



Summer 6-1-1994

The "God Squad" Proves Mortal: Ex Parte Contacts and the White House After Portland Audubon Society

Michael A. Bosh

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Administrative Law Commons](#), and the [Constitutional Law Commons](#)

Recommended Citation

Michael A. Bosh, *The "God Squad" Proves Mortal: Ex Parte Contacts and the White House After Portland Audubon Society*, 51 Wash. & Lee L. Rev. 1029 (1994).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol51/iss3/8>

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

The "God Squad" Proves Mortal: Ex Parte Contacts and the White House After *Portland Audubon Society*

I. Introduction

On February 10, 1993, the United States Court of Appeals for the Ninth Circuit decided *Portland Audubon Society v Endangered Species Committee*.¹ The three member panel of the Ninth Circuit² held that the proceedings of the Endangered Species Committee (Committee), which grants exemptions from the requirements of the Endangered Species Act (ESA)³ for proposed agency action, were subject to the Administrative Procedure Act's⁴ (APA) ban on ex parte contacts.⁵ More importantly,

1. 984 F.2d 1534 (9th Cir. 1993).

2. *Portland Audubon Soc'y v Endangered Species Comm.*, 984 F.2d 1534, 1534 (9th Cir. 1993). Judge Reinhardt delivered the opinion of the court, in which Judge Nelson joined. *Id.* Judge Goodwin filed a concurring opinion. *Id.* at 1551.

3. Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988). See generally BALANCING ON THE BRINK OF EXTINCTION: THE ENDANGERED SPECIES ACT AND LESSONS FOR THE FUTURE (Kathryn A. Kohm ed., 1991) (discussing ESA); ROCKY BARKER, SAVING ALL THE PARTS: RECONCILING ECONOMICS AND THE ENDANGERED SPECIES ACT (1993) (same); Jared des Rosiers, Note, *The Exemption Process Under the Endangered Species Act: How the "God Squad" Works and Why*, 66 NOTRE DAME L. REV. 825, 827-43 (1991) (discussing history and policy behind ESA).

4. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5372, 7521 (1988)).

5. *Portland*, 984 F.2d at 1543. An ex parte communication is "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding." 5 U.S.C. § 551(14) (1988). The original APA prohibited ex parte contacts in any agency adjudication, but this provision did not apply to the agency or members of the agency. 5 U.S.C. § 554(d) (1970). Congress added the present provisions concerning ex parte communications with the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1246 (1976) (codified at 5 U.S.C. § 557(d) (1988)).

however, the court ruled that the APA's prohibition on ex parte communications also applied to the President and his White House staff.⁶

Both courts and commentators have examined the scope of the President's power to influence agency action in the rulemaking and adjudicatory contexts.⁷ These analyses often involve a convergence of the APA and the doctrine of separation of powers and require a characterization of the relevant proceedings under the APA.⁸ The result is a wide range of positions regarding when the President actually crosses the line from supervising and guiding the executive branch to improperly influenc-

6. *Portland*, 984 F.2d at 1548.

7 See generally *Myers v United States*, 272 U.S. 52, 135 (1926) (discussing President's authority to supervise and guide executive branch officials); *Sierra Club v Costle*, 657 F.2d 298, 404-08 (D.C. Cir. 1981) (discussing President's authority to interact in agency proceedings); Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979) (discussing President's role in regulatory process); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV L. REV 1075, 1080-88 (1986) (discussing benefits and answering criticisms of White House review of agency rulemaking); Philip J. Harter, *Executive Oversight of Rulemaking: The President is No Stranger*, 36 AM. U. L. REV 557 (1987) (discussing presidential oversight of regulatory process); Oliver A. Houck, *President X and the New (Approved) Decisionmaking*, 36 AM. U. L. REV 535 (1987) (same); Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV 443 (1987) (discussing President's role in regulatory process); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV 469, 520-24 (1985) (expressing desirability of presidential control over and judicial deference to agency rulemaking); Thomas O. Sargentich, *The Administrative Process in Crisis—The Example of Presidential Oversight of Agency Rulemaking*, 6 ADMIN. L.J. AM. U. 710 (1993) (discussing presidential oversight of regulatory process); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV 181 (1986) (same); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV 943 (1980) (discussing President's role in regulatory process).

8. See generally 5 U.S.C. § 553 (1988) (governing informal rulemaking); *id.* §§ 554, 556-557 (prescribing strict, trial-type procedures that agency must use in formal rulemaking and formal adjudications). The APA does not provide explicit procedures for a fourth type of agency action, informal adjudications, which are those agency adjudications that a statute does not require the agency to make on the record. See Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP CT. REV 345, 384-86 (discussing informal adjudications under APA). This omission by the APA is strange, considering that "informal adjudication undoubtedly constitutes the vast majority of agency actions." *Id.* at 385.

ing an agency action.⁹ While there are relatively well-defined rules and doctrines that courts can apply on either end of the APA spectrum,¹⁰ the congressional creation of hybrid procedures,¹¹ which the APA does not

9. Compare, e.g., DeMuth & Ginsburg, *supra* note 7, at 1075-80 (supporting executive review of agency rulemaking) and Strauss & Sunstein, *supra* note 7, at 188-94 (arguing for more presidential control of regulatory process) and Verkuil, *supra* note 7, at 978-82 (arguing that courts should not extend restrictions on White House involvement in agency proceedings to informal rulemaking context) with Bruff, *supra* note 7, at 500-06 (arguing presidential right to control regulatory process should be limited) and McGarity, *supra* note 7, at 454-89 (arguing any presidential influence over agency proceedings must be in open view).

10. See, e.g., *Sierra Club v Costle*, 657 F.2d 298, 401-02 (D.C. Cir. 1981) (noting Congress did not intend APA prohibition on ex parte contacts to apply to informal rulemaking proceedings); *Sangamon Valley Television Corp. v United States*, 269 F.2d 221, 224 (D.C. Cir. 1959) (barring ex parte contacts when "conflicting private claims to a valuable privilege" are involved). Therefore, the President has the authority to communicate the administration's policy goals during an informal rulemaking, while due process prevents the President from attempting to influence an agency adjudication when an individual is "exceptionally affected, in each case upon individual grounds," by the agency proceeding. *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 245 (1973) (quoting *Bi-Metallic Inv. Co. v State Bd. of Equalization*, 239 U.S. 441, 446 (1915)).

11. See Arthur E. Bonfield, *The Quest for an Ideal State Administrative Rulemaking Procedure*, 18 FLA. ST. U. L. REV. 617, 657-58 (1991) (discussing advantages of hybrid procedures that Congress has imposed on agencies); Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 593 (1989) (noting that Congress has created hybrid rulemaking programs that "employ some adjudicative procedure"); Ronald A. Cass, *Models of Administrative Action*, 72 VA. L. REV. 363, 383 (1986) (noting some statutes create process combining both adjudicatory and legislative procedures); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1399 (1992) (noting that Congress has imposed hybrid procedures upon agencies "on a rather ad hoc basis"); Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625, 1696-97 (1986) (discussing hybrid rulemaking). Hybrid rulemaking procedures also have been imposed by the judiciary, especially during the 1970s, but the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543-48 (1978), halted this practice. See Scalia, *supra* note 8, at 348-52 (discussing judicially imposed hybrid procedures); see also PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 174-75 (1989) (describing development of hybrid rulemaking procedures); Stephen F. Williams, "Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401 (1975) (discussing hybrid rulemaking).

address,¹² forces courts into uncertain characterizations to justify uncertain results. The result in *Portland* typifies such a situation.

The controversy surrounding the ESA has led to numerous proposals calling for significant amendments to the ESA.¹³ Indeed, the spotted owl controversy, alone generating an immense number of cases, illustrates both the importance of the ESA and the friction between environmental and economic concerns.¹⁴ Given the uncertainty concerning the appropriate

12. See *supra* note 8 (noting that APA governs only three categories of agency proceedings).

13. See S. 1521, 103d Cong., 1st Sess. (1993) (proposing amendments to ESA); S. 1440, 103d Cong., 1st Sess. (1993) (same); S. 921, 103d Cong., 1st Sess. (1993) (same); S. 74, 103d Cong., 1st Sess. (1993) (same); H.R. 2207, 103d Cong., 1st Sess. (1993) (same); H.R. 2043, 103d Cong., 1st Sess. (1993) (same); H.R. 1490, 103d Cong., 1st Sess. (1993) (same); H.R. 888, 103d Cong., 1st Sess. (1993) (same); see also 139 CONG. REC. S13,172, S13,172-75 (daily ed. Oct. 6, 1993) (statement of Senators Shelby, Gorton, and Packwood) (introducing and discussing S. 1521); 139 CONG. REC. S10,841, S10,924-25 (daily ed. Aug. 6, 1993) (statement of Sen. Burns) (introducing and discussing S. 1440); 139 CONG. REC. S5647, S5656-62 (daily ed. May 6, 1993) (statement of Sen. Baucus) (introducing and discussing S. 921); 139 CONG. REC. S195, S491-92 (daily ed. Jan. 21, 1993) (statement of Sen. Metzenbaum) (introducing and discussing S. 74); 139 CONG. REC. E1476, E1476-77 (daily ed. June 10, 1993) (statement of Rep. Brewster) (discussing H.R. 2207); 139 CONG. REC. E807, E807-08 (daily ed. Mar. 30, 1993) (statement of Rep. Tauzin) (discussing H.R. 1490).

14. See generally *Portland Audubon Soc'y v Babbitt*, 998 F.2d 705 (9th Cir. 1993) (seeking injunction to protect habitat of Northern Spotted owl); *Seattle Audubon Soc'y v Espy*, 998 F.2d 699 (9th Cir. 1993) (concerning environmental impact statement issued by United States Forest Service for habitat of Northern Spotted owl); *Portland Audubon Soc'y v Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993) (dealing with alleged improper ex parte contacts by President in Committee proceeding); *Lane County Audubon Soc'y v Jamison*, 958 F.2d 290 (9th Cir. 1992) (addressing alleged failure by Bureau of Land Management to consult with Fish and Wildlife Service); *Portland Audubon Soc'y v Lujan*, 884 F.2d 1233 (9th Cir. 1989) (seeking to enjoin sale of old-growth timber by Bureau of Land Management), *cert. denied*, 494 U.S. 1026 (1990); *Douglas County v. Lujan*, 810 F Supp. 1470 (D. Or. 1992) (concerning designation of Northern Spotted owl's critical habitat); *Sweet Home Chapter of Communities for a Great Oregon v. Lujan*, 806 F Supp. 279 (D.D.C. 1992) (examining regulations promulgated by Secretary of Interior), *aff'd*, 1 F.3d 1 (D.C. Cir. 1993), *and rev'd in part*, No. 92-5255, 1994 WL 71984 (D.C. Cir. Mar. 11, 1994); *Seattle Audubon Soc'y v Evans*, 771 F Supp. 1081 (W.D. Wash.) (seeking injunction to halt sale of logging rights in Northern Spotted owl habitat), *aff'd*, 952 F.2d 297 (9th Cir. 1991); *Northern Spotted Owl v Lujan*, 758 F Supp. 621 (W.D. Wash. 1991) (addressing designation of Northern Spotted owl's critical habitat); *Northern Spotted Owl v. Hodel*, 716 F Supp. 479 (W.D. Wash. 1988) (concerning listing of Northern Spotted owl

level of presidential influence over hybrid agency proceedings, and the potential for conflicts similar to those in *Portland*,¹⁵ the time is ripe for a congressional clarification of the President's ability to referee exemption disputes.

This Note, in the context of *Portland*, examines the scope of the President's power to exert influence over an agency action with both adjudicatory and rulemaking features. First, this Note examines the background of *Portland* and sets out the Ninth Circuit's analysis that supported the decision that the APA ban on ex parte communications applies to both Committee proceedings and the President.¹⁶ Second, this Note takes a more detailed look at the Ninth Circuit's reasoning, specifically the validity of the characterization of Committee proceedings as adjudicatory.¹⁷ Finally, this Note looks at the ramifications of the

under ESA); Alyson C. Flournoy, *Beyond the "Spotted Owl Problem" - Learning From the Old-Growth Controversy*, 17 HARV ENVTL. L. REV. 261 (1993) (discussing Northern Spotted owl controversy); Elizabeth A. Foley, *The Tarnishing of an Environmental Jewel: The Endangered Species Act and the Northern Spotted Owl*, 8 J. LAND USE & ENVTL. L. 253 (1992) (same); Victor M. Sher, *Travels With Strix: The Spotted Owl's Journey Through the Federal Courts*, 14 PUB. LAND L. REV. 41 (1993) (chronicling Northern Spotted owl litigation).

15. See BARKER, *supra* note 3, at 6, 156-58 (discussing effect on agricultural irrigation and hydroelectric dams due to protection of several species of Snake River salmon on 200,000 acre Columbia River watershed); 140 CONG. REC. S128-02 (daily ed. Jan. 26, 1994) (statement of Sen. Gorton) (describing how recovery of species of Columbia River salmon caused \$100 million increase in region's 1993 energy costs); see also J. Michael Kennedy, *U.S. Water Curb May Leave San Antonio High and Dry*, L.A. TIMES, Feb. 4, 1993, at A1 (discussing federal judge's ruling that City of San Antonio must maintain flow to two springs fed by Edward's Aquifer at all times to protect four endangered species, thereby threatening 60% of San Antonio's water supply in times of drought); Henry Schacht, *Endangered Species Act Draws Fire in California*, S.F. CHRON., Jan. 23, 1993, at B2 (discussing proposed listing of giant garter snake as endangered species, which would require farmers to obtain permits before they could plant or water crops). The ESA currently protects 277 domestic animals and 243 domestic plants as "endangered." BARKER, *supra* note 3, at 6. In addition, 97 animals and 43 plants are "threatened." *Id.* Moreover, the ESA also protects 528 foreign species. *Id.* These protected species, coupled with the 3,000 domestic species under consideration for protection, show that the current conflicts between protecting both endangered species and the economy will only increase, not abate. *Id.* at 223.

16. See *infra* notes 18-60 and accompanying text (setting out background and Ninth Circuit's analysis in *Portland*).

17. See *infra* notes 61-225 and accompanying text (analyzing Ninth Circuit's reasoning in *Portland*).

Portland decision in light of the doctrine of separation of powers and concludes that although the policy behind the ESA and the APA may prevent members of the general public from privately intervening in Committee proceedings, the Ninth Circuit improperly applied the APA ban on ex parte communications to the President.

II. Background of Portland Audubon Society v Endangered Species Committee

On May 15, 1992, the Endangered Species Committee (Committee), a cabinet-level body also known as the "God Squad,"¹⁸ comprised of six high-ranking executive branch officials and a state representative,¹⁹ granted an exemption from the requirements of the ESA²⁰ to the Bureau

18. See BARKER, *supra* note 3, at 155 (explaining "God Squad" nickname). Commentators call the Committee the "God Squad" because the ESA gives the Committee the power to allow a species to become extinct. *Id.*

19. See 16 U.S.C. § 1536(e)(1) (1988) (establishing Committee). Congress created the Committee and the exemption process in general by amending the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988). See Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (creating Committee and exemption process). The 1978 Amendments created a seven member cabinet-level Committee comprised of the Secretary of Agriculture, the Secretary of the Army, the Chairman of the Council of Economic Advisors, the Administrator of the Environmental Protection Agency, the Secretary of the Interior, the Administrator of the National Oceanic and Atmospheric Administration, and a presidential appointee from each affected state. 16 U.S.C. § 1536(e)(3) (1988). The Secretary of the Interior serves as the chairman of the Committee. *Id.* § 1536(e)(5)(B); see *infra* note 20 (detailing exemption process).

20. The Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988). A key provision of the ESA requires each federal agency to consult with the Secretary of the Interior (or the Secretary of Commerce if the exemption process involves a marine species) whenever the agency "has reason to believe that an endangered species or a threatened species may be present in the area affected by [an agency action] and that such implementation of such action will likely affect such species." *Id.* § 1536(a)(3). The purpose of this consultation is to ensure that the agency action is "not likely to jeopardize the continued existence of any endangered or threatened species unless such agency has been granted an exemption" from the ESA. *Id.* § 1536(a)(2). If, after consultation with the agency under § 1536(a)(2), the Secretary determines that the proposed agency action would violate the ESA, the agency may apply for an exemption. *Id.* § 1536(g)(1). If the Secretary determines that the exemption application satisfies the threshold requirements of § 1536(g)(3)(A), the Secretary holds a hearing and submits a report to the Committee. *Id.* § 1536(g)(4). The Committee, based on the report, the record of the hearing, and any other

of Land Management (BLM) for thirteen of forty-four proposed federal timber sales in western Oregon.²¹ On June 10, 1992, the Portland Audubon Society (PAS) filed a petition for review with the Ninth Circuit. PAS contended in the petition that flaws existed in both the exemption application procedure and the ultimate Committee decision to grant the exemption.²² Relying on published media reports by the Associated

testimony or evidence it receives, then has 30 days to grant or deny the exemption. *Id.* § 1536(h)(1). See des Rosiers, *supra* note 3, at 849-61 (discussing exemption process).

The 1978 amendments to the ESA created the original exemption process, which differed significantly from the present procedure. See generally Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (detailing original exemption process); des Rosiers, *supra* note 3, at 843-48 (discussing 1978 amendments). The primary difference involved the use of a Review Board, which originally included "three members: one appointed by the Secretary, one appointed by the President . . . , and an administrative law judge." H.R. CONF. REP. NO. 1804, 95th Cong., 2d Sess. 19 (1979). The Review Board would ensure that the application met the threshold requirements, conduct a formal evidentiary hearing on the application, and submit a report to the Committee. *Id.* at 19-20. In 1982, Congress amended the ESA, in part, to "streamline" the exemption process by eliminating the Review Board, allocating the Review Board's duties to the Secretary, and reducing the time periods allowed to complete each stage of the procedure. See S. REP. NO. 418, 97th Cong., 2d Sess. 16-19 (1982) (discussing changes to exemption process).

The Committee has granted only one exemption since Congress amended the ESA to include the exemption process. The Committee granted an exemption to the Missouri Basin Power Project on February 7, 1979. *Portland Audubon Soc'y v Endangered Species Comm.*, 984 F.2d 1534, 1537 n.2 (9th Cir. 1993). Another application, concerning Tellico Dam and the famous snail darter, reached the Committee, but the Committee denied the exemption. See *infra* note 98 (describing Tellico Dam exemption case). The Consolidated Grain and Barge Company of St. Louis, Missouri, submitted an application in 1986, but withdrew the application before the Committee took any action. See 51 Fed. Reg. 2750-01 (1986) (announcing withdrawal of application).

21. See 57 Fed. Reg. 23,405-02 (1992) (setting out decision of Committee).

22. Petitioners' Motion For Appointment of Special Master To Govern Discovery, and For Leave to Conduct Discovery at 4, *Portland Audubon Soc'y v Endangered Species Comm.*, 984 F.2d 1534, 1536 (9th Cir. 1993) (No. 92-70436). In addition to the allegation that improper ex parte contacts took place, PAS alleged that (1) BLM failed to consult with the U.S. Fish and Wildlife Service to ensure that the proposed timber sales would not "jeopardize the continued existence of the northern spotted owl" before BLM applied to the Secretary of the Interior (Secretary) for the exemption; (2) BLM violated the National Environmental Policy Act, 42 U.S.C. § 4321, and § 7(k) of the ESA, (3) the Secretary improperly convened the Committee to consider this matter; and (4) the Committee failed to satisfy the statutory requirements set forth in § 7(h) of the ESA before the Committee granted the exemption. *Id.* at 4-6.

Press²³ and Reuters²⁴ alleging that the White House pressured Committee

23. See Scott Fonner, *Bush Prods 'God Squad' to OK Timber Sales, Sources Say*, THE OREGONIAN, May 6, 1992, at D09. The Associated Press (AP) report, in part, read as follows:

The Bush administration is pressuring "God Squad" members to exempt 44 Northwest timber sales from the Endangered Species Act's protection of the northern spotted owl, sources said Tuesday.

Two administration sources, speaking on conditions of anonymity, said that at least three members of the panel have been summoned to White House meetings to discuss coming decisions on the owl.

But a spokesman for Interior Secretary Manuel Lujan Jr. said the conversations pertain to general environmental policy and that no political pressure is being placed on the Endangered Species Committee.

According to the sources, each of the meetings was attended by Lujan, the chairman of the committee, and Clayton Yeutter, President Bush's domestic policy advisor.

William K. Reilly, head of the Environmental Protection Agency and a committee member, joined Lujan and Yeutter in meeting Tuesday, one source said.

John Knauss, head of the National Oceanic and Atmospheric Administration and a committee member, attended a similar meeting within the last two weeks, the source said.

Frances Hunt, a forestry specialist for the National Wildlife Federation, said other administration sources had told her that Knauss was pressured at the meeting to vote for the exemption to the Endangered Species Act.

"My understanding is that it was all-out arm-twisting," she said Tuesday. "Lujan is portraying this as something the administration needs."

Steve Goldstein, Lujan's chief spokesman, confirmed that Lujan and Reilly met Tuesday with Yeutter.

"Clayton Yeutter is the environmental policy coordinator for the administration. We are part of the administration. But no one from the administration will dictate to any committee member how they should vote," Goldstein said.

Id.

24. See Sue Kirchhoff, *Debate Over Owl Protection Comes to a Head on the Hill*, SEATTLE POST-INTELLIGENCER, May 6, 1992, at A3 (publishing Reuters story). The Reuters report was very similar in substance to the report of the AP.

Two administration sources told the Associated Press yesterday that the Bush administration is pressuring members of the Cabinet-level panel to grant the exemption.

The sources, speaking on condition of anonymity, said that at least three members of the Endangered Species Committee, as it is formally known, have

members to grant the exemption, PAS filed a motion seeking authority from the Ninth Circuit to conduct discovery into the alleged contacts. PAS asserted that the contacts would constitute improper ex parte communications under the APA.²⁵ PAS noted that § 557 of the APA, when applicable, prohibits ex parte communications between agency decisionmakers and interested parties outside the agency.²⁶ Because § 557 applies to both rulemaking and adjudicatory decisions that the enacting legislation requires the agency to make "on the record after opportunity for agency hearing"²⁷ and because the ESA requires both a hearing²⁸ and a decision to be made

been called to White House meetings to discuss upcoming decisions on the owl.

But a spokesman for Lujan said the conversations pertain to general environmental policy and that no political pressure is being placed on the panel.

Id.

25. *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1538-39 (9th Cir. 1993). PAS sought: (1) interrogatories and documents identifying staff of Committee and any relevant exchanges between the Committee staff and the White House; (2) subpoenas for documents from the White House on the same subject; and (3) depositions of persons identified in the first two sets of discovery requests. *Id.*

26. *See* 5 U.S.C. § 557(d)(1) (1988) (containing prohibition on improper ex parte communications). Section 557(d)(1) states:

(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;

Id. § 557(d)(1)(A)-(B).

27 *See id.* § 553(c) (pertaining to rulemaking proceedings); *id.* § 554(a) (pertaining to adjudicatory proceedings). Section 553(c) states that "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection." *Id.* § 553(c). Section 554(a) states that "[t]his section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." *Id.* § 554(a).

28. *See* 16 U.S.C. § 1536(g)(4) (1988) (requiring Secretary of Interior to hold hearing if exemption application meets threshold requirements of § 1536(g)(3)(A)(i)-(iii)). Section 1536(g)(4) states:

"on the record,"²⁹ PAS asserted that § 557's ban on ex parte communications applies to the Committee's exemption decisions. On this basis, PAS sought to conduct discovery to determine if the alleged ex parte communications actually occurred.³⁰

III. Court's Analysis in Portland

In *Portland*, the Ninth Circuit addressed two key issues. First, the court considered whether the § 557(d)(1) prohibition on ex parte communications applies to Committee proceedings.³¹ Second, the court considered whether the ban on ex parte communications also applies to the President and White House staff.³²

A. Application of the APA's Ban on Ex Parte Communications to Committee Proceedings

After noting that the ESA provisions dealing with the Committee do not mention the APA, the Ninth Circuit found that the APA itself requires that the APA apply to certain administrative proceedings.³³ Specifically,

If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A)(i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b)(1) and (2) thereof) of title 5 and prepare the report to be submitted pursuant to paragraph (5).

Id.

29. *See id.* § 1536(h)(1)(A) (requiring Committee to make exemption decision "on the record"). Section 1536(h)(1)(A) states that the Committee can grant an exemption if "it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) of this section and on such other testimony or evidence as it may receive " *Id.*

30. *Portland Audubon Soc'y v Endangered Species Comm.*, 984 F.2d 1534, 1536 (9th Cir. 1993).

31. *Id.* at 1539-43.

32. *Id.* at 1543-48.

33. *Id.* at 1540. *See Seacoast Anti-Pollution League v Costle*, 572 F.2d 872, 875-80 (1st Cir.) (discussing applicability of APA § 554 to certain administrative procedures and ultimately determining that phrase "opportunity for public hearing" in § 402 of Clean Water Act, 42 U.S.C. § 1342 (1988), without express statement that hearing must be "on the record," requires formal adjudicatory hearing), *cert. denied*, 439 U.S. 824 (1978); *Marathon*

the court found that the statutory language of § 554 of the APA, which deals with formal adjudication, triggers § 557, which contains the ban on ex parte contacts whenever the provisions of § 554 govern an agency proceeding.³⁴ Therefore, the court found that the APA's ban on ex parte contacts applies whenever the proceeding in question meets the three requirements found in § 554(a).³⁵ Section 554(a) of the APA applies if the agency proceeding is (1) an adjudication; (2) on the record; and (3) after an opportunity for an agency hearing.³⁶

Applying these factors to Committee proceedings, the Ninth Circuit first found that Committee proceedings are quasi-judicial insofar as the Committee uses specific factual showings to determine whether it will grant a particular exemption.³⁷ The court then examined the legislative history of the ESA to support the view that Committee proceedings are "adjudications" under APA § 554(a). Specifically, the court found determinative a Senate report describing the Committee as an "administrative court."³⁸

The Ninth Circuit also found that Committee proceedings satisfy the second requirement of § 554(a) because the ESA compels the Committee to decide "on the record" whether to grant an exemption.³⁹ Finally, the court determined that Committee proceedings satisfy the final requirement of APA § 554(a) because the ESA requires the Committee to base its decision, at least in part, upon the hearing that the Secretary of the Interior holds pursuant to § 1536(g)(4) of the ESA.⁴⁰ Therefore, the court found

Oil Co. v EPA, 564 F.2d 1253, 1261-64 (9th Cir. 1977) (same); United States Steel Corp. v. Train, 556 F.2d 822, 833-34 (7th Cir. 1977) (same).

34. *Portland*, 984 F.2d at 1540.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 1541 (quoting S. REP. NO. 418, *supra* note 20, at 17); *see infra* notes 61-108 and accompanying text (analyzing court's determination that Committee proceedings are adjudicatory).

39. *Portland Audubon Soc'y v Endangered Species Comm.*, 984 F.2d 1534, 1541 (9th Cir. 1993); *see* 16 U.S.C. §1536(h)(1)(A) (requiring Committee decision to be "on the record"); *infra* notes 109-23 and accompanying text (analyzing court's determination that Committee decision is "on the record").

40. *Portland*, 984 F.2d at 1541, *see* 16 U.S.C. § 1536(h)(1)(A) (requiring Committee to base final determination, in part, upon record of Secretary's hearing); *infra* notes 109-38 and accompanying text (analyzing court's determination that Committee proceedings satisfy

that Committee proceedings satisfy the three requirements of § 554(a) of the APA, thereby subjecting the exemption process to the APA ban on ex parte communications found in § 557⁴¹

B. Application of the APA's Ban on Ex Parte Communications to the President and White House Staff

In analyzing whether the APA ban on ex parte contacts should apply to the President in the context of exemption proceedings, the Ninth Circuit first addressed the Government's three arguments as to why APA § 557(d)(1) should not apply to the President or White House staff.⁴² First, the Government argued that neither the President nor a member of the White House staff could be an "interested person" under the APA because the President, due to his position as the core of the executive branch, neither represents a particular agency nor has an interest in agency proceedings that is greater than that of the public as a whole.⁴³ After noting that public policy⁴⁴ and the APA's legislative history⁴⁵ support broadly interpreting the phrase "interested person" to include public officials, the Ninth Circuit relied on *Professional Air Traffic Controllers Organization (PATCO) v Federal Labor Relations Authority*⁴⁶ to conclude that the President and White House staff are "interested persons" under the APA.⁴⁷

§ 554(a)).

41. *Portland*, 984 F.2d at 1543.

42. *Id.* at 1543-44.

43. *Id.* at 1544.

44. *Id.*

45. *Id.*

46. 685 F.2d 547 (D.C. Cir. 1982); *see infra* notes 146-50 and accompanying text (discussing *Professional Air Traffic Controllers Org. (PATCO) v. Federal Labor Relations Auth.*, 685 F.2d 547, 562 (D.C. Cir. 1982)).

47. *Portland Audubon Soc'y v Endangered Species Comm.*, 984 F.2d 1534, 1545 (9th Cir. 1993). The *PATCO* court found that Congress intended the phrase "interested person" to be a "wide, inclusive term covering any individual or other person with an interest in the agency proceeding that is greater than the general interest the public as a whole may have." *Professional Air Traffic Controllers Org. (PATCO) v Federal Labor Relations Auth.*, 685 F.2d 547, 562 (D.C. Cir. 1982); *see infra* notes 151-52 and accompanying text (discussing Ninth Circuit's analysis of *PATCO*).

Second, the Government asserted that the President is not "outside the agency" for purposes of APA § 557(d)(1).⁴⁸ Because all Committee members are executive branch officials, the Government argued that Congress explicitly recognized the role of the President in the Committee's decisionmaking process and accordingly could not limit the President's power to speak confidentially with any of his appointees on the Committee.⁴⁹ The Ninth Circuit, however, determined that the President and White House staff are not part of the Committee's decisionmaking process and are therefore "outside the agency" for purposes of the APA prohibition on ex parte communications.⁵⁰

Finally, the Government argued that application of the APA's prohibition on ex parte contacts would violate the separation of powers doctrine.⁵¹ Relying on *Myers v United States*,⁵² the Government asserted that subjecting the President to the ban on ex parte communications would impermissibly infringe on the President's constitutional duty to

48. *Portland*, 984 F.2d at 1545.

49. *Id.*

50. *Id.* at 1545-46. The court also rejected the Government's contention that *Sierra Club v Costle*, 657 F.2d 298 (D.C. Cir. 1981), asserts that contacts with the White House are not ex parte contacts which taint the decisionmaking process. *Portland*, 984 F.2d at 1545-46; *see infra* notes 178-87 and accompanying text (discussing *Sierra Club*).

51. *Portland*, 984 F.2d at 1546.

52. 272 U.S. 52 (1926). In *Myers v United States*, 272 U.S. 52 (1926), the Supreme Court addressed whether the Constitution gives the President the authority to remove executive officers whom he has appointed with the advice and consent of the Senate. *Id.* at 106. President Wilson had demanded the resignation of a postmaster, Myers, whom he had personally appointed. After Myers refused to resign, Wilson removed him from office and Myers brought suit seeking his salary to the end of his term. *Id.* Premised on the belief that the three branches of government should be kept separate unless expressly blended by the Constitution and emphasizing the President's duty under the Take Care Clause, the Court determined that Congress had no authority to limit the President's removal power of executive officials. *Id.* at 134. The Court concluded that the President "may properly supervise and guide their construction of the statutes under which they act in order to secure the unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." *Id.* at 135. While recognizing in dicta that "duties of a quasi-judicial character [could be] imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control," the Court found that this restriction would not limit the President's power to remove such an executive officer. *Id.*

"supervise and guide" his executive branch subordinates.⁵³ Rejecting this argument "out of hand," the Ninth Circuit used the Supreme Court's analysis in *Nixon v Administrator of General Services*⁵⁴ to evaluate whether Congress improperly interfered with a presidential power by establishing Committee procedures that may forbid presidential contact with key cabinet officials during Committee proceedings.⁵⁵ After characterizing the impact on presidential power as "de minimis," the court found that the policy goals the ban on ex parte communications furthered more than outweighed any such infringement.⁵⁶ Moreover, the court found that if the Government's separation of powers argument prevailed, the result would "destroy the integrity of all federal agency adjudications."⁵⁷

Ultimately, after determining that Congress had the power to shield the Committee from presidential control, the Ninth Circuit held that the APA's prohibition on ex parte contacts applies to any communications between the White House and the Committee that are relevant to the merits of a pending exemption decision.⁵⁸ Although finding for PAS on the merits, the Ninth Circuit denied PAS's motion for expedited discovery.⁵⁹ Instead, the court granted a remand to the Committee for an evidentiary hearing to determine

53. *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1546 (9th Cir. 1993).

54. 433 U.S. 425 (1977); *see infra* notes 159-67 and accompanying text (discussing *Nixon I*).

55. *Portland*, 984 F.2d at 1546.

56. *Id.*, *see infra* notes 159-61 and accompanying text (discussing Ninth Circuit's determination that applying APA's prohibition of ex parte contacts to President in context of exemption proceedings will not violate separation of powers).

57. *Portland*, 984 F.2d at 1546-47.

58. *Id.* at 1547-48. Whereas the court included the President in its holding that the APA prohibits these types of ex parte communications, Judge Goodwin refused to extend the APA's ban on ex parte contacts to communications from the President on the facts in *Portland*. *Id.* at 1551 (Goodwin, J., concurring). While agreeing that executive and cabinet level officials would be subject to the ban, Judge Goodwin would not have addressed the "troubling separation of powers problems" when no evidence existed that President Bush himself had any contact with members of the Committee. *Id.* (Goodwin, J., concurring).

59. *Id.* at 1549. The court determined that granting PAS's motion for discovery would be improper because there was not a need for "extremely prompt action," which such a motion requires. *Id.* Instead, the Ninth Circuit concluded that allowing the agency to resolve the factual issues that PAS's motion presented would protect the purposes behind the ESA. *Id.*

the nature and source of any improper contacts and their effect upon the Committee's decisionmaking process.⁶⁰

IV Analysis of the Court's Reasoning in Portland

The Ninth Circuit's initial characterization of Committee proceedings as adjudicatory compelled the conclusion that both Committee proceedings and the White House are subject to the APA ban on ex parte communications. This facially valid characterization, however, fails to portray accurately the overall policy and procedure implicit in the ESA, both of which support a characterization of Committee proceedings as something other than either a pure adjudication or rulemaking under the APA. The Ninth Circuit, faced with this dilemma of a hybrid procedure, chose to characterize Committee proceedings as adjudicatory and ignored both the internal and external inconsistencies that this determination creates.

A. Analysis of Court's Decision that Committee Proceedings Are Adjudicatory

The Ninth Circuit's first characterization was that the proceedings of the Committee are quasi-judicial, thereby satisfying the first prong of APA

60. *Id.* at 1549-50. Pursuant to the determination that any ex parte contacts would be improper, the Ninth Circuit remanded the issue to the Committee to conduct an evidentiary hearing into whether the alleged ex parte communications actually took place. *Id.* However, before the Committee held this hearing, the BLM withdrew the exemption application for the proposed timber sales on April 19, 1993. Letter from Michael Penfold, Acting Director, Bureau of Land Management, to Bruce Babbitt, Secretary of the Interior (Apr. 19, 1993). Subsequently, on June 3, 1993, the Ninth Circuit granted the Committee's motion to dismiss, having determined that the withdrawal mooted the need for a remand. *See Portland Audubon Soc'y v Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993) (Order Granting Motion to Dismiss as Moot, Denying Oregon Lands Coalition Request to Vacate Prior Opinion) (dismissing case, thereby negating need for remand to Committee). This dismissal, however, does not diminish the importance of this issue because the Ninth Circuit did not withdraw its decision. For discussions of the current status of the Northern Spotted owl controversy, see Eastside Ecosystem Management Strategy, Pacific Northwest Region, 59 Fed. Reg. 4680 (1994) (providing notice of intent to prepare environmental impact statement on Clinton Administration's plan for managing forests in Pacific Northwest); Tom Kenworthy, *Revised Clinton Plan Saves More Forest*, WASH. POST, Feb. 24, 1994, at A4 (discussing Clinton Administration's modified plan for managing forests in Pacific Northwest).

§ 554(a).⁶¹ This characterization made inevitable the conclusion that APA § 557's ban on ex parte communications would apply to the exemption process.⁶² The court turned to both the legislative history of the ESA and judicial precedent to support this characterization.⁶³

To buttress the conclusion that Committee proceedings are quasi-adjudicatory, the court examined the legislative history of the ESA.⁶⁴ Specifically, the Ninth Circuit quoted a Senate Report that states that the "Endangered Species Committee is designed to function as an administrative court of last resort."⁶⁵ The court, however, failed to put this statement in context.

61. See *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1540 (9th Cir. 1993) (finding Committee determinations to be "quasi-judicial"); *id.* at 1547 (noting that President cannot interfere with "quasi-adjudicatory agency actions"). That the Ninth Circuit labeled Committee proceedings "quasi-adjudicatory," as opposed to "adjudicatory," is also important. See Edwin J. Madaj, *Agency Investigations: Adjudication or Rulemaking?—The ITC's Material Injury Determinations Under the Antidumping and Countervailing Duty Laws*, 15 N.C. J. INT'L L. & COM. REG. 441, 445 (1990) (noting problems with labels such as "quasi-adjudication" and "quasirulemaking"). Madaj says:

It is questionable whether this "quasi" categorization means very much, particularly since there appears to be no set definition of a quasi-adjudicative or quasi-legislative proceeding. A quasiadjudication is not an adjudication, but rather some other type of proceeding which the categorizer is unable to describe except by styling it as something with similarities to an adjudicatory proceeding.

Id. Justice Jackson agreed, finding that the "mere retreat to the qualifying 'quasi' is implicit with the confession that all recognized classifications have broken down and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting).

62. See *Portland*, 984 F.2d at 1540-41 (determining that Committee proceedings constitute adjudications within meaning of APA § 554(a)).

63. *Id.*

64. *Id.* at 1541.

65. S. REP. NO. 418, *supra* note 20, at 17. In addition to the language characterizing the Committee as an "administrative court of last resort," the Ninth Circuit found two more portions of this Report relevant. First, the Report provides that the Committee is to base the final decision, in part, upon a "formal adjudicatory hearing." *Id.* at 18. Second, the court states that the Report "makes clear that the Committee's duty is to be an ultimate arbiter of conflicts that the parties have been unable to resolve." *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1541 (9th Cir. 1993) (citing to pp. 16-17 of Report). The former reference is of questionable value because there is no dispute that the Secretary holds a formal adjudicatory hearing. See 16 U.S.C. § 1536(g)(4) (1988) (requiring Secretary, if threshold requirements of exemption application satisfied, to hold hearing "in accordance with sections 554, 555, and 556 [of the APA]"). What is disputed, however, is whether the Committee proceedings constitute an adjudication.

First, the portion of the Report from which the court extracted this sentence deals with the requirement that an agency make a complete and good faith effort to resolve a conflict between the proposed agency action and the ESA through consultation with the Fish and Wildlife Service.⁶⁶ The Senate intended the quoted passage merely to clarify that both the agency and the Fish and Wildlife Service must make every conceivable attempt to reconcile the agency action with the ESA, not necessarily to characterize the Committee proceedings as adjudicatory.⁶⁷ Second, the Senate prepared the quoted Report nearly four years after Congress passed the legislation creating the exemption process. This fact raises doubts about the Report's reliability for conveying congressional intent pertaining to characterizations of Committee proceedings.⁶⁸ Finally, while additional portions of the legislative history tend to support the Ninth Circuit's characterization,⁶⁹

66. See S. REP. NO. 418, *supra* note 20, at 17-18 (noting that Secretary should reject any application "until all other administrative remedies have been pursued in good faith"); see also 16 U.S.C. § 1536(a)-(c) (1988) (discussing consultation process).

67. See S. REP. NO. 418, 97th Cong., 2d Sess 17 (1982) (discussing that under ESA, "an action cannot be considered for an exemption unless every effort has been made to resolve the conflict"). The original legislation required a determination that an "irresolvable conflict" existed before the Review Board could prepare the report for the Committee. *Id.* The 1982 Amendments to the ESA removed this requirement because Congress felt that "all conflicts are 'resolvable' whether by accommodation, exemption, or otherwise, and that the real purpose of this provision had been to ensure that every effort had been made by the agency and the Fish and Wildlife Service to resolve the conflict before the Committee examined the issue." *Id.* Congress, therefore, intended the key element of the phrase "administrative court of last resort" to be "last resort," not "administrative court."

68. See S. REP. NO. 418, *supra* note 20 (reporting Senate version of proposed Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411). In addition to Congress preparing the Report four years after the ESA created the Committee, the House Conference Report for the 1982 Amendments does not contain language characterizing the Committee as an "administrative court of last resort." See H.R. CONF. REP. NO. 835, 97th Cong., 2d Sess. (1982) (failing to characterize Committee as administrative court); *supra* note 20 (discussing how 1982 amendments changed exemption process).

69. See H.R. CONF. REP. NO. 835, *supra* note 68, at 28 (stating administrative law judge will preside over formal hearing); S. REP. NO. 418, *supra* note 20, at 18-19 (requiring Secretary to hold formal adjudicatory hearing to provide record of facts); H.R. CONF. REP. NO. 1804, *supra* note 20, at 19 (noting Secretary to hold formal adjudicatory hearing); H. REP. NO. 1625, 95th Cong., 2d Sess. 14 (1978) (same); S. REP. NO. 874, 95th Cong., 2d Sess. 6 (1978) (providing that "final determination must be on the record and thus must be accompanied by a formal hearing process"). The references to a formal adjudicatory hearing,

other portions appear to refute the characterization by implying that the evidence the Committee gathers after receiving the Secretary's report is not subject to the strict guidelines of formal proceedings.⁷⁰ Indeed, a portion of the legislative history goes so far as to compare the process to an administrative hearing examiner making recommendations to an agency on a "pending regulatory proposal."⁷¹

The court's determination that Committee proceedings are adjudicatory is questionable for several other reasons. First, while the Committee grants or denies exemptions on a case-by-case basis,⁷² the Committee bases exemption decisions almost exclusively upon policy judgments.⁷³ These

however, do not characterize Committee proceedings, but the hearing that § 1536(g)(4) requires the Secretary to hold before preparing the report that § 1536(g)(5) requires. *See supra* note 65 (noting that there is no dispute that Secretary's hearing is "formal").

70. *See* S. REP. NO. 418, *supra* note 20, at 19 (noting that Committee is "not expected to conduct additional formal adjudicatory hearings"); H.R. CONF. REP. NO. 1804, *supra* note 20, at 20 (same); H.R. REP. NO. 1625, *supra* note 69, at 24 (same). The Senate Report even implies that APA protections are not strictly required for the Secretary's hearing: "[I]t will be practicable in *most*, if not all, cases to conduct the required hearing in accordance with sections 554, 555, and 556 [of the APA]." S. REP. NO. 418, *supra* note 20, at 18 (emphasis added).

71. H.R. REP. NO. 1625, *supra* note 69, at 14. The Report compares the exemption process to an "administrative hearing examiner who makes recommendations to a Federal agency on a pending regulatory proposal." *Id.*

72. *See id.* § 1536(e)-(p) (1988) (detailing exemption process).

73. *See id.* § 1536(g)(5) (detailing what Secretary's report to Committee must discuss). Section 1536(g)(5) requires the Secretary's report to discuss:

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternate courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section.

Id. § 1536(g)(5)(A)-(D). These factors mirror the factors the Committee considers when making the final exemption decision. *Id.* § 1536(h)(1)(A)(i)-(iv). The legislative history makes clear, however, that these criteria are not the only factors the Committee can take into consideration. *See* S. REP. NO. 874, *supra* note 69, at 7 (stating that criteria found in

policy considerations include balancing national goals and priorities against the value of the endangered species that the proposed agency action will harm.⁷⁴ The ESA requires that the proposed agency action be both "in the public interest" and "of regional or national significance" before the Committee can grant an exemption.⁷⁵ Taken together, therefore, the public policy that the Committee considers and the legislative history of the ESA indicate that Congress explicitly intended the Committee to examine only agency action that concerns the public as a whole and that has far-reaching environmental and economic implications.⁷⁶ This intent runs counter to a characterization of the Committee as a mere arbitrator of factual disputes between an exemption applicant and a federal agency

Similarly, the Ninth Circuit's use of precedent in forming the key characterization of Committee proceedings as adjudicatory is unpersuasive. Relying on *Marathon Oil Co. v Environmental Protection Agency*,⁷⁷ the

§ 1536(h)(1)(A) are not meant to limit Committee, but are only examples of factors Committee should consider).

74. See H.R. CONF. REP. NO. 1804, *supra* note 20, at 21 (providing factors for Committee to consider when making exemption decision); H.R. REP. NO. 1625, *supra* note 69, at 22 (same); S. REP. NO. 874, *supra* note 69, at 7 (same). House Report No. 1625, for example, states that besides the criteria the ESA lists, the Committee should "also consider the national interest . . . , the aesthetic, ecological, educational, historical, recreational and scientific value of any endangered or threatened species; and any other factors deemed relevant." H.R. REP. NO. 1625, *supra* note 69, at 22. On the floor of the Senate, during consideration of the passage of the legislation creating the Committee, Senator Wallop stated that the amendments provided a process by which the Committee could "balance the need to protect and manage endangered species while considering other legitimate national priorities." 124 CONG. REC. 21,137 (1978).

75. 16 U.S.C. § 1536(h)(1)(A)(ii)-(iii) (1988).

76. See, e.g., Richard Siegal, *Will the Winner be Owls or Jobs?*, WASH. TIMES, Sept. 4, 1990, at C4 (discussing two studies concerning number of jobs at stake in Northern Spotted owl controversy). The Forest Service estimated that 28,000 jobs could be lost, while the timber industry estimated that 44,500 people would lose their jobs directly, and nearly 60,000 more indirectly. *Id.* The Fish and Wildlife Service estimated that the listing of the Northern Spotted owl would result in 32,000 lost jobs, or one-third of the 110,000 timber-related jobs in Washington and Oregon in 1989. BARKER, *supra* note 3, at 110, 120.

77. 564 F.2d 1253 (9th Cir. 1977). In *Marathon Oil Co. v EPA*, 564 F.2d 1253 (9th Cir. 1977), oil companies challenged the waste disposal levels of effluent limitations set through permits by the EPA under the Federal Water Pollution Control Act (Act). *Id.* at 1256-57. The Act requires the EPA to provide an "opportunity for public hearing," and the EPA interpreted this provision not to require a full adjudicatory hearing under the APA. *Id.* at 1258. Petitioners brought suit, contending that the Act mandates a full adjudicatory

court distinguished between quasi-judicial and rulemaking proceedings,⁷⁸ noting that the former involves adjudicating "disputed facts in particular cases," whereas the latter requires the making of policy judgments that an agency can apply to future cases.⁷⁹ Based upon this dichotomy, the Ninth Circuit determined that Committee proceedings are quasi-judicial in that the Committee considers specific exemptions and bases final decisions upon "specific factual showings."⁸⁰

However, the court failed to note the key distinction between adjudicative and legislative facts.⁸¹ Committee proceedings do not involve the

hearing in accord with §§ 554, 556, and 557 of the APA. *Id.* at 1260. The Ninth Circuit agreed, finding that Congress, through the APA, recognized that when administration proceedings resemble a judicial action, the APA requires procedural protections similar to those in judicial proceedings. *Id.* at 1261. Based upon a dichotomy between "quasi-judicial proceedings [that] determine the specific rights of particular individuals" and "agency determinations that depend more on the drawing of policy," the Ninth Circuit determined that the Act's process for setting effluent limitations clearly were "adjudicatory" in nature and that "[a]dversarial hearings [would] be helpful" to ensure reasoned decisionmaking and effective judicial review. *Id.* at 1261-62. The *Marathon Oil* court also addressed petitioner's contention that the APA's provisions for formal adjudications do not apply to the permit hearing because the Act did not require the public hearing to be held "on the record." *Id.* at 1262-63. The Ninth Circuit rejected this argument, asserting that Congress did not intend the language of APA § 554(a) to be a "talisman." *Id.* at 1263-64. Instead, the court found that Congress intended the substantive nature of the hearing under the relevant statute to determine if the APA's formal adjudicatory provisions apply. *Id.* at 1263-64. Under this framework, the *Marathon Oil* court determined that the substantive nature of the public hearing afforded permit applicants under the Act requires the formal adjudicatory provisions of the APA to apply. *Id.* at 1264.

78. *Portland Audubon Soc'y v Endangered Species Comm.*, 984 F.2d 1534, 1540 (9th Cir. 1993).

79. *Id.* (quoting *Marathon Oil Co. v EPA*, 564 F.2d 1253, 1261 (9th Cir. 1977)).

80. *Id.*

81. See KENNETH C. DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE §§ 7.5, 10.5 (1994) (discussing widely accepted distinction between legislative and adjudicative facts). Professors Davis and Pierce state:

Adjudicative facts are the kind of specific historic facts that are resolved by a jury in a judicial trial—who, what, where, when, and why. Disputes concerning the factual predicates of rules almost invariably concern legislative facts. Legislative facts are the general facts on which all legal institutions—legislatures, courts, and agencies—predicate rules of law.

Id. § 7.5. The Second Circuit determined that in rulemakings:

former because the Committee does not hear conflicting descriptions of the situation. Rather, the Committee hears differing views of what is in the public's best interest.⁸² For example, in the case of the Northern Spotted owl, the consultation process made clear that the proposed timber sales would harm the Northern Spotted owl. In exempting the timber sales, the Committee did not dispute that the proposed timber sales would be harmful to the owl, but instead determined that the "social, cultural, economic and other benefits" of the proposed timber sales outweighed the "ecological, educational, scientific, and other benefits of alternatives which would conserve the species."⁸³ This is a policy decision involving legislative facts to which the APA's prohibition should not apply.⁸⁴

[T]he key questions of fact [are] "legislative" rather than "adjudicatory"—that is, they [are] matters of statistics, economics and expert interpretation, rather than questions of whether some norm [has been violated] and [someone] would thus be subject to retrospective sanctions or other judicial questions of who did what, when, and where.

American Tel. & Tel. Co. v FCC, 449 F.2d 439, 454-55 (2d Cir. 1971). In addition, the Justice Department, which helped draft the APA, stated that "[p]roceedings are classified as rule makings under [the APA] not merely because, like the legislative process, they result in regulations of general applicability, but also because they involve subject matter demanding judgments based on technical knowledge and experience." ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 126-27 (1947) [hereinafter ATTORNEY GENERAL'S MANUAL].

82. See H.R. REP NO. 1625, *supra* note 69, at 23 (describing meaning of phrase "public interest" in context of § 1536(h)(1)(A)(ii)); S. REP NO. 874, *supra* note 69, at 7 (noting that Committee must determine which result is in public's best interest). House Report No. 1625 provides that "[t]o be 'in the public interest,' an agency action must affect some interest, right or duty of the community at large in a way which they would perceive as positive." H.R. REP NO. 1625, *supra* note 69, at 23. Senate Report No. 874 states that "great care must be applied in trying to decide, finally, in cases of conflict, what future course of action is in the public interest." S. REP. NO. 874, *supra* note 69, at 7 This belies an assertion that Committee proceedings are concerned with "individual interests."

83. 125 CONG. REC. 14,571 (1979).

84. See DAVIS & PIERCE, *supra* note 81, § 8.4 (arguing prohibition of ex parte contacts should not apply to contested issues of legislative facts). Professors Davis and Pierce state that the "statutory prohibition on ex parte communications should apply only to communications with respect to contested, material adjudicatory facts. It should have no application to issues of policy or legislative facts." *Id.*

Third, the Ninth Circuit, while acknowledging that an impartial decisionmaker is crucial to an adjudicatory decision,⁸⁵ ignored the inherent bias of the exemption process toward environmental concerns due to the statutory makeup of the Committee.⁸⁶ Although Congress attempted to create a balanced and expert Committee,⁸⁷ the ESA's legislative history indicates that the key congressional concern was to ensure an *informed*, not an impartial, decision.⁸⁸ The makeup of the Committee

85. *Portland Audubon Soc'y v Endangered Species Comm.*, 984 F.2d 1534, 1543 (9th Cir. 1993).

86. *See* 16 U.S.C. § 1536(e)(3) (1988) (listing members of Committee).

87. *See* S. REP. NO. 874, *supra* note 69, at 4 (discussing balance of Committee). The Senate Report states that the Committee will "offer the involvement of the broadest array of expertise and the greatest potential for a balancing of viewpoints concerning all the alternatives to be considered." *Id.* The present makeup of the Committee represents a compromise over the proposals the House and Senate made. Senate Bill 2899 differed from the enacted ESA in that the bill recommended that the Committee be comprised of the Secretary of the Interior, the Secretary of the Army, the Secretary of Agriculture, the Secretary of the Smithsonian Institution, the Administrator of the Environmental Protection Agency, the Chairman of the Council on Environmental Quality, and the governor of the state affected by the proposed agency action. *See id.* (listing proposed members of Committee). House Resolution 14104, on the other hand, proposed a six member Committee comprised of the Secretary of Agriculture, the Secretary of the Army, the Secretary of the Interior, the Administrator of the National Oceanic and Atmospheric Administration, the Chairman of the Council on Environmental Quality, and the governor of the state affected by the proposed agency action. *See* H.R. REP. NO. 1625, *supra* note 69, at 14-15 (listing proposed members of Committee). The enacted legislation adopted the Senate proposal for a seven member Committee, but substituted the Chairman of the Council of Economic Advisors for the Chairman of the Council on Environmental Quality, the Administrator of the National Oceanic and Atmospheric Administration for the Director of the Smithsonian, and made the state representative a presidential appointee. *See* 16 U.S.C. § 1536(e)(3) (1988) (listing makeup of Committee).

88. *See* 124 CONG. REC. 21,288 (1978) (discussing Committee makeup and slant toward environment); *id.* at 21,334 (same). Senator Culver of Iowa, co-sponsor of the amendments creating the Committee, stated:

[W]e have I believe set up a system which will afford a very carefully considered process whereby this Endangered Species Committee can weigh the evidence—we have strengthened provisions for consultation—and can reach an informed judgment. The Endangered Species Committee has been weighted in its voting so that the presumption in favor of protection of the species is overwhelming.

Id. at 21,288. Similarly, Senator Stennis told the Senate not to "fool" themselves, as they were "not setting up an impartial commission that is going to make decisions by a majority vote." *Id.* at 21,334.

reflects a congressional attempt to balance environmental and developmental concerns.⁸⁹ Three Committee members appear inclined toward environmental concerns and three lean towards development, leaving the state representative to be a presidentially appointed wildcard.⁹⁰ The requirement that five Committee members vote for an exemption before the Committee grants an exemption, however, belies this "balance" because only three votes are needed to defeat any exemption.⁹¹ Thus, unless one of the Committee's three environmentalists votes against an endangered species, the Committee cannot grant an exemption.⁹²

Congress, through the ESA, has not created a panel of seven impartial members who enter Committee proceedings with open minds as to the

89. See *id.* at 38,124 (noting Interior Department and National Oceanic and Atmospheric Administration represent environmental interests, while Departments of the Army and Agriculture represent development concerns); *id.* at 21,146 (noting Secretary of Interior and Administrator of Environmental Protection Agency are pro-environment). Based upon this setup, the Secretary of the Interior, the Administrator of the National Oceanic and Atmospheric Administration, and the Administrator of the Environmental Protection Agency represent pro-environment concerns. The Secretary of the Army, Secretary of Agriculture, and the Chairman of the Council of Economic Advisors represent pro-development interests. Because the President appoints the seventh Committee member, the President will be able to choose a state representative who shares the Administration's general views on the clash between environment and economic concerns.

90. This "balance," of course, assumes Congress did not place the Chairman of the Council of Economic Advisors on the Committee for his environmental views. See 125 CONG. REC. 14,575 (1979) (noting that Chairman of the Council of Economic Advisors is not on Committee for environmental concerns).

91. See 16 U.S.C. § 1536(h)(1) (1988) (requiring five affirmative votes before exemption can be granted); 124 CONG. REC. 21,146 (1978) (discussing burden on exemption applicant that statutory makeup of Committee creates); *supra* note 88 (providing references to floor debate discussing how Committee is deliberately weighted toward environment). Senator Stennis, during debate on the amendments creating the Committee, stated that the ESA creates "very heavy burdens of proof to be carried by a sponsoring agency. They are particularly heavy when the requirement of five affirmative votes and the composition of the committee is [sic] added. The committee setup appears to me to be an institutional veto." *Id.*

92. See Keith Schneider, *White House on Conflicting Paths As It Agrees to Protection for Owl*, N.Y. TIMES, May 15, 1992, at A1 (detailing voting results in Committee's final decision in *Portland*). Both Manual Lujan, Jr., Secretary of the Interior, and John Knauss, the Administrator of the National Oceanic and Atmospheric Administration, voted to exempt the 13 timber sales, meaning that two of the three "environmentalists" voted with the pro-development Committee members against the Northern Spotted owl. *Id.*

exemption decision. Instead, Congress placed six high-ranking cabinet officials and a presidential appointee on the Committee.⁹³ Congress created the Committee with the knowledge that each Committee member would be leaning toward a particular decision due to the policy views implicit in that member's position in the executive branch.⁹⁴ Indeed, any assertion that Congress chose these six cabinet officials solely because of their expertise would be inaccurate. Congress easily could have enacted legislation calling for the Committee to be comprised of experts with superior qualifications and tailored to each particular exemption application.⁹⁵ This structure would provide a more "informed" and politically insulated Committee, and also would free six high-ranking cabinet officials from weeks of hearings and deliberations and allow them to resume their traditional executive branch duties.⁹⁶ The enactment of the ESA as written, therefore, indicates that Congress believed each Committee member would need not only mere technical knowledge, but also a grasp on the relevant policy considerations, which the Committee members would hold by virtue of their positions in the executive branch.⁹⁷

93. See 16 U.S.C. § 1536(e)(3) (1988) (providing composition of Committee).

94. See *supra* notes 85-97 and accompanying text (discussing congressional intent to weigh Committee toward environment).

95. See, e.g., 7 U.S.C. § 4(a) (1988) (establishing Commodity Futures Trading Commission and requiring President to nominate persons with "demonstrated knowledge" in subject area); 15 U.S.C. § 2053(a) (1988) (establishing Consumer Product Safety Commission and requiring President to appoint individuals whose "background and expertise" qualify them for appointment); 19 U.S.C. § 1330(a) (1988) (establishing United States International Trade Commission and requiring President to appoint only those individuals having "expert knowledge of international trade problems"); 42 U.S.C. § 907(a) (1988) (establishing National Commission on Social Security and requiring members of "recognized standing and distinction").

96. See 16 U.S.C. § 1536(h)(1) (1988) (requiring Committee to gather any further information and to make final determination within 30 days of receiving Secretary's report). In addition to the 30 days the Committee will spend gathering information and deliberating, the ESA also requires the Committee members to consult with the Secretary during the hearing that § 1536(g)(4) requires, a process that can take up to 140 days. *Id.* § 1536(g)(5). Indeed, Congress, recognizing the problems that Committee members would face, said "[w]e recognized that it will be exceedingly difficult to get the cabinet level committee members to devote a substantial amount of personal time to the collection of evidence on the merits of any exemption." 124 CONG. REC. 38,133 (1978).

97 See Verkuil, *supra* note 7, at 964-65 (discussing how choice of procedure by Congress can be relevant). Professor Verkuil states that "[b]y choosing to christen an

Finally, the Ninth Circuit's characterization of Committee proceedings as adjudicatory disregards other elements of the exemption process that are inconsistent with regular notions of adjudicatory proceedings. For example, Congress has the power to circumvent individual Committee decisions.⁹⁸ Thus, although the legislative history shows a clear intent to

executive agency as the policymaking vessel, Congress makes a considered judgment about the need for stronger executive and political control." *Id.*

98. See generally Stephen W. Owens, *Congressional Action Exempts Observatory from the Endangered Species Act*, 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 314 (1993) (discussing congressional exemptions for specific projects from environmental laws). The best example of how Congress would be willing to void a Committee decision involves the Tellico Dam in Tennessee, which helped bring about the creation of the Committee. Tellico Dam was a project under the control of the Tennessee Valley Authority (TVA) and was 80% complete when Congress passed the ESA in 1973. When the dam was 90% complete, and after the TVA had spent \$100 million, a citizens group established that the proposed reservoir would harm an endangered fish, the snail darter. See S. REP. NO. 151, 96th Cong., 1st Sess. 7-8 (1979) (discussing Tellico Dam case). A citizens group filed suit to enjoin construction of the dam, but the district court refused to stop construction. *Hill v. Tennessee Valley Auth.*, 419 F. Supp. 753 (E.D. Tenn. 1976), *rev'd*, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978). On appeal, the Sixth Circuit reversed, determining that the TVA could not complete the project until either Congress exempted the project or the Fish and Wildlife Service delisted the snail darter. *Hill v. Tennessee Valley Auth.*, 549 F.2d 1064, 1074 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978). The Supreme Court upheld this decision, determining that the language of the ESA provided for no exceptions. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978). The House subsequently passed an amendment exempting the Tellico Dam project from the ESA, but then dropped this amendment in favor of legislation creating the exemption process, including the Committee, to address and balance the competing concerns. In addition, the amendments provided that the Committee would conduct expedited review of the Tellico Dam project and a similar project on the Missouri River, with the threshold requirements being waived. See H.R. CONF. REP. NO. 1804, *supra* note 20, at 25 (discussing provisions to provide for expedited review). The Committee granted the exemption for the Missouri River project (the only exemption ever granted until the Northern Spotted owl case), but voted unanimously to deny the Tellico Dam exemption. Although Congress refused to grant a specific exemption for Tellico in the 1979 Amendments to the ESA, Tennessee congressmen were able to attach a rider to the Energy and Water Development Act of 1980, Pub. L. No. 96-367, 94 Stat. 1331. The bill passed without the rest of Congress fully realizing that the rider would exempt Tellico Dam from all environmental laws preventing its completion. See Cathryn Campbell, *Federal Protection of Endangered Species: A Policy of Overkill?*, 3 J. ENVTL. L. 219, 261 (1983) (discussing how Congress passed this "midnight legislation"); Zygmunt J.B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and its Consequences*, 19 U. MICH. J.L. REF. 805, 813 (1986) (same). See generally TVA, FIFTY YEARS OF GRASS-ROOTS BUREAUCRACY (Erwin C. Hargrove & Paul K. Conkin eds., 1983) (discussing Tellico Dam case); WILLIAM

insulate Congress from most exemption decisions,⁹⁹ Congress likely would not hesitate to overrule a Committee decision with which it disagreed.¹⁰⁰

Committee proceedings are also inconsistent with normal concepts of formal adjudication in that the ESA does not seem to contemplate Committee proceedings involving a private claim to a valuable privilege.¹⁰¹ Rather, Committee proceedings involve two entities, both representing the public as a whole, differing as to what is in the public's best interest.¹⁰² The ESA specifies who can apply for an exemption, listing a federal agency, the governor of an affected state, and a permit or license applicant.¹⁰³ The initial parties to an exemption application, therefore, will be a member of one of these three groups and the Secretary,

B. WHEELER & MICHAEL J. McDONALD, *TVA AND THE TELLICO DAM, 1936-1979: A BUREAUCRATIC CRISIS IN POST-INDUSTRIAL AMERICA* (1986) (same); Eric Erdheim, *The Wake of the Snail Darter: Insuring the Effectiveness of Section 7 of the Endangered Species Act*, 9 *ECOLOGY L.Q.* 629 (1981) (same).

99. See 124 CONG. REC. 21,288 (1978) (noting congressional intent to insulate itself from political pressure on exemption decisions); *id.* at 21,347 (noting Congress does not want to sit as "judge and jury" on each individual exemption decision); S. REP. NO. 151, 96th Cong., 1st. Sess. 8 (1979) (noting Congress initiated exemption process in order to avoid "ad hoc congressional review" of exemption decisions for which Congress has "neither the time nor the expertise").

100. See STEVEN L. YAFFEE, *PROHIBITIVE POLICY: IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT 99* (1982) (noting Congress can exempt entire project from ESA); *supra* note 98 (discussing Tellico Dam case).

101. See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 103 (1993) (noting agency adjudications are normally between agency and individual or firm).

102. *But cf.* 16 U.S.C. § 1536(g)(1) (1988) (allowing permit or license applicant to apply for exemption). Although the availability of the exemption process to permit and license applicants could conceivably involve a private individual or entity, this is not likely considering the requirement that the proposed action be both "of regional or national significance" and in the "public interest" before the Committee can grant an exemption. *Id.* § 1536(h)(1)(A). If, however, such an action arose, due process concerns may require the President to docket any relevant communications he has with Committee members that relate to a pending exemption proceeding.

103. See 16 U.S.C. § 1536(g)(1) (1988) (listing potential applicants for exemptions from ESA). Section 1536(g)(1) allows a "Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant" to apply for an exemption if the Secretary determines the proposed agency action will violate the ESA. *Id.*

through the Fish and Wildlife Service.¹⁰⁴ In *Portland*, for example, the initial parties were the Fish and Wildlife Service, which determined that the proposed federal timber sales would jeopardize the spotted owl, and the Bureau of Land Management, which believed the economic benefits of the timber sales outweighed the environmental consequences.¹⁰⁵ Instead of a conflict involving a private claim to a valuable privilege, the facts of *Portland* represent the Committee making the final policy decision regarding an issue on which two Executive agencies, both trying to carry out a legislative mandate, could not reach a compromise.

In sum, the Ninth Circuit's portrayal of the exemption process as adjudicatory is suspect because the procedures Congress designed constitute a hybrid procedure under the APA, with both rulemaking and adjudicatory features. Moreover, the very factors the court relies on to justify applying the ban on *ex parte* communications to Committee proceedings, namely that Committee hearings, meetings, and records are open to the public,¹⁰⁶ are themselves more consistent with rulemaking proceedings than agency adjudications.¹⁰⁷ Indeed, the nature and scope of the procedures the Com-

104. See 50 C.F.R. § 452.06 (1992) (identifying parties to exemption process). The regulations provide:

(a) *Parties*. The parties shall consist of the exemption applicant, the Federal agency responsible for the agency action in question, the [Fish and Wildlife Service], and intervenors whose motions have been granted.

Id.

105. See *infra* note 174 (discussing conflicting goals of Bureau of Land Management and Fish and Wildlife Service).

106. *Portland Audubon Soc'y v Endangered Species Comm.*, 984 F.2d 1534, 1542 (9th Cir. 1993).

107 See 5 U.S.C. § 552b(c)(10) (1988) (allowing agency to close formal agency adjudications and other agency proceedings "on the record after opportunity for a hearing"); *Amrep Corp. v FTC*, 768 F.2d 1171 (10th Cir. 1985) (upholding invocation of § 552b(c)(10) exemption by Federal Trade Commission), *cert. denied*, 475 U.S. 1034 (1986); *Philadelphia Newspapers, Inc. v Nuclear Regulatory Comm'n*, 727 F.2d 1195, 1199-1203 (D.C. Cir. 1984) (upholding invocation of exception by Nuclear Regulatory Commission to close meeting concerning restart of nuclear power plant); *Time, Inc. v. United States Postal Serv.*, 667 F.2d 329, 334 (2d Cir. 1981) (discussing § 552b(c)(10) exemption); *Shurberg Broadcasting of Hartford, Inc. v FCC*, 617 F Supp. 825, 829-30 (D.D.C. 1985) (upholding invocation of § 552b(c)(10) exemption by Federal Communications Commission even though meeting was outside actual hearing process for renewal applications). Indeed, the Second Circuit found that "[t]he evident sense of Congress [behind the exemption] was that when a statute required an agency to act as would a court, its deliberations should be protected from

mittee utilized in *Portland* exhibit some of the rulemaking characteristics that an exemption process can entail.¹⁰⁸

*B. Analysis of Court's Decision that Congress Intended
APA § 554 to Apply to Committee Proceedings*

Even if the Ninth Circuit correctly characterized Committee proceedings as adjudicatory, APA § 554 applies only to those adjudications that Congress intends to be "on the record after opportunity for agency hearing."¹⁰⁹ For the Ninth Circuit, having concluded that Committee proceedings were adjudicatory, the determination that the exemption decision was "on the record after opportunity for agency hearing" became a mere formality.¹¹⁰ The determination that Congress specifically intended APA § 554 to apply to the entire exemption process, however, is not as rudimentary as the court indicated.

disclosure as a court's would be." *Time, Inc.*, 667 F.2d at 334.

108. See SECRETARY OF THE INTERIOR, REPORT OF THE SECRETARY OF THE INTERIOR TO THE ENDANGERED SPECIES COMMITTEE: RELATED TO THE APPLICATION BY THE BUREAU OF LAND MANAGEMENT FOR EXEMPTION FROM THE REQUIREMENTS OF SECTION 7(A)(2) OF THE ENDANGERED SPECIES ACT Intro-3 to Intro-5 (Apr. 29, 1992) (discussing evidentiary and public hearings held during *Portland's* exemption process) [hereinafter SECRETARY'S REPORT]. Harvey C. Sweitzer, the administrative law judge designated by the Secretary, conducted the hearing required by § 1536(g)(4) of the ESA on January 8-30, 1992, in Portland, Oregon. *Id.* at Intro-3. Pursuant to a notice in the Federal Register, the Committee also held a public hearing on February 12-13, 1992, during which 97 witnesses appeared and a further 1,800 submitted written documents. *Id.* at Intro-5. The parallels between this public hearing and the notice and comment mechanisms found in an informal rulemaking are striking. Indeed, as lead counsel for PAS concedes, there is no doubt that the Secretary, during the exemption process, considered the Committee to be engaged in a rulemaking function. See Sher, *supra* note 14, at 53 (discussing Secretary's views of exemption process). Sher quotes the Secretary as concluding "that the procedural requirements for the exemption process 'are much less stringent than those required in an adjudication.'" *Id.* at 53 n.78 (citing Memorandum from Tom Sansonetti, Counsel, Endangered Species Committee, to Harvey C. Sweitzer, Administrative Law Judge (Jan. 13, 1992) (copy on file with Sher)).

109. See 5 U.S.C. § 554(a) (1988) (requiring that § 554 apply only when adjudication is "required by statute to be determined on the record after opportunity for an agency hearing").

110. *Portland Audubon Soc'y v Endangered Species Comm.*, 984 F.2d 1534, 1541 (9th Cir. 1993).

The ESA undoubtedly requires the Committee to place the final exemption decision "on the record."¹¹¹ Thus, the Ninth Circuit was correct in noting that the ESA requires the Committee to base its decision, at least in part, on a hearing.¹¹² What is not clear, however, is whether Congress intended the language of § 1536(h)(1)(A) of the ESA to subject all Committee proceedings to the APA procedures governing formal adjudications, as the Ninth Circuit held.

The ESA does not specifically use the key phrase "on the record after opportunity for agency hearing."¹¹³ Faced with this fact, the Ninth Circuit made an unsupported determination that APA § 554 will apply whenever an adjudication is "determined at least in part based on an agency hearing."¹¹⁴ This determination is questionable because the Committee does not have to base the final exemption decision solely upon the evidence accumulated at the Secretary's hearing.¹¹⁵ The ESA gives the Committee wide latitude in making the final decision because the Committee may also look to "such other testimony or evidence as it may

111. See 16 U.S.C. § 1536(h)(1)(A) (1988) (requiring Committee decision to be placed on record).

112. See *id.* (requiring Committee to base final decision, in part, upon Secretary's hearing held in accordance with § 1536(g)(4)).

113. See *id.* (detailing upon what Committee is to base final exemption decision). The ESA requires the Committee to make the final determination "on the record, based on the report of the Secretary, the record of the [Secretary's hearing] and on such other testimony or evidence as it may receive." *Id.* But see *Seacoast Anti-Pollution League v Costle*, 572 F.2d 872, 876 (1st Cir.) (rejecting argument that exact words "on the record" are necessary to trigger APA in adjudicatory context if statute provides for agency hearing), *cert. denied*, 439 U.S. 824 (1978). The *Seacoast* court also determined that the applicability of the APA in the adjudicatory context must "turn on the substantive nature of the hearing Congress intended to provide." *Id.* The *Seacoast* court presumed that unless the "statute otherwise specifies, an adjudicatory hearing subject to judicial review must be on the record." *Id.* at 877 Therefore, if Congress provides for an agency hearing in an adjudicatory context, a reviewing court can presume that APA § 554 applies, absent a discernible congressional intent to the contrary. This is not determinative in *Portland*, however, because there is no dispute that § 554 applies to the Secretary's hearing. Instead, the crucial issue is whether application of § 554 to the Secretary's hearings requires the application of § 554 to Committee information gathering and Committee deliberations.

114. *Portland*, 984 F.2d at 1541.

115. See 16 U.S.C. § 1536(h)(1)(A) (1988) (detailing upon what Committee is to base final exemption decision).

receive."¹¹⁶ Congress may have meant § 554, however, to apply only to adjudications that follow an agency hearing and that produce a final decision based solely upon the record of that hearing.¹¹⁷ When an agency bases a final determination on any information not subject to the guidelines of a formal hearing, as is the case with exemption decisions under the ESA,¹¹⁸ this reliance on nonrecord information greatly reduces

116. *Id.*, see *id.* § 1536(e)(7)(A) (giving Committee discretion to take such evidence as Committee "deems advisable").

117. See *Seacoast*, 572 F.2d at 877-78 (noting requirement for hearing ordinarily implies requirement that decision will be made in accordance with evidence presented at hearing). In *Seacoast*, the First Circuit quoted the Justice Department for the proposition that:

[W]ith respect to adjudication the specific statutory requirement of a hearing, without anything more, carries with it the further requirement of decision on the basis of evidence adduced at the hearing. In fact, it is assumed that where a statute specifically provides for administrative adjudication . . . after opportunity for an agency hearing, such specific requirement for a hearing ordinarily implies the further requirement of decision in accordance with evidence adduced at the hearing.

Id. (quoting ATTORNEY GENERAL'S MANUAL, *supra* note 81, at 42-43) (original emphasis removed); see *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978) (noting ATTORNEY GENERAL'S MANUAL is entitled to "some deference" due to role of Department of Justice in drafting APA); see also *Power Reactor Dev. Co. v. International Union of Elec., Radio, & Mach. Workers*, 367 U.S. 396, 408 (1961) (discussing deference given to "contemporaneous construction" of statute by enacting body); *United States v. Zucca*, 351 U.S. 91, 96 (1956) (providing deference to "contemporaneous construction" of statute by enforcing officer). More importantly, the legislative history of the amendments adding the ban on ex parte communications to the APA supports the view that § 554 only applies to adjudications in which the agency bases the final decision solely on the record:

The bill also establishes for the first time a clear, statutory prohibition against private ex parte communications between agencies and outside parties on matters being adjudicated by the agency. This provision assures that decisions required by law to be made solely on the basis of a public record will not be influenced by secret discussions that some of the parties to the proceeding, or the public, do not know about.

S. REP. NO. 354, 94th Cong., 1st Sess. 1 (1975).

118. See 16 U.S.C. § 1536(h)(1)(A) (1988) (allowing Committee to base final determination, in part, upon evidence and testimony not presented at formal hearing). The ESA and the regulations enacting the exemption process give the Committee wide latitude in the taking of evidence and testimony. See *id.* § 1536(7)(A) (allowing Committee to hold such hearings and take such evidence as Committee "deems advisable"); *id.* § 1536(8)(A) (allowing Committee to promulgate and amend any rules, regulations, procedures, or orders

the benefits of the ban on ex parte communications.¹¹⁹ Following this rationale, APA § 554 should not apply when the agency bases a final decision, in part, on information not presented at the agency hearing.

Moreover, the court failed to address the fact that Congress amended the crucial language of § 1536(h)(1)(A) four years after Congress enacted the exemption procedure.¹²⁰ The original provision allowed the Committee to base a final exemption decision on "the report of the review board and on such other testimony or evidence as it may receive."¹²¹ This language indicates that Congress did not originally intend to require the Committee to base the final exemption decision, even in part, directly on the evidence presented at the hearing. Although the legislative history of the amendments does not make clear why Congress changed the language,¹²² the legislative history of the 1982 amendments does indicate

that "it deems necessary"); H.R. CONF REP. NO. 1804, *supra* note 20, at 20 (noting Committee is not to conduct second adjudicatory hearing); H.R. REP. NO. 1625, *supra* note 69, at 24 (same). Compare 50 C.F.R. § 452.05(a)-(e) (1992) (providing strict guidelines and procedures for conduct of Secretary's hearings) with *id.* § 453.04 (allowing Committee to conduct hearings in "informal manner," with time constraints limiting admissibility of evidence).

119. See S. REP. NO. 354, *supra* note 117, at 37 (noting that policy behind ban is to ensure all interested persons have opportunity to reply to substance of illegal communications); *id.* at 1 (noting that ban applies only to determinations statute requires to be made "solely on the basis of a public record").

120. See Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, § 4(a)(6), 96 Stat. 1411, 1420 (amending § 1536(h)(1)(A) of ESA).

121. H.R. CONF REP. NO. 1804, *supra* note 20, at 8.

122. See H.R. REP. NO. 567, 97th Cong., 2d Sess., pt. 1 (1982) (failing to explain change to language of § 1536(h)(1)(A)); S. REP. NO. 418, *supra* note 20 (same); H.R. CONF. REP. NO. 835, *supra* note 68 (same). Not only is the legislative history void of any rationale for the change of language, but the authors of the amendments did not make the change until the amendments reached conference. See H.R. CONF REP. NO. 835, *supra* note 20, at 11 (noting change to § 1536(h)(1)(A)). Neither the House Report nor the Senate Report changed the language of § 1536(h)(1)(A) to require the Committee to base the final decision, even in part, upon the record of the Secretary's hearing. See S. REP. NO. 418, *supra* note 20, at 17 (noting amendments will delete all references to Review Board and will substitute Secretary); H.R. REP. NO. 567, *supra*, at 5 (amending § 1536(h)(1)(A) only to substitute "Secretary" for "Review Board"). This silence is crucial because Congress would not likely work such a fundamental change, subjecting the entire exemption process to § 554, without debating or explaining their rationale. Instead, Congress likely meant the change merely to ensure that the Committee would not rely solely upon the Secretary's report to learn the facts and views

that Congress intended the modifications only to "streamline the exemption process," not to "alter the substantive requirements or standards that were adopted in 1978."¹²³

Even if Congress did not intend the language of § 1536(h)(1)(A) to subject the entire exemption process to the strict guidelines of APA § 554, a reviewing court should examine the ESA as a whole to determine whether other elements of the statute require the formal procedures of § 554 to guide Committee deliberations, thereby making the prohibition on ex parte contacts applicable. Although § 1536 does make two explicit references to the APA,¹²⁴ the language is ambiguous as to whether the APA provisions identified in § 1536(g)(6) pertain solely to the hearings the Secretary holds, or also to Committee deliberations.¹²⁵ Overall, the

adduced at the Secretary's hearing.

123. S. REP. NO. 418, *supra* note 20, at 16.

124. *See* 16 U.S.C. § 1536(g)(4), (6) (1988) (requiring hearings to be held in accordance with APA §§ 554, 555, and portions of 556). Section 1536(g)(4) says:

If the Secretary determines that the Federal agency concerned and the exemption applicant have met the [threshold requirements] he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b)(1) and (2) thereof) of title 5 and prepare a report to be submitted pursuant to paragraph (5).

Id. § 1536(g)(4). Section 1536(g)(6) says:

To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5.

Id. § 1536(g)(6).

125. *See id.* § 1536(g)(6) (setting out ambiguous language). There is no dispute that the ESA limits the references to the APA in § 1536(g)(4) to the hearing discussed in § 1536(g)(4). While PAS argued that § 1536(g)(6) applies to the actions of both the Committee and the Secretary, the Committee asserted that § 1536(g)(6) only refers to actions of the Secretary. *Portland Audubon Soc'y v Endangered Species Comm.*, 984 F.2d 1534, 1543 n.22 (9th Cir. 1993). The noted APA provisions, however, could not be referring to the Committee hearings because they are not held under subsection (g). *See* 16 U.S.C. § 1536(g)(6) (1988) (making noted APA provisions only applicable to hearings held pursuant to subsection (g)). Therefore, to subject the Committee to the

ESA grants the Committee broad discretion in the content and manner of amassing the relevant information on which the Committee will make a

listed APA provisions, a reviewing court would have to read § 1536(g)(6) to include Committee deliberations as a "consideration of any application for an exemption under this section." *Id.* This requirement, however, would render the portions of § 1536 allowing the Committee broad discretion in the taking of testimony and evidence almost meaningless. *See id.* § 1536(e)(7)(A) (showing broad discretion given Committee); *id.* § 1536(E)(8) (same). Section 1536(e)(7)(A) states: "The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Committee deems advisable." *Id.* § 1536(e)(7)(A) (emphasis added). Section 1536(E)(8) states that "[i]n carrying out its duties under [§ 1536], the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary." *Id.* § 1536(E)(8). A more logical reading, therefore, of the "consideration of any application" language in § 1536(g)(6) would involve interpreting the phrase to simply refer to the consideration of applications by the Secretary under § 1536(g)(1)-(3).

The Committee's argument is equally untenable, as the Committee's interpretation would subject the § 1536(g)(4) hearing to a different portion of APA § 556 than § 1536(g)(4) lists. *Compare* 16 U.S.C. 1536(g)(4) (1988) (requiring § 1536(g)(4) hearing to be in accordance with APA § 556 other than subsections (b)(1) and (2)) *with id.* § 1536(g)(6) (requiring hearings under subsection (g) to be in accordance with APA § 556 other than subsection (b)(3)) (emphasis added). Section 556(b) of the APA states: "There shall preside at the taking of evidence: (1) the agency; (2) one or more members of the body which comprises the agency; or (3) one or more administrative law judges." 5 U.S.C. § 556(b) (1988). Therefore, if APA § 556(b)(1) and (2) do not apply, an administrative law judge, not the Secretary, would conduct the hearing held pursuant to § 1536(g)(4) of the ESA. If APA § 556(b)(3) does not apply, as in § 1536(g)(6), the Secretary would preside over the hearing, although any other Committee member(s) or the entire Committee could also do so.

Thus, because § 1536(g)(6) cannot refer to hearings held pursuant to § 1536(g)(4) and because Committee hearings are not held under subsection (g), an ambiguity exists. One possible interpretation would be to read § 1536(g)(6) as providing an alternative process when the time constraints of the normal procedure do not allow the administrative law judge to hold the § 1536(g)(4) hearing "in consultation with Members of the Committee." 16 U.S.C. § 1536(g)(4) (1988). For example, the administrative law judge cannot hold a hearing pursuant to § 1536(g)(4) until the President selects the state representative to the Committee pursuant to § 1536(g)(2)(B) because § 1536(g)(4) requires consultation with the Committee. If the President cannot quickly choose the state representative, there may not be sufficient time to hold the necessary formal hearing and prepare an adequate report. Therefore, when time does not allow a § 1536(g)(4) hearing, one could read § 1536(g)(6) to allow the Secretary himself, as opposed to the administrative law judge, to preside personally over the formal hearing, negating the need for consultation with the Committee.

final determination. This broad discretion counters the assertion that Congress meant to subject Committee deliberations to guidelines customarily associated with formal adjudications.¹²⁶

The legislative history of APA § 557(d)(1) shows that a key purpose behind the ban on ex parte communications was to allow interested persons the opportunity to reply to the contents of improper communications with decisionmakers.¹²⁷ The ESA, on the other hand, seems to provide for this type of rebuttal evidence only at the Secretary's hearings, not during Committee hearings or information gathering.¹²⁸ That the ESA requires all portions of the exemption process to be open to the

126. See 16 U.S.C. § 1536(e)(7)(A) (1988) (granting Committee broad discretionary powers in conducting hearings and amassing evidence); *id.* § 1536(h)(1)(A) (allowing Committee to base decision, in part, on "such other testimony or evidence as it may receive"). Section 1536(e)(7)(A) states that the "Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Committee deems advisable." *Id.* § 1536(e)(7)(A).

In addition, there are some indications that Congress did not even consider the Committee to be an "agency" subject to the APA. See H.R. REP. NO. 1625, *supra* note 69, at 23 (stating Committee not agency); H.R. CONF. REP. NO. 1804, *supra* note 20, at 20 (same). House Report 95-1625 states that the "[House committee] does not intend that either the review board or the Endangered Species Committee should be considered as Federal agencies except as provided for in the bill. The Federal Advisory Committee Act shall not be applicable to either the review boards or the Endangered Species Committee." H.R. REP. NO. 1625, *supra* note 69, at 23; see 16 U.S.C. § 1536(e)(7)(D) (1988) (implying Committee is not federal agency). Section 1536(e)(7)(D) states: "The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency." *Id.* The Committee, however, did not argue in *Portland* that the Committee was not an agency under the APA. *Portland Audubon Soc'y v Endangered Species Comm.*, 984 F.2d 1534, 1539 n.10 (9th Cir. 1993).

127 See S. REP. NO. 354, *supra* note 117, at 37 (stating that purpose of prohibition of ex parte communications is to give interested persons chance to respond to improper communications). The Report states:

The purpose of this provision is to notify the opposing party and the public, as well as all decisionmakers, of the improper contact and give all interested persons a chance to reply to anything contained in the illegal communication. In this way the secret nature of the contact is effectively eliminated.

Id.

128. See *supra* note 118 (discussing how ESA, legislative history, and enacting regulations show how much discretion Committee given in information gathering procedures).

public¹²⁹ is not inconsistent with this conclusion because the legislative history of the Government in the Sunshine Act indicates that public attendance does not include the ability to participate.¹³⁰ Thus, because Congress did not provide for cross-examination or rebuttal of evidence collected after the Secretary's hearing, any contention that Congress intended a different result for information that a Committee member receives outside the exemption process is questionable.

The Department of the Interior, the Department of Commerce, and the Committee promulgated the regulations that govern the ESA and thus provided an agency interpretation of the procedures the legislation mandates.¹³¹ While the regulations explicitly require any hearing held by the Secretary to be in accord with APA §§ 554, 555, and 556,¹³² the regulations dealing with Committee deliberations and information gathering do not mention the APA.¹³³ More importantly, the regulations explicitly make APA § 557(d), banning ex parte contacts, applicable to the Secretary's hearing and report, while the regulations do not contain a similar provision referring to Committee deliberations or information gathering.¹³⁴ The Ninth Circuit, however, discounted the relevance of this regulation, contending that the regulation merely clarified an ambiguity in the ESA.¹³⁵

129. See 16 U.S.C. § 1536(e)(5)(D) (1988) (requiring all Committee meetings and records to be open to public); *id.* § 1536(g)(8) (requiring all records and activities relating to subsection (g) to be open to public).

130. See S. REP. NO. 354, *supra* note 117, at 1-2 (noting amendments to APA do not increase right of public to participate in agency process); *id.* at 5 (noting policy of reducing public distrust in government operations is served by mere attendance at meetings).

131. See 50 C.F.R. §§ 450-453 (1992) (enacting procedures to carry out exemption process).

132. See *id.* § 452.05(a) (requiring Secretary's hearing to be in accordance with APA §§ 554, 555, and 556).

133. See *id.* §§ 453.03, 453.04 (failing to mention any APA provisions).

134. See *id.* § 452.07(b) (referring to APA § 557(d)). The regulation states: "The provisions of 5 U.S.C. 557(d) apply to the hearing and the preparation of the report." *Id.*

135. *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1542 (9th Cir. 1993). The Ninth Circuit determined that because § 1536(g)(4) does not explicitly mention APA § 557, the "omission could conceivably lead to considerable confusion." *Id.* Therefore, the court felt the reference to § 557(d) serves to "eliminate the confusion and remove any doubt as to the applicability of the ex parte communications prohibition to the

In sum, the ESA itself does not explicitly require the application of § 557's prohibition on ex parte contacts.¹³⁶ Therefore, to find that § 557 applies to exemption proceedings, the Ninth Circuit determined that Congress, through § 1536(h)(1)(A) of the ESA, implicitly called for APA § 557(d)(1) to apply.¹³⁷ While this is a plausible reading of the statute, the Ninth Circuit's determination is debatable.¹³⁸ However, even if Congress did intend § 557 of the APA to apply to exemption proceedings, the Ninth Circuit's determination that Congress also meant to include the President within this prohibition does not necessarily follow

C. Analysis of Court's Decision that President Is Subject to APA Ban on Ex Parte Communications

Having determined that the § 557(d)(1)¹³⁹ prohibition on ex parte contacts applies to Committee proceedings, the Ninth Circuit considered whether the prohibition also applies to the President and White House staff.¹⁴⁰ The court's analysis involved determinations that the President

proceedings before the Secretary." *Id.* The court believed this clarification was unnecessary as to Committee actions because § 1536(h)(1)(A) governs Committee actions and does not mention some APA provisions while leaving out § 557. *Id.* The court's argument is unpersuasive, particularly after the assertion that APA § 557 applies whenever § 554 does. *See Portland*, 984 F.2d at 1540 (asserting §§ 556 and 557 apply whenever § 554 does). In addition, this determination is valid only as long as the court accepts the Committee's argument that § 1536(g)(6) does not apply to Committee proceedings. *See supra* note 125 and accompanying text (discussing ambiguity of § 1536(g)(6)). If § 1536(g)(6) applies to the Committee, then the same ambiguity results because § 1536(g)(6) mentions some APA provisions while leaving out APA § 557. 16 U.S.C. § 1536(g)(6) (1988). The court also justified the determination on the basis that a contrary finding would violate the explicit policy of the ESA to ensure that all exemption proceedings are open to the public. *Portland*, 984 F.2d at 1542.

136. *See supra* note 33 and accompanying text (noting Ninth Circuit's determination that ESA does not explicitly require APA § 557 to apply).

137. *See supra* notes 33-41 and accompanying text (setting out Ninth Circuit's rationale for determination that § 1536(h)(1)(A) implicitly calls for APA § 557(d)(1) to apply).

138. *See supra* notes 61-135 and accompanying text (discussing problems with court's determination that § 1536(h)(1)(A) implicitly calls for APA § 557(d)(1) to apply).

139. *See supra* note 26 (setting out text of APA § 557(d)(1)).

140. *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1543-

was both an "interested person" and "outside the agency" for the purposes of § 557(d)(1).¹⁴¹ These determinations, however, are questionable.

The legislative history of § 557(d)(1) of the APA indicates that courts should give the phrase "interested person" a broad reading, and that the phrase includes "public officials with a special interest in the matter regulated."¹⁴² While the court correctly notes that the President is interested in all agency proceedings,¹⁴³ this does not necessarily render the interest either "special" or "greater than the general interest of the public as a whole," as Congress required.¹⁴⁴ Indeed, the President, by virtue of his office, is elected to serve and represent the "general interest of the public as a whole" and consequently could not have an interest

48 (9th Cir. 1993).

141. 5 U.S.C. § 557(d)(1) (1988).

142. See S. REP. NO. 354, 94th Cong., 1st Sess. 36 (1975) (implying courts should interpret phrase "interested person" broadly). The Report says the term:

is intended to be a wide, inclusive term covering any individual or other person with an interest in the agency proceeding that is greater than the general interest the public as a whole may have. The interest need not be monetary, nor need a person be a party to, or intervenor in, the agency proceeding to come under this section. The term includes, but is not limited to, parties, competitors, public officials, and nonprofit or public interest organizations and associations with a special interest in the matter regulated. The term does not include a member of the public at large who makes a casual or general expression of opinion about a pending proceeding.

Id.

143. See *Portland*, 984 F.2d at 1545 (noting President has "interest in every agency proceeding") (emphasis in original). In addition, the Ninth Circuit's determination that the President or a member of the White House staff could be an "interested person" in every agency proceeding ignores the practical effect of such an edict. *Id.* at 1545. As "interested persons," the President and White House staff should have the right to be heard if they have relevant views to offer. The court's holding, however, would subject the President to the inflexible schedules of each particular agency action. See Verkuil, *supra* note 7, at 979 (discussing problems with subjecting President to agency schedule). The holding also ignores the presumption of executive privilege. See *infra* notes 196-204 and accompanying text (discussing executive privilege in context of *Portland*). This practicality problem is particularly troublesome when Congress mandates accelerated action and hybrid procedures, such as in *Portland*.

144. See S. REP. NO. 354, *supra* note 117, at 36 (providing language interpreting phrase "interested person").

beyond that of the general public as a whole solely by reason of his position in the executive branch.¹⁴⁵

The Ninth Circuit, in determining that the President is an "interested person," compared the executive branch's alleged involvement in *Portland* to the Secretary of Transportation's involvement in *Professional Air Traffic Controllers Organization (PATCO) v Federal Labor Relations Authority*.¹⁴⁶ In *PATCO*, a strike endorsed by PATCO seriously affected air service throughout the United States and led to a charge of unfair labor practices against PATCO.¹⁴⁷ Following an administrative hearing on the issue, the Federal Labor Relations Authority (FLRA) revoked PATCO's status as exclusive bargaining representative for the striking air traffic controllers.¹⁴⁸ Following the adverse determination, PATCO alleged that FLRA members had engaged in improper ex parte contacts during the case, including a charge that the Secretary of Transportation telephoned a FLRA member to discuss the pending strike negotiations.¹⁴⁹ The United States Court of Appeals for the District of Columbia, however, declined to determine whether the phone call was improper, noting that the contact was not prejudicial and that the FLRA representative acted in good faith.¹⁵⁰

In *Portland*, the Ninth Circuit interpreted *PATCO* as a determination by the D.C. Circuit that the Secretary of Transportation could be an "interested person" under the APA.¹⁵¹ However, even if the D.C. Circuit had made such a determination, *PATCO* is distinguishable from *Portland* because, unlike the Secretary of Transportation, the President occupies the

145. See Verkuil, *supra* note 7, at 978-79 (noting special status of President). Professor Verkuil states that the "President is obviously not 'like everyone else' he happens to have been elected by 'everyone else' to run the executive branch and see that the laws are faithfully executed." *Id.*

146. 685 F.2d 547 (D.C. Cir. 1982).

147. *Professional Air Traffic Controllers Org. v Federal Labor Relations Auth.*, 685 F.2d 547, 551-52 (D.C. Cir. 1982).

148. *Id.* at 554.

149. *Id.* at 558-59.

150. *Id.* at 568.

151. *Portland Audubon Soc'y v Endangered Species Comm.*, 984 F.2d 1534, 1545 (9th Cir. 1993). The *Portland* court found it "evident" that the D.C. Circuit opinion determined the Secretary of Transportation to have "a special interest in a major transportation dispute which is beyond that of the general public and that [the Secretary of Transportation] is therefore an interested person." *Id.*

central seat in the executive branch and is responsible for the overall direction of the executive branch, not just one department. Thus, while the Secretary of Transportation could conceivably have a "special interest" in a matter before that agency, the President could not.¹⁵² Therefore, the very nature of the President's position in the executive branch distinguishes even the Ninth Circuit's attenuated reading of *PATCO*

Another questionable aspect of the Ninth Circuit's determination that the APA's ban on ex parte communications is applicable to the President is the court's reluctance to adhere to the Supreme Court's language in *Franklin v Massachusetts*.¹⁵³ The *Franklin* Court, in analyzing whether the President was an "agency" for purposes of judicial review under the APA, concluded that an "express statement by Congress" was necessary before the Court would find the President's actions to be reviewable.¹⁵⁴

152. See *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982) (noting President's unique status). The Court found that the "President's unique status under the Constitution distinguishes him from other executive officials." *Id.*

153. 112 S. Ct. 2767 (1992). In *Franklin v Massachusetts*, 112 S. Ct. 2767 (1992), Massachusetts and two registered voters challenged the reapportionment of seats in the United States House of Representatives after the 1990 census, alleging that the Census Bureau's allocation of overseas defense personnel to their "home of record" was arbitrary and capricious under the APA. *Id.* at 2770-71. In the past, the Census Bureau normally excluded overseas personnel from census figures, and the switch in allocation methods caused a Representative to shift from Massachusetts to Washington. *Id.* at 2770. After each census, the Census Bureau sends the census figures to the Secretary of Commerce, who then submits the reapportionment data to the President. *Id.* at 2771. The President then makes a report to Congress delineating the number of Representatives for each state. *Id.*

Under the APA, a court can only review "final agency action," 5 U.S.C. § 704 (1988), so the *Franklin* Court first addressed whether the transmittal of the census figures to the President by the Secretary of Commerce constituted final agency action. *Id.* at 2773-75. Because the President could conceivably alter the census figures before reporting them to Congress, the Court determined that the President, not the Secretary of Commerce, takes the final action in the reapportionment process. *Id.* at 2775. In addition, the Court determined that because Congress did not expressly include the President within the APA's review provisions, the Court could not consider the President an "agency" under the APA. *Id.* at 2775-76. Because the President was not an "agency," the submittal of the census figures to Congress could not be "final agency action" under the APA, and the method of allocating overseas personnel was therefore unreviewable for abuse of discretion. *Id.* at 2776. The Court also addressed a constitutional challenge by the appellees, ultimately holding that the Census Bureau's allocation method did not "hamper the underlying constitutional goal of equal representation." *Id.* at 2778.

154. *Franklin*, 112 S. Ct. at 2775.

Therefore, because the APA did not expressly allow review of presidential action, the *Franklin* Court presumed that Congress did not intend to subject the President to the APA's review provisions.¹⁵⁵

The Ninth Circuit, faced with the Supreme Court's concern about subjecting the President to the APA, tried to distinguish *Franklin* by noting that the issue in *Portland* was whether the President could be an "interested person" under § 557(d)(1) of the APA, not whether the President is an "agency" subject to the review provisions of the APA.¹⁵⁶ While the Ninth Circuit is correct that *Franklin* did not specifically address whether the President could be an "interested person" under the APA, the court should not have rejected the *Franklin* Court's implicit message so readily. As in *Franklin*, Congress did not provide an explicit statement in the APA that the phrase "interested person" could include the President. In *Franklin*, the Supreme Court determined that "[o]ut of respect for the separation of powers and the unique constitutional position of the President textual silence is not enough to subject the President to the provisions of the APA."¹⁵⁷ In *Portland*, therefore, these same separation of powers considerations should have provided the same protection, and the Ninth Circuit should not have found the President to be an "interested person" under § 557(d)(1) of the APA.

*D Analysis of Court's Determination that Application of the
APA Prohibition on Ex Parte Contacts to the President Will
Not Violate the Doctrine of Separation of Powers*

Even if Congress did not intend to exempt the President from the APA's ban on ex parte contacts, the question remains whether application of the ban to the President, in the context of the ESA's hybrid procedure,

155. *Id.*, see *Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.27 (1982) (requiring explicit statement by Congress before court will assume Congress created damages action against President); Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 18-24 (1982) (discussing applicability of APA to President). Professor Bruff ultimately concludes that "[n]either the terminology nor the legislative history of the APA compels the conclusion that it governs the President." *Id.* at 23 (footnotes omitted). However, Professor Bruff also determines that the requirement of an explicit statement by Congress to subject the President to a statute would work too great a burden upon Congress. *Id.* at 31.

156. *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1547 (9th Cir. 1993).

157. *Franklin*, 112 S. Ct. at 2775.

violates the doctrine of separation of powers. The Ninth Circuit's initial step of labelling the exemption process as adjudicatory in nature¹⁵⁸ was the critical move from which the rest of the opinion predictably flowed. Relying upon *Nixon v. Administrator of General Services (Nixon I)*,¹⁵⁹ the Ninth Circuit determined that the congressional policy underlying the APA clearly rendered "de minimis" any adverse effect on a presidential power to influence the results of administrative adjudications.¹⁶⁰ However, the court's characterization of the exemption process as adjudicatory is suspect.¹⁶¹ Thus, the Ninth Circuit's analysis of the separation of powers problem under *Nixon I* may be flawed for failing to take into account the hybrid procedure Congress designed in the ESA. A proper characterization of the exemption process leads to the conclusion that Congress's excursion into the power of the President is substantial, and hence improper.

In *Nixon I*, President Nixon executed an agreement with the Administrator of General Services, an executive branch official, to store documents and tape recordings accumulated during the Nixon presidency.¹⁶² Worried about the possible destruction of valuable material, Congress passed the Presidential Recordings and Materials Preservation Act,¹⁶³

158. *Portland*, 984 F.2d at 1547-48. The court states:

[T]he language of the [ESA] shows that [Congress] intended to create the Committee as a quasi-judicial adjudicatory body subject to the statutory restrictions that the APA imposes on such institutions. Congress clearly has the authority to do so, and thereby to ensure the independence of the agency from presidential control.

Id.

159. 433 U.S. 425 (1977).

160. *Portland*, 984 F.2d at 1546.

161. *See supra* notes 61-108 and accompanying text (analyzing Ninth Circuit's characterization of Committee proceedings as adjudicatory).

162. *Nixon v. Administrator of Gen. Servs. (Nixon I)*, 433 U.S. 425, 431 (1977). Under the agreement to store the Nixon presidential materials, neither Nixon nor the Administrator of General Services (Administrator) could gain access to the roughly 42 million documents and 880 tape recordings without the other's consent. *Id.* at 432. The agreement governed procedures and time frames for the withdrawal and destruction of the materials, including a provision that Nixon could order the Administrator to destroy such tapes as Nixon directed after five years had passed, and a provision that the Administrator would destroy all tapes upon Nixon's death or within 10 years, whichever occurred first. *Id.*

163. Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, 88 Stat. 1695 (1974).

which directed the Administrator to take custody of and screen the Nixon materials, thereby preserving any documents or recordings having historical value and any materials pertinent to pending criminal proceedings.¹⁶⁴ Nixon contested the statute, alleging in part that the legislation violated the doctrine of separation of powers because the statute infringed upon the presidential power to control the internal operations of the executive branch.¹⁶⁵ In assessing this claim, the Supreme Court provided a framework for assessing whether a congressional act improperly interferes with a presidential duty. First, the court must determine whether the congressional act upsets the appropriate balance between the two branches, focusing on how the act affects the President's authority to accomplish his constitutional functions.¹⁶⁶ Second, if the congressional action impinges upon a presidential function, the court must determine the extent to which the policy behind the congressional action justifies the interference.¹⁶⁷ When analyzing the process of review and consultation contemplated by the ESA's exemption process, therefore, a court should first determine whether subjecting the President to the ban on ex parte contacts would impermissibly infringe upon any of the President's constitutional duties. If so, the next question becomes whether the policy behind the prohibition on ex parte contacts justifies the congressional infringement.

1 Extent to Which the Ban on Ex Parte Contacts Prevents the President from Carrying out Constitutional Duties

Article II of the Constitution vests the executive power in a President of the United States and instructs the President to "take Care that the Laws

164. *Nixon I*, 433 U.S. at 429. The Presidential Recordings and Materials Preservation Act also required the enacting regulations to protect all constitutionally based rights or privileges. *Id.*

165. *Id.* at 440. Nixon argued that Congress did not possess the power to delegate to an executive branch officer the discretion to release presidential materials or to dictate the terms that will govern the disclosure of the materials. *Id.*

166. *Id.* at 443.

167. *Id.* In *Nixon I*, the Court determined that because the Nixon presidential material was to remain within the control of an executive branch official and because the Presidential Recordings and Materials Preservation Act requires the Administrator of General Services to apply any applicable executive privileges, the legislation did not unduly disrupt the executive branch and was therefore constitutional. *Id.* at 444-45.

be faithfully executed."¹⁶⁸ On the basis of this charge, scholars associate the President with the constitutional authority to coordinate the magnitude of statutes that the Constitution charges the President to execute.¹⁶⁹ Accordingly, the President must be able to carry out the national policy goals he establishes by having the power to coordinate and control the direction of the various federal regulatory policies.¹⁷⁰ By virtue of an

168. U.S. CONST. art. II, §§ 1, 3.

169. See Bruff, *supra* note 7, at 462 (noting President has responsibility to "harmonize" many statutes at once); McGarity, *supra* note 7, at 448 (noting President's position at center of executive branch provides him "unique" position for policy coordination). Professor Bruff believed that the:

argument that the President has some implied statutory or constitutional authority to harmonize the welter of statutes, or to act interstitially at times, has a functional basis because legislation necessarily distributes power in a somewhat fragmentary fashion, and cannot resolve all the future problems of coordinating policy under separate statutes. The President has a unique vantage point from which he can focus on a vital issue that falls within the jurisdiction of a variety of executive and independent agencies, each having power to deal with only part of the problem.

Bruff, *supra* note 7, at 462 (footnotes omitted).

170. See *Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981) (noting authority of President to supervise and guide executive policymaking); *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566, 570 (D.D.C. 1986) (same); Bruff, *supra* note 7, at 468 (noting President should have authority to control direction of federal regulatory policy); *Demuth & Ginsburg*, *supra* note 7, at 1079-80 (noting how rapid expansion of rulemaking authorities creates coordination problems); McGarity, *supra* note 7, at 448 (discussing presidential authority to coordinate agency disputes); *Strauss & Sunstein*, *supra* note 7, at 189 (discussing President's ability to centralize and coordinate regulatory process). The D.C. Circuit's discussion in *Sierra Club* is particularly relevant:

The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking. Regulations such as those involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. Our form of government simply could not function effectively or rationally if key executive policymakers are isolated from each other and from the Chief Executive.

Sierra Club, 657 F.2d at 406 (footnotes omitted); see *Meyer v. Bush*, 981 F.2d 1288, 1297 (D.C. Cir. 1993) (noting President's constitutional duty to oversee regulatory policies produced by executive branch); *Public Citizen v. Burke*, 843 F.2d 1473, 1477-78 (D.C. Cir. 1988) (noting presidential ability to guide interpretation of statutes by even reluctant subordinates).

accountability to a national constituency,¹⁷¹ the President should be able to use his broad policy perspective to assist regulatory agencies with policy determinations.¹⁷²

When a dispute between two executive agencies that are both trying to carry out statutory mandates arises,¹⁷³ as in *Portland*,¹⁷⁴ the presi-

171. See Bruff, *supra* note 7, at 461 (noting President has national constituency not shared by any other oversight mechanism); Strauss & Sunstein, *supra* note 7, at 190 (arguing that because President is electorally accountable and has national constituency, he is "uniquely well-situated" to coordinate regulatory policy to benefit public as whole). Indeed, the Supreme Court determined the President to be:

representative of the people just as members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the legislature.

Myers v United States, 272 U.S. 52, 123 (1926).

172. See *Chevron United States, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (discussing President's authority, due to his direct accountability, to help agencies make policy choices); McGarity, *supra* note 7, at 449-50 (discussing role President's accountability to national electorate plays in regulatory coordination); Pierce, *supra* note 7, at 520-21 (arguing policy decisions should be made by most politically accountable institution); Strauss & Sunstein, *supra* note 7, at 190 (noting that President's perspective is particularly crucial when there is national view that regulatory policy should follow certain course); Verkuil, *supra* note 7, at 958 (arguing that presidential regulatory policy coordination may be only way to keep agencies accountable to both President and public). *But see* McGarity, *supra* note 7, at 456-57 (proposing that accountability suffers when presidential pressure hidden from public record). The Supreme Court states:

Judges are not part of either political branch of government. In contrast, an agency to which Congress has delegated policy-making responsibility may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of Government to make such policy choices.

Chevron, 467 U.S. at 865.

173. See Bruff, *supra* note 7, at 451-56 (noting that overlapping agency jurisdictions can result from lack of regulatory coordination); Lloyd H. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1396 (1975) (finding overlapping agency jurisdictions often lead to inter-agency battles); McGarity, *supra* note 7, at 447 (noting need for coordination when two agencies have clash of opposing goals).

174. See SECRETARY'S REPORT, *supra* note 108, at Intro-4 (noting statutory mandates of BLM and U.S. Fish and Wildlife Service). In *Portland*, the BLM is under "a legal mandate to provide timber supplies on a sustainable basis, subject to certain constraints," while the

dential duty to coordinate the regulatory policy of the executive branch is especially important.¹⁷⁵ By statutory mandate, the agency action that the Committee analyzes cannot be local or focused solely upon the interests of a few individuals.¹⁷⁶ Instead, the proposed agency action inevitably results in clashes between significant and conflicting executive agency goals. In *Portland*, for example, the proposed timber sales caused a fundamental clash between the ESA's mandate to protect endangered species and the equally significant and important need to preserve a regional economy, thereby protecting both jobs and other business interests.¹⁷⁷

The President, based on an accountability to a national constituency and a constitutional mandate to execute the laws faithfully, has the duty to see that, within the broad parameters of discretion usually accorded the executive branch in statutory delegations, the executive branch is carrying out regulatory programs in the public interest. The United States Court of Appeals for the District of Columbia addressed this duty in *Sierra Club v Costle*,¹⁷⁸ in which the court examined the impact of ex parte contacts by the President in the context of informal rulemaking. While the Ninth Circuit correctly notes that the ESA's exemption process is not an informal rulemaking under the APA,¹⁷⁹ the Ninth Circuit fails to realize that *Sierra Club* is relevant for examining the extent to which the President should be able to confer with executive branch officials to coordinate policy in any proceeding that encompasses rulemaking characteristics, such as the hybrid procedure in *Portland*.

U.S. Fish and Wildlife Service has a statutory mandate to prevent agency action that could jeopardize listed species or their habitat. *Id.*

175. See DAVIS & PIERCE, *supra* note 81, § 7.9 (arguing President should have power to resolve policy conflicts between agencies). Professors Davis and Pierce state that "[c]ases that should be styled 'United States v. United States,' are both common and unexcusable. The President should have the power and the responsibility to resolve policy conflicts between federal agencies." *Id.*

176. See 16 U.S.C. § 1536(h)(1)(A)(ii)-(iii) (1988) (requiring Committee to grant exemptions only to agency actions in public interest and of national or regional significance).

177. See *supra* note 174 (discussing conflicting agency goals concerning clash between economic and environmental interests in *Portland*).

178. 657 F.2d 298 (D.C. Cir. 1981).

179. See *Portland Audubon Soc'y v Endangered Species Comm.*, 984 F.2d 1534, 1545-46 (9th Cir. 1993) (determining *Sierra Club* inapplicable to facts of *Portland*).

In *Sierra Club*, the Sierra Club alleged that ex parte contacts occurred during the Environmental Protection Agency's (EPA) rulemaking procedure concerning new emission standards under the Clean Air Act.¹⁸⁰ One claim involved a meeting that President Carter held after the EPA had closed the public comment period of the rulemaking.¹⁸¹ Other executive branch officials and members of the EPA attended the closed-door meeting and discussed issues concerning the pending rules.¹⁸² In analyzing the claim that the intra-executive branch meeting constituted an improper ex parte contact with the EPA, the D.C. Circuit recognized the President's authority to ensure the consistency of executive agency regulations with his overall domestic policy.¹⁸³ While noting that due process concerns might require the docketing of presidential communications concerning adjudicatory proceedings,¹⁸⁴ the D.C. Circuit determined that a court should "tread with extraordinary caution" in mandating disclosure when the President himself is involved directly in oral communications with executive branch officials.¹⁸⁵ Indeed, the court found that unless explicitly forbidden by Congress, such presidential communications with executive branch officials can take place both during and after the public comment period.¹⁸⁶ Judge Wald's deference and conservative approach toward the President's authority under the Constitution to coordinate the regulatory policy of the executive branch are

180. *Sierra Club v. Costle*, 657 F.2d 298, 386-89 (D.C. Cir. 1981).

181. *Id.* at 404.

182. *Id.*

183. *Id.* at 405. The D.C. Circuit stated:

The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House advisors surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered.

Id.

184. *Id.* at 406-07

185. *Id.* at 407. The D.C. Circuit cited Article II of the Constitution and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), for this determination. *Sierra Club v. Costle*, 657 F.2d 298, 407 (D.C. Cir. 1981).

186. *Id.* at 405.

also applicable to situations such as *Portland*, where executive branch officials are engaged in hybrid agency proceedings with significant regulatory characteristics.¹⁸⁷

Considering the practical effect in the context of the ESA's exemption process, the Ninth Circuit's determination that the APA's ban on ex parte communications applies to the President is particularly troublesome. Indeed, the court's holding would forbid the President or any White House aides from contacting any Committee member or a member's personal staff on any matter that a reviewing court might deem relevant to a pending exemption proceeding.¹⁸⁸ In essence, this holding might prohibit the President, for the duration of an exemption proceeding,¹⁸⁹ from discussing with Cabinet members the Administration's overall policy on the ever-present conflict between economic and environmental concerns. Although the ex parte ban applies only to communications "relevant to the merits" of an exemption decision,¹⁹⁰ the Ninth Circuit found a congressional desire to have courts interpret this phrase broadly.¹⁹¹ This conclusion suggests

187. See *supra* notes 81-84, 107-08 and accompanying text (discussing regulatory nature of Committee proceedings).

188. See *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1546 (9th Cir. 1993) (determining APA ban on ex parte contacts is "fully applicable" to President and White House staff). If the ban applies to the President, APA § 551(14), which defines ex parte communications, would require the agency to place the substance of any communications between the President and a Committee member on the public record if the communication is "relevant to the merits of the proceeding" under § 557(d)(1)(A) of the APA.

189. See 16 U.S.C. § 1536(g)(5) (1988) (giving Secretary 140 days to prepare report for Committee); *id.* § 1536(h)(1) (requiring Committee to make final determination within 30 days of receiving Secretary's report). Because the ESA requires the Secretary to hold hearings and prepare the report "in consultation with Members of the Committee," *id.* § 1536(g)(4), "interested persons" could not approach Committee members from the time the Secretary makes the determination that the exemption application meets the threshold requirements of § 1536(g)(3) to the time the Committee makes the final determination under § 1536(h)(1). Indeed, the exemption process could take longer than 170 days because § 1536(h)(5) allows the exemption applicant and the Secretary to agree to extend the time allowed to prepare the Secretary's report. *Id.* § 1536(h)(5). During this time, therefore, the Committee members would be unapproachable on any matter that could possibly be deemed "relevant to the merits" under 5 U.S.C. § 557(d)(1) (1988), unless the agency places the contact on the administrative record.

190. 5 U.S.C. § 557(d)(1) (1988).

191. See *Portland*, 984 F.2d at 1546 n.26 (finding Congress meant for courts to construe phrase "relevant to the merits" broadly) (citing Professional Air Traffic Controllers Org. (PATCO) v. Federal Labor Relations Auth., 685 F.2d 547, 567-68 (D.C. Cir. 1982)).

that a reviewing court could conceivably construe even a general policy discussion concerning the conflict between economic and environmental interests as being "relevant to the merits" of an exemption proceeding.¹⁹²

Therefore, the application of the APA's ban on ex parte contacts in the context of an exemption proceeding could seriously affect the President's ability to guide his Administration's regulatory policy. Indeed, the prohibition would deprive the President of the ability to consult with key advisors for up to six months on matters entrusted to their expertise by virtue of their Cabinet positions.¹⁹³ At the least, the holding will chill discussion between the President and a Committee member on issues approaching the magnitude of the Northern Spotted owl controversy, even though these Cabinet officials are chiefly responsible for advising the President and for ultimately implementing the Administration's policy in these areas. Therefore, under the first prong of the *Nixon I* framework, the isolation of the President from Committee members for the duration of an exemption proceeding constitutes an impermissible infringement upon a constitutional function of the President.¹⁹⁴

There is an argument, however, that the application of the APA ban on ex parte contacts does not truly isolate the President from his chief advisors because APA § 557(d)(1) would not apply if the agency placed the contacts on the public record.¹⁹⁵ Under this rationale, the President would not be deprived of the opportunity to consult with key Cabinet officials as long as the agency places the substance of each communication on the public record of the agency proceeding. This argument, however, ignores

192. See *North Carolina v. EPA*, 881 F.2d 1250, 1257 (4th Cir. 1989) (determining language of § 557(d)(1) entitled to broad reading); *Professional Air Traffic Controllers Org. (PATCO) v. Federal Labor Relations Auth.*, 685 F.2d 547, 563 (D.C. Cir. 1982) (using legislative history to find that phrase "relevant to the merits" should be construed liberally to "effectuate the dual purposes of the Government in the Sunshine Act"). But see *Louisiana Ass'n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1112 (D.C. Cir. 1992) (noting that APA § 557(d)(1) does not prohibit "general background discussions" of proceeding).

193. See *supra* notes 168-92 and accompanying text (discussing President's constitutional authority to coordinate Administration's regulatory policy and how Ninth Circuit's holding could intrude upon President's ability to carry out this duty).

194. See *Nixon v. Administrator of Gen. Servs. (Nixon I)*, 433 U.S. 425, 443 (1977) (setting out appropriate framework for separation of powers analysis).

195. See 5 U.S.C. § 551(14) (1988) (defining "ex parte communication" to include only oral and written communications not on public record).

the Supreme Court's treatment of executive privilege in *United States v Nixon (Nixon II)*.¹⁹⁶ In *Nixon II*, the Court recognized a legitimate governmental interest in the ability to keep conversations between the President and his chief advisors confidential.¹⁹⁷

In *Nixon II*, the Supreme Court found a presumptive privilege for presidential communications because advisors would otherwise "temper candor with concern for appearances and for their own interests to the detriment of the decisionmaking process."¹⁹⁸ Although this privilege is

196. 418 U.S. 683 (1974).

197. *United States v Nixon (Nixon II)*, 418 U.S. 683, 705-06 (1974). In *Nixon II*, President Nixon, after a grand jury named him an unindicted coconspirator, challenged a district court subpoena directing him to produce certain documents and tape recordings regarding conversations with executive branch aides and advisors. *Id.* at 687-88. The Court agreed with Nixon that a critical governmental need exists to keep confidential communications between high government officials and their advisors because the advisors may otherwise "temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Id.* at 705. However, the Court refused to uphold Nixon's assertion of an absolute executive privilege absent a "claim of need to protect military, diplomatic, or sensitive national security secrets." *Id.* at 706. Although concluding that the President is entitled to a presumption of executive privilege, the Court also determined that the need to preserve the "essential functions of each branch" could outweigh the presumption. *Id.* at 707. In *Nixon II*, the Court found that "fundamental demands of due process of law in the fair administration of criminal justice" outweighed a generalized invocation of executive privilege by the President. *Id.* at 713. In addition, the Court gave the district court the "heavy responsibility" of reviewing the presidential materials *in camera* and releasing only those found to be both relevant and admissible. *Id.* at 714-15.

198. *Id.* at 705. The Court found the executive privilege to be "fundamental to the operation of Government and inextricably rooted in separation of powers under the Constitution." *Id.* at 708 (footnote omitted). The importance of the executive privilege in the Court's eye cannot be challenged because the Court found the privilege "necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice." *Id.* at 715; see *Nixon v Administrator of Gen. Servs. (Nixon I)*, 433 U.S. 425, 448-49 (1977) (discussing executive privilege); *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1981) (noting judicial gloss on Constitution accords President right to invoke executive privilege to "protect consultative privacy"). In *Nixon I*, the Supreme Court stated:

[T]he privilege is necessary to provide the confidentiality required for the President's conduct of office. Unless he can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of fact and opinions upon which effective discharge of his duty depends.

not absolute, only the particularly strong countervailing interests of the criminal justice system, interests that invoked constitutional values, outweighed the presumption of executive privilege in *Nixon II*.¹⁹⁹ Equally important, the Supreme Court required the district court to conduct an *in camera* inspection of presidential communications and to release only information relevant to the criminal proceeding.²⁰⁰

In an exemption proceeding, by contrast, there could be no provision for a limited intrusion, such as the *in camera* inspection in *Nixon II*. Instead, the Committee would have to place the substance of all relevant conversations between the President and Committee members on the public record in order to satisfy § 557(d)(1) of the APA.²⁰¹ This docketing of presidential communication would severely diminish the President's ability to take part in policy discussions with Committee members.²⁰² Furthermore, the countervailing constitutional interests found in *Nixon II* are absent in the context of exemption proceedings.²⁰³ Instead, a reviewing court must weigh any claim of executive privilege in the context of *Portland* against the congressional policy behind the

Nixon I, 433 U.S. at 448-49; see Bruff, *supra* note 155, at 44 (noting judicial review of presidential action must respect separation of powers limitations on intrusions into executive branch deliberations); Demuth & Ginsburg, *supra* note 7, at 1085-86 (noting deliberative process requires candid discussions of relevant issues); McGarity, *supra* note 7, at 487 (determining President must be accorded opportunity to discuss national policy matters with cabinet members in private).

199. See *Nixon II*, 418 U.S. at 713. The Court found that the Sixth Amendment guarantees of confrontation and compulsory process for securing favorable witnesses and the Fifth Amendment protection of due process outweighed the executive privilege in this case. *Id.* at 711, see also Bruff, *supra* note 7, at 484 (noting that *Nixon II* Court may have decided case other way if competing interests had been less important).

200. *Nixon II*, 418 U.S. at 714-16.

201. 5 U.S.C. § 557(d)(1) (1988).

202. See Bruff, *supra* note 155, at 49 (discussing problems with disclosing internal executive branch policy discussions). Professor Bruff noted that "executive privilege protects policy debate in the White House from public disclosure; it would sharply curtail the privilege to require contacts between White House officials and outsiders to be made public. Indeed, such a rule could increase White House insularity by deterring free consultation." *Id.*

203. See *supra* note 199 and accompanying text (discussing constitutional interests implicated in *Nixon II*).

objectives reflected in the APA's prohibition on ex parte communications.²⁰⁴

2. Policy Behind Congressional Objectives Reflected in the APA's Prohibition of Ex Parte Communications

Section 557(d)(1)'s prohibition of ex parte communications serves two distinct purposes. First, the prohibition protects the public's "right to participate meaningfully in the decisionmaking process."²⁰⁵ Second, the prohibition helps to ensure the "proper functioning of effective judicial review"²⁰⁶ The legislative history behind § 557(d)(1), however, shows that the prohibition was not meant to "significantly [interfere] with the ability of the Government to carry out its substantive responsibilities."²⁰⁷ In *Portland*, the Ninth Circuit found that allowing the Committee to base the final exemption decision on private conversations would nullify the public's right to attend and participate at Committee meetings

204. See *Nixon v. Administrator of Gen. Servs. (Nixon I)*, 433 U.S. 425, 443 (1977) (setting out framework for separation of powers analysis); see also Bruff, *supra* note 7, at 484 (determining that balancing approach used by *Nixon II* Court could allow President to successfully assert executive privilege in rulemaking context).

205. *United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, 540 (D.C. Cir. 1978); see *North Carolina v. EPA*, 881 F.2d 1250, 1257 (4th Cir. 1989) (citing *United States Lines* for policy behind APA's prohibition on improper ex parte contacts); *Professional Air Traffic Controllers Org. (PATCO) v. Federal Labor Relations Auth.*, 685 F.2d 547, 563 (D.C. Cir. 1982) (noting prohibition on ex parte contacts serves to prevent the appearance of impropriety and to ensure opposing party can respond to content of private communication); S. REP. NO. 343, 94th Cong., 1st Sess. 8 (1975) (noting ex parte communications prevent party from rebutting arguments opposing party presented in secret); *id.* at 37 (noting purpose of provision is to give "interested persons a chance to reply to anything contained in the illegal communication").

206. *United States Lines*, 584 F.2d at 542; see *North Carolina v. EPA*, 881 F.2d 1250, 1257 (4th Cir. 1989) (citing *United States Lines* for policy behind APA's prohibition of improper ex parte contacts).

207. H. REP. NO. 880, 94th Cong., 2d Sess., pt. 2, at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 2183, 2188-89; see Nathaniel L. Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 ADMIN. L. REV. 377, 404 (1978) (discussing purposes behind Government in the Sunshine Act). Nathanson concludes that the Freedom of Information Act and the Government in the Sunshine Act "represent careful compromises between the right of the public to know what is going on in their government and the need of government officials for a measure of privacy both in their internal deliberations and in their communications with various sectors of the public." *Id.*

and hearings and to have access to all Committee records.²⁰⁸ Therefore, the court determined that allowing such conversations would be contrary to congressional intent.²⁰⁹

While the ESA does guarantee the public access to all Committee meetings and records,²¹⁰ the ESA does not confer a corresponding right to participate in Committee hearings.²¹¹ Indeed, if the public's ability to participate in the exemption proceeding beyond the Secretary's hearing truly concerned Congress, Congress would not have given the Committee such broad discretion to supplement the evidence gathered at the Secretary's hearing.²¹² Instead, Congress believed that a timely final decision by the Committee was more important than public participation.²¹³ Consequently, the exemption process does not indicate a congressional intent to allow parties the opportunity to rebut the substance of *ex parte* communications.²¹⁴ Therefore, only the preference that an agency base

208. *Portland Audubon Soc'y v Endangered Species Comm.*, 984 F.2d 1534, 1542 (9th Cir. 1993).

209. *Id.* at 1543.

210. *See supra* note 129 (setting out ESA provisions allowing for open meetings and records).

211. *See supra* note 130 (noting ESA does not guarantee public's right to participate in exemption proceedings); S. REP. NO. 343, *supra* note 205, at 1-2 (noting purpose of Government in the Sunshine Act was not to increase public's right to participate in agency proceeding).

212. *See supra* note 126 (detailing broad discretion ESA gives Committee in supplementing evidence Committee uses to make final decision).

213. *Compare* 16 U.S.C. § 1536(h)(1) (1988) (requiring Committee to make final decision within 30 days of receiving Secretary's report, without chance of extending time limit) *with id.* § 1536(g)(3) (allowing Secretary and exemption applicant to extend 20 day limit for Secretary to consider application) *and id.* § 1536(g)(5) (allowing Secretary and exemption applicant to extend 140 day limit for preparing report for Committee). The 1982 Amendments to the ESA show that Congress's foremost concern was speeding up the exemption process. *See* H.R. REP. NO. 567, *supra* note 122, at 14 (discussing reduction of timetable for exemption decision from 360 to 180 days). Indeed, the Amendments reduced the amount of time available for the Committee to review the Secretary's report and make the final decision from 90 to 30 days. *Id.* at 5. Thus, in situations when the Committee determines that additional information is necessary, the 30 day limit, which the Committee has no authority to extend, would prevent the Committee from allowing all interested parties the opportunity to review the new information and submit responses before the 30 day limit expires.

214. *See supra* notes 205-07 and accompanying text (discussing policy behind prohibition of *ex parte* communications).

final decisions solely upon the record remains to rebut the presumption of executive privilege in exemption proceedings.²¹⁵

The policy of requiring an agency to base final decisions solely upon the record has obvious utility from the standpoint of a reviewing court. A court should review the reasons and information that the agency actually relied upon when assessing whether the agency's decision was arbitrary and capricious.²¹⁶ This policy, however, does not carry the same weight as the constitutional issues that outweighed the presumption of executive privilege in *Nixon II*.²¹⁷ Moreover, as Judge Wald pointed out in *Sierra Club*, any agency decision must be factually supported by the administrative record.²¹⁸ This requirement serves to police any presidential involvement in an exemption proceeding by preventing the President from pressuring a Committee decision that the administrative record does not support.²¹⁹ Although not a perfect cure,²²⁰ this limitation is arguably

215. See *supra* notes 205-07 (discussing policy behind APA's prohibition of ex parte communications).

216. See McGarity, *supra* note 7, at 460-61 (discussing importance of having agency rely solely upon record when making final decisions).

217. See *supra* note 199 (noting constitutional interests involved in *Nixon II*).

218. See *Sierra Club v Costle*, 657 F.2d 298, 407 (D.C. Cir. 1981) (noting administrative record must support all agency decisions). The D.C. Circuit noted that the:

purposes of full-record review which underlie the need for disclosing ex parte conversations in some settings do not require that courts know the details of every White House contact, including a Presidential one, in this informal rulemaking setting. After all, any rule issued here with or without White House assistance must have the requisite *factual support* in the rulemaking record. The courts will monitor all this, but they need not be omniscient to perform their role effectively.

Id. (emphasis in original).

219. See Demuth & Ginsburg, *supra* note 7, at 1086 (arguing reviewing court will reject final decisions "not anchored in the record"); Verkuil, *supra* note 7, at 980 (noting presidential influence limited by administrative record). Professor Verkuil states that:

So long as the agency and the White House staff are bound by the rulemaking record in their policy discussions, staff participation in the decision process must be limited to suggesting outcomes that are supported by that record. Under this approach, agency and White House staff can be viewed as partners in a process of collaborative decisionmaking.

Id.

220. See *Sierra Club*, 657 F.2d at 408 (conceding that presidential pressure could bring about different result than would have occurred absent presidential involvement).

enough to allow a presidential claim of executive privilege to prevent the placing of policy discussions between the President and Committee members during exemption proceedings on the public record.²²¹

In sum, the Ninth Circuit's holding impinges upon the presidential authority to coordinate the executive branch.²²² In addition, this impingement is not rendered de minimis by an assertion that the President could still confer with Committee members in their capacities as Cabinet officers if the substance of any such communication is placed on the record because

The D.C. Circuit noted that:

[I]t is always possible that undisclosed Presidential prodding may direct an outcome that is factually based on the record, but different from the outcome that would have obtained in the absence of Presidential involvement. In such a case, it would be true that the political process did affect the outcome in a way the courts could not police. But we do not believe that Congress intended that the courts convert informal rulemaking into a rarified technical process, unaffected by political considerations or the presence of Presidential power.

Id. (emphasis in original); see McGarity, *supra* note 7, at 457 (noting agency can usually manipulate final decision to fit presidentially pressured outcome). While Professor McGarity's view cannot be discounted completely, his argument seems to assume that an agency will usually have the ability and means to manipulate the stated explanation to reach the presidentially pressured result and still be supported by the administrative record. If this manipulative ability were so common, however, judicial review would be almost pointless because a court could never be certain if the agency actually relied upon the stated analysis.

221. See Verkuil, *supra* note 7, at 979 (discussing balancing of executive privilege with needs of judicial review). Professor Verkuil argues that the "need for executive privacy outweighs the merely statutory interest in seeing the 'whole record' on judicial review. The statutory interest is legitimately subordinated to the President's Article II power to execute the laws." *Id.*, see Glenn T. Carberry, *Ex Parte Communications in Off-the Record Administrative Proceedings: A Proposed Limitation on Judicial Innovation*, 1980 DUKE L.J. 65, 92-94 (discussing arbitrary and capricious test); Nathanson, *supra* note 207, at 394-95 (arguing that reviewing court will reverse any agency action that cannot be supported without reference to undisclosed ex parte communications). Carberry argues that a "court can review an agency decision under the arbitrary and capricious standard without the disclosure of all information available to the agency." Carberry, *supra*, at 93. Carberry notes that "even if ex parte communications indicate that an agency decision was motivated by unarticulated policies or goals, this fact should not invalidate the decision where the articulated policies are reasonable and reflect legitimate statutory considerations." *Id.* at 93-94 (footnote omitted). But see Bruff, *supra* note 7, at 504 (arguing that presidential pressure to change agency decision that is still supported by record may violate "essential fairness").

222. See *supra* notes 168-72 and accompanying text (discussing presidential authority to coordinate Executive Branch).

this assertion ignores the presumption of executive privilege.²²³ Thus, one must analyze this infringement under the second prong of the *Nixon I* Court's separation of powers framework.²²⁴ The policy behind the ban on ex parte communications cannot render this impingement de minimis, however, for the same reasons the policy could not rebut the presidential presumption of executive privilege under *Nixon II*.²²⁵ Therefore, this congressional intrusion violates the doctrine of separation of powers under the *Nixon II* framework.

V Conclusion

With numerous amendments to the ESA pending,²²⁶ Congress should not ignore the Ninth Circuit's approach to analyzing the exemption mechanism of the ESA. The hybrid procedures found in the exemption process create not only characterization problems,²²⁷ but also a separation of powers dilemma.²²⁸ Therefore, Congress should amend the ESA to define clearly the exemption mechanism as a hybrid process under the APA. In addition, Congress, keeping in mind the presidential presumption of executive privilege and other separation of powers concerns, should expressly clarify the proper scope of the President's authority to intercede in exemption disputes involving two federal agencies.

Michael A. Bosh

223. See *supra* notes 196-204 and accompanying text (discussing executive privilege presumption in context of *Portland*).

224. See *supra* notes 166-67 and accompanying text (setting out *Nixon I* Court's framework for separation of powers analysis).

225. See *supra* notes 205-21 and accompanying text (discussing how policy behind ex parte contacts prohibition does not outweigh presumption of executive privilege).

226. See *supra* note 13 and accompanying text (noting proposed amendments to ESA).

227. See *supra* notes 61-108 and accompanying text (arguing Ninth Circuit improperly characterized exemption proceedings as requiring application of § 557(d)(1) of APA).

228. See *supra* notes 158-225 and accompanying text (discussing separation of powers problems with Ninth Circuit's holding in *Portland*).

