supposed insulation from the vagaries of partisan politics.[81]

b. Limits on OMB Review Authority

If OMB review of regulatory decisions clearly delegated by Congress to the EPA Administrator has become a supervisory or decision-controlling procedure, rather than a mere interagency commenting procedure,[82] from what source does OMB's control authority derive? No statute may be said even implicitly to vest such authority in the Office.[83] The Executive Order itself expressly

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[81] Former EPA Administrator Ruckelshaus recently noted, for example, "[T]he major lesson of the unpleasant events of last year [the 1983 EPA scandal] was that the American people will not tolerate the involvement of partisan politics in the operation of environmental programs." Envtl. Forum, Aug. 1984, at 5 (quoting William Ruckelshaus, EPA Adm'r).

[82] The power of OMB effectively to supervise EPA rulemaking is discussed *infra* notes 201-53 and accompanying text.

[83] Judge Harold Greene has held, it seems correctly, that neither OMB's organic legislation nor its Reorganization Plan authorizes OMB usurpation of discretion granted by statute to another agency. American Fed'n of Gov't Employees v. Freeman, 498 F. Supp. 651, 658 (D.D.C. 1980). *AFGE*, decided before E.O. 12,291 was signed, held that OMB has been given no authority to direct General Services Administration (GSA) discretion. It noted, however, that because *no* executive order "issued pursuant to legitimate Presidential authority" purported to give OMB such power, the Court need not decide whether the President, as head of the Executive Branch, would be empowered to direct GSA with respect to a matter entrusted to its discretion by statute." *Id.* at 658 & n.16.

OMB asserts that E.O. 12,291, the Budget and Accounting Act, 31 U.S.C. § 1111 (1982), and the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3520 (1982), give it legal authority to request changes in EPA regulations. *See* Questions from the Subcommittee on Administrative Law and Governmental Relations for the Office of Management and Budget, August 2, 1983 (attachment to letter from Christopher DeMuth, OMB, OIRA Adm'r to Hon. Sam B. Hall, Subcomm. Chm'n, Sept. 2, 1983) (Question 14) [hereinafter cited as OMB Response to House Questionnaire], *reprinted in Regulatory Reform Act: Hearings Before the Subcomm. on Admin. Law and Govtl. Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 971, 980 (1983) [hearings hereinafter cited as *Hearings*].

Neither of the Acts cited by OMB even impliedly authorizes the Office to review rules. The Budget and Accounting Act includes no provision even remotely suggesting that OMB (or its predecessor, the Bureau of the Budget) should review regulations. The Paperwork Reduction Act states clearly that it is not to be construed "as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, . . .with respect to the substantive policies and programs" of agencies. 44 U.S.C. § 3518(e). Indeed, OMB admits, "[L]egislative history is clear that Congress did not intend the Paperwork Reduction Act to be a 'regulatory reform' bill." OMB, Controlling Paperwork Burdens on the Public, 48 Fed. Reg. 13,666, 13,668 (1983) [hereinafter cited as OMB Paperwork Rules]. The Senate Committee Report notes that it did "*not intend that 'regulatory reform' issues* which go beyond the scope of information management and burden *be assigned to the Office*." S. Rep. No. 930, 96th Cong., 2d. Sess. 8-9 (1980) (emphasis added).

Finally, when EPA and OMB were created by their respective Reorganization Plans in 1970, there were indications that OMB was not to have supervisory authority over EPA. *See* Reorganization Plan No. 2 of 1970, Message from the President of the United States (Mar. 12, 1970), H.R. Doc. No. 275, 91st Cong., 2d Sess., *reprinted in Reorganization Plan No. 2*

denies OMB the authority to displace decisions vested by law in another agency.[84] Even assuming the Executive Order to be an implicit presidential grant of supervisory authority to OMB, may a unilateral presidential action in the domestic arena, unsupported by any legislation, properly vest in OMB the authority to assume decisionmaking discretion Congress clearly has vested in the EPA Administrator?

The Supreme Court has said little regarding the limits of presidential authority to take domestic[85] action without Congress' blessing. The primary source of guidance in this field is *Youngstown Sheet & Tube Co. v. Sawyer*,[86] the *Steel Seizure Case*. Justice Jackson's oft-cited concurrence[87] proposes that where the President acts pursuant to an express or implied grant of power, his constitutional authority is at its maximum.[88] On the other hand, as Jackson explained, if the President "takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb[, and] Courts can sustain exclusive Presidential control . . . only by disabling Congress from acting on the subject."[89] Where there exists no relevant statute tending to affirm or deny the President's asserted authority, there is a "zone of twilight," suggested Jackson, in which the President and Congress may share authority.[90]

More recently, the Court's somewhat inflexible approach to the separation of powers principle, as shown in *Immigration and Naturalization Serv. v. Chadha*,[91] seems to emphasize that any action

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of 1970: Hearings Before a Subcomm. of the House Comm. on Gov't Operations, 91st Cong., 2d Sess. 2, 3-5 (1970) (OMB to be concerned with *how* government operates, whereas Domestic Council was to have more substantive role); *Senate Hearings on the Creation of EPA*, *supra* note 78, at 87 (statement of OMB Ass't Director Ink that EPA would be setting standards and OMB would merely be concerned "with the effective operation of governmental machinery").

[84] E.O. 12,291, *supra* note 1, § 3(f)(3).

[85] The President's powers respecting foreign relations may be more expansive than they are in the domestic context. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981).

[86] 343 U.S. 579 (1952). In this decision, President Truman's seizure of several steel mills, justified on the basis of a national defense emergency need for steel to fight the Korean War, was held an unconstitutional usurpation of Congress' legislative powers.

[87] *Id.* at 634 (Jackson, J., concurring) Justice Black's plurality opinion has been eclipsed in judicial and academic writings by Justice Jackson's concurrence. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981); Bruff, *supra* note 2, at 471-72.

[88] 343 U.S. at 635-37.

[89] *Id.* at 637-38.

[90] *Id.* at 637. The Court's continued reliance on the Jackson analysis was confirmed in Dames & Moore v. Regan, 453 U.S. 654 (1981).

[91] 103 S.Ct. 2764. The *Chadha* Court held a one-house legislative veto provision in §

with the purpose and effect of legislation must either be enacted in conformity with constitutional procedures, or be the direct product of an express delegation of legislative authority to an agency. No single branch is empowered to take action of a legislative nature.

These principles cast doubt on the permissibility of an executive order that implicitly grants to OMB the authority to control decisions expressly delegated to the discretion or judgment of another agency. Such OMB control would constitute a substantive change in the statutory delegation. Absent an express or implied legislative statement that OMB control of the decision was contemplated, the Office's encroachment would contravene Congress' directive.

Reinforcing the view that clear delegation of authority to a lesser executive official must be honored is Chief Justice (and former President) Taft's dictum in the celebrated case of *Myers v. United States*.[92] A vocal supporter of presidential power, Taft believed

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244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2) (1982), to be unconstitutional. The Court reasoned that the action there at issue was "essentially legislative in purpose and effect," 103 S.Ct. at 2784, and therefore "could have been achieved, if at all, only by legislation" passed by both Houses of Congress and either signed by the President, or the President's veto overridden, *id.* at 2785. Justice White reminded the Court in dissent that the entire administrative state is dependent on rules essentially legislative, though not adopted pursuant to the formalities of the Constitution. *Id.* at 2801-04 (White, J., dissenting). The Court responded: "The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1,7." *Id.* at 2785 n.16. The Court also reiterated: "Clearly, . . .'[i]n the framework of our Constitution the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Id.* (quoting the *Steel Seizure Case*, 343 U.S. 579, 587 (1952)). Thus, it seems likely that OMB could ignore a clear and specific legislative directive, such as a delegation of authority to the expert judgment of a named administrator, only at the risk of being held in contravention of statutory authority.

[92] 272 U.S. 52 (1926). The first major twentieth century case to address the power of the President vis-a-vis Congress to dismiss federal employees, *Myers* held that Congress could not constitutionally restrict the President's power to fire a postmaster, an executive officer appointed by the President with the advice and consent of the Senate. Chief Justice Taft, writing for the majority, found a broad executive power to remove executive officers, although, except in cases of an impeachable offense, the Constitution is silent on the subject. *See* U.S. Const. art. II. Taft found this broad power implicit in, for one, the "take care" clause. 272 U.S. at 129-34. Taft readily conceded: "To Congress, under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction. . . ." *Id.* at 129.

In Humphrey's Executor v. United States, 295 U.S. 602 (1935), the second of the so-called Removal Cases, the President was held to lack the power to remove an FTC commissioner before his term expired, except for one of the congressionally established causes. The Court reasoned that the FTC clearly was intended by Congress to be an "independent" agency, and "one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will"; furthermore, the FTC

that the President may generally "supervise and guide" his subordinates' construction of statutes in order "to secure th[e] unitary and uniform execution of the laws."[93] The Chief Justice opined, however, in a frequently overlooked[94] portion of the *Myers* opinion, that those decisions "peculiarly and specifically committed to the discretion" of a lesser executive officer by statute, or decisions "quasi-judicial" in character, may be beyond even the President's proper influence.[95]

Taft's dictum that a superior must honor a clear delegation of authority to his subordinate finds support in *United States ex rel. Accardi v. Shaughnessy*.[96] In *Accardi* the Supreme Court held that the Attorney General could not direct a decision which he had delegated by regulation to the discretion of a subordinate panel. The Court noted that "if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience."[97] Similarly, the 1838 Supreme Court decision in *Kendall v. United States*[98] and early opinions of United States

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"duties are neither political nor executive, but predominately quasi-judicial and quasi-legislative." *Id.* at 624. The "fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence" of the others precluded the President from firing the commissioner against the congressional mandate. *Id.* at 629.

The *Humphrey's* opinion could be read, in conjunction with *Myers*, to mean that the functional character of an officer's job might determine the power of the President to dismiss him.

In Weiner v. United States, 357 U.S. 349 (1958), the Court reiterated the bright-line functional test of "purely executive" versus quasi-judicial or quasi-legislative. The Court found the President lacked the power to remove an official, this time a member of the War Claims Commission fired for political reasons by President Eisenhower. Questions before the Commission were to be adjudicated "according to law" (that is, on the merits of each claim, supported by evidence and governing legal considerations) by a body "entirely free from the control or coercive influence, direct or indirect," of the President or Congress. *Id.* at 355-56. To protect the Commission from such coercive influence, the Court held that the commissioner could not be removed. *Id.* at 356.

[93] 272 U.S. at 135.

[94] For example, the court in Sierra Club v. Costle, 657 F.2d 298, 406 n.524 (D.C. Cir. 1981), fails to cite or discuss this important passage of the *Myers* opinion, although it quotes from the sentence preceding it, and rests much of its analysis of presidential authority over rulemaking on the *Myers* dictum.

[95] 272 U.S. at 135.

[96] 347 U.S. 260 (1954). While the *Accardi* Court held that the Attorney General could not properly control the subordinate panel's decision, the Court did not find that he was foreclosed from continuing to enjoy his *undelegated* authority formally to overrule the panel pursuant to statutory and regulatory procedures.

[97] *Id.* at 267.

[98] 37 U.S. (12 Pet.) 524 (1838). The Court denied the President the power to direct the

Attorneys General[99] tend to affirm that a decision specifically vested by statute in the discretion or judgment of a lesser executive official is beyond the proper control of his superiors, including the President.

Determining the permissibility of OMB influence on agency rulemaking pursuant to E.O. 12,291, therefore, requires a search for any implied or explicit expression of congressional will which grants or denies the President the authority to oversee or control the agency rulemaking under examination. Despite the repeated efforts of past and present Presidents, Congress has refused to codify any "Regulatory Reform" statute that would ratify broad OMB or presidential oversight of rulemaking.[100] Some commentators have inferred from Congress' repeated rejection of these bills, and from the lack of any other statutory support for OMB or presidential review of rulemaking,[101] a congressional will to reject such review.[102] At the same time, clear congressional delegation of regulatory decisionmaking to the EPA Administrator's expert judgment, accompanied by Congress' expectation that the EPA Administrator will remain "independent" and responsible to Congress and the public as well as to the President,[103] may reasonably be viewed as

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Postmaster General's performance of his ministerial duty. Rosenberg, *supra* note 2, at 205, argues that *Kendall* "reflect[s] the nineteenth-century notion that the President may not direct the manner in which executive officers carry out their discretionary functions."

[99] *See, e.g.*, 1 Op. Att'y Gen. 625 (1823) ("[T]he Constitution assigns *to Congress* the power of particular subordinate officers. . . . [The President] has the power of removal, but not the power of correcting, by his own official act, the errors of judgment of incompetent or unfaithful subordinates.") (emphasis added); 18 Op. Att'y Gen. 33 (1884) (advising the President, "It has been repeatedly held that the observance of your constitutional duty of taking care that laws be faithfully executed does not of itself warrant your taking part in the discharge of duties devolved by law upon an executive officer"). *But see* 7 Op. Att'y Gen. 453 (1855).

[100] The most recent victims were H.R. 2327, 98th Cong., 1st Sess. (1983) and S. 1080, 98th Cong., 1st Sess. (1983), both of which died in the 98th Congress. Extensive hearings were held on the House Bill, in which agency staff and outside observers strongly criticized current OMB review practices. *See Hearings, supra* note 83.

Congress' repeated rejections of attempts to codify OMB review are reviewed in Rosenberg, *supra* note 2, at 219-20, 227-34. *See also Probably Doomed for Year: Rules Committee Fails to Act; Regulatory Reform Stalled*, 1982 Cong. Q. 3029 (Dec. 11, 1982).

[101] *See supra* note 83.

[102] *See, e.g.*, Rosenberg, *supra* note 2, at 227-34.

[103] *See supra* note 78.

The Department of Justice memorandum clearing E.O. 12,291 argues that "supervision is more readily justified when it does not purport wholly to displace, but only to guide and limit, discretion which Congress has allocated to a particular subordinate official. A wholesale displacement might be held inconsistent with the statute vesting authority in the relevant official." Simms, *supra* note 51, at 4.

an implied expression of congressional will that those decisions not be overseen by OMB. Thus, to avoid a constitutional question, a court should read E.O. 12,291 as withholding OMB authority over decisions delegated by statute to the judgment of the Administrator.

c. Introduction of Non-Statutory Criteria into Agency Rulemaking

Executive Order 12,291 directs OMB to ensure "to the extent permitted by law"[104] that the costs of a regulation do not exceed its benefits, and to attempt to assure that net societal benefits are maximized in agency rulemaking.[105] As noted above, many statutory provisions delegating rulemaking authority to EPA list specific factors (e.g., protection of public health) on which the regulation is to be based. Cost and cost-effectiveness are at times noticeably absent from the list.[106] May OMB properly require EPA to consider economics in its rulemaking when this is not made relevant by the statute authorizing the rule?

Substantial case authority holds that where a statute sets out certain factors to be considered by an agency in a rulemaking, only those factors may be considered.[107] In *Lead Industries Ass'n v. EPA*,[108] for example, the D.C. Circuit rejected an argument that EPA consider the economic or technical feasibility of achieving certain air pollution standards, noting:

This memorandum, however, seems to misperceive the case authorities' thrust. The correct focus is not on whether the displacement of authority is wholesale or only partial; rather, it is on whether the relevant statute specifically and clearly places that decision in the judgment or discretion of the subordinate official. If it does, then arguably no OMB or presidential supervision—wholesale or limited—would be proper.

[104] E.O. 12,291, *supra* note 1, § 2.

[105] *Id.*

[106] *See, e.g.*, 42 U.S.C. § 7409(b)(1) (1982) (EPA Administrator shall promulgate primary National Ambient Air Quality Standards "based on such [published health-based] criteria and allowing an adequate margin of safety, [as] are requisite to protect the public health"); *cf.* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 510-11 (1981) ("When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute.").

[107] There is, however, case authority leaning the other way. *See, e.g.*, American Fed'n of Gov't Employees, AFL-CIO v. Carmen, 669 F.2d 815, 821 (D.C. Cir. 1981) ("We cannot agree that an exercise of [statutory] authority becomes illegitimate if, in design and operation, the President's prescription, in addition to promoting economy and efficiency [as required by the applicable statute], serves other not impermissible ends as well."). This case involved an open-ended delegation of authority to the agency, rather than a set of specific factors to be considered in rulemaking.

[108] 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

> When Congress directs an agency to consider only certain factors in reaching an administrative decision, the agency is not free to trespass beyond the bounds of statutory authority by taking other factors into account. . . . A policy choice such as this *is one which only Congress, not the courts and not EPA*, can make.[109]

Presumably, if neither the courts nor EPA may alter Congress' policy choice, neither may OMB.

The same court reached a similar conclusion in *National Fed'n of Fed. Employees v. Brown*,[110] rejecting the President's introduction of certain non-statutorily enumerated factors:

> Under the structure of government—the separation of powers—established by the Constitution, *the President has no authority* to alter policy and principles declared by Congress even if, at the time the President acts, signals from Congress suggest it would approve the President's action. . . .We must therefore reject the sole position advanced by the Government. . . that the President remains free to define 'the public interest' in any reasonable manner and without reliance upon the explicit standards Congress set to constrain executive discretion.[111]

Other decisions confirm that it is for *Congress* to establish the factors to be considered in administrative decisionmaking.[112] If certain factors clearly are set out as the basis of decision under a statute, other considerations not made relevant by statute should not enter into the calculus.[113]

The D.C. District Court recently applied this principle to a Treasury Department rulemaking in which the agency relied on E.O. 12,291 as the basis for rescinding certain rules. Invalidating

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[109] *Id.* at 1150 (emphasis added).

[110] 645 F.2d 1017 (D.C. Cir. 1981), *cert. denied*, 102 S.Ct. 103 (1982).

[111] *Id.* at 1025 (emphasis added).

[112] *See, e.g.*, American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981) (rejecting industry argument that Occupational Safety and Health Administration must engage in cost-benefit analysis when setting occupational standards for cotton dust exposure); EPA v. National Crushed Stone Ass'n, 449 U.S. 64 (1980) (where industry petitioners argued that certain Clean Air Act standards should consider compliance costs, Court held that Congress had clearly intended technology-based, not cost-based, standards); Union Electric Co. v. EPA, 427 U.S. 246, 257 (1976) ("The [statutory] provision sets out eight criteria that. . .must [be] satisf[ied], and provides that if these criteria are met. . .the Administrator 'shall approve' the proposed state plan. The mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than those specified.").

[113] This, of course, is one implication of the *Steel Seizure Case:* if a statute clearly sets out the criteria to be considered in a rulemaking, the President is on thin constitutional ice when he proposes to graft new considerations onto the statute. *See supra* notes 86-91 and accompanying text.

the rule rescission, the court in *Center for Science in the Public Interest v. Department of the Treasury*[114] stated: "[T]he broad thrust of Executive Order No. 12,291 provides an insufficient basis for the defendants to disregard their statutory duties. . .reflecting Congressional policy which was reaffirmed as recently as 1979."[115] Because the applicable statute included no "proviso that the regulations could be withdrawn if the costs to industry turned out to be too high,"[116] the court reasoned that the Executive Order could not add a new basis for agency action.[117]

These cases illustrate that if EPA is directed by statute to consider certain specified factors in drafting a rule, it is improper for EPA, OMB, or even the President to introduce new criteria—such as the cost-benefit calculation mandated by E.O. 12,291—into the rulemaking. Of course, statutes include provisions of varying specificity as to what factors may be considered in setting a standard or other rule. Logically, the more general and broad a delegation of authority, the more likely that Congress intended to allow the decisionmaker to consider factors he deems relevant, though not specifically cited in the statute. Conversely, the more specific a delegation of authority, the less likely that Congress would countenance the introduction of non-enumerated criteria into the decision.[118]

d. OMB Review is Proper Only if Limited

Influence on a rulemaking ranges from mere commentary, to strong persuasion, to outright control. In light of OMB's pervasive control of executive agency budgets, personnel ceilings, and formal contacts with Congress, as well as its other powers,[119] a scrutinizing eye must be kept on the Office's "suggestions" regarding rulemaking delegated to other agencies. Comments by OMB on executive agency rules are proper, and sometimes desirable for the reasons stated in *Sierra Club*. But, while E.O. 12,291 may be entirely proper as written, it should not be used by OMB as a means to supervise decisions vested by law in the judgment of the EPA Administrator or other official.

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[114] 573 F. Supp. 1168 (D.D.C. 1983), *appeal dismissed*, ___ F.2d ___ (D.C. Cir. 1984).
[115] *Id.* at 1175.
[116] *Id.* at 1174.
[117] *Id.* at 1174-75.
[118] *See generally* Bernstein, *supra* note 2, at 827.
[119] *See supra* text accompanying notes 5-17.

B. OMB Review: The Necessity of Disclosure

1. OMB Contacts with Outside Parties During Rule Review

a. The Ex Parte Contacts Doctrine

While the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. NRDC*[120] may temporarily have fettered judicial creativity under the Administrative Procedure Act (APA),[121] the courts continue to sculpt the APA in an effort to accomodate the needs of modern administrative government.[122] The notion that "informal" rulemaking under the APA[123] should be accompanied by the building of a centralized administrative record has gradually gained acceptance, and continues to retain vitality despite the APA's silence on the point.[124] Courts and commentators have urged agencies to compile such a record to ensure that a complete account of the agencies' rulemaking process is available to the public, to encourage fair and intelligent debate during rulemaking, and to aid courts in reviewing the rationality of agency rulemaking under the APA. An informal rulemaking record serves to document the facts and arguments presented to the agency, and thus helps to ensure that improper, non-statutory factors are not considered in reaching the decision.[125]

Ex parte contacts—unannounced, private, and off-the-record contacts with decisionmakers by those outside the decisionmaking agency—have long been prohibited in formal rulemaking.[126] In the

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[120] 435 U.S. 519 (1978). *Vermont Yankee* strongly cautioned lower courts against imposing procedural requirements not found in the APA on informal rulemaking. For discussions of the *Vermont Yankee* decision, see Stewart, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 Harv. L. Rev. 1805 (1978); Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345.

[121] 5 U.S.C. § 551-559, 701-706 (1982).

[122] *See generally* K. Davis, Administrative Law Treatise §§ 6:36-6:38 (1982 Supp.) (criticizing *Vermont Yankee* and noting continued judicial creativity).

[123] "Informal" rulemaking is a term of art describing rule promulgation by federal agencies pursuant to § 553 of the APA. *See generally* K. Davis, *supra* note 122, §§ 6:1-6:10 (distinguishing between informal, or "notice-and-comment," rulemaking, and formal rulemaking).

[124] *See* Pedersen, *Formal Records and Informal Rulemaking*, 85 Yale L.J. 38 (1975).

[125] *See infra* text accompanying notes 140-59.

[126] Prohibition for agency adjudications is at 5 U.S.C. § 554(d); prohibition for formal rulemakings is at *id.* § 557(d). *See also* Pillsbury Co. v. FTC, 354 F.2d 952, 964 (5th Cir. 1966) (in adjudicatory proceeding, ex parte contacts violate due process); Massachusetts Bay Telecasters, Inc. v. FCC, 261 F.2d 55, 66-67 (D.C. Cir. 1958) (in agency licensing proceeding, ex parte contacts prohibited).

informal rulemaking context, however, there is no express prohibition on ex parte contacts, and the case law is confused.[127]

In informal rulemakings, where trial-type, quasi-adjudicatory[128] proceedings are not required, and no "conflicting private claims to a valuable privilege"[129] are involved, the courts have been circumspect about requiring agencies to avoid, or even to docket,[130] ex parte contacts. A notable exception is *Home Box Office, Inc. v. FCC*,[131] in which the D.C. Circuit[132] held that extensive ex parte contacts during a purely informal rulemaking vitiated an FCC rule, necessitating a remand to the Commission.[133]

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[127] *Compare, e.g.*, Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977) (holding that ex parte contacts during informal rulemaking are generally prohibited), *with* Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977) (holding that ex parte contacts during informal rulemaking not involving competing private claims to a valuable privilege generally are not prohibited).

[128] *See* United States Lines v. FMC, 584 F.2d 519 (D.C. Cir. 1978) (quasi-adjudicatory rulemaking, though not "formal" or fully adjudicatory, vitiated by ex parte contacts); National Small Shipments Traffic Conference, Inc. v. ICC, 590 F.2d 345, 350 (D.C. Cir. 1978) (adjudicative form of informal rulemaking "lies near the core described by the [ex parte contacts] doctrine's rationales").

[129] Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959); *see also* Sierra Club v. Costle, 657 F.2d 298, 400 (D.C. Cir. 1981) (noting that where rulemaking "involves. . .quasi-adjudication among 'conflicting private claims to a valuable privilege' the insulation of the decisionmaker from ex parte contacts is justified by basic notions of due process") (quoting *Sangamon Valley*); Action for Children's Television v. FCC, 564 F.2d 458, 475 (D.C. Cir. 1977) (dictum) (refusing to vacate FCC informal rulemaking decision, despite extensive ex parte contacts, because rulemaking did not involve "conflicting private claims to a valuable privilege"); *accord* Town of Orangetown v. Ruckelshaus, 740 F.2d 185, 188-89 (2d Cir. 1984).

One might consider exactly what this oft-quoted but rarely analyzed *Sangamon Valley* phrase "conflicting private claims to a valuable privilege" actually means. For example, when an agency proceeding decides whether a high level of worker protection from lead poisoning should be compromised to allow an industry to save millions of dollars, are these not competing private claims to valuable privileges (workers' health versus stockholders' dollars)? For a negative answer, see United Steelworkers of America v. Marshall, 647 F.2d 1189, 1218 n.33 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981). Such competing claims to valuable privileges—whose claimants often are readily discernable prior to the rulemaking—may occur in many EPA, OSHA, FDA, and other federal agency informal rulemakings. For example, an EPA standard for ambient levels of particulate matter may determine the future health of tens of thousands of especially pollution-sensitive Americans who are in competition with industrial polluters for the use of a valuable commodity—clean air.

[130] "Docketing" is the practice of placing written materials and summaries of oral communications in a publicly available file.

[131] 567 F.2d 9 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977).

[132] The lengthy per curiam decision, although of course unattributed, was "obviously authored" by Judge Wright. J. Mashaw & R. Merrill, Introduction to the American Public Law System 41 (1980 Supp.).

[133] 567 F.2d at 57.

In light of the Supreme Court decision in *Vermont Yankee*,[134] and subsequent D.C. Circuit decisions,[135] the continued vitality of the broad dicta in *Home Box Office* is suspect.[136] Still, in the face of *Vermont Yankee*, at least one court has held that an agency's purely informal rule was vitiated by extensive post-comment-period ex parte communications.[137]

The current law apparently does not prohibit ex parte contacts during informal rulemaking. One common thread in the decisions is that docketing generally is sufficient to avoid reversal of the rule, as long as the docketing occurs in time for full adversarial comment on the new information or argument.[138] Whether docketing is *required* for substantial argumentative or factual contacts in informal rulemaking is controversial.

The principles developed by the courts applicable to ex parte contacts between the decisionmaking agency and outside parties should apply to contacts between OMB staff and outside parties during rulemaking review. This analogy is proper if OMB is either

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[134] 435 U.S. 519 (1978); *see supra* note 120.

[135] *See, e.g.*, Action for Children's Television v. FCC, 564 F. 2d 458 (D.C. Cir. 1977).

[136] For judicial treatment of ex parte contacts after *Vermont Yankee*, see, e.g., Sierra Club v. Costle, 657 F.2d 298, 391-92 (D.C. Cir. 1981); United Steelworkers of America v. Marshall, 647 F. 2d 1189, 1216 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981); Hercules, Inc. v. EPA, 598 F.2d 91, 126 (D.C. Cir. 1978); United States Lines v. FMC, 584 F.2d 519, 542 n.63 (D.C. Cir. 1978).

Some commentators suggest that *Vermont Yankee* may have overruled the broad *Home Box Office* language. *See, e.g.*, Carberry, *Ex Parte Communications in Off-the-Record Administrative Proceedings: A Proposed Limitation on Judicial Innovation*, 1980 Duke L.J. 65; Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking: Home Box Office and Action for Children's Television*, 1978 Ariz. St. L.J. 69; Bruff, *supra* note 2, at 503.

[137] Environmental Defense Fund v. Blum, 458 F.Supp. 650, 659-61 (D.D.C. 1978).

[138] *Id.* at 660 ("Where . . . information received *ex parte* is not generated internally by the agency, bears directly on highly complex technical issues, and will probably have some effect on the final outcome [of the rule], it should be revealed for public comment before the agency reaches its decision."); *Home Box Office*, 567 F.2d at 57 (suggesting, in dictum, docketing of ex parte contacts in time for interested parties to comment, should ex parte contacts occur despite prohibition thereon); *see also* Admin. Conference of the United States (ACUS), Recommendation 77-3, 1 C.F.R. § 305.77-3 (1984) (recommending docketing of written communications addressed to the merits of an informal rulemaking, and suggesting that agencies experiment with procedures to disclose oral communications of significant arguments or information from ex parte contacts).

The cases encouraging timely docketing of ex parte contacts accord with the principle of administrative law that information critical to the substance of a proposed rule should be docketed to provide adequate opportunity for comment. *See, e.g.*, United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252 (2d Cir. 1977) (noting that where FDA apparently relied on certain data not available for public rebuttal, its action was not based on consideration of all relevant factors and was arbitrary).