process clause.

176. The proposition would be less sound if the informal adjudication did not directly raise due process concerns. In this regard Secretary Volpe's difficulties with the Three Sisters Bridge construction are instructive. There the reviewing court invalidated the Secretary's decision to approve construction because the decision had been subject to congressional influence. *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972). The court speculated that the rulemaking might have been held valid despite those "extraneous pressures." *Id.* at 1247. But it is also doubtful whether the interest the plaintiffs sought to protect rose to due process levels, thereby incorporating ex parte contact prohibitions. Since the issue in the Three Sisters Bridge case was whether a hearing was required by statute before the Secretary approved the construction, the due process issue did not arise directly, although Judge Wright had been willing to address it if the court did not locate procedural rights in the statute itself. *D.C. Fed'n of Civic Ass'ns v. Volpe*, 434 F.2d 436, 437-39 (D.C. Cir. 1970).

177. See Robinson, *supra* note 162, at 228-30.

178. *Overton Park* does discuss the "full administrative record," but that phrase, while susceptible to expansive meaning standing alone, seems qualified by the Court's acceptance in *Camp* of an administratively created record.

179. See notes 138-39 and accompanying text *supra*.

terested persons." One can only have a contact without "parties" present in a proceeding where parties are involved, namely adjudication or formal rulemaking.

2. *Vermont Yankee and Ex Parte Contacts*. In *Vermont Yankee* the Supreme Court emphatically instructed the courts of appeals not to add procedures to informal rulemaking other than those specified in section 553 of the APA. The issue in the case was whether cross-examination on critical testimony in an informal rulemaking was a necessary addition to the section 553 ingredients of notice, comment, and statement of basis and purpose.<sup>180</sup> The Court also criticized the assumption that additional procedural ingredients like cross-examination were justified by the applicable standard of review, noting that "informal rulemaking need not be based solely on the transcript of a hearing held before an agency. Indeed, the agency need not even hold a formal hearing. . . . [T]he agency [need only follow] the statutory mandate of the Administrative Procedure Act or other relevant statutes."<sup>181</sup>

With this mandate to comply with the APA, *Home Box Office* bears a heavy burden of justification. The prohibition against ex parte contacts can be viewed as a procedural ingredient much like cross-examination, discovery, or the right to call witnesses. Because it is one of the procedural ingredients from formal adjudication that was specifically left out of section 553 informal rulemaking, adding it judicially flies in the face of the basic message of *Vermont Yankee*.

As a practical matter, however, the FCC and other agencies have imposed ex parte contact restrictions upon themselves in light of *Home Box Office*.<sup>182</sup> If the agencies have done so voluntarily, the *Vermont Yankee* problem does not arise.<sup>183</sup> But some agencies have not yet agreed to restrict ex parte contacts, or have not agreed to restrict them adequately, or would like to change their restrictions if permitted to do so. In these situations, following *Home Box Office* could well lead to a confrontation with *Vermont Yankee*.

In such a case, several "defenses" to the application of *Vermont Yankee* can be raised in the ex parte rulemaking situation. First, it could be argued that the real danger of imposing a requirement of cross-examination on crucial issues was its indeterminacy, a problem that is not present in the context of ex parte contacts. The Court in *Vermont Yankee* feared that an abstract requirement of cross-examination on crucial issues would convert all rulemaking into a full adjudicatory hearing, causing serious delay.<sup>184</sup> By comparison, once ex parte con-

180. 435 U.S. 519, 541 (1978).

181. *Id.* at 547.

182. See 47 C.F.R. § 1 (1979) (FCC rules); 14 C.F.R. § 300.2 (1979) (CAB rules); 16 C.F.R. § 1012 (1979) (CPSC rules). The Consumer Product Safety Commission rules require disclosure of ex parte contacts, whereas the CAB rules ban them. The agencies that have restricted ex parte contacts in rulemaking seem generally to be pleased with the results.

183. In *Vermont Yankee*, the Court emphasized that "[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." 435 U.S. at 524.

184. Ironically, this view was inspired by Judge Wright, a proponent of the ex parte contacts development in rulemaking. See Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 *Cornell L. Rev.* 375, 387-88 (1974).

tact rules are established, an agency need no longer worry about their application to a particular rulemaking. Thus, the potential for serious delay does not appear great. Indeed, it may speed things up because the agency will not have to spend time meeting with various interests off the record. But the addition of such a restriction nonetheless inevitably leads informal rulemaking in the direction of formal adjudication.<sup>185</sup>

Another possible escape route from *Vermont Yankee* lies in the meaning of the "whole record" standard of review arguably present in section 706 of the APA.<sup>186</sup> In *Overton Park*, the whole record requirement was referred to in connection with the "arbitrary or capricious" standard of review, but it is not a concept that has traditionally been applied to informal rulemaking. Informal rulemaking was originally thought to be a process that, like the legislative process itself, did not lead to the creation of a "judicial" record.<sup>187</sup> Recently, however, some courts, by reading the whole record requirement literally, have imported the concept into informal rulemaking review.<sup>188</sup> If this idea takes hold, it is easier to argue, as the court did in *Home Box Office*, that the whole record incorporates everything that was before the decisionmaker, including all ex parte contacts. Of course, this interpretation pulls some of the teeth from the *Home Box Office* remedy because it converts the ex parte idea from a prohibitory notion to one that requires disclosure and memorializing instead. But even in this form it effects a significant change in traditional notions of the record associated with informal rulemaking.<sup>189</sup>

Although the *Vermont Yankee* opinion indicates that section 553 rulemaking need not be "based solely on the transcript of a hearing," it also says that the adequacy of a record "turns on whether the agency has followed the statutory mandate of the APA."<sup>190</sup> This statutory mandate, of course, may include the expanded notion of "whole record" in section 706. The most that can be said is that the Court has not clearly stated whether informal rulemaking is bound by record requirements that can be construed to include ex parte contact restrictions as a way of making the record "whole." Since *Vermont Yankee*, however, is the most thorough opinion on this point, its message may supersede anything to the contrary in *Overton Park*. And the message of the later case is that there is a distinct possibility that ex parte contacts should not be forbidden at all in infor-

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185. Of course, if one is willing to take the position that informal rulemaking is subject to due process analysis, this formalizing aspect may be viewed as a necessary component of fair decision-making. See Note, Due Process and Ex Parte Contacts in Informal Rulemaking, 89 Yale L.J. 194 (1979).

186. See *Overton Park*, 401 U.S. at 419.

187. It has always been something of a mystery why the whole-record paragraph should have been placed at the end of the scope-of-review section, since the whole-record concept had been exclusively associated with the substantial evidence test and *Universal Camera*. See 5 U.S.C. § 706 (1976); note 168 supra. The Attorney General's Manual is silent on the application of the whole-record provision except as it relates to the substantial evidence test in § 706(2)(E). See Attorney General's Manual on the Administrative Procedure Act 110 (1948).

188. See *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977).

189. See *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935).

190. 435 U.S. at 547.

mal rulemaking, or that they should be recorded as part of the rulemaking record but not excluded from its coverage.

In the context of informal adjudication, the *U.S. Lines* restriction on ex parte contacts may survive *Vermont Yankee*. The principal concern of the *Vermont Yankee* Court was to protect the organizing scheme of the APA. Since that scheme virtually ignores informal adjudication, there is little that the courts can do to disrupt it.<sup>191</sup> Unless one accepts the extreme position that APA "silence" on the subject of informal adjudication implies a substantive desire not to formulate procedures, the courts seem free to create procedures as needs arise without offending the APA. Indeed, it may be that this incremental approach is exactly what the APA architects contemplated when they decided that a general procedural mechanism for informal adjudication was unworkable.<sup>192</sup> Furthermore, informal adjudication usually implicates due process concerns, creating a separate basis of support for imposing ex parte contact restrictions. In *Vermont Yankee* the Court recognized that, even in some rulemakings, "additional procedures may be required in order to afford the aggrieved individuals due process."<sup>193</sup> As a result of these differences the Court could well conclude that "rulemaking in its purest form" would not justify additional ex parte procedures, whereas informal adjudication or "valuable privilege" rulemaking might. Thus, *U.S. Lines* may survive *Vermont Yankee* while *Home Box Office* might not.

#### B. *The Application of Ex Parte Principles to the White House*

The foregoing discussion should make courts wary of extending the *Home Box Office* rationale without careful analysis. Since the principle is not even firmly accepted as it relates to private contacts in informal rulemaking, it should be evaluated critically before it is read to prohibit ex parte contacts by the President or the White House staff. Most commentary, however, has done little to acknowledge that presidential contacts present judicial review problems of a different order of magnitude. We are simply told, for example, that the President "ought to be treated like everyone else" when deciding how he should participate in administrative policymaking.<sup>194</sup> But the President is obviously not "like

191. The APA can be segmented into four procedural boxes created by two dividers: a horizontal "formal-informal" distinction and a vertical "adjudication-rulemaking" distinction. If this is done one finds the informal adjudication box virtually devoid of procedural ingredients. The only potential ingredient is the grounds for denial requirement of § 555(e). See note 153 *supra*.

192. The indications are that the designers of the APA were impressed by the complexity of the informal decision process and did not desire to "formalize" it into a single procedural mold. See Final Report of the Attorney General's Committee on Administrative Procedure 35-42 (1941) (informal procedures are "truly the lifeblood of the administrative process"). In fact, the majority of the Attorney General's Committee did not even believe that formal adjudication was susceptible to uniform treatment. It was the minority's views on that subject that prevailed when the APA was enacted in 1946. See Verkuil, *supra* note 140, at 274-78. Even today there is considerable debate about whether an "Informal Administrative Procedure Act" can ever be a reality. See generally Gardner, *The Informal Actions of the Federal Government*, 26 Am. U.L. Rev. 799 (1977).

193. 435 U.S. at 542. Compare Note, *supra* note 185, at 194.

194. Senate Hearings, *supra* note 146, at 148 (statement by Alan Morrison). Mr. Morrison meant by this that the President should be able to participate in informal rulemaking only during the comment period.

everyone else": he happens to have been elected by "everyone else" to run the executive branch and see that the laws are faithfully executed.

First let us consider the impact of *Home Box Office* upon the policymaking activities of the President himself. Meetings that he holds with cabinet-level officers must surely be as protected from scrutiny by the courts as they are from interference by Congress.<sup>195</sup> Article II gives the President the power to demand the opinion of his officers in writing and presumably in oral communication as well. At cabinet meetings or at special sessions held to resolve differences, as in the cotton dust proceeding,<sup>196</sup> the President is acting within his exclusive constitutional power.

When the President participates in rulemaking, he should also be accorded some constitutional consideration, at least as his involvement relates to executive agencies.<sup>197</sup> Can it be that a comment timetable set by the agency in a rulemaking proceeding was meant to bind the President as well? It is hard to take seriously the argument that the President's calendar should be controlled by dates set by agencies for organizing public participation. Indeed, it may make better sense for the President to engage in agency policy coordination after the public has submitted comments for the record, because he and his advisors, as well as the agency, can learn from a review of the comments submitted.

While policy coordination does not necessarily require nonrecord discussions, the President's power to execute the laws will undoubtedly be impaired if he is forced to notify the public of all contacts with the agencies. The concept of executive privilege developed earlier suggests that a degree of secret policymaking may be indispensable to candor in decisionmaking. This analysis would make *Home Box Office* inapplicable to ex parte contacts by the President, because the need for executive privacy outweighs the merely statutory interest in seeing the "whole record" on judicial review. The statutory interest is legitimately subordinated to the President's article II power to execute the laws.

When the participation in agency rulemaking takes place at the White House staff level, article II interests are still present. It is reasonable to assume that the President must delegate some of the policy-coordinating function. Although, as previously indicated, Congress may have the power to require written delegations of authority, when it has not so restricted White House staff activities separation of powers interests balance in favor of off-the-record contacts by the executive branch.<sup>198</sup> The "whole record" concept will not be frustrated by this intra-

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195. See note 97 and accompanying text *supra*.

196. See notes 4-10 and accompanying text *supra*.

197. Presidential involvement in independent agency rulemaking is less defensible. One would not expect the President to intervene in FCC license allocation decisions or even in rulemaking proceedings where the issues at stake are similar to those in *Home Box Office*. As has been suggested earlier, Congress may have selected independent agencies as a decision vehicle in order to avoid some degree of White House coordination. See note 136 and accompanying text *supra*. Thus the role of the courts in scrutinizing the whole record may be greater in these situations. As a practical matter, however, the President is not likely to intervene actively in independent agency policymaking.

198. Although White House staff may not have as crucial a timing problem as the President, they still may desire the benefit of a completed rulemaking record before reviewing or setting administrative policy.

executive-branch contact. So long as the agency and the White House staff are bound by the rulemaking record in their policy discussions, staff participation in the decision process must be limited to suggesting outcomes that are supported by that record. Under this approach, agency and White House staff can be viewed as partners in a process of collaborative decisionmaking. But the notion that the executive branch is a single decisionmaking unit is not without controversy.

If one accepts the full implications of *Hercules, Inc. v. EPA*,<sup>199</sup> it may be more difficult to justify the idea that executive agencies are all part of a policymaking team centered in the White House. *Hercules* carved out what appeared to be a limited exception from *Home Box Office* for intra-agency ex parte contacts. The contacts were between the EPA judicial officer who presided over the rulemaking proceeding and members of the EPA legal and scientific staff who had appeared before her.<sup>200</sup> The court reluctantly permitted the contacts, because they were undertaken in good faith to assist in understanding the record.<sup>201</sup> The court avoided *Home Box Office* by holding that it did not apply retroactively, deferring the larger issue of its impact upon future ex parte communications.<sup>202</sup> Since the APA's strictures against ex parte communications do not apply to informal rulemaking or to intra-agency contacts,<sup>203</sup> it is a matter of debate how far the courts should go in mandating an equivalent judicial protective device.

199. 598 F.2d 91 (D.C. Cir. 1978). The EPA had established regulations limiting discharges of two toxic substances into the nation's waterways. The proceeding was conducted pursuant to § 307(a) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1317(a) (1976). The act calls for "on the record" determinations, which trigger formal rulemaking procedures under the APA. As the court noted, the rulemaking involves "categorical" or policy determinations, not individual or local determinations. 598 F.2d at 106. Thus, it is rulemaking in its "purest form," rather than valuable-privilege rulemaking.

200. The EPA had changed its mind about permitting staff assistance, adopting a new regulation to replace an ex parte contact rule that had been applied to separate staff from the decisionmaker. See 40 C.F.R. § 104.14(a) (1976), superseding 40 C.F.R. § 104.16 (1975).

The chief judicial officer, Harriet B. Marple, submitted an affidavit to the reviewing court listing her contacts with agency legal staff and with staff experts. 598 F.2d at 121.

201. *Id.* at 127.

202. The court stated:

Notwithstanding our decision, however, we feel compelled to record our uneasiness with one aspect of this case—the communication between Ms. Marple and EPA staff legal advocates (Mr. Hall and Ms. Chang). The fact that the attorneys who represented the staff's position at the administrative hearing were later consulted by the judicial officer who prepared the final decision possibly gives rise to an appearance of unfairness, even though the consultations did not involve factual or policy issues . . .

Amendatory legislation may be justified if agencies do not themselves proscribe post-hearing contacts between staff *advocates* and decisionmakers in formal rulemaking proceedings, lest there be an erosion of public trust and confidence in the administrative process.

*Id.*

203. See 5 U.S.C. §§ 544(d), 557(d) (1976). The Senate and House reports state, with respect to § 557(d), that "[C]ommunications solely between agency employees are excluded from the section's prohibition." S. Rep. No. 354, 94th Cong., 1st Sess. 36 (1975); H.R. Rep. No. 880, 94th Cong., 2d Sess. 20 (1976).

Presumably the doctrine the courts evolve for intra-agency contacts will also be extended to executive agency contacts with White House staff. Even under a concept of collaborative decisionmaking, White House staff arguably have no more freedom to make contacts privately than agency staff. Thus, the message the *Hercules* case should hold for the agencies is to note the presence of contacts with White House staff, and proceed to defend the rule on the basis of the record before the agency. *Hercules* is not the final word on this point, but it does counsel a cautious approach. It may be that the executive power under article II gives the President *both* the right to intervene and direct *and* the right to do so in private, whereas the same power gives the White House staff only the right to intervene and direct publicly. This *Hercules*-inspired compromise with article II accommodates the countervailing judicial need to review the record of the decision.

The purpose of whole-record review and the attendant ex parte contact restriction is to ensure that the courts are aware of the factual and policy basis for the rule and that all private contacts and documents pertaining to the rule are available for judicial evaluation. It also informs the courts of the extent to which the rule was subjected to postcomment discussion within the executive branch. It is not necessary for the purposes of whole-record review, however, for courts to know the details of every White House contact, including presidential ones. Any rule promulgated with or without White House assistance must have factual support in the record. That much the courts will guarantee, but they need not be omniscient to perform this role effectively.<sup>204</sup>

When private contacts are funneled through the White House or the agency, the court will inevitably look for them in the rulemaking record. "Conduit" contacts, oral as well as written, are included in the record in order to prevent one side in a policy debate from rearguing its position out of the earshot or view of other sides. Since the core of the ex parte contact restriction is directed at nongovernmental contacts, any system that does not ensure that such private contacts are recorded bears a heavy burden of justification. That, of course, is what *Home Box Office* is all about. But valid executive branch interests are not frustrated by a system that publicizes the conduit function.<sup>205</sup>

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204. This reasoning does not account for one troubling scenario of presidential involvement. Since all policy decisions are necessarily made within a "zone of reasonableness," it is possible for undisclosed presidential involvement, motivated by political considerations, to direct an outcome that is supported by the record (i.e., within the zone), but yet different from the outcome that would have been reached in the absence of presidential involvement. Cf. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945) (holding that a conspiracy to fix rates within a zone of reasonableness could violate the antitrust laws). Within certain limits, in other words, the political process affects outcomes in ways the courts cannot police. Perhaps the best answer to this is simply to recognize that politics is as much part of rulemaking as it is of legislation. Despite the presence of the APA, it is not intended that the courts convert informal rulemaking into a totally "rational" process, unaffected by the presence of presidential power.

205. The Justice Department's advice to Secretary Andrus and the CEA concerning the recordation of private contacts appears to be a sound rule for the courts to follow as well. See Department of Justice Memorandum, *supra* note 18. While the strip mining rule was under consideration, the Department suggested, and the CEA accepted, a responsibility for logging all private contacts. The CEA also agreed to place all documents received from private parties in the rulemaking record. See text

With these qualifications, *Home Box Office* and *Hercules* have some relevance to the restriction or recordation of presidential contacts in rulemaking. But they are far from being the guiding precedents for all executive branch activity. *Hercules* must be read in an expansive manner to render it persuasive on the appropriate scope of White House contacts. Ultimately, restrictions on informal rulemaking are better left to congressional resolution, a prospect with which even the *Hercules* court does not quarrel.<sup>206</sup>

*U.S. Lines*, on the other hand, appears to have more vitality on the question of the scope of White House involvement. It suggests that in informal adjudication, the right of the President to intervene off the record is considerably circumscribed. Even direct involvement by the President may be subject to recordation, because the concept of executive privilege introduced in *United States v. Nixon* can be limited by due process interests implicated in adjudicatory proceedings.<sup>207</sup> There is no inherent executive power to control the rights of individuals in an adjudicative setting.

In summary, the judicial role in controlling White House ex parte contacts involves the application of *U.S. Lines*, with some limited room for *Home Box Office* and *Hercules*. These cases may apply, with modification, to presidential intervention in independent agency rulemaking or White House staff intervention in executive agency rulemaking. But direct presidential intervention in executive agency rulemaking should remain free from judicially imposed record requirements.

#### V. A CRITIQUE OF PROPOSALS FOR REGULARIZING PRESIDENTIAL INVOLVEMENT IN AGENCY POLICYMAKING

Several proposals seeking to regularize the policymaking function of the White House are currently before Congress. Of particular interest is a plan, sponsored by the Commission on Law and the Economy of the American Bar Association, to give the President the ability to change policies created by agency rulemakings.<sup>208</sup> In addition, a bill introduced by Senator Culver would explicitly exempt the White House from ex parte contact restrictions,<sup>209</sup> and one introduced by Senator Kennedy would have the opposite effect.<sup>210</sup>

accompanying notes 21-23 supra. There is no reason why a court should not impose similar standards upon the rulemaking record as part of its function on judicial review.

206. See 598 F.2d at 127-28.

207. See text accompanying notes 90-93 supra.

208. See ABA Commission on Law and the Economy, *Federal Regulation: Roads to Reform* ch. 5 (1979) [hereinafter cited as *Federal Regulation*]. A bill embodying the ABA proposal has been introduced by Senator Roth. See S. 1545, *Accountability in Regulatory Rulemaking Act of 1979*, 96th Cong., 1st Sess. (1979).

In the interests of full disclosure, the author should note that he served as a consultant to the Commission, but his efforts were confined to chapter 6 of the Report. The discussion herein deals only with chapter 5.

209. S. 2147, *The Regulatory Flexibility and Administrative Reform Act of 1979*, 96th Cong., 1st Sess. (1979), reprinted in 125 Cong. Rec. S. 19040 (daily ed. Dec. 18, 1979).

210. S. 1291, *The Administrative Practice and Regulatory Control Act of 1979*, 96th Cong., 1st Sess. (1979).



### A. *The ABA Proposal*

In its important book, *Federal Regulation: Roads to Reform*,<sup>211</sup> the ABA Commission on Law and the Economy proposed a statute authorizing the President to require executive and independent agencies to reconsider or modify regulations that the President finds significantly affect other national interests or statutory goals.<sup>212</sup> The proposed statute would contain subject-matter limitations and procedural safeguards and preclude intervention in licensing or ratesetting proceedings. In addition, it would allow time for Congress to react to presidential directives. It would not disturb existing standards of judicial review.<sup>213</sup>

Inspired by the need to enhance presidential accountability for agency policymaking,<sup>214</sup> this recommendation seeks to provide the President with a forcing mechanism to ensure uniform policy on "critical" national issues.<sup>215</sup> The President is given the power to require executive and independent agencies to consider or reconsider an actual regulation within a specified period of time. If such reconsideration does not take place to the President's satisfaction, the President is free to direct the agency to modify or reverse its decision.<sup>216</sup>

The grant of substantive power to reverse agency policy is cabined by an elaborate procedural structure. Before taking action the President must set forth by executive order in the Federal Register his findings on the questioned action or inaction by the agency involved.<sup>217</sup> Before ordering a modification or reversal, the President must provide a thirty-day written comment period. All comments become part of the public docket, which is designed to include all ex parte contacts between the President, his staff, and interested private persons, as well as discussions between the President, his staff, and the affected agency staff. On this latter point the Commission seeks a compromise, suggesting "that the occurrence of any meeting or discussion . . . be placed in the record, but that the substance of the discussion remain private for the same reason that intra-agency discussions remain private—in order to encourage a full and frank exchange of opinions and advice."<sup>218</sup>

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211. *Federal Regulation*, supra note 208.

212. *Id.* at 79-80. See generally Note, *Delegation and Regulatory Reform: Letting the President Change the Rules*, 89 *Yale L.J.* 561 (1980) (concluding that this resolution contemplates a "dangerously broad delegation").

213. *Federal Regulation*, supra note 208, at 80.

214. The recommendation is based on an earlier proposal by Lloyd Cutler, a member of the Commission, and David Johnson. See Cutler & Johnson, *Regulation and the Political Process*, 84 *Yale L.J.* 1395 (1975).

215. "Critical" regulations are defined as those with "major significance to the national interest" and to the achievement of one or more statutory goals in addition to the statutory goal primarily entrusted to the initiating agency. *Federal Regulation*, supra note 208, at 80.

216. *Id.*

217. The President's power is derivative. No presidential order could require modification or reversal unless the agency itself had the power so to act. The President would also be bound by an agency's findings of basic fact. See *id.* at 81-82. Congress is also given a stated time to modify the President's proposed modification or reversal order. If Congress so acts, the President may withdraw his order. *Id.*

218. *Id.* This approach is also followed in the Commission's related recommendation 4, which proposes that the executive branch require review of proposed regulations. *Id.* at 87.

The Commission's compromise plan seems calculated to gain the support of no political group. While it postulates a statutory grant of clear power to determine policy in the President and his staff, it limits that power in a substantively restrictive and procedurally burdensome manner. Moreover, it may actually offer the President less power over executive agencies than he currently enjoys under article II.<sup>219</sup> Conversely, some members of the Commission and of Congress believe the Commission went too far in granting the President the restricted reversal power that emerged from the recommendation.<sup>220</sup>

The provision restricting *ex parte* contacts bears further analysis. Although it tries to accommodate conflicting views on White House involvement in the agency decision process, it suffers from the defect of requiring the same public declarations of contacts from the President as from his staff. Arguably, the President has a greater interest in protecting both written and oral communications with cabinet officials from disclosure. Moreover, the concept of executive privilege expounded in *United States v. Nixon* seems to assure the President privacy in communications of this kind. In effect, the Commission proposal seeks to have the President waive some of his inherent power over "critical regulations" in order to achieve a congressionally sanctioned policy control device. Critical regulations, however, do not encompass all executive agency policymaking, and thus the scope of the proposal is not necessarily coextensive with executive privilege in this field. A situation may arise where the President retains his general off-the-record prerogatives while still exercising the limited on-the-record jurisdiction over critical regulations contemplated by the Commission proposal.<sup>221</sup> It seems doubtful that any President would want to accept such a dangerous duality of policymaking control, because it may lead to a reinterpretation of the shifting contours of the executive privilege doctrine.

As for the Commission's proposal on restricting the *ex parte* communications of White House staff, the notation of meetings with agency staff does not force the President to concede any power under article II. As discussed earlier, the President must be able to delegate duties to staff in order faithfully to execute the laws. But the staff need not have as grand a cloak of privacy to do its job effectively. If Congress can require specific delegations in writing, it could

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219. Of course, the inherent executive power in article II cannot be modified by the proposal. But if the President acts pursuant to the Commission's plan, he may as a practical matter have foregone his right to act differently on other regulations. Since the independent agencies do little of the truly controversial policymaking, which is usually in the areas of energy, environment, and health, there is more to be lost than gained if the President's freedom to control executive agencies is procedurally circumscribed.

220. Four of the Commission's 26 members dissented from recommendation 3. The tenor of the dissents was fear of a politicization of agency rulemaking where "political payoffs" might be more the reality than political accountability.

The Senate Governmental Affairs Committee, chaired by Senator Ribicoff, has introduced a major administrative reform package that intentionally omits the Commission proposal for presidential accountability. See S. 262, Reform of Federal Regulation Act of 1979, 96th Cong., 1st Sess. (1979).

221. The Commission proposal specifically notes that it "would not alter any other existing presidential power derived from the Constitution or other laws." Federal Regulation, *supra* note 208, at 83. Moreover, the expectation is that the President will invoke the critical regulation power only three or four times a year. *Id.* at 84.

presumably require the recordation of contacts. By keeping the substance of those contacts private, article II interests are adequately protected. Thus, the ex parte contacts provision may form the basis for a modification of existing practice even if the Commission's overall proposal fails to become law.<sup>222</sup>

### B. *Ex Parte Contact Proposals*

Congress has before it several bills to reform the APA, at least two of which include sections dealing with ex parte contacts in informal rulemaking. Senator Kennedy has introduced a bill extending ex parte restrictions to informal rulemaking without differentiating in any way between White House and private contacts.<sup>223</sup> It goes beyond the Commission proposal by requiring that written comments and the substance of all oral comments be included in the record.<sup>224</sup> The Kennedy bill simply extends ex parte restrictions from the formal to informal process without qualification. A bill introduced by Senator Culver takes a dramatically different approach. It proposes a new section of the APA on "open communications in informal rulemaking" that explicitly excludes communications within the government, whether or not emanating from the White House, from any restrictions.<sup>225</sup> It is in effect a legislative private contact rule of limited scope.<sup>226</sup>

The Kennedy bill would legislate a full application of *Home Box Office* to all government officials, including those in the White House and the President himself, without any recognition of the distinctly different interests represented by those "outsiders." This approach stands on no better policy footing as a legislative recommendation than it does as a judicial extension of *Home Box Office*. It fails to come to grips with the valid institutional concerns that distinguish the White House from a private participant in the rulemaking process.

The Culver bill, on the other hand, makes a blanket legislative assumption that communications within the government are performed among insiders. It also

222. The proposal does not deal separately with the conduit problem, but that is probably unnecessary so long as it is construed to include all comments on a particular presidential intervention, whether privately or governmentally inspired. This is the approach taken in the Roth bill. See S. 1545, *supra* note 208, § 604(c).

223. S. 1291, § 103, 96th Cong., 1st Sess. (1979) (proposing a new § 553a of the APA).

224. The only exception is for documents exempt from mandatory disclosure under the FOIA. Id. § 103a. This exception would presumably give some small protection to presidential documents, but not those likely to be circulated in connection with domestic policy coordination.

225. Proposed § 553a(a)(2) states in relevant part:

The term "outside communication" means an oral or written communication between an agency official and any person outside the Government which is not on the record and which is relevant to the merits of a rulemaking proceeding for a rule determined to be a major rule under section 621 of this title . . . .

S. 1291, § 103.

226. It only applies to major rules, which the Culver bill proposes to conduct pursuant to "hybrid" rulemaking procedures. See S. 2147, § 621. The bill is also limited in that it renders the ex parte restrictions inapplicable unless prejudice can be shown on review:

Upon review, no court shall hold unlawful or set aside any agency action on the basis that this agency failed to comply with the provisions of this section unless (1) the outside communication involved in such failure presented data, views, or arguments which the agency significantly relied upon in promulgating the final rule and (2) the parties to the proceeding had not been given reasonable notice of such data, views, or arguments.

in effect overrides cases like *Hercules, Inc. v. EPA*, which try to restrain contacts between officials within an agency, by discarding the concept of qualified agency insider introduced by *Hercules* in favor of a blanket rule for both intra- and inter-agency contacts. One might question whether this approach ignores more subtle differences between government and private contacts. For example, the bill fails to account for the "conduit" possibility: it appears to approve a contact between a private person and a government official that is in turn transmitted from that official to the agency official involved in rulemaking.<sup>227</sup> Even the present administration, which generally favors a maximally permissive ex parte contact rule, has accepted the conduit restraint. Thus, the Culver bill is more liberal on ex parte communications than appears necessary to protect legitimate article II interests.

If, however, one had to choose between these two alternatives, there is little doubt that the Culver provision would do less damage. The decisional risks of the conduit problem appear far less serious than the prospect of cutting off all private communications between the President and his agency subordinates. Indeed, that aspect of the Kennedy bill as applied to executive officials might brook serious constitutional challenge should it be enacted.<sup>228</sup>

Of course, there are alternatives other than the two formulated here. It is possible simply to do nothing legislatively and let the present state of the law, with all of its unanswered questions, control outcomes for the future.<sup>229</sup> This course of nonaction is not without merit. It allows the issue to be ventilated and gives the courts an opportunity to structure the constitutional issues more clearly. But its drawback is obvious: it prevents a clear and prompt resolution of the matter, thus frustrating or inhibiting the executive branch and the agencies. Until the cloud on ex parte contacts is lifted, many agency officials, especially those in the independent agencies, will be uncomfortable with White House involve-

227. It would be possible to read the phrase "any person outside the government" as applying to such a person whether or not the communication is "laundered" by contact with an intervening White House official. But there is certainly nothing in the currently available legislative history that would support this interpretation. See 125 Cong. Rec. S19,060 (daily ed. Dec. 18, 1979) (section-by-section analysis).

228. The argument would be that *Myers* and *Nixon* apply the concept of executive privilege to policymaking relationships with executive agency officials.

229. This seems to be the approach taken by other administrative reform bills, which do not address the ex parte contacts issue. For example, the bill introduced by Senator Ribicoff, S. 262, see note 220, *supra*, was silent on ex parte contacts. Since this bill was preceded by one of the most comprehensive committee reports ever produced in the field of administrative reform, its silence should not be taken lightly. See Senate Comm. on Governmental Affairs, Study on Federal Regulation, 96th Cong., 1st Sess. (1979) (Vols. I-VI).

On May 8, 1980, the Senate Judiciary Committee agreed on an amendment to S. 262 that was substituted for the ex parte contacts provision of the Culver bill. The provision reads as follows:

(f) Within one year after the enactment of this legislation, each agency shall conduct rule making proceedings in accordance with section 553 of this title to consider procedures for dealing with ex parte communications in informal rule making proceedings.

S. 262, § 201(f). This amendment seems to defer the ex parte contacts issue; it certainly does not resolve it, because agencies are likely to take a variety of approaches to the problem, including the question of whether the White House should be included within any proposed restraints.

ment and will resist presidential influence. It is therefore desirable to develop a workable ex parte contact rule from the various interests that have been advanced.

## VI. RECOMMENDATIONS

The preceding discussion demonstrates that extending ex parte contact principles to the White House is not to be undertaken lightly. It is far from obvious that ex parte principles should be extended to informal rulemaking in any event,<sup>230</sup> but even if they are, there are sound institutional reasons for distinguishing between presidential and private contacts in the rulemaking process. The President cannot logically be held to the same standards as private persons for participation in the informal rulemaking process. Any limitations on off-the-record contacts by the President should be applied cautiously. Such limitations should apply principally to independent agencies; they should relate only to informal adjudication or valuable-privilege rulemaking, not to "pure" informal rulemaking; and they should focus on contacts between private interests and White House staff that affect the outcome of rulemaking. These principles should form the basis of any legislative, judicial, or administrative solutions to the problem of presidential intervention.

If Congress desires to legislate on the subject, it could adopt the Culver Bill without any danger of interfering with the executive function. The bill exempts all "government officials" from the ex parte contact provisions and thereby grants the President and the White House staff unrestricted access to agency policymakers. On the other hand, if Congress wanted to modify the Culver Bill, it could do so without necessarily trampling upon article II interests. Such modifications might proceed along the following lines. Ex parte contact restrictions could be extended to written, rather than oral, contacts by government officials other than the President.<sup>231</sup> Written comments received by White House staff directly from private parties should also be included as part of the rulemaking record.<sup>232</sup> This approach follows part of the proposal suggested by the ABA Commission on Law and the Economy. Written contacts should be made part of the record because they are likely to be substantive in nature and could affect the outcome of the rulemaking. There should be no requirement that these written contacts be submitted in accordance with the timeframe established for public comment, but they should be placed in the record before the rule is finally

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230. See generally Scalia, *Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court, 1978 Sup. Ct. Rev. 345; Scalia, *The Judicialization of Standardless Rulemaking—Two Wrongs Make a Right*, 1 Regulation 38 (July/Aug. 1977).

231. Whether the President's written contacts can be covered is a close question. On the one hand, most of the jawboning that is likely to occur with his subordinates will be done on an informal, oral basis. One would surmise that written communications are more prone to be substantive and therefore more logically part of the rulemaking record. There is certainly the possibility, however, that a President may want to send a sharp note of displeasure to a subordinate that he would want to keep private.

232. See, e.g., the CEA procedure, discussed in note 205 supra.

promulgated.<sup>233</sup> Limiting contacts to the public comment period would reduce the value of public comments to the agency and to the executive branch. Post-comment contacts are important precisely because they are informed by the comment process itself.

The treatment of oral contacts by the President is a more difficult issue. If the article II privilege is to have any meaning, the substance of such contacts should be outside the record. Moreover, the fact of the contact itself may have to be private so as not to distort the exercise of the President's coordination power.<sup>234</sup> Oral contacts by White House staff should also be privileged, but the privilege should not attach to the same extent as it does for the President. The substance of such contacts should be shielded from scrutiny because it will be difficult to describe them explicitly without, in effect, requiring another "record" to be made.<sup>235</sup> White House staff are likely to meet repeatedly with agency officials to discuss the public comments and the decision rationale behind critical regulations, rendering it extremely difficult to isolate the substance of White House staff discussions from discussions within the agency itself.

The privacy interests implicated by recordation of White House staff contacts with the agency can yield without greatly disrupting the coordination powers of the Presidency. The compromise suggested by the Commission on Law and the Economy with respect to recordation of oral contacts may be the best way to resolve the competing interests.<sup>236</sup> So long as such notations are limited to White House staff contacts, the President should have sufficient flexibility to intervene privately, and the courts can still evaluate the relevance of White House involvement to the decision process.<sup>237</sup>

These restrictions are not inconsistent with a strong view of the President's power to coordinate agency policymaking. Congress must recognize that regulation of direct presidential contacts is as much a restraint upon its own control over executive agency policymaking as it is upon the President's control. Un-

233. There is precedent for this delayed creation of a rulemaking record by the insertion of relevant documents after the close of the public comment period. The 1977 Clean Air Act amendments define the "record" as follows: "All documents which become available after the proposed rule has been published and which the administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability." 42 U.S.C.A. § 7607(d)(4)(B)(i) (Supp. 1978). The statute also makes clear that the rule must be based on data received in the docket by the date the rule is promulgated. See *id.* § 7607(d)(6)(C). This date has been interpreted to mean the date the final rule is signed by the Administrator and released to the public, not the date on which it appears in the Federal Register. See *American Petroleum Inst. v. Costle*, 609 F.2d 20 (D.C. Cir. 1979).

234. If the fact of contact were public, the President would have to weigh the attention such contacts would bring to a particular rulemaking proceeding. Where several conversations are involved, the cumulative impact might become a separate inhibiting consideration.

235. The views of the ACT court are relevant here. The court speculated that it would ultimately have to require conversations to be recorded or administer a lie-detector test to determine if summaries are accurate. See *Action for Children's Television v. FCC*, 564 F.2d 458, 474 (D.C. Cir. 1977).

236. See text accompanying note 224 *supra*.

237. Even *Hercules, Inc.*, which expressed concern about the integrity of the decision process by contact between agency deciders and agency "advocates," accepted a recordation of contacts rule as satisfactory for judicial review purposes. See notes 199-202 and accompanying text *supra*.

necessary formalities will frustrate presidential accountability efforts, thereby depriving Congress of a ready ally in the fight against an increasingly unaccountable bureaucracy.

But Congress is only part of the picture. Whether or not new legislation is forthcoming,<sup>238</sup> the courts reviewing informal rulemaking should cautiously apply cases such as *Home Box Office, U.S. Lines*, and *Hercules*, since they involve a variety of decision contexts other than informal rulemaking. The following factors may prove helpful in resolving particular cases: (1) Ex parte contact restraints should not apply when the President has a direct policymaking stake in the outcome of rulemaking; (2) The courts should be alert to the distinctions among pure informal rulemaking, informal adjudication, and valuable-privilege rulemaking, since the latter two are situations in which interests of due process and judicial review may override article II interests; (3) Off-the-record contacts by White House staff may not deserve judicial deference unless the President's involvement is made known through these contacts; (4) A decisional rule limited to requiring recordation of written rather than oral contacts by the White House staff may prove workable; (5) A recordation or even a publication rule limited to independent agency policymaking would run little danger of frustrating presidential prerogatives.

While there will undoubtedly be difficult choices to make in the future, these factors should assist courts in identifying the valid interests of the executive branch. Ultimately the judicial role in informal rulemaking review should respect the President's need to confer with and direct executive agency policymaking. The need for a record, important as it may be, should not override all other interests, including the principle that it is the President who must coordinate and direct agency policymaking as part of his article II duties and powers.

For the agencies the problem is most immediate. They seem to be responding well to the challenge of occasional presidential intervention in rulemaking. The executive agencies whose policymaking has attracted the most attention appear to be able to handle presidential oversight while still retaining final decisional authority. In the situations where they have been criticized for yielding to White House pressure, the agencies seem instead to have responded responsibly to an inherently difficult situation. It is never easy for administrators to receive policymaking guidance from outside the agency, but to reject executive branch involvement unilaterally is not a politically realistic course of action. At a time when no agency can be too confident of the correctness or economic impact of any policy choice in the areas of health, safety, or the environment, participation by the President and the White House staff seems desirable as well as inevitable. It would be foolhardy for an executive agency strictly to prohibit presidential ex parte contacts where no restriction is called for by Congress or by due process. Jawboning by the President is not something from which agencies any more than private industry have a right to be free.

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238. If Congress does legislate on ex parte contacts by the White House, it should separately address the problem of judicial review. It would do well to include the harmless error concept introduced in the Culver bill. See note 226 supra.