UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

April 15, 1980

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The Honorable Abraham A. Ribicoff
Chairman, Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On January 23, 1980, I responded to your request for the views of the Nuclear Regulatory Commission on legislative proposals for comprehensive regulatory reform. In connection with the provisions in the legislation for separation of functions, we stated that our agency was conducting a study of the issue of communications between agency staff and decisionmakers, and that we would transmit our views on these provisions after our study was completed. Accordingly, I am transmitting with this letter "A Study of the Separation of Functions and Ex Parte Rules in Nuclear Regulatory Commission Adjudications for Domestic Licensing," NUREG-0670, prepared by our Office of General Counsel, and written comments which we have received about that document. The study, which does not necessarily reflect the views of any Commissioner, discusses in depth many of the statutory uncertainties in subsection 554(d) of the APA and a number of policy considerations which are relevant in designing any scheme for separation of functions. We hope that the study can prove useful to your deliberations about changing the present statute, particularly as to the matters which the statute leaves uncertain. In addition, the Commission wishes to offer some general comments in this letter about S. 262 and S. 2147.

The Nuclear Regulatory Commission's separation of functions rules are more stringent than those required by the APA, the Atomic Energy Act or the Constitution. Largely as the result of an effort over the years to maximize fairness and the appearance of fairness, the agency has sacrificed many of the benefits associated with more liberal rules, such as an increased flow of advice on technical matters to commissioners from staff experts. The Kemeny Commission Report and the Rogovin Report, both of which examined the workings of the NRC in the context of improving the agency after Three Mile Island, criticized the strictness of our separation of functions rules. The Commission is seriously considering a relaxation of those rules and thus, as a general proposition, opposes any legislation which would decrease its present flexibility in that regard.

Viewing the issue from this perspective, it is important to note that under the present APA, the Commission would be able to take advantage of the initial licensing exemption to the separation of functions requirements in subsection 554(d). More fundamentally, however, in the typical initial licensing case at

the NRC, and in most other adjudicatory proceedings at the agency, there are no agency staff members who perform "investigative or prosecuting functions" for the Commission -- the only type of functions which disqualify staff members from communicating with decisionmakers or otherwise participating or advising in agency decisions. The reference to "investigative or prosecuting functions" is an indication that the separation of functions rules were to be applied in accusatory-type proceedings in which violations of statutes or regulations are at issue, and not to non-accusatory adjudications such as the typical initial licensing case. Although agency staff members who are litigating a position in a non-accusatory case may be considered advocates of a particular viewpoint and result, NUREG-0670 has convinced us that the Congress did not intend to cover such advocates when it adopted the communications ban in subsection 554(d) of the APA.

We agree that considerations of fairness are relevant in fashioning separation of functions rules in non-accusatory cases; in fact, in NUREG-0670 it is suggested that the constitutional requirement of due process may compel a ban on private contacts between agency decisionmakers and staff advocates. But there are a number of factors to be weighed in determining whether such a ban is required in a given case, and we would prefer to be guided solely by constitutional principles in this regard instead of a Congressional mandate that is generally applicable to all non-accusatory cases. Thus, we oppose the provision in S. 262 and any interpretation of S. 2147 which would allow for the extension of the separation of functions rules to typical initial licensing cases and to agency staff members performing "litigating functions" in these and other non-accusatory adjudications. However, if S. 262 is adopted, it should be expressly stated which agency employees would be considered to be performing "litigating functions," and particularly whether staff witnesses who assist the actual litigator and testify in his behalf come within this definition. If Congress agrees with our view and chooses to retain the present language of subsection 554(d) -- "investigative and prosecuting functions," the terms used in S. 2147 -- we believe that the legislative history should make clear that agency advocates and other participants in non-accusatory cases do not fall within this terminology.

On a more specific issue, we are also concerned with the treatment accorded presiding officers by proposed changes to subsection 554(d)(1). Presently, that subsection states that a presiding officer shall not "consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate." Both S. 262 and S. 2147 would make changes in this language.

Under S. 262, it seems clear that an agency staff member would be considered to be a "person or party" who could not be consulted on a fact in issue. As NUREG-0670 indicates, there is no legislative history to support the notion that Congress, in 1946, intended this interpretation. Although we recognize that

there is a recent, solitary -- and, in our view, undesirable -- dictum in Butz v. Economou, 438 U.S. 478, 514 (1978), that "person or party" includes agency officials, we believe that Congress should recognize that S. 262 may well be working a large extension in the reach of present subsection 554(d)(1). Under S. 262, for example, in initial licensing cases, presiding officers would be barred from consulting agency litigators in non-accusatory proceedings, in addition to the already existing ban on consulting investigators and prosecutors in accusatory-type cases. More significantly, however, in non-initial licensing cases that are non-accusatory -- e.g., most suspensions, revocations, non-renewals and agency-initiated amendments of licenses at the NRC -- S. 262 would prevent presiding officers from consulting with even non-involved staff experts, unless the agency was able to and chose to adopt the expedited hearing procedures under subsection 554(e) and accordingly appointed the assistants and advisors specifically provided for under subsection 554(e)(4). The Commission would strongly object to these results.

The changes made by S. 2147 seem more desirable to us, though they also leave some doubt about the reach of subsection 554(d)(1). Under S. 2147, a presiding officer may not consult with "a party, a person outside the agency, or an agency employee participating in an investigative or prosecuting function." This change would appear to make explicit the interpretation of Congressional intent contained in NUREG-0670, and should serve to overturn the dictum in the Butz case. However, some doubt may still remain because a court might view agency staff members who are not investigators or prosecutors as being, nonetheless, "a party" to the proceeding. See, e.g., NUREG-0670 at page 107, note 181 and New England Coalition on Nuclear Pollution v. U.S.N.R.C., 582 F.2d 87, 94, note 12 (1st Cir. 1978). The legislative history of S. 2147 should further clarify that "a party" does not refer to agency employees. Furthermore, we are concerned about the interpretation of "investigative or prosecuting function" in this subsection of S. 2147. As previously stated, we would generally read this term narrowly, and applicable only to accusatory situations. However, in subsection 555(e)(2), with respect to expedited procedures, it is stated that the term includes various advocacy functions, leaving some doubt that a proceeding must be accusatory in nature to trigger a ban on communications between agency adjudicators -- including presiding officers -- and staff advocates. Because we do not favor a statutory provision extending separation of functions to "litigating" employees, we hope that Congress would clarify that separation of functions requirements apply only to whatever accusatory-type proceedings may be conducted under section 554 or section 555.

Commissioner Bradford does not feel that this letter contains adequate justification for relaxing statutory ex parte constraints as they affect NRC.

If we may be of further assistance in addressing the APA reform legislation, particularly as to matters affecting the NRC, please let us know.

Sincerely,

John F. Ahearne

Enclosures:
1. NUREG-0670
2. Comments on NUREG-0670

cc: Rep. Charles Percy