TWO CHEERS FOR HBO: THE PROBLEM OF THE NONPUBLIC RECORD

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INTRODUCTION

Controversy has surrounded the George W. Bush administration’s energy plan because, among other reasons, the energy industry helped develop the plan in secret consultation with the government. The administration’s energy task force held numerous meetings with lobbyists and business executives, but had little or no contact with environmental or public interest groups. After the administration refused to reveal the names of the persons with whom the task force met to the General Accounting Office

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1. See Don Van Natta, Jr., Executive Order Followed Energy Industry Recommendation, Documents Show, N.Y. Times, Apr. 4, 2002, at A18 (environmental groups have complained that they had almost no say in the formulation of the national energy plan); Joseph Kahn, White House Sets Up Clash Over Congressional Inquiry, N.Y. Times, Sept. 7, 2001, at A12 (citing congressional concern over extent of industry influence on energy task force).
(GAO), GAO used its subpoena power to demand the names.2

The administration's recalcitrance to reveal the developmental process of its energy plan raises issues concerning the legitimacy of secret lobbying in the administrative state. The legitimacy issue has taken on new significance with the advent of "presidential administration."3 That term, coined recently by Professor Elena Kagan, refers to President Bill Clinton's extensive involvement in the rulemaking process. While President Clinton continued the program of Office of Budget and Management (OMB) oversight used in the two previous administrations, uniquely, he ordered agencies to commence rulemaking and announced the results of the rulemaking outcome.4 Professor Kagan predicts that the Bush administration is likely to continue "presidential administration" and likewise involve, if not the president, at least high-level White House officials in the origination of rules and in the shaping of their content.5

OMB's new authority to oversee the quality of agency data has enhanced the potential for secret lobbying.6 Although Congress buried the decision to make the Office of Information and Regulatory Affairs (OIRA) the "data quality police" in an appropriation bill,7 this legislation potentially gives OIRA greater control over agency rulemaking.8 Since this new authority offers a new way to affect the scope of agency regulation, OIRA will draw additional attention from private lobbyists.

Lobbying behind closed doors is part and parcel of the political process, and its occurrence at the White House is simply an extension of its occurrence in Congress. Although an older case, Home Box Office, Inc. v. FCC (HBO),9 found it "intolerable" that the public and courts did not have ac-

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2. See Don Van Natta, Jr., Agency Files Suit for Cheney Papers on Energy Policy, N.Y. TIMES, Feb. 22, 2002, at A1 (GAO has sued Vice President Cheney to force him to reveal the identities of oil executives who helped the administration develop its energy policy).


4. See id. at 2249-50 (describing President Clinton's use of formal directives to executive agencies and personal appropriation of regulatory actions and work product).

5. See id. at 2317 (predicting the continuation and development of presidential administration in future administrations).


7. Id. at 839 (noting location of OIRA under OMB authority).

8. See id. at 841 (showing how OIRA's information policing gives it significant rule-making power).

9. 567 F.2d 9, 54 (D.C. Cir. 1977) ("Even the possibility that there is here one administrative record for the public and another for the [agency] and those 'in the know' is intolerable.").
cess to information and viewpoints expressed during such private meetings, subsequent decisions have accepted the practice as lawful. Current law provides that only information and viewpoints in the rulemaking record become public, and that a reviewing court need only confirm the agency's decision as defensible on the basis of this public record.\(^\text{10}\)

This Article seeks to rescue HBO from undeserved oblivion. The legitimacy of rulemaking relies on public knowledge of private contacts with agency and White House officials even if an agency can successfully defend its rule against legal attacks on the basis of publicly available information. Still, I reject HBO's suggestion that all private contacts be disclosed. Instead, agencies and the White House should reveal private communications of central relevance to the rulemaking proceeding and administrators should keep a public calendar of nonpublic meetings.\(^\text{11}\) The calendar should disclose the identities of the persons attending the meeting and the meeting's subject.

The HBO court interpreted the Administration Procedure Act (APA) as banning ex parte contacts during the pendency of a rulemaking proceeding. Such an interpretation is possible, but the APA's language does not demand it. Indeed, every court since HBO has rejected it. I will argue that if the APA does not require such disclosures, agencies and the White House should adopt them voluntarily. If they refuse, Congress should impose the disclosures on them.

\(^{10}\) See, e.g., Action for Children's Television v. FCC, 564 F.2d 458, 474-78 (D.C. Cir. 1977) (rejecting HBO and limiting it to rulemakings that resolve conflicting claims to a valuable privilege); see also Sierra Club v. Costle, 657 F.2d 298, 402 (D.C. Cir. 1981) (following prior cases that declined to apply HBO in the context of rulemaking of a "general policymaking sort").

\(^{11}\) Professor Araiza points out in his contribution to this symposium that White House involvement in rulemaking creates two types of contacts. See William D. Azaira, Judicial and Legislative Checks on Ex parte OMB Influence Over Rulemaking, 54 Admin. L. Rev. 611 (2002). Contact occurs between OMB or other White House officers and agency officials sometimes at the behest of private parties. See id. at 614. When a private party requests contact, the White House may become a conduit for regulated parties seeking to influence agency action. See id. at 621-22. This Article addresses the publication of contacts between private parties and the government, particularly contacts between White House officials and private parties. It does not address the issue of revealing intergovernmental contacts addressed by Professor Araiza. See id. at 613-15. For my views on the issue Professor Araiza addressed, see Sidney A. Shapiro, Political Oversight and The Deterioration of Regulatory Policy, 46 Admin. L. Rev. 1 (1994).
I. HBO AND THE APA

A. HBO Bans Ex Parte Contacts After a Notice of Proposed Rulemaking is Issued

The plain language of the APA permits ex parte contacts during informal rulemaking. First, section 553 of the APA, which establishes rulemaking procedures for informal rulemaking, does not prohibit ex parte contacts.\(^{12}\) Second, ex parte contacts are expressly prohibited during formal rulemaking,\(^{13}\) which suggests that Congress distinguished informal and formal rulemaking concerning ex parte contacts. The different nature of the record in the two types of proceedings supports this distinction. In formal rulemaking, an agency must make a decision based only on the record before it;\(^{14}\) ex parte contacts would therefore violate the integrity of the proceeding. Since there is no similar requirement in informal rulemaking,\(^{15}\) ex parte contacts would have no similar impact.

Despite this rather formidable set of arguments permitting ex parte contacts during informal rulemaking, the HBO court interpreted the APA as banning them once an agency issued a Notice of Proposed Rulemaking.\(^{16}\) The HBO case involved a rule promulgated by the Federal Communications Commission (FCC or Commission) concerning restrictions on cable programming intended to protect the broadcast industry.\(^{17}\) After the rule’s adoption, a number of interested parties challenged it. One issue concerned the FCC’s engagement in ex parte communications. The FCC had filed with the court a document more than sixty pages in length listing the “widespread ex parte communications” that had occurred.\(^{18}\) The Commission also reported that FCC personnel had met eighteen times after the comment period had closed with broadcast interests, nine times with cable


\(^{13}\) See id. § 557(d)(1) (prohibiting ex parte contacts between members of agency or interested persons outside agency).

\(^{14}\) See id. § 556(e) (providing that the transcripts of testimony, exhibits, and all papers and requests filed in proceeding are the “exclusive record for decision”).

\(^{15}\) See id. § 553 (establishing no requirement that rulemaking record is exclusive record for the proceeding).

\(^{16}\) See Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir. 1977) (restricting agency official or employee from discussing rulemakings with interested private parties).

\(^{17}\) See id. at 58 (showing how the rule protected the broadcast industry).

\(^{18}\) Id. at 52 (demonstrating the FCC’s concern with excessive ex parte communications).
interests, five times each with motion picture and sports interests, and not at all with public interest groups. 19

The court focused on the APA’s judicial review provisions to justify its holding. The APA requires a court to determine whether agency action, findings, and conclusions are “arbitrary and capricious.” 20 The court reasoned that ex parte contacts hindered its capacity to make that conclusion. It explained that ex parte communications concerning important aspects of the final FCC rule made it “difficult to judge the truth of what the Commission asserted it knew about the television industry because [the judges did] not have the benefit of an adversarial discussion among the parties.” 21

This idea was reminiscent of an earlier case, Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission, 22 which recommended that the Nuclear Regulatory Commission (NRC) use procedures in addition to notice-and-comment rulemaking to develop a record that would more sharply and clearly delineate the issues relevant to the agency’s rule. 23 Judge Bazelon, one of the judges in HBO, had written the opinion in the prior case.

B. The Supreme Court Limits Courts to the Explicit Language in the APA

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 24 which held that courts could not require agencies to go beyond the literal requirements of the APA, 25 ended Judge Bazelon’s efforts to require a more adversarial process than the APA requires on its face. The Court held, that “[a]bsent constitutional constraints or extremely compelling circumstances,” administrative agencies “should be free to fashion their own rules of procedure.” 26 Justice Rehnquist disagreed that “additional procedures will automatically result in a more adequate record because it will give interested parties more of an opportunity to participate in

19. See id. at 53 (commenting on the disparate treatment that public interest groups received).
20. 5 U.S.C. § 706(2)(A) (establishing standard of review a court uses when analyzing agency action).
21. Home Box Office, 567 F.2d at 55 (noting difficulty court encounters when ex parte contacts occur when formulating a rule).
22. 547 F.2d 633 (D.C. Cir. 1976).
23. See id. at 657 (observing that “more precision may be required than the less rigorous development of scientific facts which may attend notice and comment procedures.”).
25. See id. at 548 (showing a strict interpretation of the APA and what it requires of agencies).
26. Id. at 543 (leaving discretion with the administrative agencies to fashion procedural rules not explicit in the APA).
and contribute to proceedings.27 Since an agency engaged in informal
rulemaking can seek information from sources other than filed comments,
the “adequacy of the ‘record’ in this type of proceeding is not correlated
directly to the type of procedural devices employed.”28 Instead, it “turns on
whether the agency has followed the statutory mandate of the Administra-
tive Procedure Act or other relevant statutes.”29 In other words, the APA
defines the adequacy of the record by specifying what information must be
disclosed in it.

The HBO court offered another reason why ex parte contacts violated
the APA—section 706 of the APA requires a court to determine a regula-
tion’s sufficiency based on the “whole record.”30 The HBO panel deter-
mined that this language required an agency to put in the rulemaking record
information it received while rulemaking proceedings were pending. Oth-
erwise, the record denied judges the opportunity to review all of the informa-
tion that the agency relied on when making its decision to issue or not
issue a rule:

[It is the obligation of this court to test the actions of the Commission for arbitrar-
iness or inconsistency with delegated authority. Yet here agency secrecy stands be-
tween us and fulfillment of our obligation.31

Thus, “[e]ven the possibility that there is here one administrative record
for the public and this court and another for the Commission and those ‘in
the know’ is intolerable.”32 The court concluded:

[Where, as here, an agency justifies its actions by reference only to information
that has been presented to it in the public file while failing to disclose the substance of
other relevant information that has been presented to it, a reviewing court cannot pre-
sume that the agency has acted properly, but must treat the agency’s justifications as
a fictional account of the actual decision making process and must perforce find its
actions arbitrary.33

27. Id. at 547 (arguing a more accurate record will not necessarily follow additional
procedures).
28. Id. (describing how the wealth of information that goes into rulemaking prevents
procedural safeguards from resulting in more accurate records)
29. Id. (stating the APA and other statutory requirements provide an adequate record).
31. Home Box Office, Inc. v. FCC, 567 F.2d 9, 54 (D.C. Cir. 1977) (demonstrating an
instance where a court felt that the secret record prevented making a decision about agency
action) (citations omitted).
32. Id. (noting how the existence of an unofficial record makes the court’s work diffi-
cult when trying to determine whether an agency action was arbitrary and capricious).
33. Id. at 54-55 (showing how a court can find agency action arbitrary when the sub-
stantive issues influencing agency action are not present in the record) (citations omitted).
This second argument has the advantage over the first that it is connected, at least superficially, with explicit language in the APA. As noted earlier, the APA does require the court to review the "whole record." The issue, of course, is what constitutes the "whole record." As mentioned, the U.S. Supreme Court in Vermont Yankee rejected the idea that the agency could not gather evidence and arguments that were not reflected in the rulemaking record. Instead, the Court appeared to define the "whole record" for purposes of informal rulemaking as consisting of all of the information that the APA requires an agency to put in the record. Thus, the "whole record" for purposes of judicial review of informal rulemaking would not include ex parte contacts because the APA does not require the publication of such contacts. Instead, the APA requires judges to consider all of the information that an agency puts in the record, but the record need not include all of the information that an agency considers.

II. SIERRA CLUB AND THE APA

A. The D.C. Circuit Notes Important Justifications for Reading the APA Literally

The D.C. Circuit quickly rejected the HBO court's aggressive interpretation of the APA. In Sierra Club v. Costle, Judge Patricia Wald justified a literal reading of the APA on the grounds that ex parte contacts were valuable to government. She noted that the right to petition the government was of fundamental importance. Also, private meetings give an agency the chance to ask interested parties questions, to measure the strength of their support and objections to the proposed rule, and to attempt to convince parties to support the rule. Given these benefits of informal communications, Judge Wald was reluctant to interpret the APA to mandate disclosures that the statute did not clearly require.

B. The D.C. Circuit Recognizes the Problem of the Secret Record

Sierra Club appears to be a robust rejection of HBO, but Judge Wald

34. See Vermont Yankee, 435 U.S. at 547 (finding record adequate where agency follows APA requirements notwithstanding procedural devices used).
35. See Sierra Club v. Costle, 657 F.2d 298, 402 (D.C. Cir. 1981) (declining to apply HBO to informal rulemaking and procedures mandated by Clean Air Act Amendments).
36. See id. at 400 (venerating accessibility to agency officials).
37. See id. at 400-01 (extolling benefits of public participation in the agency rulemaking process).
38. See id. at 402 (finding no express provision in APA to restrict post-comment contacts during informal rulemaking).
recognized the problem of the "secret" record that had arisen in HBO. She engaged in her own aggressive statutory interpretation to address this problem, but she did so as a matter of interpreting the Clean Air Act, rather than the APA.

The Clean Air Act has a number of hybrid rulemaking requirements. One of these requirements concerns the rulemaking record:

All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.\(^{39}\)

Judge Wald recognized that this provision intended to address the very problem that HBO identified. She explained:

The possibility of course exists that in permitting ex parte communications with rulemakers we create the danger of "one administrative record for the public and this court and another for the Commission." Under the Clean Air Act procedures, however, "[t]he promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket. . . ." Thus EPA must justify its rulemaking solely on the basis of the record it compiles and makes public.\(^{40}\)

But, Judge Wald was not satisfied that the statutory requirement to disclose documents accomplished the purpose of informing the court of all relevant information to the rulemaking. She noted,

[I]f oral communications are to be freely permitted after the close of the comment period, then at least some adequate summary of them must be made in order to preserve the integrity of the rulemaking docket, which under the statute must be the sole repository of material upon which EPA intends to rely.\(^{41}\)

Although the statute did not require the docketing of all post-comment period conversations and meetings, Judge Wald decided that "a fair inference can be drawn that in some instances such docketing may be needed in order to give practical effect to section 307(d)(4)(B)(i), which provides that all documents `of central relevance to the rulemaking’ shall be placed in the docket as soon as possible after their availability."\(^{42}\) She explained,

This is so because unless oral communications of central relevance to the rulemaking are also docketed in some fashion or other, information central to the justification of the rule could be obtained without ever appearing on the docket, simply by commun-

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\(^{40}\) Sierra Club, 657 F.2d at 401 (explaining how the Clean Air Act requires that no secret record exist in EPA's rulemaking process).

\(^{41}\) Id. at 402 (giving the minimum amount of additional information that an agency must include in the record after the formal comment period expires).

\(^{42}\) Id. (stating that not all documents must be included in the record in the post comment period, but only those of central relevance).
cating it by voice rather than by pen, thereby frustrating the command of section 307 that the final rule not be "based (in part or whole) on any information or data which has not been placed in the docket." 43

Judge Wald considered protecting the integrity of the rulemaking docket sufficiently important to engage in her own aggressive statutory interpretation of the Clean Air Act. Because she was interpreting the Clean Air Act, the Vermont Yankee edict—that courts adhere to a literal reading of the APA's rulemaking requirements—did not restrict Judge Wald. Subsequently, another panel of the D.C. Circuit refused to extend the docketing requirement in Sierra Club to rules that arose under statutes other than the Clean Air Act. 44 In Board of Regents of the University of Washington v. Environmental Protection Agency, one of the parties relied on Sierra Club to argue that EPA's failure to include a summary of a significant ex parte contact violated the APA. 45 The court replied, "[b]ut Sierra Club involved statutory language (§ 307(d) of the Clean Air Act, 42 U.S.C. § 7607(d)) providing that all documents 'of central relevance to the rulemaking' were to be placed in the docket as soon as possible after they became available, . . . language that has no counterpart in the notice-and-comment provisions of 5 U.S.C. § 553." 46

III. DISCLOSURE POLICY

It would be an uphill battle for a court to interpret the APA as requiring the publication of ex parte contacts or ex parte contacts of central relevance to the rulemaking proceeding. 47 Except for HBO, the D.C. Circuit has con-

43. Id. (explaining how the broad disclosure rule prevents information of central relevance from being excluded from the record even if communicated orally).

44. See Bd. of Regents of Univ. of Wash. v. EPA, 86 F.3d 1214, 1222 (D.C. Cir. 1996) (finding no language in APA requiring documents of central relevance be included in record).

45. See id. at 1222 (showing how subsequent litigants have used Sierra Club to invalidate agency action when ex parte communications exist).

46. Id. (limiting the holding of Sierra Club to cases involving the Clean Air Act).

47. Professor Araiza reaches the same conclusion in his contribution to this symposium. See Araiza, supra note 11, at 618 ("The Court's rejection of free-standing procedural requirements . . . makes it unlikely that such requirements could be imposed on OMB influence in rulemaking."). Professor Araiza usefully points out that this does not necessarily mean that the APA establishes no obligation to publish ex parte contacts. See id. at 621. Courts have long insisted that agencies put on the table the information and data on which they are relying to promulgate a rule, see ibid. at 619-21 (citing relevant cases), which presumably would include information and data obtained in ex parte contacts. Still, this obligation does not prevent an agency from being influenced by information and data, as well as arguments, that are not revealed in the rulemaking record. Araiza concludes, "On balance, these cases suggest that significant information can remain undisclosed as long as it is not
sistently resisted such an interpretation, and the U.S. Supreme Court’s decision in Vermont Yankee supports this refusal. The Court’s refusal to imply such a requirement arises from a skepticism about the value of such a requirement. After all, rulemaking is a surrogate for the legislative process in Congress where behind-the-scenes lobbying is a common occurrence. Moreover, as Judge Wald identified, ex parte contacts have benefits, as well as costs. If a publication requirement does not make sense as a matter of institutional design, then it is difficult to believe that Congress might have intended such a requirement, particularly in light of specific language that suggests Congress did not do so.

This Section takes issue with the standard assumption that the publication of ex parte contacts is not worthwhile and, even if worthwhile, the benefits of such publication are outweighed by the costs of doing so. If one accepts my argument, it would support an interpretation of the APA similar to that made in HBO. Nevertheless, I recognize that courts may be unwilling to take this step in light of the contrary precedent. This Section is therefore also addressed to agencies and the White House. It argues that both should voluntarily make the disclosures that I recommend. If they do not, Congress should consider imposing such requirements.

The HBO court found that a “secret record” inhibited judicial review because it prevented an adversarial discussion regarding information considered relevant by an agency, and it prevented the court from considering that information in judging the legality of the agency’s actions. In Sierra Club, the court rejected the first reason as adequate to require disclosure of ex parte communications, but it recognized the validity of the second problem. Judge Wald went out of her way to strengthen the disclosure provisions of the Clean Air Act, requiring the disclosure of oral, as well as written, communications of “central relevance” to the rulemaking. The same disclosure policy should apply to other agencies as well.

The possibility that a reviewing court would not see significant information on which an agency relied in a rulemaking is not a problem for some commentators. For these observers, as long as the agency can establish the legality of its rule in light of publicly available information, it does not matter that agency officials may have been influenced by information that is not publicly available. As Professor Nathaniel Nathanson explains:

So far as judicial review is concerned, if the formulation given is an appropriate one under the governing statute, that should be sufficient to sustain administrative action. It might be that administrative action is also motivated by some other policy considerations which could not be so easily articulated or which had not relation the acknowledged purposes of the statute or the agency. Such ulterior purposes might or

critical to the decision, and thus suggest that much conduit information could be kept secret.” Id. at 622.
might not be suggested by the disclosure of ex parte communications. Even so it is
had to see why the existence of such ulterior motives should be the proper concern of
a reviewing court, any more than it would be if the court were reviewing the reason-
ableteness of legislation. 48

The short answer to Nathanson’s argument is that the agency is not Con-
gress. As I have argued elsewhere, judicial review of the reasons that an
agency gives for its actions is essential to establish the legitimacy of
agency rulemaking. 49 Since rationalism review “places the burden on an
agency to adequately explain its decision in terms of its statutory mandate,”
agencies “must be able to demonstrate that they have applied their expertise
in a meaningful manner and have reasonably investigated the problem that
they are attempting to resolve.” 50

As the HBO decision noted, what occurs behind-the-scenes can be rele-
vant to judges making this determination:

Although it is impossible to draw any firm conclusions about the effect of ex
parte presentations upon the ultimate shape of the pay cable rules, the evidence is
certainly consistent with often-voiced claims of undue industry influence over Com-
mission proceedings, and we are particularly concerned that the final shaping of the
rules we are reviewing here may have been by compromise among the contending in-
dustry forces, rather than by exercise of the independent discretion in the public in-
terest the Communications Act vests in individual commissioners. Our concern is
heightened by the submission of the Commission’s Broadcast Bureau to this court
which states that in December 1974 broadcast representatives “described the kind of
pay cable regulation that, in their view, broadcasters ‘could live with.’” If actual po-

ingions were not revealed in public comments, as this statement would suggest, and,

further, if the Commission relied on these apparently more candid private discus-
sions in framing the final pay cable rules, then the elaborate public discussion in these
dockets has been reduced to a sham. 51

48. Nathaniel Nathanson, Report to the Select Committee on Ex Parte Communications
49. See Sidney A. Shapiro & Richard E. Levy, Heightened Scrutiny of the Fourth
Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency De-
cisions, 1987 Duke L.J. 387, 440 (arguing that judicial review of agency decisions fluctuates
in accordance with American political values, and concluding that separation of powers has
precluded courts from subjecting agency decisions to strict judicial review).
50. Id. at 430.
51. Home Box Office, Inc. v. FCC, 567 F.2d 9, 53-54 (D.C. Cir. 1977) (citations
omitted). Professor Araiza makes a similar point regarding the pattern of private lobbying
at OMB. He notes:

OMB’s value as an information conduit presumably arises from the possibility that
OMB might adopt the information and use its influence to press it upon the agency.
Thus, it might be very difficult for a reviewing court to know how important a piece
of information was to the agency by simply examining the information in the abstract.
Araiza, supra note 11, at 624. When OMB discloses significant ex parte contacts that it has
received, this pattern of influence is observable to a court.
The Administrative Conference of the United States (ACUS) has agreed that "certain restraints" on ex parte communications are desirable because without them "significant information may be unavailable to reviewing courts." While ACUS was not prepared to support a general prohibition on ex parte communications, it did advise agencies promptly to place written communications received from outside parties in the rulemaking file if they were "addressed to the merits" of a proposed rule. ACUS also advised agencies to "experiment in appropriate situations with procedures designed to disclose oral communications from outside of the agency of significant information or argument respecting the merits of proposed rules."

I have argued elsewhere for a similar result on the basis of Sierra Club. The idea is that Sierra Club offers a useful policy compromise between nondisclosure and complete disclosure:

An agency could be required to place a summary of all ex parte contacts of central relevance to the disposition of an informal proceeding in a record of that proceeding. This solution would have two advantages. First, it would allow such contacts to occur and an agency therefore could obtain whatever advantages would result from them. Second, it would ensure that a reviewing court had a complete record from which the court could determine whether the agency's actions were arbitrary and capricious.

The value of publicizing significant ex parte contacts has been recognized by some agencies and the White House. While partial disclosure is not required by the APA, agencies have complied with ACUS's recommendations, although the extent of compliance is the subject of some dispute. In the Clinton administration, OMB was among the agencies that partially disclosed ex parte communications. After an agency had pub-

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52. Ex Parte Communications in Informal Rulemaking Proceedings (Recommendation 77-3), 1 C.F.R. § 305.77 (2001) (listing other advantages associated with restraining ex parte communications, including reducing possibility of unfair influence over decision makers and affording interested parties opportunity to respond to information relied upon in decisionmaking process).
53. Id. § 305.77-3, at Recommendation 2.
54. Id. § 305.77-3, at Recommendation 3.
56. See WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 230 (3d ed. 1997) (arguing that "few other agencies" have followed the FCC, which has promulgated detailed rules on ex parte contacts including rules on contacts during a rulemaking proceeding). Compare WALTER GELLHORN ET AL., ADMINISTRATIVE LAW: CASES AND COMMENTS 929 (8th ed. 1987) (stating that "restraints suggested by the Conference have been widely heeded"), with JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 231 (3d ed. 1998) ("Agencies take various approaches in handling ex parte communications, and the independent regulatory agencies appear to have the most restrictive policies regarding such contacts in rulemaking.").
lished a regulatory action in the Federal Register (or it was otherwise resolved), OMB disclosed publicly any substantive written communications that it had received from persons outside of the government.\textsuperscript{57} It also disclosed the subject matter of “substantive” oral communications, but not their content.\textsuperscript{58}

The Clinton order fell short of the ACUS recommendation that agencies find procedures to disclose oral communications from outside of the agency of significant information or argument respecting the merits of proposed rules. It is not clear whether this loophole invited lobbyists to say orally what they were not prepared to put in writing. As the reader will recall, Judge Wald interpreted the disclosure provisions of the Clean Air Act to apply to oral, as well as written, communications precisely because of this concern.\textsuperscript{59} The administration, however, did have other safeguards regarding oral communications that are discussed in the next section.\textsuperscript{60}

The two prior Republican administrations did not engage in the same degree of disclosure as the Clinton administration. “White House oversight operated in complete secrecy for the first five years of the Reagan administration except for leaks or information disclosed by legislative oversight. OMB adopted some disclosure requirements in 1986 to head off an appropriations rider that would have eliminated its funding for regulatory oversight[,]”\textsuperscript{61} but these procedures “contained [some] generous loopholes.”\textsuperscript{62}

By comparison, the current Bush administration will apparently follow the procedures used by the Clinton administration.\textsuperscript{63} The administration has stated:

On occasion, parties outside the Executive branch will meet with the OIRA Administrator or his or her designee regarding a rule under review. OIRA will invite representatives of relevant agencies to such meetings and OIRA appreciates having agencies make senior regulatory policy officials available to attend such meetings. In addition, written materials received from those outside the Executive branch are retained for public inspection in OIRA’s public docket room and forwarded to the

\textsuperscript{58} See id. § 6(b)(4)(C)(iii).
\textsuperscript{59} See Sierra Club v. Costa, 657 F.2d 298, 402 (D.C. Cir. 1981) (explaining Judge Wald’s exact position on how policies regarding disclosure of ex parte communications should be structured).
\textsuperscript{60} See infra text accompanying note 75.
\textsuperscript{61} Shapiro, supra note 11, at 21 (noting, however, that too much political oversight over policymaking process has resulted in ineffective regulatory policies).
\textsuperscript{62} Id. at 22.
\textsuperscript{63} See OMB Regulatory Review: Principles and Procedures 4 (Sept. 20, 2001), available at http://www.whitehouse.gov/omb/inforeg/oira_review-process.html. The memorandum commits OMB to the disclosure procedures specified in § 6(b)(4) of Executive Order No. 12,866. See supra notes 57-58 (describing Clinton’s administrative procedures).
rulemaking agency. It is the responsibility of each agency to place these in the rule-
making docket.64

The Bush administration order suffers from the same defect as the
Clinton order because it does not cover oral communications from outside of
the agency relevant to the merits of proposed rules. Moreover, there is
another defect. The OMB disclosure provisions cover only lobbying at
OMB. The rise of the administrative presidency, described earlier,65 invites
lobbyists with the appropriate connections to ply their trade in the offices of
persons who work directly for the president. If the president is now go-
ing to call the shots in rulemaking, as Professor Kagan suggests will hap-
pen,66 the OMB procedures will not be sufficient to establish the necessary
accountability concerning ex parte contacts by lobbyists outside of the gov-
ernment.

Professor Kagan recognizes secrecy as a potential problem with presi-
dential administration, although she downplays its significance. She argues
that presidential administration will lead to greater public accountability in
regulatory policy for two reasons. Presidential leadership “enhances trans-
parency, enabling the public to comprehend more accurately the sources
and nature of bureaucratic power,” and it “establishes an electoral link be-
tween the public and the bureaucracy, increasing the latter’s responsiveness
to the former.”67 Kagan cautions, however, that “[t]o the extent that presi-
dential supervision of agencies remains hidden from public scrutiny, the
President will have greater freedom to play to parochial interests.”68 This
potential does not shake Professor Kagan’s support of presidential admin-
istration because the “[p]residency is by nature a public institution, and al-
most no presidential exercise of authority, however masked or oblique,
long can escape public notice.”69 Still, “greater openness” makes the pre-
vious advantages of presidential administration “more potent.”70

Professor Kagan’s faith that presidential exercises of authority will be
unmasked may be correct, but the relevant issue here is whether secret lob-
bying of the White House will be unmasked. In other words, should the
White House itself follow the types of disclosure policies that OMB used in
the Clinton administration and which the Bush administration has contin-

whitehouse.gov/omb/inforeg/oira_review-process.html.
65. See supra notes 3-5 and accompanying text.
66. See supra note 5 and accompanying text.
67. Kagan, supra note 3, at 2331-32 (arguing that because agencies are part of the ex-
cutive branch, the president should be able to regulate their policies).
68. Id. at 2337.
69. Id.
70. Id.
The refusal of the Bush administration to reveal the name of the energy executives who participated in the drafting of the administration’s energy plan suggests that the White House is not be willing to make such disclosures.

IV. PUBLIC CALENDARS

The APA, as it is currently interpreted, does not require the disclosure of ex parte contacts in informal rulemaking. This lack of accountability is defended on the ground that a rule is legitimate as long as an agency can defend it on the basis of publicly available information. The public would be better served, however, if agencies, OMB, and the White House would disclose ex parte contacts of central relevance to a rulemaking. This disclosure permits the public, as well as courts, to determine the rationality of a rule in light of all of the significant data and arguments that an agency took into account. Since rules are legitimized on the basis of the agency’s reasons for the rule, this step demonstrates the legitimacy of the agency’s actions.

There is a second reason to disclose ex parte contacts. As ACUS recognized, without such disclosures, “decision-makers may be influenced by communications made privately, thus creating a situation at odds with the widespread demand for open government.” More specifically, the public is entitled to know about the pattern of agency lobbying because it offers a perspective on the legitimacy of the agency’s actions.

It is often difficult for outsiders to determine what policy is reasonable in a given situation. An agency that meets only with the business community is not necessarily captured, but the industry’s role in creating a rule is certainly relevant to the public’s judgment about whether capture has occurred. The fact that the Bush administration met secretly with members of the energy industry, but not the environmental community, is hardly irrelevant to public judgments about the merits of the administration’s energy plan.

The fact that current law does not require private contacts to be acknowledged protects the access of industry or other favored groups to agency officials. The irony is that the lack of public knowledge may give a rule more legitimacy than it deserves because the secrecy hides the industry influence. The lack of disclosure also encourages such behind-the-scenes contacts. The willingness of influential lobbyists to ply their trade may be impacted by the extent to which the lobbying is visible to the public.

The ACUS recommendations make government more open, but they do not go far enough. Since the disclosure provisions apply only to written

communications addressed to the merits, an agency is under no obligation to disclose the extent of its contacts with private groups. Moreover, although ACUS recommended that summaries of oral communications should ordinarily identify the source of the communications, ACUS suggested that agencies need not make such an identification when the information or argument is cumulative. Both of these provisions facilitate an agency hiding from the public the pattern of influence that occurred in HBO and regarding the Bush administration’s energy initiative.

ACUS was stymied in addressing this problem because the only answer it considered was to endorse HBO and require the disclosure of all ex parte communications. Specifically, ACUS concluded that a general prohibition applicable to all agencies against the receipt of private oral or written communications was undesirable “because it would . . . result in procedures that are unduly complicated, slow and expensive, and, at the same time, perhaps not conducive to developing all relevant information.”

The requirement that administrators keep a public calendar is another way to provide the public with information about the pattern of industry lobbying. The procedural rules adopted by the Clinton administration regarding OMB are a good example. President Clinton required OIRA to maintain a publicly available log, concerning regulatory actions under review by OIRA, that contained the “dates and names of individuals involved in all substantive oral communications . . . between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications.”

The public would have a means to monitor the pattern of lobbying at an agency if it used a calendaring requirement similar to the one adopted by the Clinton OMB. Moreover, this requirement does not have the disadvantages that are associated with requiring the disclosure of all oral and written communications as HBO would have done. Indeed, the only apparent disadvantage of this proposal is that it might discourage some groups or lobbyists from meeting with an administrator. On balance, it is difficult to see the value of protecting the right of lobbyists to meet secretly with administrators or OMB. This is the issue raised by the Bush administration’s

72. See 1 C.F.R. § 305.77-3 Recommendation 1 (stating that it would be undesirable to prohibit all ex parte written or oral communications between an agency and private party because such action would deprive agencies of certain flexibility when fashioning rules).

73. See id. (recommending standards for summaries of oral communications).

74. Id.

75. Exec. Order No. 12,866, § 6(b)(4)(C)(iii), 58 Fed. Reg. 51,735 (Sept. 30, 1993). The Clinton administration also required that only the administrator of OIRA could receive oral communications initiated by persons not employed by the executive branch of the federal government regarding the substance of a regulatory action under review by OIRA. See id. § 6(b)(4)(A).
refusal to identify the lobbyists with whom it met during the development of its energy proposal. Since a calendaring requirement does not reveal the content of a meeting, only its existence, the argument against revelation must be that disclosure will discourage some lobbyists from seeking a meeting with administrators or OMB in the first place. While this may be true, protecting the identity of lobbyists in this circumstance flies in the face of our general commitment to open government. This value should trump any claim that lobbyists have the right to privately contact agency administrators or OMB.\textsuperscript{76}

There is no similar calendaring requirement that applies to Congress, but as argued earlier, agencies and OMB are not Congress. As unelected bureaucrats, administrators and OMB officials do not have the same democratic legitimacy as members of Congress. Moreover, a calendaring requirement would assist Congress in its oversight role of monitoring the Executive Branch. Indeed, GAO’s demand that the Bush administration turn over the names of lobbyists who met with the White House was in support of just such oversight.

\section*{Conclusion}

Efforts to root out secret lobbying might be characterized as a misguided attempt to perfect the rulemaking process. Since rulemaking is a political process, as well as a legal one, it inevitably will be subject to the elements of politics that give certain persons or corporations an advantage over others. Such disparities are endemic to our political life and cannot be eliminated no matter how much one might try. Indeed, some would regard the rough tumble of politics as perfectly appropriate since it represents the unregulated clash of political forces.

This response, however, ignores the possibility of making improvements in the rulemaking process, which is not the same thing as eliminating all political elements from rulemaking. If there are pragmatic ways to address

\textsuperscript{76} Professor Araiza raises the issue of whether the president’s obligation under Article II to execute the laws establishes a privilege to keep secret conversations between White House and agency officials. See Araiza, \textit{supra} note 11, at 627. Even if such a privilege prevents the revelation of any intergovernmental contacts, I have argued that it does not do so in other contexts. See Shapiro, \textit{supra} note 11, at 29 (stating that it is highly questionable that the privilege extends to information and arguments that private individuals make to White House officials). To establish a privilege concerning such information, the president would have to argue that its revelation would significantly interfere with the administrations ability to manage the rulemaking process. The privilege, however, is a deliberative privilege, and it is difficult to see how such disclosures inhibit the president’s capacity to deliberate with agency officials. Even if there is some adverse impact, it is outweighed by the public value of such disclosures. See \textit{id.} at 29 (arguing that the Supreme Court balances the benefits and detriments of disclosure in ruling of executive privilege claims).
the problems posed by secret lobbying, there appears to be no reason not to
do so. One might argue about the practicality of proposed solutions, but
doing nothing is satisfactory only if none of the proposed solutions is a
pragmatic solution.

Both Sierra Club and ACUS recognized the concern expressed in HBO
that agencies may act on the basis of information not available to a re-
viewing court. Sierra Club supported the disclosure requirement of the
Clean Air Act that EPA docket communications of "central relevance" to
the rulemaking proceeding.\textsuperscript{77} ACUS endorsed the disclosure of ex parte
communications "addressed to the merits" of a rulemaking.\textsuperscript{78} HBO and
ACUS recognized another problem. The existence of secret lobbying is in-
consistent with the widespread public demand for open government. Disclo-
sure of all ex parte communications is not a practical solution to this
problem, but ACUS overlooked calendaring as a solution.

It is possible to interpret the APA as requiring the disclosure of ex parte
contacts following the arguments made in HBO, but it is unlikely that the
courts are going to take this step any time soon in light of the contrary
authority. Moreover, it would be even more difficult to imply that the
APA requires administrators to keep a public calendar. Agencies, OMB,
and the White House can voluntary adopt the procedures that I recommend,
and there are good policy reasons for them to do so. If they do not, Con-
gress should consider imposing such requirements, although presidential
opposition may make this an unlikely outcome.

\textsuperscript{77} See supra note 39 and accompanying text.
\textsuperscript{78} See supra notes 53-54 and accompanying text.