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GREENLIGHTING ADMINISTRATIVE PROSECUTION: CHECKS AND BALANCES ON CHARGING DECISIONS

Michael Asimow*

I. INTRODUCTION

This study concerns the charging practices of federal regulatory agencies that engage both in law enforcement and adjudication. It focuses on the process by which the agency staff decides to charge suspected violators (hereinafter referred to as "targets"[1]) and the agency (usually but not always a multi-member board or commission) approves these charging decisions—a process I describe as "greenlighting."[2]

The decision to charge a target is an exercise of prosecutorial discretion by agency staff that resembles the charging decision by prosecutors in criminal cases.[3] The charging decision may be the most consequential decision point in the administrative adjudicatory process, as it is in criminal prosecution. The charging decision is often announced to the public through a press release which ensures adverse publicity.[4] The vast majority of targets settle enforcement cases after the staff decides to recommend enforcement.[5] A settlement usually requires the target to

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[1] The defendant in enforcement cases is often referred to as a "respondent" or "subject," but I use the catchier term "target."

[2] "Greenlighting" is a term often used in the entertainment industry. It refers to an executive-level decision by a financing or distribution company to approve a proposal for a new film or television show. I also borrowed the greenlight metaphor from Harlow and Rawlings who distinguish redlight and greenlight theories. CAROL HARLOW AND RICHARD RAWLINGS, LAW AND ADMINISTRATION (2004). Most of administrative law is redlight—stopping agencies from doing what they want to do. In contrast, public administration theories stress greenlight approaches that help agencies do what they want to do effectively and efficiently.

[3] It is beyond the scope of this study to compare the charging process in the administrative and criminal justice systems. However, it is often pointed out that the charging decisions of criminal prosecutors (who settle perhaps 95% of their cases) are largely unaccountable. See Rachel E. Barkow, *Foreword: Overseeing Agency Enforcement,* 84 GEO. WASH. L. REV 1129 (2016) (criticizing the lack of accountability of both administrative and criminal law prosecutors, especially in the area of under-enforcement) [hereinafter Barkow, *Overseeing Agency Enforcement*]; Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law,* 61 STAN. L. REV. 869 (2009) (advocating separation of functions for criminal prosecutors) [hereinafter *Institutional Design*]; Samuel J. Levine, *Disciplinary Regulation of Prosecutorial Discretion*, 16 OHIO ST. J. CRIM. L. 237, 237 n.1 (2019).

[4] *See* Admin. Conf. of the U.S., Recommendation 73-1, *Adverse Agency Publicity*, 38 Fed. Reg. 16839 (June 27, 1973).

[5] In the interviews conducted for this study, I asked respondents what percentage of charged cases settled before hearing. Depending on the agency in question, the estimates ran between 30% and 95%. In federal criminal cases,

accede to various unwelcome remedies. For those who settle after being charged, the charging decision is the only agency decision that matters.

If a target decides to contest the charges through the adjudicatory process—typically a hearing before an administrative law judge (ALJ) and an appeal to the agency—it will face heavy costs and fees and a significant drain on the time of its executives. And, of course, there is a better than average probability that the target will lose, perhaps becoming subject to more onerous remedies than it could have settled for.[6] An agency's refusal to charge is equally consequential, since it may signal under-enforcement of regulatory norms or industry capture of the agency's enforcement mechanism.

Thus, the charging decision is a critical landmark in an administrative enforcement case, whether it is settled or litigated. Charging decisions and administrative prosecutorial discretion are worthy subjects for inquiry and for development of best practices, but they have been understudied.[7]

Part II of this study describes the greenlighting practices of five multi-member combined-function independent agencies: the Securities and Exchange Commission (SEC), Federal Trade Commission (FTC), Federal Energy Regulatory Commission (FERC), Federal Communications Commission (FCC), and National Labor Relations Board (NLRB). Part III discusses the pros and cons of greenlighting, ultimately concluding that the benefits outweigh the costs. Part IV discusses the legality of greenlighting, concluding that it satisfies both constitutional due process and the dictates of the Administrative Procedure Act (APA). Part V discusses the benefits and costs of various procedural mechanisms relating to the greenlighting process that agencies have adopted or that writers have recommended. Part VI concludes with recommended best practices for combined-function agencies.

The primary source of data for this report involves interviews by the author with experts familiar with the enforcement practices of the SEC, FTC, FERC, FCC, and NLRB.[8] The

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more than 95% of cases are plea bargained. See Ellen Podgor, *The Dichotomy Between Overcriminalization and Underregulation,* 70 AMER. U. L. REV. 1061, 1093 (2021).

[6] See Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Observation*, 92 WASH. L. REV. 315 (2017) (ALJs ruled for the SEC in 90% of cases; federal district judges ruled in favor of the SEC in 88% of cases).

[7] There is a large and informative literature on the administrative enforcement function, but little of it concentrates on the subject of this paper—that is, greenlighting in combined-function agencies. Cf. EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK (1982); Kate Andrias, *The President's Enforcement Power,* 88 N.Y.U. L. REV. 1031 (2013); Barkow, *Overseeing Agency Enforcement, supra* note 3; Stephanie Bornstein, *Public-Private Co-Enforcement Litigation,* 104 MINN. L. REV. 811(2019); John Braithwaite et al., *An Enforcement Taxonomy of Regulatory Agencies,* 9 LAW & POLICY 323 (1989); Margaret H. Lemos, *Democratic Enforcement: Accountability and Independence for the Litigation State,* 102 CORNELL L. REV. 929 (2017); Daniel L. Markell & Robert L. Glicksman, *A Holistic Look at Agency Enforcement,* 93 N.C. L. REV. 1 (2014); Max Minzner, *Should Agencies Enforce?* 99 MINN. L. REV. 2113 (2015); Jodi L. Short, *The Politics of Regulatory Enforcement and Compliance: Theorizing and Operationalizing Political Influences,* 15 REGUL. & GOVERNANCE 653 (2019); Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31 (2017); Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369 (2019).

[8] The five agencies I studied have multiple members. However, I believe my findings and recommendations apply to combined-function agencies in the executive branch as well as independent agencies. They also apply to agencies that have only a single head (although the advantage of encouraging collegial discussion discussed in Part IUII. A.

interviews were conducted with present and former agency members and staff, as well as law professors and private defense lawyers (many of whom were themselves former agency members or staff). I am most grateful to these interviewees for serving as data sources and I have promised them anonymity. As a result, citations to interview data will identify the agency concerned and the interviewees by number but will not disclose their names or any identifying details.

II. THE ENFORCEMENT PROCESS IN FIVE COMBINED-FUNCTION AGENCIES

This Part provides an overview of the enforcement process, including greenlighting mechanisms, in five combined-function, multi-member, independent federal agencies: the SEC, FTC, FERC, FCC, and NLRB.

A. Securities and Exchange Commission (SEC)

The SEC can impose significant monetary sanctions on persons who violate the securities laws.[9] Increasingly, the SEC litigates the majority of enforcement cases through administrative litigation rather than by seeking relief in federal courts since the available monetary remedies are the same in either venue.[10]

The enforcement process begins with investigation by the Enforcement Division (ED). The investigators can initiate investigations and issue subpoenas without agency-head approval.[11] After ED makes a preliminary determination that the facts justify a charging decision, it generates a detailed "Wells notice" that summarizes its conclusions and recommendations.[12] The target then can file a detailed "Wells submission" in response to the Wells notice.[13]

The Dodd-Frank Act requires the Commission to issue a complaint within 180 days of issuing a Wells notice.[14] As a result, the staff now frequently dispenses with the Wells procedure in order to avoid triggering the timing requirement and to secure additional time for investigation. Another reason to dispense with the Wells notice is that public companies believe

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obviously would not apply). The five agencies are all subject to the adjudication provisions of the APA whose hearings are conducted by ALJs. Its findings should also apply to combined-function agencies outside the APA (so-called Type B adjudication) whose trial-type adjudicatory hearings are conducted by administrative judges (AJs) instead of ALJs.

[9] Dodd-Frank Act § 929P(a), 15 U.S.C. §§ 77h1, 78u-2, 80a-9, 80b-3.

[10] Velikonja, *supra* note 6 at 341-45; Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. PA. J. CONST. L. 45, 53-59 (2016).

[11] At one time, the Commission had to approve issuance of subpoenas but that authority has been delegated to individual investigators. Under current practice, subpoenas must be approved by the Director of Enforcement, but not by the Commission.

[12] The Wells notice is named after John A. Wells, chair of a committee that recommended the practice in 1972. The Wells procedure is SEC practice and is not legally required.

[13] 17 C.F.R. 202.5(b), (c); SEC DIVISION OF ENFORCEMENT, ENFORCEMENT MANUAL § 2.4 (2017). https://www.sec.gov/divisions/enforce/enforcementmanual.pdf [hereinafter SEC ENFORCEMENT MANUAL].

[14] 15 U.S.C. § 78d-5(a)(1). This provision allows the Director of Enforcement to extend the period for an additional 180 days in complex cases. If additional time is needed, the Commission must approve the extension. *Id*. § 78d-5(a)(2).

they must disclose issuance of a Wells notice and therefore prefer to avoid it. Instead, the staff often communicates its intention to recommend issuance of a complaint via an informal memorandum or phone call to the target. The target can respond with a "white paper."[15] As a practical matter, the informal communication may provide as much information to the target as a Wells notice, and the white paper can provide as much information to the agency as a Wells submission.[16]

Under either procedure, targets may request access to the Commission's investigative file, and staff has discretion to disclose information that will assist the target to defend the case.[17] Staff members vary in their willingness to disclose material in investigative files.[18]

If the staff is not persuaded by the Wells submission or the white paper, it generates an "action memorandum" to the commissioners. This memorandum is circulated to all operating divisions of the Commission as well as to the General Counsel (GC). The action memorandum contains a comprehensive explanation of the factual and legal foundation of the recommendation and analyzes the strengths and weaknesses of the case. It summarizes and responds to arguments submitted by targets in the Wells submission or the white paper as well as input received from other Commission offices or from the GC.

If the target and the staff have agreed to a settlement the action memo contains the proposed settlement. The vast majority of cases are settled at some point before hearing.[19] If the case is not settled, the action memorandum recommends one of three possible actions: that the agency issue a complaint for in-house administrative enforcement ("action instituting proceedings"), seek enforcement action in federal court, or make a criminal referral to the Department of Justice (DOJ). Staff may conduct meetings with commissioners to discuss particular charging recommendations.[20]

When the Chair determines that the matter is ready for full consideration, the five commissioners consider the charging decision or proposed settlement at a closed meeting.[21] The GC and heads of the relevant SEC divisions are present at this meeting. The commissioners have access to the Wells notice and the Wells submission (or the informal memorandum and responsive white paper if the Wells procedure is not used). The commissioners vote on whether to charge the target or accept a settlement. Occasionally the matter will be put over until a later meeting or resolved by seriatim emails. In situations deemed to require immediate issuance of a complaint, the "duty officer" (a single commissioner) has power to authorize enforcement action;

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[15] SEC 1, 7, 8. The white paper procedure existed before the development of the Wells notice.
[16] SEC 8.
[17] The SEC Enforcement Manual provides that the staff should consider whether "access to portions of the file would be a productive way for both the staff and the recipient of the Wells notice to assess the strength of the evidence that forms the basis for the staff's proposed recommendations." SEC ENFORCEMENT MANUAL, *supra* note 13, § 2.4.
[18] SEC 7.
[19] Interviewees estimated that 70 to 80% of cases are settled before hearing. SEC 7, 8; *see also* Barkow, *Overseeing Agency Enforcement, supra* note 3 at 1164.
[20] SEC 3.
[21] *See* SEC ENFORCEMENT MANUAL, *supra* note 13, § 2.5 for details concerning Commission consideration and seriatim voting.

the other commissions will ratify that action at a later time.[22] The Commission approves the vast majority of the charging recommendations in action memoranda. However, there is occasionally vigorous discussion of the charging decision and split decisions.[23]

The SEC has a large pending caseload. In the six-month period ending March 2021, there were 289 outstanding orders instituting proceedings that were pending before the Commission. The average age of the pending matters was 501 days since the issuance of the order instituting proceedings.[24]

B. Federal Trade Commission (FTC)[25]

FTC enforcement bureaus (either the Bureau of Competition or the Bureau of Consumer Protection) investigate potential enforcement cases, against targets suspected of violating laws to prevent fraud, deception, and unfair or anti-competitive business practices. The bureaus normally initiate investigations without seeking authorization from the full Commission.[26] Compulsory process (such as subpoenas or civil investigative demands) can be authorized by a single commissioner.[27]

The FTC staff ordinarily contacts proposed targets to advise them of the general nature of the inquiry. Representatives of the targets typically meet informally with the staff and the head of the relevant bureau during the investigation and are entitled to submit memoranda (called "white papers") on key issues.[28] If no such contact is made during the investigation, the staff contacts the target at the conclusion of the investigation and informs it that a recommendation for issuance of a complaint is being forwarded to the agency heads.[29]

The bureau then prepares a "memorandum recommending complaint" which analyzes the factual basis for the recommendation and explains why issuance of a complaint would be in the public interest. If there is a settlement (and the vast majority of cases are settled), the memorandum includes the proposed consent decree. In unsettled cases, the commissioners

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[22] *Id.,* § 2.5.2.3; SEC 1.
[23] SEC 1, 2, 4, 7. One current SEC member has frequently opposed enforcement. See Andrew Ramonas, *SEC's Newest Republican Emerges as One-Woman Party of 'No,'* BLOOMBERG LAW (May 8, 2018, 6:40 AM), https://news.bloomberglaw.com/business-and-practice/secs-newest-republican-emerges-as-one-woman-party-of-no.
[24] SEC Release No. 91734, Report on Administrative Proceedings for the Period October 1, 2020, through March 31, 2021 (Apr. 30, 2021), https://www.sec.gov/files/34-91734.pdf.
[25] Numerous authors have expressed discomfort with the FTC's combined-function structure. *See, e.g.,* Carl A. Auerbach, *The Federal Trade Commission: Internal Organization and Procedure,* 48 MINN. L REV. 383, 418-24 (1963); Terry Calvani, *The Federal Trade Commission: A Proposal for Radical Change,* 34 ANTITRUST BULL. 185, 202-03 (1989); N.Y.C. Bar Ass'n Comm. on Trade Regul. *Federal Trade Commission Procedure for Issuance of Complaints,* 30 REC. ASS'N BAR OF CITY OF NY 213 (1975) (recommending creation of separate adjudicatory tribunal); Philip Elman, *Administrative Reform of the Federal Trade Commission,* 59 GEO. L.J. 777, 810-12 (1971).
[26] Investigations must be approved by the relevant bureau directors, the Bureau of Economics, and the Evaluation Committee.
[27] Press Release, FTC, FTC Authorizes Investigations Into Key Enforcement Priorities (July 1, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-authorizes-investigations-key-enforcement-priorities. Prior to July 2021, the full Commission had to approve compulsory process.
[28] FTC 4.
[29] Many of the details of the FTC's investigatory process were set forth in the FTC Operating Manual, but the Manual has been withdrawn and is no longer available online.

receive the white paper and there may be additional memoranda from the GC and from staff and chiefs of the Bureau of Competition and the Bureau of Economics.[30]

The memorandum recommending complaint indicates whether the FTC should seek an injunction pending the administrative process (as it typically does in merger cases). If the case involves unusually complex or novel issues, the staff also prepares a trial memorandum or brief citing the evidentiary materials and legal authorities to be relied on.

After the memorandum is submitted, targets have an opportunity to meet individually with the commissioners to persuade them that no complaint should be issued or that the case should be settled. Staff members are usually present at these meetings.[31]

In order to greenlight a complaint, the FTC must determine that there is "reason to believe" that a violation has occurred and that a proceeding would be in the "public interest."[32] A "moving commissioner" is assigned randomly to each case, and the moving commissioner decides when the charging decision is ready for full Commission consideration. However, a majority of the Commission can bring a matter up for decision despite opposition from the moving commissioner.[33] The Commission discusses the charging decision in a closed meeting or makes the decision through seriatim communications. The commissioners generally respect and follow the views of the Chair about enforcement priorities, since the Chair typically has conferred informally with the staff during the investigatory process and usually concurs in the staff recommendation.[34]

The same process is used for the approval of settlements negotiated by staff. There is an elaborate procedure for public comment on proposed settlements in competition cases.[35]

The FTC's caseload is not heavy. In 2020, the Commission resolved 36 competition cases (12 merger consent orders, 9 merger cases filed, 11 mergers abandoned, 3 non-merger cases, and 1 civil penalty). In the consumer protection area, the FTC filed 21 administrative cases and 66 federal court cases.[36]

C. Federal Communications Commission (FCC)

The FCC's Enforcement Bureau (EB) investigates a broad range of complaints against licensees, manufacturers of telecommunications equipment, robo-callers, and others. The FCC

[30] FTC 1, 5.
[31] FTC 1, 2, 3, 4, 5. This practice is discussed further in Part V. B.
[32] 15 U.S.C. § 45(b); 16 C.F.R. § 3.11(a).
[33] FTC 1, 4, 5.
[34] FTC 3, 4, 5. According to FTC 3, charging decisions are made by the Chair unless overridden by the votes of three commissioners. In addition, the Chair has appointed senior staff members who reflect the Chair's views about enforcement priorities.
[35] See Christopher S. Yoo, Thomas Fetzer, Shan Jiang, & Yong Huang, *Due Process in Antitrust Enforcement: Normative and Comparative Perspectives,* 94 S. CALIF. L. REV. (forthcoming 2021) (manuscript at 52-54, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3558179).
[36] *Stats & Data 2020*, FTC, https://www.ftc.gov/reports/annual-highlights-2020/stats-data-2020 (last visited Sep. 2, 2021). https://www.ftc.gov/reports/annual-highlights-2020/stats-data-2020 (last visited Sep. 2, 2021)

has no formalized process for notice and comment by targets during the investigation process. If the staff concludes that a target should be charged, it prepares a detailed Notice of Apparent Liability (NAL), which is typically when a target learns of the investigation.[37] The NAL can seek a civil money penalty (called a "forfeiture" in FCC parlance) or a licensee sanction (such as revocation).

Commission approval is not required for settlements negotiated by staff. The vast majority of FCC enforcement cases—well over 80%, according to one estimate[38]—are settled through consent decrees negotiated by the staff before or after the NAL is issued. Licensees are very likely to settle, but private parties like robo-callers and pirate radio operations are less likely to settle. The EB considers about 450 cases a year and issues about 200-300 NALs.

The staff has delegated authority to issue an NAL for a civil penalty that does not exceed $100,000 for common carriers and $25,000 for other entities. NALs that propose greater amounts must be greenlighted by the full Commission.[39] Charging decisions in cases involving licensee discipline other than civil penalties must also be approved by the full Commission. The Enforcement Bureau might consider about 450 cases a year and issue about 200-300 NALs, most of which are settled. The Commission exercises its greenlighting function in perhaps 20 to 40 enforcement cases per year.[40]

If an NAL requires Commission approval, the Chair has substantial authority over when the matter will be presented. The EB does not produce an additional confidential document about the case for the commissioners to consider, but it may conduct ex parte conversations with commissioners or their advisory staffs.[41] Normally, the Commission votes whether to approve the NAL and declare a forfeiture through a system of notational voting, rather than an in-person meeting. The Commission usually greenlights the NAL, although there have been. instances in which it declined to do so because some commissioners weighed the relevant statutory factors (such as a target's ability to pay) differently from the staff. Refusal to issue a forfeiture can also occur when there are shifts in the membership of the Commission. There have been occasional dissents to the decision issuing a forfeiture.

If the EB issues an NAL under delegated authority or if the Commission greenlights the NAL, the target can file a detailed response to the NAL. However, that response is intended more as advocacy to the commissioners than to the EB, which rarely changes its position once it commits to an NAL. After issuance of an NAL, targets have the opportunity to meet with FCC commissioners separately in meetings attended by enforcement staff.[42]

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[37] FCC ENFORCEMENT BUREAU, FCC ENFORCEMENT OVERVIEW 4-10 (2020), https://www.fcc.gov/sites/default/files/public_enforcement_overview.pdf [hereinafter FCC ENFORCEMENT OVERVIEW]. In most cases, an NAL must be issued within one year of an alleged violation. 47 C.F.R. § 1.80(c)(5). As a result, EB must act quickly and may lack sufficient time to engage in notice and comment procedure with the target before issuing an NAL.

[38] FCC 1.

[39] FCC 1; FCC ENFORCEMENT OVERVIEW, *supra* note 37, at 19.

[40] FCC 4.

[41] *Id.*

[42] This practice is further discussed in Part V. B.

ALJ hearings are provided in licensee discipline cases that seek remedies such as license revocation.[43] Although the FCC has the option to also adjudicate civil penalty cases through ALJ hearings, it seldom does so. The commissioners normally decide civil penalty cases through consideration of documents in the file (i.e., the NAL and the response) rather than by a trial-type hearing. If the Commission is not persuaded by the response, it issues a notice of forfeiture.[44]

Although the FCC's separation-of-functions rules apply in licensee discipline cases sent to an ALJ, they do not apply in civil penalty cases decided by the Commission. Enforcement staff can and do speak off the record with the commissioners or their advisers at all points in the process. The FCC does not consider its civil penalty determinations as adjudicatory, because it lacks power to collect civil penalties. DOJ must enforce the penalty in federal district court, which provides a de novo hearing. I was told that it is difficult to get the DOJ interested if the proposed penalty is less than a substantial amount, perhaps $75,000, depending on the district and how busy the U.S. attorneys are.[45] Obviously, the FCC's inability to enforce civil penalties fine through internal adjudication, rather than through federal court litigation controlled by DOJ, detracts from the effectiveness of civil penalties as a regulatory tool.

D. Federal Energy Regulatory Commission (FERC)[46]

FERC among other responsibilities regulates the interstate transmission of electricity, natural gas, and oil. It has the power to levy substantial civil penalties (up to $1.3 million per violation per day) and can order other remedial sanctions. Its investigative and prosecutorial arm is the Office of Enforcement (OE). OE focuses on four distinct areas: (1) fraud and market manipulation, (2) serious violations of the FERC reliability standards, (3) anticompetitive conduct, and (4) conduct that threatens transparency in regulated markets.

OE dismisses the majority of the cases it investigates as lacking merit and often exercises prosecutorial discretion in declining to pursue borderline cases when the evidence is weak or no sanction is warranted. Relatively few cases are actually charged and enforcement is a relatively small part of FERC's responsibilities.[47] Nevertheless, enforcement cases often require application of unsettled law about manipulation of energy markets. Thus, enforcement cases are used as policy-making vehicles.[48]

During the investigation process, OE and counsel for targets are in constant contact.[49] FERC allows targets to communicate in writing with commissioners during the investigative stage and

[43] FCC ENFORCEMENT OVERVIEW, *supra* note 37, at 21.
[44] Details of the Commission's consideration of forfeiture cases are provided in 47 U.S.C. § 503(b)(3) and (4) and in FCC ENFORCEMENT OVERVIEW, *supra* note 37, at 14-18.
[45] FCC 1, 4.
[46] For a summary of FERC's enforcement process, see Total Gas & Power North America v. FERC, 850 F.3d 325 (5th Cir. 2017); Todd Mullins & Chris McEachran, *Adjudication of FERC Enforcement Cases: "See You in Court?"* 36 ENERGY L. J. 261 (2015); Allison Murphy, Todd Hettenbach, & Thomas Olson, *The FERC Enforcement Process,* 35 ENERGY L. J. 283, 291-97 (2014) (hereinafter Murphy); *Revised Policy Statement on Enforcement,* 123 FERC ¶61,156, ¶¶20-40 (May 15, 2008) (hereinafter FERC Policy Statement).
[47] FERC 5, 6; see also 2020 REPORT ON ENFORCEMENT (Nov. 19, 2020), https://www.ferc.gov/media/2020-annual-report-enforcement
[48] FERC 3, 6.
[49] FERC 2, 3, 5.

the targets often take advantage of this opportunity.[50] If the staff seeks formal investigative authority to issue a subpoena or take a deposition, it must receive authority from the Commission, but this is rarely necessary since targets usually supply requested information without compulsion.[51]

If OE determines that a violation occurred that warrants the imposition of sanctions, it provides the target with a "preliminary findings letter" that furnishes a detailed and often lengthy description of the staff's findings as to facts and legal theories. The letter may be in the form of a slide deck.[52] The target has an opportunity to file a brief that responds to the staff's preliminary findings.[53] Attorneys who represent targets subject to enforcement issues believe that the preliminary statement and the opportunity to respond are quite useful to their clients.[54]

If OE continues to believe a sanction is warranted, it seeks authority from the Commission to negotiate a settlement with the target. The practice of requiring authorization to negotiate a settlement seems unique to FERC. OE's submission to the Commission includes the target's response to the preliminary findings letter.[55] Staff then pursues settlement negotiations within the parameters set by the Commission. If a settlement is reached, OE seeks the Commission's approval of the settlement. At least 90% of cases settle at some point in the process.[56] Interviewees had conflicting opinions about whether the process of involvement of agency heads in granting settlement authority to the staff was worth its costs and delays.[57]

If the parties fail to negotiate a settlement, and OE intends to recommend enforcement action, it provides the target with notice, called a Rule 1b.19 statement, and a further opportunity to respond within 30 days.[58] The Rule 1b.19 procedure was modeled after the SEC's Wells notice.[59] Rule 1b.19 statements tend to be briefer than the earlier preliminary findings letter. The target has the right to respond to the Rule 1b.19 statement, but the staff is not required to answer the target's response.[60]

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[50] The rule permitting targets to communicate with commissioners in writing dates to 2008. Prior to that time, both oral and written communications were permitted. FERC 1, 2, 3, 5, 6. Murphy, *supra* note 46, at 292-93; *FERC Policy Statement, supra* note 46, ¶27. For further discussion of this practice, see Part V. B.

[51] Generally, the decision whether to use compulsory process is up to the Chair. FERC 6.

[52] FERC 5.

[53] Murphy, *supra* note 46, at 294; *FERC Policy Statement, supra* note 46, ¶ 32.

[54] FERC 4, 5.

[55] Murphy, *supra* note 46, at 294-5; *FERC Policy Statement, supra* note 46, ¶ 35.

[56] FERC 3, 4, 5, 6. Cases involving regulated utilities nearly always settle. Cases involving energy market manipulation are least likely to settle. FERC 5.

[57] FERC 5 thought the settlement authorization process was a significant check on prosecutorial discretion. FERC 4 thought it was useful for staff to get an early read from commissioners about the merits of the case. But FERC 5 and 6 thought it was of little utility and contributed to delay in resolving cases.

[58] "Such notice shall provide sufficient information and facts to enable the entity to provide a response. " 18 C.F.R. § 1b.19.

[59] See Part II. A. FERC staff is supposed to disclose exculpatory material that falls under the criminal-law *Brady* standard, but some defense lawyers argue that it does not do so. See FERC 2, 5. See William S. Scherman, Brandon C. Johnson, & James J. Fletcher, *The FERC Enforcement Process: Time for Structural Due Process and Substantive Reforms,* 35 ENERGY L. J. 101, 111-13 (2014) (hereinafter *Scherman, FERC Enforcement)*.

[60] *Id.* at 111–13.

Some interviewees believe that it is redundant to give the target two notices and the opportunity to write two briefs, since by this point, it is unlikely OE will change its views.[61] Others think it is not redundant because investigations often take years to complete during which time new commissioners are appointed.[62]

If OE is not persuaded by the target's response to the Rule 1b.19 statement, it drafts an "Enforcement Staff Report and Recommendation" to the Commission. This report can be quite lengthy. It includes OE's proposed findings of fact and conclusions of law and its recommendation to issue an administrative complaint. There is a good deal of negotiation between the enforcement staff and the Commission's advisory staff and the commissioners themselves about the content of the report. The charging recommendation is usually approved through notational voting rather than at a formal meeting. It is rare that the Commission fails to approve the recommendation, given the extensive contacts between staff and commissioners during the drafting process, but non-approval has occurred.[63]

If the Commission concurs with OE's recommendation, FERC issues an Order to Show Cause (OSC), which is the charging document. The target has still another opportunity to respond to the OSC through a formal brief.[64] The Commission's issuance of an OSC triggers the Commission's ex parte and separation-of-functions rules, at which point the enforcement staff is prohibited from communicating with the commissioners or their decisional advisers except on the record.[65] In gas cases, the Commission may decide the case through a paper hearing, meaning it is based on documents in the file. In electricity cases, the Commission may refer the case to an ALJ if there are unresolved factual issues. If the case is heard by an ALJ, the commissioners make the final agency decision.

In electricity but not gas cases, a target can elect a different process within 30 days after FERC issues an OSC proposing a civil penalty.[66] This alternative process allows the target to obtain a "review de novo" of the assessment before a federal district court. FERC then files an action in district court for an order affirming the civil penalty. The court conducts a trial of the validity of the sanction. In nearly every electricity case, lawyers make this election because they feel the prospects for success are better before a district court than if the FERC decides the case in-house.[67] However, the Commission has been quite successful in obtaining enforcement of penalties after de novo judicial proceedings.[68]

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[61] FERC 2.
[62] FERC 3.
[63] FERC 1, 2, 3, 6. There are occasional dissents to approval of charging decisions. FERC 6.
[64] See Murphy, *supra* note 46, at 296. Murphy describes the Barclay's case in which the target used all three opportunities to oppose the charging decision and submitted a total of 850 pages of argument and factual representations.
[65] *FERC Policy Statement, supra* note 46, at 36. For further discussion of FERC separation of functions, see Part V.C.
[66] See Mullins, *supra* note 46; *see also* Total Gas & Power North America v. FERC, 850 F.2d 325 (5th Cir. 2017).
[67] FERC 2, 4, 5.
[68] FERC 4.

E. National Labor Relations Board (NLRB)

The NLRB differs from the other agencies I studied because it does not engage in greenlighting of unfair labor practice (ULP) cases. The charging decision is made by the GC who is appointed by the President, confirmed by the Senate, and independent of the Board.[69] The GC also has extensive administrative powers, including control of the Board's regional offices (ROs). In addition, the GC manages the NLRB's litigation function. Federal court litigation is extensive since the Board must enforce is orders in court as well as enforce subpoenas. The GC's powers are so extensive that the GC is sometimes described as an additional agency head.

Thus, Board members play no role in charging decisions and exercise no prosecutorial function.[70] There is, however, an important exception to this general rule. Board members must greenlight the GC's recommendation to seek a temporary injunction in a ULP case (so called "10(j) cases").[71] Temporary injunctions are sought in cases where delay would cause irreparable harm to the interests of charging parties.[72] Board members make decisions on whether to greenlight injunctions by notational voting, rather than at in-person meetings. The Board generally approves the GC's recommendation to seek an injunction, but there are occasional dissents.[73] The Board also has power to disapprove recommendations made by regional offices in representation cases, such as designation of appropriate bargaining units, but such decisions are not considered prosecutorial.

The NLRB prosecutorial process begins when an outside party (an employee, employer, or union) files a ULP "charge" with a regional office (RO). The RO affords the target of the charge an opportunity to file a position statement setting forth its version of the case. NLRB regional directors decide whether to investigate the target based on the charge and the target's position statement.

During the investigation process, the target has informal opportunities to influence the charging decision through meetings with RO investigators.[74] In cases involving unsettled legal issues, the regional director may seek advice from the GC's Advice and Review section. During that process, the target has an opportunity to file a brief and argue its position to investigators. If the regional director declines to issue a complaint, the charging party can appeal to the appeals

[69] Whether the President can discharge the GC is currently the subject of federal court litigation. President Biden fired GC Peter Robb who had refused to resign. Robb is contesting his discharge and various parties before the Board are challenging the legality of cases brought by the Acting GC. The NLRB has refused to rule on the legality of Robb's discharge. Colleen Naumovich & David J. Pryzbylski, "Status of Former NLRB General Counsel Still Up in the Air," Barnes & Thornburg LLC (May 6, 2021), https://btlaw.com/insights/blogs/labor-relations/2021/status-of-former-nlrb-general-counsel-still-up-in-the-air; William B. Gould IV, "Legal Issues Surrounding Firing of NLRB General Counsel," Bloomberg Law, https://news.bloomberglaw.com/white-collar-and-criminal-law/legal-issues-surrounding-firing-of-nlrb-general-counsel.
[70] 29 U.S.C. § 153(d). Whether the NLRB model should be carried to other agencies is discussed in Part V.F. The structure of the Federal Labor Relations Authority is the same as NLRB. The GC has exclusive authority over prosecution of unfair labor practice cases. 5 C.F.R. Ch. XIV, App. B.
[71] 29 U.S.C. § 160(j).
[72] NLRB 3.
[73] NLRB 3.
[74] NLRB 3.

and review section of the GC's office, but the reversal rate is low. Charged parties also may confer with the GC if the GC agrees to do so.[75]

During fiscal year 2020, the Board received 15,869 ULP charges from employees, employers, and unions. ROs found about one-third of them to have merit.[76] Many cases settled without issuance of a complaint. Regional offices issued 809 complaints. The Board sought temporary injunctions, known as "10j's" in ten cases. The Board decided 251 ULP cases. These figures were depressed by the COVID-19 pandemic and by policy decisions made by the GC. The figures from earlier years are considerably higher.[77]

Well over 90% of the NLRB's settle before or after issuance of a complaint. NLRB ALJs are particularly active in promoting settlements. Mediation is often conducted by a settlement ALJ, who is different from the ALJ assigned to adjudicate the case.[78] Cases that do not settle proceed to a hearing before an ALJ with a right of appeal to the Board.

III. GREENLIGHTING BY AGENCY MEMBERS

As discussed in Part I, the enforcement process in combined-function agencies begins with an investigation conducted by agency staff members who suspect a private sector target of wrongdoing.[79] If the investigators conclude that the law and facts support the issuance of a complaint, they report their conclusion to agency prosecutors. In the agencies I studied, other than the NLRB, if the prosecutors agree, they must request that agency heads greenlight the case by authorizing the issuance of a complaint, initiation of federal court action, or referral of the matter to DOJ for criminal prosecution. In the vast majority of cases, the staff agree to a settlement with the target before the greenlighting stage and must seek approval of the settlement from the agency members. An exception is the FCC, where the Commission has delegated many prosecution decisions and settlement decisions to the staff. The members of the NLRB exercise no greenlighting function except in temporary injunction cases.

A. Greenlighting as an Accountability Mechanism

Greenlighting serves as an important mechanism for accountability within agencies given the lack of meaningful external accountability mechanisms[80] that might constrain agency

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[75] NLRB 1, 2, 3. In fiscal year 2020, the Appeals Office resolved 1224 appeals by charging parties who challenged the RO's decision not to issue a complaint.

[76] NLRB 3. The statistics in this paragraph are derived from the NLRB Performance and Accountability Report 2020, available at https://www.nlrb.gov/sites/default/files/attachments/pages/node-130/nlrb-fy2020-par-508.pdf

[77] In fiscal year 2016, for example, the NLRB received 21,326 charges. ROs issued 1272 complaints. The board decided 295 ULP cases. The Board approved 29 requests to seek 10(j) temporary injunctions. The much lower number of 10(j) requests in 2020 reflected the policy preferences of the General Counsel. NLRB 3.

[78] NLRB 2.

[79] For discussion of the division of power between investigators and agency prosecutors, see Van Loo, *supra* note 7.

[80] There is a vast literature on the subject of accountability in administrative law and public administration. *See* THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY (Mark Bovens, Robert E. Goodin & Thomas Schillemans eds., 2014); ELIZABETH FISHER & SIDNEY A. SHAPIRO, ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW, 66–100 (2020); Michael Asimow et al., *Ex Ante Administrative Review of the Legality of Regulations: A Comparative Approach*, 68 AM. J. OF COMP. L. 332 (2020) [hereinafter Asimow, *Ex Ante Administrative Review*];

discretion.[81] The judiciary exercises no oversight over decisions to pursue enforcement actions because the decision to charge is judicially unreviewable. A charging decision is not a "final order."[82] Moreover, a decision to charge or not to charge is normally unreviewable because enforcement decisions are committed to agency discretion.[83] In any case, the vast majority of administrative enforcement cases settle without resulting in a final agency decision subject to judicial review.

Of cases that do result in a final agency decision, relatively few are judicially reviewed since the review process is so slow and costly and because various deference doctrines make reversal unlikely.[84] If the case is judicially reviewed, the court considers the merits of the decision and the fairness of the administrative process, not the preliminary decision to charge the target. And even a successful judicial challenge by a target following adjudication by the agency often produces only a remand that allows the agency to reconsider the case and come to the same conclusion.

Nor does Congress or the President exert any meaningful control over enforcement discretion in individual cases; indeed, it would generally be improper for those bodies to interfere in a pending adjudicatory process.[85]

The charging process is largely concealed from the public and from targets as a matter of statute. The Government in the Sunshine Act permits agencies to close the meeting at which the members consider whether to take enforcement action.[86] In fact, most agencies make these

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Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse,* 103 MICH. L. REV. 2073, 2120–2134 (2005).

[81] Sohoni, *supra* note 7, at 42-47; Lemos, *supra* note 7, at 968-79 (discussing the absence of executive and legislative accountability mechanisms for constraining enforcement).

[82] FTC v. Standard Oil Co. of Cal., 449 U.S. 232 (1980) (holding FTC's "reason to believe" greenlighting determination is not a final order and thus unreviewable).

[83] 5 U.S.C. § 701(a)(2); Heckler v. Chaney, 470 U.S. 821 (1985); Public Citizen v. FERC, 7 F.4th 1177, 1195-96 (D.C. Cir. 2021) (FERC decision to terminate market-manipulation investigation is not judicially reviewable even though its substantive decision in the same case was held to be arbitrary); CREW v. FEC, 993 F.3d 880 (D.C. Cir. 2021) (finding that court cannot review Federal Election Commission's deadlocked decision not to prosecute even though primarily based on a question of law since it was also based on prosecutorial discretion); Lemos, *supra* note 7, at 990–992.

[84] In addition to the costs and delays inherent in the judicial review process, regulated parties often fear that seeking judicial review of an enforcement decision might trigger reprisals from agencies with which they must maintain a good relationship. Asimow, *Ex Ante Administrative Review*, supra note 80, at 359.

[85] The executive branch often seeks to dictate enforcement priorities by manipulating the agency's budget or appointing pro- or anti-regulation agency heads, but involvement with individual enforcement decisions is rare and violates unwritten conventions. Andrias, *supra* note 7; Elena Chachko, *Administrative National Security,* 108 GEO. L.J. 1063, 1122-23 (2020); Memorandum from Dana Remus, White House Counsel to White House Staff, July 21, 2021, https://www.whitehouse.gov/wp-content/uploads/2021/07/White-House-Policy-for-Contacts-with-Agencies-and-Departments.pdf?emci=12770deb-dfef-eb11-a7ad-501ac57b8fa7&emdi=eea5f50a-86f0-eb11-b563-501ac57b8fa7&ceid=203637; Adrian Vermeule, *Conventions of Agency Independence,* 113 COLUM. L. REV. 1163, 1211-14 (2013). Congressional interference in a pending adjudication is improper and could violate due process. Pillsbury Co. v. FTC, 345 F.2d 952 (5th Cir. 1980).

[86] 5 U.S.C. § 552b(c)(10).

decisions by notational voting, not in meetings. And staff memoranda recommending enforcement are excepted from disclosure under the Freedom of Information Act.[87]

As a result, the only meaningful accountability mechanisms in individual enforcement cases are those that agencies impose on themselves. Agencies should generate internal checks on the enforcement process by creating procedures that limit the discretion of agency members or staff, allow monitoring by superiors of staff discretionary decisions, and provide protections for regulated parties and beneficiaries that the agencies are not legally required to provide.[88]

The following sections assess the arguments for and against greenlighting as a source of internal administrative law.[89] Weighing the case for and against greenlighting, my conclusion is that the greenlighting function is valuable and should be preserved in agencies where caseload permits it. I am persuaded by the advantages of this function in terms of public administration norms. Greenlighting also mitigates the principal-agent problem that arises in the enforcement function. I think these benefits outweigh the problems of confirmation bias and inefficiency, but I will suggest further checks and balances in section V that could alleviate both concerns.

B. The Case for Agency-Member Greenlighting

The greenlighting function, which requires agency members to approve staff charging decisions, has important structural advantages as an accountability mechanism.[90] For a number of reasons, the agency members rather than the staff should make the call when an agency's enforcement caseload is small enough to allow it to feasibly do so.[91]

As pointed out earlier, the charging decision may be the most important procedural event to the target in the entire administrative and judicial regulatory process.[92] If the agency members believe a case brought to them by prosecutors is weak or ill-advised, or does not align with their priorities, the case should be stopped before it goes any further. In such cases, the target should not be forced to agree to a settlement or litigate and the agency should not embark on the costly adjudication process.

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[87] 5 U.S.C. § 552(b)(5); NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). One former agency member told me that the chair concealed critical information about the charging process even from that member. FCC 2.
[88] See Barkow, *Overseeing Agency Enforcement*, *supra* note 3, at 1131–38.
[89] There is a rich literature on internal administrative law, but none of it concentrates on the problem of checking enforcement discretion. *See* Jill E. Family, *An Invisible Border Wall and the Danger of Internal Agency Control,* 25 LEWIS & CLARK L. REV. 71, 112-19 (2021); Elizabeth Magill, *Agency Self-Regulation,* 77 GEO WASH L. REV. 859, 884-88 (2009); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law,* 115 MICH. L. REV. 1239 (2017); Jennifer Nou, *Intra-Agency Coordination,* 129 HARV. L. REV. 421 (2015); Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside Out,* 65 U. OF MIAMI L. REV. 577 (2011).
[90] The necessity of agency head approval of charging decisions was recognized as far back as 1941 Report of the Attorney General's Committee on Administrative Procedure which formed the rationale for enactment of the APA in 1946. See Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 978 (1991).
[91] *See* Part V.I. Of course, if the caseload does not permit agency members to practice greenlighting, Congress or the agency should devise other accountability mechanisms. Gifford, *supra* note 90, at 992-1000.
[92] *See* Part I.

The argument for greenlighting goes well beyond the protection of private interests. An agency must adopt prosecutorial priorities, since its resources will never be adequate to prosecute every case that might involve regulatory violations.[93] It is appropriate for agency heads to make the call on how limited enforcement resources should be allocated. Even more significant, combined-function agencies use adjudication for policymaking, and the choice of which cases to prosecute is an essential element of the policymaking process. The balance of this section explores the arguments in favor of greenlighting in greater detail.

1. Improved Decision Making

As practiced in most agencies, greenlighting requires staff prosecutors to produce a confidential and candid memorandum to the agency heads. These memos explain the factual, legal, and policy rationales for charging a target or settling the dispute and analyze strategic concerns such as evidentiary weak points or political implications. As discussed in Part II, SEC prosecutors file "Action Memos;" FTC prosecutors file "Memoranda Recommending Complaint;" FERC prosecutors produce the "Enforcement Staff Report and Recommendation." The process of preparing such memoranda is likely to improve the staff's decisionmaking process because it requires staff to think carefully about the strength of the evidence and arguments in the case and to abandon weak cases before they go any further. Staff members realize that they will have repeated interactions with the Commissioners and are anxious to preserve their credibility by writing thorough and balanced memoranda urging the heads to approve their charging decisions.

2. Principles of Public Administration[94]

Professor Gillian Metzger has argued that there exists a constitutional duty for agency members to supervise the staff.[95] Whether or not such a constitutional duty exists, supervision of staff is essential in agencies that exercise delegated power (whether through rulemaking or adjudication) to insure that the priorities of agency heads are carried out. Agency head supervision is particularly vital when it concerns functions like charging decisions that are unconstrained by external judicial, executive or legislative checks.[96] Of course, supervision can take many forms, but greenlighting is one effective method of accomplishing it.

The greenlighting process serves other goals stressed by public administration scholars. William Simon[97] explains that contemporary administrative procedures are often "performance-

[93] *See* Part V. G. For discussion of the centrality of resource allocation and priority-setting issues, see Eric Biber, *The Importance of Resource Allocation in Administrative Law,* 60 ADMIN. L. REV. 1, 16-24 (2008); Bornstein, *supra* note 7, at 859-62 (discussing diminishing budgetary resources for enforcement).

[94] Legal scholars often urge that public administration principles be incorporated in administrative law. The field of public administration is concerned with making government institutions work competently and efficiently, while administrative law is often concerned with creating constraints upon administrative functions that favor regulated parties. See Fisher & Shapiro, *supra* note 80, ch. 1; Harlow & Rawlings, *supra* note 2.

[95] Gillian E. Metzger, *The Constitutional Duty to Supervise,* 124 YALE L. J. 1836, 1890-99 (2015).

[96] See Parts I and III.

[97] William H. Simon, *The Organizational Premises of Administrative Law,* 78 LAW & CONTEMP. PROB. 61 (2015); William H. Simon, *The Organization of Prosecutorial Discretion,* in MAXIMO LANGER & DAVID SKLANSKY, eds. PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY (2017) (hereinafter *Organization of Prosecutorial Discretion*).

based." They operate mostly ex ante or proactively, before decisions are made, rather than operating ex post like judicial review. Performance-based processes are transparent to agency managers and allow for frequent revisions as agency priorities or markets change. Ex ante procedures entail peer review and constant monitoring as lessons are learned from prior decisions. Organizations often adopt presumptive rules about how discretion should be organized and require that departure from the presumptive rules be justified.[98]

The greenlighting process qualifies as a performance-based procedure described by Simon. Greenlighting is responsive to input from targets who have the ability to file memoranda urging staff and agency heads not to charge them. Greenlighting allows the heads to easily change their priorities as economic, political, personnel, or budgetary conditions change. Greenlighting allows agency heads to learn from their prior decisions to approve or decline prosecution and enables them to monitor staff decisionmaking in real time.

Still another advantage of greenlighting from the public administration point of view is that, in multi-member agencies, the process subjects charging decisions to deliberation by members who are politically balanced and are likely to have different skill sets and backgrounds. This sort of collegial decisionmaking may be better than leaving decisionmaking to individual prosecutors or to the GC (as occurs at the NLRB). Even in this era of hyper-partisanship, pluralistic decisionmaking by multi-member agencies produces better decisions in both rulemaking and adjudication. That advantage should apply to the exercise of prosecutorial discretion as well.[99]

3. Internal Separation of Powers

The greenlighting function is an example of "internal separation of powers" as described by Jon Michaels.[100] Michaels describes three distinct and competitive interests at play in agency decisionmaking: the politically appointed agency members, the career staff, and the public (including regulated parties and regulatory beneficiaries). These three interests engage in constant rivalrous competition as the agency engages in a variety of administrative functions. Michaels draws parallels between this internal separation of powers and the traditional systems of external separation of powers and checks and balances between the legislative, executive, and judicial branches of government.

The greenlighting function operationalizes the kind of "internal separation of powers" Michaels describes. Career staff investigators and prosecutors take the initiative to uncover to uncover violations, prioritize them, and make the initial decision whether to prosecute, settle, or abandon the cases. The staff is checked by the agency members who must greenlight its decision. In practice, the heads almost always back the staff, but the need for agency head approval

[98] Simon focusses on the criminal prosecution process. He criticizes outdated doctrines such as leaving criminal charging decisions up to the professional judgment of individual prosecutors. He praises innovations such as adoption of guidelines, peer review, transparency, and the ability of prosecution offices to make changes to charging criteria in light of experience.

[99] See Paul R. Verkuil, *The Purposes and Limits of Independent Agencies,* 1988 DUKE L.J. 257, 259–63 (1988); FTC 3.

[100] Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers,* 91 N.Y.U. L. REV. 227 (2016).

constrains prosecutorial decisions.[101] Regulatory targets also have substantial ability to influence the staff and agency head charging decisions through mechanisms discussed in Part IV of this study. Thus, the three interests identified by Michaels engage in a competitive struggle within the adjudicatory process, with the same positive effects as traditional inter-branch checks and balances. Given that external separation of powers has almost no influence over charging decisions,[102] internal separation of powers seems to be an attractive alternative.

4. The Principal-Agent Problem

Prosecutorial decisions or settlements can represent an important principal-agent problem if the preferences and priorities of staff prosecutors do not align with the preferences or priorities of agency members.[103] Misalignment of priorities between agency and staff can result in either over- or under-enforcement.

Agency prosecutors sometimes want to push the envelope to pursue targets they perceive as wrongdoers even if the evidentiary basis for doing so is questionable or the legal theory is not well supported by existing precedent.[104] The staff may be pursuing a "crackdown" by allocating resources to a particular class of cases that the heads might not support.[105] Prosecutors may be overcharging to force the target to settle. Agency attorneys may have their own future careers in mind rather than the public interest.[106] The staff may wish to use resources unwisely by concentrating on trivial cases that are easier to win or to run up the numbers.[107] The career staff might not favor aggressive prosecution policies favored by agency members. Thus, the requirement that the agency members greenlight a charging decision makes staff prosecutorial decisions transparent to agency members and helps them rectify misalignment of priorities. Such misalignment issues have sometimes surfaced in NLRB unfair labor practice enforcement where the GC rather than the agency members control charging decisions.[108]

In addition to correcting misalignment of priorities between agency members and staff in particular cases, the existence of greenlighting creates what is sometimes called a "sentinel effect." The sentinel effect means that people make different decisions when those decisions are subject to check than when they are not. The sentinel effect exists because the staff is well acquainted with the enforcement preferences of the chair and the other agency members. The members may have made these preferences clear in previous discussions with prosecutors, or the prosecutors may discern these preferences from their experience with past greenlighting decisions. The staff will not advance proposed complaints if they think that the agency members might reject or narrow them, or even that there might be a contentious discussion or a split vote

[101] See discussion of the sentinel effect in Part III. B. 4.
[102] See Parts I and III. B. 3.
[103] The literature on this issue is extensive. *See* Brian Feinstein & Abby Wood, *Divided Agencies,* SO. CALIF. L. REV. (forthcoming 2021), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3925861
(documenting the presence of political misalignment between agency members and career staff and considering its effect on rulemaking).
[104] SEC 5, 6, 7; FERC 3.
[105] See Sohoni, *supra* note 7, at 55-63.
[106] Lemos, *supra* note 7, at 952-56; Sohoni, *supra* note 7, at 67-69.
[107] SEC 6; FTC 5.
[108] NLRB 3; Parts II.E, and V.F.

at the agency-head level. I frequently asked interview subjects a counterfactual question: if greenlighting did not exist and the staff was free to choose prosecution targets, would the pattern of prosecutions look different than it does now? Most interviewees answered affirmatively. They believed that the staff would have been more aggressive in choosing prosecution targets if their charging decisions were not subject to greenlighting.[109]

Agency-head approval is less effective as a check on under-enforcement (as opposed to over-enforcement) since the agency members do not see the cases that the staff decided not to pursue.[110] The under-enforcement problem is often addressed by informal communications between the Chair and the GC.[111] Nevertheless, at some point agency members should perceive that they are not seeing a certain class of cases that they believe should be prosecuted, thus enabling them to correct the under-enforcement problem.

C. The Case Against Agency-Head Greenlighting

Despite the institutional advantages of greenlighting enforcement decisions, the process has given rise to serious concerns about confirmation bias and efficiency that are discussed in this sub-section.

1. Confirmation Bias

a. The Problem of Confirmation Bias

A number of observers of the administrative enforcement process are troubled by the problem of confirmation bias.[112] The greenlighting process requires agency members to first discharge a prosecutorial function and later perform a judicial function in the same case. The concern is that, as a result, they may be unable to render an unbiased final adjudicatory decision when a case they previously greenlighted returns to them for the final agency decision.[113] This

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[109] All eight of the SEC interviewees answered affirmatively, as did FERC 5, FCC 2, 4, and FTC 5. See Bardach & Kagan, *supra* note 7, at 34.

[110] Barkow, *supra* note 7, at 1139; Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620, 1628 (2018). Indeed, excessive checks and balances may lead to under-enforcement since front-line investigators and prosecutors are sometimes discouraged by the many hoops they must jump through. Bardach & Kagan, *supra* note 7, at 39-44.

[111] SEC 8. In the NLRB, a charging party can appeal the regional office's decision not to issue a complaint, which is a meaningful check on under-enforcement.

[112] See e.g. Edward H. Fleischmann, *Toward Neutral Principles: The SEC's Discharge of its Tri-Functional Administrative Responsibilities,* 42 CATH. U. L. REV. 251 (1993); Miles Kirkpatrick et al., *Report of the ABA Antitrust Section,* 58 ANTITRUST L. J. 43, 119 (1989) (finding that "…concern about at least the appearance of fairness is inevitable" but concluding the benefits of combined functions outweigh the disadvantages); *Report of the Task Force on the SEC Administrative Law Judge Process,* 47 Bus. Lwyr. 1731, 1732 (1992) (SEC power to approve complaints and to reverse ALJ decision "adversely affects in a fundamental way the perceived and actual fairness of the process"); Andrew N. Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. MICH. J. L. REF. 103 (2018) (hereinafter *Vollmer, Accusers*); Daniel R. Walfish, *The Real Problem with SEC Administrative Proceedings, and How to Fix It*, FORBES (July 20, 2015), https://www.forbes.com/sites/danielfisher/2015/07/20/the-real-problem-with-sec-administrative-proceedings-and-how-to-fix-it/?sh=106c2ea22e01.

[113] Another type of bias that might be called "institutional bias" exists independently of confirmation bias. Institutional bias means that agency heads are likely to believe in strong enforcement of the regulatory statute for

concern was identified as early as the famous 1941 *Report of the Attorney General's Committee on Administrative Procedure*, which, as discussed below, offered a suggestion to partially remedy the problem.[114]

Confirmation bias might manifest itself in different ways. For example, the agency heads may be reluctant to overturn an ALJ's decision against the target because that would suggest that they were wrong to have greenlighted the complaint in the first place and thus wasted agency resources.[115] And the converse problem exists as well—commissioners who voted against greenlighting the complaint may be reluctant to uphold an ALJs decision against the target because to do so would suggest they were wrong to oppose the decision to charge.[116]

There is another way that participation in the prosecution decision could negatively affect the final decisionmaking process. Agency heads might rely on ex parte information, opinions, and anecdotes communicated to them by the prosecutorial staff in meetings that occurred during the greenlighting process. Yet this material might not appear in the record of the hearing conducted by the ALJ that should form the exclusive basis for their final adjudicatory decision. Consequently, it might be difficult for the members to decide the case on that record without taking account of other information about the case they have obtained during greenlighting. This problem becomes more severe the greater the number and intensity of the contacts between the staff and agency heads before the charging decision occurs. In FERC, for example, such communications apparently occur frequently over a course of years during the investigatory process.[117]

The drafters of the APA were concerned by the problem of confirmation bias, as well as the problem of exposure to non-record information, and they instituted a system of internal separation of functions to protect against them. Under section 554(d) of the APA, agency staff members who played a significant adversarial role in a case as prosecutors, investigators or advocates are prohibited from serving as adjudicatory decisionmakers or as off-the-record advisers to the decisionmakers. Congress had two rationales for the requirement of internal separation of functions. First, an adversarial staff member's prosecutorial or investigative work may have infused a "will to win" that distorts the adversary's ability to serve as an impartial decisionmaker or adviser. Second, the adversary may have been exposed to information about the facts of the case or other information about the target and its behavior that do not find their way into the adjudicatory record. [118] Essentially, as discussed above, these are the two ways that greenlighting might negatively affect the fairness of decisionmaking at the agency head level.

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which they are responsible. They probably wish to support the hard work of their prosecutorial and investigative staff by validating those lower-level prosecutorial decisions. Institutional bias is inevitably present in combined-function agency enforcement proceedings, but confirmation bias adds an additional concerning element.

[114] *See* Part V D.

[115] *See* Elman, *supra* note 25, at 810-12 ("the Commission may fear that dismissal of its own complaint will be construed as an admission of costly error…"); Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 53 (1969). Posner and Elman offer no empirical support for these assertions which were tossed off briefly in long articles criticizing the FTC for many other reasons. An additional factor that might induce confirmation bias is that a dismissal of the complaint at the agency head level could expose the agency to liability for the target's attorney fees under the Equal Access to Justice Act. 5 U.S.C. § 504.

[116] SEC 8

[117] FERC 2; *Scherman, FERC Enforcement*, *supra* note 59; Mullins, *supra* note 46.

[118] Grolier, Inc. v. FTC, 615 F.2d 1219-21 (9th Cir. 1980).

However, for reasons to be discussed in Part IV,[119] the drafters of the APA excluded agency members from the statute's separation-of-functions requirement.

b. Reasons to Believe That Confirmation Bias Is Not A Serious Problem

In theory, the risk that agency-head decisionmakers may be infected by confirmation bias should be greatly reduced by important differences in the roles they play as prosecutors and adjudicators and their appreciation of these differences. For example, the burden of proof at the two stages is different. The greenlighting decision is based on probable cause to believe that a violation of law has occurred. An adjudicatory decision against the target must be supported by a preponderance of the evidence in the record—a far more demanding decisional standard.

When they greenlight the complaint, the agency members know they are relying on a one-sided ex parte staff presentation of the evidence and argument in favor of charging. Often the staff accepted the credibility of outsiders for purposes of deciding whether to charge the target. The final decision, on the other hand, occurs after a trial-type adversarial hearing that tests the credibility of witnesses. The ALJ produces a reasoned opinion based on the evidence presented during the hearing. The agency heads are limited by the APA's exclusive-record rule to considering only the evidence introduced at the hearing (unless they decide to hold further hearings which occurs rarely).

Whether these differences in the decisionmaking function at the two stages make any practical difference, however, is disputed. In any event, many targets and their attorneys are not impressed by the differences between the prosecutorial and adjudicatory stages. They continue to complain that their prosecutors are acting as their judges.

c. Interview Data on Confirmation Bias

In my interviews, a majority of former agency members said that they did not believe that they personally were subject to confirmation bias, but they were aware of the issue.[120] Indeed, some said they barely remembered the meetings (or the notational voting procedure) at which they greenlighted the complaints. They pointed to the differences between the greenlighting and adjudication stages decisions that are discussed above, such as the exclusive record for decisionmaking and differences in the burden of proof. They observe that a failure to take account of evidence and argument developed during the ALJ hearing would invite disaster on judicial review.[121] Needless to say, however, such interview data is not very reliable. Some former agency heads stated that they found the situation uncomfortable[122] and others acknowledged that it might create an appearance of bias even though they believed they were not personally subject to confirmation bias.[123]

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[119] See Part IV B.
[120] SEC 1, 6; FTC 5; NLRB 3.
[121] FTC 5.
[122] SEC 4; FTC 3, 4; FCC 1, 2.
[123] SEC 2, 6.

Some former agency staff members believe that confirmation bias is a serious problem.[124] Other former staff members who are now in the defense bar disagree; they are not concerned with the possibility of confirmation bias.[125]

Needless to say, data from interviews with former agency heads about whether they were biased in making adjudicatory decisions is not very reliable. And data from staff interviews is even less reliable, since a staff member would have no way to know whether the agency members were biased in deciding cases that the staff members were involved in prosecuting.

d. Empirical Research on Confirmation Bias

Attempted empirical research on the existence of confirmation bias based on win rates is inconclusive. This is hardly surprising given the elusive character of psychological phenomena such as confirmation bias. Clearly, there are many other variables that predict win rates, most of them more important than confirmation bias.

Most of the empirical work on this issue concerns the FTC. The most comprehensive study of the issue covered all FTC agency-head administrative decisions between 1977 and 2016 (a total of 145 cases).[126] It suggests that confirmation bias is not a major problem if it exists at all. When the same Commission majority both authorized the complaint and decided the case, the FTC dismissed 33% of the cases. When a different majority voted out the complaint and made the final decision, the FTC dismissed only 27% of the cases—the opposite of what one would expect if confirmation bias was in play.[127]

Several other studies of FTC decisionmaking point in the opposite direction, but they are based on a shorter time period and consider only limited portions of the FTC's work. One study of FTC merger decisions between 1950 and 2011 indicated that confirmation bias does exist. When three, four, or five commissioners who made the final decision also participated in the charging decision, the FTC enjoyed a greater win rate at the agency head level than in situations where zero, one, or two commissioners participated in both decisions.[128] Other studies simply

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[124] SEC 3; FTC 2; FCC 3

[125] SEC 5, 7, 8; FTC 1; FCC 4.

[126] Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp,* 12 J. COMPETITION LAW & ECON. 623 (2016). Overall, the FTC agency heads dismissed 40% of the competition cases that reached them for final decision, but dismissed only 9% of the consumer protection cases, suggesting that the final decision stage is not a rubber stamp process in competition cases. In an additional 13% of cases in which it imposed liability, the Commission struck some of the allegations, counts, or respondents, suggesting that it engaged in careful analysis. *Id.* at 628–35.

[127] Ohlhausen cautions that this conclusion is only suggestive, as many other factors are in play, such as changes in antitrust doctrine and the rigor of recent FTC decisions at the time of her survey as compared to the past. In more recent years, there have been many fewer cases decided by the FTC agency heads, case selection has been more rigorous, the percentage of complaint dismissals is much lower, and the rate of affirmance by the federal courts is higher. *Id.* at 64244.

[128] *See* Nicole Durkin, *Rates of Dismissal in FTC Competition Cases from 1950-2011 and Integration of Decision Functions,* 81 GEO. WASH. L REV. 1684 (2013). Durkin's study concerned only competition cases, not consumer-protection cases and counted only "merits" dismissals, excluding non-merits decisions. The dismissal rate was 21% in the 1950s, 14% in the 1960s, 18% in the 1970s, 38% in the 1980s, 18% in the 1990s, and 0% from 2000-2011.

infer bias from the fact that the agency wins most of the cases decided at the Commission level.[129] However this analytical method is suspect given that the FTC is a law-enforcement agency with discretion to select only strong cases to prosecute and in which the vast majority of the cases settle. Agency decisionmakers are naturally subject to institutional bias; it is not surprising that they would uphold most or all of the ALJ decisions that come to them, whether or not confirmation bias also exists.[130]

As a practical matter, the confirmation bias problem arises infrequently. Most greenlighted cases settle; very few of them make it all the way to a final decision by the agency heads. And of those cases that traverse the entire process, confirmation bias is seldom a problem because of the high rate of turnover of agency members. The members who are called upon to make the final decision are usually not the same people who greenlighted the case years before. But those members who remain in their job for more than a couple of years are likely to see cases a second time.

2. Efficiency

A second disadvantage of the greenlighting system is based on efficiency concerns. The greenlighting process can be quite time consuming for agency members, especially if they are conscientious about reading the complete files. Another efficiency concern is that the need for greenlighting at the agency head level can prolong settlement negotiations or increase the time between the prosecutorial decision to charge a target and the commencement of an agency hearing. Thus, greenlighting may contribute to the problem of administrative delay.

At the SEC, for example, action memos can run 50 to 75 pages in length, and perhaps five to ten of them are circulated each week. In addition, the Wells responses or white papers are often lengthy, and some commissioners read them in full.[131] Greenlighting is considered at formal SEC meetings which are sometimes contentious. As a result, a substantial portion of the time of SEC members is devoted to enforcement matters.

Agencies that handle the greenlighting function through notational voting spend less time in meetings but the members must still read the lengthy files. At FERC, the agency heads make greenlighting decisions in several stages. Each stage generates lengthy memos, but voting is generally done through a notational process rather than in-person meetings. The same is true at FCC where enforcement matters are seldom taken up during commission meetings.

SEC interviewees estimated that perhaps 40% or more of the time of agency heads is taken up in enforcement matters, including but not limited to charging decisions and settlement

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The majority of the dismissals were "straddle" cases meaning they were brought under a president from one party but decided under a president from the opposing party.

[129] See A. Douglas Melamed, Comment Letter on FTC Workshop Concerning Section 5 of the FTC Act 14-17 (Oct. 14. 2008) (questioning the impartiality of the FTC heads based on a high percentage of agency wins); Joshua Wright, *Supreme Court Should Tell FTC to Listen to Economists, Not Competitors on Antitrust,* FORBES March 14, 2016, 11:00 AM), https://www.forbes.com/sites/danielfisher/2016/03/14/supreme-court-should-tell-ftc-on-antitrust.

[130] See *supra* note 113, discussing the difference between institutional and confirmation bias.

[131] SEC 1, 3, 4, 6, 8.

approvals.[132] At FERC, estimates were much lower, perhaps in the 10% range, because relatively few enforcement cases make it that far.[133] One former FTC member estimated that the member spent half of work time on enforcement issues, but thought the time investment was well worth it.[134]

Obviously, agency heads pay a substantial opportunity cost in order to achieve this level of involvement in enforcement issues.[135] This is time the heads could devote to other important responsibilities such as rulemaking, ratemaking, liaisons with other agencies, study of the problems faced by the regulated industry or regulatory beneficiaries, development of policy, or consideration of adjudicatory records at the time of final decision.

IV. LEGALITY OF GREENLIGHTING

Weighing the case for and against greenlighting as a matter of policy, Part III concluded that the greenlighting process is valuable and should be preserved in agencies where the caseload makes it practicable to do so. But some commentators have raised concerns about the legality of greenlighting founded in constitutional due process or the APA. This Part evaluates those arguments. It concludes that greenlighting violates neither due process nor the APA.

A. Due Process

In an important article, Andrew Vollmer argues that a target of an SEC enforcement action is denied due process when the agency heads greenlight a complaint and later issue the final agency decision.[136] I disagree with that analysis, because the Supreme Court has consistently rejected constitutional attacks that arise out of the structure of combined-function administrative agencies.

The leading case on this issue is *Withrow v. Larkin.*[137] In *Withrow,* the Supreme Court assumed that the heads of a state medical licensing agency had personally investigated a physician's conduct, authorized the filing of a criminal complaint against the physician, and then adjudicated a revocation of his license. The Court unanimously rejected the physician's due process claim. It held that agency heads could exercise the functions of both investigation and adjudication in the same case, absent particularized facts indicating that the heads had prejudged the case. The Court pointed out that "there is no incompatibility between the agency filing a complaint based on probable cause and a subsequent adjudicatory decision rendered when all the evidence is in that there has been no violation of the statute."[138] The Court was obviously concerned that a contrary decision would cast doubt on the practices of countless federal, state and local licensing agencies.

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[132] SEC 1,2, 3, 4, 6, 8.
[133] FERC 5.
[134] FTC 5.
[135] SEC 1. FTC 3, 5.
[136] *Vollmer, Accusers*, *supra* note 112.
[137] 421 U.S. 35 (1975). See Michael Asimow, *Withrow v. Larkin,* in LEADING CASES IN ADMINISTRATIVE LAW (Matthew Weiner & Anna Shavers, eds., forthcoming, 2022).
[138] *Withrow,* 421 U.S. 35, 57.

The *Withrow* decision is supported by the principle of necessity. If the agency heads were disqualified by their involvement in prosecution, there would be no way to adjudicate the doctor's case and to revoke his license. *Withrow* is consistent with several earlier Supreme Court cases also based on the necessity principle. These decisions held that agency adjudicatory decisionmakers are not biased by reason of their involvement in earlier agency proceedings.[139]

Under *Withrow,* it seems clear that due process is not violated when agency heads greenlight a charging decision and later make the final adjudicatory decision in the same case, absent some further evidence that they had prejudged the issues. Since *Withrow*, federal courts have consistently rejected arguments that agency heads who exercised overlapping functions could not fairly adjudicate a case.[140]

Despite this authority, Vollmer argues that due process is violated when agency heads greenlight and later adjudicate the same case. His analysis is based on *Williams v. Pennsylvania.*[141] *Williams* was a death penalty case in which Ronald Castille had previously served as a prosecutor. Castille later became a justice on the Pennsylvania Supreme Court and voted to uphold the death penalty in a case that he had previously helped to prosecute. The Supreme Court held that this combination of functions violated due process.

It seems plain that *Williams* is distinguishable from the administrative greenlighting issue. It is shocking and inexplicable that a justice on a state supreme court would not disqualify himself in an appeal of case he had prosecuted. It is a gross breach of judicial ethics for a judge to decide a case, let alone a death penalty case, in which the judge served as counsel in an earlier phase of the case.[142] The *Williams* scenario is likely a situation that will never recur. It easily fits into the *Withrow* exception for particularized facts that reveal prejudgment. In contrast, there is no breach of judicial ethics and ordinarily no particularized facts indicating prejudgment when

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[139] Hortonville Joint School Dist. v. Hortonville Educational Ass'n, 426 U.S. 482 (1976); Cement Institute v. FTC, 333 U.S. 683 (1948). In *Cement Institute*, the Court said: "If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another." *Cement Institute,* 333 U.S. at 702.

[140] See, e.g., Marine Shale Processors v. EPA, 81 F.3d 1371, 1385 (5th Cir. 1996) (EPA regional administrator denied permit application, then adjudicated the same issue); Simpson v. Office of Thrift Supervision, 29 F.3d 1418, 1424–25 (9th Cir. 1994) (rejecting claim of due process violation because agency head both approved prosecution and then decided the case after an ALJ decision); Blinder, Robinson & Co. v. SEC, 837 F.2d 1099, 1107 (D. C. Cir. 1988) (SEC not prohibited from adjudicating case because it earlier prosecuted a criminal case against same party). A recent case provides a good example of the prevailing law on whether agency heads should be disqualified because of playing multiple roles in the process. Zen Magnets, LLC v. CPSC, 968 F.3d 1156 (10th Cir. 2020). *Zen Magnets* held that due process is not violated when agency heads adopt a product safety regulation about the dangers of small magnets and then adjudicate the same issue. The agency heads made various statements at the time of the rulemaking about the dangers of the product but the court considered they were "in role" (meaning they were performing agency functions as opposed to some non-agency function) and the statements did not indicate they had prejudged the issue.

[141] 136 S. Ct. 1899 (2016).

[142] *See* MODEL CODE OF JUD. CONDUCT § 2.11 (AM. BAR ASS'N 2010) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including [when] … (6) The judge: (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association; (b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding…"

an agency head greenlights a prosecution, then decides the case. Such action is routine, generally accepted, and has occurred in countless cases.

By concentrating only on the SEC, Vollmer fails to deal with the systemic effect of holding that greenlighting plus adjudication is a due process violation. Such a decision would have an enormously disruptive effect on the state and federal administrative process because greenlighting is such a common function, particularly in licensing agencies. The Supreme Court is reluctant to decree due process principles that would have widespread effect of this kind.[143] As the *Withrow* decision pointed out, invalidation of the prosecution/adjudication combination would invalidate the "agency head" exception in section 554(d) of the APA,[144] a step the Supreme Court was obviously reluctant to take. The *Williams* decision does not offend the principle of necessity because the Pennsylvania Supreme Court could have decided the case if Castille had recused himself. In contrast, a decision preventing all agency heads who had greenlighted a prosecution from deciding the case could immobilize the agency for lack of a quorum, thus making it impossible for it to render a final decision. Thus, Vollmer's argument that greenlighting at the SEC or elsewhere violates due process is not persuasive.

Vollmer argues that to solve the due process problem, an agency member who voted to greenlight a case should be disqualified from voting on the final decision. Although the Constitution does not require disqualification, whether Scherman's proposal should be adopted as a matter of policy is discussed below.[145]

B. The Administrative Procedure Act

Section 554(d) of the APA imposes a separation-of-functions requirement that prevents a staff member involved in investigation of a case from serving as an adjudicator in the same case (or a substantially related one) or as an adviser to the adjudicator.[146] However, section 554(d) does not apply "to the agency or a member or members of the body comprising the agency."

This "agency head" exception was inserted because Congress believed that application of separation of functions to the agency head would damage the agency's ability to conduct law enforcement.[147] As a result, according to a number of cases, the APA allows agency heads to engage in a prosecution function such as greenlighting, then participate in the agency's final adjudicatory decision.[148] The *Withrow* decision contains a dictum confirming that the APA

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[143] *See* Richardson v. Perales, 402 U.S. 389 (1971) which upheld the Social Security practice whereby an administrative law judge represents both sides and then decides the case. "Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity." *Id.* at 410.

[144] *See* Section IV. B.

[145] *See* Section V. E.

[146] See Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies,* 81 Colum. L. Rev. 759 (1981) [hereinafter Asimow, *When the Curtain Falls*]

[147] According to the legislative history of the APA, "[t]he exemption from 554(d) was created only for those positions in which involvement in all phases of a case is dictated 'by the very nature of administrative agencies, where the same authority is responsible for both the investigation-prosecution and the hearing and decision of cases.'" H. R. Rep. No. 79-1980 at 27 (1946). *See also* Grolier, Inc. v. FTC, 615 F.2d 1215, 1220 (9th Cir. 1980).

[148] In Environmental Defense Fund v. EPA, 510 F.2d 1292, 1305 (D.C. Cir. 1975), Judge Leventhal wrote: "[Congress] has accepted a pragmatic view that the need for effective control by the agency head over the

permits agency heads to engage in investigation and prosecution in the same case they adjudicate.[149]

V. ADDITIONAL CHECKING MECHANISMS ON PROSECUTORIAL DISCRETION

Part III of this paper discussed the fundamental rationale for the greenlighting function. Agency head review of charging decision serves as an accountability mechanism that promotes public administration values and helps to correct principal-agent misalignments. Nevertheless, Part III acknowledged concerns about greenlighting because of possible confirmation bias and inefficiency. This section discusses a number of proposals that might alleviate these concerns. These mechanisms exist in some agencies or have been suggested in the literature. There are, in addition, structural changes such as eliminating combined-function agencies that would address these concerns, but these options are beyond the scope of this study.[150]

A. Opportunity for Target to Dissuade Staff from Recommending Decision to Charge

Informal interchange of information ordinarily takes place during the investigation process between the target's attorneys and agency enforcement staff. In addition, as discussed in Part II, the SEC, NLRB and FERC employ formalized pre-charging comment procedures that invite targets to submit memoranda designed to dissuade the staff from charging them.[151]

When the SEC staff tentatively decides that an administrative complaint should issue or that the SEC should seek judicial enforcement, it formulates a memorandum to the target (the "Wells notice") that summarizes the factual and legal predicates for the complaint and may (but need not) disclose investigative material from the agency's file. The target is then entitled to submit a written rebuttal (the "Wells response"). That response is designed both to dissuade the staff from seeking a Commission greenlight and to influence the agency heads not to greenlight the complaint if the staff persists. A strong Wells response is also an important strategic tool in the settlement process.[152]

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commencement of proceedings requires an ability to conduct consultations in candor with an investigative section on the question whether a notice should be issued and a proceeding begun, and this notwithstanding any residual possibilities of unfairness." *See also* Air Products & Chemicals, Inc. v. FERC, 650 F.2d 687, 709-10 (5th Cir. 1981) (APA agency head exception allows prosecutorial staff to meet with agency heads in deciding to issue complaint).

[149] "It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law." Withrow v. Larkin, 421 U.S. 35, 56-57 (1975) The APA does not, however, allow an attorney-adviser to the agency head to later serve as a ALJ in the same case in which the adviser materially participated in a greenlighting decision. Grolier Inc., 615 F.2d at 1220 (9th Cir. 1980). The APA probably does not allow agency members to be advised ex parte by adversarial staff when the members are considering the final adjudicatory decision. See Asimow, *When the Curtain Falls, supra* note 146, at 766.

[150] See Part V.I. An additional check on irresponsible prosecution decisions is the ability of targets to collect attorney fees under the Equal Access to Justice Act if the agency's action (at the agency level or the judicial review level) was not substantially justified. 5 U.S.C. § 504, 28 U.S.C. 2812.

[151] See Parts II.A, D, E.

[152] SEC 5

As discussed above,[153] the SEC staff now commonly avoids the Wells procedure because the Dodd-Frank Act imposed time limits on agency consideration of the charging decision that run from the date the Wells notice is issued. In addition, public companies believe they must disclose issuance of a Wells notice and thus prefer that the SEC omit the procedure. Instead, the staff informally notifies the target of its intention to recommend that the Commission charge the target. This notice is probably less comprehensive than a Wells notice would have been. The target then is invited to prepare a "white paper" that serves the same function as a Wells response.

SEC commissioners told me that they and their advisory staff take Wells responses or white papers seriously.[154] These submissions sometimes persuade the SEC heads that issuance of a complaint is contrary to their policy priorities, that the case against the target is weak, or that the complaint should be narrowed. Defense lawyers appreciate the Wells process and often use it to extract more information from the staff than would otherwise be disclosed.[155] Among the people I interviewed, there was unanimous support for the Wells and white paper procedures.[156]

The regional offices of the NLRB that investigate unfair labor practice charges offer targets the ability to file a position paper in response to the charge that was filed by a union or employer, an opportunity that targets usually avail themselves of.

FERC provides two distinct opportunities for the target to influence the charging decision. After investigating the case and deciding that a complaint should issue, the staff produces a "preliminary findings memo, " and the target has the opportunity to file a responsive brief. These documents are presented to the agency heads when the heads consider whether to permit the staff to enter into settlement negotiations.[157] If the case does not settle, the staff produces a Rule 1b.19 notice, a process modelled after the SEC's Wells notice. The Rule 1b.19 notice again sets forth the facts and legal analysis supporting the staff's decision to seek a charging decision, but more briefly than the preliminary findings memorandum. The target has 30 days to respond to the Rule 1b.19 notice. The agency heads consider the Rule 1b.19 notice and the target's response when they decide whether to issue a charging decision (an OSC in FERC parlance) or seek federal court enforcement. Several interviewees thought the Rule 1b.19 procedure was redundant since it duplicates the preliminary findings memo and response.[158] The target has a third opportunity to state its case by filing a brief after issuance of the OSC.

The FCC does not provide a formalized notice and comment system prior to issuance of a Notice of Apparent Liability (NAL). Instead, the target can file a detailed response after the staff issues the NAL. The response is intended primarily for the benefit of the Commissioners who will be called on to greenlight the complaint and, later, will adjudicate it.

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[153] See Part II.A.
[154] SEC 1, 5.
[155] SEC 5.
[156] SEC 1–8.
[157] Everyone I interviewed who is familiar with FERC practice thought the preliminary findings memo and response procedure was quite useful. FERC 1–6.
[158] FERC 2, 4, 5, 6. One interviewee thought the procedure was useful because of the long delays that occur in FERC enforcement; by the time the Rule 1b.19 memo issues, the composition of the agency heads has often changed and private lawyers have an opportunity to influence the new commissioners. FERC 3.

In my opinion, the notice-and-comment procedure employed by the SEC, NLRB, and FERC during the pre-charging phase of enforcement is quite useful. As urged by Part VI, I suggest that other combined-function agencies adopt similar devices. This process contributes to a sense by private parties that they are being treated fairly and helps them decide whether to settle or keep fighting. The process facilitates reasoned decisionmaking by the enforcement staff when it decides whether to charge a target and helps to produce an informed decision by agency heads in the greenlighting process. It furthers what Michaels called internal separation of powers through the rivalrous competition between agency members, career staff, and regulatory targets.[159] I would not, however, recommend that agencies provide two separate opportunities of this kind, as occurs in FERC practice. A double notice-and-comment procedure seems redundant and increases costs for both targets and agencies without corresponding benefit.

B. Opportunity for Target to Communicate with Individual Agency Members Prior to Greenlighting

Several agencies permit targets to communicate with members of the agency prior to their greenlighting decision. At the FTC, after the staff recommends issuance of a complaint, the target is entitled to meet separately with each of the five FTC commissioners to attempt to dissuade them from greenlighting the complaint. Commission staff are usually present at these meetings. Because no complaint has issued, the APA's ban on outsider ex parte communications to agency decisionmakers[160] is not applicable. A similar practice of meetings between targets and commissioners exists at the FCC, but it is employed less often than at the FTC.[161]

Among interviewees familiar with the FTC, I found considerable support for the FTC ex parte meeting procedure.[162] Former agency heads found these meetings enlightening since they are exposed mostly to the staff's arguments before they are called on to greenlight the complaint.[163] The meetings also tend to offset criticisms that the commissioners are out of touch and removed from business realities.[164] Private lawyers (including former FTC staff) think the meetings can be useful in persuading a commissioner that a complaint should not issue because the case is weaker than the staff says it is.[165] At times, the commissioners can broker settlements. Other private lawyers refer to the FTC meetings as "last rites" and think they are a waste of time.[166]

Interviewees familiar with the FCC were skeptical about the value of meetings between targets and FCC commissioners which were regarded as useless in influencing member greenlighting decisions.[167]

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[159] See *supra* note 100 and accompanying text.
[160] 5 U.S.C. § 557(d)(1)(E).
[161] FCC 4
[162] FTC 1–5.
[163] FTC 5
[164] *Id.*
[165] FTC 1, 3, 5.
[166] FTC 2.
[167] FCC 2, 4.

Staff members and former heads at the SEC and FERC were unenthusiastic about the FTC's and FCC's one-on-one practice.[168] I agree with their criticisms. These meetings seem wasteful of the precious time of the agency heads and of staff members who sit in on them.[169] The meetings are costly for clients who must pay their lawyers to engage in numerous separate meetings, even though it is unlikely that the meetings will have much practical impact. The meetings can make the confirmation-bias problem worse because the heads learn still more about the case at the pre-complaint stage, including material that may never be introduced at the ALJ hearing.[170]

FERC encourages targets to submit written (but not oral) communications to the agency heads during the investigation process. This approach (a holdover from prior practice existing before the FERC obtained civil penalty authority) is less time consuming and costly than the ex parte meetings at the FTC or FCC. Some FERC practitioners send such letters frequently; others never do. Whether such communications are useful to targets or to FERC is debatable. Some interviewees thought that such letters might prompt commissioners receiving them to communicate with the staff to better understand the issues.[171] Others thought the practice was counter-productive since communications by targets with agency members might prejudice the staff against a target that attempted to go over their heads.[172]

I do not favor the FERC written communication practice. It magnifies the confirmation-bias problem by exposing agency heads to additional information about the case that might never get into the record. Considering these letters is time consuming for the busy agency heads, even if they do not answer them. The existing FERC process that that permits targets to respond to the staff's preliminary findings memo seems to furnish an adequate opportunity to provide feedback. The procedure for sending separate letters to the commissioners seems redundant.

C. Application of Separation-of-Function Rules to the Investigatory Stage

An article by William Scherman proposed that FERC change its rules on ex parte communication and separation of functions rules so that those rules would go into effect earlier in the process.[173] Under the existing FERC rules, as in most agencies, the curtain falls when FERC makes a charging decision by issuing an order to show cause (OSC). At that point, neither the target nor the agency staff adversaries (meaning prosecutors, investigators, and advocates) can make off-the-record communications to agency heads or their advisers. However, such communications can occur before the agency makes the decision to charge.[174]

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[168] SEC 1-8.; FERC 5, 6.
[169] FCC 4 thought each meeting took about an hour.
[170] FTC 2; *see* Elman, *supra* note 25, at 788–89.
[171] FERC 3, 4.
[172] FERC 5.
[173] Scherman, *FERC Enforcement, supra* note 59, at 114–15 (2014).
[174] 18 C.F.R. §§ 2201, 2202. *See* Asimow, *When the Curtain Falls*, *supra* note 145, for discussion of separation of functions. The APA rule prohibiting ex parte communications by outsiders to agency adjudicators goes into effect when the proceeding is noticed for hearing but can come into force earlier if the agency so designates. 5 U.S.C. § 557(d)(1)(E). The separation of functions rule prohibits adversaries from participating or advising in any ALJ decision or agency review. However, staff adversaries can communicate with agency heads off the record in connection with the greenlighting decision. 5 U.S.C. § 554(d). See Part IV.B.

Scherman proposed that the agency's rules on separation of functions and outsider ex parte communications should go into effect at an earlier stage of the process, perhaps at the time the staff issues the Rule 1b.19 notice (meaning staff has decided to recommend charging the target), or even earlier. His article expressed concern about the fairness of allowing the staff unfettered access to the Commission during the investigatory and greenlighting phases of the case, while the ability of targets to communicate with agency heads is limited to written submissions.[175] Under Scherman's proposal, meetings between the staff and agency heads concerning greenlighting would be on the record and the target could participate.

In published articles, members of the FERC staff and outside lawyers strongly disagreed with this suggestion.[176] Nearly everyone I interviewed opposed implementing Scherman's proposal, whether at FERC or at other enforcement agencies. The interviewees believe that the staff needs to conduct a candid and robust discussion with the heads about whether to issue a charging decision. If the target's representatives are present or if the discussion is on the record, staff could not level with the agency heads about the weaknesses in the case or the political or policy issues it creates or the terms on which it might be settled.[177] The need for candid discussion about charging is the reason for the Sunshine Act permits agencies to close meetings devoted to the initiation of litigation.[178] I do not support Scherman's proposal.

D. Delegation to Enforcement Staff in Routine Cases

The 1941 Report of the Attorney General's Committee on Administrative Procedure was concerned with the problem of confirmation bias in the greenlighting process. To alleviate the problem, the Report suggested that agencies delegate to staff the decision to issue complaints in cases that raise only the applications of well-established legal principles. Such cases might present difficulties of proof but would otherwise be routine. Nor would such delegation of the charging decision in routine cases inhibit the agency's ability to develop policy through case-by-case adjudication. However, in particularly important cases or in those that involved the extension of existing precedents or new departures, the agency heads should be responsible for making the charging decision.[179] Doing so ensures that the agency members can supervise staff and retain primary responsibility for developing policy.

Such delegations are in effect at several agencies. The FCC staff has power to charge civil penalties below a certain amount ($100,000 for common carriers, $25,000 for others), so that the majority of enforcement cases need not be considered by the Commission. At FERC, penalties arising from reliability violations that are assessed by an industry self-regulatory

[175] FERC permits targets to communicate with the agency heads in writing before the heads have greenlighted the case. See Part II.V.
[176] Murphy, *supra* note 46, at 299–302 (2014); Mullins, *supra* note 46, at 285–86.
[177] SEC 1–7; FERC 1, 3, 5, 6. FTC 1–3.
[178] 5 U.S.C. § 552b(c)(10).
[179] See Auerbach, *supra* note 25, at 418–24. This was the practice at the NLRB before the 1947 legislation stripping agency heads of power over the charging process. Board members spent one morning per week considering questions relating to issuance of complaints in non-routine cases. Seymour Scher, *The Politics of Agency Organization,* 15 POL. RSCH. Q. 328, 331 (1962).

process can be processed without agency head involvement.[180] In the NLRB, over 90% of complaints processed by regional offices involve routine, well-settled applications of law, and are filed without any involvement of the GC or the GC's staff, even though, in theory, the GC is responsible for all NLRB prosecution decisions.[181]

I think delegation to staff of complaint issuance in routine cases is a good idea, especially in agencies with substantial enforcement caseloads.[182] Delegation would reduce the number of cases in which confirmation bias is a concern because the agency heads would not have seen those cases before the final adjudicatory stage. Delegation would be efficiency-enhancing because it would reduce the amount of time the heads spend on enforcement decisions, Thus, as proposed below,[183] agency heads could adopt procedural rules setting forth classes of cases that the staff could initiate on its own. Of course, such rules are possible only if allowed by statute. Some statutes, like the FTC Act, require agency head approval of every complaint.[184]

Nevertheless, most of the interviewees opposed delegation to the staff of complaint issuance. They thought it would be difficult to identify precisely which cases are routine or unimportant.[185] At FERC, relatively few enforcement cases are litigated rather than settled; the ones that remain tend to involve policy questions.[186] Even when a case turns on evidentiary issues rather than disputed legal questions, these evidentiary issues can be controversial and of fundamental importance, especially in competition and securities cases. Even routine cases involve the expenditure of resources and can create precedents that may have important effects on the regulated industry. Some former commission members think that complaints in routine cases should be approved by politically responsible agency heads in light of the importance of the cases to the particular parties[187] and the sentinel effect.[188] Private lawyers want the agency-level bite at the apple, even if the case seems routine.

In the future, some charging decisions may be made through utilization of artificial intelligence methodology. An algorithm will reflect the agency heads' decisions about how to prioritize limited resources in the choice of which cases to pursue and should be capable of learning from past decisions. To the extent that AI removes the discretionary element from charging decisions, there would be little need for the agency members to take a second look. However, it seems likely that even in a world of AI, the staff and agency members will need to revise the algorithm periodically to reflect changing enforcement preferences. In addition, the staff will retain discretion to decide which cases are important enough to charge, regardless of

[180] FERC 6.
[181] NLRB 3.
[182] See *supra* note 92.
[183] See Part VI. B.
[184] See Part II. B. The SEC has power to delegate any function to the staff, but a single commissioner can bring any delegated matter to the Commission for review. 15 U.S.C. § 78d-1(a), (b). One former SEC staff member thought a delegation system could work but suggested that the staff should obtain approval from a duty commissioner in routine cases rather than from the full Commission. SEC 5.
[185] SEC 1– 4, 6, 8.
[186] FERC 5.
[187] SEC 3; FTC 4.
[188] SEC 4. The sentinel effect is discussed in text preceding note 110.

the algorithm, and these decisions to override the algorithm should receive a second look at the agency head level.[189]

E. Disqualification of Agency Members Who Participated in Charging Decisions.

One proposal for solving the confirmation bias problem is to require the disqualification of an agency member from voting on the final adjudicatory decision if he or she previously took part in the decision to prosecute that same case. Andrew Vollmer, who was a former SEC staff member, has strongly advocated this proposal.[190]

One practical problem with Vollmer's proposal is that such disqualifications might render the agency unable to muster a quorum to vote on the final decision, causing the case to be suspended indefinitely. This would not occur frequently, given the fairly rapid turnover of agency heads, but it would occur occasionally, especially during presidential transitions when the confirmation process causes substantial delays in filling vacancies. Virtually everyone I interviewed opposed this proposal, including many who now serve in the defense bar.[191]

More fundamentally, Vollmer's proposal would put commissioners (at least those who have not decided to leave the agency in the near future) to a difficult choice. Should they disqualify themselves from the greenlighting function in order to preserve the ability to vote on the final decision, or should they retain the greenlighting function and give up voting on the final adjudicatory decision? Some of former agency heads who answered this question said they would opt out of the charging decision because of the importance of being able to make policy through the adjudicatory decision.[192] Others said they would opt out of adjudication because the charging decisions are so important and so much more numerous than cases that survive all the way to the final adjudicatory decision.[193]

As argued above, participation of commissioners in the charging decision is valuable as a check on prosecutors and as an element of policymaking. It would be unfortunate if many commissioners opted out of that function. And it would be equally unfortunate if some were disqualified from taking part in the final decision process. That process involves collegial effort and compromise of diverse policy perspectives and often entails establishing agency policy for the future.[194]

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[189] The SEC currently uses AI methodology in its investigatory processes, but staff continues to exercise prosecutorial discretion in charging cases. Engstrom and Ho have expressed reservations about the use of AI in making enforcement decisions. AI might reduce the costs of searching for violations and thus enable more enforcement activity from a limited budget. But it could also make the system more susceptible to gaming by well-financed private interests anxious to avoid scrutiny. These are concerns for the future, not the present. David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey, & Mariano-Florentino Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies* 21-29 (2020) (report to the Admin. Conf. of the U.S.); David Freeman Engstrom & Daniel E. Ho, *Algorithmic Accountability in the Administrative State,* 37 YALE J. ON REG. 800, 815-23 (2020).

[190] See *Vollmer*, *Accusers, supra* note 113. Vollmer also argued that due process is violated when agency heads vote on a case in which they greenlighted prosecution. *See* Part IV.A.

[191] SEC 1, 2, 6, 7; FERC 5, 6; FTC 1–5; FCC 2.

[192] SEC 1.

[193] FTC 3; SEC 6.

[194] SEC 6; FTC 4, 5.

F. Removal of Agency Members Heads from Greenlighting: The NLRB Model

Since passage of the Taft-Hartley Act in 1947, NLRB agency heads lack power to make charging decisions in ULP cases.[195] Instead, the GC makes the charging decisions and is politically accountable for those decisions. Thus, the confirmation bias problem does not exist in ULP cases. Much has been written about the separation of prosecution and adjudication functions in the NLRB.[196] A number of articles concerned with the confirmation bias issue have recommended that Congress mandate that other combined-function enforcement agencies emulate the NLRB model.[197]

Although Board members play no prosecutorial role in most ULP cases, the separation of prosecution and adjudication is not complete. The NLRB members decide whether to approve the GC's recommendation that the Board seek a temporary injunction in ULP cases (so-called 10(j) cases).[198] Section 10(j) cases are more significant than routine ULP cases. The Board seeks an injunction when the conduct being enjoined may inflict irreparable injury that could not be remedied by a later adjudicatory decision. For example, the Board might seek a temporary injunction against employer violations that interrupt a union organizing campaign; an injunction is appropriate because an adjudicatory decision in the case would occur long after the momentum behind the organizing campaign had dissipated.[199] Thus, under the NLRB model, the agency members greenlight the particularly sensitive temporary injunction cases but not the more routine and far more numerous ULP complaints in which no injunction is sought.

A basic reality is that NLRB regional offices file between 800 and 1200 ULP complaints each year. This heavy caseload would make it practically impossible for the NLRB agency heads to be involved in charging decisions in any meaningful way.[200] Board members see between ten and one hundred 10(j) cases each year which is a more manageable task. Limiting the Board's greenlighting function to 10(j) cases makes sense, because these cases are more significant than the routine ULP case.

Confirmation bias remains a potential issue in 10(j) cases since Board members exercise both prosecution and adjudicatory functions in those cases. For what it is worth, my interview subjects doubted that the problem was serious, because the GC's written request for Board approval of the injunction accepts the credibility of the complainant and does not include much of the factual and evidentiary material that the prosecutors have assembled. When a 10(j) case

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[195] See Part II.E.

[196] Michael Ellement, *Labor Law in 3(d): Reexamining the General Counsel of the NLRB as an Independent Prosecutor of Labor Violations,* 29 ABA J. OF LABOR & EMPL LAW 477 (2014); Jonathan D. Rosenblum, *A New Look at the General Counsel's Unreviewable Discretion Not to Issue a Complaint under the NLRA,* 86 YALE L.J. 2349 (1977); Scher, *supra* note 179 (discussing the 1947 politics surrounding adoption of the Taft-Hartley Act)

[197] *See* Calvani, *supra* note 25, at 206–07; Verkuil, *supra* note 99, at 267; *Report of the Task Force on the SEC Administrative Law Judge Process, supra* note 112, at 1737.

[198] NLRB 2 and 3. These approvals are usually secured through notational voting, not at an in-person meeting.

[199] NLRB 3.

[200] Prior to the Taft-Hartley Act, the Board reviewed regional director decisions to charge or not charge only in cases involving important or unique legal issues. One morning a week of the Board members' time was spent in considering questions relating to the issuance of complaints. Scher, *supra* note 179 at 331.

comes to the Board after an ALJ decision, it often looks completely different than it did at the complaint stage, because of the ALJ's credibility determinations and the target's evidence.[201]

The separation of prosecution and adjudication at the NLRB can create principal-agent problems when the views of the GC and the Board members misalign. One interviewee estimated that this might occur in around a dozen cases a year.[202] These principal-agent problems arise most frequently when presidential administrations change and the 3-2 political balance on the board switches, while the GC holds over.[203]

The GC may refuse to issue complaints in cases that the heads would have wished to prosecute.[204] Alternatively, the GC may issue complaints that the heads would not have authorized if they had the power to decide whether to charge.[205] Since most cases settle (at least 90%), the Commission never gets an opportunity to pass on the policy issues raised in settled cases.

One example of this sort of conflict arises out of the GC's valuable advice-giving function. If the GC disagrees with Board-made law and hopes to change it, the GC can advise charging parties to file particular types of charges and regional offices to issue complaints in those cases. Of course, the Board makes the final call and can reject the GC's initiative. Charging parties are allowed to participate in ALJ hearings and can introduce witnesses and argument supporting their view, perhaps disagreeing with the GC's approach. On the other hand, the Board will be unable to change existing law if the GC disagrees and declines to charge cases raising the issue.[206]

Another area in which the GC and the agency heads might come into conflict arises in the area of judicial enforcement. Unlike most independent agencies, the Board's attorneys handle litigation for the Board through the court of appeal level. Conflict might arise when the GC is called on to enforce a Board decision in court with which the GC disagrees (as could occur after a change in presidential administration, where the GC is a holdover). Such problems have occurred in the past, but not in recent years.[207]

An additional problem with the independent GC is that it creates a duplicate power center within the agency. In a real sense, the GC is a sixth agency head, whose practical power may well exceed those of the four NLRB members who are not the chair. Particularly during periods of budget stringency and uncertainty, such as have occurred in recent years, the Board and GC have disagreed about management and budgetary issues, such as how to make the necessary budget cuts and allocation of limited resources. A recent example of GC-Board conflict occurred

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[201] NLRB 2, 3.
[202] NLRB 3.
[203] NLRB 1, 2, 3.
[204] See Ellement, *supra* note 196, at 492–93, citing the refusal by the GC to enforce union shop provisions in the 1950s. The Board members could only resort to public criticism of the GC's decision not to charge these cases.
[205] See *id*. at 491, describing a set of cases in which the General Counsel in the 1950s believed that unfair labor practices should be prosecuted even if they have only minor effect on interstate commerce, while the Board members disagreed.
[206] NLRB 3.
[207] Ellement, *supra* note 196, at 493–96; NLRB 3.

out of differences of opinion about replacement of the Board's outmoded IT systems. In addition, the GC makes staff hiring decisions (except over the Board members' personal staffs). GC hiring decisions have given rise to conflict with Board members.[208]

In my interviews, I found little enthusiasm for the NLRB model in other federal combined-function agencies. Most interviewees favored having the agency heads make charging decisions, both in the interest of constraining prosecutors and articulating policy.[209] They were concerned by the problem of the GC being out of sync with the agency heads and the creation of a competing power center.[210] They feared that an independent GC might increase partisanship.[211] A minority of interviewees were open to the idea.[212]

G. Enforcement Guidelines

Agencies should consider the adoption of guidance documents that establish enforcement priorities and criteria.[213] The guidelines can and should be updated as conditions in the regulated industry change, as new agency members are appointed with different priorities, or as the agency gains experience with the outcome of earlier charging decisions.

The process of adoption of enforcement guidelines requires agency members and staff to consider and resolve issues of enforcement priorities. [214] The guidelines provide readily available guidance for the staff and help to assure more consistent charging decisions. A concern with making such guidelines publicly available, however, is that they can undermine deterrence by informing the regulated industry of what cases are unlikely to be prosecuted.

In my research, I encountered various agency guidelines that establish enforcement criteria. The FCC adopted guidelines for upward and downward adjustment of forfeiture penalties.[215] The NLRB Office of Advice furnishes detailed guidance to regional offices about enforcement criteria and policies in unfair labor practice cases. In addition, the NLRB GC adopted detailed case-handling instructions (publicly available) to regional offices about every

[208] NLRB 1, 3; Ellement, *supra* note 196, at 492–93.
[209] FTC 1, 2, 3, 5. SEC 2, 5–8. SEC 1 was open to the idea, but only if agency members could remove the GC for any reason.
[210] SEC 5, 6.
[211] SEC 2, 5.
[212] SEC 3.
[213] Barkow, *Overseeing Agency Enforcement, supra* note 3, at 1154-59; Simon, *The Organization of Prosecutorial Discretion, supra* note 98; Sohoni, *supra* note 7, at 82. Agencies are not required to provide pre-adoption notice and comment with respect to general statements of policy, of which enforcement guidelines would be a paradigmatic example. 5 U.S.C, § 553(b)(A). Guidelines should be flexible and leave room for discretion at both staff and agency head levels to avoid being treated as legislative rules that can only be adopted or revised with prior notice and comment.
[214] See generally Cary Coglianese and Daniel E. Walters, A*genda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 93 (2016) (noting importance of the agenda-setting process with respect to agency rulemaking responsibilities).
[215] FCC ENFORCEMENT OVERVIEW, *supra* note 37, at 17-18.

aspect of processing ULP, representation and compliance cases.[216] In 2021, the newly appointed GC issued guidelines outlining her enforcement priorities.[217]

FERC has issued the following guideline: To determine whether there is a substantial basis for opening an investigation, staff considers available information concerning the following factors, as appropriate:

- Nature and seriousness of the alleged violation,
- Nature and extent of the harm, if any,
- Efforts made to remedy the alleged violation,
- Whether the alleged violations were widespread or isolated,
- Whether the alleged violations were willful or inadvertent,
- Importance of documenting and remedying the potential violations to advance Commission policy objectives,
- Likelihood of the conduct recurring,
- Amount of detail in the allegation or suspicion of wrongdoing,
- Likelihood that staff could assemble a legally and factually sufficient case,
- Compliance history of the alleged wrongdoer, and
- Staff resources.[218]

H. Staff Memoranda to Agency Members

As discussed earlier,[219] the greenlighting practice of the SEC, FTC and FERC requires prosecutors to prepare a detailed, candid and confidential memorandum to the agency members for the members to consider in making greenlighting decisions. These memos summarize the input by targets and responds to arguments the targets have made. They highlight the legal and evidentiary strengths and weaknesses of the prosecution and defenses cases and the necessary resource commitments. The memos may also discuss the strategic and political ramifications of the decision to charge. They discusses settlement options and often advocate acceptance of a settlement the staff has negotiated.

The requirement that such memos be prepared is a significant check and balance on agency prosecutorial decisionmaking. The process of preparing the memo improves the staff decisionmaking process and facilitates peer review by staff superiors of the charging decisions by staff prosecutors. And, of course, having these detailed memoranda available at the time the members must make greenlight decisions improves the quality of those decisions.

I. Delegation of the Internal Agency Appeal Function

Combined-function agencies should consider delegation of the internal appeal function to an appellate review board (such as the Environmental Appeals Board) or a judicial officer (as

[216] Ellement, *supra* note 195, at 489-90; NLRB 3.
[217] Jennifer A. Abruzzo, Gen. Counsel, NLRB, Memorandum GC 21-04, *Mandatory Submissions to Advice* (Aug. 12, 2021).
[218] *FERC Policy Statement, supra* note 46.
[219] See Section III.A.1.

occurs in the Department of Agriculture). The delegation could cover certain classes of cases that are likely to present only factual issues or it could cover all enforcement cases. The agency heads could retain discretionary review power over decisions of the intermediate review board or judicial officer in cases presenting important policy issues.

Delegations of final decisional authority are quite common in the administrative state[220] and might be attractive for agencies with substantial caseloads or serious backlogs at the agency head level. In addition to limiting the number of cases subject to potential confirmation bias, delegation of the adjudicatory function would promote efficient use of the limited time of the agency heads and reduce delays in making final decisions. Prior ACUS recommendations favor such delegations,[221] but further discussion of this reform is beyond the scope of this report.

J. Structural Changes

There are a number of options involving structural changes in agency organization that would remove the possibility of confirmation bias. Except for considering the NLRB option for stripping agency heads of greenlighting power,[222] I have not explored these options. They are beyond the scope of this study and most of them do not seem politically feasible.[223]

For example, Congress might require that all enforcement adjudication be situated in federal court rather than being conducted through internal agency adjudication,[224] or that a target would have the right to remove an administrative enforcement case to federal court, as occurs in the case of FERC,[225] or that the agency must bring a de novo federal court action to collect a civil penalty, as in the case of the FCC.[226]

Another set of options, often referred to as external separation of functions, calls for creation of adjudicatory tribunals, as is common in Commonwealth countries, either for specific agencies (as occurs in Canada) or across-the-board for all enforcement agencies (as occurs in Australia and the UK).[227] Under this model, the enforcement agency engages in rulemaking and prosecution, but it must adjudicate its cases before a separate agency. This model is employed in

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[220] *See* Ronald A. Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis,* 66 BOS. U. L. REV. 1, 12–13 (1986); Verkuil, *supra* note 99, at 268-69; Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251 (1996).
[221] *See* Admin. Conf. of the U.S., Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers under the Administrative Procedure Act*. 48 Fed. Reg. 57461 (Dec. 30, 1983); Admin. Conf. of the U.S., Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency,* 38 Fed. Reg. 19783 (July 23, 1973).
[222] *See* Part V.F.
[223] Similarly, the study does not consider proposals for enhanced executive branch oversight of enforcement decisions (like the OMB's control over rulemaking) or increased Congressional supervision of the enforcement function.
[224] *See* Mullins, *supra* note 46. There are numerous examples of enforcement agencies that lack adjudicatory power, such as the EEOC in cases of non-governmental employment discrimination or the Wage and Hours Division of the Department of Labor.
[225] *See* Part II. D.
[226] *See* Part II.C.
[227] *See* Michael Asimow, *Five Models of Administrative Adjudication,* 63 AMER. J. COMP. L. 3 (2015).

the U.S. in cases involving worker safety, mining safety, and federal taxation, and in many state unemployment compensation and workers compensation systems.[228]

VI. RECOMMENDED BEST PRACTICES FOR AGENCIES

This section consists of recommended best practices for agencies suggested by my research. These recommendations concern the enforcement function of combined-function federal agencies, meaning agencies that investigate, prosecute, and then adjudicate complaints that a target has violated the regulatory law that the agency enforces. In order to issue an enforcement complaint, the agency prosecutors and investigators must first decide to charge the target. This charging decision is extremely important, as the vast majority of targets settle the case after the prosecutors decide to charge them. The charging decision often leads to adverse publicity. Targets that do not settle encounter an internal adjudication process involving an ALJ hearing and a final decision by the agency heads. Alternatively, if permitted by statute, an agency might choose to pursue relief through action in federal court rather through its internal enforcement mechanism. Either internal or external enforcement is likely to be a lengthy and costly process for both target and agency. Yet an agency charging decision is not subject to judicial review or any other external accountability mechanism. Consequently, the charging decision should be subject to internal agency accountability mechanisms. This recommendation concerns best practices for such mechanisms.

A. Greenlighting

The agency head (including all of the heads of a multiple-member agency) should decide whether to approve the charging decisions made by the staff, A practice known as "greenlighting," if it is practicable to do so in light of the agency's caseload.

Greenlighting assures that the choice of enforcement targets aligns with the priorities of the agency head and is a wise allocation of scarce enforcement resources. The agency heads should also decide whether to approve settlements negotiated by the staff, again if it is practicable to do so in light of the agency's caseload.

B. Delegation to the Staff

The agency should consider whether its enforcement docket includes one or more classes of cases that are sufficiently routine that the charging decision can be delegated to the staff (if such delegation is permitted by statute), rather than requiring all complaints to be approved by the agency heads.

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[228] *See* Gifford, *supra* note 90; Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law,* 74 COLUM L. REV. 1231, 1254–64 (1974); Verkuil, *supra* note 99, at 268–69. Several authors suggested creation of a separate tribunal for FTC adjudicatory matters. See *supra* note 25.

C. Prosecution Guidelines

The agency should consider adopting guidelines that set forth priorities for exercising its prosecutorial discretion.

D. Opportunity for Target to Influence Charging Decision

An agency should provide for a structured notice and comment procedure between the target of regulatory enforcement and the agency's investigators and prosecutors before prosecutors recommend that the target be charged. The explanatory document prepared by prosecutors for this purpose should contain sufficient detail about the facts uncovered by the investigation and the applicable law to enable the target to decide whether to settle the case or to challenge the complaint. The target should be invited to furnish a written response to the explanatory document. Both documents generated by this interchange should be made available to the agency members when they decide whether to greenlight the complaint or approve a settlement.

E. Charging Memoranda

In connection with agency head approval of the staff's decision to charge, the staff should generate a detailed memorandum to the agency heads setting forth the facts uncovered by the investigation and applicable legal analysis to assist the head in deciding whether to approve a charging decision or settlement. Such memoranda should discuss the arguments made by the target in its written responses to the staff's decision to charge (as discussed in Recommendation D) and explain why the staff has rejected those arguments. Charging memoranda should discuss why issuance of the complaint complies with the enforcement guidelines discussed in Recommendation C and why prosecution is a wise use of the agency's limited resources. Such memoranda are pre-decisional documents that need not be released to the public under the Freedom of Information Act.