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A STUDY OF THE SEPARATION OF FUNCTIONS AND EX PARTE RULES IN NUCLEAR REGULATORY COMMISSION ADJUDICATIONS FOR DOMESTIC LICENSING

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I. INTRODUCTION

In its report, The President's Commission on the Accident at Three Mile Island found that the commissioners of the Nuclear Regulatory Commission "have adopted unnecessarily stringent ex parte rules to preserve their adjudicative impartiality ...." 1/ However, the President's Commission declined to make any recommendations with respect to these rules. Rather, the Nuclear Regulatory Commission was left with only the report of the Chief Counsel of the President's Commission, in which the ex parte rules were blamed, in part, for the "strained communication system within NRC." 2/ The Chief Counsel's Report noted that, although not required by the Administrative Procedure Act, 5 U.S.C. § 551, et seq. (the "APA"), the NRC's ex parte rules apply to initial licensing cases and to all members of the NRC's staff, which is viewed as a "party" to such cases. 3/ The implication seems clear that if the Nuclear Regulatory Commission were willing to relax its ex parte rules, many of the problems facing the agency could be better resolved.

1/ Report of The President's Commission on the Accident at Three Mile Island (hereafter, "President's Commission Report") at 51 (October 1979).

2/ Report of the Office of the Chief Counsel on the Nuclear Regulatory Commission (hereafter, "Chief Counsel's Report") at 43 (October 1979).

3/ Id. at 40.

A similar conclusion was reached in the "Rogovin Report" which concluded that NRC members are isolated "from detailed consideration of case-related safety issues by the so-called 'ex parte rule.'" 4/ This report stated that the NRC rule goes far beyond APA requirements in separating the commissioners from "those within their own agency who have the most knowledge and expertise about those questions." 5/ It called for the NRC ex parte rule to be "very significantly limited and applied more rationally." 6/

While these two reports suggested changes in the NRC's ex parte rule, this subject has concerned the members of the agency long before the accident at Three Mile Island. For years the agency has debated the reach of its ex parte rules. 7/ Finally, in February 1979, the Nuclear Regulatory Commission committed itself to a study of its ex parte and separation of functions rules. 8/

Although the President's Commission Report and the Rogovin Report have confirmed the need for such a study, the basic questions to be analyzed have not changed. These questions relate to differences between the phrasing of the separation of functions and ex parte

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4/ Three Mile Island: A Report to the Commissioners and to the Public (hereafter, "the Rogovin Report," so named for Mitchell Rogovin, who headed the Special Inquiry Group appointed by the NRC) at 141 (January 1980).

5/ Id.

6/ Id.

7/ Part II of this study provides a detailed history of these rules.

8/ NRC Meeting on Discussion of Ex Parte and Separation of Functions Regulations, February 7, 1979 at transcript pages 1-50.

requirements as stated in the APA, 5 U.S.C. §§ 554(d) and 557(d), and in the NRC's own rules, 10 C.F.R. § 2.719 and 2.780. Such differences reflect some varying degrees of emphasis in the application of these requirements and, more significantly, a fundamental difference in approach. The major purpose of this paper is to explore the latter, including the following questions:

* Can the Nuclear Regulatory Commission dispense with separation of functions requirements because of the exemption in 5 U.S.C. § 554(d)(2)(A) for "applications for initial licenses"?

* Does the initial licensing exemption affect the application of the ex parte rule in 5 U.S.C. §557(d) with regard to communications from persons outside the agency?

* If the initial licensing exemption does not apply, what separation of functions limitations are imposed on the Nuclear Regulatory Commission and its licensing/appeal boards by the prohibition in 5 U.S.C. § 554(d)(2) against "an employee or agent engaged in the performance of investigative or prosecuting functions ... not, in that or a factually related case, participat[ing] or advis[ing] in the decision, recommended decision or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings"?

* If the initial licensing exemption does not apply, whom may the licensing boards consult in light of the prohibition in 5 U.S.C. § 554(d)(1) against consulting "a person or party on a fact in issue, unless on notice and opportunity for all parties to participate"?

* If the initial licensing exemption does apply, so that separation of functions is not required under the Administrative Procedure Act, what separation of functions limitations are required as a matter of law under the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011, et seq., or under the Due Process Clause of the Constitution?

* What policy considerations are relevant in fashioning separation of functions and ex parte rules at the Nuclear Regulatory Commission?

In addition to answering these questions, this study will examine the present text of the NRC's separation of functions and ex parte rules in order to determine how they differ, in less fundamental ways, from the restrictions imposed by the Administrative Procedure Act. The rationale for such differences will be explored and options for amendments to the present rules will be presented.

Before examining these questions, however, we believe that it is important to place the conclusions of the President's Commission

Report and the Rogovin Report in perspective with regard to separation of functions and ex parte rules at the NRC.

There is an important difference in the terms "separation of functions" and "ex parte". Simply stated, separation of functions relates to the internal mechanisms in an agency whereby decisionmaking personnel are separated from other agency employees who perform investigative, prosecuting, advocacy or other functions. The bulk of § 554(d) of the APA deals with separation of functions. The term "ex parte" more generally refers to communications made to a decisionmaker by only one side in a proceeding, without notice having been given to other parties. It has more often been used to describe private contacts between persons outside an agency and agency decisionmakers. This is the use that Congress made of the term in § 557(d) of the APA. It is also an appropriate term to describe the restrictions placed on an agency employee who presides over receipt of evidence and who is prohibited from certain communications under § 554(d)(1) of the APA.

To the extent that some agency employees can be viewed as parties to a proceeding, it is possible to use the term "ex parte communications" to refer to communications between them and agency decisionmakers. This is the terminology used in the President's Commission Report and the Rogovin Report. However, it would be more accurate to

use the term "separation of functions" in that context, as we have attempted to do in this study. It is understandable, however, how the term "ex parte" has swallowed up the term "separation of functions". This is because the NRC's own ex parte rule, 10 CFR §2.780, has been applied to intra-agency communications and has, through interpretation, created far more barriers to such communications than the agency's separation of functions rule, 10 CFR §2.719.

Although the existence of the NRC's separation of functions and ex parte rules may have created a chilling effect on all communications between the Commission and the staff, we believe that it is not proper to suggest that the plethora of communications problems in the agency is the result of legal prohibitions imposed by these rules. Of the seven specific communications problems cited in the Chief Counsel's Report, it is unclear that any of them were actually caused by these rules. 9/, 10/

9/ Chief Counsel's Report at 43-44. This report itself states that the "strained communication system within NRC" is "based on both formal ex parte rules and informal policies" and was "combined with the lack of clearly defined management responsibilities." Id. at 43 (emphases added). We fail to see how the refusal of the Division of Operating Reactors to accept responsibilities for a plant from the Division of Project Management, and the commissioners' failure to know about this general practice, has anything to do with ex parte or separation of functions rules. Similarly, the failure of commissioners to know about the results of investigations conducted by NRC staff, where such investigations related to accidents and not simply to resolving on-the-record licensing adjudications, should not be blamed on these rules. Even in adjudications, there is no reason why commissioners should be left uninformed about the status of a particular case, what issues are troublesome, etc. -- these matters are typically reflected in publicly-filed documents and decisions of licensing and appeal boards.

10/ The Rogovin Report, in its main volume that is now publicly available, did not provide any specific examples.

These and other misconceptions about the NRC's rules must be eliminated if the agency is to have the ability to make an accurate assessment of the present state of its rules, their conformity with relevant statutory and constitutional standards, the policies underlying them, and the options for change. In order to assist with addressing these issues, we first present the history behind the NRC's present separation of functions and ex parte rules.

Before examining this history, however, it should be emphasized that this study is directed only to formal adjudicatory proceedings, i.e., those "required by statute to be determined on the record after an opportunity for an agency hearing." 5 U.S.C. §554(d). In the context of the NRC, that means specifically domestic licensing and enforcement cases under §189(a) of the Atomic Energy Act, as amended -- i.e., initial licensing, amendments, modifications, transfers, renewals, suspensions and revocations. This study is not directed to export licenses, other informal adjudications such as 2.206 proceedings, or to rulemaking proceedings, since neither the APA nor NRC rules require separation of functions in such proceedings.

II. THE HISTORY OF THE SEPARATION OF FUNCTIONS AND EX PARTE RULES FOR ADJUDICATIONS

Any criticism of the Commission's separation of functions and ex parte rules should not be made in a historical vacuum. 11/ The very adoption of these rules and their amendment over the years have taken place only after spirited debate in which competing legal and policy considerations were identified. While it is possible that the balance of these factors might be weighted differently today, an examination of how and why the rules came about and have operated can help substitute experience for speculation in some respects.

11/ The President's Commission Report at 34-36 did attempt to examine the rules from a historical perspective.

A. The Early Years

Only after the adoption of the Atomic Energy Act of 1954, which established the system for government licensing of commercially-owned reactors, was the issue of separation of functions a realistic one for the AEC. In August 1955, the AEC proposed rules of practice which included a separation of functions provision in 10 CFR § 2.734. 12/ With slight change, the proposed

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12/ The proposed rule stated:

> (a) Hearing examiners appointed pursuant to section 11 of the Administrative Procedure Act shall perform no duties inconsistent with their duties and responsibilities as presiding officers, and shall not be responsible to or subject to the supervision of direction of any officer or employee, other than members of the Commission, engaged in the performance of investigative or prosecuting functions for the AEC.
>
> (b) In any case of adjudication other than initial licensing:
>
> (1) The presiding officer, unless he is a member of the Commission or officer having final authority in the case, many not consult any person or party on any fact in issue except upon notice and opportunity for all parties to participate, save to the extent required for the disposition of ex parte matters as authorized by law;
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> (2) No officer of employee of AEC, other than a member of the Commission or an officer having final authority in the case, who has engaged in the performance of any investigative or prosecuting function in the case or a factually related case may participate or advise in the intermediate or final decision, except as witness or counsel in the formal hearing.

20 Fed. Reg. 5789 (August 10, 1955) (Emphasis added).

On April 1, 1955 in AEC 812 at 6, the AEC General Counsel opined that the APA prohibition on consulting "any person or party", as proposed in § 2.734(b)(1), included agency employees within the class of persons who could not be consulted.

version was adopted in February 1956. 13/ In essence, the rule merely repeated the language of the separation of functions provision in the Administrative Procedure Act, 5 U.S.C. § 554(d). Significantly, it included the initial licensing exemption.

Although the initial licensing exemption existed in the AEC's regulations, it appears that its full utilization was limited to only uncontested cases. In the first case of reactor licensing in which an intervenor opposed the license, the Power Reactor Development Corporation case, 1 AEC 128 (1959), the Commission established a "separated staff" in December, 1956, to present the AEC staff position at the initial licensing hearings. The reasoning behind the creation of this "separated staff" was as follows:

> While Section 5c of the Administrative Procedure Act [5 U.S.C. § 554(d)] requiring separation of functions does not apply to proceedings involving initial licensing, the Commission has felt that adopting the separation of functions in its first formal hearing under the licensing program is desirable.
>
> In the preparation and conduct of the proceeding, the separated staff will not be subject to supervision by persons not on the separated staff. The staff will not participate in advising the Commission ... except by briefs and other statements on the record.

13/ The change was the deletion of the clause "other than members of the Commission" in paragraph (a). The reason for the change was not given. 21 Fed. Reg. 804 (February 4, 1956).

> The remainder of the AEC staff will be available to the Commission to give advice and recommendations on the basis of the record established at the hearing to aid the Commission in making its final decision. To assure the impartiality of these AEC staff members in advising the Commission, the Commission has directed that such staff members may not discuss with members of the separated staff questions relating to the position to be taken by the separated staff at the proceedings. Such staff members, of course, are free to discuss with members of the separated staff any facts or expert opinion that they may have which are relevant to the issues, to appear on request of the separated staff as witnesses in the proceeding, and to discuss with the separated staff matters relating to such appearances as witnesses. 14/

The AEC's decision to establish a separated staff must be viewed in the context of the times. One year earlier the Second Hoover Commission had issued its report on administrative law reform in which it called for the abolition of the initial licensing exemption. 15/ In the view of the Second Hoover Commission, if Congress required an on-the-record adjudication, then separation of functions should apply in order to prevent "the contamination of judging by other inconsistent functions" and to "maintain the integrity of, and public confidence in, case adjudication affecting private rights." 16/

14/ "A Study of AEC Procedures and Organization in the Licensing of Reactor Facilities", Joint Committee Print of the Joint Committee on Atomic Energy, 85th Congress, 1st Session, April 1957, at 178. (Hereafter cited as "April 1957 JCAE Print.")

15/ Cited in April 1957 JCAE Print at 39-40.

16/ Cited in April 1957 JCAE Print at 40. In AEC 812, April 1, 1955, the AEC General Counsel informed the agency of these recommendations and expressed the view that, if adopted, they would seriously hamper the ability of the AEC to formulate policy through licensing proceedings.

It does not appear that the creation of the separated staff was motivated by a concern over the alleged conflict of interest between the AEC's promotional and operational functions on the one hand and its regulatory duties on the other hand. 17/ In fact, despite the separation, in reviewing a licensing decision of a presiding officer 18/ the AEC was still permitted to consult

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17/ In December 1957, the AEC formally separated its promotional and regulatory staffs by eliminating the Division of Civilian Applications -- which had performed both functions -- and substituting a Division of Licensing and Regulation and an Office of Industrial Development. Both these divisions continued to report to the AEC General Manager, who in turn reported to the AEC Commissioners.

The separated staff, for the most part, was not defined on a case-by-case basis with reference to particular individuals working on a specific case. Instead, in 1957, it consisted of the entire Division of Licensing and Regulation, counsel for that division and attorneys under his supervision. There were included, on a case-by-case basis, other individuals who were requested to assist the regulatory staff in presenting its position at the hearings, such as attorneys in the General Counsel's office.

The non-separated staff included the General Counsel, his special assistant and a limited number of other personnel who were not part of the separated staff. There is also no indication that the promotional and operational staffs were precluded from advising the AEC in licensing cases.

The particular divisions included in the separated staff did change over the years, as the agency reorganized itself. However, it seems clear that the present-day concept of disqualifying the entire regulatory staff from advising Commissioners in licensing cases can be traced to the creation of the separated staff in 1956.

18/ The presiding officer is the person who presides over the receipt of evidence at the hearing. Throughout the years, this person has been labeled as a "hearing examiner," "hearing officer" or "administrative law judge." After 1962, at the AEC this person was replaced by a three-member licensing board. We will use these terms interchangeably.

with its promotional and operational staffs -- the non-separated staff -- on substantive matters at issue. 19/ Furthermore, although the non-separated staff might be performing a decision-maker's role by advising the AEC, it was not foreclosed from discussing "any facts or expert opinion" with the separated staff nor from serving as witnesses in the proceeding on behalf of the separated staff. Finally, it is significant to note the AEC's statement that "persons not on the separated staff" would not be supervising that staff. Although it is unclear whether the AEC itself meant to give up any supervisory responsibility, it is apparent that the separated staff was possessed of a unique degree of independence.

In April, 1957, the staff of the Joint Committee on Atomic Energy released a "Study of AEC Procedures and Organization in the Licensing of Reactor Facilities," largely as a result of criticism of the AEC for some of its procedures in the Power Reactor Development Corporation proceeding. 20/ The Joint Committee staff expressed the erroneous view that the initial licensing exemption was not applicable to cases involving sharply contested

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19/ For this reason, and in light of what we have determined to be the rationale behind the separated staff, we believe that the Chief Counsel's Report at 35, which concluded that the alleged promotional/regulatory conflict led to the separated staff concept, is in error.

20/ April 1957 JCAE Print.

issues, 21/ noted that the separation of functions adopted in the Power Reactor Development Corporation case was of a "limited nature," and took cognizance of the report of the Second Hoover Commission. The Joint Committee staff also referenced two papers prepared for it by Professor Davison of George Washington University Law School, in which it was stated that initial licensing cases were more like rulemakings involving policy determinations than typical adjudications involving determinations of private rights. 22/ This view, which is roughly in accord with the framers of the Administrative Procedure Act, was said to support the conclusion that separation of functions was not necessary for initial licensing cases in as much as such separation was not required for rule-makings. 23/ Professor Davison also argued that the Atomic Energy Act of 1954 did not impose any separation of functions requirements. 24/ Hence, in his view, the separated staff concept adopted by the AEC was not required by law. 25/ While one might be inclined to give little or no weight to the Joint Committee staff's interpretation of the scope of the initial licensing exemption in the Administrative Procedure Act -- an area removed from the Joint Committee's expertise -- it is significant that the staff expressed no disagreement with the position that nothing in the Atomic Energy Act of 1954 required separation.

21/ Id. at 195. As we will see, only in accusatory initial licensing cases involving sharply contested issues will the exemption not be applicable.

22/ April 1957 JCAE Print at 195.

23/ Id.

24/ Id. at 209.

25/ Id.

B. The Emergence of the Ex Parte Rule

Over two years later, in November, 1959, the AEC published its first rule prohibiting ex parte communications. 26/ The impetus

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26/ The rule was 10 CFR § 2.757. Subparts (b) and (c) set forth disclosure requirements for ex parte communications. Subpart (a), of more concern to us, stated:

> § 2.757 Ex parte communications.
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> (a) Save to the extent required for the disposition of ex parte matters as authorized by law, neither (1) Commissioners, members of their immediate staffs, or other AEC officials and employees who advise the Commissioners in the exercise of their quasi-judicial functions will request or entertain off the record except from each other, nor (2) any applicant for or holder of an AEC license or permit, or any officer employee, representative, or other person directly or indirectly acting in behalf thereof shall submit off the record to Commissioners or such staff members, officials, and employees, any evidence, explanation, analysis, or advice, whether written or oral, regarding any substantive matter at issue in a proceeding on the record then pending before the AEC for the issuance, denial, amendment, transfer, renewal, modification, suspension, or revocation of a license or permit. For the purposes of this section, the term "proceeding on the record then pending before the AEC" shall include any application or matter which has been noticed for hearing or concerning which a hearing has been requested pursuant to this part.

for the rule is unclear. 27/ In its terse prefatory remarks, the agency explained that:

> In view of the increasing number of AEC regulatory proceedings, the Commission considers it in the public interest that certain principles of law concerning ex parte communications, applicable to the exercise of the Commissioners' quasi-judicial functions, should be embodied in a published rule amending Part 2 ...
>
> As under existing law, the rules prohibit oral or written communications concerning substantive matters involved in an adjudicatory proceeding between Commissioners and employees who advise the Commissioners in the exercise of their quasi-judicial functions, on the one

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27/ The rule was probably an outgrowth of a June 23, 1959 memorandum from the AEC General Counsel, entitled "Dual Role of AEC As Promotional and Regulatory Agency With Related Problems of Ex Parte Contacts," AEC 812/1. That memorandum itself was prompted by a number of court decisions in 1959 in which decisions of other agencies -- particularly the Federal Communications Commission -- were reversed because of ex parte communications from outsiders to agency decisionmakers. The present-day confusion between the separation of functions and ex parte rules may well stem from this memorandum.

A large part of the memorandum deals with the question of a conflict between the AEC's promotional duties and its regulatory responsibilities. It is not clear why this conflict was treated as part of the ex parte problem since the court cases which triggered the memorandum did not emphasize, in the least, any similar potential conflict between the FCC's promotional and regulatory duties; instead, those cases focused upon the inherent unfairness of allowing persons outside an agency to privately persuade agency decisionmakers in licensing proceedings where there were competitors for a license. Nonetheless, the memorandum generalized from ex parte contacts by persons outside the agency to similar communications from agency staff members working on a case. This latter type of contact was properly discussed as a separation of functions problem. However, the memorandum then confused two different types of separation: separating adjudicatory from non-adjudicatory functions (like investigating and prosecuting) and separating promotional from regulatory responsibilities.

> hand, and applicants for and holders of licenses, and their officers, employees, and representatives, on the other. 28/

Two observations can be made about the AEC's intent and the language used in the rule. First, it appears that the agency's concern was with communications between AEC adjudicatory personnel and applicants for licenses; there is absolutely no indication that the AEC sought, by adoption of this rule, to reach communications between AEC adjudicatory personnel and the AEC regulatory staff or the so-called separated staff. 29/ The reference to "as under existing law, the rules prohibit ..." supports this conclusion. In light of the AEC's own rule, 10 CFR § 2.734, which took advantage of the initial licensing exemption, it seems clear that the AEC felt that nothing in either the Administrative Procedure Act, in particular 5 U.S.C. § 554(d), or in the Atomic Energy Act of 1954

28/ 24 Fed. Reg. 9330 (Nov. 19, 1959).

29/ Once again, doubt must be expressed regarding the conclusion reached by the President's Commission on this point. After noting the ad hoc establishment of the "separated staff" in 1956, which it attributed to a desire by the AEC to avoid a conflict between AEC promotional and regulatory duties, but see page 13 note 17 supra, the President's Commission stated that "This ex parte communication rule was formally adopted by the AEC in 1959." President's Commission Report at 35. Even the secondary source material relied upon in this section of the report does not reach that conclusion, instead stating that "to further remove itself from suspicion, the Commission also amended its own regulations to (1) bar all ex parte communications between applicants and Commissioners, unless they were made public ..." Elizabeth Rolph, Nuclear Power and the Public Safety (The Rand Corporation, 1979) at 45.

prohibited communications between AEC decisionmakers and the separated staff. 30/ Furthermore, the most expansive, court-created case law at that time precluded only communications between agency adjudicators and applicants for licenses; it did not reach contacts with agency staff. 31/ Thus, if the intent of the AEC was to have its ex parte rule mirror existing law, the rule apparently was not designed to cover contacts between AEC commissioners and the separated staff.

Second, the language of the rule itself is somewhat ambiguous and capable of an overly broad reading if the AEC's intent is overlooked. Subpart (a)(2) only prohibits "any applicant" for a license from submitting off-the-record "evidence, explanation, analysis or advice ... regarding any substantive matter at issue" in an on-the-record licensing proceeding. Its range, of course, is very limited, in that a similar prohibition was not placed upon anyone else from

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30/ If the AEC had intended to outlaw contacts between its adjudicatory personnel and the "separated staff," it would have made far more sense to amend or abolish 10 CFR §2.734, which did not bar such contacts in "initial licensing" cases, rather than to adopt a new rule.

31/ In May 1959, the case of Sangamon Valley Television Corp. v. Federal Communications Commission, 269 F.2d 221 (D.C. 1959) was decided. On due process grounds the court invalidated channel allocations (akin to licensing) because of secret, ex parte contacts between agency decisionmakers and private parties with an interest in the outcome of the proceeding. This was one of the cases discussed in AEC 812/1, and it had to cause concern for the AEC since the Atomic Energy Act of 1954 provided for a licensing process which was based on the process in the earlier Federal Communications Act of 1934. See G. F. Trowbridge, Licensing and Regulation of Private Atomic Energy Activities, 34 Tex. L. Rev. 842, 848 (1956).

communicating off the record with the adjudicators -- i.e., neither intervenors nor the separated staff were covered. However, subpart (a)(1) precluded the agency adjudicators from "requesting or entertaining off the record except from each other" communications of the aforementioned kind. Obviously, the agency would have had to rely on this subpart to foreclose the adjudicators from communications made by intervenors. Furthermore, if the adjudicators were to be prevented from receiving communications made by agency staff -- whether the separated staff or the non-separated staff -- that prohibition would have had to come from an expansive interpretation of subpart (a)(1). There is nothing to indicate that this broad reading was intended and, especially in light of the AEC's intent as expressed in the prefatory language explaining the rationale for the rule, such a reading is of doubtful validity. 32/

32/ Absent the prefatory language, the broad reading of subpart (a) (1) would be more plausible. One can imagine that the AEC did not want to be advised by its promotional or operational staff in reviewing licensing decisions of administrative law judges because of the potential conflict of interest. Hence, most or all of the non-separated staff -- at least those persons not specifically assigned adjudicatory duties -- might have been precluded from communicating with the commissioners about a case. In addition, on grounds of fairness -- the same reason which seems to have led to the ad hoc adoption of the separated staff concept in 1956 -- the AEC might not have wanted to allow the separated staff involved in litigating the case the opportunity to privately lobby the commissioners. Combining these two rationales, one could read 10 CFR § 2.757(a) (1) as cutting off consultations with all non-adjudicatory staff. However, the more compelling argument is that the commissioners who adopted the rule did not intend to isolate themselves to that extent.

The first hint that the ex parte rule was to be broadly interpreted came in November, 1960, with the AEC's "Report on the Regulatory Program of the AEC," submitted to the Joint Committee on Atomic Energy. 33/ Referring to attorneys in the Office of General Counsel who were assigned on an ad hoc basis to the separated staff, the report stated that "these attorneys are not permitted by practice or rule to confer concerning issues in the proceeding with the Commissioners, the hearing examiner, the General Counsel" or other adjudicative employees. 34/ Since the separation of functions rule, 10 CFR § 2.734, still contained an initial licensing exemption, and the separated staff was still a creature of practice 35/ rather than rule, the AEC report must have been referring to the ex parte rule as the basis for the prohibition on communications. 36/

33/ The Report is printed in "Improving the AEC Regulatory Process", Joint Committee Print of the Joint Committee on Atomic Energy, 87th Congress, 1st Session, March 1961, Volume II. (Hereafter cited as "March 1961 JCAE Print", "Vol. I" or "Vol. II".) This was the first of three studies of the AEC done in a four-month period. The second study was conducted by the Atomic Energy Research Project of the University of Michigan Law School. A third study was made by the staff of the Joint Committee on Atomic Energy. These three studies will be discussed in order.

34/ Id. at 123-124 (emphasis added).

35/ The AEC report also lends further credence to the view that the separated staff was established not out of a concern over a potential conflict between AEC promotional and regulatory functions, but rather "for the purpose of conducting the hearing as nearly as possible under the conditions of objectivity which characterizes the trial of issues of fact in a court." Id. at 141.

36/ Commissioner Olson confirmed this view in his testimony before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, 86th Cong., 2d Sess. at 283-284 (Dec. 2, 1960).

Subsequent to the AEC report, the Executive Director of the Joint Committee inquired of the AEC whether administrative law judges and commissioners should be free to consult with the non-separated staff in uncontested licensing cases. 37/ Commissioner Olson responded for the agency:

> Limited use of this procedure would seem appropriate providing great care is used to insure that no off-record information enters into [the judge's] final judgment. We prefer the view, however, that it is the duty of the separated staff to offer in evidence any relevant or material facts, including opinion evidence, necessary for a proper determination of the case. In any instance in which [the judge] feels that the record is not adequate, he may require that further information be offered in evidence. 38/

In a supplementary report issued only three months later, the agency reaffirmed its view that the ex parte rule, 10 CFR § 2.757, did prohibit communications between AEC adjudicators and the separated staff, which still included the entire regulatory staff. 39/ However, it recognized the problems which could result from this prohibition and expressed a determination to provide guidance to the regulatory staff:

> It is particularly important, in view of the regulation and policy prohibiting ex parte communication between the separate staff and the Commissioners as to pending proceedings (10 CFR § 2.757), that the communication between the Commission and the regulatory staff as to policy matters of general application should be frequent, free, and informed, and more direct than at present.

37/ March 1961 JCAE Print, Vol. II at 576.

38/ Id. at 585.

39/ Id. at 401.

> ... The head of the regulatory staff should report directly to the Commission as to the regulatory program and the functions under his supervision on a regular and continuing basis.... The problem of regulation and law enforcement in an area affecting the public health and safety so thoroughly impregnated with scientific and technological information requires such continuing consultation and direct and speedy communication, both oral and written. This can be done without violating either the letter or the spirit of the ex parte rule, so long as it excludes dealing with the substance of the pending cases. 40/

A similar "hands-off" approach was reaffirmed for administrative law judges. Guidance for these adjudicators as to substantive policy was "confined to the issuance of regulations and quasi-judicial decisions of the Commission" 41/ in order to protect "the integrity of the function of the [administrative law judge]." 42/ Not only was direct contact between these judges and commissioners frowned upon, but the judges were not free to seek private advice from any of the technical staff. 43/

At the same time that the AEC issued its report, the co-directors of the Atomic Energy Research Project of the University of Michigan Law School offered their own study which took issue with the AEC rules and practice. 44/ The study particularly criticized the isolation of the administrative law judges:

40/ Id. at 401-402.

41/ Id. at 408.

42/ Id.

43/ Id.

44/ Id. at 425. The study is significant because of its use by the Joint Committee.

> These [judges] should have relatively free access to the scientific and technical staff of the AEC on the problems of the safety of nuclear facilities. While it is desirable to insulate a [judge] who presides over a particular case from the members of the staff who investigate regulatory violations and initiate proceedings to revoke or suspend licenses, there is no justification for the general isolation of [judges] from the technical staff and the Commissioners with respect to overall problems of safety and regulatory policy. This isolation may produce the optimum degree of objectivity, but it is also likely to result in decisions that do not reflect a full comprehension of the technical and policy implications of a particular case. 45/

As to the isolation of the AEC commissioners from the regulatory staff, the study noted the recommendations of the Second Hoover Commission to abolish the initial licensing exemption, but the study concluded that the AEC could use its regulatory staff to advise it at least on uncontested initial licensing cases. 46/

If the University of Michigan study raised doubts about the AEC's practices, a third study - the March 1961 study done by the staff of the Joint Committee - was even more critical. 47/ The Joint Committee staff emphasized the dangers that might come from the AEC's view of the role of the agency's staff:

45/ Id. at 518.

46/ Id. at 525.

47/ March 1961 JCAE Print, Vol. I.

> Typically the AEC staff is not called upon to resolve a controversy between private interests or between a private interest and the public interests, but simply to reach a sound judgment as to the safety of a proposed reactor. Typically, this staff judgment is not based on facts but on an admixture of facts, scientific and engineering theory and experimentation, and policy considerations. A policy judgment based on incorrect or incomplete assumptions concerning the physical risk of a particular case may be erroneous and even dangerous. 48/

Furthermore, the Joint Committee staff criticized the isolation of the AEC commissioners.

> The Commissioners in carrying out their adjudicatory functions are presently assisted only by legal counsel and personal office assistants, none of whom are technically qualified on matters of reactor safety. As a result, the Commissioners are isolated from agency expertise and their opinions have been largely concerned with matters of procedure rather than scientific questions. 49/

The Joint Committee staff referred to these problems as having been caused by the "judicialization of agency procedures." 50/ It criticized the failure of the AEC to take advantage of the initial licensing exemption of the Administrative Procedure Act at least insofar as uncontested proceedings were concerned -- which included the vast majority of AEC cases in 1961. 51/ In such cases, it concluded

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48/ Id. at 45.

49/ Id. at 51.

50/ Id. at 58.

51/ Id.

that "it is impossible to consider the AEC staff as filling an 'accusatory role' in any meaningful sense of the term", so that it made no sense to apply the separation of functions concept. 52/

Significantly, however, the Joint Committee staff appeared to approve of the strict prohibition between adjudicators and separated staff in contested cases:

> In contested materials license cases or in the rare case of controversy between a reactor applicant and the staff or an intervenor, the separation of the staff which has considered the application from the decision maker seems a wise precaution. However, in the case of a decision maker who lacks technical qualifications, that separation underscores the anomaly of his position. 53/

The Joint Committee staff made a number of recommendations. Foremost was its proposal to establish a three-member licensing board, composed of two scientific experts and one administrative

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52/ Id.

53/ Id. It should be noted that the Joint Committee staff did not appear to endorse the application of the ex parte or separation of functions rule to the non-separated staff in initial licensing cases.

Significantly, in 1960 various Congressional committees had questioned the legality and ethics of the initial licensing exemption. See, e.g., "Independent Regulatory Commissions", H.Rpt. No. 2238, 86th Cong., 2d Sess. at 23-25. An effort to delete this exemption failed. See "Independent Regulatory Agencies Act of 1960", H.Rpt. No. 2070, 86th Cong, 2d Sess. at 15-16.

procedure expert. 54/ It was anticipated that this would result in improved initial decisions. Furthermore, the staff suggested that this board should be free to consult with the Advisory Committee on Reactor Safety and the AEC technical staff for aid in evaluating testimony after the hearing; the suggestion did not seem limited to uncontested cases or to only those AEC technical staff who were not part of the separated staff. 55/ Finally, the Joint Committee staff argued for confining application of the ex parte and separation of functions rules for AEC staff to "cases involving license suspension or revocation, where the AEC's staff is cast in an accusatory role ..." 56/

When comments were sought on these proposals, Professor Davis, perhaps the leading administrative law expert at the time, agreed with the proposal to allow communications between the AEC commissioners or administrative law judges and the AEC technical staff, finding it entirely consistent with applicable statutory and

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54/ Id. at 72.

55/ Id.

56/ Id.

constitutional law. 57/

57/ Professor Davis commented:

> "On problems of reactor safety, I think that even when facts are in dispute so that trial procedure is appropriate, the idea of separation of functions is out of place. Nothing about due process prevents the Commissioners from freely consulting the technical staff. Nothing about the Administrative Procedure Act prevents such consultation, for section 5(c) [5 U.S.C. § 554(d)] exempts proceedings on applications for initial licensing. Whatever the legal rules, the purpose of separation of functions is primarily to keep the deciding function from being contaminated by the thinking of those who are trying to win for one side; on a safety question, a member of the technical staff is not in the position of an advocate. In accusatory cases, such as revocation of a license for an alleged offense, separation of functions serves a useful purpose." "Views and Comments on Improving the AEC Regulatory Process", Joint Committee Print of the Joint Committee on Atomic Energy, 87th Congress, 1st Session, June 1961.
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> Professor Davis' view is somewhat clouded by his later testimony that he would "agree that in a contested case in which members of the staff have taken positions of advocates and are trying to win for one side, it would be inappropriate for the Commission to consult the staff behind the scenes." "Radiation Safety and Regulation", Hearings before the Joint Committee on Atomic Energy, 87th Congress, 1st Session, June 1961 at 374 (Emphases added). (Hereafter cited as "1961 Radiation Safety Hearings".) However, this later testimony can also be read as consistent with Professor Davis' general analysis that except in accusatory cases, agency staffs typically do not serve as "advocates" for "one side;" hence, the type of "contested case" referred to by Professor Davis is limited to a contested accusatory case, such as a license revocation based on charges of licensee misconduct. One might question, nonetheless, Professor Davis' image of a staff which, in advising an agency head, "can limit itself to answering questions about the meaning of statements that are made, and ... not taking a position as if they were advocating anything in any direction." Id. at 381.

James Landis, a special assistant to the President on regulatory matters, noted that the inability of the administrative law judges and commissioners to exchange ideas with AEC technical staff members was "self-imposed" in light of the initial licensing exemption. 58/ In response to these and similar comments, AEC Commissioner Olson defended the present system, but admitted that it was "not so perfect that it can't be subjected to change." 59/

If one could characterize the period between 1956 and 1962 with respect to separation of functions and ex parte developments at the AEC, it would be proper to conclude that the agency's practice mirrored the judicial process. Although the 1956 separation of functions rule allowed for an initial licensing exemption, the rule

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58/ 1961 Radiation Safety Hearings at 249. Mr. Landis argued that "in the absence of contest, that kind of internal communication seems to me to be quite all right ... But beyond the statutory prohibition on consulting with staff who perform investigatory or prosecuting functions, a communication with experts, engineers, scientists, general counsel and so on seems to me a very desirable thing." Id. AEC Commissioner Ramey responded that "the argument to the contrary has been that it undercuts the hearing record", to which Mr. Landis replied, "I think it is just carrying the concept a little far." Id.

59/ Id. at 385. It must be noted that changes in other respects were also of major concern to the Joint Committee. For example, the AEC had interpreted the Atomic Energy Act of 1954 to require full, adjudicatory, on-the-record hearings in uncontested operating license cases, even when there had previously been a similar hearing at the construction permit stage. This, like the ex parte rule, was roundly criticized as another example of "over-judicialization." While the focus of this study is on the separation of functions and ex parte rules, we do not mean to imply that these matters received sole or even primary consideration by Congress or the AEC.

was virtually of no value after the creation of the separated staff and the expansive reading of the 1959 ex parte rule. Administrative law judges and AEC commissioners, often with little or no technical training, were precluded from consulting with AEC technical staff experts in an effort to achieve a "fair" regulatory scheme. In the process, the lack of communication resulted both in a regulatory staff acting with little policy guidance from AEC commissioners and in critical decisions on safety that were open to question.

C. Regulatory and Legislative Changes in 1962

It seemed clear that after the AEC report, the University of Michigan study, the study of the staff of the Joint Committee, and hearings of that committee, some changes would result. In January 1962, the AEC overhauled its rules of practice. 60/ It adopted a new "separation of functions" rule, 10 C.F.R. § 2.719, which was actually more restrictive than the previous rule in that it did not

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60/ 27 Fed. Reg. 377 (January 13, 1962).

contain an initial licensing exemption. 61/ Of course this "tightening up" is somewhat illusory since the exemption had never really been applied by the AEC. However, the ex parte rule, now 10 C.F.R. § 2.780, was liberalized by the addition of subsection (d) which exempted from the prohibition on communications between agency adjudicators and anyone else:

> ... communications requested by the Commission concerning:
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> (1) Its proprietary functions;
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> (2) General health and safety problems and responsibilities of the Commission; or
>
> (3) The status of proceedings. 62/

61/ Id. at 384. The new rule also changed the class of persons whom the presiding officer could not consult, from "any person or party" (the standard in 5 U.S.C. 554(d)(1)) to "any person other than a member of his staff." The new rule reads:

> (a) A presiding officer shall perform no duties inconsistent with his responsibilities as a presiding officer, and will not be responsible to or subject to the supervision or direction of any officer or employee engaged in the performance of investigative or prosecuting functions.
>
> (b) In any adjudication, the presiding officer may not consult any person other than a member of his staff on any fact in issue unless on notice and opportunity for all parties to participate, except as required for the disposition of ex parte matters as authorized by law.
>
> (c) In any case of adjudication, no officer or employee of the Commission who has engaged in the performance of any investigative or prosecuting function in the case or a factually related case may participate or advise in the initial or final decision, except as a witness or counsel in the proceeding.

62/ Id. at 388.

These changes were said to be made "to expedite proceedings without sacrificing the fair and impartial consideration and adjudication of issues." 63/ There was no explanation of how the rules would operate. However, apparently the AEC was now permitted to consult its staff or even persons outside the agency about "general health and safety problems and responsibilities," even if the advice or information sought would also relate to a substantive matter at issue in a licensing proceeding. 64/ Significantly, the rules did not approve of contacts between agency adjudicators and AEC technical staff for the purpose of obtaining assistance in resolving a particular licensing case.

Subsequent to these and other rule changes, the Joint Committee commenced hearings on amending the Atomic Energy Act of 1954. 65/ The primary focus of the hearings was on proposals to replace the administrative law judge with an Atomic Safety and Licensing Board and to abolish the mandatory hearing requirement in uncontested operating license cases. However, there was testimony about how

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63/ Id. at 377.

64/ For example, if a safety issue in a particular proceeding was also of generic concern to the AEC -- e.g., its resolution might affect a number of plants -- the AEC rules now authorized the commissioners to request communications about the general problem. Presumably, these communications would not be focused upon the resolution of the specific safety issue in the particular proceeding, but rather would be of broader value. Furthermore, it must be emphasized that the communications had to be requested by the AEC commissioners.

65/ "AEC Regulatory Problems", Hearings of the Joint Committee on Atomic Energy, 87th Congress, 2d Session, April 1962.

the new board might be hamstrung in the performance of its duties by the AEC's strict separation of functions and ex parte rules. A representative of the American Bar Association asked the Joint Committee to address this problem in the proposed legislation. 66/ He requested specifically that the Joint Committee make clear that informal procedures without separation of functions may be used in at least uncontested initial licensing cases. 67/ When asked why this was necessary in light of the initial licensing exemption, he replied:

> We are not quite sure how it came about, but it appears that under existing practice, if not interpretation, the AEC view is that its [administrative law judges] should be cut off from staff assistance in initial license cases. My own view is that this is not required by Section 5(c) of the Administraive Procedure Act. It expressly exempts initial licensing from separation and certain requirements that would normally exist in adjudication. But since AEC has adopted this view, it seems to me -- since there is an apparent need for this kind of staff assistance -- that the bill ought to make clear and underscore what apparently is not clear to those who have made such an interpretation. 68/

66/ Herzel Plaine, Chairman of the American Bar Association's Atomic Energy Law Committee stated:

> If decisionmakers in the initial licensing process need the aid of the technically trained staff of AEC (a form of assistance authorized by the Administrative Procedure Act), such aid ought not be artificially cut off by strict interpretations of existing law. Hence, it would improve the bills if they were amended to make plain that, where hearing requirements exist, AEC may hold public initial licensing proceedings without trial-type procedures and other formalities when they are not adapted to the needs of an examination into difficult scientific and technical questions. Id. at 33.

67/ Id. at 35.

68/ Id.

The suggestion was made that this view could be reflected in the legislative history of the bill, rather than in the bill itself. 69/ Consequently, in its report on the bill, the Joint Committee expressly stated that the licensing board "in initial licensing cases, would be free to consult with the AEC staff including technical experts as permitted by the Administrative Procedure Act (5 U.S.C. [554(d)]." 70/ However, the Joint Committee also concluded that "[w]ithout question, more formal procedures are required in contested cases, especially those involving compliance." 71/

Much like the 1961 hearings, the 1962 hearings focused on whether as a matter of policy -- rather than as a matter of law -- the AEC commissioners and administrative law judges should be prevented from obtaining technical staff assistance in initial licensing cases. 72/ Although there was some minimal argument that the answer to this question might depend on whether or not the initial

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69/ Id.

70/ June 1962, JCAE Report No. 1966, 8th Cong., 2d Sess. at 6.

The Joint Committee Report stated that it "encourages the Commission to use informal procedures to the maximum extent permitted by the Administrative Procedure Act." Id.

71/ This statement was made with respect to the use of the broad array of quasi-judicial procedures, presumably including -- but not limited to -- use of separation of functions.

72/ There was little, if any, dissent from the general view that the AEC could take advantage of the "initial licensing" exemption if it chose to do so.

licensing hearing was accusatory, the line drawn by most commentators was between contested and uncontested cases. 73/

D. AEC Regulatory Review Panels: 1962-1967

The period following the 1962 hearings resulted in much study but little action for several years. In July 1963, the Director of Regulation proposed that the AEC relax its strict ex parte rules, at least for uncontested initial licensing cases. 74/ He emphasized that the problem was one of "ethical conduct rather than a problem of statutory requirement," 75/ and that in uncontested cases the rules had led to an "over-judicialization" of the licensing process. 76/ Significantly, he stated that the "staff is in agreement that the

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73/ The Joint Committee received a paper from Professor David Cavers and William Mitchell in April, 1962, which proposed a radically new hearing procedure which would have been more informal than the existing scheme. However, even these writers noted that the AEC might well forbid consultation between the regulatory staff and the licensing board where a formal adjudication was being held because of the presence of an intervenor. Id. at 55.

74/ AEC-R 43/2 (July 26, 1963).

75/ Id. at i.

76/ Id. at iii.

rule should not be abolished with respect to contested cases". 77/ The AEC apparently never acted on these recommendations. 78/

Later, in January 1965, the AEC established a Regulatory Review Panel to report on and recommend improvements in the AEC's licensing procedures. The Mitchell Panel, named after its chairman William Mitchell, issued its report on July 14, 1965. 79/ The Mitchell

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77/ Id. at ii. The Director proposed that 10 CFR §2.790 be amended by adding a proviso to read:

"... except with respect to any matter in controversy, this section shall not apply to the Commission or the members thereof in determining applications for initial licenses." Id. at 9.

It should be noted that in that proposal, and in a number of others considered by the AEC over the following years, the rationale for relaxing the ex parte rules was based on assertions of its legality under the initial licensing exemption and the "members of ... the agency" exemption to 5 U.S.C. §554(d) (the latter now identified as §554(d)(2)(C)). For reasons which are discussed later in this paper, we do not believe that the "members of ... the agency" exemption would add anything above and beyond the initial licensing exemption insofar as AEC (or NRC) initial licensing proceedings are concerned.

78/ The July 1963 paper was supplemented on August 7, 1963 by AEC-R 43/3, which reported recent CAB proposals to amend that agency's separation of functions rules so that all agency staff -- except counsel in a rate proceeding or counsel's witnesses -- could advise the CAB in its adjudicative deliberations. Furthermore, to the extent that any staff were concerned with "establishing prior misconduct by a party", those staff could not advise the CAB in the adjudication.

79/ The Mitchell Panel's report is published in "Licensing and Regulation of Nuclear Reactors", Hearings before the Joint Committee on Atomic Energy, 90th Cong., 1st Session, April - May 1967, Part I at 410. (Hereafter cited as "1967 JCAE Hearings, Part I".)

Panel noted that the AEC ex parte regulation had been adopted as a matter of policy, and that it went beyond the requirements of the Administrative Procedure Act, which exempted initial licensing cases and members of agencies from ex parte restrictions. 80/ The result, according to the Mitchell Panel, was an:

> "unnecessary rigidity . . . [in] the licensing process and isolat[ion of] the Commissioners and their advisors from obtaining assistance on technical questions in which the staff is expert and from access to current developments on which the Commission should be kept informed." 81/

The report contained recommendations that the AEC significantly liberalize its ex parte rule, 10 CFR § 2.780, so that there could be free consultations between AEC decisionmakers and AEC staff members in uncontested licensing proceedings. In contested cases, the Mitchell Panel recommended that the agency be free to initiate such consultations, but that if the AEC's decision were to rest on any fact or opinion obtained from these consultations and not in the formal record for decision, there should be public disclosure and an opportunity to comment prior to the decision. 82/

Significantly, the Mitchell Panel recommended that in any contested case in which the applicant and the AEC staff were in opposition,

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80/ For reasons which we later discuss, the "members of the agency" exemption was wrongly interpreted out of context by the Mitchell Panel.

81/ 1967 JCAE Hearings, Part I at 427.

82/ Id. at 428.

"the Commission should refrain from consulting with the Director of Regulation and members of his staff and should look to other members of the AEC organization for advice." 83/

After receipt of the Mitchell Panel report, the AEC proposed what was then -- and what remains to this day -- the most radical amendment to its separation of functions and ex parte rules. 84/ As a prelude, the AEC explained that under the rules then in effect: (1) communications between the commissioners and the AEC technical staff 85/ were precluded under both the separation of functions, 10 CFR §2.719(c), and ex parte, 10 CFR §2.780, rules; 86/ (2) communications between a licensing board and any persons not on the staff of that board were forbidden under the separation of functions rule, 10 CFR §2.719(b). 87/

83/ Id. at 428.

84/ 31 Fed. Reg. 830 (January 21, 1966).

85/ The AEC technical staff, it must be recalled, included both the regulatory staff (akin to the separated staff) and the promotional/operational staff (akin to the non-separated staff).

86/ 31 Fed. Reg. 830 (January 21, 1966). Rule 2.719(c) prevented communications between adjudicators and only those employees performing investigatory or prosecuting functions, the test in 5 U.S.C. §554(d)(2). The AEC appears to have taken the position that its regulatory staff in an initial licensing proceeding would be performing such functions. We will examine the validity of this interpretation later.

87/ Id. Rule 2.719(b) prohibited communications between presiding officers and "any person other than a member of his staff on any fact in issue...". It is based on 5 U.S.C. §554(d)(1), which applies the prohibition to "any person or party".

The AEC proposed to liberalize these restrictions by, (1) in any uncontested initial licensing case, allowing commissioners to consult with the AEC technical staff; (2) in any contested initial licensing case, allowing such consultations with only those staff members who were not counsel or witness in the case and only if the commissioners initiated the consultation; 88/ (3) in any initial licensing case, allowing licensing boards to consult with any members on the licensing board panel; and (4) in uncontested initial licensing cases, allowing the boards to consult with any AEC technical staff. 89/

In proposing these amendments, the AEC noted that the communications to be permitted were permissible under the initial licensing exemption in the Administrative Procedure Act. 90/ The agency recognized the competing considerations: maintaining the fairness and objectivity of proceedings, on the one hand, and the need to facilitate the analysis of safety issues by allowing licensing boards and the commissioners to consult with staff, on the other hand. 91/ It

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88/ This change would have reversed the broad ad hoc "separation of functions" precedent set up in 1957 whereby the entire regulatory staff was off-limits to commissioners. The change would have been made by amending the existing 10 CFR §2.719(c) and adding a new 10 CFR 2.780(e) to allow such communications.

89/ This change would have been achieved by amending the existing 10 CFR §2.719(b) and (c).

90/ 31 Fed. Reg. at 831.

91/ Id.

concluded that its proposal would adequately serve both interests. 92/

While these proposals were pending, the AEC appointed its "Second Regulatory Review Panel on the Study of Contested Reactor Applications" in April 1966. 93/ As a result, the final rules adopted by the agency differed markedly from those proposed. The relaxation

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92/ The AEC's proposal grew out of AEC-R 43/5, a "Report to the Commission by the Director of Regulation and the General Counsel" (Nov. 5, 1965). This report covered the same topic as AEC-R 43/4, circulated on May 6, 1965, in which the General Counsel and the Director of Regulation disagreed on the extent to which the ex parte rules should be relaxed. After the Mitchell Panel Report, however, the General Counsel and the Director did reach agreement.

Significantly, the General Counsel and the Director explained their joint disagreement with two recommendations of the Mitchell Panel:

> "[First], ... it is proposed that in contested cases where the Commission wishes to initiate consultation with the regulatory staff, the Commission consult only with members of the AEC staff, including the regulatory staff, who have not appeared at and directly participated in the hearing as witness or counsel. The object of relaxation of the ex parte rules is to permit the Commission to utilize the expertise of its staff where helpful in the decision of cases, not to afford an opportunity for off-the-record advocacy by the staff. For that reason, it is considered appropriate to restrict consultation in contested cases to staff members who have not directly participated in the cases as witness or counsel.
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> [Second], we would not adopt the Panel's suggestion that Commission consultation with the staff be barred when the staff opposes the applicant, but not when the staff opposes an intervenor. That suggestion would appear to be prejudicial to the interests of intervenors. It would seem preferable that the liberalization of the ex parte rules in contested cases be the same, regardless of what party opposes the application."
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> AEC-R 43/5 at 8-9.

93/ The panel's appointment is referred to in 31 Fed. Reg. 12774 (September 30, 1966).

of the separation of function and ex parte rules was limited to uncontested initial licensing cases. 94/ A policy statement accompanying the rules expressly stated that the "intra-agency consultation and communications referred to ... are not permitted in contested proceedings." 95/ The agency explained that it had decided to postpone any action on amended procedures for contested proceedings until the Second Regulatory Review Panel had reported. 96/

94/ The AEC amended its rules to (1) allow commissioners to consult the regulatory staff in uncontested initial licensing cases, regardless of whether the commissioners or the staff initiated the contact; (2) allow commissioners to consult with staff other than the regulatory staff, in uncontested initial licensing cases, but only upon the initiation of the commissioners; (3) allow licensing board members to consult with other members of the licensing board panel only in uncontested initial licensing cases, and then only on technical and not policy issues; and (4) allow licensing board members to consult with the regulatory staff only in uncontested initial licensing cases. These changes were made by adding a new paragraph (e) to 10 CFR §2.780 and a new paragraph (c) to 10 CFR §2.719, and incorporating these changes by reference into 10 CFR §2.780(d) and 10 CFR §2.719(b) and (c).

95/ 31 Fed. Reg. at 12777. This policy statement, adopted as Appendix A to Part 2 of the AEC's rules, replaced AEC Press Release F-240, released November 25, 1963, which had previously set forth AEC general policies in licensing proceedings. Appendix A still exists today, though in amended form.

96/ 31 Fed. Reg. at 12775.

After these amendments, but before the Second Panel reported, the Joint Committee on Atomic Energy held hearings on "Licensing and Regulation of Nuclear Reactors." 97/ AEC Director of Regulation, Harold Price, testified about the recent amendments to the separation of functions and ex parte rules for uncontested initial licensing cases, noting that greater communications with the staff would allow more effective consideration of safety issues. 98/ AEC Commissioner Ramey, formerly the Executive Director of the Joint Committee's staff, also spoke in favor of these relaxations in the rules. He admitted that the relaxed rules were based on policy considerations, and were more strict than any required by the Administrative Procedure Act. 99/ But he thought that further relaxation could create problems, including the unfair consideration of extra-record information. 100/

97/ 1967 JCAE Hearings, Part I.

98/ Id. at 44. Mr. Price also confirmed that under the previous ex parte rule, such communications with the staff would have been forbidden. By letter of June 2, 1967, the AEC Chairman also informed the Joint Committee of the relaxed, amended rules. Id. at 79.

97/ 1967 JCAE Hearings, Part I.

100/ Id. In response at a Joint Committee inquiry on whether further relaxation of the ex parte rule should be made, chief administrative law judge Samuel Jensch replied that "for lack of experience" he was unable to express an opinion. Id. at 177. The Joint Committee also heard from William Mitchell, who chaired the First Panel and was a member of the Second Panel. He summarized the findings of the First Panel and stated that the Second Panel would soon be finishing its work. Id. at 188.

In June 1967, the "Second Regulatory Review Panel on the Study of Contested Reactor Applications" issued its report. That Panel's report differed from the Mitchell Panel's conclusions as to ex parte communications in contested initial licensing proceedings. 101/ It recommended that the licensing boards not communicate with anyone regarding the merits of any contested issue and that if additional expert opinion were desired, the board should request the parties to provide further testimony. However, the board could, in the panel's view, consult with the chairman or vice-chairman of the licensing board panel to identify relevant precedent or statements of AEC policy. For contested cases before the AEC commissioners, the panel recommended that the commissioners consult only with employees who advise them on quasi-judicial matters; if they felt the need of additional clarification, oral argument or remanding for further testimony was suggested. The panel recognized that the initial licensing exemption might be used to remove construction permit and operating licensing cases from the strict separation of functions rules in the Administrative Procedure Act. It opined that this could permit the licensing board members and the AEC commissioners to "seek elucidation" from experts in the field, specifically mentioning other members of the licensing board

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101/ The Second Panel's report is published in 1967 JCAE Hearings, Part I. The textual material in the above paragraph can be found at pages 475 - 476.

panel, the ACRS and employees of AEC contractors -- but omitting any mention of the AEC staff involved in the proceeding. 102/ Of course, new matters developed through such consultations would have to be disclosed and subject to rebuttal. However, the panel rejected the notion of allowing any such consultations. A concern about the public's perception of openness and objectivity, and a more vague reference to the risk of introducing error, were identified as "serious dangers" associated with such consultations. It was even recommended that members of a licensing board not be allowed to consult with members of the board panel not assigned to that case.

E. The Aftermath of the Second Panel's Report: 1968 - 1979

The Second Panel's report severely jolted any plans to liberalize the existing separation of function and ex parte rules for contested initial licensing cases. In connection with further hearings before the Joint Committee on Atomic Energy, the AEC chairman wrote that the commissioners were meeting two or three times per week with the Director of Regulation and his assistants "for informal review, discussions and guidance on important

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102/ It is unclear why the panel did not mention consultations with AEC regulatory staff in this regard, but it seems that its failure to do so was a reflection of its belief that as a matter of policy--and not as a matter of law--such consultations with staff should not be allowed.

matters involving nuclear safety." 103/ Presumably, these general meetings -- and others with the Advisory Committee on Reactor Safety and members of the licensing board panel -- were to help solve the communications problems caused by the application of the separation of functions and ex parte rules to individual reactor licensing proceedings. 104/

For several years, the only major changes in these rules related to the establishment of the Atomic Safety and Licensing Appeal Board. In January 1969, when the AEC proposed to establish the Appeal Board, it also proposed to extend to that board the separation of functions and ex parte rules then applicable to licensing

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103/ "Licensing and Regulation of Nuclear Reactors", Hearings before the Joint Committee on Atomic Energy, 90th Congress, 1st Session, September 1967, Part II, at 920. (Hereafter cited as "1967 JCAE Hearings, Part II".)

104/ In November 1967, the AEC proposed to add a new part to its General Policy Statement, Appendix A to Part 2 of its rules, to allow a licensing board to consult with the chairman or vice-chairman of the board panel "for the purpose of identifying relevant decisions or statements of Commission policy". 31 Fed. Reg. at 928. This modest proposal was adopted on June 12, 1968. 33 Fed. Reg. 8588.

boards and to AEC commissioners. 105/ These proposals were adopted in August 1969, 106/ but they did not affect the vital area of contacts between AEC technical staff and the boards. Similarly, the absence of a ban on communications between appeal board members and other members of the appeal board panel -- after a separate appeal board panel had been established in October 1972 -- did nothing to improve consultations between the appeal board and the staff. 107/

105/ Specifically, paragraph (f) was to be added to 10 CFR §2.780, stating that the ex parte rules applicable to other AEC adjudicatory personnel "are applicable to members of the Atomic Safety and Licensing Appeal Board, members of their immediate staffs, and other AEC officials and employees who advise members of the Appeal Board in the exercise of their quasi-judicial functions." 34 Fed. Reg. 870 (January 18, 1969).

A proviso was also to be added to 10 CFR §2.719(c) that would prevent the licensing board members from consulting on any fact in issue with any member of the Appeal Board if the case was one in which exceptions might be taken to the Appeal Board. Id. At that time, the Appeal Board was composed of the Chairman and Vice-Chairman of the licensing board and another member of the licensing board, designated on a case-by-case basis by the AEC commissioners.

These changes were further explained in new section VII(c) to Appendix A, Part 2 of the AEC Rules. Id. at 871. That section also confirms the view that 10 CFR §2.780 governs consultations between AEC adjudicators and AEC staff. Id.

106/ 34 Fed. Reg. 13360 (August 19, 1969).

107/ The absence of this prohibition is somewhat anomalous. Except in uncontested cases, licensing board members had not been permitted to consult other members of the licensing board panel. See, e.g., 37 Fed. Reg. 15142, referring to the then-existing (and yet unchanged) version of 10 CFR §2.719(c). However, when a separate appeal board panel was created, see 37 Fed. Reg. 22791 (October 25, 1972), members of individual appeal boards were not precluded from consulting other members of the appeal board panel. To this day, the licensing board follows this prohibition, but the appeal board does not.

One other change during this period is worth noting. In July 1972, the AEC amended 10 CFR §2.780(a)(2) to prohibit "any party" -- rather than "any applicant for or holder of an AEC license or permit", as had been the case since 1959 -- from making ex parte communications. 108/ The impact of this change would appear to have been non-existent, since communications between AEC adjudicators and "any party" -- much like communications between AEC adjudicators and the AEC regulatory staff -- would have been precluded by 10 CFR §2.780(a)(1). 109/

Significantly, despite the extensive overhauling of the AEC by Congress in the 1974 Reorganization Act, which created a Department of Energy to engage in promotional duties and a Nuclear Regulatory Commission to regulate in the interests of safety and health, Congress did not focus on the AEC's separation of functions and ex parte rules. Although the rules had been debated and criticized throughout the years, Congress suggested no changes in them and, accordingly, they were adopted by the new NRC.

108/ 37 Fed. Reg. 15137 (July 28, 1972). This change, curiously enough, was not included in the proposed changes published in 37 Fed. Reg. 9345 (May 9, 1972).

109/ See page , supra.

F. Summary

After reviewing in detail the history of the separation of functions and ex parte rules at this agency, it is possible to make a number of generalizations. First, it is clear that at one time the AEC did incorporate the initial licensing exemption in its separation of functions rule. However, despite the presence of this exemption in the rule from 1956 until 1962, the exemption was never actually utilized. The creation of the separated staff in 1956 -- in a non-accusatory, but contested initial licensing case -- was accompanied by the practice of prohibiting the separated staff from consulting with agency adjudicators, including the AEC commissioners, about the merits of these cases. This prohibition was based not on a concern for potential conflicts of interest problems resulting from the AEC's role as regulator, on one hand, and promoter and operator, on the other hand; rather, it emanated from a desire to follow judicial procedures of fairness, under which trial advocates do not consult privately with adjudicators. Nonetheless, these adjudicators were still able to consult with the non-separated staff -- essentially promotional and operational employees -- at least until 1959.

Second, it is obvious that the adoption of the ex parte rule in 1959 resulted in further restrictions upon private communications

between agency adjudicators and agency staff. Although it appears that in promulgating this rule, the AEC did not intend to go beyond regulating private contacts between applicants for a license and agency adjudicators, by 1960 the rule was being cited as the basis for prohibiting such contacts between all agency staffers -- whether part of the separated staff or the non-separated staff -- and agency adjudicators and their assistants. It is this broad interpretation of the ex parte rule which is the source of the present-day prohibition of private contacts between staff members and agency adjudicators.

Third, when the AEC's rules of practice were thoroughly revised in 1962, the initial licensing exemption in the former separation of functions rule was formally abolished. In its place, the ex parte rule and a strict separation of functions rule emerged as the basis for regulating contacts between agency staff members and adjudicators.

Fourth, the AEC thorougly considered -- and rejected -- major changes in the 1962 ex parte and separation of functions rules. To the extent that changes were made, they permitted private communications only in uncontested initial licensing cases. Efforts at further liberalization, generally instigated by a desire to improve the quality of the agency's decisionmaking processes, were defeated in the name of maintaining fairness.

Finally, it is clear that the strict rules adopted by the AEC, and retained by this agency, were based upon policy judgments, and not upon legal requirements. The Joint Committee on Atomic Energy, others in Congress, legal commentators and the agency itself all recognized the tremendous flexibility accorded the agency in fashioning its ex parte and separation of functions rules. Furthermore, there was often support, even in the Joint Committee, for maintaining strict rules for contested initial licensing cases.

As we examine the difficult legal questions which must be resolved if it is desired to further relax the NRC's rules, it will be helpful to keep in mind the history behind the present rules.

III. IS THE "INITIAL LICENSING" EXEMPTION IN THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. §554(d)(2)(A), APPLICABLE TO NRC LICENSING PROCEEDINGS? 110/

A. Introduction

As previously noted, the Chief Counsel's Report of the President's Commission concluded, rather tersely, that the NRC was not bound by the separation of functions rules in the Administrative Procedure Act, 5 U.S.C. §554(d), because of the exemption for "applications for initial licensing." 5 U.S.C. §554(d)(2)(A). We have concluded that the question of the breadth of this exemption is not so easily answered and that the declaration in the Chief Counsel's

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110/ 5 U.S.C. § 554(d)(2) in its entirety reads as follows:

> "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency on a case may not, in that or a factually related case, participate or advise in the decision, recommended decision or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply --
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> (A) in determining applications for initial licenses;
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> (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
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> (C) to the agency or a member or members of the body comprising the agency. (emphasis added).

We are not dealing with export licenses in this paper since there is no formal hearing requirement for such licenses so as to trigger §554 of the APA.

Report, although essentially true, is overbroad. 111/

In order to understand the scope of the initial licensing exemption, it is important to appreciate the history behind its inclusion in the Administrative Procedure Act. The issue of separation of functions was a major -- and one might conclude the most important -- source of dispute among drafters of the legislation. As early as 1941, when generic overhauling of administrative agencies was suggested in a number of legislative proposals, separation of functions was discussed. The 1941 bills grew out of the Report of the Attorney General's Committee on Administrative Procedure. 112/ Although the Committee was able to reach agreement on a broad range of administrative reforms, there was sharp disagreement on the question of separation of functions. A minority of the Committee advocated a complete separation of functions, with one agency making rules and formulating policy, and another separate agency performing the court-like function of deciding cases. This organization was

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111/ This conclusion is true only as far as it goes - i.e., although the NRC may not be bound by the separation of functions rule in 5 U.S.C. §554(d) because of the initial licensing exemption, this is not to say that the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2011 et seq., and the Due Process Clause of the Constitution, as reflected in judicial interpretations, would not require some sort of separation of functions to be applied in some licensing situations. See Parts VII and VIII, infra.

112/ In 1939 the Attorney General requested a committee to investigate existing administrative practices and to recommend improvements. President Roosevelt, in anticipation of the Attorney General's Report, vetoed in 1940 the Walter-Logan Bill, which Congress passed and which would have made significant changes in administrative agency procedures. In January 1941, the Attorney General's Report was issued.

likened to the Internal Revenue Service/Tax Court separation. 113/ However, the majority rejected complete separation and instead proposed an internal segregation of functions, similar to that eventually established by the Administrative Procedure Act. Prosecutors and decisionmakers would be permitted to work in the same agency as long as there was no private consultation between them on cases before the agency. This prohibition on consultations would assure that prosecutorial staff with a "will to win" would not provide biased advice to decisionmakers. It would also help preclude an interpolation of facts not on the record, but gleaned from an ex parte familiarity with the case.

The majority view was largely premised on the added cost and duplication of effort which would be encouraged by complete separation. It was also noted that complete separation was not necessary to achieve the objective of fairness. Yet, it was this latter objective which both the majority and minority agreed was crucial in any administrative agency process:

> A man who has buried himself on one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions. Clearly the advocate's view ought to be presented publicly and not privately to those who decide. .... Investigators, if allowed to participate, would be likely to interpolate facts and information discovered by them ex parte and not adduced at the hearing, where

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113/ Report of the Attorney General's Committee on Administrative Procedure at 208 (1941) (hereafter cited as "1941 Attorney General's Report"). See also Hearings before the Committee on the Judiciary, United States Senate, 77th Congress, 1st Session, April 1941, at 1308 et seq. (hereafter cited as "1941 Hearings").

> the testimony is sworn and subject to cross-examination and rebuttal. 114/

The majority's solution to the fairness objective -- internal separation of functions -- prevailed and was adopted by the framers of the Administrative Procedure Act in 1945-46. 115/ It is reflected in 5 U.S.C. §554(d). Yet the separation of functions requirements in that subsection contain an exemption for "determining applications for initial licenses." 5 U.S.C. §554(d)(2)(A). It is legitimate to ask how this exemption arose and is consistent with the concern for fairness. This requires an examination of the legislative history behind the exemption 116/ and its relationship to the basic dichotomy in the Administrative Procedure Act between adjudication and rulemaking.

114/ 1941 Attorney General's Report at 56.

115/ Administrative Procedure Act, Legislative History, Senate Documents Volume 8, 79th Congress, 2d Session (1946) at 24-25 (hereafter cited as "Sen. Doc.").

116/ As a general proposition, there can be no need to examine legislative history when the terms of a statute are clear. However, despite superficial appearances, the exemption for "initial licenses" is sufficiently unclear to have required several paragraphs of interpretation in the 1947 Attorney General's Manual on the Administrative Procedure Act at 50-53. Furthermore, "ambiguity is not uniformly insisted on as a prerequisite to the use of aids to construction. Thus it has been said that 'Usually a court looks into the legislative history to clear up some ambiguity ... but such ambiguity is not the sine qua non for a judicial inquiry into legislative history,' and that 'the plain meaning rule ... is not to be used to thwart or distort the intent of Congress by excluding from consideration enlightening material from the legislative files.'" 2A Sutherland on Statutory Construction at 182 noting Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437 (1955).

B. Adjudication/Rulemaking Dichotomy and its Relation to Congress' General View of Initial Licensing

The initial licensing exemption was based upon certain generalizations which may not hold true in particular instances. 117/

> [In exempting] such matters as the granting of certificates of convenience and necessity which are of indefinite duration, [Congress relied] upon the theory that in most licensing cases the original application may be much like rulemaking. The Administrative Procedure Act does not require any separation of functions for rulemaking. 118/

Unfortunately, there is little elucidation of the analogy and we are left to general principles to develop it. Although a rule may be of general or particular applicability, it is essentially future-oriented and its adoption would typically be based primarily on questions of policy, rather than on questions of evidentiary fact. The policy determinations, in turn, may result from generally agreed-upon "legislative facts" 119/ or basically undisputed statis-

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117/ As we explain later, when an initial licensing proceeding is "accusatory in form" and involves sharply contested factual issues, Congress apparently did not intend the initial licensing exemption to apply.

118/ Attorney General's Manual on the Administrative Procedure Act, United States Department of Justice (1947) at 50. (Hereafter cited as "1947 Attorney General's Manual"). The Manual cites Sen. Doc. at 203-204 in support of this point.

119/ Under Davis' definition, "legislative facts" are "ordinarily general and do not concern the immediate parties". See 2 K. Davis, Administrative Law Treatise § 15.03, p. 353 et seq. (1958)(hereafter cited as "Davis Treatise").

tics and expert testimony. 120/ As the 1947 Attorney General's Manual states:

> The object of the rulemaking proceeding is the implementation or prescription of law or policy for the future, rather than evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts. 121/

Because of the nature of rulemaking, consultations between decisionmakers and staff were felt to be necessary. Staff expertise could offer the decisionmakers a thorough understanding of technical matters and legislative facts from which policy alternatives might emerge. In addition, those agency employees involved in marshalling material for a rule would have the opportunity to be guided by direct and certain knowledge about the policy considerations which appear to be most important to the decisionmakers. Thus, even in formal rulemakings before an intra-agency lower tribunal or administrative law judge, if those decisionmakers can consult with agency staff experts who generally assist agency heads in making policy decisions, then "the intermediate decisions will be more useful to

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120/ The classic example given is the Civil Aeronautics Board's proceedings for the issuance of certificates of convenience and necessity. In licensing an airline for a new route, certain relevant facts are considered -- e.g., the extent of passenger travel between two cities, the number of existing routes, income to airlines on a route, etc. Some of these facts may favor approval of a certificate, and others may support denial. Many of these relevant facts might be assumed or uncontested. Most important is the weight to be given to the respective factors in light of developing agency policy towards airline travel, competition and the like.

121/ 1947 Attorney General's Manual at 14. See also 1941 Hearings at 657, 1298, 1451.

the parties in advising them of the real issues..." 122/ Furthermore, in rulemakings -- unlike adjudications -- consultations between staff experts and decisionmakers were not thought of as involving the same "Anglo-American tradition" of fairness. In short, there was much to be gained and nothing to be lost, in Congress' view, in allowing such consultations in rulemakings.

In contrast to rulemakings, adjudications are not usually future-oriented. Furthermore, as the 1947 Attorney General's Manual suggests, a different type of fact-finding is involved in adjudication. The decisionmaker must determine "evidentiary facts, as to which the veracity and demeanor of witnesses would often be important." 123/ This is because

> adjudication is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action. Or it may involve the determination of a person's right to benefits under existing law so that the issues relate to whether he is within the established category of persons entitled to such benefits. In such proceedings, the issues of fact are often sharply controverted. 124/

122/ 1947 Attorney General's Manual at 15.

123/ Id. at 14.

124/ Id. at 14-15.

Thus, in view of Congress, two important factors that distinguish rulemaking from adjudication were critical for establishing a separation of functions requirement for the latter and none for the former: the general accusatory nature of adjudication and the typical dispute over evidentiary facts. While there may be benefits to be derived from consultations between agency staff and decision-makers in adjudications, "fundamental principles of due process" dictate that the decisionmakers should not be exposed to off-the-record input from parties or staff intimately associated with making the case for or against those parties. 125/ It was felt that such staff would have developed the zeal of an advocate in an accusatory proceeding, and thus would have abandoned the state of mind compatible with providing neutral and dispassionate private advice to decisionmakers.

These broad generalizations about the differences between rulemaking and adjudication may have been seriously questioned and undermined over the years. Nonetheless, they formed the basis for the initial licensing exemption. Once Congress had determined that separation of functions was not necessary in rulemaking proceedings, and that initial licensing is more akin to rulemaking than adjudication, it made sense to create an exemption from separation of functions requirements for initial licensing proceedings. 126/

125/ Id. at 55.

126/ Obviously Congress did not believe that initial licensing should be considered more like rulemaking than adjudication in terms of the other protections accorded the applicant for an initial license -- i.e., 5 U.S.C. §§554(a)-(c); 555; 556(a)-(c), (e) and portions of (d); 557(a), (c), (d) and portions of (b); 558(c).

C. The Congressional Limitation of the Initial Licensing Exemption

A review of the legislative history behind the Administrative Procedure Act indicates that Congress was aware that its generalizations about initial licensing would not always be true. The Senate Judiciary Committee stated:

> There are ... some instances of [initial licensing] case[s] which tend to be accusatory in form and involve sharply controversial factual issues. Agencies should not apply the exemptions in such cases, because they are not to be interpreted as precluding fair procedure where it is required. 127/

Thus, the initial licensing exemption is not as broad as it appears to be. 128/ If such a proceeding involves "sharply controversial factual issues" and is "accusatory in form," separation of functions should be applied. While the former phrase can be understood without much difficulty, it is necessary to explore what Congress meant by the term "accusatory in form."

Since the beginning of hearings on administrative procedure bills which proposed separation of functions, the concern has focused

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127/ Sen. Doc. at 204 (emphasis added). In its general comments on the bill, the Senate Judiciary Committee noted that it had "expressed its reasons for the language used and has stated that, where cases present sharply contested issues of fact, agencies should not as a matter of good practice take advantage" of the initial licensing exemption. Sen. Doc. at 216. While this summary omits the requirement that the proceeding be accusatory, as well as involve controverted facts, we believe that the more specific language earlier in the report more accurately presents the Committee's intent.

128/ In the 1947 Attorney General's Manual at 51, it is stated that the separation of functions provision was meant to apply to "all those phases of licensing in which accusatory or disciplinary factors are, or are likely to be, present."

upon adjudications because they were primarily accusatory. The 1941 Attorney General's Report cited as the two most common proceedings in which a combination of functions was criticized those proceedings in which "either the agency initiates proceedings on its own motion, or private parties make complaints and the agency then makes those complaints its own." 129/ The Senate Judiciary Committee print of the original bill introduced by Senator McCarran in 1945 explained, in a note to what is now 5 U.S.C. §554(d), that separation of functions applied "in so called 'accusatory' proceedings." 130/

Thus, although the exemption in the Administrative Procedure Act for initial licensing was first introduced as applicable to all "applications for licenses," the Senate Judiciary Committee inserted the word "initial":

> It is apparent from the legislative history that the word "initial" was inserted in the exception to distinguish original applications for licenses, i.e., any agency "approval" or "permission", from applications for renewals of licenses. This is entirely consistent with the underlying analogy of initial licensing to rule making, because renewal proceedings frequently involve review of the licensee's past conduct and thus resemble adjudication rather than rule making. 131/

129/ 1941 Attorney General's Report at 208.

130/ Sen. Doc. at 24.

131/ 1947 Attorney General's Manual at 52.

When we examine the nature of the separation of functions rule as it applies to adjudications, it is easier to understand what Congress meant by proceedings which are "accusatory in form."

Black's Law Dictionary defines "accusation" as a "formal charge against a person to the effect that he is guilty of a punishable offense." The "accusatory part" of an indictment is "that part where the offense is named." In a note to this definition it is pointed out that:

> In its popular sense, "accusation" applies to all derogatory charges or imputations, whether or not they relate to a punishable offense, and however made, whether orally, by newspaper, or otherwise... But in legal phraseology, it is limited to such accusations as have taken shape in a prosecution. 132/

As previously stated, Congress viewed adjudications as primarily concerned with the lawfulness of past conduct. As such, the term "accusatory in form" refers to proceedings in which violations of laws or rules are involved, and not simply to those proceedings in which general derogatory charges are made. In accordance with this view, Congress chose to prevent agency decisionmakers from getting advice from those staff members who perform "investigative or prosecuting functions" in a case. 5 U.S.C. §554(d)(2). The reference to "prosecuting functions" implies the more narrow and legal interpretation of the term "accusatory in form", rather than the popular definition. 133/

132/ Black's Law Dictionary, 4th Ed. at 38-39.

133/ As we explain later, the term "investigative" must be viewed in this same light -- i.e., an investigation leading to a prosecution or to charges of misconduct that is violative of law or rule.

In conclusion, while Congress created the initial licensing exemption, it did not intend the exemption to be applied to those proceedings which were both "accusatory in form" and in which there were sharply contested factual issues. 134/ A proceeding was "accusatory in form" if it involved charges of violations of law or rules, in which case the specific conduct of the alleged offender would be at issue. 135/

D. Amendments and Modifications of Licenses

Although the language of §554(d)(2)(A) is clear in its reference to "initial licenses," we have seen that the exemption is not as broad as the language would indicate. However, that language also apparently means more than one would expect in that certain proceedings

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134/ There is a question about how the separation of functions rule should apply when a proceeding only partially involves an accusatory element -- i.e., there are charges of wrongdoing, accompanied by other, non-accusatory issues. Congress did not provide guidance on this matter. However, we believe that where the accusatory element is significant, the entire proceeding should be viewed as "accusatory in form." As a result of the accusations, participants in the proceedings -- including agency staff -- can be forced into "taking sides" with the result that impartiality or the appearance of impartiality on the non-accusatory issues may be difficult or impossible to achieve. We recognize that a different view of the matter is not unreasonable -- i.e., that initial licensings can be separated into accusatory and non-accusatory issues so as to disallow the use of the exemption for the former issues, but to permit it for the latter issues.

135/ The proceeding in which the accusation is being made need not be a prosecution in the precise meaning of that word. For example, if it is suggested that an initial license be denied to an applicant because he has violated several laws and regulations with regard to an already-licensed facility, the proceeding could be said to be "accusatory in form"; the "penalty", rather than a fine, is a denial of a new license.

to amend and modify licenses could also be included within the initial licensing exemption.

The Attorney General's Manual states that:

> In view of the function of the exemption, the phrase "application for initial licenses" must be construed to include applications by the licensee for modifications of his original license. In effect, this gives full meaning to the broad definition of "license" in section 2(e), i.e., "the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." (Italics supplied). In other words, the definition clearly suggests that any agency "approval" or "permission" is a license, regardless of whether it is in addition to or related to an earlier license. [footnote omitted]. Only by such a construction can the appropriate procedures be made applicable to those aspects of licensing which are dominated by policy making considerations and in which accusatory and disciplinary factors are absent. [cite omitted]. In this way, the basic dichotomy of the Act between rulemaking and adjudication is preserved, because section 5(c) will remain applicable to licensing proceedings involving the renewal, revocation, suspension, annulment, withdrawal or agency-initiated modification or amendment of licenses -- i.e., all those phases of licensing in which the accusatory or disciplinary factors are, or are likely to be, present. 136/

To some extent, one cannot quarrel with this logic. If Congress believed that policy questions and legislative facts predominated in initial licensing cases, it is reasonable to conclude that similar questions and facts will predominate in amendments or modifications requested by a licensee. In contrast, as a general

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136/ 1947 Attorney General's Manual at 51 (emphasis added).

proposition, one may agree that agency-initiated license proceedings, especially renewals, revocations and the like, might well involve accusatory elements and sharply disputed adjudicative facts about a licensee's past conduct. In accordance with the reasoning behind the separation of functions provision, the former class of proceedings might not require separation of functions while the latter category would.

However, these generalizations can very easily break down. For example, at the NRC if the staff decides that changes in a license are necessary, it is likely to persuade the licensee of this opinion so that the licensee can file a formal application. If the licensee thus acts, the initial licensing exemption is apparently applicable. However, if the licensee is not persuaded of the staff's position, so that the agency itself must initiate action, there is little sense in concluding that that amendment proceeding has become accusatory in nature. Although the proceeding may now be contested, with the staff and applicant on opposite sides, this is little different functionally from a contested -- but non-accusatory -- initial licensing case. In non-accusatory initial licensing cases we have seen that separation of functions does not apply, and yet the 1947 Attorney General's Manual would appear to have the separation of functions rule apply to agency-initiated amendment proceedings. Similarly, it is not necessarily true that all renewals, revocations or suspensions are accusatory in nature so as to require application of the separation of functions principle. At the NRC, for example, license revocations

or suspensions may well be based upon changed scientific knowledge about earthquake predictions or a different policy with regard to emergency evacuation plans. Nonetheless, as a category of non-initial licensing cases, these non-accusatory revocation proceedings must be conducted in accordance with separation of functions requirements.

Although we are left with some illogical results through this interpretation of the initial licensing exemption to include licensee-initiated amendments and modifications -- but not agency-initiated modifications or amendments, and not revocations, suspensions, renewals and the like -- the Attorney General has found this result to be consistent with the general dichotomy in the APA between rulemaking and adjudication, and to be supported by the legislative history of that statute. 137/

E. Application of the Initial Licensing Exemption at the NRC

Even though a construction permit or cperating license proceeding may be contested, it is rare that the proceeding will be "accusatory in form." Similarly, amendment or modification proceedings may often not be accusatory. Consequently, these proceedings will

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137/ Referring to a Senate Committee Report on the initial licensing exemption, the Attorney General noted that the inapplicability of the exemption to amendments or modifications was meant to include only those amendments or modifications imposed by the agency on the ground that in such proceedings, as in renewal proceedings, the issues would often relate to the licensee's past conduct. 1947 Attorney General's Manual at 52.

typically come within the initial licensing exemption in 5 U.S.C. §554(d)(2)(A).

We recognize that the logic behind the exemption -- that policy issues and legislative facts usually predominate in initial licensing, thus making the proceedings more like rulemakings than adjudications -- may have far less force for NRC proceedings where intervenors inject sharply disputed evidentiary facts.

Nonetheless, the exemption remains in the law. Of course, in the initial licensing or modification case which is "accusatory in form" -- e.g., an application is opposed on grounds of general incompetence or character, as evidenced by repeated or willful violations of law and regulations governing other facilities already licensed to the applicant -- the NRC could not take advantage of the initial licensing exemption. Similarly, in any other licensing proceeding initiated by the agency -- including amendments, modifications, renewals, revocations and suspensions --the exemption would not appear to apply. The scope of the exemption in the typical case where it does apply, and whether the NRC should utilize it as a matter of policy, are yet to be discussed.

One final, and important, point must also be made about the initial licensing exemption: it does not permit the staff to privately introduce new information or arguments for consideration by adjudicators. As we will see, unless other parties are aware of

and can comment upon such new material, a decision may be reversed on due process or statutory grounds. 137A/

F. The Initial Licensing Exemption and the NRC's Separation of Functions and Ex Parte Rules

As we have seen in connection with examining the history of the Commission's separation of functions and ex parte rules, this agency makes almost no use of the initial licensing exemption. Presently, licensing board members may consult privately with NRC staff members and other members of the licensing board panel in only uncontested initial licensing cases. 10 CFR §2.719(c).

Similarly, the commissioners and appeal board members may consult privately with the NRC staff in only uncontested initial licensing cases. 10 CFR §§2.780(e) and (f). As we discuss in more detail later with regard to options available to the Commission, there is a wide latitude in the APA to expand the scope of persons with whom adjudicators may privately consult, and to include contested initial licensing cases -- as long as they are non-accusatory.

137A/ See footnote 213, infra and accompanying text (due process); footnote 192, infra (Atomic Energy Act); footnote 169, infra (§§ 556(e) and 706(2)(E) of APA); and part IX-A, infra (policy of fairness).

IV. THE INTERPLAY BETWEEN THE EX PARTE PROVISION IN SECTION 557(d) OF THE APA AND THE SEPARATION OF FUNCTIONS AND INITIAL LICENSING EXEMPTION PROVISION IN SECTION 554(d) OF THE APA 137B/

Although we have determined that the Commission may take advantage of the initial licensing exemption in non-accusatory proceedings involving construction permits, operating licenses and licensee-initiated amendments or modifications, the use of this exemption may come at a cost.

137B/The relevant sections of 5 U.S.C. §557(d) read as follows:

> (d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law --
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> > (A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;
> >
> > (B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding; ...
> >
> > (E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

In instances where the NRC wishes to consult with certain of its staff members, not to supervise them in the presentation of a case, but rather to obtain advice about or elucidation of the record in a licensing proceeding under review by the commissioners, we believe that §557(d) of the APA is applicable. In these cases, the advising staff members can be said to be "employee[s] who [are] or may reasonably be expected to be involved in the decisional process of the proceeding," as that phrase is used in the ex parte provision in 5 U.S.C. §557(d). Consequently, pursuant to that provision, "no interested person outside the agency" -- including, of course, applicants and intervenors -- would be able to communicate about the merits of the licensing proceeding with such staff members unless these communications were "on the public record" or other parties to the proceeding had advance notice of them. This could result in a complete restructuring of the licensing process if the NRC adjudicators chose to seek decisional advice from the staff members assigned to review, litigate or testify about the license application because these staff members would not be able to engage in informal, private communications with the applicant.

Furthermore, the scope of the communications between these staff members involved in the decisional process and other agency staff members might also be circumscribed. This limitation could result from the following analysis. Section 557(d) appears to break agency employees into two mutually exclusive classes for purposes of on-the-record adjudications: (1) those who are "involved

in the decisional process of the agency" and who, consequently, may not communicate privately and informally about the merits of the case with persons outside the agency; and (2) those who may continue to communicate privately and informally with persons outside the agency about the merits of the case and who, consequently, may not be "involved in the decisional process of the agency." What kind of communications, however, are permitted between these two classes of employees?

If the bar in §557(d) is to have any meaning, it seems clear that the first class of employees (those who will assist the adjudicators to decide the case) should not be able to seek private advice from the second class of employees (those who will continue informal communications with outsiders and who will not assist the adjudicators in deciding the case) about how the issues in the case should be determined; otherwise, the second class of employees would also be "involved in the decisional process of the agency." However, the "separation" between these two classes of employees effectuated by §557(d) is not absolute. As long as the communications between these two groups do not involve the second class in the "decisional process of the agency" or cause the supervisor to become an advocate, such contacts are proper. For example, let us assume that the first class includes various staff supervisors and the second class includes staff attorneys and witnesses involved in the licensing case. The attorneys and witnesses could seek general advice from the supervisors about

what policy and legal issues are implicated in the case, what sorts of evidence are relevant to these issues, etc. Analogously, the supervisors could give instructions of this sort to the staff attorneys and witnesses. 138/ We do not believe that such communications, for the most part, mean that the staff attorneys and witnesses are "involved in the decisional process of the agency." However, when it comes time for the licensing board or the Commission to decide the case, only the supervisors (assuming that they have had no ex parte contacts with persons outside the agency and have not themselves become advocates) will be able to advise in the decisional process; the staff attorneys and witnesses (assuming that they have had ex parte contacts with persons outside the agency) will not be able to advise the licensing board or the Commission either directly, or indirectly by advising the supervisors.

138/ It may be that for reasons other than §557(d), the supervisors may not be able to advise in the decisional process if, through their extensive involvement with the staff, they have become akin to staff advocates for a particular viewpoint. For example, if the supervisor has directed the staff to take a specific position and to introduce evidence in support of it, the supervisor may be little different from the staff advocate litigating the case. Accordingly, if the staff advocate is precluded from privately advising the adjudicators because of potential due process problems, the supervisor who is heavily involved in the case may suffer the same prohibitions. In the end, through the application of §557(d) and the Due Process Clause, the Commission could be left with a supervisor who will render advice to adjudicators in their deliberation of a particular case, but who will be foreclosed from private consultations with outsiders in that case and whose supervisory authority over the staff in that case will be limited to rather general guidance that is given from a detached and more neutral respective. See footnotes 210-212, infra, and accompanying text, and footnote 235, infra, and accompanying text.

There are three caveats to this conclusion that certain types of communications between the two classes of staff employees are permissible. First, private contacts between the second class of employees "acting as agents for interested persons outside the agency" and the first class of employees are "clearly within the scope of the prohibitions" in §557(d); 139/ thus, the allowable communications between both classes of employees presume a good faith desire to seek advice or provide supervision, and not an intent to secretly pass along outsiders' comments to employees who will later be assisting the adjudicators to decide the case. Second, because the first class of employees will be involved in the decisional process of the case, its members should be careful not to allow their communications with or supervision of other staff members to cause them to prejudge the issues in the case or to have become advocates themselves; otherwise, a due process claim that the decisionmaker has been tainted by biased advice could result. Third, and for similar reasons, it would be better if the conversations between the two classes of employees were based solely upon information that has been made publicly available or will soon be available. If secret material enters into these conversations it is possible that a due process objection might arise on the ground that a person involved in the decisional process and who is advising the adjudicators has been exposed to private, non-evidentiary information which has colored his judgment. 140/

139/ Sen. Rpt. No. 94-354, 94th Cong., 1st Sess. at 36 (June 31, 1975).

140/ Some of these aspects of the potential due process problem may be better understood after reading the due process section of this paper. See footnotes 210-212, infra and accompanying text.

In short, a decision by the Commission to use certain staff members as advisors during an adjudication would require some restructuring of the present system of communications between those persons and persons outside the agency, and those persons and other agency staff members.

Significantly, the initial licensing exemption appears to be of no avail in avoiding these results since there is no indication in the legislative history of §557(d), or in the language of the provision itself, that Congress did not intend to apply the ex parte restrictions in initial licensing cases. In fact, the contrary appears to be true.

It is stated in §557(d)(1) that the ex parte provision applies "in any agency proceeding which is subject to subsection (a) of this section." Subsection (a) of §557 states that "this section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title." In §556(a) it is stated that "this section [i.e., §556] applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section." In §554(c), it is expressly stated that "to the extent that the parties are unable so to determine a controversy by consent, a hearing and decision on notice and in accordance with sections 556 and 557 of this title" must be an opportunity afforded to interested parties. The initial licensing exemption, which appears in subsection (d) of §554, does not affect the reach of subsection (c) of §554.

Hence, through this chain of references, the ex parte provisions in §557(d) apply to initial licensing cases, as they apply to all adjudications required by statute to be determined on the record after opportunity for an agency hearing. 141/

141/ There is a difficult question of whether §557(d) applies to uncontested proceedings. On the one hand, as discussed above, the application of that subsection comes about through the series of statutory references back to §554. However, §554(c)(2) states that the hearing and notice provisions of §§556 and 557 apply "to the extent that the parties are unable so to determine a controversy by consent." Obviously, in an uncontested construction permit proceeding, the parties -- the staff and the applicant -- have consented about how the case should be resolved. Furthermore, there is no "controversy" which need be resolved. Apparently, the APA did not envision a complete, on-the-record adjudicatory hearing in such uncontested situations and hence there is little reason to believe that Congress intended the ex parte restrictions in §557(d) to apply.

On the other hand, it is very possible to read §554(d) to conclude that, at least with regard to uncontested construction permits -- as opposed to uncontested initial operating license cases -- the staff and the applicant are "unable" to resolve the case by consent. This is because §189a of the Atomic Energy Act has been interpreted to require a formal, on-the-record adjudication in uncontested, as well as contested, construction permit cases. In view of the fact that such formal procedures must be followed, it is also reasonable to argue that the ex parte restrictions in §557(d) should apply; the decision on the construction permit should be based solely on the record in the case and communications known to both the staff and the applicant. Thus, where a person outside the agency seeks to privately influence an adjudicator to deny the license application, even if it is formally uncontested, this is obviously unfair to the applicant. Furthermore, if the outsider is siding with the applicant and the staff, the public may be denied its statutory right to have the mandatory construction permit hearing resolved solely on the basis of record evidence. Private comments from supportive outsiders may inject new information into the adjudicator's mind, and although this information may assist the applicant in getting a license, the public may never know about it.

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As the Commission chooses the extent to which it wishes to avail itself of the opportunity to involve members of the agency staff in the decisional process, it must weigh the impact that these consultations will have on the flexibility and informality of communications that presently exist between the staff and

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141/ (Continued from preceding page)

This discussion is important because the question of whether §557(d) applies to uncontested cases, which would be asked in the construction permit situation, does have some implications for the relaxation of the separation of functions rules. Of course, in uncontested cases there would be no problem with a communication between the agency staff member who was to advise the adjudicators and the license applicant because this would not be an ex parte communication: the only parties to the proceeding, the staff and the applicant, would obviously have notice of and be involved in the communication. However, a problem might result if the staff desired to consult with some interested person outside the agency, other than the applicant, about the merits of the uncontested case. Unless such communication was on the record or the applicant had notice of it, this might be viewed as an ex parte communication between the outsider and the staff member who is an advisor to the adjudicator. If this interpretation of the law were to prevail, even in uncontested cases the Commission would have to sacrifice either the informality of communications between staff members serving as advisors to adjudicators and persons outside the agency or the prospect of consultations between these staff members and the adjudicators. As with contested cases, the Commission would not be able to have both. We believe, however, that Congress did not intend to apply §557(d) to uncontested adjudications.

applicants or intervenors, and between the staff involved in the decisional process and other staff members. 142/

142/ One other point must be made about the potential application of § 557(d) in contested or uncontested cases. The statute requires that the restriction on ex parte communications must commence at the time that a hearing is noticed, "unless the person responsible for the communication has knowledge that it will be noticed." § 557(d)(1)(E). Obviously, in the case of construction permits, it is known to everyone that there will be a hearing. While it may be said that Congress never intended the ex parte rules to apply in every respect to the unique type of mandatory construction permit hearing conducted by the NRC, it is necessary to note that a broad reading of § 557(d) could well destroy the flexibility of the Commission's licensing process. If the adjudicators wish to consult with staff assigned to advocate or investigate in a construction permit case, a broad reading of § 557(d) would mean that these persons could not consult informally with the applicant or others outside the agency even before a formal hearing was noticed because everyone would know that a hearing will definitely be held. We do not believe that this interpretation of the statute is compelled and, in fact, we conclude that it is not very likely. However, it is possible that a court may reach the opposite conclusion.

V. WHAT RESTRICTIONS ARE IMPOSED ON STAFF CONSULTATIONS WITH THE COMMISSION, THE APPEAL BOARDS AND THE LICENSING BOARDS BY THE PROHIBITION IN 5 U.S.C. §554(d)(2) AGAINST "AN EMPLOYEE OR AGENT ENGAGED IN THE PERFORMANCE OF INVESTIGATIVE OR PROSECUTING FUNCTIONS FOR AN AGENCY ... NOT, IN THAT OR A FACTUALLY RELATED CASE, PARTICIPAT[ING] OR ADVIS[ING] IN THE DECISION, RECOMMENDED DECISION OR AGENCY REVIEW ... EXCEPT AS WITNESS OR COUNSEL IN PUBLIC PROCEEDINGS"? 142A/

A. Introduction

As we have seen in connection with the discussion of the initial licensing exemption, the major concern of the drafters of the Administrative Procedure Act in the separation of functions section, now 5 U.S.C. § 554(d), was to protect the rights of those persons who are the subjects of agency-initiated accusatory proceedings. This conceptual framework within which the details of the separation of functions section were specified also underlies the interpretation of the phrase "employee or agent engaged in the performance of investigative or prosecuting functions" for an agency. Thus, assuming that the initial licensing exemption does

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142A/The relevant section at 5 U.S.C. §554(d) reads as follows:

> ... An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.

not apply as a matter of law 143/ or that the Commission does not wish to take advantage of it as a matter of policy, 144/ it is necessary and helpful to examine the contours of the separation of functions provision in the APA.

Under the better and more accepted reading of the statute, "investigative and prosecuting functions" would be performed only in connection with accusatory proceedings. In non-accusatory cases, there would be no such functions and, as a result, there is no separation requirement. The traditional definition of "prosecutor" supports this conclusion. "Prosecutor" is:

143/ The "initial licensing" exemption would not be applicable as a matter of law if (1) the accusatory/non-accusatory distinction is rejected in favor of reading the legislative history as drawing the line between contested and uncontested cases; (2) the Atomic Energy Act is interpreted as making the exemption inapplicable; (3) a court determines that due process requires that the exemption not be applied; or (4) Congress, as has been suggested, repeals the exemption. As explained elsewhere in this paper, each of these possibilities exists, but each is less probable than the conclusion that the Commission may legally utilize the exemption.

Of course, the initial licensing exemption would not apply to certain NRC adjudications like enforcement actions, revocations and the like. Hence, our consideration of the reach of 5 U.S.C. § 554(d)(2) is of more than theoretical value.

144/ If the Commission chooses not to take advantage of the exemption as a matter of policy, it would not be bound by the requirements imposed as a matter of law upon non-exempt licensings. Nonetheless, in fashioning an operational expression of its policy, it is useful for the agency to know what Congress intended in the separation of functions section of the APA.

> One who prosecutes another for a crime in the name of the government; one who instigates a prosecution by making affidavit charging a named person with the commission of a penal offense on which a warrant is issued or an indictment or accusation is based. 145/

The definition of "investigation" does not appear to be so limited to such offenses. "Investigation" is:

> To trace or track; to search into, to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry. 146/

These general meanings, however, must be considered in light of the Congressional intent, manifested in the legislative history of the APA, to apply separation of functions rules to accusatory proceedings.

B. "Investigative and Prosecuting Functions" in Accusatory Proceedings

The typical case of adjudication, the one envisioned by the drafters of the APA, was the one in which the agency was accusing a party of misconduct, of violating a statute or regulation -- e.g., SEC prosecution of a corporation for failure to register

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145/ Black's Law Dictionary, 4th Ed., p. 1385.

146/ Id. at 960.

securities, or NRC imposing a fine against a plant operator or revoking an operator's license because of misconduct. In such a case, the staff counsel who argues the case against the party in the agency hearing is certainly engaged in prosecuting functions. 147/ The counsel's law clerk would be engaged in "investigating"

147/ An interesting situation is the case in which an agency's staff sides with a party accused of misconduct by an intervenor. Would the staff be "prosecutors" in that situation? The writers of the APA apparently did not anticipate such a case, though it may be quite likely to occur today. One could say that the staff is not trying to find a violation, so the staff would not be performing prosecutorial functions in the traditional sense of the word. Since Congress' primary concern was to protect party-defendants from unfair, private consultations between decisionmakers and staff opposed to the party, it would not conform to Congressional intent to interpret the separation requirement to apply to staff members who side with the party. One could argue that it is likely that the writers of the APA might have prohibited such contacts if they had envisioned this situation, but the fact remains that they chose the word "prosecuting", leaving the matter uncovered by the statute.

On the other hand, it is possible to argue that the word "prosecuting" is equivalent to "advocacy", and that staff consultations are prohibited even when the staff -- as an advocate -- sides with the party-defendant. Certainly a staff member on the side of the party in an accusatory case has "buried himself on the side" of a controversial charge of misconduct, and one might question that member's ability to advise an agency objectively. There are extensive references in the legislative history of the APA to support this notion -- e.g., in the 1945 print of the bill, "advocate" is used in place of "prosecutor" (Sen. Doc. at 25); in the 1941 Attorney General's Report, "prosecution" is used interchangeably with "advocacy" (1941 Attorney General's Report at 55-56), and "advocate" is later defined as "the agency's attorney" (Id.). The 1947 Attorney General's Manual refers to separation of functions as forbidding consultation with "employees of the agency who have had such previous participation in an adversary capacity," 1947 Attorney General's Manual at 57 (emphasis added), and there is little reason to believe this could not be viewed as "adversary" to an intervenor.

functions relative to the prosecution, as would someone charged with actual investigation of the violations -- e.g., a member of NRC's Inspection and Enforcement staff who had inspected a plant. But it is not so easy to conclude when other staff members are sufficiently involved in a case so as to be performing "investigative or prosecuting functions" within the meaning of the statute. In resolving this issue, we have examined several different groups of staff members, keeping in mind the two general aims of the separation of functions provision: to prevent biased advice because the staff has a "will to win" and to preclude an interpolation of facts not on the record but gleaned from an ex parte familiarity with the case. Furthermore, we have considered the admonition of the Attorney General that the purpose of 5 U.S.C. §554(d) is not to "isolate the agency heads from their staffs." 148/

Staff involved in a similar case. Staff members who perform "investigative or prosecuting functions" in a "factually related case" may not participate or advise in an agency decision in a case. The term "factually related case" refers to "two different proceedings arising out of the same or a connected set of facts," such as a cease and desist proceeding and license revocation proceeding stemming from the same violation. 149/ Thus, staff members would not be prohibited from advising the agency in a case simply because they were involved in another case which had a similar pattern of facts.

148/ 1947 Attorney General's Manual at 57.

149/ Id. at 54, note 6. See also Giambanco v. Immigration and Naturalization Service, 531 F.2d 141, 150, note 4 (3rd Cir. 1976) in which Judge Gibbon, dissenting on another issue, provided a good discussion of the "factually related case" standard.

Supervisors. The Attorney General's Manual postulates that a supervisor, such as a general counsel, who has not consulted significantly with the prosecuting staff under him probably could advise the decisionmaker. However, it assumes that where a supervisor has been consulted extensively by his subordinates, he becomes unavailable for consultation or advice on the decision to be made. 150/ This interpretation is a sensible one, and is consistent with the philosophy of separation, since a supervisor would tend to be more steeped in one side of the case as he consulted more extensively on it.

Case law supports the idea that a supervisor is disqualified from advising in a case developed by his subordinates only when he has been personally involved in it. In Amos Treat & Company v. SEC, 306 F.2d 260 (D.C. Cir. 1962), the court held that a supervisor of the Division of Corporate Finance who later became a commissioner of the SEC could not decide a case he had helped develop in his previous position. The court cited 5 U.S.C. §554(d) (then §1004(c)), as well as the Due Process Clause, as grounds for the decision. The court also indicated that initiating an investigation, weighing its results, and recommending the filing of charges is enough to constitute prosecuting or investigating. 306 F.2d at 266. However, a supervisor who merely oversees an initial investigation before the decision to prosecute is made might argue that he was not performing

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150/ 1947 Attorney General's Manual at 58.

investigative or prosecuting functions. 151/ But even if he investigated without pointing the investigation toward a prosecution, he could probably be barred from advising the decisionmaker under 5 U.S.C. §554(d)(2) since he engaged in investigative functions in a case that led to a prosecution. Surely if he pointed the investigation in the direction of a prosecution, Amos Treat indicates that he would be barred from consulting with the decisionmaker. In all these instances, though he may not have prejudged the party at that early stage, we must remember that preventing biased advice is not the only policy consideration involved in separation of functions. The other is interpolation of ex parte facts, and the supervisor might well have gathered such facts which he might inject off the record during the decisionmaking process.

Other agency adjudicators. What restrictions, if any, does the APA place on the contacts that hearing officers or licensing boards may have with agency commissioners or with intermediate appeal boards in accusatory cases? And what APA restrictions, if any, exist with regard to contacts between intermediate appeal boards and agency commissioners in these cases?

151/ Soon after the APA was passed, Professor Davis argued that initiating proceedings was not inconsistent with participating in the decision, on the theory that the initial decision to prosecute is similar to the decision of a judge to issue a temporary restraining order -- he only makes a preliminary determination based on the evidence then available. Professor Davis conceded, however, that such a decision tends to commit the judge (or administrative decisionmaker) "to some extent as to his view of the probable facts in advance of a full development of the evidence." Davis, Separation of Functions on Administrative Agencies, 61 Harv. L. Rev. at 645 (1946). (Hereafter cited as "Davis 1946 Article"). This latter sentiment accords more closely with case law as it has developed, in Amos Treat and Holman, where initiating proceedings were held to be investigative and prosecuting.

Clearly, those persons performing solely adjudicative functions are, by definition, not performing investigative or prosecuting functions. Thus, there would appear to be no prohibition in the APA 152/ to licensing boards consulting members of the licensing board panel about a particular case. Through such consultations, licensing board members may better understand the agency's decisions and policies. Likewise, appellate board members may find it helpful to consult with licensing board members who heard a case, but for a different reason; in this case, the trier of fact may be able to assist with references to or an organized review of the record for decision.

These same rationales apply with at least equal force to consultations of and by the agency commissioners with hearing officers or boards and with appellate boards. In those cases, however, it is possible that the members of the agency may have performed either investigative or prosecuting functions in the early, pre-hearing stages of a case. Under the general proscription in § 554(d)(2), the agency members would appear to be excluded from advising hearing officers or boards and appellate boards either

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152/ One might argue that there are due process problems in allowing hearing officers or boards to consult with those who will review their decisions in advance of those decisions. Similarly, a due process claim might be made with regard to agency members seeking advice from appellate boards or hearing boards (or appellate boards seeking advice from hearing boards) on the ground that the lower decisionmakers might have a stake in their decisions being upheld. We will address this matter in the section of this report dealing with due process considerations.

with regard to facts, law or policy in a case. However, the exemption in § 554(d)(2)(C) is applicable here, in that the separation of functions provision would not apply to the "members of ... the agency." This exemption reflects the recognition by Congress of the principle that members of an agency must possess some degree of freedom to initiate investigations or prosecutions and yet not sacrifice their authority to provide guidance to lower level decisionmakers where desirable.

Staff witnesses. The APA does not specifically deal with staff witnesses in terms of separation of functions. Even in accusatory cases, a witness could not be considered a prosecutor in the traditional sense. He is not presenting the case for the agency, though the testimony may well further it. In testifying as to technical matters, a staff member need not become absorbed in one side of the case, nor would he absorb off-the-record facts which he might interpolate ex parte during the decisionmaking process. Professor Davis has concluded that

> nothing in the APA prevents a member of an agency's staff from serving as an expert witness at the hearing and later advising the heads of the agency in making the decision. 153/

An argument could be made that, in testifying on behalf of the agency, then being cross-examined and forced to publicly defend the position, a staff witness becomes biased toward one side of the controversy. Certainly, if the witness was a member of the investigative and prosecuting staff as well as a witness, he could

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153/ Davis 1946 Article at 649.

not advise for that reason. On the other hand, Professor Davis argues that a staff member who has been cross-examined is precisely the one who should advise, since the witness' views already will have been subject to dispute on the record. Whatever the policy merits, the APA seems to allow consultation with staff witnesses by decisionmakers.

C. "Prosecuting and Investigating" in Non-Accusatory Cases

In an adjudication which is not accusatory in nature but where there are disputed issues, would a staff member who took a side against a party (or for the party, for that matter) be performing a prosecuting function? In short, does "prosecution" equal "advocacy" in the general sense?

Whatever the merits of the policy might be today, it is doubtful that the writers of the APA meant this interpretation of prosecuting. Basically, there is no such thing as an "investigative or prosecuting function" in a non-accusatory adjudication. As we have seen consistently, the separation of functions provision is aimed at accusatory proceedings. A staff advocate in non-accusatory proceedings would be able to advise the decisionmaker under the APA. He is an advocate, but not a prosecutor.

Consistent with the rationale of the APA writers, in allowing this consultation we could conclude that even though there are disputed issues in such cases, they do not concern the misconduct

of the party; instead, such issues would be primarily policy-oriented issues. As such, the staff would be generally offering opinions on technical and policy matters, according to its expertise, and there would not be the same type of bias possible, as in a case where "evidentiary facts" were being determined.

Professor Davis addresses this matter by providing the example of the CAB public counsel who opposes a merger application of two airlines. 154/ It is pointed out that, though an advocate, the staff member would not be considered a prosecutor under the APA. Professor Davis believes that the language of §554(d) could be said to include proceedings which are accusatory in nature, even where no formal charges were being pressed (i.e., allegations of disqualifying misconduct, previously discussed), but could not be said to include non-accusatory proceedings.

What about investigative functions? It would seem from a literal reading that § 554(d) bars anyone who has investigated any case, accusatory or non-accusatory, from advising in the decision of it. But Professor Davis and others believe "investigative" should be given a narrow reading and that it only applies to investigations looking toward prosecutions. 155/ Under this reading, in a non-accusatory proceeding investigators could consult decisionmakers, since the questions would typically be primarily policy questions.

154/ Davis Treatise at 218.

155/ Davis Treatise at 216-218; Davis 1946 Article at 616-618.

Professor Davis gives the example of a Social Security investigator who is not for or against a claimant, but who is simply gathering the relevant information. That investigator would not, therefore, have developed the "state of mind incompatible with ... objective impartiality" that the writers of the APA feared in prosecutors and investigators. 156/

This narrow reading of "investigative" is well supported in the legislative history. The explanation of the section given in the 1945 print of the original Senate bill states that it was meant to protect fairness in "so-called 'accusatory' proceedings." 157/ In addressing the "investigative and prosecuting" part of § 554(d), the print telescoped "investigative and prosecuting" into the one word "prosecuting" when referring to the "segregation of deciding and prosecuting functions". The implication is that investigation is a subset of prosecuting. 158/ The committee report on the bill also telescoped "investigative and prosecuting" under the general term "prosecuting." It explained § 554(d)(2), which requires that the hearing examiner not be subject to the supervision of an employee "engaged in the performance of investigative or prosecuting functions", by saying, "they may not be made subject to the supervision of prosecuting officers." 159/ The committee report

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156/ Davis 1946 Article at 618.

157/ Sen. Doc. at 24.

158/ Id.

159/ Id at 203

further explained that "the latter [i.e., prosecuting officers] may not participate in the decisions except as witness or counsel in public proceedings." 160/

It is also significant that almost every other time they are mentioned, the terms "investigative" and "prosecuting" are used together -- in the language of the statute, in the Attorney General's Manual, and in the legislative history. Although "prosecuting" is sometimes used to denote the two together, as discussed, the term "investigative" does not appear to have been used separately.

The legislative history, then, indicates that the term "investigative functions" applies to investigations related to prosecutions in accusatory proceedings. Because the entire thrust of the separation of functions doctrine is to protect parties whose past conduct is being questioned, a narrow reading of "investigative functions" is preferred.

In short, we believe that staff members of an agency should not be said to have performed "prosecuting" or "investigative" functions -- as those terms were used by Congress in the APA -- in non-accusatory adjudications.

160/ Id.

D. The Meaning of "Participate or Advise in the Decision, Recommended Decision, or Agency Review"

It is important to recognize that investigators and prosecutors in accusatory cases are not prohibited from having any communications whatsoever with agency adjudicators. Rather, they are not to privately "participate or advise in the decision, recommended decision, or agency review pursuant to section 557 ...." 5 U.S.C. § 554(d)(2). Most clearly, this prohibition does not allow investigators and prosecutors to privately advise adjudicators about how to resolve the factual, legal or policy matters in a case when the case is pending before those adjudicators for decision. However, it remains to be decided what other contacts investigators and prosecutors may have with adjudicators, particularly with the commissioners.

In order to respond to this question, we must refer to the problems sought to be remedied by Congress when it adopted the separation of functions rule. As we have stated, Congress intended to prevent decisionmakers from receiving biased advice and from being exposed to off-the-record facts which might be introduced by investigators and prosecutors familiar with the case. However, these problems were discussed in the context of the decisionmakers being faced with this information and advice as they performed their adjudicative roles. Congress recognized that, at least as to members of the agency, communications with the entire agency staff -- including prosecutors and investigators -- were

appropriate in connection with the commissioners' performance of their non-adjudicative responsibilities. Thus, for example, if the initiation of an investigation or the commencement of a prosecution are matters which the agency members generally approve, there would be no problem in allowing investigators and prosecutors to consult with the commissioners in the pre-adjudicatory stage about whether to investigate or prosecute. Such consultations would not be "participat[ing] or advis[ing] in the decision, recommended decision or agency review," since no adjudication of that case would have commenced or was about to be decided.

After an accusatory adjudication has begun, however, what contacts may the commissioners have with the investigators and prosecutors? The simple answer is that short of participation or advice in the decision, any contacts are proper. 161/ These contacts may arise in connection with the commissioners' performance of their other duties: investigative or prosecutorial duties, rulemaking responsibilities, other adjudicative decisionmaking, or supervision of the agency's staff generally or with regard to the particular pending adjudication. We will consider each of these in turn.

161/ As stated in the 1947 Attorney General's Manual at 57, the APA "merely excludes from any such participation in the decision of a case those employees of the agency who have had such previous participation in an adversary capacity in that or a factually-related case ...." (emphasis added).

As to other investigative or prosecutorial duties, let us assume that the conduct of company A is at issue in accusatory adjudication X. However, let us assume that the agency staff has discovered new information which indicates that additional charges should be brought against company A, and that company B should also be the subject of further investigation and possible prosecution. Can the investigators and prosecutors in adjudication X talk privately with the commissioners about the need to commence an additional investigation or prosecution against either company A or company B when the facts to be discussed will relate very directly to adjudication X which is now before the commissioners for decision? The following answer was provided by the court in Environmental Defense Fund, Inc. v. Environmental Protection Agency, 510 F.2d 1292, 1305 (D.C. Cir. 1975):

> It may happen that during the course of an agency proceeding against two individuals the "prosecuting" staff discerns from the evidence that proceedings should also be instituted against, or the initial proceeding broadened to include, a third individual. The prosecutorial staff would not be debarred from consulting with the agency head about these steps by the mere fact that a related proceeding was already under way. The same conclusion is applicable where there is no new party but the emerging evidence indicates that a new charge or a broadened charge is appropriate.
>
> Congress has not accepted the view that the possibilities of unfairness require prohibition of an administrative structure that permits the same agency to issue the notice that begins a proceeding and to make the ultimate determination. [footnote omitted]. It has accepted a pragmatic view that the need for effective control by the agency head over the commencement of proceedings requires an ability to conduct consultations in candor with an investigative section on the question of whether a notice should be issued and a proceeding begun, and this notwithstanding any residual possibilities of unfairness.

> [In this case] there is no allegation of communication between "prosecutor" and agency head regarding the final decision 45/

45/ The Administrative Procedure Act, 5 U.S.C. § 554(d) (1970), only prohibits participation or advice in the "decision, recommended decision, or agency review."

Thus, even if an accusatory adjudication is pending which requires separation of functions, the APA does not prevent commissioners from consulting with the prosecutors and investigators in that case if such consultations relate to the advisability of commencing an additional investigation or prosecution, or to broadening the charges in the pending case. 162/

162/ Additional support for this view can be found in Pangburn v. Civil Aeronautics Board, 311 F.2d 349 (1st Cir. 1962), which rejected a due process challenge in a similar setting. In that case members of the CAB conducted an investigation and issued a report on the probable cause of an accident and, at the very same time, adjudicated an appeal from the pilot, who was involved in the accident and whose license had been suspended by a CAB hearing examiner. The court focused on two statutory duties of the CAB: to investigate and to report on accidents for the purposes of determining probable cause and considering safety recommendations, and to decide through adjudicatory proceedings whether the public interest requires suspension of the licenses of pilots involved in accidents. The court recognized that although "similar questions may frequently be involved in the two proceedings," Congress had determined to vest in the agency these two important, clear-cut and fundamentally different functions. Although no APA claim was made, the court specifically mentioned that separation of functions would not apply in the case before it to "members of ... the agency" because of the exemption in § 554(d)(2)(C) of the APA.

A similar decision may be reached with regard to the agency discharging its rulemaking and other adjudicative responsibilities. More specifically, suppose that the agency has pending a generic rulemaking proceeding involving seismic problems facing nuclear power plants, or that the agency is considering commencing such a rulemaking. The agency may wish to consult privately with its staff experts on seismic problems in connection with the rulemaking, 163/ but these very experts may have performed investigative or prosecuting functions in a pending accusatory adjudication. 164/

163/ We are assuming, of course, that there is no statutory or constitutional bar to the commissioners consulting privately with agency staff members who are involved in such rulemakings. Compare Katherine Gibbs School v. Federal Trade Commission, ____ F.2d ____ (2d Cir. No. 78-4204, Dec. 12, 1978)(Slip op. at 20) with Chicago, Milwaukee, St. Paul & Pacific RR v. United States, 585 F.2d 254, 263 (7th Cir. 1978).

We should note that the view apparently adopted by the writers of the APA was stated in the 1941 Attorney General's Report at 57-58:

> Particularly in cases where adjudicatory functions are not a principal part of the agency's work or are closely interrelated with other activities, whatever gains might result from separation would be plainly outweighed by the loss in consistency of action as a whole . . . . In greater or lesser degree these same considerations are applicable wherever the adjudicatory and nonadjudicatory functions of an agency are required to be exercised in harmony with each other and where the knowledge secured in the exercise of the one group of functions is important in the wise exercise of the other . . . . These powers must be exercised consistently and, therefore, by the same body, not only to realize the public purposes which the statutes are designed to further but also to avoid confusion of the private interests.

164/ We could assume that a licensee has been charged with violating certain NRC rules with regard to protection against seismic hazards, and that this misconduct is the subject of an enforcement adjudication.

Even if the rulemaking involved some of the very same factual, legal and policy matters which arose in the adjudicatory proceeding, we believe that there is no bar in the APA to the commissioners talking with the investigators or prosecutors about how to resolve the rulemaking. These persons would not be providing any advice "in the decision, recommended decision or agency review" of the adjudicatory proceeding. The same argument could be made here, rather than being concerned with a rulemaking proceeding, the commissioners had to resolve the seismic issue as part of an informal adjudication, such as an export license. This might occur where a seismic problem had an impact on the global commons. In order to obtain expert advice on how to resolve the seismic issues in this informal adjudication, the commissioners may consult -- consistent with the APA -- knowledgeable prosecutors and investigators who are involved in a factually related accusatory adjudication.

Finally, we come to the question of communications between commissioners and agency investigative or prosecuting staff for the purpose of supervising the staff as a general proposition or in connection with the very adjudication at hand. If the commissioners are concerned about generic issues which transcend individual cases, and their contact with the staff members who perform investigative or prosecuting functions is related to their desire to provide the staff with guidance on general agency policies in this area, this supervisory contact is not incon-

sistent with the APA separation of functions requirements. 165/ Through such contact, the agency investigators and prosecutors would not be participating or advising in a particular decision. Furthermore, these communications would be akin to the "informal review, discussions and guidance on important matters involving nuclear safety" which, as we have seen, the AEC informed the Joint Committee on Atomic Energy about in 1967. 166/

A more difficult problem may arise in connection with Commission efforts to supervise staff investigators and prosecutors in the course of a particular accusatory adjudication. Even though the writers of the APA permitted members of the agency to oversee investigations and approve the commencement of prosecutions, they believed that the better course of conduct was for the commissioners to "delegate the actual supervision of investigation and initiation of cases to responsible subordinate officers," leaving the commissioners themselves with only the deciding function. 167/

165/ For example, suppose the Commission has had to reverse appeal board or licensing board decisions on the basis of policy considerations. The commissioners may desire to talk to the investigative and prosecuting staff in order to assure that these persons are aware of the new policy, and that their investigations and prosecutions will be carried out in accordance with that policy.

166/ See pp. 43-44, supra.

167/ Sen. Doc. at 204. The 1941 Attorney General's Report, which laid the foundation for the APA, did not envision involvement by commissioners in the day-to-day activities of the agency, but it left little doubt that such involvement would not be inappropriate:

> Save at the level of the agency heads, an internal separation of function can afford substantially complete protection against the danger that impartiality of decision will be impaired by the personal

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A fortiori, it is apparent that Congress did not envision the commissioners actually supervising the conduct of a particular prosecution. This does not mean, however, that such supervision would be improper under the APA. The question to be answered is whether this supervision would lead to participation or advice to the commissioners about how to decide the particular case. While a one-way communication by the commissioners to the prosecutors to "do this" or "don't do that" would not violate the statutory prohibition, it is quite possible that an extensive interchange between agency prosecutors and commissioners about the specific facts and policies applicable to a particular proceeding might lead a court to conclude that the prosecutors or investigators

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167/ (Continued from preceding page)
precommitments of the investigator and the advocate. Even at the level of ultimate decision there can be similar protection, for the sheer volume of work does not permit the agency heads to participate actively in developing one side of any single side but requires that they reserve themselves for the task of deciding questions presented to them by others. Nevertheless, so far as the agency is empowered to initiate action at all, the agency heads do have the responsibility of determining the general policy according to which action is taken. They have at least residual powers to control, supervise, and direct all the activities of the agency, including the various preliminary and deciding phases of the process of disposing of particular cases.

1941 Attorney General's Report at 57 (emphasis added).

had, in effect, advised the decisionmaker on how the case should be resolved. 168/

Of course, the aforementioned consultations and supervision may well expose the commissioners to the facts of a particular adjudication, and they may be required to take a position on those facts in order to resolve the investigation, prosecution, rulemaking or other proceeding which caused them to seek the advice of the technical staff. However, when Congress decided to repose these varying responsibilities in agencies, it recognized that the agencies should not be forced to sacrifice some of their goals in order to obtain others; commissioners should not, for example, be faced with sacrificing expert advice in an investigative proceeding merely because the same experts are involved in a factually related accusatory adjudication. Environmental Defense Fund, supra, 510 F.2d at 1305.

There are, however, some caveats to the consultations which the APA appears to sanction. Obviously the consultations must truly

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168/ We believe that a more serious problem in this situation is not the problem of the APA, but rather a question of due process. There seems to be some inherent unfairness in having the person who approved and supervised the investigation, who agreed to the prosecution, and who actually supervised the prosecution team also be the very same person who will adjudicate the case. Furthermore, there are concerns that through such close supervision, the adjudicators will be found to have prejudged the case. These issues will be discussed later in the due process section of this paper.

be associated with the resolution of the non-accusatory proceeding; they cannot be used to circumvent the proscription in § 554(d)(2) against investigators and prosecutors advising in the adjudication or a factually related adjudication. The line between circumvention and proper conversations may sometimes be very fine. The totality of circumstances surrounding the consultation should be considered -- e.g., the extent of overlapping facts, the expressed intent of the communicants, the nature of the consultation (informational, advocacy, etc.), the necessity for the consultation. In addition, the commissioners must be sure not to prejudge any issues which will have to be resolved on the basis of the record in the on-the-record accusatory proceeding. 169/ Thus, to the extent that such judgments are necessary in the context of the other proceeding which caused the consultations -- i.e., the investigation, rulemaking, etc. -- those judgments should be recognized as being limited to that other proceeding.

It is also important to recognize that we have discussed private consultations with staff in the context of accusatory adjudications. At the NRC, few proceedings will fall into this category.

169/ The APA requires that an on-the-record adjudication must be resolved strictly on the basis of the evidence presented in that case. 5 U.S.C. §§ 556(e) and 706(2)(E). If additional information reaches the decisionmaker, whether through persons outside the agency or agency staff members, the decision may be reversed unless the information is made public and there is an opportunity for rebuttal, and cross-examination where appropriate. Weyerhaeuser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978); Twiggs v. United States Small Business Administration, 541 F.2d 150 (3rd Cir. 1976). See also footnote 192, infra (Atomic Energy Act "hearing" requirement) and footnote 213, infra (due process).

Accordingly, there would be no bar in the APA to such consultations between agency advocates or witnesses and the commissioners, whether for purposes of the commissioners' obtaining advice about deciding a particular non-accusatory licensing case or because the commissioners wished to supervise the staff presentation in such a case. 170/

E. The NRC's Rules

As with the initial licensing exemption, the NRC's separation of functions and ex parte rules are more restrictive than the prohibitions required by § 554(d)(2) of the APA. In particular, 10 CFR § 2.780(a) prevents the commissioners and those who advise them in their quasi-judicial functions from requesting or entertaining off the record, 171/ except from each other:

170/ The meaning of the term "participate or advise in the agency decision ...." is, however, relevant in determining the legality of consultations between decisionmakers and agency advocates in non-accusatory cases. We believe that as a general proposition for non-accusatory adjudications, there will be a potential due process problem only when the agency staff member who consults with the decisionmakers is thereby participating or advising in the decision. Accordingly, in the later due process section of this paper, the bulk of the discussion will be concerned with staff advocates, witnesses and the like who advise in the decision in non-accusatory cases -- and not with staff members who consult with decisionmakers in a manner that does not amount to such participation or advice in an adjudication.

171/ The Commission has never formally interpreted the phrase "off-the-record" which appears in 10 CFR § 2.780(a). However, in SECY 75-435 at 3 (August 12, 1975), the General Counsel stated that with regard to written communications, the term means "not filed according to the usual rules of practice and not served on all parties." The Commission has apparently adopted an analogous interpretation for oral

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any evidence, explanation, analysis, or advice, whether written or oral, regarding any substantive matter at issue in a proceeding on the record then pending before the NRC for the issuance, denial, amendment, transfer, modification, suspension, or revocation of a license or permit.

171/ (Continued from preceding page)

communications -- that is, they are "off-the-record" if they are not made according to the usual rules of practice and not presented in the presence of the other parties. The "usual rules of practice" have been that all parties should have an opportunity to make an oral statement if one party does so.

It should be noted that the APA does not use the term "off-the-record" in connection with separation of functions in § 554(d). It uses the term "not on the public record" to define ex parte communications with outsiders, §§ 551(14) and 557(d), but neither the statute nor the legislative history makes clear whether an agency's refusal to allow a party an opportunity to respond to communications converts them into communications "not on the public record", even if they had been publicly made and the other parties were aware of them.

In any event, it is possible that the NRC's use of the term "off-the-record", if read to require an opportunity to respond, goes beyond the separation of functions requirements of the APA where the agency publicly receives communications from its staff -- and only its staff -- about an issue in a formal adjudication. As a practical matter, however, the result of this strict reading of "off-the-record" in the NRC rule would probably occur for other reasons. To allow the staff alone, as a party to the adjudication, to present new arguments or information would likely run afoul of other sections of the APA -- e.g., § 554(c)(1) ("agency shall give all interested parties opportunity for the submission, and consideration of facts [and] arguments . . . When time, the nature of the proceeding, and the public interest permit"); § 556(e) ("transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision . . . ."); § 557(c) ("parties are entitled to a reasonable opportunity to submit . . . supporting reasons for the exceptions or proposed findings or conclusions"); § 556(d) ("party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts").

We have seen that this provision has been interpreted to prevent the commissioners from consulting with the agency staff in even non-accusatory adjudications, even though such staff members would not be performing investigative or prosecuting functions within the meaning of the APA -- the prerequisite to the separation of functions bar in § 554(d)(2). Furthermore, this prohibition on consultations with staff members applies even if the communications are not in connection with a staff member's participation or advice in the decision of an adjudication; as long as the communication consists of "any evidence, explanation, analysis or advice ... regarding any substantive matter at issue" in a pending adjudication, it is apparently proscribed although it may have independent significance.

The agency has, however, tried to relax this broad restriction by use of 10 CFR § 2.780(d) which permits:

> ... communications requested by the Commission concerning:
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> (1) Its proprietary functions;
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> (2) General health and safety problems and responsibilities of the Commission; or
>
> (3) The status of its proceedings.

These relaxations, while helpful, also do not permit consultations to the extent authorized by the APA. For example, the communications must be requested by the Commission; i.e., apparently not by an individual commissioner, and certainly not on the

initiative of the staff. In addition, although the Commission may request staff advice on "general health and safety problems and responsibilities," there is no explicit recognition that this could include rulemaking proceedings or industry-wide investigations. Nor is there any express provision for the Commission to request or entertain staff advice about whether to commence a new investigation or prosecution, as in the previously discussed Environmental Defense Fund case. 172/ Finally, there is no provision for consultations with the staff for the purpose of supervising the staff. In short, it seems possible that the NRC can, consistent with the APA, further relax 10 CFR § 2.780 so that additional persons can be consulted and so that additional types of communications beyond those contained in § 2.780(d) can be made. 172A/

172/ Although there is no express provision in the NRC rules which would allow these results, we do not believe that 10 C.F.R. §2.780(a) must necessarily be interpreted to prohibit conversations of the kind mentioned in Environmental Defense Fund. The operative language is whether the commissioners' consultations with staff are "regarding any substantive matter at issue" in a pending adjudication. We might give this a narrow meaning, so that it is interpreted to mean "associated with the resolution of any substantive matter at issue" in a pending adjudication. A number of factors could be examined -- e.g., the expressed intent of the communicator, the extent of overlapping facts, the necessity for the consultation, see footnote 169, supra and accompanying text -- in order to determine if the communication was actually "associated with the resolution of" the pending adjudication, or whether it was more properly "associated with the resolution of" a proposal to commence additional proceedings and the like.

172A/ Any due process restrictions on such consultations will be discussed later, though such restrictions might exist as a general matter only when the staff members to be consulted were involved in the very case for which their participation and advice in the decision was being sought.

VI. WHAT LIMITATIONS ARE IMPOSED BY THE ADMINISTRATIVE PROCEDURE ACT'S PROVISION IN 5 U.S.C. §554(d)(1) THAT "THE HEARING OFFICER MAY NOT...CONSULT A PERSON OR PARTY ON A FACT IN ISSUE?" 173/

A. The Limitations in the APA

Section 554(d) of the APA provides that a hearing officer may not consult with "any person or party" on any "fact in issue, unless on notice and opportunity for all parties to participate." Read literally, this would mean that a member of a licensing board could not even consult privately with staff members not involved in the case, since they are "persons." 173A/ A strict reading would even preclude advice from law clerks and assistants. But it is hard to imagine that the writers of the APA prohibited such consultations, and the legislative history and contemporary comments on the APA all lead to the conclusion that a hearing examiner may indeed consult non-involved staff members, despite the "person or party" limitation. The most likely interpretation of the language, as we will explain, is that it refers to persons or parties outside the agency.

173/ 5 U.S.C. §554(d)(1) reads as follows:

> (d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not-
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> (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
>
> (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

173A/"Person" is defined in 551(2): "Person includes individuals, partnerships, corporations, associations or public or private organizations of any character other than agencies." A staff member is certainly an "individual."

In commencing our analysis, it is useful to examine the legislative history. In 1941, a minority of the Attorney General's Committee proposed a clause prohibiting the hearing examiner from privately consulting with anyone but his law clerk and personal assistant. 174/ This idea was sharply criticized in Congressional hearings, the point being made that hearing examiners would inevitably discuss cases with other hearing examiners in their day-to-day contact and, further, that they needed the help of staff experts to make an intelligent decision. 175/ To the extent that separation of functions concerns were relevant to hearing examiners, it was because of the desire to ensure that prosecuting staff personnel did not privately advise the decisionmaker. Nowhere in the history is any reason given why a hearing examiner should not consult privately with non-involved staff members. In short, there is no indication that the drafters of the APA adopted the minority position of the 1941 Attorney General's Committee.

This view is consistent with the 1947 Attorney General's Manual, which specifically states that even in cases where separation of functions is required, a hearing officer may consult with non-prosecuting agency personnel:

174/ 1941 Attorney General's Report at 343, 236.

175/ 1941 Hearings, at 226, 592, 734, 736, 737.

> Further, it is manifest from the third sentence of section [554(d)] that the hearing officer may obtain advice from or consult with agency personnel not engaged in investigative or prosecuting functions in that or a factually related case. 176/

Such consultation was viewed as desirable in the formation of a decision that truly reflects agency policy and is based on sound factual determinations.

In light of the legislative history, how can the clear language "person or party" be read to not include agency staff? Professor Nathanson confronted this problem in a 1946 article written soon after the passage of the APA. 177/ Noting that it was "inconceivable" that Congress meant to preclude private staff assistance for hearing officers, Professor Nathanson proposed two alternative meanings for this part of § 554(d).

First, it was suggested that the statutory reference to the hearing examiner was meant to include staff assistants or clerks assigned to help him in his duties -- i.e., they, together with the actual hearing officer, form a "corporate person" labeled together as the "hearing officer." 178/ This accords with the

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176/ 1947 Attorney General's Manual at 55.

177/ Nathanson, Some Comments on the Administrative Procedure Act, 41 Ill. L. Rev. 368 (1946). (hereafter cited as "Nathanson 1946 Article").

178/ Id. at 389.

common view that an action required to be performed by a certain official may be performed as well by his subordinate, who is considered part of his office.

Professor Nathanson's second, and better interpretation, is that "person or party" refers only to persons outside the agency. 179/ Professor Davis supported this reading in an article written soon after Professor Nathanson's. Both professors cite two basic reasons why staff members are not "persons or parties" with whom the hearing examiner is barred from privately consulting under the statute. First is the overall intent of the §554(d) provision, which is to avoid biased consultation by people steeped in one side of the case. Nowhere is there an indication that Congress meant to abridge the institutional decisionmaking process by preventing advice from non-involved agency staff. Second, the APA consistently uses "person or party" to refer to individuals outside the agency. Professor Davis counted 38 references in the APA to "person" or "party", and concluded that "in every instance [Congress] seem[s] to have reference only to outsiders and not to members of the agency's staff." 180/ When Congress intended to refer to agency staff, it typically used the terms "officer", "employee", or "agent." For example, there is the §554(d) reference

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179/ Id. at 389-390.

180/ Davis Treatise at 107.

to "employee or agent engaged in the performance of investigative or prosecuting functions for an agency" -- it could well have been written "persons engaged in ..." if "persons" was generally meant to include staff members. Moreover, if the reference to "person or party" includes staff members, the succeeding paragraph prohibiting decisionmakers from consulting prosecuting staff would be superfluous insofar as presiding officers are concerned. Thus the most likely interpretation of this section is that "person or party" refers to persons outside the agency.

On the other hand, there is a respectable case for the literal reading of the statute to bar hearing examiners from consulting privately with any person, including all staff members. The obvious reason is simply the "natural meaning of the words used" -- the plain meaning excluded all persons, and normally a statute will be construed to mean what it says. 181/ In terms of policy, there is also the fear that if the hearing examiner consults with someone off the record, including non-involved staff, he may possibly be provided information that is not on the record, thus not subject to rebuttal and cross-examination by the parties affected. This was the major concern of the minority of

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181/ A similar argument can be made with regard to the word "party". The regulatory staff involved in a licensing hearing has been called, by a former Director of Regulation of the AEC, "a party in all hearing cases" AEC-R 43/4 (May 6, 1965) at 13, and courts have also taken this view. New England Coalition on Nuclear Pollution v. U.S. Nuclear Regulatory Commission, 582 F.2d 87, 94, note 12 (1st Cir. 1978).

the Attorney General's Committee in 1941. However, given the total picture portrayed in the legislative history, it does not appear that this minority view was adopted by Congress in 1946 when it passed the APA.

Professor Davis concluded on this question as follows:

> Altogether, the problem of interpreting "person or party" is a close question which could go either way. The literal interpretation has the merit of simplicity and is likely to be adopted by a court that fails to make a rather profound and extended inquiry into the problem. But a court which digs deeply enough may well be impressed with the reasons for rejecting the literal interpretation. 182/

Professor Nathanson's conclusion was even more forceful:

> I conclude then that the subsection is designed to isolate the hearing officer only from those engaged in prosecutory or investigatory questions in the particular case before him or in factually related cases. Otherwise, he is free to avail himself of the assistance of all the facilities of the agency. Such freedom clearly works toward strengthening, not weakening, the position of the hearing officer i.. the administrative process. 183/

182/ Davis Treatise at 199. Apparently, some 35 years after the APA was adopted, there are still no court cases which provide a definite ruling on which of the two interpretations is correct.

183/ Nathanson 1946 Article at 390.

We also conclude that when Congress forbade hearing examiners from privately consulting with "persons or parties" on a fact in issue, it was referring to persons or parties outside the agency, and it did not mean to prohibit consultation with agency staff. 183A/

B. The NRC's Rule

The Commission's rule goes far beyond the § 554(d)(1) limitation, largely because it appears that the NRC -- like its AEC predecessor -- has read the APA provision to include agency employees within the "person or party" terminology. As we have seen in connection with discussing the history of the agency's separation of functions rule, originally the AEC regulation mirrored the language of the APA -- i.e., presiding officers could not consult any

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183A/ Our conclusion means that, to a great extent, § 554(d)(1) is superfluous in light of the prohibition in § 557(d). In fact, the ABA recommended that § 554(d)(1) be deleted in favor of adopting a more general restriction on ex parte contacts. Government in the Sunshine, Hearings Before Subcommittee on Reorganization, Research, and International Organizations of Senate Government Operations Committee, 93rd Cong., 2d Sess. at 373 (May, October 1974). However, as the head of the Administrative Conference of the United States observed, § 554(d)(1) prohibits private contacts about facts in issue with any person outside the agency, and not merely interested parties covered by § 557(d)(e.g., presumably persons like outside experts). Id. at 258. Of course, Congress did not delete § 554(d) when it adopted § 557(d).

"person or party." 184/ However, the 1962 rule changes substituted the language that "the presiding officer may not consult any person other than a member of his staff." 185/

Accordingly, although not required by statute in initial licensing or any other types of formal adjudication, the NRC forbids its licensing boards and administrative law judges from obtaining assistance from ron-involved staff members or even from other members of the licensing board panel. We will subsequently explore the options for expanding the class of persons which may be consulted by presiding officers.

184/ See footnote 12, supra.

185/ See footnote 61, supra. This language change apparently only explicitly stated what had long been the AEC interpretation of its earlier rule -- i.e., "the hearing examiners may not be advised by any other agency officer except as a witness or permit any agency officer or employee to participate in the formulation of findings or decisions." Report to the Hoover Commission Concerning Proposed Administrative Code, AEC 812 at 6 (April 1, 1955).

VII. WHAT SEPARATION OF FUNCTIONS LIMITATIONS ARE REQUIRED AS A MATTER OF LAW UNDER THE ATOMIC ENERGY ACT OF 1954, AS AMENDED?

The Atomic Energy Act of 1954, as amended, contains no separation of functions requirements. However, the question arises as to whether any type of separation of functions inheres in the statutory requirement of a "hearing" in Section 189a. 42 U.S.C. § 2239a.

As the Commission undoubtedly knows, the legislative history behind the "hearing" requirement is terse and obscure. Senator Anderson, commenting upon the need to adopt the "hearing" requirement, stated:

> ... but because I feel so strongly that nuclear energy is probably the most important thing we are dealing with in our industrial life today, I wish to be sure that the Commission has to do its business out of doors, so to speak, where everyone can see it.
>
> Although I have no doubt about the ability or integrity of the members of the Commission, I simply wish to be sure that they have to move where everyone can see every step they take; and if they are to grant a license in this very important field, where monopoly could so easily be possible, I think a hearing should be required and a formal record should be made regarding all aspects, including the public aspects.186/

186/ 100 Cong. Rec. 10,000 (July 14, 1954) (emphases added).

It is possible, relying upon this language, to argue that Congress intended that "every step" and "all aspects" of a licensing decision -- including consultations between the staff and the decisionmakers -- must be on the record. Consequently, while the Atomic Energy Act might not bar communications of this sort, it -- like the separation of functions provisions in § 554(d)(2) of the APA -- requires such advice by staff who perform "investigative or prosecuting functions" to be limited to "witness or counsel in public proceedings." In fact, it is possible to argue that the "hearing" requirement of the Atomic Energy Act goes beyond the Administrative Procedure Act to encompass communications from staff members who perform advocacy functions, even if such functions cannot be classified as "investigative or prosecuting." In short, the "hearing" requirement may serve to nullify the initial licensing exemption in 5 U.S.C. § 554(d)(2)(A). 187/

187/ This conclusion was reached in a different context in Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir.), cert. den. 99 S.Ct. 94 (1978). At issue was 5 U.S.C. § 556(d), which provides parties with the right to present their cases by oral or documentary evidence, except in initial licensing cases, where an agency may require the submission of all or part of the evidence in written form if a party will not be prejudiced. Without even addressing the prejudice standard, the court found that EPA could not take advantage of the initial licensing exemption because:

> [T]he APA does not excuse procedures compelled by the governing statute. In this case ... the [Federal Water Pollution Control Act] requires the EPA to afford an opportunity for a public hearing [footnote omitted]. We do not believe that the Administrator can comply with the statute merely by taking some evidence at a public hearing and then taking the rest in written form... Therefore, we interpret the closing lines of § 556(d) of the APA to mean that the Administrator can require evidence to be submitted in written form in initial licensings unless the governing statute requires a public hearing [footnote omitted]. 572 F.2d at 879-880 (emphasis in original).

Although it is possible that a court may reach this conclusion, there are several reasons why we think that it is unlikely to do so. First, the Commission's interpretation of the "hearing" requirement must be given great deference in light of the "virtually unique" regulatory scheme in which "broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." Siegel v. Atomic Energy Commission, 400 F.2d 778 (D.C. Cir. 1968).

Second, as the Supreme Court admonished lower courts in the case of Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978):

> Congress intended that the discretion of the agencies and not that of the courts to be exercised in determining when extra procedural devices [i.e., those not required by the APA] should be employed (emphasis in original). 188/

188/ The Vermont Yankee admonition has not deterred courts from finding that even though a procedure might be sanctioned by the Administrative Procedure Act, it may nonetheless be prohibited under a judicial interpretation of a "hearing" requirement in an agency's organic act. See, e.g., United States Lines, Inc. v. Federal Maritime Commission, 584 F.2d 519 (D.C. Cir. 1978) (ex parte communications not prohibited by the Administrative Procedure Act are nonetheless inconsistent with agency's statutory duty to hold a "hearing"); National Small Shipments Traffic Conference, Inc. v. Interstate Commerce Commission, 590 F.2d 345 (D.C. Cir. 1978) (similar ruling).

Third, the Joint Committee on Atomic Energy, which authored the Atomic Energy Act of 1954, addressed the separation of functions question when it created the Atomic Safety and Licensing Board in 1962. During the hearings on the 1962 legislation, Herzel Plaine, Chairman of the Special Committee on Atomic Energy Law, American Bar Association, criticized the application of separation of functions rules to certain initial licensing cases, commenting that the initial licensing exemption in the Administrative Procedure Act could be utilized. 189/ He argued that such formality was inconsistent with the 1962 reforms, which included abolition of the mandatory hearing requirement in uncontested operating license proceedings, as well as the establishment of the Atomic Safety and Licensing Board. The suggestion was made that the views of the Joint Committee on the separation of functions issue could be made explicit in a committee report, rather than by writing them into the 1962 legislation. Subsequently, the report did state that the Atomic Safety and Licensing Board, "in initial licensing cases, would be free to consult with the AEC staff including technical experts as permitted by the Administrative Procedure Act," 5 U.S.C. § 554(d). 190/ The views of the

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189/ Atomic Energy Commission Regulatory Problems, Hearings before the Subcommittee on Legislation of the Joint Committee on Atomic Energy, 87th Cong., 2d Sess. at 35 (April 17, 1962).

190/ House Rpt. No. 1966, 87th Cong., 2d Sess. at 6 (July 5, 1962).

Joint Committee on the Administrative Procedure Act are, of course, entitled to little or no weight in interpreting the latter statute. United States v. Wise, 370 U.S. 405 (1962). However, these views are a clear implication that there is nothing in the Atomic Energy Act of 1954, as amended, which would impose separation of functions requirements that the Joint Committee felt were not even imposed by APA. In particular, it is implicit that the Joint Committee believed that separation of functions did not inhere in the "hearing" requirements of the Atomic Energy Act. While there is disagreement about the precise contexts in which subsequent legislative declarations about the intent of an earlier law are to be given much weight, compare Federal Housing Authority v. The Darlington, 358 U.S. 84, 90 (1958), with Securities and Exchange Commission v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 199-200 (1963), in this case the close relationship between the Joint Committee and the Commission would justify reliance upon the Joint Committee's views. Power Reactor Development Co. v. International Union, 376 U.S. 396 (1961).

Finally, we believe that the decision in Seacoast Anti-Pollution League is in error, for the following reasons expressed by the Environmental Protection Agency:

> [T]o say that [the initial licensing exemption] does not apply whenever the statute at issue requires a "hearing" would be in effect to say that it almost or never applied, since a statutory "hearing" requirement is necessary to make the APA applicable in the first place. It would be in effect to say that the same statutory reference that makes formal hearing procedures applicable generally also makes the ... initial licensing [exemption] for [separation of functions requirements] inapplicable 191/

In conclusion, we do not believe that a court would rule that the "hearing" requirement in Section 189a of the Atomic Energy Act of 1954, as amended, mandates that the Commission apply separation of functions rules to initial licensing proceedings. 192/ Of course, neither does that law preclude the Commission from determining, in its discretion, that separation rules should be applied.

As with the initial licensing exemption, however, the Atomic Energy Act cannot be read to sanction the staff's interjection of new material, not disclosed to other parties and subject to rebuttal, into the adjudicators' minds. In fact, if this occurred, a court would probably find a violation of the "hearing" requirement, as well as other constitutional or APA violations. 192/

191/ 44 Fed. Reg. 32, 890 (July 7, 1979).

192/ For cases in which the introduction of new material was found to be a violation of a statutory "hearing" requirement, see footnote 188, supra. See also footnote 169, supra (§§556(e) and 706(E)(2) of APA) and footnote 213, supra and accompanying text (due process).

Furthermore, because the rationale for implying an ex parte rule in informal rulemakings is somewhat different, our conclusion here should not be viewed as being inconsistent with the cases cited in footnote 188 supra.

VIII. WHAT SEPARATION OF FUNCTIONS RULE IS REQUIRED UNDER THE DUE PROCESS CLAUSE?

A. The Constitutional Framework

Although neither the Administrative Procedure Act, 5 U.S.C. § 554(d), nor the "hearing" requirement in the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a), would bar consultations between NRC commissioners and the regulatory staff -- including the staff counsel in a proceeding -- in non-accusatory licensing proceedings, it remains to be seen what limitations might be required by the Due Process Clause of the Constitution for initial licensing and other cases. 193/

In responding to this question, we are guided by the recent Supreme Court decision in Withrow v. Larkin, 421 U.S. 33 (1975), in which there was a rejection of the idea that, as a general proposition, the combination of investigating and judging

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193/ Most of the discussion in this section of the paper concerns staff members who have been involved in a case and who later serve as advisors to the adjudicators in the course of their decisionmaking process. We believe that any potential due process problems are far more likely to be associated with such advisory consultations, rather than with efforts of the commissioners to supervise the staff involved in a proceeding or with consultations between these involved staff members and the commissioners about other matters such as independent, but factually related, investigations, rulemaking and the like -- though the latter situations do not present merely frivolous concerns. See footnote 166, supra, and accompanying text.

As for due process problems which might result where new information or arguments, not already on the record, were privately communicated by staff to the adjudicators, see footnote 213, infra, and accompanying text.

functions in the same person or agency was necessarily tantamount to a denial of due process. In that case a state licensing board had conducted an investigative proceeding involving a doctc in order to determine whether to commence formal license suspension proceedings, over which the same board would preside. The doctor claimed that the board's combination of investigative and adjudicatory responsibilities was a violation of due process. In rejecting this claim of "institutional" bias, the Supreme Court stated that the claim must:

> ... overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individual poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented. 421 U.S. at 47.

The Withrow court focused on the different functions being performed by the board in its investigative and adjudicative capacities: to find "probable cause" sufficient to commence a prosecution in the former, but to make a finding of an actual violation based solely on record evidence in the latter. In light of these different duties, the Court said of the charge of "institutional" bias:

> The risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position .... Here, if the Board now proceeded after an adversary hearing to determine that

> appellee's license to practice should not be temporarily suspended, it would not implicitly be admitting error in its prior finding of probable cause. Its position most probably would merely reflect the benefit of a more complete view of the evidence afforded by an adversary hearing. 421 U.S. at 57-58.

In addition to the possibility of "institutional" bias, there remains the issue of actual bias or prejudgment in individual cases. The Withrow court noted that there was no proof of actual bias, 421 U.S. at 54, note 21, and it refused to pass on the validity of several lower court decisions which found that an adjudicator was disqualified on due process grounds because of actual bias or prejudgment. 421 U.S. at 50, note 16.

Although the Withrow case concerned alleged bias or prejudgment in the ultimate decisionmakers, we believe that the principles discussed therein are at least equally applicable to initial decisionmakers (such as licensing boards, or even appeal boards) and to agency staff who assist the adjudicators in making their decisions. Thus, under the general standards set forth in Withrow, we must determine the extent to which the Due Process Clause places limitations on private contacts between (1) agency adjudicators -- including commissioners, the appeal boards and the licensing boards -- and the regulatory staff; and (2) the commissioners and the licensing boards and/or appeal boards, as well as between the licensing boards and the appeal boards.

B. Communications Between Agency Adjudicators and the Regulatory Staff in Accusatory Proceedings

Consistent with the precise holding in Withrow, there are no due process problems associated with NRC commissioners themselves conducting an investigation and, subsequently determining to hold a formal hearing in which the commissioners would become adjudicators. Moreover, insofar as the commissioners delegate the actual investigative tasks to the regulatory staff, which would make a recommendation to the commissioners on whether to commence formal proceedings, there are no due process problems with the commissioners consulting privately with and supervising the investigators during the investigation and at least up until the time that a formal hearing is ordered. 194/ However, after a hearing has been

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194/ In Withrow, 421 U.S. at 54, note 20, the Supreme Court noted that the board had assigned the actual investigation to its staff, and that the recommendation to prosecute was made by an assistant attorney general. The Court stated that this internal board organization, geared to minimize the risks from combining investigative and adjudicative duties, was "not essential" to the decision upholding the constitutionality of the board's combination of both duties.

However, it is unclear the extent to which the commissioners could, consistent with the due process clause, actually participate in the direct supervision of agency prosecutors or advocates after the adjudication commenced and during the course of the hearing. See footnote 163, supra. In one pre-Withrow decision, the court found due process violations where, in an accusatory proceeding, the legal advisor to a board made decisions for the board and also acted as the prosecuting attorney, and where that same person was present during the deliberative sessions of the board. Mack v. Florida State Board of Dentistry, 296 F.Supp. 1269 (S.D. Fla. 1969). However, Professor Davis has stated that the APA "permits a combination of judging not only with instituting proceedings but also with prosecuting and investigating," and he cited a number of state courts which have upheld this combination against a due process challenge. Davis Treatise, § 13.10 at 237 and 240, note 15.

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commenced, we believe that a possible due process violation would result if the NRC commissioners sought private advice in deciding the case from agency staff who had served as "prosecutors" or "investigators" in accusatory adjudications. Insofar as such proceedings are concerned -- e.g., enforcement actions, license revocations because of misconduct -- the scope of due process clause may be viewed as co-extensive with that of the separation of functions provision in the APA. 195/ In short, the combination of

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194/ (Continued from preceding page)

We prefer to take a middle course. Thus, we conclude that the better view is that a due process violation should not be found where the commissioners communicate with the staff involved in an accusatory proceeding, during the course of that proceeding, in order to supervise and guide the staff as to general legal and policy considerations. However, we believe that it would be wise for the Commission to limit, as much as possible, its discussion with the staff involved in an accusatory adjudication concerning the precise facts of the case. Some persons may believe that this position allows for too little, and others that it allows for too much. However, because due process problems are so fact-specific and there is no definitive judicial guidance, we have suggested this middle course of action.

195/ To the extent that the "members of ... the agency" exemption in § 554(d)(2)(C) has been viewed as permitting private consultations between those members and agency employees involved in "prosecuting" or "investigative" activities, we believe that this view is erroneous. First, we note that this interpretation would make meaningless the restriction in § 554(d)(2) on persons who perform these activities participating or advising in "review" of an initial decision. At the time the APA was passed, virtually all agency review processes were appeals directly from initial decision-makers to agency heads. If the "members of ... the agency" exemption were viewed to allow private consultations in those situations, there would be nothing left of the separation of functions section of the APA. Second, this interpretation would require a court to find a constitutional violation. In Amos Treat & Co. v. Securities and Exchange Commission, 306 F.2d 260, 266-267 (D.C. Cir. 1962), the court ruled that it "would be tantamount to that denial of administrative due process against which both the Congress

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functions in such accusatory proceedings might well constitute an unacceptable form of "institutional" bias. 196/ 197/

C. Communications in Non-Accusatory Cases

1. General Principles

The resolution of this issue is less clear for non-accusatory proceedings, such as the typical initial licensing case. The fundamental principle announced in Withrow for accusatory cases

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and the courts have inveighed" to allow a commissioner to partake in an agency adjudication after having been promoted from a staff position where he initiated an investigation, weighed its results and perhaps recommended the filing of charges. We believe that, a fortiori, it would be tantamount to a violation of due process to allow a staff member who remains on the investigative or prosecuting staff to provide private advice to a commissioner who is performing an adjudicative function in an accusatory proceeding.

196/ Of course, a party would also be entitled to show actual prejudgement or personal bias on the part of the decision-maker. See, e.g., American Cyanimid Co. v. Federal Trade Commission, 363 F.2d 757 (6th Cir. 1966).

197/ We have thus far discussed the due process implications of communications between adjudicators and staff investigators or prosecutors in accusatory proceedings. We have not discussed communications between the adjudicators and other agency employees in the context of such proceedings -- e.g., conversations with staff witnesses, with non-involved staff members, with other adjudicators and the like. The remainder of the discussion in the due process section of this paper, although it focuses on communications in non-accusatory proceedings, would also be relevant to determining the propriety of communications between adjudicators and staff employees other than investigators and prosecutors in accusatory cases.

also remains the same in non-accusatory cases -- i.e., the parties are entitled to a decision from an impartial decisionmaker. American Public Gas Association v. Federal Power Commission, 567 F.2d 1016, 1069 (D.C. Cir. 1977). Yet, in this class of cases there are no "prosecutors" and, to the extent there are investigators, their functions differ from those investigators in accusatory proceedings. 198/ Nonetheless, staff members in non-accusatory cases may well be advocates for a particular viewpoint which is opposed by a party to the proceeding. What due process problems, if any, might arise if these staff advocates were allowed to privately advise agency decisionmakers in the course of an adjudication?

Many of the courts which have considered the issue of private communications between staff and agency decisionmakers have done so in the context of informal rulemaking proceedings. An examination of these cases is helpful in considering a similar due process argument for non-accusatory adjudications.

At an earlier time the law was very clear that there was no separation of functions requirement in the context of informal rulemakings. 199/ However, recent case law leaves doubt about the

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198/ See Part V of this paper.

199/ See, e.g., Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676 (9th Cir.) cert. den. 338 U.S. 860 (1949) (no violation of APA or due process where chief government witness and chief government counsel in rulemaking proceeding aided and prepared portions of findings and conclusions); Wilson & Co. v.

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soundness of these earlier decisions. In Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), cert. den. 434 U.S. 829 (1977), the court flatly prohibited ex parte communications between persons outside the agency and agency decisionmakers in an informal rulemaking proceeding. One basis for the court's decision was that it had previously condemned agency decisions which were based upon information known only to the staff of the agency and not commented upon by parties to the rulemaking proceeding. 200/ Accordingly, the Home Box Office court found that "from a functional standpoint, we see no difference between assertions of fact and expert opinion tendered by the public ... and that generated internally in an agency: each may be biased, inaccurate, or incomplete ..." 567 F.2d at 55. Thus, the court used the rationale of the impropriety of such secret staff information to find contacts with persons outside the agency to be equally inappropriate.

199/ (Continued from preceding page)

United States, 335 F.2d 788 (7th Cir. 1964), cert. den. 380 U.S. 941 (1965) (no violation of APA or due process where government counsel of record in ratemaking/rulemaking proceeding participated in decisional review process within agency); American Telephone & Telegraph Co. v. FCC, 449 F.2d 439 (2d Cir. 1971) (no violation of APA or due process where agency staff members and staff witness in ratemaking/rulemaking proceeding advised agency with regard to final decision); and Hoffman-LaRoche, Inc. v. Kleindienst, 478 F.2d 1 (3rd Cir. 1973) (no violation of APA or due process where government trial counsel in rulemaking proceeding helped prepare agency's tentative and final orders).

200/ See, e.g., Environmental Defense Fund, Inc. v. EPA, 548 F.2d 998 (D.C. Cir. 1976); Portland Cement Ass'n. v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), cert. den. 417 U.S. 226 (1974); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973).

The analogy would appear to have come full circle: if ex parte communications from interested persons outside the agency are prohibited in light of Home Box Office, why should interested staff members inside an agency -- at least where they have taken an advocacy position adverse to other participants in a rulemaking proceeding -- be allowed to communicate in private with agency decisionmakers? The post-Home Box Office cases dealing with this issue have been confusing and contradictory: two courts have flatly rejected the suggestion that staff-decisionmaker contacts are violative of due process, 201/ one court left this sensitive

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201/ In Marketing Assistance Program, Inc. v. Bergland, 562 F.2d 1305 (D.C. Cir. 1977), decided after Home Box Office, the court refused to invalidate an agency decision where an agency employee who had investigated conduct and who had drafted a proposed rulemaking order also helped the agency head write his final decision. The court found the separation of functions requirements of the APA to be inapplicable in informal rulemaking; nor could it find any violation of due process. Despite a footnote reference to the absence of ex parte contacts between outsiders and agency decisionmakers, so that Home Box Office did not apply, 562 F.2d at 1309, note 6, the court did not examine the application of the Home Box Office rationale to staff-agency decisionmaker contacts.

More recently, in a hybrid rulemaking under the Moss-Magnuson Act, 15 U.S.C. § 57a (Supp. 79), a challenge was made to FTC procedures which prohibited outside parties from privately communicating with decisionmakers, but allowed such communications and advice from agency staff which had advocated particular rules during the proceeding. The complete portion of the court's opinion on this issue is as follows:

> Petitioner's complaints of ex parte communications between the Commission and an allegedly biased staff do not disclose a lack of due process and are more properly addressed to Congress. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 539-549 (1978); Hoffman-LaRoche, Inc. v. Kleindienst, 478 F.2d 1, 12-13 (3rd Cir. 1973).

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constitutional issue "to another day" in light of unique facts in the case before it, 202/ another court raised serious doubts about the practice but dismissed the challenge as premature, 203/ and in

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Katherine Gibbs School v. Federal Trade Commission, ____ F.2d ____ (2d Cir., No. 78-4204, Dec. 12, 1979) (Slip op. at 20).

202/ In Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978), the court refused to invalidate a rule, despite the fact that the person who drafted the final version of the rule for the agency head had contacted the agency's rulemaking staff -- attorneys and expert witnesses -- for assistance in understanding the record and finding material in the record. Although the agency could have used notice and comment rulemaking, it decided to develop a formal record for decision akin to formal adjudication. Despite recognition of the importance of these formal procedures, the court upheld the rule because Home Box Office was not retroactive; because the particular statutory and administrative context made rapid action by the agency necessary to carry out Congressional mandates for the protection of public health; and because the contacts only concerned assistance in understanding the record. Nonetheless, the court expressed discomfort at the situation, and suggested that Congress or agencies themselves limit or provide disclosure of post-hearing contacts between staff advocates and decisionmakers. It left to another day judicial treatment of these "issues of great sensitivity, involving constitutional questions, precedent that is difficult to reconcile, and a host of critical considerations." 598 F.2d at 126.

203/ In Association of National Advertisers, Inc. v. Federal Trade Commission, ____ F.2d ____ (D.C. Cir. No. 79-1030, Oct. 2, 1979), the court addressed the very rulemaking procedures approved by the court in Katherine Gibbs, supra, but with a very uncomplimentary tenor:

> "We can certainly understand the district court's misgivings, for it is difficult to read the record in this case without becoming disturbed at some of the Commission's unique steps ... [S]ome of the Commission's activities at least suggest that it long ago settled on what it had in mind and deliberately fashioned its special rules to achieve that result with the fewest possible outside intrusions from

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another case a court volunteered its opinion that such private contacts between staff and decisionmakers were improper. 204/

The discussion of these rulemaking cases is helpful because it indicates that if some courts are concerned about the due process

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> precisely the parties Congress intended to have participate in a proceeding of this kind." Slip op. at 14.

Responding to this implicit criticism, Chief Judge Wright, author of Home Box Office, wrote a concurring opinion in which he stated:

> [T]he District Court correctly perceived that the law in this circuit is unsettled with regard to the propriety of various types of intra-agency communications that might occur during the course of a rulemaking.*/

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*/ ... See, e.g., Hercules, Inc. v. EPA ...: Home Box Office, Inc. v. FCC ... Slip Op. (concurring opinion) at 25.

Both the majority and Chief Judge Wright found some comfort in the fact that even though staff-decisionmaker communications were permitted, staff recommendations and other relevant information presented by the staff would be included in the rulemaking record. Thus, as the majority stated, a reviewing court would have a "complete factual record to explore the constitutional and statutory implications of the Commission's regulation of intra-agency communications." Slip op. at 18.

204/ In Chicago, Milwaukee, St. Paul & Pacific RR v. United States, 585 F.2d 254 (7th Cir. 1978), the court in terse dictum and without any explanation referred to a written communication between an agency staff office and a commissioner of the ICC -- such communication being unknown to the participants in a rulemaking -- and stated that "we, of course, do not condone such ex parte communications in agency proceedings, see Home Box Office ..." 585 F.2d at 263.

implications of private contacts between agency staff advocates and agency decisionmakers in informal rulemaking proceedings, then a fortiori there is reason to be concerned about such contacts in formal, on-the-record non-accusatory adjudications. As a general rule, private communications "by an adversary party to a decision-maker in an adjudicatory proceeding are prohibited as fundamentally at variance with our conceptions of due process." Doe v. Hampton, 566 F.2d 265, 276 (D.C. Cir. 1977). 205/ To the extent that courts may begin to view staff advocates in a non-accusatory adjudication as representing an "adversary party", there may be due process limitations on private consultations between staff advocates and the adjudicators.

In examining potential due process problems associated with advice from staff advocates, these foregoing principles and the standards set forth in Withrow must be considered in different contexts. Their application to staff attorneys, staff witnesses, non-involved staff and others may very well lead to different results.

205/ Doe v. Hampton was an accusatory adjudication, but it cited the above proposition as a general rule and, in support thereof, referred to Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959). The latter case, however, was a rulemaking proceeding involving ex parte contacts by persons outside the agency.

2. Communications With Staff Advocates

Unlike the board in Withrow, the regulatory staff in NRC's Office of Nuclear Reactor Regulation and staff attorneys in the Office of Executive Legal Director typically form an opinion of an application in a non-adversary investigative stage of the initial licensing process. These staff members then take an advocacy role during contested adjudicatory proceedings -- typically adverse to an intervenor on the merits of the application, but either adverse to an intervenor or to the applicant on procedural issues. 206/ Like other parties to the adjudication, the staff also files its proposed findings and conclusions which it advocates, on the record, to the licensing board, the appeal board, and the commissioners themselves. These duties would appear to be inconsistent with the notion of impartial decision-making in Withrow because the staff might well be "so psychologically wedded ... that they would consciously or unconsciously avoid the appearance of having erred or changed position." 421 U.S. at 57. For these reasons, we believe that there are potential due process problems with allowing the regulatory staff in a licensing proceeding to privately advise agency adjudicators -- including the commissioners, the appeal boards and the licensing

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206/ In Withrow, the court pointed out that there were no due process problems involved in taking a position during a non-adversary investigative phase, and then adjudicating a matter. Hence, it was not dealing with an agency employee -- whether staff or commissioner -- who performed an advocacy role during the adjudicatory phase of a proceeding.

boards. The conclusion might be made on the grounds of "institutional" bias or because of actual prejudgment. 207/

207/ At least two cases can be viewed as supporting this conclusion of potential due process problems. In Trans World Airlines v. Civil Aeronautics Board, 254 F.2d 90 (D.C. Cir. 1958), in a compensation proceeding before the agency -- i.e., a non-accusatory adjudication -- one of the parties contesting a compensation request was the Postmaster General. The Solicitor of the Post Office, who signed the brief on behalf of the Postmaster General, later became a member of the CAB when the issue came before the agency. In reversing the CAB's decision because of the participation of this member, the court said:

> It is plain that in this statute Congress contemplates an adjudicatory proceeding and conferred upon the Board in this respect quasi-judicial functions. The fundamental requirements of fairness in the performance of such functions require at least that one who participates in a case on behalf of any party, whether actively or merely formally by being on pleadings or briefs, take no part in the decision of that case by any tribunal on which he may thereafter sit. 254 F.2d at 91.

Of course, this case concerned the representation of a party outside the agency -- and not the agency staff. However, we question whether the result would have been different if the represented "party" was a CAB staff Bureau. It would appear, for example, that the counsel for that Bureau in the case would not have been allowed to later adjudicate the case consistent with due process (although such consultation would not be barred by the APA). And, if this conclusion is accurate, neither do we believe that Bureau counsel would be allowed to privately advise CAB members as they performed their adjudicative responsibilities. On the other hand, it is not certain that after Withrow, merely "formally ... being on pleadings or briefs" -- without having taken a personal role as an advocate who has already judged the facts -- would be sufficient to disqualify a staff member or even director from advising the adjudicators.

The opinion in National Rifle Association v. United States Postal Service, 407 F.Supp. 88 (D.D.C. 1976) can be read to support the same result. The court found that the due process standards set forth in Withrow had been violated where an adjudicator issued a proposed decision ordering that certain mailing privileges not be granted and then purported to

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3. Communications With Staff Witnesses

The matter of staff witnesses in non-accusatory cases is generally more difficult. At the NRC the staff witnesses could be considered to be staff advocates who serve as part of a counsel/witness advocacy team, and thus the previous section on staff advocates would apply at the NRC. However, at other agencies, or if the NRC determined to restructure the staff role, staff witnesses might be considered as a separate category. In this context, there is a footnote in Withrow, supra, 421 U.S. at 56, note 24, quoting from Professor Davis' treatise:

> "If deciding officers may consult staff specialists who have not testified, they should be allowed to consult those who have testified; the need here is not for protection against contamination, but is assurance of appropriate opportunity to meet what is considered." 2 K. Davis. Administrative Law Treatise § 13.11, p. 249 (1958).

Professor Davis' rationale is that unlike staff experts who have not testified, those who have testified have explained their positions on the record and have been subjected to cross-examination. Their credibility and competence can be determined by the adjudicator who chooses to rely on their private advice. On the contrary, private advice from non-witness staff experts is more likely to introduce new information and opinions from untested

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> reconsider that decision on appeal. Although the court found no "institutional bias", it found a "well-defined predisposition" and "prejudgment" -- because of vulnerability to "psychological pressures" -- which disqualified the adjudicator from involvement in making the later decision. 407 F.Supp. at 94.

sources, and yet there is no constitutional or statutory barrier to such advice. Accordingly, in Professor Davis' view, there should be no barrier to permitting staff witnesses to privately advise the adjudicator.

Although this rationale is compelling -- and the Withrow court did not explicitly address this point -- it overlooks the reality that the staff witness may be just as "psychologically wedded" to a viewpoint as the staff attorney or other advocate. In fact, unlike the attorney who has been hired to perform an advocate's role, the staff witness may well have a greater dedication to the principles he or she is espousing on the witness stand. To expect the witness to overlook these firmly held convictions about scientific principles might well be tantamount to asking the expert to confess error. Thus, if staff attorneys and other advocates should be precluded as a matter of due process from privately advising adjudicators, a similar rationale might be applied to expert witnesses. However, we believe that the trend in the case law is even more uncertain here than with staff advocates, and there is no decision which clearly prohibits advice from witnesses to adjudicators.

4. Communications With Investigators/Reviewers

The issue of private consultations between agency adjudicators and investigators in a non-accusatory licensing case is easier to resolve for most agencies. Unlike an investigator in an accusatory

proceeding, where investigation is geared to ferret out instances of misconduct, the investigator in a non-accusatory adjudication may well be a neutral employee whose primary function is to review an application and to discover all facts having any relevance to the issues in a proceeding. In performing this function, the investigator is not called upon to serve as an advocate for any particular viewpoint in the investigative or subsequent trial phase. In short, the neutral investigator is not "psychologically wedded" to a position from which he or she could not retreat without confessing error. In such situations, the Supreme Court has even approved of a scheme under which those charged with gathering evidence may also sit in judgment in a non-accusatory proceeding. Richardson v. Perales, 402 U.S. 389, 408-410 (1971). 208/ Thus, we do not believe that private consultations between agency adjudicators and neutral investigators results in any "institutional" bias which is violative of due process. 209/

At the NRC, however, we recognize that there will rarely be neutral or uncommitted investigators or reviewers, as we have defined the concept. Staff members who work on a license application will

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208/ In this case an allegation of a due process violation was made with respect to the roles performed by a social security hearing examiner. The examiner is charged with developing information relevant to a claimant's request for social security benefits and also ruling on that request, though the case is not one of formal adjudication.

209/ This is not to say, of course, that a party should be precluded from making a showing of actual bias or prejudgment on the part of the investigator which would place the investigator in a position similar to that of a staff advocate who is "psychologically wedded" to a position.

typically become part of the advocacy team, either as witnesses, counsel or behind-the-scenes supporters of the staff viewpoint. If the NRC should restructure the role of its staff, or if there are some occasions when a staff member may have reviewed an application not with a view to developing and, later defending a firm staff position, but with a view to bringing out all the facts and relevant expert opinion, pro and con, without reaching any firm conclusion, the discussion here would be applicable.

5. Communications With Supervisors

The issue of whether a staff supervisor may privately advise agency adjudicators consistent with the due process clause must be resolved by looking at the precise role played by the supervisor in the particular non-accusatory case. Surely when a supervisor has personally and actively participated in developing the positions presented by the agency trial staff in a particular non-accusatory case, there are strong reasons to view the supervisor as an advocate, and therefore as an adversary to an intervenor in a contested licensing proceeding. 210/ The rationale for prohibiting private consultations with such supervisors may be even stronger since the adverse "party" is not the trial staff

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210/ The most obvious application of this principle is when we are considering a supervisor of an agency's trial staff. If this supervisor has been intimately involved in a proceeding, we believe that he or she must be viewed as being as much of an advocate as the trial attorneys.

but is, in fact, often the divisions headed by the supervisors. 211/ See Amos Treat, supra, 306 F.2d at 266-267.

Where the supervisor's role has been pro forma, however, it would be difficult to conclude that there is any "institutional" or personal bias on the part of the supervisor sufficient enough to preclude, on due process grounds, an adjudicator's private consultation with the supervisor. Even in accusatory adjudications where a supervisor has supervised persons in the division charged with the prosecutorial function, absent some significant personal involvement in that or a factually related case, the supervisor is not precluded from later performing adjudicatory functions. 212/

211/ At this agency, in licensing proceedings the trial staff represents the various offices within the staff, the totality of which constitutes the "party" in the proceedings.

212/ See R. A. Holman & Co. v. Securities and Exchange Commission, 366 F.2d 446, 453 (2d Cir. 1966) (no due process violation where supervisor of investigatory staff personally performed no role in investigation); San Francisco Mining Exchange v. Securities and Exchange Commission, 378 F.2d 162 (9th Cir. 1967) (supervisors of prosecutorial division performed no role related to pending prosecution and any other connection with facts of case was too remote in time to support alleged due process violation); Giambanco v. Immigration and Naturalization Service, 531 F.2d 141, 145, note 7 (3rd Cir. 1976) (no due process violation where board member previously supervised prosecutor in pending case but had no knowledge of case).

The only case we have found to be contrary to this principle is Trans World Airlines, supra, 254 F.2d at 91, where a due process violation was said to exist when a supervisor who was "merely formally ... on pleadings or briefs" later became an adjudicator in the case. After Withrow, we question the correctness of this broad ruling.

6. Communications With Non-Involved Staff

While this conclusion is obvious by now, there is no due process bar to private consultations between agency adjudicators and non-involved staff in non-accusatory proceedings. However, it is important to recognize that if as a result of any consultations between adjudicators and the staff -- whether the non-involved staff or the involved staff -- the adjudicators become exposed to new information, there would be a violation of due process unless this information was disclosed to the parties and subject to rebuttal by them. Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1029-1031 (D.C. Cir. 1978). 213/

D. Adjudicator Contact With Other Adjudicators in Accusatory or Non-Accusatory Cases

We next examine the due process implications of adjudicators consulting other adjudicators at another level of the agency. For example, may a licensing board member deciding a case consult a member of the appeal board panel? May a commissioner deciding a case on review consult a licensing board member who decided that case? There are four types of consultation we will consider.

213/ The on-the-record decisional requirements of the APA would also be violated. See footnote 169, supra. It should be noted that this argument may be extended to the introduction of new rationales.

1. Decisionmaker -- Panel Member Consultation

There would seem to be no due process problems with a decisionmaker consulting a member of a panel whether it be at his own level (e.g., a licensing board member consulting a licensing board panel member not deciding that case) or at a different level (e.g., a licensing board member consulting a member of the appeal board panel who has not been or will not be involved in reviewing the case). In such a case, the panel member would be like any other non-involved staff member, with no particular tie to that case, therefore no reason to give biased advice.

2. Consultation by Licensing Board Members or Appeal Board Members With the Commissioners

There would similarly be no due process problem with a decisionmaker consulting a commissioner who may later review the case. That commissioner can give general policy direction to guide the decisionmaker in making a decision consistent with developing agency policy. The only caution here would be that the commissioners must be careful, while giving advice, to not prejudge the merits of the case.

3. Consultation by the Commission or Appeal Board With a Lower-Level Adjudicator Who Has Already Rendered a Decision in the Case

More difficulties arise when a reviewing decisionmaker consults with the adjudicator whose decision he is reviewing. Presumably the

complete basis of the lower decision is set out in the statement of findings and reasons, and that public decision is what is being reviewed. Moreover, an adjudicator who has publicly announced a decision would certainly be "psychologically wedded" to his resolution of the issues, and to advise higher-level adjudicators to the contrary would be tantamount to confessing error. Thus, there is reason to doubt whether unbiased advice could be expected.

The case law is inconclusive on this point. Two pre-Withrow cases indicate that there would be a due process violation with a decision-maker becoming involved in subsequent review of his own decision. In Pregent v. New Hampshire Department of Employment Security, 361 F.Supp. 782, 797, note 24 (D.N.H. 1973), the court made a strong case for a due process violation, in dictum:

> If the Chairman of the Appeal Tribunal did have prior involvement with a claimant's case, whether in the investigatory, fact-finding or decision-making state, we would regard such prior official contact as disqualifying and as violative of due process ... E.g., if the certifying officer who made the initial decision to terminate claimant's unemployment benefits sat on the Appeal Tribunal we would regard this as a clear violation of due process. In addition, the same individuals who either made the initial decision to terminate benefits or conducted a review thereof should not be permitted to sit in judgment of their own determination. For administrative review to be meaningful, each review officer must not have had any prior official involvement with the case before him.

This language is quoted with approval in King v. Caesar Rodney School District, 380 F.Supp. 1112 (D.Del. 1974), which also warned that excessive familiarity with the facts would tarnish the fairness of review proceedings.

In Withrow, the Supreme Court did not rule on this fact situation, and gave conflicting indications in dictum. In a footnote, the Court quoted Professor Davis' view that there is no due process problem in allowing staff witnesses to advise in the decision. 421 U.S. at 56, note 24. It could be argued that lower-level decisionmakers are no more "wedded" to their positions than staff witnesses. However, in another footnote, the Court mentioned cases in other contexts which stand for the proposition that "when review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review." 421 U.S. at 58, note 25. The Court then stated that "[a]llowing a decisionmaker to review and evaluate his own prior decisions raises problems that are not present here ...", id., intimating that if similar circumstances were present in the administrative agency context, the Court might find a due process violation. We conclude that it would be better to prohibit consultations of this sort.

4. Licensing Board -- Appeal Board Consultation

The appeal board plays a significant part in carrying out general agency policy, so its private advice would be helpful to the licensing board members in making a decision. 214/ We have found no cases that suggest that there would be any due process problem in appeal board members giving general policy advice to the licensing

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214/ This situation would arise where the appeal board members have previously been involved in a case which, because of a remand or other reasons, is back before the licensing board.

board members, as long as they are careful not to prejudge the merits of the case. However, since they are not the agency heads, they could not supervise and direct the conduct of the case to the same extent the commissioners could. 215/

215/ For this reason, one may question the wisdom of such consultations. Appeal board members do not make ultimate policy decisions for the agency, and thus their advice to licensing boards might better be given solely on the record through review of licensing board decisions.

IX. POLICY CONSIDERATIONS IN FORMULATING SEPARATION OF FUNCTIONS RULES

If the NRC is to rationally exercise its legal flexibility to fashion separation of functions rules, it is necessary to identify and weigh the competing policy considerations. We have attempted to set forth a number of these major considerations.

A. Fairness to the Parties to a Proceeding

The touchstone of any decisionmaking process must be fairness. Without fairness, survival of that process is threatened. Although the concept of fairness is somewhat amorphorous, and might even be better reviewed by identifying what is unfair, there are certain characteristics of fairness which have come to be accepted. For example, parties to a proceeding are entitled to an impartial decisionmaker, not in the sense that the decisionmaker must be subjectively impartial and without some philosophical inclinations, but rather that the decisionmaker must "consider in good faith, and ... objectively evaluate, arguments presented ...." Carolina Environmental Study Group v. United States, 510 F. 2d 796, 801 (D.C. Cir. 1975). Of course, in adjudications, where specific factual issues may be disputed, this also means that the decision-maker should not have prejudged the facts in advance of hearing

them. Cinderella Career & Finishing Schools, Inc. v. Federal Trade Commission, 425 F. 2d 583, 591 (D.C. Cir. 1970). Furthermore, fairness requires that extra-record facts and arguments not reach the adjudicators as a result of their contacts with agency staff or persons outside the agency. Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 881-882 (1st Cir. 1978); Garvey v. Freeman, 397 F.2d 600, 610-611 (10th Cir. 1968).

In accusatory adjudicatory proceedings, it is also clear that a commingling of judging and prosecuting functions is inconsistent with the concept of fairness, at least insofar as private consultations between the prosecutor and the decisionmaker are concerned. 216/ One might also question the propriety of staff advocates who are not prosecutors being able to consult privately with decisionmakers in contested, non-accusatory adjudications. It is true that Congress did not find the element of unfairness in such situations to be so great so as to require separation of functions in the APA. However, Congress' adoption in 1976 of a formal ex parte rule for persons outside federal agencies was

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216/ This was the position of the 1941 Attorney General's Report, although the majority view in that document also recognized the members of an agency could, consistent with fairness, approve the commencement of a prosecution and subsequently serve as adjudicators in the case so long as, in connection with their adjudicative deliberations, they did not consult privately with agency employees who have performed prosecutorial functions.

based upon the unfairness inherent in allowing advocates for one side to have private, off-the-record communications with agency decisionmakers. 217/ A similar rationale might be extended to staff advocates and, in fact, Congress appears to have assumed that as an advocate for the staff's position, "an agency attorney litigating the case for the agency will not be involved in the decisionmaking process of the agency ...." 218/ As we have explained, we believe that there are due process problems associated with such involvement.

When fashioning its separation of function and ex parte rules, the NRC should consider the extent to which these various aspects of fairness will be sacrificed.

B. The Appearance of Fairness

Not only must adjudicatory proceedings be conducted fairly, but they must appear to be conducted in that manner. The "appearance of impartiality [is] the sine qua non of American judicial justice ...." Pillsbury v. Federal Trade Commission, 354 F. 2d

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217/ This provision of the APA, adopted in conjunction with the Sunshine Act, now appears as 5 U.S.C. § 557(d).

218/ Sen. Rpt. No. 94-354, 94th Cong., 1st Sess. at 36 (July 31, 1975); House Rpt. No. 94-880, Part I, 94th Cong., 2d Sess. at 20 (March 8, 1976).

952 964 (D.C. Dir. 1966) (emphasis in original). As a matter of fact, agency staff members, even those involved as advocates in an adjudication, may provide complete and unbiased advice to agency decisionmakers; nonetheless, there is some risk that public perception of the process may be different, especially in well-publicized and highly adversarial licensing cases in which the staff's position coincides with that of the applicant or with that of an intervenor. While instances of perceived unfairness may be small in number, we believe that the NRC should, at least, be cognizant of this potential problem if it decides to relax its separation of functions and ex parte rules.

C. The Impact of § 557(d) of the APA on Communications Between Staff Members and Persons Outside the Agency, and on Intra-Agency Communications

As we have previously discussed, a relaxation of the Commission's separation of functions rules could have significant implications for the structuring of the licensing process. Because of the restrictions in § 557(d) of the APA on communications between persons outside the agency and agency employees "involved in the decisional process of [a] proceeding", an employee selected by the commissioners to advise them or board members in the decision of a case would be foreclosed from privately communicating with

persons outside the agency about that case. For example, if a supervisor in the Office of Nuclear Reactor Regulation was to assist the commissioners or the boards in deciding a case, he could not engage in ex parte consultations with the license applicant or an intervenor, at least once the hearing had commenced. Furthermore, we have examined the inferences to be drawn from § 557(d) regarding intra-agency communications such as those between this supervisor and his staff, and we have concluded that they, too, would be somewhat circumscribed. Accordingly, as the Commission chooses the extent to which it wishes to avail itself of the opportunity to involve certain staff members in the decisional process of a case, it must weigh the impact that these choices will have on the flexibility and informality of communications that presently exist between these decisional employees and persons outside the agency, and between these decisional employees and other staff members.

D. Knowledgeable Decisions

Undoubtedly, one of the major detriments associated with strict separation of functions rules is that the quality of the decisions made by an adjudicator may suffer. These strict rules undermine one of the great strengths of the administrative process -- the

"institutional decision". 219/ It is a recognition of reality, and not a slight on the individual, to admit that no commissioner or board member can be a specialist in every field. For instance, when a commissioner-scientist confronts a legal question, he needs the advice of his legal staff. Analogously, a lawyer-commissioner may well require assistance from the scientific staff. This assistance may be necessary to resolve complex factual disputes based on the record of a proceeding, or to understand the application of scientific or economic theories to the facts of a case. The Attorney General's Manual made it clear that separation of functions was not intended to preclude consultations with staff, except to the extent required by fairness. 220/ Furthermore, more knowledgeable decisionmaking not only serves the cause of justice in a particular case, but it also better allows the NRC to meet its overall mandate to regulate the peaceful uses of nuclear energy while safeguarding public health and safety. Thus, the benefits that can flow fr more relaxed separation of functions or ex parte rules in terms of more knowledgeable decisions must be considered in evaluating the present rules. 221/

219/ Davis Treatise at 36 et seq.

220/ 1947 Attorney General's Manual at 55.

221/ We do not mean to suggest that NRC decisions can only be made more knowledgeable by relaxing separation of functions rules. For example, the Commission may decide to hire outside consultants or to establish a Commission-level technical staff -- similar to the Office of General Counsel and the Office of Policy Evaluation -- to obtain better technical advice.

E. Decisions That Reflect Agency Policy

It is important that licensing boards and appeal boards issue decisions which correctly reflect agency policy. If the Commission is moving in a particular policy direction and a board makes a decision in an uncharted area that is inconsistent with this policy direction, unnecessary duplication of effort and frustration will result when the Commission overturns the decision on appeal. In addition, an initial decision that more accurately reflects agency policy will focus the issues and provide the parties with a better indication of the significant points they must address when they appeal to a higher level of the agency. These matters were important considerations to the writers of the APA, 222/ and the Commission should consider this benefit to be achieved from relaxing its present rules. 223/

F. Supervision of Staff by Commissioners

At one extreme, it is possible to return to the days of the separated staff "which was permitted to take a position on the

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222/ 1947 Attorney General's Manual at 55.

223/ Of course, the Commission may get its policy positions across to licensing boards and appeal boards through more formal means, such as public policy statements and decisions in other cases. Those methods, however, would be far inferior than direct contact with the lower-level adjudicators.

record without consultation with or approval by the Commissioners." 224/ Presently, of course, the staff receives some direct, but minimal, supervision by the Commission, typically through the directors of the various offices or in pre-hearing consultations, so that the staff's position during a licensing case can reflect the Commission's concerns and policy orientation. However, at the other extreme, one can imagine a situation in which the staff reports on a daily basis to the Commission, during a licensing case, so that commissioners may evaluate evidence, identify gaps in the record, direct the staff to present certain witnesses or cross-examine other witnesses in specific ways and the like. While one might question the fairness of this approach, undoubtedly it gives the Commission maximum supervision over the staff. This, in turn, will lead to a better record for decision, thereby reducing the chances for remand when the case reaches the Commission level. Most likely, the NRC will want a delicate balance in which the commissioners reserve judgment on factual matters so as to more fairly exercise their quasi-judicial functions, but also in which they are able to provide better guidance to the staff on policy positions. 225/

224/ Dual Role of AEC as Promotional and Regulatory Agency with Related Problems of Ex Parte Contacts, AEC 812/1 at 7 (June 23, 1959).

225/ For example, a pending licensing decision may raise the issues of the best method for measuring seismic risk, what potential dangers are associated with these risks, and what level of safety is adequate. If the Commission policy on these matters was ambiguous, the staff and other parties could well try the case without introducing information thought to be critical by the Commission to any appropriate resolution of the case -- i.e., the Commission may be truly undecided on these issues, but may desire that certain policy options be explored, in evidence and through arguments, by the parties. Direct communication of this fact by the Commission to the staff would guarantee that action and would avoid a remand, years after the case first went to trial.

G. More Informed Commissioners

The members of the NRC have responsibilities that transcend individual licensing cases. They must be able to set policies and adopt rules governing nuclear facilities and all aspects of the fuel cycle. They must also be able to respond to Congressional inquiries and concerns about develcpments in these areas. Because licensing is a major part of the agency's work, and new uncertainties or novel problems may arise in individual licensing proceedings, it is important that the members of the agency know about these matters well in advance of their review of a case some years after its commencement. This knowledge may not necessarily be used to directly impact a case at hand; instead, it might be more useful, and perhpas essential, in helping the commissioners to identify emerging patterns of problem areas common to several licensing cases, to focus on generic resolution of problems through regulations, and to generally coordinate and direct all of the NRC's responsibilities. 226/

H. Increased Conservation and Efficient Use of Monetary Resources

Complaints of bureaucratic duplication of effort in government are common. Consistent with fairness to parties in an adjudication,

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226/ Improving the information flow to commissioners may be achieved in various ways, including a requirement that licensing boards and appeal boards consult regularly with the Commission about different cases before them. Communication between commissioners and agency staff is but one way to achieve this policy goal.

the NRC must act to conserve both human and monetary resources. This is entirely appropriate, and is one of the reasons that the majority of the Attorney General's Committee rejected a complete separation of functions which would have required two separate agencies: unlike the minority, the majority believed that complete separation would not result in increased fairness sufficient enough to justify the added expense of separate regulatory and adjudicative agencies. 227/ Conservation of resources is a major benefit of relaxed separation rules since duplicative staffs within an agency -- e.g., one to function in an advocacy role and another to deal with the same issues in the role of advisors to adjudicators -- would be very costly.

Increased efficiency must go hand-in-hand with conservation. Maximization of efficiency should be an important part of the "institutional decision." This requries the cooperation of specialists from different disciplines, each communicating with and contributing to one another. Strict separation of functions rules impede this cooperative process.

I. Legal Uncertainties

Many of the issues involving separation of functions have yet to receive authoritative treatment by Congress or the courts. Uncertainties abound in the interpretation of the various statutes,

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227/ 1941 Attorney General's Report at 59-60.

particularly the Administrative Procedure Act, and also with regard to the Due Process Clause of the Constitution. We have attempted to present both sides of each such issue and to offer a non-speculative legal conclusion as to the better argument, where appropriate. However, the Commission must judge the extent to which it is willing to risk court reversal by adopting an untested statutory or constitutional position in order to gain the benefits from relaxed separation of functions rules.

X. OPTIONS AVAILABLE TO THE COMMISSION FOR AMENDING ITS SEPARATION OF FUNCTIONS AND EX PARTE RULES

We have examined the history behind the NRC's separation of functions and ex parte rules and have found several expressions of opinion that the present, strict rules are a product of policy considerations rather than statutory or constitutional requirements. This general view has been confirmed by our own analysis of the Administrative Procedure Act, the Atomic Energy Act of 1954, as amended, and the relevant constitutional standards. We have identified several major policy considerations which the NRC should balance in determining the extent to which it wishes to liberalize the present rules. Many of these changes could be made through the agency's amendment of 10 CFR §§ 2.719 and 2.780, and the accompanying Appendix A to Part 2. Other changes might be accomplished by reorganization of the present licensing system, including redefining the role of the regulatory staff. Finally, the NRC may wish to seek legislation for these changes, or for others which could not be accomplished absent Congressional action. What follows is a presentation of some of the more fundamental changes which might be made, and a brief discussion of the competing policy considerations associated with them. Whatever option the Commission does choose, it must abide by a principle which we have identified previously: private communications between agency staff and adjudicators may not introduce new info mation or arguments that are not contained in the formal record of the

proceeding. If such material is introduced, and other parties are not informed and given a chance to respond, the decision may be defective on due process or statutory grounds. 227A/

227A/See footnotes 137A, 169, 192 and 213, supra.

Option A: Take Advantage of the Initial Licensing Exemption in the APA By Amending 10 CFR §§ 2.719(c) and 2.780(e), So As to Allow Adjudicators to Consult with Additional Staff Members in Non-Accusatory Initial Licensing Proceedings

Under 10 CFR § 2.719(b), presiding officers -- either licensing boards or administrative law judges -- may consult privately about a case with only their own staffs, except that § 2.719(c) allows consultations in uncontested initial licensing cases with NRC staff members and other members of the licensing board panel. It may be legally possible to expand the category of cases and persons in §2.719(c) so as to include even contested initial licensing cases and perhaps any agency employee, including appeal board members and commissioners. 228/ Similarly, under 10 CFR § 2.780(a), commissioners and their assistants who perform quasi-judicial duties are cut off from any communication about the merits of a case with any person inside or outside the agency, except for consultations among themselves. Section 2.780(e) relaxes this rule to allow for consultations with staff in initial licensing cases. 229/ Consideration could be given to further expansion of the category of cases and persons in § 2.780(e) so as to include contested initial licensing cases and other agency employees, including appeal board and licensing board members. By making these changes to §§ 2.719(c)

228/ The restriction in § 2.719(d) on communications between adjudicators and investigative or prosecuting employees is, of course, statutorily based in the APA and applies to all accusatory adjudications, including initial licensing cases.

229/ Analogous restrictions and relaxations for the appeal boards are covered by 10 CFR 2.780(f).

and 2.780(e), the NRC would be taking full advantage of the initial licensing exemption to the extent permitted by the APA, consistent with the Atomic Energy Act and the Due Process Clause. 230/

Of course, the Commission need not go to the full extent permitted by law, so that various sub-options exist. For example, in initial licensing cases the Commission may wish to allow adjudicators to consult with any staff members except staff advocates in contested proceedings; or the restriction might include even non-involved supervisors. The choice requires a decision on how far down the chain of consultation the Commission feels it can go in initial licensing cases in terms of the benefits to be received and the costs to be anticipated. The more significant factors to be considered for each class of potential staff consultants are discussed below.

1. Staff Advocates

The major problem of consulting with staff advocates arises in contested licensing cases. Few would argue that separation should apply in uncontested cases since there is no real controversy. Staff members may be advocates, but there are no adversaries. All the benefits from relaxed separation of functions rules would exist, but there would be no sacrifice of fairness. Furthermore, even if the ex parte provisions in § 557(d) of the APA apply, the

230/ Further relaxation of the ex parte rule is contained in 10 CFR § 2.780(d), but as that provision applies to both initial licensing cases and other adjudications -- revocations, suspensions, enforcement actions, agency-initiated amendments, etc. -- its scope will be discussed later.

same agency staff members who advise the adjudicators we probably be able to continue informal consultations with the license applicant. 231/ Consultations with staff in uncontested cases might lead to an appearance of unfairness, since the public could perceive that the adjudicators were straying from the record for decision and, in addition, were relying upon off-the-record conversations with staff advocates. Yet, as we have seen, the history of the separation separations of functions rule at the NRC, and formerly the AEC, evidences almost no objection to allowing adjudicators to consult with the regulatory staff in uncontested initial licensing cases.

On the other hand, contested cases present a more difficult balancing process. In such cases there are opposing sides, the issues are often sharply debated and the facts are often hotly disputed. In these settings, staff advocates have typically buried themselves on one side of the case in which, despite the lack of accusatorial allegations, significant interests are at stake. For example, the resolution of disputed scientific and engineering issues affects construction permit applicants just as much as or more than a prosecution for safety violations which may result in a $100,000 fine; in addition, priceless rights of the public living near a nuclear facility site are at stake and may be in conflict with the applicant's plans and the agency staff's position.

231/ See footnote 141, supra.

In this context of the contested initial licensing case, there appears to be a serious problem of fairness if only staff advocates -- and not other parties to the proceeding -- are allowed to consult privately with agency adjudicators about the merits of the proceeding. Even if no new evidence is introduced off the record, such private lobbying gives the staff advocate a unique opportunity to emphasize some arguments and ignore others. Professor Davis agrees that the "will to win" that resides in staff advocates would be a contaminating factor in the decisionmaking process. 232/ Likewise, the appearance of fairness could be impaired by such consultations. Furthermore, if staff advocates will participate in the private decisionmaking process of adjudicators, their contact with persons outside the agency -- such as the licensee -- will be severely restricted by the ex parte rule in § 557(d) of the APA. There are also serious due process questions associated with private contacts between staff advocates and adjudicators.

The benefits received from consulting with staff advocates are obvious. The flow of information to adjudicators, particularly to the Commission, will result in more knowledgeable decisions which accurately reflect agency policy. The commissioners would be able to better supervise the staff and would receive information about new uncertainties in individual cases. In fact, the staff member who is most familiar with the facts of a case can best provide the

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232/ As Professor Davis stated, "Judicial equilibrium gives way to partisanship. Materials on one side are maximized and those on the other are minimized." Davis Treatise at 218.

commissioners with advice. 233/

All of these arguments can be countered in one way or another. For example, one might say that advice from staff advocates will always be fair in non-accusatory cases where policy and technical matters predominate; since no one is being "tried," no bias would result. In addition, commentators have suggested that it is better for adjudicators to consult staff advocates, whose views have been presented and disputed publicly and on the record, rather than to consult with secret, uninvolved staff members whose ideas have not been subjected to scrutiny by the parties in the proceeding. In deciding whether, as a matter of policy, commissioners or other agency adjudicators should be allowed to consult privately with staff advocates about the merits of a case, the NRC must weigh all of these factors. In our view, the legal and policy arguments against such consultation are more persuasive. 233A/ Accordingly,

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233/ See Administrative Conference Statement on ABA Proposals to Amend the Administrative Procedure Act, 25 Ad. Law Rev. 419, 435 (1973).

233A/ We recognize that our opinion is against the weight of the previously mentioned informal rulemaking cases which have rejected due process challenges to intra-agency communications between staff advocates and decisionmakers. Since non-accusatory licensing cases have been thought to be similar to rulemaking proceedings, the logic of those cases might be applied here. However, we are concerned with an on-the-record formal adjudication, and we think that due process concerns have a somewhat different dimension in this context. Furthermore, the reasonableness of our conclusion is confirmed by a recent action of the Environmental Protection Agency. That agency relied upon the initial licensing exemption in the APA to adopt one of the most informal and novel licensing schemes utilized by any federal agency. However, it maintained a separation of functions rule between staff advocates who were not prosecutors and the agency decisionmakers. 44 Fed. Reg. 32,888 (June 7, 1979); 40 CFR § 124.78 (1979 amendment).

we do not think that an adjudicator can be permitted to seek advice from staff advocates involved in a case -- be they staff attorneys, witnesses or others performing advocacy functions. As we shall see, however, there is still substantial expertise that the adjudicators can call upon in the non-involved staff.

2. Staff Witnesses

At the NRC, as previously noted, staff witnesses will typically be considered as staff advocates, and adjudicators would not be able to seek advice from them in deciding a case. However, if the Commission decided to change the role of the staff, a somewhat different analysis would follow. Professor Davis approves of private consultations with staff witnesses and finds that it is entirely consistent with the spirit of the APA -- in contrast with his view on staff advocates. 234/ He and others have suggested that such witnesses are merely providing information and are not taking sides. This alleged lack of bias leads to the conclusion that there would be no unfairness, or even an appearance of unfairness, in allowing these consultations. Moreover, it may be more fair that the adjudicators seek advice from an expert who has testified and has been subjected to cross-examination, than that they look for assistance to experts who may have strong views which have not been subjected to vigorous public scrutiny. Better decisions would also result.

234/ Davis 1946 Article at 649.

On the other hand, there are compelling reasons for not allowing adjudicators to consult privately with staff witnesses. Much like the staff attorney who is truly an advocate, the staff witness may have the "will to win" for his side and may be "psychologically wedded" to his position, thereby subjecting the decisionmaker to biased advice. In fact, the witness' views may even be more unchangeable since they may come from years of experience which have been molded into a "true belief" about a subject. From this perspective, it is difficult to see the difference between the staff witness and the prosecutor or advisor situation, the former condemned in the APA and the latter viewed by Professor Davis as equally unfair. In the case of American Telephone & Telegraph Co. v. Federal Communications Commission, 449 F.2d 439 (2d Cir. 1971), the court refused to find any legal roadblocks to commissioner consultations with staff expert witnesses in a rulemaking proceeding, but it commented that such private contacts were "ill-advised." Finally, if such witnesses do assist the adjudicators, application of § 557(d) of the APA would require that they be prohibited from privately consulting about the merits of the case with interested persons outside the agency -- perhaps a troubling restriction, though maybe not as troubling as placing a similar restriction on staff advocates.

At the NRC, because staff witnesses are, in reality, advocates for a definite position advanced by the staff, our discussion here would not allow these witnesses to advise decisionmakers.

However, if the role of the staff is changed, on balance we do not see any major legal roadblocks to adjudicators consulting with staff witnesses, though the law is too uncertain to offer a definitive legal judgment.

3. Staff Investigators or Reviewers

As we have ordinarily seen, agency investigators or reviewers in initial licensing cases at the NRC are advocates for a definite staff position at the hearing, as opposed to being uncommitted investigators or reviewers. However, where such a person exists or if the role of the staff is changed, in non-accusatory cases there is wide latitude for adjudicators to discuss the merits of the case with agency investigators or reviewers. As previously discussed in regard to due process considerations, such neutral investigators would not search for evidence to support a prosecution, but typically would be charged with seeing that all relevant facts are uncovered, whether the case is contested or uncontested. It is the agency advocate who will use these facts to mold a position on the issues in the proceeding. Accordingly, there may be no unfairness or appearance of unfairness in allowing adjudicators to consult with these neutral investigators. As potential decisional employees, however, these investigators could be precluded from ex parte communications with persons outside the agency once the formal hearing has commenced. The Commission may find these concerns minimal when weighed against the benefits to

be achieved from consultations, particularly more knowledgeable decisions and better informed commissioners.

A contrary argument could be made for contested cases. It is obvious that the facts uncovered by the investigators will be placed in the framework of a staff position, and so the investigator is really a part of the advocacy team. Consultations with advocates do raise fairness problems with regard to biased advice. Furthermore even if the investigator is truly neutral, he may have been exposed to large amounts of information which have not been incorporated into the record for decision, and which may unfairly affect his advice to the adjudicators. Whether or not such ex parte contacts in the pre-hearing stage are disqualifying under § 557(d) of the APA, there is also some concern about the appearance of unfairness in having investigators who have been exposed to extra-record information later serve as advisors to the adjudicators.

In sum, in the rare case of an uncommitted agency reviewer at the NRC, or if the staff role is revised, the balance can be easily drawn in favor of allowing private consultations with staff reviewers or investigators in uncontested initial licensing cases. In contested cases, there would likewise be no major legal objection. However, the Commission should consider the uncertain legal problems which could be associated with the application of § 557(d) of the APA.

4. Supervisors

In uncontested initial licensing cases, there should be no problem with supervisors advising the decisionmakers, for the same reasons cited in our prior discussion of advocates and others in uncontested cases. A contested case, however, raises more difficult questions.

If a supervisor is directly supervising staff advocates, reviewing their work and contributing to the development of the contested case, he may be thrust into the position of an advocate himself. Thus, the fairness and appearance of fairness due process concerns which led us to criticize private advice from staff advocates to adjudicators would apply here as well. Additionally, the supervisor who is to serve as an advisor during the decisionmaking process would be foreclosed from consulting privately with persons outside the agency under the rationale in § 557(d) of the APA. For these reasons, we believe that supervisors who play such advocacy roles in non-accusatory initial licensing cases should not be advising the Commission or the boards in those cases. 235/236/

The situation is more complicated where a supervisor's subordinates are advocates, but the supervisor is not directing and reviewing

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235/ See footnote 138, supra, and accompanying text, and footnotes 210-212, supra, and accompanying text for a more extended discussion of the §557(d) and due process rationales.

236/ On the other extreme, if neither the supervisor nor his subordinates are involved in an initial licensing proceeding, he becomes like any other non-involved staff member who should be free to privately advise the adjudicators.

their work in that case and otherwise has no personal involvement. Some would question whether a supervisor in that situation could advise impartially, or whether he would naturally tend to defend his subordinates' positions and to promote their point of view. It is for this reason that the Civil Aeronautics Board prohibits a bureau supervisor from consulting with the board in disciplinary cases in which any of the supervisor's subordinates are involved in prosecuting the case, whether or not the supervisor himself is personally involved. 237/ Especially in a small, close-knit division where personal contacts among staff may be extensive, there could be pressures on even the non-involved supervisor who is called upon to second-guess his staff as he advises the adjudicators.

On the other hand, the logical extension of this "bureau loyalty" rationale could lead to the disqualification of all members of a bureau when any member is involved in a case, on the theory that they would all tend to uphold the view of their fellow staff members. Few agencies have gone that far, apparently reasoning that professional objectivity (and the cloak of anonymity in the advising situation) will overcome bureau loyalty in such a situation. Furthermore, the supervisory level may well be the point at which the benefit of increased information and expert advice begins to outweigh the slight fairness detriment which might be associated with supervisors providing advice to adjudicators. Forcing decisionmakers to seek advice from sources other than trusted supervisors may also cause needless wasted effort and inefficiency in the use of limited agency resources. For these reasons,

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237/ 14 CFR § 300.4(a).

we see no legal problems with a supervisor who is not involved in a case serving as an advisor to the adjudicators.

5. Consultations Between Adjudicators

When a case is being decided by an adjudicator at one level of the agency, to what extent should he (or they) be allowed to discuss the case with adjudicators at the same or other levels? For instance, when a licensing board member is adjudicating a case, can he consult with other licensing board panel members not on the case, members of the appeal board panel, or the Commission?

The fewest fairness problems would result from consulting other members of the panel at the same level of the agency. It is inevitable that licensing or appeal board panel members will want to talk among themselves and discuss cases in the office, over lunch, etc. The common experiences of other panel members in similar cases would help the decisionmakers make a more informed decision which better accords with agency policy. Trial judges in the judicial system often engage in such consultations, as do members of the appeal board at the NRC, while licensing board members are precluded from doing so by 10 CFR § 2.719(b). A problem might arise if two panel members are deciding factually related cases concerning the same party at the same time. Consultation might result in the injection of off-the-record facts which might prejudice the decisionmaker for or against a party. However, such a situation is very unlikely and in this context, we would not presume that an adjudicator would stray from the record for decision.

For many of these same reasons, we believe that it would be appropriate for appeal board members to consult with members of the licensing board panel who did not decide the case below, and for the Commission to consult with appeal board panel members and licensing board panel members who did not decide the case below. There should be no problems of fairness here, and all the benefits of such consultations would result.

There are more problems associated with commissioners consulting with licensing boards or appeal boards during the time that either of the latter is making a decision. It is very possible that the Commission may eventually be deciding the very same case. If the Commission is seeking information about the case from these decision-makers, a claim might arise that the receipt of selective information by the Commission would tend to make the commissioners less than impartial when the time for formal review arrives. Correspondingly, if the Commission is seeking to guide the lower boards with private policy advice, one might argue that the Commission is prejudging the merits of a case prior to its receipt of the formal record and the arguments of the parties during the formal review which is to follow. In addition, individual commissioners could pressure boards to come out in a way that is not best supported by the record and/or by other commissioners' policies. There is no doubt that absent this appearance of unfairness, the many benefits associated with such consultations would result -- more

knowledgeable decisions, more informed commissioners, and decisions which more accurately reflect agency policy. Although these consultations might appear improper at first glance, in view of the foregoing benefits and the slight risk of unfairness, they were expressly encouraged by the 1947 Attorney General's Manual. 238/

For many of these same reasons, we see no significant legal problem with allowing communications between appeal board members who will hear a case and members of the licensing board before whom a case is presently pending. 239/ However, we might question the wisdom of such consultations. Although appeal boards carry out agency policy, they are not the ultimate repositories of such policy and hence, unlike commissioners, have less reason to privately advise licensing board members. Similarly, unlike commissioners who have a broad range of experience as a result of their rulemaking duties, Congressional testimony and the like, appeal board members have less to offer in terms of overall policy guidance to licensing board members. And, because they are not ultimate policymakers, appeal board members may have less reason to keep advised of licensing board decisions or interlocutory rulings

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238/ 1947 Attorney General's Manual at 55.

239/ Typically, when a case is before a licensing board it is not known which appeal board members will hear a case. Hence, the suggested scenario is not very likely. However, there are instances where an appeal board has heard a case and has remanded it to the licensing board. In these instances, informal advice between the appeal board and the licensing board could take place.

through private consultations, especially since a public record of these matters is available. Therefore, we recommend that private consultations between an appeal board and a licensing board, while the case is pending before the latter, should not take place. 240/

Finally, we come to the most difficult question: should the Commission be allowed to consult with the licensing board or appeal board which heard a case when the Commission itself is deliberating the case on review? 241/ The major benefit of such consultations is obvious, in that these lower tribunals have done the most extensive thinking about the case from a neutral, adjudicative perspective. They are probably most familiar with the facts, the weaknesses and strengths of the parties' arguments and the like. Their advice to the commissioners would be invaluable, and would result in a more knowledgeable decision by the Commission. However, the major problem with such consultations is also obvious and quite serious: the lower tribunals might have a vested interest in

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240/ For these same reasons, where a licensing board has consulted informally with members of the appeal board panel prior to any appeal board contact with a case, we suggest that when an appeal board is appointed to review the case, it should generally not include those appeal board panel members who were informally consulted. As long as they have not prejudged the merits of the case, we do not believe that this result is compelled by any existing court decision, but it would seem to be a wise precaution.

241/ The same considerations to be discussed also apply to determining whether the licensing board which decided a case should be allowed to advise the appeal board which is considering it on review.

their decisions so that they could hardly be expected to put aside their subconscious prejudices and advise the Commission objectively. In terms of the rationale in Withrow, they would be "psychologically wedded" to their views and to advise otherwise would amount to a confession of "error." One might argue in response to these due process concerns that the lower tribunals have already given their advice on the record, in their formal decisions, so that there would be little secret in what they would tell the commissioners in private. However, privacy allows for different emphases and a more strident commitment to the public decision. We believe that the due process concerns of fairness, and appearance of fairness, are too great to allow such consultations. 242/

It is important to recognize that the aforementioned problems with communications between adjudicators arise primarily in contested cases. In uncontested initial licensing cases -- or any uncontested adjudication -- there is no real controversy and, absent a mandatory hearing requirement there would be no hearing. Consequently, we believe that any of the restrictions which we have suggested should

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242/ In his seminal article, Pedersen argues to the contrary. W. Pedersen, The Decline of Separation of Functions in Regulatory Agencies, 64 Va.L.Rev. 991, 1001 (1978). He believes that the concept of a hearing examiner has changed from the original "gatherer of evidence" who makes a recommended decision to the present "administrative law judge" conception. He advocates a return to the old conception, under which there is no problem with the agency heads consulting the hearing examiner in private, since the examiner is not really judging, but is just preparing the record for an agency decision. Consultation by the agency is more appropriate under this view.

be limited to contested cases. Restrictions in uncontested cases would only make the decisional process unnecessarily cumbersome.

6. Non-Involved Staff and Own Staff

Presently decisionmakers at the NRC can consult with non-involved staff, as with staff involved in a case, only in uncontested initial licensing proceedings. There is clearly no problem allowing consultations in such cases. The question is whether the rules should be changed to allow consultation with non-involved staff in a contested licensing case, such as with persons in the Office of Standards Development, Office of Nuclear Regulatory Research and the like.

The present rule could well be termed an over-reaction to fears of the appearance and reality of improper consultations. It is designed to absolutely assure that no tainted advice or extra-record material will reach the decisionmaker's ears. The by-product of this assurance is that it is often difficult for the decisionmaker to obtain needed expert advice, reducing the information flow within the agency as well as hindering efficiency by forcing decisionmakers to gain information by more time-consuming means. This would not even be an unbearable sacrifice if there were significant fairness considerations, but in fact the likelihood that the decision will be improperly affected by allowing consultations with non-involved staff is negligible. It is possible that one of the staff members may have become prejudiced through some

indirect involvement with the case or the parties, but even where the issues are sharply contested, allowing such consultations presents small difficulties in comparison with the benefits which would result. 243/ Furthermore, the adjudicator is just as likely to be exposed to extra-record material if he consults a textbook or his own staff member in order to understand the record.

There is also no question that a decisionmaker should be able to consult his own staff. They are permanently assigned to help that person and, absent any problem of personal bias or insertion of extra-record material, may consult at any time. The present NRC rule does make this concession.

Option B: Amend 10 CFR §§ 2.780(a) and 2.719(b) for Non-Initial Licensing Cases to the Extent Permitted by the APA and the Due Process Clause

Presently, NRC rules do not permit decisionmakers in non-initial licensing cases to consult anyone but their own staffs. This rule is even more restrictive than the rule for initial licensing cases. In Option A, we addressed the possibilities open to the Commission for relaxing its rules in initial licensing cases. The basic principle was that such relaxation must be consistent with both the APA and the Due Process Clause. This same principle applies to non-initial licensing cases and thus we conclude that in all contested

243/ It is important to note, as we did in discussing due process, that the advice involved here is in interpreting the record. Advisors may not offer new facts or arguments unless those facts or arguments have been put on the record and subject to public scrutiny.

non-initial licensing cases, whether accusatory or not, the range of potential discussions between adjudicators and other agency employees is much like that in Option A. For the reasons stated in Option A, we believe that the consultations permissible in non-accusatory initial licensing cases should also be allowed in non-accusatory non-initial licensing cases. 243A/

These general conclusions are based upon our belief that although the APA on its face may draw distinctions between initial licensing and non-initial licensing cases, we have seen that the drafters of the APA actually intended the same rule for accusatory initial licensing cases as for accusatory non-initial licensing cases. As for non-accusatory initial licensing cases, the APA permits abandonment of the separation of functions rule. Yet, we have seen that the rule would be inapplicable anyway because there are no employees performing "investigative or prosecuting functions" in non-accusatory cases, whether initial licensing cases or non-initial licensing cases. Hence, the APA rule for non-accusatory initial

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243A/ Although we have not discussed under Option A the communications which are permissible in accusatory initial licensing cases, we believe that the restrictions imposed in those instances are clear. Certainly, all of the restrictions which are legally required in non-accusatory initial licensing cases would apply; furthermore, as we have seen, participation or advice by staff investigators and prosecutors would be prohibited by the APA and due process. We also believe that the consultations allowable for non-accusatory initial licensing cases would be likewise allowable in accusatory initial licensing cases. For the reasons expressed in the text under Option B, the rule for all accusatory cases would be the same regardless of whether an initial licensing or other case was involved.

licensing cases is the same as the APA rule for non-accusatory non-initial licensing cases.

Similarly, the Due Process Clause would appear to impose the same sorts of restrictions, and allow the same sort of communications, in all contested non-accusatory adjudications, whether initial licensing cases or not. In such cases, staff advocates may replace staff prosecutors and we see little due process reason for prohibiting such advocates from advising adjudicators in some contested cases (i.e., non-initial licensing cases) and not others (i.e., initial licensing cases).

For these reasons, we believe that the discussion of the permissible consultations for initial licensing cases under Option A would also apply to non-initial licensing cases under Option B.

Option C: Institute a "Separated Staff" System, Whereby Certain Sections of the Staff are Designated as Decisionmaking Personnel and May Consult the Decisionmakers, While Certain Other Sections are Designated as Non-Decisionmaking Personnel and May Not Consult

As we have seen in examining the history of the NRC's separation of functions rules, the agency utilized a "separated staff" concept several years ago. 244/ Even today, this concept can be said to apply at the NRC, though it is entirely too overbroad, as rules 2.719 and 2.780 separate virtually the entire staff of the agency from agency adjudicators in all cases but a small number of uncontested initial licensing proceedings. However, it is possible to

244/ See footnote 14, supra and accompanying text.

return to the separated staff practice under which selected offices that are regularly involved in proceedings as prosecutors or advocates, as well as other employees who are detailed on a case-by-case basis, would form a separated staff that is precluded from advising adjudicators who are deciding a case. Persons not on the separated staff would then be able to advise the adjudicators as long as they do not communicate ex parte with persons outside the agency in violation of § 557(d); persons on the separated staff could, of course, continue to consult freely with outsiders.

The rationale behind the separated staff system is to avoid an overlap of inconsistent functions within a single bureau or division. It is reasoned that if an entire bureau is involved exclusively in advocacy, while another bureau is involved exclusively in advising decisionmakers, it will be easier for the decisionmakers to know who they can talk to without having to worry if that particular person was involved in that particular adjudication. This separation would decrease the likelihood of unfairness to parties through inadvertent contacts. Moreover, this system eliminates the possibility that staff members who serve in the same bureau as agency prosecutors will advise the decisionmaker with some sort of bias in favor of the views of their fellow bureau members. It also reduces the chances that these same staff members would have absorbed some off-the-record information that they could inject during their consultations.

A separated staff system also increases the appearance of fairness, since the parties and the public can see a definite demarcation line between those whom the decisionmaker is talking to and those whom he is not talking to. Under the APA, this line may change from adjudication to adjudication, depending on what staff members from several divisions are prosecuting a particular case.

Aside from fairness considerations, a separated staff system may also enhance an informed decision to the extent that decisionmakers can develop a rapport with staff members from the non-separated staff with whom they consult regularly. On the other hand, it would constrict the flow of information to decisionmakers, since they would be unable to consult staff members who were not involved in the particular case, but who were part of the separated staff. Inefficiency and duplication might also result, since staff resources would be spread thinner due to the inability of staff members to perform dual roles of advocate and advisor in different cases.

The balance here is between the increased fairness and appearance of fairness associated with the separated staff concept and the decreased efficient flow of information to decisionmakers associated with placing certain non-involved staff members off-limits simply because they belong to the separated staff. It might be pointed out that the benefits to fairness would generally be increased by a separated staff system in agencies which, unlike the NRC, have a

large volume of adjudications. In such agencies there would be more frequent Commission-staff consultation and greater possibility of an improper contact absent a separated staff. Furthermore, a separated staff system would also tend to be more effective in small bureaus, where bureau members who advise the adjudicators would be more likely to support each others' positions out of bureau loyalty.

It may be useful to contrast the treatment of two major bureaus in the FCC to see how the separated staff concept can work. Under its separated staff system, the entire Broadcast Bureau, which deals primarily with licensing and license revocation cases, is classified as consisting of non-decisionmaking personnel who may not advise the Commission once a hearing has been set. The Common Carrier Bureau, which deals primarily with ratemaking and rulemaking cases, is classified in rulemaking cases as consisting of decisionmaking personnel who may consult the Commission, except when there is a trial staff, in which case that trial staff alone is separated. The Broadcast Bureau typically deals with cases involving many "adjudicatory" facts, while the Common Carrier Bureau deals more with "legislative" facts related to ratemaking, in which case the Commission has greater need of the technical advice of the staff to understand the intellectually difficult issues involved.

NRC adjudications usually involve a mixture of adjudicative and legislative facts. However, because most licensing proceedings require a consideration of a sizeable number of complicated scientific issues, the size of the separated staff should be kept to a minimum so that other staff members are available to provide technical advice to the Commission and its adjudicative tribunals. For example, the separated staff might exist of only the office which is composed of the agency's trial staff and other staff members who are designated as off-limits in a particular case.

Adoption of the separated staff concept would, of course, require amending the NRC's separation of functions and ex parte rules in accordance with many of our previous suggestions. The major difference under Option C is that there would be an "institutional" separation within the staff itself, rather than solely a person-by-person determination of whether separation was required under the agency's general rules.

Option D: Change the Role of the Staff in Adjudications from One of Advocacy to One of Impartial Investigation to Develop a Full Record

Option D focuses on the role of the staff so that it performs a solely fact-finding function in adjudicative proceedings, rather than a prosecuting or advocacy function. 245/ In essence, the staff would scrutinize each side's position during the public

245/ Of course, in accusatory cases commenced by the staff -- certain revocations, suspensions, enforcement actions, etc. -- at least the NRC trial staff, by definition, would be performing a prosecutorial role.

proceedings, then summarize the issues and alternatives to the Commission in a written memorandum, without taking one side or the other. The decisionmaker would then make a decision from the outlined alternatives. There would then be no problem in privately consulting any staff member under the APA or the Due Process Clause, since no staff member would be performing prosecuting or advocacy functions under this system. However, because of § 557(d) of the APA, these staff members could not consult ex parte with persons outside the agency, at least after the hearing was noticed. Marshall Miller outlined a similar proposal in his letter to the Commission on the waste confidence rulemaking:

> The Staff would guide the Participants and the Presiding Officer in the development of a complete record on which to base an informed conclusion regarding the outlook for safe waste disposal...When the record of the proceeding is complete, Staff will prepare a summary, identify the key issues and controversies, and indicate how their resolution could affect the Commission's decision. The staff would not make any recommendations on the ultimate conclusions in this proceeding.

A system like this in adjudications would allow the staff to perform a fact-finding role in developing a complete record, as well as an advisory role. The result would be a very efficient use of staff resources and an increased flow of information to the decisionmakers. Under this system, the staff would be a sort of "devil's advocate" toward both sides of the controversy, bringing out all relevant facts and alternatives. However, such a system

would require a substantial change in the informal staff licensing review process. There would no longer be any staff "positions" on the issues prior to the beginning of the hearing, and the present process of "negotiation" between applicant and staff would largely disappear because there would be no staff "positions" to discuss. The result would be that applicants and intervenors would proceed to the hearing with no firm idea whether the staff favored or opposed the license or permit. There would be some necessary changes to the format of SERs and the Commission's NEPA regulations would need to be modified so that the Staff FES did not need to include staff positions on the important issues.

The Federal Communications Commission utilized a similar system in the case of AT&T and the Associate Bell Companies, in which it allowed the Common Carrier Bureau to cross-examine witnesses, present evidence, then advise the Commission. 246/ The Bureau was to seek to fully develop the record rather than take the conventional adversary position. The Commission felt that the advice of its expert staff was indispensible in the proceeding.

Professor Davis vehemently attacked this system in the 1970 supplement to his Treatise. 247/ He argued that the system would not be the most effective way to bring out all sides of the issue, particularly the interests of the public. He stated that a major

246/ 2 FCC 2d. 142 (1965).

247/ Davis, Administrative Law Treatise, 1970 Supplement, § 13.00, p. 445-457.

role of an agency is to protect the general public interest by forceful advocacy. He felt that under this system, the industry point of view would be brought out forcefully, with an awesome array of industry legal talent, while the public interest would be only mildly advanced by a weakened "neutral" agency staff. This criticism has merit, but it must be remembered that under this system the staff would be directed to fully develop the record and presumably, if the industry side dominated, the staff would do what was necessary to scrutinize the industry position and bring out the other side.

Professor Davis also believes that staff members will inevitably take a side and present that side privately to the Commission. They will, he contends, in advising the decisionmaker privately, interpret the evidence they have gathered in a way that justifies their position, and the parties will not have an occasion to rebut that position as they would if the staff played an open advocacy role in the public proceedings.

Professor Davis' views are not unreasonable. It is true that the staff, regardless of its formal mandate, might find it difficult to be completely objective in developing the record. As the facts unfolded, the staff might naturally tend to favor one side or the other and, as a result, develop one side of the record more vigorously. Parties to the proceeding might tend to complain that contrary to its mandate, the staff was not neutrally developing a full record.

We conclude that although there are some dangers in this approach, and some assumptions which support it are open to question, the Commission should give serious consideration to adopting a licensing scheme in which its staff would not play an adversarial role.

Option E: Congressional Amendment of §557(d) of the APA to Incorporate an Initial Licensing Exemption and/or Permit Private Conversations Between Persons Outside the Agency and Agency Staff Members Other than the Actual Decisionmakers

Many of the options available to the Commission will require it to significantly reduce the freedom and informality of communications between staff members "involved in the decisional process," on the one hand, and persons outside the agency or staff members who communicate privately about a case with persons outside the agency, on the other hand. Under §557(d) of the APA, as we have seen, such restrictions seem necessary. 248/ Consequently, for example, if the director of the Office of Nuclear Reactor Regulation was assisting the Commission or a licensing board in its adjudicative deliberations, he could not go to his subordinate staff for advice if they had previously communicated privately about the case with the licensee. This and similar results could be eliminated by amending § 557(d) so that only those staff members who directly advise an agency adjudicator would be foreclosed from consulting with persons outside the agency about the case. The statute would then allow a supervisor to ask his subordinates for advice as he prepares to

248/ See part IV, supra.

advise the Commission, even though those subordinates had prior conversations with the licensee. 249/

Alternatively, a more extensive amendment could be made to § 557(d) so that it applied to communications between persons outside the agency and only agency decisionmakers (agency heads, hearing boards and appeal boards). 250/ With this amendment, the Commission could still seek advice from a supervisor who had prior ex parte contacts about a case with persons outside the agency.

Finally, it is possible to amend § 557(d) so as to make it inapplicable to initial licensing cases, much like § 554(d)'s separation of functions rule does not apply to such cases --

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249/ Section 557(d) now prohibits ex parte communications between interested persons outside the agency and any "employee who is or may reasonably be expected to be involved in the decisional process of the proceeding." This might be amended to refer to any "employee who is personally involved, by oral or written communications, in directly advising any member of the body comprising the agency, an administrative law judge, a hearing board or an appellate board or officer."

250/ In the context of logging communications with outsiders in informal rulemaking proceedings, a majority of the Commission has gone on record as favoring "drawing the line" between actual decisionmakers and those who advise the decisionmakers. Thus, in opposing a provision in the Administrative Reform Act of 1979, which would have required all employees involved in the decisional process to log contacts with outsiders in informal rulemakings, a majority stated that it could support such a rule if it applied only to agency heads and hearing boards: "however, this would not be intended to sanction an agency's staff serving as a mere conduit for outside communications...." Letter from Chairman Ahearne to Senator John Culver, January 23, 1980 at 4.

that is, if they are non-accusatory. This result would allow even commissioners and the boards to talk privately with persons outside the agency. However, we do not believe that such an amendment would survive a challenge under the Due Process Clause or § 556(e) of the APA, at least with regard to contested initial licensing cases. 251/

Any of these amendments would not, of course, eliminate the difficult policy choices facing the Commission as it decides the extent to which it wishes to relax its separation of functions rules. They would, however, remove a serious barrier to relaxation. 252/

251/ See House Rpt. No. 94-880, Part 2, 94th Cong., 2d Sess. at 18 (April 8, 1976) where a similar suggestion of invalidity was made.

252/ We suggest that it might also be helpful for Congress to clarify whether agency advocates in non-accusatory cases should be precluded from advising agency decisionmakers in private. Presently, we are left with conflicting and piecemeal court decisions, based on due process grounds, which have created great uncertainty.

XI. CONCLUSION

This study has examined the major differences between the NRC's present separation of functions and ex parte rules and the prohibitions on communications required by statute or constitutional law. We have presented a number of general options for consideration by the Commission. After the commissioners have received additional input and have focused on the general direction which they wish to take, potential rule amendments and/or changes in agency practice can be explored with more specificity.

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NINETY-SIXTH CONGRESS

Congress of the United States

House of Representatives

ENVIRONMENT, ENERGY, AND NATURAL RESOURCES
SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
RAYBURN HOUSE OFFICE BUILDING, ROOM B-371-B-C
WASHINGTON, D.C. 20515

April 1, 1980

Honorable John F. Ahearne
Chairman
Nuclear Regulatory Commission
Washington, D.C.

Dear Chairman Ahearne:

I strongly applaud the Commission's current efforts to deal with the problems posed by its ex parte rules. The studies of the Nuclear Regulatory Commission precipitated by the Three Mile Island accident have uniformly suggested that those rules are part of a complex of institutional factors which have inhibited Commissioners' access to the information and experience reposing in their staff. Those inhibitions have impeded sound decision-making, as certain examples cited by the Kemeny Commission staff demonstrated.

The study completed by your General Counsel on the law of ex parte contacts in the formal adjudicatory setting is an important first step in eliminating those impediments to rational decision-making which are not in fact required by statutes, the Constitution or fundamental doctrines of fairness in agency proceedings. As your General Counsel noted in his memorandum to you, of March 11, 1980, "The dominant conclusion of our study is that the present NRC rules, as interpreted, do place greater restrictions on intra-agency communications than are required by the (Administrative Procedure Act), the Atomic Energy Act or the Due Process Clause."

Given that legal conclusion, the Commission should attempt to bring its actual rules into conformity with the actual requirements imposed by law upon the Commission. However, my impression of the realities of NRC staff habits and practices leads me to suggest that the Commission will have to work hard to change the staff perceptions of the impact of those rules as well as changing the rules themselves. That appears vital to any genuine progress toward more open communication between staff and commissioners since there has been a long history in the nuclear regulatory agencies--detailed in the General Counsel study--of staff and commissioner caution in interpreting the restrictions of ex parte rules.

I suggest therefore that whatever action the Commission takes, it must accompany that action by extraordinary efforts to inform its own staff of the full, day-to-day implications of the new rules.

Specifically addressing one of the options raised in the General Counsel memorandum, let me note my concern over the concept of the separated staff. While separation of some portion of the staff from virtually any contact with the Commissioners outside a formal setting may be unavoidable, the number of staff so segregated should be minimized. A wiser course, consistent with the law and with other agencies' practice, is to separate or isolate staff from Commissioners only on a case-by-case basis. As a general proposition, fundamental fairness only requires that a staffer not be permitted to communicate his or her views off the record to decision-makers in specific cases where the staff person has that personal vested interest which springs from work on the case and an adversary stake in its outcome. Such case-by-case separation is adequate to guarantee fairness in agency proceedings, and does not threaten to inhibit the flow of information among staff to the Commissioners.

Finally, let me urge the Commission not to stop this effort after simply addressing the ex parte rules in the adjudicatory context. The proper application of ex parte principles in the informal rulemaking arena, as you know, is a complex and shifting area of agency practice. Yet the same concerns--facilitating sound decision-making while preserving fairness--underlying this effort should compel the Commission to address the rulemaking context as well.

Sincerely,

Toby Moffett

Toby Moffett
Chairman

TM:bhc

cc: Commissioner Joseph M. Hendrie
Commissioner Victor Gilinsky
Commissioner Richard T. Kennedy
Commissioner Peter A. Bradford