

Negotiating Regulations: A Cure for Malaise

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The formalization of rulemaking procedures has created a highly complex system of developing federal regulations. Although the procedures were intended to produce sound agency decisions and to safeguard against arbitrary and capricious rules, they have generated an adversarial system characterized by delay, expense, and dissatisfaction. Mr. Harter provides an alternative approach: negotiating proposed regulations. Negotiations as a supplemental rulemaking procedure would allow affected interests and an agency to participate directly in the development of a proposed rule while maintaining safeguards against arbitrary and capricious results. This article proposes in detail a negotiating process, which Mr. Harter believes would provide incentives and opportunities to resolve issues during rulemaking and would result in better rules.

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INTRODUCTION

The malaise of administrative law, and particularly of rulemaking, has been with us for at least fifteen years.¹ It has existed since the very origins of American administrative law, and it results from a fundamental lack of consensus over appropriate rulemaking procedures and the nature of government regulation as a whole.

The debate over rulemaking procedures and government regulation has taken place in two dimensions, political and procedural. The political fight has focused on whether agencies should be accorded broad discretion to effectuate regulatory programs,² or whether they should be given a more narrow, confined function.³ Procedurally, there has been tension between according an agency broad flexibility to act with a minimum of procedural limitations⁴ and requiring relatively formal procedures that permit interested parties to chal-

1. See *American Airlines, Inc. v. Civil Aeronautics Bd.*, 359 F.2d 624, 630 (D.C. Cir.) (en banc) (difficulties currently experienced in administrative process sometimes referred to as its "malaise"); *cert. denied*, 385 U.S. 843 (1966). As Professors Bruff and Gellhorn observe, "Even the term 'malaise' has a pedigree." Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1369 n.1 (1977) (citing H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* 2-3 (1962)).

2. Woodrow Wilson advocated "large powers and unhampered discretion" for administrative agencies. Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887), reprinted in 56 POL. SCI. Q. 481, 497 (1941). See I. K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 3.3, at 152-57 (1978) (arguing that administrative agencies must be given broad jurisdiction over various fields to regulate in public interest without legislative branch defining particular means and ends); J. LANDIS, *THE ADMINISTRATIVE PROCESS* 68 (1938) (arguing in favor of 1930's legislation that frequently failed to set forth rules to control administrative action; instead, administrative agencies were delegated broad power to prescribe regulations to implement certain policies).

3. See T. LOWI, *THE END OF LIBERALISM* 302-03 (2d ed. 1979) (criticizing vague legislative formulations; proposing administrative formality and "early rule-making" in place of case-by-case administrative adjudication and rulemaking that is subject to interest group pressure); Freund, *The Substitution of Rule for Discretion in Public Law*, 9 AM. POL. SCI. REV. 666, 675 (1915) (practice of delegating specification of generic legislative requirements to administrative commissions is constitutionally desirable and legitimate within narrow and definite limits); Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1183-84 (1973) (analyzing and criticizing the "broad delegation model," arguing that it does not accurately describe administrative process and creates damaging expectations); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1676 (1975) (charging that vague and general statutes create discretion in agencies that threatens legitimacy of agency action because major policy questions decided by officials not accountable to electorate).

4. See J. LANDIS, *supra* note 2, at 68 (arguing in favor of legislation that does not prescribe particular

lunge the factual bases and policy choices of rules.⁵ On the political side broad agency discretion has clearly been accepted,⁶ if not always granted by individual statutes.⁷ The procedural debate, however, continues.⁸

After President Roosevelt vetoed a bill calling for relatively formal administrative procedures⁹ because he believed that it would straight-jacket the agencies,¹⁰ the Administrative Procedure Act¹¹ (APA) was born of a compromise

rules to control administrative action); *infra* note 10 (quoting President Roosevelt's opposition to formal procedures).

5. See Scalia, *Chairman's Message*, 33 AD. L. REV. v, v-x (comparing procedural reform movements of 1946 and 1981 advocating greater formalization of rulemaking procedures); cf. SENATE COMM. ON THE JUDICIARY, THE REGULATORY REFORM ACT, S. REP. NO. 305, 97TH CONG., 1ST SESS. 2 (1981) (explaining that regulatory reform bill proposes codification of enhanced procedural protections developed by courts because growing pervasiveness and complexity of federal regulation requires more formalized approach).

6. See Jaffe, *supra* note 2, at 1183 (noting that it is once again fashionable to advocate broad delegation model).

7. Ackerman & Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L.J. 1466, 1556 (1980) (discussing "agency-forcing statutes" that remove issues from agency discretion).

8. The Committee on Governmental Operations of the United States Senate engaged in a comprehensive examination of federal regulation pursuant to S. Res. 71, 95th Cong., 1st Sess., 123 CONG. REC. 4382 (1977). SENATE COMM. ON GOVERNMENTAL AFFAIRS, PRINCIPAL RECOMMENDATIONS AND FINDINGS OF THE STUDY ON FEDERAL REGULATION, 96th Cong., 1st Sess. iii (1979). The committee made many procedural recommendations. *Id.* at 1-2. In addition, major regulatory reform bills that would amend the APA's rulemaking procedures have been introduced in both the House and Senate in the last two Congresses. See, e.g., S. 1080, 97th Cong., 1st Sess., 127 CONG. REC. S4231-34 (daily ed. April 30, 1981) (proposing new regulatory requirements, including agency consideration of reasonable alternatives to proposed rule and projected benefits and adverse effects of proposed rule and alternatives); H.R. 746, 97th Cong., 1st Sess., 127 CONG. REC. H73 (daily ed. Jan. 6, 1981) (same); H.R. 3150, 96th Cong., 1st Sess., 125 CONG. REC. 6338-40 (1979) (same); S. 755, 96th Cong., 1st Sess., 125 CONG. REC. 6152-59 (1979) (same); S. 262, 96th Cong., 1st Sess., 125 CONG. REC. 1411-30 (1979) (proposing new regulatory requirements, including agency consideration of projected effects of rule). Hearings filling many volumes were held on the respective bills. As a result, Congress has probably given more thought and attention during the past few years to regulatory procedure than at any time since the decade during which the APA was developed. Moreover, the White House has been active to an unprecedented degree, imposing wholly new procedural requirements on the agencies in the executive branch. See Exec. Order No. 11,821, 39 Fed. Reg. 41,501 (1974), reprinted in 12 U.S.C. app. § 1904 (1976) (requiring preparation of inflationary impact statements for major rules), amended by Exec. Order No. 11,949, 42 Fed. Reg. 1,017 (1976); Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (1978) (requiring various agency procedures, including approval by agency head of significant regulations); Exec. Order No. 12,291, 3 C.F.R. 127 (1981) (requiring various agency procedures, including preparation of regulatory impact analysis of major rules).

9. Walter-Logan Bill, H.R. 6324, 76th Cong., 3d Sess. § 2(a), 84 CONG. REC. 5561 (1939) (rules issued only after publication of notice and public hearings).

10. Explaining his reasons for vetoing the bill, President Roosevelt stated:

The administrative tribunal or agency has been evolved in order to handle controversies arising under particular statutes. It is characteristic of these tribunals that simple and nontechnical hearings take the place of court trials and informal proceedings supersede rigid and formal pleadings and processes. . . .

. . . [A] large part of the legal profession[, however,] has never reconciled itself to the existence of the administrative tribunal. Many of them prefer the stately ritual of the courts, in which lawyers play the speaking parts, to the simple procedure of administrative hearings which a client can understand and even participate in. . . .

In addition . . . there are powerful interests which are opposed to reforms that can only be made effective through the use of an administrative tribunal. . . . Great interests . . . which desire to escape regulation rightly see that if they can strike at the heart of modern reform by sterilizing the administrative tribunal which administers them they will have effectively destroyed the reform itself.

86 CONG. REC. 13,942 (1940).

11. Pub. L. No. 79-404, 60 Stat. 237 (1946), repealed and replaced by Pub. L. No. 89-554, 80 Stat. 378 (1966) (codified as amended at 5 U.S.C. §§ 551-59, 701-06 (1976)).

between the competing factions.¹² The APA has served as the foundation of agency rulemaking for more than a generation without having been significantly amended.¹³ Although, at first blush, that durability suggests an enduring agreement that the APA's provisions are broadly applicable, such is not the case.¹⁴ The APA, unlike the Federal Rules of Civil Procedure, has not garnered a supporting consensus. The Federal Rules were developed roughly contemporaneously with the APA and continue to have the general allegiance of Congress, practitioners, and scholars.¹⁵ The Federal Rules continue to shape judicial practice even though entirely new forms of litigation have arisen.¹⁶

12. Before the APA was enacted, the Attorney General's Committee on Administrative Procedure recommended that public hearings be held for rules of economic character, and "established as standard administrative practice, to be extended as circumstances warrant into new areas of rule making." ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 108 (1941) [hereinafter FINAL REPORT]. The Committee acknowledged that hearings already were required for the establishment of regulations under a number of statutes, writing:

The regulation of . . . these matters bears upon economic enterprise and touches directly the financial aspects of great numbers of businesses affected, either by imposing direct costs or by limiting opportunities for gain. Appreciation of these effects, both by businessmen and government officials, seems to be the chief cause of the increased use of hearings in administrative rulemaking.

Id. The Committee recommended against requiring hearings in all rulemakings, however, because "[a]dvance notice and hearings in rule making inescapably involve expense and a measure of delay—not always warranted in connection with regulations of minor, non-controversial character." *Id.* Thus, the Committee was prepared to rely "upon administrative good faith—good faith in not dispensing with hearings when controversial additions to or changes in rules are contemplated." *Id.*

When ultimately enacted the APA reflected the view of the Attorney General's Committee on Administrative Procedure. The Senate committee that was largely responsible for the APA cited with approval a statement by the Attorney General's Committee:

An administrative agency . . . is not ordinarily a representative body. . . . Its deliberations are not carried on in public and its members are not subject to direct political controls as are legislators. . . . Its knowledge is rarely complete, and it must always learn the . . . viewpoints of those whom its regulations will affect. . . . [Public] participation . . . in the rulemaking process is essential in order to permit the administrative agencies to inform themselves and to afford safeguards to private interests. It may be accomplished by oral or written communication and consultation; by specially summoned conferences; by advisory committees; or by hearings.

S. REP. NO. 752, 79th Cong., 1st Sess. (Comm. Print) (1945), reprinted in ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 19-20 (1946) [hereinafter LEGISLATIVE HISTORY]. The Committee pointed out that it did not recommend hearings for administrative rulemakings in cases in which Congress had not required hearings by separate statute. *Id.* at 20. The Committee also acknowledged that, "[p]rivate parties complain that this subsection provides inadequate procedure, particularly in the matter of findings and conclusions." *Id.* The Committee explained that in its view, the requirement that agencies consider "all relevant matter presented" and issue "a concise general statement of their basis and purpose" would achieve the goal of a more elaborate scheme. *Id.*

13. See Williams, *Fifty Years of the Law of Federal Administrative Agencies—and Beyond*, 29 FED. B.J. 267, 268 (1970) (APA has never been significantly amended).

14. See PRESIDENT'S COMMISSION FOR A NATIONAL AGENDA FOR THE EIGHTIES, GOVERNMENT AND THE REGULATION OF CORPORATE AND INDIVIDUAL DECISIONS IN THE EIGHTIES: REPORT OF THE PANEL ON GOVERNMENT AND THE REGULATION OF CORPORATE AND INDIVIDUAL DECISIONS 46-51 (1981) [hereinafter GOVERNMENT AND REGULATION] (reviewing current proposals for procedural reform).

15. As Professors Wright and Miller have noted, "[T]he chorus of approval by judges, lawyers, and commentators has been virtually unanimous, unstinted, and spontaneous." 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1008, at 65 (1969).

16. The Federal Rules of Civil Procedure have, of course, been modified over the years, but neither the Advisory Committee, the courts, nor Congress has made any wholesale changes in the rules, either by means of interpretations or radical modifications of the basic concepts. The basic contours of a

Rulemaking procedures, on the other hand, have changed markedly to respond to new forms of regulation. The courts have imposed procedural requirements through scores of judicial decisions,¹⁷ and Congress has regularly supplemented the APA's procedures in new substantive statutes.¹⁸ The resulting regulatory process, "hybrid rulemaking," combines the original informal rulemaking procedures of the APA and the more recent procedures imposed by Congress and the courts.¹⁹

The current debate on rulemaking centers not on whether procedures in addition to those of the APA are appropriate,²⁰ but rather on what are proper

judicial proceeding still are determined by the original structure of the federal rules. See 1 J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 0.2(2) (2d ed. 1982) (describing history of Federal Rules of Civil Procedure).

17. See DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 259, 266-70 (1979) (federal courts of appeals have expanded obligations of agencies during informal rulemaking). In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), the Supreme Court held that lower courts may not require additional procedures during informal rulemaking beyond those necessary to afford an aggrieved party due process. *Id.* at 542. *Vermont Yankee*, however, did not overturn specific informal rulemaking requirements imposed by courts of appeals in earlier cases. This ambiguity in the decision prompted one commentator to note the "tension between the opinion's language and its outcome." DeLong, *supra*, at 260; see also *infra* note 60 (discussing *Vermont Yankee*).

18. See, e.g., National Highway Traffic Safety Act § 105(a)(2), 15 U.S.C. § 1394(a)(2) (1976) (court reviewing standard promulgated by Department of Transportation may order Secretary of agency to take more evidence); Consumer Product Safety Act §§ 7(a)(2)-9, 15 U.S.C. §§ 2056(a)(2)-2058 (1976) (during rulemaking, Consumer Product Safety Commission (CPSC) must allow interested persons to present data, opinions, or arguments orally, as well as in writing as provided by 5 U.S.C. § 553(c)); Toxic Substances Control Act § 6(c)(2), 15 U.S.C. § 2605(c)(2) (1976) (during rulemaking, Environmental Protection Agency (EPA) must comply with procedures additional to 5 U.S.C. § 553, including holding an informal hearing); Occupational Safety and Health Act § 6(b)(1)-(5), 29 U.S.C. § 655(b)(1)-(5) (1976) (during rulemaking, Occupational Safety and Health Administration (OSHA) must comply with procedures additional to 5 U.S.C. § 553, including holding an informal hearing); Clean Air Act, Pub. L. No. 95-95, § 305(a), 91 Stat. 772-76 (1977) (codified as amended at 42 U.S.C. § 7607(d) (Supp. IV 1980)) (during rulemaking, EPA must permit oral presentation of evidence and must respond to any written or oral comments).

19. DeLong, *supra* note 17, at 260-61. The exact contours of hybrid rulemaking are fuzzy. Generally, the additional procedures include an opportunity for oral hearing, with or without cross-examination, requirements that the agency explain its factual basis, the methodology and reasoning used to proceed from those facts to the ultimate rule, and a more stringent form of judicial review. See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392-93 (D.C. Cir. 1973) (requiring EPA on remand of challenged standard to respond to cement industry's comments and to identify clearly basis for standards promulgated), *cert. denied*, 417 U.S. 921 (1974); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 648, 650 (D.C. Cir. 1973) (requiring EPA on remand of challenged standard to produce reasoned presentation of reliability of predictions and methodology used to reject manufacturer's evidence showing no available technology to comply with standards); Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking: Administrative Conference of the United States, Recommendation 76-3, 1 C.F.R. § 305.76-3 (recommending agencies follow procedures additional to those of APA, 5 U.S.C. § 553, including responding to parties' comments, explaining testing methodologies, holding hearings, and allowing oral presentations in order to encourage parties' participation in rulemaking); DeLong, *supra* note 17, at 260 n.22 (citing additional authorities).

20. The drafters of the APA itself contemplated that in particular cases agencies would use procedures beyond the minimum requirements of the APA. The Senate report accompanying the bill that became the Administrative Procedure Act described rulemaking procedures as follows:

This subsection states, in its first sentence, the minimum requirements of public rule making procedure short of statutory hearing. Under it agencies might in addition confer with industry advisory committees, consult organizations, hold informal "hearings", and the like. Considerations of practicality, necessity, and public interest . . . will naturally govern the agency's determination of the extent to which public proceedings should go. Matters of great import, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures. The agency

procedures²¹ and when should they be followed.²² Even though there is general agreement that some form of hybrid rulemaking process is appropriate for rules having a significant effect,²³ the malaise remains—parties complain about the time,²⁴ expense,²⁵ and legitimacy²⁶ of the administrative decisions reached by the hybrid process. Moreover, a number of legislative enactments

must analyze and consider all relevant matter presented. The required statement of the basis and purpose of rules issued should not only relate to the data so presented but with reasonable fullness explain the actual basis and objectives of the rule.

S. REP. NO. 752, 79th Cong., 1st Sess. (Comm. Print) (1945), *reprinted in* LEGISLATIVE HISTORY, *supra* note 12, at 200-01.

21. See SENATE COMM. ON THE JUDICIARY, REGULATORY REFORM ACT, S. REP. NO. 284, 97th Cong., 1st Sess. 93-106 (1981) (to accompany S. 1080, 97th Cong., 1st Sess. (1981)) (discussing proposed development and codification of various hybrid rulemaking procedures); SENATE COMM. ON GOVERNMENTAL AFFAIRS, REGULATORY REFORM ACT S. REP. NO. 305, 97th Cong., 1st Sess. 72-77, 84-92 (1981) (to accompany S. 1080, 97th Cong., 1st Sess. (1981)) (same).

22. See generally DeLong, *supra* note 17, at 261-62 (discussing skepticism of government decision-making evidenced by heightened judicial scrutiny and nonlegal criticism of informal rulemaking). Recent bills require procedures beyond the minimal procedures of the current APA for all rulemakings and additional procedures for "major" rules. See *supra* note 8 (citing bills). Although the definition of "major" varies in the bills, each would apply the definition to those regulations having an effect on the economy of more than \$100,000,000 or a significant effect on the economy as a whole or a particular segment of it. H.R. 746, 97th Cong., 1st Sess. § 621 (1981); S. 1080, 97th Cong., 1st Sess. 32, 127 CONG. REC. S4231-34, at S4231 (daily ed. April 30, 1981); H.R. 3263, 96th Cong., 1st Sess., § 601 (1979); S. 755, 96th Cong., 1st Sess. § 601 (1979), 125 CONG. REC. S3338-45, at S3339 (daily ed. March 26, 1979); S. 262, 96th Cong., 1st Sess. § 601, 125 CONG. REC. S861-80, at S862 (daily ed. January 31, 1979).

23. See DeLong, *supra* note 17, at 301-09 (discussing necessity of hybrid rulemaking).

24. See S. COMM. ON GOVERNMENTAL AFFAIRS, 95th Cong., 1st Sess., DELAY IN THE REGULATORY PROCESS, 4 STUDY ON FEDERAL REGULATION I (Comm. Print 1977) (deficiencies in process include delays in rulemaking procedure); Morgan, *Toward a Revised Strategy for Rulemaking*, 78 U. ILL. L.F. 21, 22 & n.6 (1978) (describing generally parties' complaints of delay in regulatory process and results of questionnaire sent to lawyers practicing before regulatory agencies).

25. S. COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS. EXTENT AND COST OF PARTICIPATION: PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS, 3 STUDY ON FEDERAL REGULATION 12 (Comm. Print 1977) [hereinafter PUBLIC PARTICIPATION].

26. Practically every aspect of modern regulation has been attacked in one way or another. For example, one common complaint is that agencies do not develop adequate factual bases to support their rules. See R. CRANDALL & L. LAVE, THE SCIENTIFIC BASIS OF HEALTH AND SAFETY REGULATION 3 (1981) (standards often promulgated on only fragmentary evidence).

Another common complaint is that agencies develop inappropriate policies. See Ackerman & Hassler, *supra* note 7, at 1469 (EPA's emission standards for new coal-burning power plants will cost public tens of billions of dollars to achieve environmental goals that could be reached more cheaply, more quickly, and more surely by other means). Yet another criticism is that agencies use clumsy and expensive regulatory tools. See P. MACAVOY, THE REGULATED INDUSTRIES AND THE ECONOMY 26 (1979) (agencies' use of accounting measurements of previous business activities as basis for price regulation constrains agency decisionmaking and causes regulated companies to shape behavior to conform to agency measuring devices); C. SCHULTZE, THE PUBLIC USE OF PRIVATE INTEREST vii (1977) (regulatory efforts are often inefficient and do more harm than good); Cornell, Noll, & Weingast, *Safety Regulation*, in SETTING NATIONAL PRIORITIES 462 (H. Owen & C. Schultze eds. 1976) (because of overlapping jurisdiction of FDA and OSHA, same violation may lead to very different outcomes depending on which agency "smells the rat").

Finally, there are also allegations that regulation has been ineffective in achieving its goals. See P. MACAVOY, *supra*, at 105-07. Criticisms of the regulatory process appear regularly in *Regulation* magazine. See, e.g., Kristol, *A Regulated Society?*, REGULATION, July-Aug. 1977, at 12, 12 (social and economic complexities make effective regulation difficult enterprise); Mendeloff, *Does Overregulation Cause Underregulation?*, REGULATION, Sept.-Oct. 1981, at 47, 47 (standards have been set so strictly that benefits often fall short of costs); Reich, *Warring Critiques of Regulation*, REGULATION, Jan.-Feb. 1979, at 37, 37 (reviewing arguments that regulation is both politically unresponsive and economically inefficient). Politicians, business, and public interest groups alike seem to agree that the process is not working well. See Morgan, *supra* note 24, at 21-22 & n.1-6 (citing to various critics of regulatory process).

and proposals reflect a disquiet with hybrid rulemaking.²⁷ Thus, now is a propitious time to step back and ask whether the difficulty stems from a basic lack of confidence in both the flexible agency procedure model and the formal agency procedure model of rulemaking, and whether a new departure can provide the missing legitimacy.

This article proposes that a form of negotiation among representatives of the interested parties, including administrative agencies, would be an effective alternative procedure to the current rulemaking process. Although virtually every rulemaking includes some negotiation, it is almost never the group consensus envisioned here. Negotiations among directly affected groups conducted within both the existing policies of the statute authorizing the regulation and the existing policies of the agency, would enable the parties to participate directly in the establishment of the rule. The significant concerns of each could be considered frontally.²⁸ Direct participation in rulemaking through negotiations is preferable to entrusting the decision to the wisdom and judgment of the agency, which is essential under the basic provisions of the APA,²⁹ or to relying on the more formal, structured method of hybrid rulemaking in which it is difficult for anyone to make the careful trade offs necessary for an enlightened regulation.³⁰ A regulation that is developed by and has the support of the respective interests would have a political legitimacy that regulations developed under any other process arguably lack.³¹

Negotiation undoubtedly will not work for all rules. Failure to use negotiations appropriately either could lead to great abuse or could simply add another layer to the already protracted rulemaking process. Experiences in analogous areas, however, suggest instances in which negotiation could be a feasible method of setting rules, and identify the procedures that should be followed to ensure that an acceptable rule emerges from a negotiation process. Because regulatory negotiation is a response to the current malaise and would

27. See *infra* notes 133-53 and accompanying text (discussing proposals for reform of administrative procedure).

28. In 1941, the Attorney General's Committee on Administrative Procedure made a similar recommendation:

The practice of holding conferences of interested parties in connection with rule making introduces an element of give-and-take on the part of those present and affords an assurance to those in attendance that their evidence and points of view are known and will be considered. As a procedure for permitting private interests to participate in the rule making process it is as definite and may be as adequate as a formal hearing. If the interested parties are sufficiently known and are not too numerous or too hostile to discuss the problems presented, conferences have evident advantages over hearings in the development of knowledge and understanding.

FINAL REPORT, *supra* note 12, at 104.

29. Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 417 (1978).

30. See Boyer, *Alternatives to Administrative Trial Type Hearings for Resolving Complex Scientific, Economic and Social Issues*, 71 MICH. L. REV. 111, 113, 119 (1972) (hybrid form of administrative decisionmaking incorporates elements of adjudication and rulemaking; administrative adjudication ill-suited to taking into account and balancing many variables); Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 586 (1972) (formal adjudicatory procedures of agencies not well adapted to make social, economic, and scientific investigations and decisions).

31. As Professor Daniel Bell observes, "[s]ince political action, fundamentally seeks to reconcile conflicting and often incompatible interests. . . . political decisions are made by bargaining or by law, not by technocratic rationality." D. BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* 12 (1976).

have to be consistent with the political role of the regulatory agency, it is appropriate to begin with a brief review of the evolution of regulation.

I. THE EVOLUTION OF THE REGULATORY PROCESS

Although it is customary to attribute the origins of modern regulation to the New Deal, many diverse regulatory programs were created between the turn of the century and the early thirties.³² The dominant theme of administrative law during this period was the protection of private interests against unwarranted government intrusion.³³ Early regulatory programs confined administrative discretion to authority explicitly delegated by Congress.³⁴ Thus, many early statutes required hearings or other procedures in addition to notice and comment for the development of rules.³⁵

The regulatory procedure currently in use traces its origins to the New Deal concept of regulation and regulatory agencies. Under this concept Congress would grant broad powers³⁶ to agencies by using vague, general standards to

32. As one commentator stated, "The presidencies of Roosevelt, Taft, and Wilson saw dramatic change in the attitude of the federal government toward positions of economic power. The philosophy and the rhetoric of the period were populist, but the expanded use of Federal executive authority clearly was not. New Federal laws were passed, new regulatory agencies established, and important precedents were set that permanently established Federal regulation as a fact of economic life." S. MORRIS, *THE REGULATORY STATE: EVOLUTION AND OUTLOOK*, PUBLICATION NO. 4, CENTER FOR BUSINESS AND PUBLIC POLICY, UNIVERSITY OF MARYLAND 6 (1981).

For example, the Antitrust Division of the Department of Justice was created in 1903, Act of February 25, 1903, Pub. L. No. 57-115, 32 Stat. 854, 903-04. The Federal Meat Inspection Act was passed in 1906. Act of June 30, 1906, Pub. L. No. 59-382, 34 Stat. 669, 672-79 (1906) (codified in scattered sections of U.S.C.). The Pure Food and Drug Act was passed in 1906. Act of June 30, 1906, Pub. L. No. 59-384, 34 Stat. 768 (1906), *repealed by* Federal Food, Drug, and Cosmetic Act § 902(a), Pub. L. No. 75-717, 52 Stat. 1040, 1059 (1938). The regulatory powers of the Interstate Commerce Commission were expanded in 1906, 1910, and 1920, Act of June 29, 1906, Pub. L. No. 59-337, 34 Stat. 584 (1906); Act of June 25, 1910, Pub. L. No. 61-266, 36 Stat. 703, 720 (1910); Transportation Act of 1920, Pub. L. No. 66-152, §§ 439-441, 41 Stat. 456, 494-99. The Federal Reserve System was created in 1913. Federal Reserve Act, Pub. L. No. 63-43, 38 Stat. 251 (1913) (now codified in scattered sections of 12 U.S.C.). The Merchant Seamen's Act came in 1915, Act of March 4, 1915, Pub. L. No. 63-302, 38 Stat. 1164 (codified in scattered sections of U.S.C.). The Federal Trade Commission was established in 1914. Act of September 26, 1914, Pub. L. No. 63-203, 38 Stat. 717 (now codified at 15 U.S.C. §§ 41-58). The Owens-Keating Act prohibiting interstate transportation of goods produced by child labor was enacted in 1916. Act of September 1, 1916, Pub. L. No. 64-249, 39 Stat. 675. The Shipping Board was established in 1916. Shipping Act of 1916, Pub. L. No. 64-260, 39 Stat. 728 (now codified as 46 U.S.C. §§ 801-842). The 1941 Attorney General's Committee on Administrative Procedure describes additional programs and amendments to existing programs that were enacted prior to 1935. FINAL REPORT, *supra* note 12, at 105-07.

33. E. FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* 583 (1928) (primary incidence of violation of public interest is private injury; administrative action is initiated to remedy private complaint). *But cf.* J. BECK, *OUR WONDERLAND OF BUREAUCRACY* 164, 270 (1932) (criticizing administrative system because it burdens private business interests and impairs individualism).

34. Stewart, *supra* note 3, at 1671-73.

35. FINAL REPORT, *supra* note 12, at 105-08.

36. In 1941 the Attorney General's Committee on Administrative Procedure stated:

Broadly speaking, the causes of the growth of administrative rule making are twofold: [t]he increasing use by Congress of "skeleton legislation," to be amplified by executive regulations; and the expansion of the field of Federal control—indeed of governmental intervention generally—in which the new legislation, like the old, contains its quota of delegation of rule making power.

FINAL REPORT, *supra* note 12, at 98. The Committee pointed out that one of the justifications for "skeleton legislation" is "the desirability of expert determination of numerous matters involved in mod-

guide agency decisions.³⁷ The animating force of regulation was the expertise of the agency staff.³⁸ The detached, neutral, technocratic experts of the agency were viewed as those most able to make the detailed decisions necessary to implement a functioning regulatory program.³⁹ A corollary of this theory was that agencies must be politically insulated to protect their expertise from the taint of the political process.⁴⁰ Courts, therefore, were to sustain agency action so long as such action had a rational basis.⁴¹ Dean Landis, undoubtedly the greatest proponent of the New Deal theory of administration,⁴² analogized judicial review of a regulation to the task of reviewing legislation. He justified the high burden necessary to overturn a regulation on the ground that "the administrative judgment . . . would tend . . . to have much weight because of its assumed expertness."⁴³

Although the APA imposed some limitations on the free rein of the experts, it was clearly built on the notion of agency expertise. The primary function of the rulemaking section was to provide an outreach by the agency for information that would help it exercise its discretion in shaping the rule while affording an opportunity for the public to make its views known.⁴⁴ The APA itself required only scant procedures.⁴⁵ For significant rules, however, the legislative history indicates that agencies were expected to provide the public with an opportunity to participate through oral or written communications and consultations, consultation with advisory committees and interested organizations,

ern legislative schemes such as those affecting housing, health, social security, and public services of many sorts." *Id.* at 98 n.17.

37. J. LANDIS, *supra* note 2, at 66 (broad and vague administrative standards typical of legislation in 1930's); Jaffe, *supra* note 2, at 1186 (legislative objectives loosely defined in 1930's).

38. This "model [of] administration derived its content and its authority, not from legislative or imperial dictates, but from an assumed, comprehensive body of expertise available for the implementation of legislative grants of authority." Jaffe, *supra* note 2, at 1187; see also J. FREEDMAN, *CRISIS AND LEGITIMACY* 44-46 (1978) (reliance upon expertise was principal attribute of administrative theory under New Deal and before).

39. Professor Stewart analogizes this view of agency expertise to that of a doctor. The doctor considers the patient's complaints, ascertains his general state of health, determines the cause of the malady, and prescribes a remedy. Stewart, *supra* note 3, at 1678. Just as few would argue that a doctor has too great discretion in treating a patient, the view was that the professionalism of the agency's staff held the government's power in check. *Id.*

40. See Ackerman & Hassler, *supra* note 7, at 1471-73 (discussing three elements of New Deal model: affirmation of agency expertise, insulation of agencies from political control, and insulation from judicial oversight).

41. The Attorney General's Committee on Administrative Procedure noted in 1941 that "[I]t should be enough that the administrative authorities are required, in case their regulations are called in question before a court, to demonstrate that they come rationally within the statutory authorization." FINAL REPORT, *supra* note 12, at 119. In 1939 the Supreme Court expressed the same sentiment: "So long as there is warrant in the record for the judgment of the expert it must stand. . . . The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 145-46 (1939) (quoting *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282, 286-87 (1934)); see also *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 207 (1947) (court may disturb commission's decision only if decision lacks rational and statutory foundation).

42. Professor Jaffe called Landis "one of [the New Deal's] . . . most important intellectuals." Jaffe, *supra* note 2, at 1187.

43. Landis, *Administrative Policies and the Courts*, 47 *YALE L.J.* 519, 533 (1938).

44. As the Attorney General's Committee on Administrative Procedure noted in 1941, "Participation . . . in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests." FINAL REPORT, *supra* note 12, at 103.

45. Administrative Procedure Act § 4(a), 5 U.S.C. § 553(a) (1976) (requiring notice of proposed rulemaking and giving interested persons opportunity to comment).

and informal hearings.⁴⁶ As a compromise with those who advocated more formal procedures, agencies were directed to consider the data submitted and to explain the basis of its rule in order to force the agency to actually consider the material.⁴⁷ The agency was not, however, limited to the facts contained in any record made in the rulemaking proceeding. "Accordingly," the Attorney General explained in 1947, "an agency is free to formulate rules on the basis of materials in its files and the knowledge and experience of the agency, in addition to the materials adduced in public rulemaking proceedings."⁴⁸ Whether or not the expertise model of the regulatory agency ever gained universal acceptance,⁴⁹ it clearly exerted a major influence in the development of regulatory procedures.

Beginning in the mid-1960's, regulatory procedure began its evolution toward the hybrid process. New regulatory programs were enacted; many of these directly regulated technology or involved broad, complex economic matters.⁵⁰ Both forms of regulation require an agency to develop large amounts of factual material before issuing a rule. With the advent of factually bound rules, the minimum procedures of the APA were no longer sufficient. New statutes augmented the notice and comment process by requiring substantial evidence to support a rule.⁵¹

The courts also played a role in expanding administrative procedures. They required agencies to explain the reasons for their actions in much greater detail⁵² and directed agencies to develop far more factual information to support

46. See *supra* note 12 (discussing procedures for economic regulation).

47. See *supra* notes 12, 20 (discussing procedures enacted in APA).

48. U.S. DEPT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 31-32 (1947)

49. Professor Jaffe argues that an essential ingredient of the New Deal model was that there was broad public opinion to support the political goals of the agencies and, hence, there was a political philosophy against which the agencies could operate. Jaffe, *supra* note 2, at 1186. He noted:

But, we came to see that the Landis model, if taken as a generalization valid for all administrative agencies at all times, makes certain untenable assumptions: the existence in each case of relevant, value-free concepts, and an administration located at any given moment of time outside the political process, that is to say, outside of insulated from the power structure.

Id. at 1187. He also observes that at the time Landis wrote, the agencies that Landis used as a model for his theory were becoming not only ineffective but harmful. *Id.*

50. William Lilley, III and James C. Miller, III, list 30 new regulatory programs enacted from 1970 through 1975, nineteen of which were based on technology and nine of which involved complex economic matters. Lilley & Miller, *The New "Social Regulation"*, 47 PUB. INTEREST 49, 52 (1977). For example, in the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (1976), Congress struck a compromise, perhaps unwittingly, between formal and informal rulemaking when it required the Secretary to file a "record of the proceedings," *id.* § 1394(a)(1), and authorized a reviewing court to order the taking of "additional evidence . . . before the Secretary," *id.* § 1394(a)(2). In the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1976), Congress provided that "[t]he determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." *Id.* § 655(f). Congress also required OSHA to provide a hearing when developing a rule. *Id.* § 655(b)(3). Both seem to be based on the notion that the agency should develop a more substantial factual basis for a rule than contemplated by the bare APA rulemaking procedures. See Industrial Union Department, AFL-CIO v. Hodgson, 499 F.2d 467, 473 (D.C. Cir. 1974) (legislative history of OSHA shows that Congress required procedures for rulemaking more formal than informal procedures of APA).

51. See DeLong, *supra* note 17, at 290-92 (describing recent statutes requiring that agencies justify rules with "substantial evidence").

52. See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392, 402 (D.C. Cir. 1973) (ordering EPA on remand to respond to industry's technical objections to promulgated standards), *cert. denied*,

rules.⁵³ Courts also augmented the standard of judicial review and began to conduct careful and searching reviews of the data agencies developed to support a rule⁵⁴ and the methodology used to progress from that data to the rule.⁵⁵ Ultimately the "rational basis" test⁵⁶ was discarded in favor of the "hard look" standard of review.⁵⁷

Along with expanded procedures and more stringent judicial review, private parties were granted a more active role in rulemaking. Perhaps under the New Deal theory, the agency was relied upon to use its expertise to assess the competing values within our society and to distill what constituted the "public interest." Accordingly, private parties did not participate directly in a proceeding and, indeed, were excluded from participation because the agency's role was to reconcile the competing interests alone.⁵⁸ This view, too, was discarded.⁵⁹ The right of direct participation in the rulemaking proceeding was expanded⁶⁰ by

417 U.S. 921 (1974); *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850-51 (D.C. Cir. 1972) (ordering EPA on remand to supply basis on which agency reached promulgated standard).

53. See *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240, 252-53 (2d Cir. 1977) (dismissing government's complaint against manufacturer for violation of food and drug laws because Food and Drug Administration (FDA) failed to answer vital questions raised during comment period); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 648 (D.C. Cir. 1973) (remanding to EPA to conduct further proceedings to consider methodological feasibility of promulgated standard); *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850-51 (D.C. Cir. 1972) (ordering EPA on remand to supply factual basis on which agency promulgated standard).

54. Although it did not involve rulemaking, the Supreme Court's decision in *CITIZENS TO PRESERVE OVERTON PARK, INC. v. VOLPE*, 401 U.S. 402 (1971), set the tone for the increase in judicial review of rules that followed:

[T]he court must consider whether the decision was based on a consideration of the relevant factors and whether there has been any clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Id. at 416.

55. See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393, 402 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) (remanding to EPA to explain methodology and scientific basis used to formulate standard).

56. As one commentator has noted, "Prior to about 1970 the courts would uphold a rule unless it were demonstrably irrational." DeLong, *supra* note 17, at 286.

57. The term "hard look" derives from Judge Leventhal's opinion in the licensing case of *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Judge Leventhal commented in *Greater Boston Television* on the duty of an agency to look at the issues:

If satisfied that the agency has taken a hard look at the issues with the use of reasons and standards, the court will uphold its findings, though of less than ideal clarity, if the agency's path may reasonably be discerned, though of course the court must not be left to guess as to the agency's findings or reasons.

Id. at 851. He made clear that the presumption of agency expertise is not sufficient to overcome a strict look at the agency's action: "Expertise is strengthened in its proper role as the servant of government when it is denied the opportunity to become 'a monster which rules with no practical limits on its discretion'. . . . The deference owed to an expert tribunal cannot be allowed to slip into judicial inertia." *Id.* at 850 (quoting *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n*, 390 U.S. 261, 272 (1968)). Judge Leventhal's later opinions in *Portland Cement* and *International Harvester*, *supra* notes 52 & 50, are perhaps the epitome of the hard look standard of judicial review.

58. See Williams, *supra* note 13, at 275 (agencies once considered to be representatives of public interest).

59. See Stewart, *supra* note 3, at 1748-52 (wide variety of private interests which will be affected by administrative action may be represented by private parties through participation in administrative proceedings and in seeking judicial review of administrative action).

60. The Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), called a halt to the imposition by lower courts of additional procedures beyond those provided in the APA and the respective substantive statutes. The Court stated:

requiring hearings and by forcing agencies to respond to the parties' arguments.⁶¹ The New Deal "expert" model of administrative agencies was repudiated in fact, if not expressly.

Moreover, Congress imposed entirely new controls to protect the impartial rationality of the agency's decision. The Federal Advisory Committee Act,⁶² the Sunshine Act⁶³ and its ex parte rules,⁶⁴ and the Freedom of Information Act⁶⁵ were all directed toward increasing the accountability of agencies. The goal of such legislation was to require an agency to make up its own mind, untainted by partisan influence, and to subject the decision to public inspection to ensure that it considered only the proper factors.

Changes also occurred on the political level. The White House undertook an increasingly activist role in influencing the exercise of agencies' discretion⁶⁶

"Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are not free to impose them if the agencies have not chosen to grant them." *Id.* at 524. The concern seems to be that by excessively relying on courtroom techniques to the exclusion of the informal give and take, courts over-formalize the informal rulemaking process. See DeLong, *supra* note 17, at 315 (*Vermont Yankee* manifests fear of judicializing informal rulemaking by increasing procedural requirements); see also *supra* note 17 (discussing *Vermont Yankee*); cf. *supra* note 28 (citing 1941 FINAL REPORT of the Attorney General's Committee on Administrative Procedure, which recommended holding informal conferences among interested parties because such practice allows for give and take).

61. See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392, 402 (D.C. Cir. 1973) (ordering EPA to respond to industry's technical objections to promulgated standards).

62. 5 U.S.C. app. §§ 1-15 (1976).

63. Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241-48 (1976) (codified in scattered sections of U.S.C.); see *id.* § 3(a) (codified at 5 U.S.C. § 552b (1976)) (providing for open meetings of certain agency proceedings).

64. Administrative Procedure Act, Pub. L. No. 89-554, § 554(d), 80 Stat. 381, 384 (1966) (codified at 5 U.S.C. § 554(d) (1976)) (prohibiting ex parte contacts between judicial officer and interested parties during adjudication); Government in the Sunshine Act, Pub. L. No. 94-409 § 4(a), 90 Stat. 1241, 1246-47 (1976) (codified at 5 U.S.C. § 557(d) (1976)) (prohibiting ex parte communications between interested persons and agency personnel involved in decision making during and after hearings conducted for adjudication and formal rulemaking). See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir.) (once notice of proposed rulemaking issued, no agency official should discuss related matters with interested party; if ex parte contact occurs, any communication must be placed in public file for comment by interested parties), *cert. denied*, 434 U.S. 829 (1977).

65. 5 U.S.C. § 552 (1976 & Supp. IV 1980) (requiring agencies to make public agency rules, opinions, orders, records, and proceedings).

66. Executive Orders 12,291, 12,044 and 11,821, *supra* note 8, required agencies to consider the cost of their actions for at least the major rules. In 1974 Congress created the Council on Wage and Price Stability to monitor federal agencies to determine the extent to which their activities contributed to inflation. Council on Wage and Price Stability Act, Pub. L. No. 93-387, § 3(a)(7), 88 Stat. 750, 750 (1974), *reprinted in* 12 U.S.C. § 1904 (1976), *amended by* Pub. L. No. 93-449, § 4(e), 88 Stat. 1364, 1367 (1974), Pub. L. No. 94-78, §§ 2(a), 3-7, 89 Stat. 411, 412 (1975), Pub. L. No. 95-121, § 6, 91 Stat. 1091, 1092 (1977), Pub. L. No. 96-10, §§ 1-5, 96 Stat. 21-23 (1979). See J. MILLER & B. YANDLE, *BENEFIT-COST ANALYSES OF SOCIAL REGULATION* 5-6 (1979) (Council on Wage and Price Stability created to monitor inflationary activities of private sector and federal agencies; agencies had to estimate benefits and costs of major rulemaking). The council also had the authority to intervene in a proceeding before an agency if it believed that a possible outcome of the proceeding would have an inflationary impact. Pub. L. No. 93-387, § 3(a)(8), 88 Stat. at 751. The authority conferred by the act expired by the terms of the act on September 30, 1980. *Id.* § 7.

President Carter established the Intergency Regulatory Analysis Review Group to review the agencies' identification of the costs and benefits of their actions, their explanations of whether they had chosen the most cost effective solution, and their explanations of why they had selected a certain solution. See Eads, *Harnessing Regulation*, REGULATION, May-June 1981, at 19-20. The Reagan administration has consolidated oversight functions of both the Council and the interagency group in the Presidential Task Force on Regulatory Relief, chaired by the Vice President and staffed by the Office of Information and Regulatory Affairs of the Office of Management and Budget. *Id.*

and in coordinating disparate and sometimes conflicting national goals.⁶⁷ Congress placed the bulk of the vast number of new programs squarely in the executive branch and generally rejected the New Deal notion of insulating agencies from political control through the creation of "independent" agencies that combined the three functions of government.⁶⁸ At times, especially in the environmental field, Congress abandoned the concept of broad discretion by requiring the agency to achieve specified goals, to set its regulatory goals in advance, and to establish by rule the means for achieving those goals.⁶⁹ Moreover, all of these requirements were to be accomplished in public proceedings rather than through reliance on the internal workings of an expert staff.⁷⁰ In addition, Congress attempted to control the agency's exercise of discretion through more frequent use of a legislative veto enabling Congress to invalidate a rule promulgated by an agency.⁷¹

67. See *Sierra Club v. Costle*, 657 F.2d 298, 312, 404-408 (D.C. Cir. 1981) (during EPA rulemaking on air pollution emission standards, the President, his staff, and high ranking officials of executive branch met to discuss issues presented by proposed rulemaking; court held meeting did not violate procedural rule prohibiting ex parte meetings after comment period); AMERICAN BAR ASSOCIATION, COMMISSION ON LAW AND THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM 68 (1979) (making wise balancing choices among courses of action that pursue one or more conflicting and competing objectives one central task of modern democratic government); Ackerman & Hassler, *supra* note 7, at 1542 (discussing executive branch intervention into rulemaking challenged in *Sierra Club v. Costle*).

68. The Consumer Product Safety Commission, established by the Consumer Product Safety Act § 4, 15 U.S.C. § 2053 (1976), and the Commodity Futures Trading Commission, established by the Commodity Futures Trading Act § 2(a)(2)-(11), 7 U.S.C. § 4a (1976 & Supp. IV 1980), are throwbacks to the New Deal concept of an independent agency. Each may promulgate rules, prosecute violations, and adjudicate violations. 7 U.S.C. § 4a; 15 U.S.C. § 2053. The Federal Election Commission (FEC) may also issue rules. Federal Election Commission Act § 310(a)(8), formerly § 311, added by Pub. L. No. 93-443, § 208(a), 88 Stat. 1263, 1282 (1974), renumbered by Pub. L. No. 94-283, § 105, 90 Stat. 475, 481 (1976), 2 U.S.C. § 437d(a)(8) (1976 & Supp. IV 1980). Although the FEC may issue subpoenas for investigation and seek an accommodation with those whom it believes may be violating the law, it must bring a civil action in court to enforce the law. *Id.* § 310(g), 2 U.S.C. § 437(g). The Occupational Safety and Health Review Commission (OSHRC) hears cases brought to contest citations issued by the Occupational Safety Administration (OSHA), Occupational Safety and Health Act § 12(i), 29 U.S.C. § 661(i) (1976 & Supp. IV 1980), but does not have policy making authority. The Federal Mine Safety and Health Review Commission has similar authority and structure with respect to mining. Federal Mine Safety and Health Review Commission Act. 30 U.S.C. § 823 (1976 & Supp. IV 1980). The Merit Systems Protection Board was created as part of the reorganization of the duties of the former Civil Service Commission. Merit Systems Protection Act § 202(a), 5 U.S.C. § 1201 (1976 & Supp. IV 1980). The Postal Rate Commission, 39 U.S.C. § 3661 (1976), resulted from the reorganization of the Post Office. *Id.* The Equal Employment Opportunity Commission (EEOC) does not have the authority to issue rules and may seek only voluntary compliance or bring civil actions against employers or unions. Equal Employment Opportunity Act § 706(b), (f)(1), 42 U.S.C. §§ 2000e-5(b), (f)(1) (1976). The EEOC, however, may promulgate rules to prohibit discrimination in employment by the federal government. Exec. Order. No. 12,106, *reprinted in* 42 U.S.C. § 2000e-4 app. at 600-01 (Supp. IV. 1980).

69. See Clean Air Act Amendments of 1970 § 109, 42 U.S.C. § 7409 (1976 & Supp. IV 1980) (requiring EPA to promulgate by regulation air quality standards which specify level of air quality requisite to protect public welfare); see also Ackerman & Hassler, *supra* note 7, at 1474-79 (Clean Air Amendments forced EPA to specify its ends more clearly than required by New Deal model).

70. See *supra* notes 62-65 (discussing FACA, Sunshine Act and its ex parte rules, and FOIA).

71. Federal Trade Commission Improvements Act (FTCIA), 15 U.S.C. § 57a-1 (Supp. IV 1980) (Federal Trade Commission must submit promulgated rules to Congress; rules become effective unless both houses of Congress adopt concurrent resolution disapproving such rule); HOUSE COMM. ON RULES, 96TH CONG., 2D SESS., STUDIES ON THE LEGISLATIVE VETO I (Comm. Print 1980) (summarizing uses of legislative veto); see generally Scalia, *The Legislative Veto: A False Remedy for System Overload*, REGULATION, Nov.-Dec. 1979, at 19 (criticizing legislative veto). The United States Court of Appeals for the District of Columbia Circuit recently declared § 57a-1 of the FTCIA unconstitutional. *Consumers Union v. FTC*, No. 82-1737, slip op. at 6 (D.C. Cir. Oct. 22, 1982). The court relied on its

These changes coalesced⁷² to convert the agency from an expert guardian of the public interest to a form of "umpire,"⁷³ albeit an active one. An agency now must review the issues involved in a proposed regulation and make an initial, tentative determination of the factual basis to support a proposed rule.⁷⁴ During this developmental process, and certainly once the rulemaking proceeding begins, interested persons may submit factual data and policy arguments that the agency must consider in reaching its final decision on the rule.⁷⁵ The agency, like an umpire, then assesses the competing contentions, those of the various parties and of its own staff, and weighs the relevant facts and policy in light of the criteria of the statute under which the agency operates.

The parties' participation is a method of ensuring that the agency has adequate information on which to base its action.⁷⁶ Participation also has an important additional role. To the extent that the agency is "bound" by the record of the rulemaking proceeding, the parties can confine the range of discretion available to the agency through the development of the rulemaking record.⁷⁷

decision in *Consumers Energy Council of America v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *appeal docketed*, 51 U.S.L.W. 3099 (U.S. Aug. 2, 1982).

72. More accurately, the changes occurred piecemeal in response to the perceived failures of the expert model of the agency and its regulatory programs.

73. Williams, *supra* note 13, at 276 (agency no longer acts as policymaker representing the public by merely hearing point of view of parties and then making its decision, but rather now acts like umpire in reaching policy decisions as result of adversary activity of competing groups). In *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), however, the United States Court of Appeals for the Second Circuit explicitly stated that agencies should not be considered umpires:

In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.

Id. at 620. This passage is cited with approval in *Calvert Cliffs Coordinating Committee v. United States Atomic Energy Commission*, 449 F.2d 1109, 1119 n.21 (D.C. Cir. 1971). This court's statement is not inconsistent with the analysis in this article because the Second Circuit used the term umpire in a different sense than it is used in this article. In *Scenic Hudson Preservation Conference*, the court meant only that the agency may not sit back passively and rely exclusively on the parties to raise issues and present facts before the agency is obligated to consider them. See 354 F.2d at 620-21 (Federal Power Commission (FPC) has affirmative duty to take the initiative to inquire into and consider all relevant facts). The *Scenic Hudson* court required that the agency's action be supported by an adequate exploration of the issues and the facts even if the agency itself must develop them. *Id.* As the term is used in this article, the agency acts as an "umpire" in that parties participate to a far greater extent than under the New Deal model, and the agency itself is called upon to resolve their competing contentions. The Supreme Court also has made clear that intervening parties have a responsibility to raise and support issues in which they are interested so that the agency may consider their position. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553-54 (1978); Rodgers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699, 719 (1979).

74. See I K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6.2, at 452 (1978) (under APA, agency must analyze and consider all relevant matter in determining factual basis of rule).

75. *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 648 (D.C. Cir. 1973) (EPA must make reasoned presentation of reliability of its methodology to overcome prima facie conclusion supported by evidence submitted by industry as interested party); see also *supra* note 20 (discussing legislative history of APA showing that agency must analyze all relevant matters presented).

76. See Eisenberg, *supra* note 29, at 417 (requiring the agency to pay attention to the parties' proofs and arguments serves purpose of assuring that decisions well informed); *supra* notes 44-47 and accompanying text (discussing function of parties participation in rulemaking).

77. Some may object to the use of the word "record" to define the collection of material developed by an agency in support of a rule and the submissions of private parties concerning the rule, on the ground that the word "record" connotes something far more formal than such a collection and gener-

The record of the rule must reflect that the agency considered the appropriate issues⁷⁸ and must contain substantial support for factual determinations.⁷⁹ Thus, the parties could exercise some control over an agency's discretion by participating in the hybrid process *if* all the issues could be resolved simply by conducting factual research and placing it in the record.

Rulemaking proceedings, however, rarely turn on such clearly delineated issues. Agencies frequently must make decisions on inadequate, incomplete, and generally unsatisfactory evidence.⁸⁰ This is either because it would take too long to develop a consensus by means of the normal scientific method of the publication of results, peer comment, and replication of work by impartial observers,⁸¹ or because the question lies beyond current scientific or technical abilities.⁸² Moreover, even if the best possible evidence were adduced, major policy questions would remain. The United States Court of Appeals for the District of Columbia Circuit observed:

From extensive and often conflicting evidence, the Secretary in this case made numerous factual determinations. With respect to some of those questions, the evidence was such that the task consisted primarily of evaluating the data and drawing conclusions from it. The court can review that data in the record and determine whether it reflects substantial support for the Secretary's findings. But some of the questions involved in the promulgation of these standards are on the frontiers of scientific knowledge, and consequently as to them insuffi-

ally would mean documentary material that is accepted into evidence along with sworn testimony. To overcome such an objection, at least one current regulatory reform bill refers to the rulemaking "file" instead of "record." S. 1080, 97th Cong., 1st Sess. § 2(c)(1)(F) (1981). This article uses the term "record" because it has a long history. See Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 62-63 (1975) (discussing use and meaning of term "record"). Moreover, the term adequately describes the materials the agency considers in developing a rule. It is not meant to be limited to material that can be accepted into evidence in a formal proceeding. See Administrative Conference of the United States, Pre-enforcement Judicial Review of Rules of General Applicability, Recommendation No. 74-4, 1 C.F.R. § 305.74-4(1) (1981) (in statutes pertaining to judicial review of rules adopted under Administrative Procedure Act, 5 U.S.C. § 553, "record" means notice, comments and documents submitted by interested persons, transcripts, other factual information considered, reports of advisory committees, and agency's concise general statement or final order).

78. See *supra* notes 12 & 20 (discussing legislative history of APA indicating that APA requires statement of basis and purpose of rule and indication that agency considered positions of parties); *supra* note 52 and accompanying text (discussing judicially imposed procedural requirements additional to APA).

79. This means, of course, that the agency must not only be able to show material that fairly supports its position, but that it must discount that material by data pointing in a contrary direction. *Aqua Slide 'N' Dive Corp. v. Consumer Prod. Safety Comm'n*, 569 F.2d 831, 838, 841 (5th Cir. 1978) (setting aside standard that was not supported by substantial evidence, in part because agency failed to rebut interested parties' objections); *cf. United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (agency may not leave unanswered vital questions raised by cogent, material comments); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392, 402 (D.C. Cir. 1973) (ordering EPA on remand to respond to industry's technical objections to promulgated standards), *cert. denied*, 417 U.S. 921 (1974).

80. See M. WESSEL, *SCIENCE AND CONSCIENCE* 144-45 (1980) (resolution of socioscientific disputes must be accomplished on basis of incomplete, inadequate research because issues must be resolved before completion of research).

81. *Id.* at 42-43, 144-45.

82. See McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L.J. 729, 729 (1979) (agencies and courts often must resolve scientific questions about which there is much uncertainty and dispute in scientific community).

cient data is presently available to make a fully informed factual determination. Decision making must in that circumstance depend to a greater extent upon policy judgments and less upon purely factual analysis. Thus, in addition to currently unresolved factual issues, the formulation of standards involves choices that by their nature require basic policy determinations rather than resolution of factual controversies.⁸³

Although parties participate in the rulemaking process by presenting facts and arguments through procedures tailored more to develop the factual basis of rules than to reach agreement on policy,⁸⁴ policy questions ultimately are decided largely by the agency. The agency virtually always retains a broad range of discretion, the exercise of which involves inherently political choices. For example, the agency decides which "facts" are relevant to the decision and how to reconcile such competing values as energy development versus environmental protection, or safety versus costs.⁸⁵ The statutes usually provide little guidance.⁸⁶ Commenting on this lack of guidance, Professor Jaffe stated that "Where in form or in substance the legislative design is incomplete, uncertain, or inchoate, a political process will take place in and around the agency, with the likely outcome a function of the usual variables which determine the product of lawmaking institutions."⁸⁷ Professor Stewart characterized the problem similarly:

Today, the exercise of agency discretion is inevitably seen as the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy. . . .

. . . [T]he application of legislative directives requires the agency to reweigh and reconcile the often nebulous or conflicting policies behind the directives in the context of a particular constellation of affected interests. The required balancing of policies is an inherently

83. *Industrial Union Dept., AFL-CIO v. Hodgson*, 499 F.2d 467, 474-75 (D.C. Cir. 1974). As one commentator has noted,

Disputes over standard-setting arise in large part because traditional approaches to regulation, and the administration of regulations, do not work as intended. In theory, experts or specialists are supposed to set guidelines based on objective scrutiny of the best scientific information available to them. Yet, every standard also involves an assessment of risks and a decision about the distribution of costs and benefits. Although the process of setting environmental quality standards involves technical analysis, it also involves subjective or political judgments. Furthermore, when standards are set on the basis of analyses prepared by the staffs of regulatory agencies that are suspected of not being neutral, but are sympathetic to the interests they are supposed to be regulating, the prospect of conflict increases. Both development and environmental interests have come to suspect that regulatory agencies are more sympathetic to the other side.

Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 13 (1981).

84. The parties may, of course, make policy arguments and seek to persuade the agency as to the wisdom of their position. The current method of judicial review, however, seems to require an agency to demonstrate more rigorously why it makes the factual determinations that support its rule than why it makes policy choices.

85. An excellent review of the literature discussing the nature of the value choices the agency must make in establishing almost any significant regulation appears in SENATE COMM. ON THE JUDICIARY, THE REGULATORY REFORM ACT, S. REP. NO. 284, 97th Cong., 1st Sess. 52-64 (1981).

86. T. LOWI, *supra* note 3, at 117.

87. Jaffe, *supra* note 2, at 1189.

discretionary, ultimately political procedure.⁸⁸

The resolution of these political questions has resulted in a crisis of legitimacy that is the current malaise.⁸⁹ Agency actions no longer gain acceptance from the presumed expertise of its staff.⁹⁰ It is no longer viewed as legitimate simply because it fills in the gaps left by Congress, or because it is guided by widely accepted public philosophy. To the extent that rulemaking has political legitimacy, it derives from the right of affected interests to present facts and arguments to an agency under procedures designed to ensure the rationality of the agency's decision.⁹¹ Although this process confines and narrows agency discretion, it does not provide a forum suitable for the resolution of the political questions or for the exercise of subtle value choices.⁹²

Political decisions necessarily have no purely rational or "right" answer. Yet, the current regulatory procedures do not permit the parties to participate directly—to share in reaching the ultimate judgment, which is what provides the legitimacy to political decisions. Although the agency, like the umpire, makes the decision alone,⁹³ a multitude of political forces influence that decision. Because there is no overriding or generally accepted reason to have faith in the choices made by the agencies,⁹⁴ rules issued after even the most ardent

88. Stewart, *supra* note 3, at 1683-84. Professor Stewart continues,

The ideal of rational decision assertedly consists in the best resolution and harmonization of conflicting interests, but since there is generally no agreed-upon criterion of what constitutes a "best solution," decisionmaking will normally be a question of preferring some interests to others. After even the most attentive consideration of the contending affected interests, there is still the inescapable question of the weight to be accorded to each interest and the values invoked in its support. Statutory directives will generally be of little assistance in assigning weights to the various affected interests, since the problem of broad agency discretion generally grows out of a legislative inability or unwillingness to strike a definitive balance among competing values and interest groups.

Id. at 1779.

89. J. FREEDMAN, *supra* note 38, at 6-7 (agency exercise of lawmaking powers without political accountability of legislature and exercise of adjudicatory power without the tenure and independence of judiciary has led to recurrent sense of crisis); T. LOWI, *supra* note 3, at 92-126 (agency regulation without sufficient legislative direction has resulted in "policy without law" and "decline of law").

90. Indeed, because complex scientific and technical issues are involved in many rulemakings, rarely will a member of the agency's staff be a recognized authority in the subject matter.

91. This appears to be the goal of the multitude of judicial decisions and most of the recently proposed legislation. See *supra* notes 52-71 and accompanying text (discussing development of more stringent judicial review of agency decisions and recent legislation providing parties with more active roles and ensuring rationality of decisions).

92. Susskind & Weinstein, *Toward a Theory of Environmental Dispute Resolution*, 9 B.C. ENVTL. AFF. L. REV. 311, 324 (1980) ("environmental disputes are at least as much value disputes as scientific controversies").

93. As one commentator describes the decisionmaking process:

In the U.S., there was essentially a two-step decision-making process, one that is repeated again and again when new regulatory agencies deal with mega-problems. In the first step, a small group of agency officials . . . decide on the contents of the final regulation. They do this in isolation, and their decision is a secret until they announce it. These officials rely, of course, on the hearing record, posthearing submissions, and their own expertise, but they write the regulation by themselves, and none of the parties who will be directly affected by the decision know what the decision will be until it is published. Until the announcement, these parties must make do with rumor and suspense.

J. BADARACCO, A STUDY OF ADVERSARIAL AND COOPERATIVE RELATIONSHIPS BETWEEN BUSINESS AND GOVERNMENT IN FOUR COUNTRIES: A REPORT TO THE OFFICE OF TECHNOLOGY STRATEGY AND EVALUATION OF THE U.S. DEPT OF COMMERCE 212 (1981).

94. Complaints about the policy judgments of agencies are, of course, legion. One commentator

hybrid process lack legitimacy.

Hybrid rulemaking has become a surrogate for direct participation in the political decision because parties have no means of direct participation in the policy choice. Parties can limit the agency's range of choices only by influencing the record.⁹⁵ As a result, the process of developing the record has become bitterly adversarial.⁹⁶ Such adversity may be an inevitable concomitant of the regulatory state in which massive costs and benefits are at stake; it may even be the best way of reaching many decisions. This adversarial system, however, fails to provide a mechanism for deciding the inherently political issues in a politically legitimate way. Groups affected by a regulation need the opportunity to actually participate in its development if they are to have faith in it. A participatory process would have positive merit in and of itself because a resulting regulation would be based on the consensus of those who would be affected by it, which is, after all, the nature of political decisionmaking.⁹⁷ Achieving the consensus of interested parties would also reduce many of the problems caused by the current adversarial process of developing regulations.⁹⁸ Before considering administrative decisionmaking based on consensus, the next section evaluates the advantages and disadvantages of the adversarial process.

II. THE ADVERSARIAL PROCESS

A. BENEFITS OF THE ADVERSARIAL PROCESS

The adversarial process has many benefits.⁹⁹ It provides a strong incentive for those interested in the outcome to develop and present factual and policy arguments for the decisionmakers to consider. Thus, the adversarial process is

summarizes the broad disquiet with which regulatory decisions are viewed: "[E]nvironmentalists and developers agree that government regulatory agencies figure costs and benefits incorrectly. Environmentalists argue that environmental protection is still being undervalued. Developers contend that arbitrary and time-consuming regulatory requirements add unnecessarily to the cost of doing business." Susskind, *supra* note 83, at 11; see also Stewart, *supra* note 3, at 1684-88 (compiling many of complaints about agency policy decisions). Many theories are offered to explain why agencies make the policy choices they do. See generally Schuck, Book Review, 90 YALE L.J. 702 (1981) (reviewing *THE POLITICS OF REGULATION* (J. Wilson ed. 1980)).

95. Address by Senator William V. Roth, Jr., before the Plenary Session of Administrative Conference of the United States (December 11, 1981) (party's main tool to control agency's discretion in adversarial rulemaking process is to influence the record on which the agency bases its rule).

96. Murray Weidenbaum, former Chairman of the Council of Economic Advisors, wrote, "The relationship between business and government in the United States can be described as being basically adversarial in nature." Weidenbaum, *A New Model of Governmental Decision Making*, in *THE BUSINESS-GOVERNMENT RELATIONSHIP: A REASSESSMENT* 65, 65 (N. Jacoby ed. 1975); see also Fox, *Breaking the Regulatory Deadlock*, HARV. BUS. REV., Sept.-Oct. 1981, at 97, 97 (most dealings between business and government are adversarial); Reich, *Regulation by Confrontation or Negotiation?*, HARV. BUS. REV., May-June 1981, at 82, 83 (same); Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 HARV. L. REV. 1871, 1871 (1981) (current proposal for administrative reform responds to criticism that regulatory process is excessively adversarial).

97. Properly implemented, a consensus solution "depends for its legitimacy not upon its objective rationality, inherent justice, or the moral capital of the institution that fashioned it, but upon the simple fact that it was reached by consent of the parties affected." Schuck, *Litigation, Bargaining, and Regulation*, REGULATION, July-Aug. 1979, at 26, 31.

98. "What is needed is a new view of the proper role of an agency. . . . [A]gencies should be viewed not primarily as decisionmakers in contested cases, but as a means of helping the parties in such cases work out a result that is both mutually acceptable and in the public interest." Morgan, *supra* note 24, at 55.

99. Schuck, *supra* note 97, at 26.

a powerful means of generating information.¹⁰⁰ Because it ensures that each party knows the contentions of the others, each participant can demonstrate the errors in the competing positions.¹⁰¹ The adversarial process, therefore, functions as a quality control pointing out errors and weaknesses in any position. It also satisfies a deeply held belief that anyone affected by government decisions should have the opportunity to present his case to the agency making the decision in a way that forces the agency to consider the argument.¹⁰² It is a way of permitting affected parties to convince the decisionmaker that the party's position should prevail.¹⁰³

B. DRAWBACKS OF THE ADVERSARIAL PROCESS

On the other hand, the adversarial process has many drawbacks. The agencies and the private parties tend to take extreme positions, expecting that they may be pushed toward the middle. For example, an agency may propose a far more stringent regulation than it expects to issue ultimately because it expects the adversarial process to create considerable pressure for it to moderate its position.¹⁰⁴ Moreover, if the agency tempers its original proposal, the agency appears reasonable and responsive.

The private participants tend to take extreme positions because they also expect to be drawn toward the middle as part of the adversarial process. Participants that oppose any regulation or that hope to obtain a minimally intrusive regulation may argue that no regulation is needed or that at most a weak one is required, and will tailor their evidence accordingly.¹⁰⁵ Because the parties advocate the extreme,¹⁰⁶ they may be reluctant to provide data to the agency and to each other because they fear the data may be misused or reveal weaknesses in the extreme position.¹⁰⁷ Thus, it is frequently difficult for parties to join forces, and frontally address the factual and policy questions. Instead, the parties dig in and defend their extreme positions.¹⁰⁸

100. *Id.*

101. *Id.*

102. *Id.*

103. Eisenberg, *supra* note 29, at 414-15.

104. See J. BADARACCO, *supra* note 93, at 184 (when setting vinyl chloride emission standard, OSHA proposed extreme limit of "no detectable level").

105. See Reich, *supra* note 96, at 89 (professional representatives of interested parties often present extreme characterization of issues).

106. See Interview with Anthony Z. Roisman, Hazardous Waste Section, Lands Division, United States Department of Justice, (May 6, 1981) [hereinafter Roisman Interview] (parties take extreme positions during rulemaking at Nuclear Regulatory Commission because they may challenge rule if the agency does not accept their position; at the challenge stage, they provide good data and more reasonable negotiating position) (copy on file at *Georgetown Law Journal*).

107. In *American Textile Mfg. Institute, Inc. v. Donovan*, 452 U.S. 490 (1981), an industry representative supplied OSHA with a cost estimate for industry compliance with cotton dust standard. *Id.* at 523. In reference to the cost estimate, the industry representative stated, "I'm beginning to wish I hadn't said anything about this, which I did, and [now] I have to be helpful." *Id.* at 528 n.51. See Interview with James A. Rogers, formerly Associate General Counsel, EPA, (April 15, 1981) [hereinafter Rogers Interview] (parties hold back data during rulemaking at EPA because they distrust government, fearing that it will not understand nuances and limitations on data) (copy on file at *Georgetown Law Journal*).

108. See M. WESSEL, *supra* note 80, at 48 (people use "sporting" tools of regulatory process, including extreme positions, to achieve goals); Fox, *supra* note 96, at 97 (regulatory procedures encourage exorbitant demands and dramatic presentations).

In addition, the adversarial process affects the presentation of proposals when people deal with each other as adversaries. A party is likely to encounter difficulty in expressing its true concerns¹⁰⁹ because it may fear losing on issues of minor interest without gaining concessions on those it cares about a great deal. Moreover, a party may feel compelled to advocate a position it may not actually favor at the time to preserve the option of advocating that position in the future. Thus, the parties' presentations appear flat: they raise every issue to nearly equal prominence and place far more issues in contention than may be necessary.

The parties in an adversarial process do not deal directly with one another; rather, each makes its presentation to the decisionmaker. Because of this presentation, the issues in controversy may be limited to those within the jurisdiction of the forum. These issues, however, may not be the ones actually separating the parties. For example, one wonders whether the challenge to the Tellico Dam in *Tennessee Valley Authority v. Hill*¹¹⁰ was prompted by a grave concern for the endangered snail darter¹¹¹ or by a broader opposition to the adverse effect on the environment and human life. If the parties are unable to define the true issues of concern, the decisionmaker and the other parties will have difficulty in addressing the parties' positions and in making informed trade offs when developing the factual basis of a rule and striking the inherently political choice embodied therein.¹¹²

The adversarial process is also unsuitable for resolving polycentric disputes involving many parties and many possible outcomes. Moreover, any one decision necessarily affects every other issue involved in the particular dispute.¹¹³ Although polycentric disputes require delicate trade offs among competing interests, they are often resolved through the adversarial process, whose very nature precludes such balancing. Professor Fuller's hypothetical about the distribution of paintings by various artists among competing claimants is a classic illustration of polycentric decisionmaking.¹¹⁴ The distribution of one painting necessarily affects each claimant because it alters the universe of paintings available for distribution to all the claimants.¹¹⁵ An adversarial approach may force the decisionmaker to put a monetary value on the respective paintings and to attempt to distribute them so that each claimant receives paintings of equal monetary value. Such an approach obviously would ignore the actual values placed on the paintings by the various parties. The assignment of monetary value would be a surrogate for the decision because the forum was incapable of deciding the true question. Analogous questions arise in the regulatory context in which agencies must balance widely competing views

109. See Dunlop, *The Limits of Legal Compulsion*, reprinted in 1975 O.S.H. REP. (BNA) 884, 886 (Nov. 12, 1975) (regulation lessens incentives for private accommodation of conflicting viewpoints; in contrast, negotiation forces parties to set priorities among their demands).

110. 437 U.S. 153 (1978).

111. *Id.* at 158.

112. Professor Stewart describes this difficulty as "a legal version of blindman's bluff." Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1256, 1346 n. 272 (1981).

113. See Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394 (1978) (making decision affects issues in other decisions to be made); Boyer, *supra* note 30, at 116-17 (same).

114. Fuller, *supra* note 113, at 394.

115. *Id.*

and national needs.¹¹⁶

The adversarial process also causes parties to engage in defensive research to bolster the factual record for a proposed rule.¹¹⁷ An agency and other affected parties may feel compelled to compile a great amount of factual material to counter other positions and to build affirmative cases, although such information may be of only marginal value in making the ultimate decision. This research, which may take the form of data gathering, new laboratory work, or the employment of recognized leaders in a field, is both time consuming and expensive. Moreover, the adversarial process tends to warp the quality of the scientific and technical information submitted. Because the parties must develop the best arguments for the positions they advocate, qualifications, limitations, and expressions of doubt are lost. We have grown accustomed to rulemaking procedures that take several years to complete at the agency level and, in the event judicial review is sought, another year or two in the courts. The cost of participating in such a proceeding for both the agency and the private parties can be staggeringly high.

The adversarial process also breeds specialists whose expertise is the process itself. These "intermediaries," as Professor Reich has called them,¹¹⁸ serve as modern knights who joust with each other at the behest of the actual parties in interest and supply their principals with intelligence about the others' actions.¹¹⁹ The intermediary is the architect and advocate of an interest's position in the proceeding. He uses available processes to achieve the goals and tends the political contacts that will shape the final decisions.¹²⁰

To a degree, the use of intermediaries in the regulatory process reflects nothing more than a specialization of functions. As Reich points out, however, intermediaries sell conflict,¹²¹ which in turn exacerbates the problems of the adversarial process.¹²² Not only does an intermediary have little incentive to minimize conflict, he usually lacks the substantive ability and authority to make trade offs with the opposing participants.

Thus, although the principals themselves bear the responsibility for decisions, their responsibility is filtered through the intermediary. This process may interfere with their ability to reach an early satisfactory agreement. It has been observed, for example, that once an adversarial process begins, the senior management of a company tends to turn decisionmaking responsibility over to

116. C. SCHULTZE, *THE PUBLIC USE OF PRIVATE INTEREST* 12 (1977) (most important characteristic of "social intervention" by the government is that its success depends on affecting skills, attitudes, consumption habits, or production patterns of millions of individuals and business firms and thousands of local governments); See Boyer, *supra* note 30, at 118 (discussing examples of agency actions that affect wide variety of interests that make it necessary to choose among many possible solutions).

117. See Morgan, *supra* note 24, at 24-25 (discussing delay in ratemaking proceedings caused by factbuilding).

118. Reich, *supra* note 96, at 84.

119. *Id.*

120. *Id.* at 85.

121. *Id.* at 86-89.

122. One commentator quipped in commenting on Reich's thesis, "If the only tool you've got is a hammer, then everything looks like a nail." J. DeLong, Letter to the Editor, *HARV. BUS. REV.*, July-Aug. 1981, at 55, 165. DeLong notes that intermediaries tend to escalate the relationship between a private party and an agency into an adversarial one, regardless of whether the adversarial process is necessary or whether it is the best way to address the issues at hand. *Id.*

the legal staff.¹²³ Although the management is trained to decide what is in the best interests of the firm, it plays a less active role once adversarial proceedings begin. Studies suggest that this process is counterproductive. For example, experiments with the litigation process have been conducted in which a third party expert and the senior management of the opposing parties were presented with an abbreviated version of the issues in a dispute. The expert then acted as an adviser rather than as a decisionmaker.¹²⁴ The parties reached an accommodation on the issues without the years of litigation.¹²⁵ The use of a third party expert as an adviser thus eliminated the intermediary and facilitated agreement.

A similar phenomenon occurs in adversarial rulemaking. The principals, who are responsible for assessing their organization's best interests in the context of the issues raised in the proceeding, generally are not direct participants. Lawyers and other intermediaries frame the issues and lend advice to the decisionmakers. This system then adds to the formality and structure of the process and further breaks down the ability of the regulatory process to address the issues directly.¹²⁶ Finally, because the adversarial process pits one party against another, those who are not victorious may believe that the decision is not legitimate because it did not fully credit their position. This perceived lack of legitimacy may reduce voluntary compliance, which is the mainstay of the regulatory process.¹²⁷

C. THE COMPLAINTS AND THE RESPONSE

The deficiencies of the adversarial process have been overdrawn to emphasize that adversarial rulemaking inhibits the dialogue¹²⁸ over and exploration

123. *Business Saves Big Money with the Minitrial*, BUSINESS WEEK, October 13, 1980, 168, 168.

124. See *id.* (describing minitrial procedure with third party adviser); see also Johnson, Massi & Oliver, *Minitrial Successfully Resolves NASA-TRW Dispute*, LEGAL TIMES OF WASHINGTON, Sept. 6, 1982, at 16, 17 (describing minitrial without adviser).

125. See Green, Marks & Olson, *Settling Large Case Litigation: An Alternate Approach*, 11 LOY. L.A.L. REV. 493, 496 (1978) (corporate management insulates itself from litigation, believing complexities of litigation require legal expertise).

126. Irving Shapiro, former chairman of the E.I. DuPont deNemours Company and of the Business Roundtable, lamented this fact:

We . . . have a lot of talent. A lot of those people are very expert in their fields, and once they've put their minds onto it, they can come up with answers. That doesn't happen very often. Instead, the system says we must be adversaries. . . . [The current regulatory process] is absolutely too cluttered up. It's got too many people tied up in knots. What it is today, really, is an adversary procedure in which you've got single-issue groups on one side pressing the agency, you've got people in the agency pressing for their own viewpoint, and then you've got people in the industry pressing for their viewpoints, and each one is shooting at the other.

DuPont's Irving S. Shapiro: Summing Up a Life in Business, Wash. Post, February 8, 1981, at G2, col. 2.

127. Cf. Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 675-76 (1976) (if rules established by power, instead of by procedure as in negotiation, party may not comply with rules).

128. At least two forces have impeded the dialogue between agencies and interested parties. First, the Federal Advisory Committee Act (FACA), 5 U.S.C. app. §§ 1-15 (1976 & Supp. IV 1980), requires close scrutiny of advisory committees by Congress and the executive branch to determine whether each is carrying out its purpose. *Id.* §§ 5-7. Although FACA recognizes that agencies' advisory committees may be a useful means of furnishing expert advice to agencies, *id.* § 2, uncertainty has arisen about whether the FACA applies to informal ad hoc groups whose views the agency wants to gather on a proposed agency action. Administrative Conference of the United States, *Interpretation and Implementation of the Federal Advisory Committee Act*, Recommendation 80-3, 1 C.F.R. § 305.80-3 (1981)

of creative solutions necessary to resolve the vexing problems addressed by agency regulation. Because we lack both a public philosophy that legitimizes agency decisions and a process by which political decisions involved in regulations can be thrashed out directly,¹²⁹ we use the surrogate of constraining and influencing the exercise of discretion through the development of a record and judicial review.¹³⁰ As long as the political acceptance of a regulation rests on the ability of interested parties to participate in building the record and on the rationality of the agency's decision, it will remain essential to improve the procedures leading to those ends. Such improvements will merely continue the adversarial process.¹³¹

[hereinafter FACA Recommendation]. The Administrative Conference has concluded that such uncertainty about the applicability of the FACA has tended to discourage useful contacts between the agency and the private sector and, accordingly, has recommended that the FACA should not apply to such groups. *Id.* For an excellent review of the inhibiting effects of the FACA, see Memorandum from Brian C. Murphy to Jim J. Tozzi, OMB, Review of Implementation of the Federal Advisory Committee Act (1980) (Dec. 12, 1980) [hereinafter Murphy Memorandum] (copy on file at *Georgetown Law Journal*).

The prohibition against ex parte contacts between agencies and interested parties outside the agency during rulemaking or adjudication has also impeded the dialogue. Ex parte rules have been imposed by the APA. See *supra* note 64 and accompanying text (describing provisions of the APA prohibiting ex parte contacts). The courts have applied and refined these ex parte rules. See *National Small Shipments Traffic Conference, Inc. v. ICC*, 590 F.2d 345, 351 (D.C. Cir. 1980) (agency not immune from rule against ex parte contacts when it postpones hearing on merits and prescribes interim substantive rule); *United States Lines, Inc. v. Federal Maritime Comm'n.*, 584 F.2d 519, 539-41 (D.C. Cir. 1978) (secret ex parte contacts are inconsistent with fair hearing and public participation); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 53-54 (D.C. Cir.) (if ex parte contacts occur, record must be made and filed so that court may fully exercise its power of review), *cert. denied*, 434 U.S. 829 (1977); *cf.* *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1213 (D.C. Cir. 1980) (5 U.S.C. § 557(d) rules which apply to adjudications and formal rulemakings do not bar contacts wholly among agency staff members because Congress, when establishing hybrid process of OSHA, never intended to impose separation of functions requirements), *cert. denied*, 453 U.S. 913 (1981); *Hercules, Inc. v. EPA*, 598 F.2d 91, 126-27 (D.C. Cir. 1978) (contacts between judicial officer and rulemaking staff not impermissible because need for expedition justified less elaborate procedure); *Action for Children's Television v. FCC*, 564 F.2d 458, 477 (D.C. Cir. 1977) (informal rulemaking by FCC to improve children's television not susceptible to poisonous ex parte influence because private groups not competing for specific valuable privilege; ex parte communications by industry do not vitiate agency decision).

The uncertain reach of FACA and the restrictions on ex parte meetings during rulemaking have made agencies reluctant to meet with parties interested in a regulation, either singly or as a group, to fill gaps in the record, negotiate positions, or otherwise reach a consensus on a rule. See *Fox, supra* note 96, at 97, 104 (many in government believe incorrectly that APA prohibits conversations with interested parties at any stage of regulation development process). Thus, the procedures used to enforce rationality and accountability actually inhibit the ability to gain information and develop consensus. See *Sierra Club v. Costle*, 657 F.2d 298, 352-56 (D.C. Cir. 1981) (*Sierra Club* claimed that because EPA, when promulgating standard, considered certain evidence after the public comment period ended, interested parties were not informed of new developments in time to make meaningful comments; court held not fatal defect); *Cardozo, The Federal Advisory Committee Act in Operation*, 33 *AD. L. REV.* 1, 26-28 (1981) (discussing examples of President and agencies excluding certain interest groups from meetings because they did not qualify as "advisory committees" under the FACA).

129. As Professors Jaffe and Stewart stated, *supra* text accompanying notes 87-88, the development of a regulation is a political process. Parties use many political tools to influence the outcome of regulatory decisions; they urge Congress or the White House to pressure agencies, personally pressure agency officials, initiate letter writing campaigns, and the like. Yet, there is no forum in which the competing interests can assemble to strike the political balance directly; rather, each attempts to influence the umpire. See *Fox, supra* note 96, at 100 (agencies do not include formal mechanisms for accommodating conflicting interests; one way for government to gain active cooperation of major participants is to establish outside organizations or forums).

130. See *supra* notes 50-57 and accompanying text (discussing development of administrative record and judicial review).

131. See *supra* note 95 (address by Senator Roth discussing party's main tool in adversarial process as influencing record).

Dissatisfaction, however, persists with the rules developed under the hybrid process.¹³² Business interests complain that agencies do not develop sufficient factual material to support the stringent regulations they issue and do not respond to policy arguments. Beneficiaries of regulation, in contrast, complain that agencies develop far too many facts, attempt to resolve questions that are inherently indeterminable, and do not act with sufficient strength. Agencies themselves complain the entire process is burdensome and consumes far more resources to gather new information, to achieve quality control, or to clarify positions, than it is worth. As a result, many efforts to break away from the basic structure of the APA and to seek new forms of regulatory procedure have been attempted. Some efforts seek to improve the factual bases of rules; others seek to reduce the formality of procedures; still others attempt to find new ways to accommodate competing interests.

1. Improvement of Factual Basis of Rules

Proposals suggesting ways to improve the development of facts underlying agency decisions are numerous. Proposals for a "science court" have been around for years.¹³³ The proponents of the science court argue that although important scientific and technical questions usually cannot be resolved expeditiously enough for regulatory action,¹³⁴ the science court would enable development of a consensus concerning the current thinking on relevant scientific and technical questions.¹³⁵ This consensus would be achieved through a basically adversarial process, with representatives of competing technical viewpoints acting as the adversaries and a panel of experts acting as the decisionmaker.¹³⁶ The agency would then use the "findings" of the "court" as

132. It seems supererogatory to marshal a gaggle of citations for this proposition and the elaborations on it that follow. The most cursory review of Plaintiff-Defendant tables or the table of contents of the *Federal Reporter, 2d Series*, reveals the number and variety of challenges to agency action or inaction. Surely that reflects dissatisfaction with the original performance. Even if such evidence can be discounted by the observation that we have become a litigious society and that we rely on courts for many decisions normally entrusted to agencies (which says something in its own right), the literature of the respective interests, including the academics (who rarely engage in the sport of litigation), reflects the unease. Interestingly, the grounds for these qualms may well have reversed since the 1980 election. See *supra* note 26 (discussing criticisms of modern regulatory system).

Undoubtedly the most prominent example of the failure of elaborate procedures to corral agency discretion and to produce acceptable results is the experience under the hybrid rulemaking procedure of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act § 18, added by Pub. L. No. 93-637, § 202(a), 88 Stat. 2183, 2193-98 (1975), 15 U.S.C. § 57a (1976 & Supp. IV 1980). The hybrid rulemaking proceedings under the Act were considered so unsatisfactory that forces mobilized to persuade Congress to impose a legislative veto on the Commission's rulemakings. See generally Administrative Conference of the United States, *Hybrid Rulemaking Procedures of the Federal Trade Commission*, Recommendation No. 80-1, 1 C.F.R. § 305.80-1 (1981) (summarizing criticisms of act's procedural requirements for rulemaking).

133. See generally M. WESSEL, *supra* note 80, at 148; Banks, *The Science Court Proposal in Retrospect: A Literature Review and Case Study*, 10 CRIT. ISSUES IN ENVIR. CON. 95 (1980); Martin, *The Proposed Science Court*, 75 MICH. L. REV. 1058 (1977); Talbott, "Science Court": A Possible Way to Obtain Scientific Certainty for Decisions Based on Scientific "Fact", 8 ENVTL. L. 827 (1978).

134. See Martin, *supra* note 133, at 1063-64 (discussing inability of scientific model to provide final answers quickly enough for regulatory policy decisions).

135. See Talbott, *supra* note 133, at 834-35 (science court would develop consensus in scientific community on scientific issues affecting society).

136. See Martin, *supra* note 133, at 1069-78 (describing adversarial format for science court); Talbott, *supra* note 133, at 831 (same).

the basis of its regulation.¹³⁷

Another proposal is to hold broad meetings, open to all responsible scientists, in an effort to develop a consensus on factual questions raised in a regulatory setting.¹³⁸ This proposal has already been put into practice to a limited extent. For example, the Consumer Product Safety Act was recently amended to provide a Chronic Hazards Advisory Panel to assess cancer, birth defects, and gene mutations associated with consumer products and to provide reports to the Consumer Product Safety Commission for use in rulemaking proceedings.¹³⁹ Similarly, the Environmental Protection Agency is required by statute to submit any "proposed criteria document, standard, limitation, or regulation, together with relevant scientific and technical information . . . on which the proposed action is based" to its Science Advisory Board for comment on its scientific adequacy.¹⁴⁰ Over the years the Food and Drug Administration has empaneled numerous advisory committees to assess the safety and efficacy of drugs. Although the determinations of the panels technically are only advisory, the agency generally has acted on these determinations.¹⁴¹ These panels consist of well-regarded, neutral experts that are usually academics, and the panel's recommendation represents an assessment of the facts and a policy determination of their relevance.¹⁴²

2. Private Party Involvement

Other modifications of the traditional procedures have attempted to involve interested parties at the outset. The Consumer Product Safety Act¹⁴³ and the

137. Martin, *supra* note 133, at 1088-89.

138. See M. WESSEL, *supra* note 80, at 173 (proposing scientific consensus finding conference).

139. Consumer Product Safety Amendments of 1981, Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1206(a), 95 Stat. 357, 716-18 (codified at 15 U.S.C.A. § 2077 (West Supp. 1982)). Each panel consists of seven members appointed by the CPSC from a list of nominees submitted by the President of the National Academy of Sciences. *Id.* § 2077(b). Each panel reviews the scientific data or other information relating to the risk of cancer, birth defects, or gene mutations from a consumer product and reports its determination to the Commission. *Id.* (codified at 15 U.S.C. § 2077(a)). The amendments direct the Commission to consider the panel's report and to incorporate the report into the notice of proposed rulemaking. *Id.*

140. Environmental Research, Development, and Demonstration Authorization Act of 1978 (ERDDA) § 8(e), 42 U.S.C. § 4365(e) (Supp. IV 1980); *cf.* American Petroleum Institute v. Costle, 665 F.2d 1176, 1189 (D.C. Cir. 1981) (although EPA's failure to submit proposed standards to Science Advisory Board violated ERDDA, error not so central as to invalidate final standards). Requiring or authorizing agencies to secure the advice of an advisory committee before issuing a regulation has become a relatively common feature of recent statutes. See Occupational Safety and Health Act § 6(b)(1), 29 U.S.C. § 655(b)(1) (1976) (Secretary of Labor may request recommendation of an advisory committee for any rule promulgated by OSHA); National Home Construction and Safety Standards Act of 1974 § 605(b), 42 U.S.C. § 5404(b) (1976 & Supp. IV 1980) (Department of Housing and Urban Development shall consult with advisory council before establishing, amending, or revoking any safety standard). See generally SUBCOMM. ON ENERGY, NUCLEAR PROLIFERATION, AND FEDERAL SERVICES OF THE SENATE COMM. ON GOVERNMENTAL AFFAIRS, FEDERAL ADVISORY COMMITTEES, INDEX TO THE MEMBERSHIP OF FEDERAL ADVISORY COMMITTEES LISTED IN THE SIXTH ANNUAL REPORT OF THE PRESIDENT TO THE CONGRESS COVERING CALENDAR YEAR 1977 (1976) (listing existing advisory committees many of which provide advice of the sort described in the text and their membership in regulatory agencies).

141. See Stewart, *supra* note 112, at 1354-1357 (discussing FDA's use of technical advisory committees).

142. *Id.* at 1354-55.

143. 15 U.S.C. §§ 2051-2081 (1976 & Supp. IV 1980), amended by Consumer Product Safety Amendments of 1981, Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 1201-1215, 95 Stat. 357, 703-25 (codified at 15 U.S.C.A. §§ 2051-2083 (West Supp. 1982)).

Medical Device Amendments of 1976¹⁴⁴ provide for an "offeror process," which requires the agency to accept offers from groups of citizens who propose rules to the agency.¹⁴⁵ The Fishery Conservation and Management Act of 1976¹⁴⁶ establishes regional fishery management councils consisting of state and federal officials and individuals "knowledgeable or experienced with regard to the management, conservation, or recreational or commercial harvest, of the fishery resources in the geographical area concerned."¹⁴⁷ The Securities Acts Amendments of 1975¹⁴⁸ establish committees of private parties to prescribe rules for various securities transactions.¹⁴⁹

The National Institute of Building Science (NIBS) is another example of an attempt to involve private parties. NIBS was created as a nongovernmental body consisting of representatives of the various segments of the building industry, including builders, manufacturers of components, labor, code officials, architects, and consumers.¹⁵⁰ Among other things, NIBS develops performance criteria, standards, and other technical provisions suitable for adoption by regulatory agencies.¹⁵¹ All federal regulatory agencies are encouraged to accept the work product of the NIBS.¹⁵² According to one commentator, "Already [NIBS] has had a constructive impact on the regulatory process in influencing an array of federal regulations that could have led to much higher costs without compensating benefits for the consumer."¹⁵³

144. Pub. L. No. 94-295, 90 Stat. 539 (1976) (codified in scattered sections of 21 U.S.C. (1976 & Supp. IV 1980)).

145. 15 U.S.C. § 2056(b)(4) (1976); 21 U.S.C. § 360(c) (1976). The CPSC's offeror process was eliminated by the Consumer Product Safety Amendments of 1981, Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1202(a), 95 Stat. 703, 703-04 (1981) (codified at 15 U.S.C.A. § 2056 (West Supp. 1982)) (commission shall rely upon voluntary standards and traditional APA rulemaking procedures). For a more detailed description of the offeror process, see *infra* notes 327-48 and accompanying text.

146. 16 U.S.C. §§ 1801-1882 (1976 & Supp. IV 1980).

147. *Id.* § 1852(b)(1).

148. Pub. L. No. 94-29, 89 Stat. 97 (1975) (codified in scattered sections of 15 U.S.C. (1976 & Supp. IV 1980)).

149. For example, the Securities and Exchange Commission is directed to establish a 15 member Municipal Securities Rulemaking Board, consisting of three groups of individuals:

- (A) five individuals who are not associated with any broker, dealer, or municipal securities dealer, at least one of whom shall be representative of investors in municipal securities, and at least one of whom shall be representative of issuers of municipal securities . . . ; (B) five individuals who are associated with and representative of municipal securities brokers and municipal securities dealers which are not banks . . . ; and (C) five individuals who are associated with and representative of municipal securities dealers which are banks

Id. § 13(b)(1) (codified at 15 U.S.C. § 780-4(b)(1) (1976)). The Act directs the board to propose and adopt rules "with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers." *Id.* § 13(b)(2) (codified at 15 U.S.C. § 780-4(b)(2) (1976)). The ultimate authority of the regulation of municipal securities remains with the Commission, however. *Id.* § 13(b)(3) (codified at 15 U.S.C. § 780-4(b)(3) (1976)). Although it makes independent decisions, the Board consults with the Commissioners on particularly controversial matters. It takes the SEC's comments into account, sometimes backing off a proposal, and sometimes not. Interview with Dean Richard West, Amos Tuck School of Business Administration, Dartmouth College, Chairman of the Board (Jan. 21, 1981) (copy on file at *Georgetown Law Journal*).

150. Housing and Community Development Act of 1974 § 809(a)-(b), 12 U.S.C. § 1701j-2(a)-(b) (1976 & Supp. IV 1980).

151. *Id.* § 1701j-2(e)(1)(A).

152. *Id.* § 1701j-2(g)(1).

153. Fox, *supra* note 96, at 100.

3. Search for Alternatives

These innovative proposals could be viewed merely as an experimentation with new forms of regulatory procedure. The proliferation of such innovations combined with many new regulatory statutes that contain their own procedural sections, however, evinces a belief that the rulemaking approach of the APA as augmented by hybrid rulemaking is inadequate. These proposals also reflect a lack of confidence in the belief that hybrid rulemaking is the answer to all regulatory questions. In short, they recognize that procedures derived from adjudication are an inappropriate device for making fundamentally political, legislative choices. These proposals also reject the argument that too many restrictions already fetter agencies; they reflect a continuation of the distrust of broad discretion that led to hybrid rulemaking in the first instance.¹⁵⁴

The new procedures have two interrelated threads. One thread is the search for a method to force agencies to develop reasonable analytical bases on which enlightened decisions can be made. The other thread is the attempt to provide a method that enables the affected interests to participate in developing a rule by sharing in the decision,¹⁵⁵ as opposed to adversarial participation with parties making formal arguments that may or may not be accepted by the agency. The interrelationship of these two threads stems from the belief that agencies are insensitive to the policy implications of the overall factual setting of a proposed rule. The first response is the use of analysis to force consideration of the issues that would be raised and considered if those affected by a rule could participate directly.¹⁵⁶ The theory underlying this response is that requiring analysis sensitizes agencies to the difficult decisions to be made by explicitly identifying the policy choice rather than commingling it with factual determinations. The second response is an attempt to replicate at least part of the political process through advisory committees that tap a diversity of interests and that provide advice and guidance to the agency. Requiring analysis to force consideration of the issues and the use of advisory committees are attempts to instill public confidence in the regulatory decisions.

The classic way of establishing public confidence, however, is to have representatives of the people make the policy choices. Thus, an alternative, more direct way to make the inherently political decisions would be to adapt the legislative process itself to the development of regulations. Such a process would enable representatives of the competing interests, including the relevant agency itself, to thrash out a consensus on the policy instead of making a pitch

154. Before giving free rein to agencies will be politically acceptable, we must have a reason to have faith that agencies will reach an acceptable result and a measure of determining whether they do so. We lack both.

155. As in most democratic situations, individuals would not participate directly at the table; rather their representatives would. Just as Congress is organized by geographical representation, negotiations of this sort could be organized by interest.

156. Examples of this phenomenon are Environmental Impact Statements required by the National Environmental Policy Act § 102, 42 U.S.C. § 4332 (1976); cost-benefit or cost-effectiveness studies required by Executive Order 12,291, *supra* note 66; requirements that before issuing a rule agencies consult with scientists that can help put a problem into perspective, *supra* note 140; and proposals that would require agencies to conduct an assessment of the risk posed by the subject of the proposed regulation before proceeding, *see, e.g.*, H.R. 3441, 97th Cong., 1st Sess., 127 CONG. REC. H1860 (daily ed. May 5, 1981) (proposing to establish program under direction of Office of Science and Technology Policy to improve and facilitate risk analysis of scientific and technological decisions).

to the umpire. A form of negotiation among the parties affected by a proposed rule would be such a process.

III. THE ADVANTAGES OF RULEMAKING BY NEGOTIATION

The idea of developing rules through negotiation among interested parties received brief attention when John Dunlop proposed it during his tenure as Secretary of Labor.¹⁵⁷ Interest in the idea largely died before being translated into legal requirements or practice. Recently, however, a number of studies and articles have renewed the interest in using a form of negotiation to establish rules.¹⁵⁸

Negotiating has many advantages over the adversarial process. The parties participate directly and immediately in the decision. They share in its development and concur with it, rather than "participate" by submitting information that the decisionmaker considers in reaching the decision. Frequently, those who participate in the negotiation are closer to the ultimate decisionmaking authority of the interest they represent than traditional intermediaries that represent the interest in an adversarial proceeding. Thus, participants in negotiations can make substantive decisions, rather than acting as experts in the decisionmaking process. In addition, negotiation can be a less expensive means of decisionmaking because it reduces the need to engage in defensive research in anticipation of arguments made by adversaries.

157. Dunlop explained:

[T]he rule-making and adjudicatory procedures do not include a mechanism for the development of mutual accommodation among the conflicting interests. Opposing interests argue their case to the government, and not to each other. Direct discussions and negotiations among opposing points of view, where mutual accommodation is mutually desirable—as in collective bargaining—forces the parties to set priorities among their demands, trading off one for another, which creates an incentive for them to find common ground. The values, perceptions, and needs for each become apparent, and some measure of mutual understanding is a by-product.

Dunlop, *supra* note 109, at 886.

158. See, e.g., Fox, *supra* note 96, at 97 (discussing examples of regulatory agency mechanisms to accommodate interests); Reich, *supra* note 96, at 82 (suggesting methods for moderating dangerous influence of professional intermediaries, including informal negotiations); Schuck, *supra* note 97, at 26 (suggesting regulatory system overemphasizes adjudicatory decisionmaking; role of bargaining should be expanded); Stewart, *supra* note 112, at 1256 (suggesting that promotion of decisionmaking procedures other than adversary litigation would improve productivity and achievement of environmental, health, and safety goals simultaneously); Note, *supra* note 96, at 1871-80 (describing proposals and arguments, pro and con, regarding regulatory negotiation); Remarks of Vice President George Bush, 23d Plenary Session of the Administrative Conference of the United States (Dec. 10, 1981) (advocating "equivalent of consent decrees" before the beginning of formal regulatory process) (copy on file at *Georgetown Law Journal*); *Hearing on H.R. 746, Regulatory Procedure Act of 1981, Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 683-84 (1982) (testimony of C. Boyden Gray, Counsel to the Vice President of the United States, advocating closer relations between agencies and regulated industries, including meetings between affected parties and agencies prior to formal rulemaking process); Remarks of Senator William Roth, 23d Plenary Session of the Administrative Conference of the United States (Dec. 11, 1981) (discussing experimental alternatives to the traditional rulemaking process).

Congressional proposals would provide a structure for negotiating regulations. S. 1601, 97th Cong., 1st Sess., 127 CONG. REC. 123, S9328 (daily ed. Sept. 9, 1981); S. 1360, 97th Cong., 1st Sess., 127 CONG. REC. 88, S6119 (daily ed. June 11, 1981); H.R. 1336, 97th Cong., 1st Sess., 127 CONG. REC. 14, 214 (daily ed. Jan. 27, 1981); see Bingham, *Does Negotiation Hold a Promise for Regulatory Reform*, RESOLVE, Fall 1981, 1, 2-6 (Conservation Foundation publication comparing the proposed congressional bills on regulatory negotiation).

Undoubtedly the prime benefit of direct negotiations is that it enables the participants to focus squarely on their respective interests. They need not advocate and maintain extreme positions before a decisionmaker. Therefore, the parties can develop a feel for the true issues that lie within the advocated extremes and attempt to accommodate fully the competing interests.¹⁵⁹ An example of this benefit occurred when a group of environmentalists opposed the construction of a dam because they feared it would lead to the development of a nearby valley.¹⁶⁰ The proponents of the dam were farmers in the valley who were adversely affected by periodic floods. Negotiations between the two groups, which were begun at the behest of the governor, revealed a common interest in preserving the valley.¹⁶¹ Without the negotiations the environmentalists would have undoubtedly sued to block construction, and necessarily would have employed adversarial tactics. Negotiations, however, demonstrated the true interests of the parties and permitted them to work toward accommodation.

In another example, an environmental group sued a government agency that granted a permit for a uranium mine, alleging that the environmental impact statement (EIS) was defective. The mine, confronted with protracted litigation and the consequent delay, agreed to negotiations. The attorney for the environmental group queried rhetorically what would have happened if the case had been successful?¹⁶² He thought that the mining company would simply beef up the EIS and continue to build the mine.¹⁶³ Negotiations enabled the parties to focus on the issues separating them instead of fighting the legal strawman of a defective EIS. A general agreement resulted from the negotiations.¹⁶⁴ More important, both sides were enthusiastic about the process.¹⁶⁵

Negotiation enables the parties to rank their concerns and to make trades to maximize their respective interests. In a traditional proceeding an agency may be unable to anticipate the intensity with which the respective parties may

159. Schuck, *supra* note 97, at 26 (discussing propensity of participants in present rulemaking process to address concerns of decisionmaker rather than own interests).

160. Sviridoff, *Recent Trends in Resolving Interpersonal, Community and Environmental Disputes*, ARB. J., Sept. 1980, at 3, 8 (negotiations, including mediation, began in 1974 after Army Corps of Engineers proposed dam on Snoqualmie River near Seattle, Washington).

161. *Id.*

162. Interview with Luke Danielson, counsel for National Wildlife Federation (Sept. 22, 1981) (concerning Homestake Mining Company's pitch mine) (copy on file at *Georgetown Law Journal*) [hereinafter Danielson Interview].

163. *Id.*

164. In return for a covenant not to sue from the conservationists, Homestake agreed to make results of research relating to water quality available to the public; to conduct a thorough and comprehensive program of research in revegetation; to add two members nominated by conservationists to its citizen's advisory committee; to implement a program to compensate for range loss and habitat disturbance to wildlife, in the event that such results are demonstrated; and to use its best efforts to ensure an adequate water flow in a neighboring creek. Mediation Agreement (Apr. 10, 1981) (agreement between Homestake Mining Company and eight conservation organizations) (copy on file at *Georgetown Law Journal*).

165. The press release accompanying the agreement stated: "Frustration with the time wasted and costs incurred through confrontation led both sides to try head-to-head negotiation to resolve their differences." Homestake Mining Company and Coalition of Colorado Environmentalists, Joint Press Release (Apr. 15, 1981). Lawyers for both parties indicated that they thought negotiation was preferable to litigation as a method of resolving the dispute. Danielson Interview, *supra* note 162; Interview with John Watson, Counsel for Homestake Mining Company (Sept. 22, 1981) (copy on file at *Georgetown Law Journal*) [hereinafter Watson Interview].

view the various provisions of a proposed rule. The agency may focus on an aspect of a rule that is critical to one party, but not of particular interest to other parties.¹⁶⁶ An agency simply would have to guess how to reconcile such an issue because it would not know how to rank the parties' concerns. An interested party, however, could easily decide to accommodate another party in return for concession on a critical point. An example of such a trade off process would be when a beneficiary of a proposed regulation argues that the standard should be stringent with early compliance by the regulated company. A company that must comply with the regulation might counter that the standard should be more lenient with a long lead time for compliance. An agency faced with this situation might decide to require a lax standard in response to the company's claims of excessive burdens and require a short deadline in response to the need for immediate protection. Everyone involved, however, may be more content with precisely the opposite result. A rule allowing a longer time to implement a more stringent standard might benefit both parties because the shorter time for implementation might cause disruption that would offset any savings resulting from the reduced level of regulation.

Rulemaking by negotiation can reduce the time and cost of developing regulations by emphasizing practical and empirical concerns rather than theoretical predictions. In developing a regulation under the current system, an agency must prove a factual case, at least preliminarily, and anticipate the factual information that will be submitted in the record. Because the agency lacks direct access to empirical data, the information used is often of a theoretical nature derived from models. In negotiations, the parties in interest decide together what information is necessary to make a reasonably informed decision. Therefore, the data used in negotiations may not have to be as theoretical or as extensive as it is in an adversary process.¹⁶⁷ For example, one agency proposed a regulation based on highly technical, theoretical data. The parties argued that the theoretical data was unnecessary because it simply did not reflect the practical experiences of the parties and of another agency.¹⁶⁸ The agency determined the validity of the assertion and modified its regulation accordingly.¹⁶⁹ The lesson of this example is that the data can emphasize practical and empirical concerns rather than theoretical predictions. In turn, this emphasis on practical experience can reduce the time and cost of developing regulations by reducing the need for developing extensive theoretical data.

Negotiation also can enable the participants to focus on the details of a regulation. In the adversary process, the big points must be hit and hit hard, while the subtleties and details frequently are overlooked.¹⁷⁰ Or, even if the details

166. See *supra* notes 104-12 and accompanying text (discussing tendency of adversarial parties to take extreme, undifferentiated positions).

167. Interview with Dr. Gerald W. Cormick, Executive Director, The Institute for Environmental Mediation (April 27, 1981) (data and theory need not be developed as completely in negotiation as in adversary process) (copy on file at *Georgetown Law Journal*) [hereinafter Cormick Interview].

168. Interview with Thomas H. Seymour, Acting Director, Office of Safety Standards, Occupational Safety and Health Administration, U.S. Dep't of Labor (July 6, 1981) (Corps of Engineers' standard for shoring deep trenches did not predict actual physical occurrences in shallow trenches) (copy on file at *Georgetown Law Journal*) [hereinafter Seymour Interview].

169. *Id.*

170. Because the parties are forced to advocate extreme positions on virtually every issue, they usually find it difficult to develop either the details of their position or of positions within the poles of debate.

are not overlooked, the decisionmaker may not appreciate their consequences.¹⁷¹ In negotiations, however, interested parties can directly address all aspects of a problem in attempting to formulate workable solutions.

Overarching all the other benefits of negotiations is the added legitimacy a rule would acquire if all parties viewed the rule as reasonable and endorsed it without a fight.¹⁷² Affected parties would participate in the development of a rule by sharing in the decisions, ranking their own concerns and needs, and trading them with other parties. Regardless of whether the horse under design turns out to be a five-legged camel or a Kentucky Derby winner, the resulting rule would have a validity beyond those developed under the current procedures. Moreover, nothing indicates that the results would be of any lesser quality than those developed currently. Surely the *Code of Federal Regulations* stable has as many camels as derby winners.¹⁷³

Negotiation clearly has distinct advantages. It is therefore easy to fall into a "hot tub" view of negotiation as a method of settling disputes and establishing public policy: if only we strip off the armor of an adversarial hearing, everyone will jump into negotiations with beguiling honesty and openness to reach the optimum solution to the problem at hand. In fact, the process is far more complex than that. Negotiation must be carefully analyzed to determine not only whether it can work at all in the regulatory context, but also to identify those situations in which it is appropriate. Moreover, if a form of negotiation is to be used to develop rules issued by a government agency that determine the rights and obligations of the population at large, the process must be sensitive to methods of conducting negotiations and translating any result into a binding rule. Thus, the complex legal issues of how negotiations would relate to the APA and to the traditional political theories and values underlying rulemaking procedures must be examined.

IV. NEGOTIATING POLICY DECISIONS: ANALOGUES OF REGULATORY NEGOTIATION

Negotiating decisions to resolve important public questions is certainly not radical, nor is it particularly unusual. Although very few current federal regu-

As a result, important aspects of the issues that may determine whether a regulation works well may go without comment. Thus, the decisionmaker must decide issues without suitable guidance. The Occupational Safety and Health Act (OSHA) is a prominent example of this phenomenon on the legislative front. The parties were so preoccupied with fighting over whether to have any regulatory program and the structure and location of such a program that they virtually ignored the "detail" of what factors the agency should or must consider when issuing standards. Harter, *In Search of OSHA*, REGULATION, Sept.-Oct. 1977, at 33, 33-34 (discussing how legislative debate on OSHA focused on structural questions and failed to establish a policy for standard setting); see *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 512-13 (1981) (interpreting OSHA to require standards that adequately ensure that no employee will suffer material impairment of health; limited only by feasibility of standards).

171. Shuck, *supra* note 97, at 28 (litigation approach leaves decisionmaker remote from ambiguities and subtleties of problem).

172. As John Dunlop stated: "In our society, a rule that is developed with the involvement of the parties who are affected is more likely to be accepted and to be effective in accomplishing its intended purposes." Dunlop, *supra* note 109, at 887.

173. For a particularly vivid anatomical description of one such camel, see Ackerman & Hassler, *supra* note 7, at 1466, which discusses the problematic regulations implementing the Clean Air Act Amendments of 1977, 42 U.S.C. §§ 7401-7648 (Supp. IV 1980).

lations have been developed by negotiations, negotiations are used in many analogous situations. The experience of these analogous situations shows that, in appropriate circumstances, the use of negotiation to establish policy lives up to its promise.

A. CURRENT REGULATORY NEGOTIATION

A form of negotiation occurs in virtually every rulemaking of consequence. During the developmental stage of a rule, many of the major interest groups meet with agency representatives to express their views on the proposed rule.¹⁷⁴ Although these meetings are clearly a form of negotiation between an interested party and the agency, the negotiation is virtually always sequential. One party talks to the agency and then another and then another and so on. This is *not* the form of negotiation considered by this article. Rather, such negotiation envisions the interested parties sitting down together and addressing the issues together. Very few regulations have been developed by this process.¹⁷⁵

174. See, e.g., W. MAGAT, L. GIANESSI, & W. HARRINGTON, ENVIRONMENTAL REGULATION IN THEORY AND PRACTICE: EPA'S PROCESS OF SETTING BEST PRACTICABLE CONTROL TECHNOLOGY STANDARDS 2-14, 2-17 (1978) (study of Environmental Protection Agency's process of setting standards and its application of process to rulemaking for setting water quality standards) [hereinafter W. MAGAT, L. GIANESSI & W. HARRINGTON].

175. Professor Jaffe discusses the development of the Federal Communication Commission's (FCC) regulation of cable TV and the Federal Power Commission's setting producer prices of natural gas. Jaffe, *supra* note 2, at 1194 & n.61. Apparently, the FCC issued a letter of intent incorporating the policies it would follow with respect to cable television. The FCC explained that the policies resulted from an intensive study of the issues and a balance of the equities involved. The three major groups affected by the contemplated rules, broadcasters, cable operators and copywriters, entered into an agreement proposing three modifications to the regulations envisioned. The Commission adopted the changes. *Id.* at 1194. See *Geller v. FCC*, 610 F.2d 973, 979-80 (D.C. Cir. 1979) (agency properly adopted modifications only if agency shows modified regulations serve public interest).

Professor Stewart provides another example involving the FCC. Competing telephone service companies negotiated regulatory standards in a tariff agreement. Stewart, *supra* note 112, at 1351 n.284. Because the parties wished to reduce uncertainty and delay, the negotiations succeeded. OSHA also has negotiated at least two standards. One involved telecommunications, 29 C.F.R. § 1910.268 (1981) (standard applying to working conditions at telecommunication centers and field installations). Negotiation participants included American Telephone & Telegraph Corporation, the International Brotherhood of Electrical Workers, and the Communication Workers of America. OSHA monitored the process, but did not participate as a full member. Seymour Interview, *supra* note 168. OSHA negotiated a second standard involving electrical systems in hazardous locations. The negotiations were conducted under the auspices of the revision of the National Electric Code. See *infra* notes 592-593 and accompanying text (discussing Code's allowing nonmetallic sheathed cable in some locations, but requiring more expensive, safer wiring in places of public accommodation).

The Environmental Protection Agency (EPA) recently negotiated an agreement with the Chemical Manufacturer's Association for the testing of particular chemicals that would be conducted by the companies in lieu of a mandatory agency testing, 47 Fed. Reg. 335, 335 (Jan. 5, 1982) (follow-up response to Interagency Testing Committee on particular chemicals). In response to a protest filed by the Natural Resources Defense Council, EPA said it believed the agreement comported with its overall statutory responsibilities, and that it had afforded the public an opportunity to comment on the decision. *Id.* Importantly, the agency stated that it believed that the testing would be completed more expeditiously under the agreement than if the agency itself were to do it. *Id.* at 336. The companies agreed to waive all claims of confidentiality, and the agency planned to monitor developments carefully. *Id.*

Several years ago attempts were made to negotiate the automobile mileage requirements. R. GOODSON, FEDERAL REGULATION OF MOTOR VEHICLES: A SUMMARY AND ANALYSIS 12 n.10 (Mar. 1977) (Department of Transportation report, DOT-TS-11552) (discussing conflict over emissions standards in 1960's). The process fell apart when EPA refused to relax the emission standards called for in the agreement. *Id.* at 35.

There are also examples in which agencies negotiated a proposed rule with only one or a limited

Sequential negotiation is substantively different from the negotiation process outlined above because such negotiation is merely one form of the adversary process itself: each party attempts to sway the decisionmaker to a favorable disposition. Indeed, the very purpose of the sequential discussions is to persuade the decisionmaker to be sympathetic with the group's views. The competing parties themselves do not meet together to work out an accommodation. Moreover, the agency clearly remains sovereign and takes the position that it is the decisionmaker.¹⁷⁶ The interest groups negotiate as supplicants, not as sharers of the ultimate decision.¹⁷⁷ Such a process may be negotiation, but it is not consensus.

Genuine negotiation could be implemented under current law. Agencies could empanel representatives of the interests who have a stake in a rule and have them negotiate a proposed rule among themselves; the agency would then use the negotiated rule as the basis for a notice of proposed rulemaking.¹⁷⁸ Agencies are understandably hesitant to do so, however. First, they would have to qualify the group as an advisory committee under the Federal Advisory Committee Act (FACA),¹⁷⁹ which imposes various requirements not fully conducive to negotiations.¹⁸⁰ Second, the full reach and applicability of judi-

number of parties in interest. This, of course, is not the group consensus envisioned in regulatory negotiations. See *Center for Auto Safety v. Cox*, 580 F.2d 689, 690-91 (D.C. Cir. 1978) (Federal Highway Administration promulgated highway construction standards after meeting with state transportation agency, but not with parties with conflicting interests); *Moss v. Civil Aeronautics Bd.*, 430 F.2d 891, 893 (D.C. Cir. 1970) (court disallowed fare increases because public improperly fenced out of ratemaking process).

Undoubtedly, there are other examples in which regulations were negotiated in the first instance by the parties in interest and the notice of proposed rulemaking reflects a resulting consensus. Inquiries of many careful observers of the regulatory process, both inside the government and out, however, did not turn up many additional examples. One must conclude that very few regulations are developed under a negotiation process as discussed in this article.

176. Eisenberg points out the difference between discussion and negotiation. Eisenberg, *supra* note 127, at 674-75. Negotiation indicates an effort to reach an agreement and connotes that both parties have a rightful interest in the matter at hand. *Id.* Discussion, on the other hand, concedes that one of the parties has the power to impose the decision. *Id.*

177. See *infra* notes 515-46 and accompanying text (discussing various approaches to defining consensus).

178. Agencies do make extensive use of voluntary standards that reflect the consensus among the interests involved. See P. HARTER, REGULATORY USE OF STANDARDS: THE IMPLICATIONS FOR STANDARDS WRITERS 12-17 (Nov. 1979) (National Bureau of Standards report discussing use of industrial standards in agency regulation). In such a case, the agency reviews, and possibly modifies, a standard developed independently of the regulatory process even though everyone involved in drafting the standard knew it ultimately would become a regulation. *Id.* at 6. This regulatory use of standards is closely analogous to negotiation of regulations. See *infra* notes 184-93 and accompanying text (discussing numerous agency standards originating as voluntary consensus standards).

179. 5 U.S.C. app. §§ 1-15 (1976 & Supp. IV 1980); see *Center for Auto Safety v. Cox*, 580 F.2d 689, 694 (D.C. Cir. 1978) (group became advisory committee within meaning of FACA when federal administrator disclosed proposed regulations to and obtained advice from select group); FACA Recommendation, *supra* note 128 (suggesting implementation be relaxed in certain circumstances).

180. For example, before an advisory committee can be convened, a charter must be approved by the head of the agency involved and the Director of Office of Management and Budget. 5 U.S.C. app. § 9 (1976 & Supp. IV 1980). Apparently, agencies have found the chartering process time-consuming and cumbersome. See FACA Recommendation, *supra* note 128 (discussing failure of many de facto committees to be officially chartered). Notice of meetings of advisory committees must be published in the *Federal Register* and meetings must be open to the public unless good cause is shown to hold the meeting in private. *Id.* § 10(a)(1). FACA further provides that an officer of the federal government has the authority to adjourn each meeting and to prohibit the committee from conducting business in the absence of that officer. *Id.* § 10(e). Thus, it clearly gives supremacy to an officer of the federal govern-

cially imposed ex parte rules is unclear.¹⁸¹ An agency may fear that a court would find it inappropriate to permit the parties to participate in a negotiated rulemaking when the avowed purpose of the negotiation is to develop a proposed rule for the agency. Several judicial decisions are sometimes read as casting doubt on the legality of all ex parte communications.¹⁸² Those decisions, however, probably can be limited to their facts because in each case the agency was importuned by and struck agreements with only a few parties; the agency did not develop a consensus among the range of affected interests.¹⁸³ Thus, properly constituted committees and ex parte rules should not be insurmountable obstacles to the institution of negotiations in the rulemaking process.

B. CONSENSUS STANDARDS

Probably the closest analogue to negotiated rules lies in the vast array of

ment. FACA also emphasizes that an advisory committee is just that. Therefore, determination of action to be taken and policy to be expressed rests solely with the government. *Id.* § 9(b).

Taken together, these restrictions inhibit the use of FACA for convening the regulatory negotiation committee. Compliance with the FACA can be time-consuming, and the requirement for public meetings can be inhibiting. See *infra* text accompanying notes 452-54 (discussing advantages and disadvantages of public meetings). The public meeting requirement places a distance between the committee and the government. That is not to say, however, that FACA's requirements are insurmountable. They clearly are not and, indeed, if sympathetically administered, FACA would not be a major inhibition to convening a regulatory negotiation group.

181. See Murphy Memorandum, *supra* note 128 (discussing impact of court decisions on ex parte contacts on advisory committees composed of government officials).

182. Two cases in particular exhibit this problem. In *Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977), the court condemned ex parte contacts with industry. *Id.* at 55-57. In that case, the agency restricted the forum for adversarial comment, and the secrecy impeded judicial review of the agency's decision. *Id.* at 55-56. Moreover, undue influence threatened fundamental fairness. *Id.* at 56-57. In *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970), the court disallowed fare increases approved by the Civil Aeronautics Board because the agency held ex parte meetings with industry and conducted only pro forma hearings which improperly fenced the public out of the ratemaking process. *Id.* at 893. See also Stewart, *supra* note 112, at 1345-46 (discussing questionable nature of undisclosed, off-the-record communications between interested outside parties once formal comment period has begun).

183. *Home Box Office*, 567 F.2d at 51-52; *Moss*, 430 F.2d at 893. As Stewart observes, however, such cases do cast doubt on the legality of off-the-record communications between interested outside parties and it is by no means clear that the inclusion of a broader range of interests would remove such a doubt. Stewart, *supra* note 112, at 1345-46. This doubt is the major inhibition on agency use of a negotiation process.

During the debate on the proposed recommendation before the ACUS, Professor Davis pointed out that ex parte contacts are not proscribed before a rulemaking proceeding begins. Remarks of Professor Kenneth C. Davis, 23d Plenary Session of the Administrative Conference of the United States (June 18, 1982). Other members of the Conference argued that because agencies are insecure about when the prohibitions begin, they are reluctant to engage in such contacts once the agency has begun to work on a specific rule, even if no notice of proposed rulemaking has been published. Remarks of Chairman Olpin, 23d Plenary Session of the Administrative Conference of the United States (June 18, 1982). Uncertainty about whether a court would interpret the empaneling of a committee for negotiation of a rule as the beginning of the rulemaking process, thus precipitating application of the restrictions, heightens such insecurity. Because of the inhibitions placed on the use of negotiation to develop proposed rules by the FACA prohibitions on ex parte contacts, ACUS formally recommended that "Congress should facilitate the regulatory negotiation process by passing legislation authorizing agencies to conduct rulemaking in the manner described in this recommendation." Recommendation 2, Administrative Conference of the United States, Recommendation 82-4, 47 Fed. Reg. 30,701-30,709 (1982). In particular, it recommended freeing agencies of the restrictions of FACA and ex parte limitations and providing that information tendered during the process is not subject to the Freedom of Information Act. *Id.*

standards developed through a consensus process.¹⁸⁴ The subjects of these standards, of which there are tens of thousands, range in complexity from the mundane, such as threads for fitting light bulbs to lamps, to the esoteric, such as control technologies for nuclear plants or storage facilities for liquified natural gas. Many consensus standards have been the basis of mandatory regulatory requirements.¹⁸⁵ For example, the National Electric Code,¹⁸⁶ which is claimed to be the most widely adopted model code in the world, is developed through the consensus process.¹⁸⁷

Consensus standards are developed through a structured decisionmaking process among representatives of interests materially affected by the standard.¹⁸⁸ The parties frequently confront difficult value choices, such as trade offs between cost and safety.¹⁸⁹ Development of standards is, therefore, a form of regulatory negotiation,¹⁹⁰ and their very existence demonstrates that complex, value-laden rules can be negotiated.¹⁹¹ Indeed, virtually every person in the United States daily entrusts his life to such negotiated rules, in the form of electrical and building codes, product safety standards, and workplace safety and health standards.¹⁹² Standards developed through a consensus process are available, however, only in situations in which a standards-writing organization can address adequately the issues raised by a proposed rule.¹⁹³ This article is addressed largely to those situations in which such a resolution is not possible.

184. See generally Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329 (1978) (federal agencies can utilize experience and expertise used to develop private consensus standards and ensure the protection of interests of consumers, workers and small businesses); P. HARTER, *supra* note 178, at v (discussing how private standards writers can better anticipate government use of their standards).

185. P. HARTER, *supra* note 178, at 2 (many government standards based on standards developed by private organizations).

186. NATIONAL ELECTRIC CODE (National Fire Protection Ass'n 1975).

187. Summers, *Preface* to THE NATIONAL ELECTRIC CODE HANDBOOK, at ix, xi (W. Summers ed. 1978).

188. See *infra* text accompanying notes 521-22 (describing consensus process that usually requires approval of more than a bare majority and provides reconsideration through appeal mechanism).

189. See *infra* text accompanying notes 588-93 (discussing how consensus process helps resolve difficult trade offs).

190. For a discussion of the ways in which consensus standards are used in regulations, see Administrative Conference of the United States, Recommendation 78-4, 1 C.F.R. § 305.78-4 (1981) (urging agencies with authority to issue health and safety regulations to interact with private standard writing organizations); P. HARTER, *supra* note 178, at 12-17 (discussing use of standards in agency regulation); Hamilton, *supra* note 184 (federal agencies can utilize the experience and expertise of private consensus standards and ensure protection of interests of consumers, workers, and small businesses).

191. Professor Stewart argues that the areas in which consensus standards have been developed are those in which firms already have a "substantial incentive to adopt and adhere to voluntary standards," and that incentives to develop such standards may be lacking in other regulatory areas, such as environmental control. Stewart, *supra* note 112, at 1343. Although Professor Stewart's analysis may not take adequate account of the diversity of interests involved in developing many consensus standards, such diversity often means that no single, unifying incentive brings the parties together to write a standard. Nevertheless, Professor Stewart raises the critical point that parties need an incentive to negotiate a standard or rule. If negotiation of regulations is to work, the single most important question is whether the parties in interest will get together to negotiate a consensus position.

192. See MacAvoy, *Preface* to OSHA REGULATIONS (P. MacAvoy ed. 1977) (analyzing task force results on revising OSHA regulations); P. HARTER, *supra* note 178, at 13 n.11, 14 n.13 (same). Hamilton, *supra* note 184, at 1386-1436 (discussing standards of various government agencies).

193. See J. Young, *Technological Innovation and Health, Safety and Environmental Regulation*, ch. 8, 24-30 (1982) (unpublished manuscript for Office of Technology Assessment contrasting voluntary standards and negotiated regulations).

C. SETTLEMENTS

Negotiations of the sort under examination here play a vitally important role in the regulatory process in the form of the settlement of lawsuits challenging rules promulgated by an agency. Interestingly, the settlement of litigation challenging rules has generated little attention in either the literature¹⁹⁴ or regulatory theory.¹⁹⁵ It is a relatively common occurrence, however, for parties that have challenged a regulation to negotiate an acceptable agreement.¹⁹⁶ In return for withdrawing the petition challenging the rule, the agency frequently

194. See Cohen, *Settling Litigation: A New Role for Regulatory Lawyers*, 67 A.B.A. J. 878, 878 (1981) (negotiations between industry and government can lead to improvement of regulations when industry shows sense of restraint). Negotiated settlement of rate cases, however, has been analyzed. Morgan, *supra* note 24, at 21 (discussing reduction of administrative delay through various methods, including increased use of informal rulemaking); Spritzer, *Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices*, 120 U. PA. L. REV. 39, 39 (1971) (discussing how use of summary power to suspend proposed tariff change can induce company to negotiate for modified proposal); Administrative Conference of the United States, Recommendation 78-1, 1 C.F.R. § 305.78-1 (1981) (advocating participation of agencies charged with ratemaking responsibility in negotiated settlements, if agency also takes account of public interest); Administrative Conference of the United States, Recommendation 72-4, 1 C.F.R. § 305.72-4 (1981) (discussing suspension and negotiation of rate proceedings by federal regulatory agency).

195. The settlement of agency adjudication has been both analyzed and specifically provided for in the APA. 5 U.S.C. § 554(c) (1976). The Senate Judiciary Committee claimed in the legislative history of the APA that "even courts through pre-trial proceedings dispose with much of their business [by informal settlement]. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process . . ." LEGISLATIVE HISTORY, *supra* note 12, at 24; see Zimmer & Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 76 DUKE L.J. 163, 163 (1976) (interests of public or parties not privy to Government's case may not receive adequate consideration in formulation of consent decrees); Comment, *Public Participation in Federal Administrative Proceedings*, 120 U. PA. L. REV. 702, 704 (1972) (study of the legal mechanisms by which groups seeking to represent or promote public interest permitted to participate in certain proceedings); MacIntyre & Volhard, *Intervention in Agency Adjudications*, 58 VA. L. REV. 230, 232 (1972) (describing how public standing to intervene in administrative proceedings can pose serious threat to intra-agency allocation of resources).

196. For example, the EPA is reportedly negotiating a settlement for the automobile industry concerning its emission standards and mileage testing procedures. The negotiations are an attempt to settle eight lawsuits filed by the auto industry. Wash. Post, Nov. 27, 1981, at A1, col. 3. The Department of Labor is reportedly attempting to settle litigation over its standard for occupational exposure to arsenic. Legal Times of Wash., July 27, 1981, at 1, col. 1. Negotiations concerning regulations of the Department of Interior involving strip mining have been conducted. Wash. Post, Apr. 3, 1981, at A6, col. 4. EPA's regulations requiring pretreatment of effluents by industrial plants have been the subject of negotiation. Legal Times of Wash., July 2, 1979, at 1, col. 4. The 30 phase one effluent guidelines issued by the EPA under the Federal Water Pollution Control Amendments of 1972 were subjected to judicial review, and nine of the suits were settled. W. MAGAT, L. GIANESSI & W. HARRINGTON, *supra* note 174, at 2-46. Further, a number of other guidelines apparently were modified in response to meetings between industry and the EPA prior to the industry's filing suit. *Id.* at 2-49, 2-50.

EPA's implementation of the Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. IV 1980), is an example of a particularly elaborate settlement. In *Environmental Defense Fund v. Costle*, 636 F.2d 1229 (D.C. Cir. 1980), the EPA, in settling challenges by various environmental groups, agreed to a comprehensive strategy for implementation of the Act. *Id.* at 1235. After the agreement was submitted to the district court for approval, the district court held hearings and allowed interested parties to file comments on the agreement. Corporate interests intervened in the proceedings and filed comments vigorously opposing the proposed agreement. After requiring several modifications, the district court found it a just, fair, and equitable resolution of the issues raised. *Id.* at 1235. The EPA, the environmental groups, and the National Coal Association signed the agreement. Because the environmental groups believed that the EPA was not living up to the terms of the agreement and industry representatives were disgruntled, they filed a suit against EPA. *Id.* at 1235-36. Interestingly, the court remanded the case for determination of whether it was appropriate for the agency to enter into an agreement that might infringe the discretion Congress committed to the administrator. *Id.* at 1259. During the remand, the EPA asked the district court to modify the agreement on grounds of the EPA's

agrees to publish a change in the regulation as a proposed rule.¹⁹⁷ Because the main parties in interest negotiated the change, few comments are received, and the agency then modifies the rule in accordance with the negotiated agreement.¹⁹⁸ Of course, if an agency receives comments necessitating a change from the negotiated agreement, it must change the rule accordingly. By and large, the process seems to work fairly well.¹⁹⁹

The setting of the challenge to a rule may explain why the parties negotiate before litigation rather than earlier in the rulemaking process. The challenge facilitates negotiations in at least four respects. First, the parties are well defined. Those who filed suits challenging the rules are eligible to participate in

changed circumstances with respect to budget cutbacks and additional duties. Wash. Post, Aug. 11, 1981, at A13, col. 3.

197. Cohen, *supra* note 194, at 881 (industry will consider dropping important legal points in exchange for modifications in regulatory language); W. MAGAT, L. GIANESSI & W. HARRINGTON, *supra* note 174, at 2-49 (discussing industry offer to give EPA opportunity to withdraw or amend regulations rather than filing lawsuit).

In *Shell Oil Co. v. EPA*, No. 80-1532 (D.C. Cir.) more than 40 petitions for review were filed concerning EPA's regulations issued under the Resource, Conservation and Recovery Act, 42 U.S.C. §§ 6901-6989 (1976 & Supp. IV 1980) (provisions governing solid waste disposal). Anthony Z. Roisman of the Department of Justice sent a letter to counsel for petitioners in the case asking each to submit a list of the issues intended to be pressed in the suit. He also requested counsel to "explain which problems raised by your client during the rulemaking have not been adequately addressed and which specific solutions to those problems suggested by your client in the rulemaking should have been adopted." Letter from Anthony Z. Roisman, Chief of Hazardous Waste Section of United States Dept. of Justice, to counsel (Sept. 5, 1980), *Shell Oil Co. v. EPA*, No. 80-1532 (D.C. Cir. filed Sept. 5, 1980) [hereinafter Roisman letter] (copy on file at *Georgetown Law Journal*). He then called a meeting of all counsel that had submitted a list of issues to discuss how the proceeding could be organized. The meeting was open only to the parties; a member of the press who sought admission was turned away. The Department of Justice and the EPA sought and received additional information on a number of issues. Roisman Interview, *supra* note 106. The Chairman of the Industry Steering Committee, Roger Streeelow, indicated, however, that he thought very little new data was submitted; rather, the position could be clarified and expanded upon in a way that would address details. Interview with Roger Streeelow, Chairman of Industry Steering Committee (July 29, 1981) [hereinafter Streeelow Interview] (copy on file at *Georgetown Law Journal*). The EPA divided the issues into three categories: those with which it largely agreed with the industry position and with which it was willing to file a notice of proposed rulemaking in the *Federal Register* embodying the change; those with which EPA disagreed with the industry position but the distance between EPA and industry was so minimal that the EPA was willing to negotiate positions; and those with which EPA disagreed with the industry and the disagreement was sufficiently great that EPA was prepared to litigate the issue. Roisman Interview, *supra* note 106; Streeelow Interview, *supra*.

198. See Rogers Interview, *supra* note 107 (stating that when short response date for comments set, regulations seldom change after notice for public rulemaking). In one case, however, the EPA had established requirements for hazardous waste. 40 C.F.R. §§ 262.10-.51, 263.10-.31 (1980). The Solid Waste Management Association petitioned for further rulemaking to extend the coverage of the regulation to small scale generators and transporters. The EPA responded and published a proposed rule requiring expanded coverage. 45 Fed. Reg. 68,409 (1980). It received 250 comments. Government's March, 1981 Report on Status of Negotiations, *Shell Oil Co. v. EPA*, No. 80-1532 (D.C. Cir. filed Mar. 10, 1981) (copy on file at *Georgetown Law Journal*).

199. See Streeelow Interview, *supra* note 197 (describing agency reactions to successful negotiations). Mr. Roisman, however, argues that negotiations and settlement of lawsuits develop a counterproductive set of incentives. He argues that if a party knows it can settle a challenge to a rulemaking, the party is more likely to take extreme positions during the rulemaking proceeding because it can challenge the rule if it fails to achieve its goals. The parties also are likely to file a defensive challenge to a rule to ensure that they are included in any settlement discussions that may take place. Thus, a party who is satisfied with the rule may challenge the rule simply to protect its interest. Roisman Interview, *supra* note 106. Another attorney argued that publishing a notice of proposed rulemaking that reflects a settlement diminishes public participation because the public believes that the agency is locked into the choice that was developed with a narrow range of interests. Statement of L. Thomas Galloway, Wash. Post, Apr. 3, 1981, at A6, col. 1.

the settlement negotiations. Second, the issues are defined and ripe for decision. Each party has stated its initial position; the agency in the rule itself, and the parties in their challenges to the proposed rule.²⁰⁰ Parties therefore can focus squarely on the issues separating them instead of either anticipating what someone else may say or fighting a legal straw man. Moreover, they can concentrate on the details of the issues, unlike the adversarial process of setting a rule in which parties must focus on the more important points.²⁰¹ Third, the agency recognizes that it does not control the ultimate decision because the final decision rests with the court. The agency therefore no longer acts as a sovereign; rather, it stands before the court on a rough par with the private parties. Finally, there is a deadline for reaching an agreement. If they do not settle the case or postpone its consideration, the court will decide. Thus, if the parties themselves are to negotiate an agreement, they must do so before the court moves. These four factors are important, perhaps essential, prerequisites for successful regulatory negotiation.²⁰²

D. PUBLIC LAW LITIGATION

Another area in which public policy decisions closely resemble negotiated rules is public law litigation. After plaintiffs establish liability, the court frequently asks the parties to negotiate a remedy to be contained in the court's decree.²⁰³ Negotiations take place within the context of the general conclusions of law and findings of fact made by the court.²⁰⁴ Each party recognizes that it must respond to the demands of the other party in the negotiation process because any unresolved issues will be submitted to the court for its resolution.²⁰⁵

E. NATIONAL COAL POLICY PROJECT

Perhaps the best known example in which parties that are usually adversarially negotiated numerous agreements concerning public policy was the National Coal Policy Project. This effort originated when Gerald L. Decker, Corporate Energy Manager of Dow Chemical Company, concluded that Dow needed to use more coal to generate electricity, but that major environmental problems could delay implementation of its plan.²⁰⁶ He decided that it would

200. Another beneficial aspect of a settlement discussion is that the Department of Justice sometimes acts as a mediator helping the parties to redefine the issues, to assess their true interests, and to attempt to reach an accommodation. Interview with Joseph B. Scott, formerly of the Civil Appellate Division, U.S. Department of Justice (July 16, 1981) [hereinafter Scott Interview] (copy on file at *Georgetown Law Journal*).

201. See *supra* notes 170-71 (discussing how adversarial process causes parties to overlook details).

202. See *infra* text accompanying notes 239-41 (discussing requirement that negotiation must benefit party before incentive to participate exists).

203. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298 (1976).

204. *Id.* at 1299-1300.

205. See *id.* at 1281 (discussing advanced role of federal judiciary in determining issues of public law).

206. Interview with Francis X. Murray, Project Director of National Coal Policy Project, Center for Strategic and International Studies, Georgetown University (May 19, 1981) [hereinafter Murray Interview] (copy on file at *Georgetown Law Journal*). In part because of his participation in studies performed under the auspices of the Technical Advisory Board of the Department of Commerce, Decker concluded that it was important for the United States to shift from the use of oil and natural gas to coal. Decker and others concluded that it would not occur without the reconciliation of environmental and

be appropriate to bring the parties in interest together to discuss the environmental issues surrounding the increased use of coal, rather than wait for the adversarial process to begin.²⁰⁷ He approached Laurence I. Moss, formerly the President of the Sierra Club, and inquired about the feasibility of organizing a group of environmentalists to meet with industry representatives about coal issues.²⁰⁸ Although Moss was at best lukewarm about the idea, he convened a meeting of environmentalists to discuss the invitation.²⁰⁹ Many environmentalists were hostile to the idea. Some denounced it as a sell-out to industry and refused to participate; others, however, agreed to negotiate.²¹⁰

The identification of interests and the creation of networks led to the formation of industry and environmental coalitions as the initial members identified others who should participate. Decker and Moss decided that a neutral third party should chair the meetings and that an institutional home was necessary to provide administrative support.²¹¹ John Dunlop chaired the first meeting, and thereafter Francis X. Quinn of the Temple University Business School served as chairman.²¹² Georgetown University's Center for Strategic and International Studies became the sponsor, and its Francis X. Murray functioned as the project director.²¹³ Five government agencies, four foundations, and eighty corporations provided funding for the enterprise.²¹⁴ The participants broke into a series of task forces to consider various aspects of the increased use of coal.²¹⁵ At the outset, they agreed that because of basic value differences, agreement on certain issues would be impossible even if the parties agreed on the facts. In those instances the parties stated their respective views and the reasons for not attempting decision.²¹⁶

The parties involved in the National Coal Policy Project reached agreement on over two hundred recommendations, some of which had far reaching import.²¹⁷ Although no regulatory agency participated directly in the negotiations, several attended as observers. The agencies stated that they did not want to be voting participants because they wanted to preserve their political flex-

industrial interests. [Summary and Synthesis] WHERE WE AGREE: REPORT OF THE NATIONAL COAL POLICY PROJECT I [hereinafter NCPP SUMMARY].

207. NCPP SUMMARY, *supra* note 206, at 1.

208. *Id.*

209. *Id.*

210. *Id.* Interview with Laurence I. Moss, former President of Sierra Club (Apr. 2, 1981) (copy on file at *Georgetown Law Journal*) [hereinafter Moss Interview]; Murray Interview, *supra* note 206; NCPP SUMMARY, *supra* note 206, at 1.

211. Moss Interview, *supra* note 210.

212. *Id.*; NCPP SUMMARY, *supra* note 206, at 2.

213. [Volume 1] WHERE WE AGREE: REPORT OF THE NATIONAL COAL POLICY PROJECT iii (1978) [hereinafter NCPP VOLUME 1].

214. NCPP SUMMARY, *supra* note 206, at 67-68. The expenses of participating environmentalists were paid from contributions from the foundations and government agencies in order to avoid any appearance that the environmentalists had a conflict of interest by receiving corporate funds. *Id.*; Murray Interview, *supra* note 206.

215. The task forces were mining, transportation, air pollution, fuel utilization and conservation, energy pricing and emission charges. NCPP SUMMARY, *supra* note 206, at vii.

216. NCPP SUMMARY, *supra* note 206, at xvii; see NCPP VOLUME 1, *supra* note 213, at 131-47 (discussing unresolved issues of Air Pollution Task Force).

217. Most of the recommendations reflect broad, general agreement. Overall, they do not include the details of how the agreement could be implemented. Nor are they sufficiently detailed that they could be used as a regulation. See NCPP SUMMARY, *supra* note 206, at 9-13 (stating that various policies should be adopted).

ibility. By refraining from voting, the agencies were able to evaluate the recommendations as a group and to pick and choose the recommendations they wished to use as a basis for proposed rulemaking.²¹⁸ Although it did not attribute the recommendation to the Coal Policy Project, the Federal Energy Regulatory Commission (FERC) used one recommendation as the basis of a proposed rule.²¹⁹ Another agency, the Office of Surface Mining (OSM) of the Department of the Interior, opposed the Project recommendations on the grounds that it did not participate in the development of the recommendations.²²⁰ Although the full effect of the Project on public policy in general, and on regulatory issues in particular, remains unclear,²²¹ it has been widely heralded as an important attempt to establish a policy dialogue among conflicting interests and to reach a consensus on policy.²²²

F. DIALOGUE GROUPS

Corporate and environmental interests have engaged in "dialogue groups" concerning the regulation of toxic substances.²²³ Sam Gusman of the Conservation Foundation developed this process as a result of his quest to find a "better way" than the adversarial process to develop regulations. Although the nearly uniform response to his suggestion was that it probably would not work, many expressed interest in participating if such a group were empaneled. A group was convened, with Gusman acting as facilitator to help define the issues, to build trust and to transmit the work product to the relevant parties. The group began with a relatively easy issue in order to build trust.²²⁴ As the group explored more complex areas, they brought in individuals with a particular expertise, and the original group developed into a steering committee for a number of dialogue groups that worked on the respective issues. The groups reached consensus recommendations on a number of issues.²²⁵

G. ENVIRONMENTAL NEGOTIATION

By far the widest range of experience with negotiating agreements on issues

218. Murray Interview, *supra* note 206.

219. *Id.*

220. *Id.* The OSM may only have been responding to the views of an important constituent. Some of the more vocal environmental groups that were extremely active in securing strip mining legislation refused to participate on the ground that any agreement reached could only compromise the goal of the new legislation. M. WESSEL, *supra* note 80, at 171-72.

221. See *Joint Hearings Before the Select Comm. on Small Business and the Subcomm. on Oversight of Government Management of the Senate Comm. of Governmental Affairs on Regulatory Negotiation*, 96th Cong., 2d Sess. 7 (1980) (Statement of Harrison Loesch, Vice President, Government Relations, Peabody Coal Company) (several bills currently before Congress contain Project recommendations; host of regulatory recommendations adopted, and many Project board policy recommendations of the Project have entered the national policy debate) [hereinafter *Regulatory Negotiation Hearings*]; *Introduction to [Overview 1976-1981] WHERE WE AGREE: REPORT OF THE NATIONAL COAL POLICY PROJECT* (1981) [hereinafter *NCPP OVERVIEW*]. The final stage of the project is an assessment of the entire process, and that is currently underway. Moss Interview, *supra* note 210.

222. *NCPP OVERVIEW*, *supra* note 221 (collection of articles, letters, and commentary concerning project).

223. *Regulatory Negotiation Hearings*, *supra* note 221, at 55-56 (Statement of Sam Gusman, Senior Associate, Conservation Foundation).

224. The first topic was the need for additional toxicologists. *Id.* at 56.

225. Interview with Sam Gusman, Senior Associate, Conservation Foundation (June 17, 1981) [hereinafter *Gusman Interview*] (copy on file at *Georgetown Law Journal*).

with significant public policy ramifications has occurred in the environmental area. Most of these negotiations have involved a specific dispute over the environmental consequences of a particular action at a specific site.²²⁶ Thus, the scope of these negotiations is closer to decisionmaking in an adjudicatory context than in a rulemaking context. The subjects negotiated include the location of a highway in the face of competing values and interests among the affected citizens;²²⁷ the effect of a uranium mine on the environment and the actions a mining company would take to mitigate adverse consequences;²²⁸ the actions of industrial plants to reduce pollution;²²⁹ the construction of dams;²³⁰ the access to beaches on nonpublic land;²³¹ and the coordination of several government agencies concerned with different aspects of the Columbia River.²³²

This body of experience has generated extensive literature analyzing various instances of negotiation and mediation.²³³ Negotiation has become so established and widespread in the environmental area that the Conservation Foundation publishes a quarterly newsletter devoted to "environmental dispute resolution."²³⁴ Similarly, a number of organizations have been established to aid parties in resolving conflicts concerning environmental questions.²³⁵ The best known of these groups is perhaps the Institute for Environmental Mediation, the successor of the Office of Environmental Mediation of the University of Washington. It was founded in 1973 and is funded primarily by foundations for the purpose of providing experienced mediators to help settle disputes through negotiation.²³⁶

Environmental negotiations raise many of the same issues, but by no means all, that negotiation among interested parties developing a proposed rule would raise. For example, environmental negotiations are frequently polycentric, that is, they are "characterized by a large number of possible results and by the fact that many interests or groups will be affected by any solution

226. See generally L. Susskind, L. Bacon & M. Wheeler, *Resolving Environmental Regulatory Disputes* (1982) (unpublished collection of case studies of environmental negotiation and mediation) (to be published under contract with Environmental Protection Agency).

227. A. TALBOT, *ENVIRONMENTAL MEDIATION: THREE CASE STUDIES* 15 (1981) (construction of Interstate 90 in Seattle, Washington).

228. See *supra* text accompanying notes 162-65 (concerning Homestake Mining Company's pitch mine).

229. See generally T. Sullivan, *The Colstrip Power Plant Controversy*, in L. Susskind, L. Bacon, & M. Wheeler, *supra* Note 226 (unpublished report prepared for the Environmental Negotiations Project, Laboratory of Architecture and Planning, under grant from EPA) (detailing dispute over Montana power company's addition of two coal fired electric power plants to facilities at Colstrip, Montana).

230. See *supra* text accompanying notes 160-61 (discussing dispute over construction of Snoqualmie Dam in state of Washington).

231. See generally A. TALBOT, *supra* note 227, at 5 (beaches on Portage Island, Washington to be reached via sand bar owned by Lummi Indian tribe).

232. Gusman Interview, *supra* note 225. Gusman mediated the negotiation between EPA, Department of Interior, Department of Commerce, Port Authority, and several state agencies.

233. G. BINGHAM, B. VAUGHN & W. GLEASON, *ENVIRONMENTAL CONFLICT RESOLUTION* (1981) (annotated bibliography published by Conservation Foundation).

234. The Conservation Foundation's newsletter, *RESOLVE*, is the successor to *ENVIRONMENTAL CONSENSUS*, formerly published by *RESOLVE*, Center for Environmental Conflict Resolution.

235. See *Update*, in *ENVIRONMENTAL CONSENSUS* 7-8 (Winter 1981) (list of eleven groups established to resolve environmental conflicts).

236. Brochure of the Institute for Environmental Mediation (description of functions of the Institute for Environmental Mediation) (copy on file at *Georgetown Law Journal*).

adopted."²³⁷ Environmental negotiations, therefore, must resolve clashes of competing values for which there are no explicit right or wrong answers. They require the identification of interests affected by the dispute resolution that should be parties to the negotiation. Further, environmental negotiations require identification of the appropriate representatives of the respective groups. Finally, resolution of environmental disputes frequently requires the satisfactory determination of complex factual issues. Thus, the principles of environmental negotiation, both theoretical and practical, are generally applicable in the regulatory context.

Negotiations of complex technical standards, settlements of lawsuits challenging regulations, decrees in public law actions, recommendations of the National Coal Policy Project and the toxic substances dialogue groups, and the agreements settling environmental disputes all reveal the principles that guide the use of negotiation for developing regulations.²³⁸

V. NEGOTIATING REGULATIONS

What follows is a proposal designed to make negotiating rules attractive to agencies and to the affected private interests. It is derived from the accumulated experience in and analysis of areas in which policy has been negotiated. The proposal is also designed to provide appropriate legal safeguards to protect the rights of those affected by a regulation and to prevent abuse. Although these safeguards are based on traditional notions of administrative law, they are adapted to the negotiation situation.

The following proposal is made up of several interrelated components. Its overall goal is to provide a structure for more direct and effective participation by those interested in rulemaking. The success of any single component of the proposal, however, is not determinative of its overall success. For example, it would not be a legitimate criticism of a negotiation to say that a consensus could not be reached on implementation language or on all facets of a proposed rule if the process narrowed the issues and reduced hostilities, facilitating the development of the final rule. Thus, the components of a proposal should be assessed separately and in light of the ultimate goal of the negotiation.

A. CONDITIONS THAT IMPROVE THE LIKELIHOOD OF SUCCESSFUL NEGOTIATIONS

Negotiating is no more appropriate for developing all proposed rules than it is for settling all disputes. In this context, as in others, the "hot tub" theory is not true: people do not get together to resolve disputes with openness and reasonableness simply because the process is labeled nonadversarial.²³⁹ A

237. Boyer, *supra* note 30, at 117 (defining and giving examples of polycentric problems).

238. See *infra* text accompanying notes 278-85 (summary of principles favoring use of negotiation: balance of powers; limited number of parties; ripe issues; inevitability of regulation; mutually acceptable criteria; and expectation that negotiated agreement will influence outcome).

239. See *supra* text following note 173 (discussing "hot tub" view of negotiations; belief that parties favor process because labeled nonadversarial).

party must believe that it will benefit from negotiation.²⁴⁰ Indeed, no party will agree to use *any* forum to reach a decision in which it is interested unless, all things considered, it believes it is more likely to achieve its overall goals by using that process instead of some other available decisional process.²⁴¹

For example, in the simple situation in which a consumer believes that he purchased defective goods from a store, he must decide whether to seek reparation by negotiation with the store, by filing suit, by complaining to the dealer's manufacturer, by going to the Better Business Bureau, or by some combination of these alternatives. The store may conclude that negotiation is in its interest and, therefore, offer to negotiate or settle in response to the purchaser's initial inquiry. The store's decision to negotiate may be based on the conclusion that the store is unlikely to win the lawsuit and that it may be able to achieve more or to lose less through negotiation. Or, the store may look beyond the individual dispute to its long run interests in maintaining its good relations with its customers, the manufacturer, or the business community and negotiate despite its belief that it was not at fault and would prevail in litigation. Thus, each party attempts to determine which method of resolving the complaint would maximize its return and to use that process to reach a decision.²⁴²

The process that is ultimately used must take account of the relative power of the parties.²⁴³ Power derives from various sources. Power may stem from bargaining strength. An example of such bargaining strength would be a situation in which a landlord commands a high price because little alternative space is available, and the tenant is not "entitled" to a low rent.²⁴⁴ The landlord in such a situation has a great deal of leverage. In the regulatory context a party may have power because of its significant political clout or strong factual argument. Norms that can be enforced to guide the resolution of the matter, such as rent control, also may be a source of power. In the bargaining over rent in the above example, the dwelling may be subject to rent controls. In such a situation, discussions would focus on application of the norms, as em-

240. For a critique of the literature analyzing incentives to bargain and how the bargainers determine their outcome by discounting other means of reaching decisions, see S. BACHARACH, E. LAWLER & J. SHEDD, *Critique of Bargaining Theory*, in S. BACHARACH & E. LAWLER, *BARGAINING: POWER TACTICS AND OUTCOMES* 1-40 (1981). For a discussion of the alternative mechanisms for resolving disputes, see R. LUCE & H. RAIFFA, *GAMES AND DECISIONS* viii (1957) (discussing game theory as individual decisionmaking in the context of conflict with other individuals and inherent risk in outcomes); Boyer, *supra* note 30, at 111 (contrasting attributes of trial type hearings with other forms of decisionmaking available to administrative agencies); Fuller, *Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 353 (discussing possible variation in elements that constitute form of adjudicatory process); Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 305 (1971) (discussing value of mediation and analyzing various situations characterizing need for and functions performed by mediator); Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 79 (1976) (discussing alternative ways of resolving disputes outside the courts to reduce caseload of federal judiciary).

241. Eisenberg, *supra* note 127, at 675-76 (discussing various means by which stronger party may be induced to enter negotiations).

242. The President's Commission for a National Agenda for the Eighties stated in its report: "Procedures, because they assign roles to various interest groups or institutions in the setting and implementing of policy, determine the relative influence of the parties affected by regulation." GOVERNMENT AND REGULATION, *supra* note 14, at 46.

243. "Assumption 1: Power Is the Essence of Bargaining." S. BACHARACH & E. LAWLER, *supra* note 240, at 43.

244. The example is from Eisenberg, *supra* note 127, at 667-71.

bodied in the regulations, to the circumstances at hand. Similarly, if a statute specifies the criteria to be used in developing a regulation, the parties' discussions would center on applying those criteria. In the latter two examples, if discussions break down, the parties can invoke a formal process by which to make the decision.²⁴⁵ Power also may derive from the ability to invoke alternative decisional processes. The process used may influence the extent to which bargaining power or norms enter into the decision. Moreover, the process may have a substantial effect on costs, delay, uncertainty, and the parties' participation in the decision.²⁴⁶

Each of these forms of power must be considered in developing a process for regulatory decisions. If, for example, one party has strong bargaining power, it would be inappropriate to use negotiation to develop a regulation because the prevailing norms might be ignored or a party might surrender the power it derived from the traditional process. Nor is it realistic to believe that the norms will be the exclusive manner of decision if one party has sufficient bargaining power to alter the governing norms. Thus, the decisional process must accommodate the various forms of power the parties in interest possess.²⁴⁷ Negotiation should be viewed as an alternative method of rulemaking to be used when it is superior to other processes. Therefore, it is necessary to determine the conditions in which negotiations are appropriate.

The discussion that follows identifies several criteria for deciding whether negotiations are likely to produce a sound regulation or to facilitate the regulatory process.²⁴⁸ The fulfillment of all the conditions identified here is by no means necessary for fruitful discussions.²⁴⁹ Moreover, even if several criteria are not satisfied, negotiations may still lead to a sound regulation.²⁵⁰ In addition, experience may demonstrate that other factors are equally important in

245. That the bargaining would be guided by norms does not mean that a formal mechanism exists for resolving an impasse. Thus, many relationships, such as parent-child, union-management, store-customer, professor-student, exhibit features of dependency and/or intimacy that inhibit the parties from seeking resolution through the intervention of a third party. Eisenberg, *supra* note 127, at 672-73.

246. Eisenberg points out that participation is important in its own right and that people frequently will resist imposition of a decision on them even if the decision is in their interest. *Id.* at 675-676.

247. As Gerald Cormick, Director of the Institute for Environmental Mediation, points out, negotiation is not a way of avoiding conflict or the clash of power; rather, it is a process for reaching a decision that reconciles the competing interests. Cormick, *The "Theory" and Practice of Environmental Mediation*, 2 ENVTL. PROF. 24, 25, 28 (1980).

248. Clark & Cummings, *Selecting an Environmental Conflict Management Strategy*, in ENVIRONMENTAL CONFLICT MANAGEMENT 10 (1981) (Council on Environmental Quality and Geological Survey of United States Department of Interior analysis of environmental conflicts to select most appropriate settlement approach); Marcus, *A Procedure for Assessing Environmental Disputes*, in ENVIRONMENTAL CONFLICT MANAGEMENT 34 (1981) (describing procedures for determination of causes and means of resolution of environmental disputes).

249. Susskind and Weinstein observe that we simply do not yet have enough experience to develop a set of criteria to determine whether an environmental dispute can be negotiated. Susskind & Weinstein, *supra* note 92, at 356.

250. For example, theory dictates that a mediator be rigorously neutral. Yet, one major environmental negotiation involving several federal and state agencies, as well as private parties, succeeded primarily because of the perceived bias of the mediator. One of the central parties that had rejected previous overtures to negotiation agreed to participate only because of the perceived bias. H. Burgess, *The Foothills Water Treatment Project: A Case Study of Environmental Mediation*, in L. Susskind, L. Bacow & M. Wheeler, *supra* note 226 (unpublished report prepared for the Environmental Negotiations Project, Laboratory of Architecture and Planning, Massachusetts Institute of Technology, under grant from EPA).

determining whether the process is effective. The following criteria are predictive and are based on experiences in analogous situations in which complex policies have been successfully negotiated.

1. Countervailing Power

If a party has the power to achieve its goal, it naturally will exercise that power. For example, a local group's objections to a company plan to build a plant may go unheard unless it has some power to prevent the building of the plant. In the regulatory context, a party may have the power to dictate the outcome of a regulation, either because it has enormous political strength and could obtain legislation incorporating the regulation, or because its position is so strong that it would carry the day before the relevant agency or before the court reviewing the rule. In such a situation, the party could achieve its wishes without compromising at all if the wishes were within the confines of the governing norms. Therefore, the dominant party would have no reason to negotiate with the other parties. For example, negotiators in the National Coal Policy Project did not consider some issues because some parties thought that they had sufficient power to achieve their will in Congress.²⁵¹

On the other hand, the various interests may have sufficient power so that no single party could achieve its will without dealing with the others. A party may derive its countervailing power from its ability to invoke a proceeding in which some third party will decide the issue and the governing norms are not sufficiently clear to permit prediction of the outcome; the ability to precipitate doubt on the outcome is a form of power. Even if the governing norms are relatively clear and one party would ultimately succeed on the merits, a party may have countervailing power because it can inflict significant costs or delay on the party.²⁵² A successful party therefore must deal with other parties that have the power to block its unfettered will. For example, when the displeased customer seeks reparation from the store, even if the store ultimately prevails, the store's victory may have come at an unacceptable price because of the costs and delay of the complaint. Similarly, in the negotiations leading to the agreement concerning the uranium mine,²⁵³ the environmentalists' power rested in their ability to delay the company's use of the mine by challenging the environmental impact statement prepared by a government agency. Although the company was confident of succeeding on the merits, it decided that direct ne-

251. As the report of the project explains,

Several of [the] unresolved issues were addressed by Congress in the 1977 amendments to the Clean Air Act and neither side was willing to make a commitment to a definite position on those issues while the Congressional deliberations were continuing. Once the amendments were enacted, there was very little room left for discussion because industry, on the whole, wanted to weaken significantly the statutory language and environmentalists were largely satisfied with the outcome, although they would have liked a few strengthening amendments.

NCPP SUMMARY, *supra* note 206, at 132.

252. A party also may have power because of its ability to harass or to flood the media with shrill, unreasonable positions used to build a political base.

253. See *supra* notes 162-65 and accompanying text (describing controversy between Homestake Mining Company and environmentalists over pitch mine site in Colorado).

gotiation was in its interest.²⁵⁴

The first consideration in deciding whether negotiation is appropriate is to determine whether any party has the power to achieve its will without having another party impose a sanction which the first views as unacceptable. If a party can achieve its will and thus control the outcome, negotiation is inappropriate. The more rigorous safeguards of the traditional process would be necessary to protect the other interests. But this is in itself a form of power because the weaker interests may be able to extract concessions from the dominant interest to avoid the delay, expense, and inherent uncertainty of the more formal process.

If the countervailing power among the parties is balanced such that the outcome of the conflict is genuinely in doubt, then negotiations among the parties may be the appropriate way to reconcile the competing interests. Before negotiations can be successful, however, the dominant parties themselves would have to recognize that it is in their respective interests to deal with each other as equals in attempting to reach a mutually satisfactory decision.²⁵⁵ The dominant parties would have to believe that negotiation would enable them to avoid the time, expense, cost, and uncertainty of another process. The party might, for example, refuse to negotiate in good faith and instead seek judicial or congressional action. In sum, the parties themselves must believe that it is in their interests to negotiate the policy with the other parties, and that other means of exercising power are frustrated by countervailing power of one or more interested parties.²⁵⁶

2. Limited Number of Parties

Negotiations will clearly not work among an auditorium full of people. The give and take of issues and positions can only occur with a limited number of participants, probably fewer than fifteen.²⁵⁷ Thus, negotiation would be inappropriate for a regulation that would affect many interests in such diverse ways that representation by a few individuals or teams of individuals would be impossible.²⁵⁸ For example, an environmental regulation may apply generally to all industry, and yet affect each industrial sector differently enough so that even several individuals could not represent the interests of all of the sectors. In that case, negotiation would not work.

254. Watson Interview, *supra* note 165. Both sides were content with the outcome and considered the process as more productive than litigation. *Id.*

255. Cormick, *supra* note 247, at 28 (successful negotiations require parties to deal with each other as equals seeking mutual satisfaction).

256. *Id.* (successful negotiations require that each party have enough power to prevent others from taking unilateral action).

257. There is no particular magic in the number 15; rather, it seems difficult to get more people than that around a table in reasonable comfort. Certainly more than 15 have participated in negotiations, but 15 people seems to be a rough practical limit. For example, the National Coal Policy Project's working task forces consisted of approximately that number. NCPP SUMMARY, *supra* note 206, at 57-60.

258. Each interest represented in the negotiations may consist of a number of different people. For purposes of negotiation the parties may form a caucus that is represented by an individual or team of individuals. That is, of course, a typical way of participating in traditional forms of rulemaking in which a trade association or other group represents the interests of a number of different organizations.

3. Mature Issues

The purpose of negotiation is to reach a decision that accommodates the interests of the parties affected. The issues to be resolved, therefore, must be "ripe" for decision. For example, if the parties are still jockeying for position by filing lawsuits or threatening to do so,²⁵⁹ building a media campaign, lining up political support, or exercising other methods of generating and demonstrating power, the issues have not yet crystallized sufficiently to permit resolution. Although such behavior is a legitimate prelude to negotiation, it may preclude a necessary party from participating at that time.²⁶⁰ Similarly, a party may still be organizing or posturing to demonstrate to other parties that it has sufficient power to impose a sanction. Alternatively, the issue itself may not be ready for decision because the interests involved in its resolution cannot yet be identified or information on the issue is insufficient. The subject matter of the negotiation, therefore, needs to be a concrete issue.

4. Inevitability of Decision

The parties will not expend the resources required for negotiation unless they are convinced that they will benefit from negotiation. Parties frequently may benefit by delaying a decision, and it seems to be human nature to procrastinate until action is required. Thus, negotiations are likely to work best if a decision is inevitable, or even better, imminent. If the decision is inevitable or imminent, and the parties in interest fail to reach an agreement by negotiation, someone else will make the decision. In the regulatory context, this situation may occur if a statute, a court order, or an overriding political pressure requires agency action within a particular time. This situation also could occur if the agency has committed itself to a schedule in the regulatory agenda,²⁶¹ or has announced a schedule for action on an ad hoc basis. In such cases, if the parties fail to reach agreement, the agency itself, or in some situations, a court or Congress, makes the decision.²⁶² The most favorable climate for negotiation occurs when all the parties believe that there is some urgency for reaching a decision.²⁶³ The inevitability of a decision creates that urgency

259. See D. Smith, A Case Study of Environmental Mediation: The Brayton Point Coal Conversion, in L. Susskind, L. Bacow & M. Wheeler, *supra* note 226 (unpublished report prepared for Environmental Negotiation Project, Laboratory of Architecture and Planning, Massachusetts Institute of Technology, under grant from EPA), in which the New England Power Company filed suit against the Federal Energy Administration (FEA) when it issued a notice of its intent to prohibit the burning of oil. Even though negotiations subsequently began, the Department of Energy, the successor to FEA, continued formal proceedings to provide an incentive to continue the negotiation process. *Id.*

260. Cormick Interview, *supra* note 167 (parties in process of building power not ready to join negotiations).

261. Exec. Order No. 12,291, § 5, 3 C.F.R. 127 (1981) (agencies shall publish regulatory agenda twice a year). A regulatory agenda consists of a listing of "proposed regulations that the agency has issued or expects to issue, and currently effective rules that are under agency review." *Id.*

262. Although this may appear to concede that the agency has the unilateral power that is antithetical to negotiation, in fact the agency may be unable to control the decision because the parties would have a significant role in developing the record and seeking an appeal. If the parties themselves, including the agency, do not reach a negotiated decision within the allotted time frame, however, they will lose the ability to share in its formulation directly. In addition, its outcome will be cast in doubt precisely because no one will be certain how the clash of interests will be reconciled by the third party decisionmaker.

263. Cormick, *supra* note 247, at 28.

to a degree. The parties then feel pressure to reach a decision themselves before someone else makes the decision and deprives them of control.

Despite the attraction of delay, in some instances a prompt decision may serve the parties' interests. For example, a company may wish to manufacture a new product or build a new plant and an agency plans to issue regulations that will control aspects of the decision. The company may be afraid to proceed because it fears that it may incur the substantial cost of modifying the product or plant in response to the new regulation. The company then would prefer a prompt decision by the agency. An opposing interest also may prefer a prompt decision if the regulation appears to effectuate that party's interest. In such a case, delay is not in the interest of either side.

Even if delay is in a particular party's interest, such as when the regulation will necessitate expensive retrofitting or large capital expense, the issue still may be suitable for negotiation if the implementation date is among the issues negotiated. Assuming that some decision is inevitable, if the implementation date is included in the issues negotiated, the reluctant party may prefer the certainty of outcome. The party thus may be willing to negotiate if it stands to gain time to implement the regulation.

5. Opportunity for Gain

Because a party would participate in negotiation only if it viewed itself as being better off for having done so, negotiation is not likely to be successful in "zero sum games," situations in which one party wins only to the extent that another loses.²⁶⁴ Thus, unless the dispute can be transformed into a "win/win" situation in which both parties are better off for having negotiated,²⁶⁵ negotiation may not succeed.

For example, in the negotiations involving the Snoqualmie Dam, the original dispute was a zero sum situation. Environmentalists wanted to stop the construction of the dam and the farmers wanted to proceed.²⁶⁶ Through negotiation the parties agreed on a common goal and turned the dispute into a "win/win" situation, in which the farmers got their dam and the environmentalists preserved the valley. Similarly, in a dispute between the Environmental Protection Agency (EPA) and a paper mill, the EPA's initial position required the factory to incur great expenses for retrofitting existing boilers to reduce air pollution.²⁶⁷ The parties negotiated a solution that required the factory to construct a new boiler. The solution satisfied EPA's concerns and also reduced the operating costs of the factory. The zero sum dispute thus was converted into a

264. See R. LUCE & H. RAIFFA, *supra* note 240 (an introduction to game theory).

265. Clark & Cummings, *supra* note 248, at 11. Clark and Cummings distinguish "collaboration," which is the "win/win" situation, from negotiation, which they describe as lying between collaborative and "win/lose." In the "win/win" situation all parties have a common goal and in the "win/lose" situations parties must trade interests and make compromises to achieve what they desire. *Id.*

266. See Sviridoff, *supra* note 160 (discussing Snoqualmie Dam negotiations); Susskind, *supra* note 83, at 3 n.6.

267. D. Gilmore, Environmental Negotiations: A Case Study Between the EPA and the Brown Company over Brown's Berlin, New Hampshire Pulp and Paper Mill, in L. Susskind, L. Bacow & M. Wheeler, *supra* note 226 (unpublished report prepared for Environmental Negotiation Project, Laboratory of Architecture and Planning, Massachusetts Institute of Technology, under grant from EPA).

“win/win” situation.²⁶⁸

To assess whether a dispute can produce a “win/win” outcome one must look to the future rather than to the current situation. For example, imagine a giant city-wide bubble within which EPA would regulate the total emission of a particular gas from all sources. The various polluters inside the bubble would perceive the setting of limits on their respective discharges as a “zero sum” game because to the extent one would win, others must lose. From this perspective, the polluters might view negotiation as inappropriate because no company would have an incentive to give away to another company its limited ability to discharge its gas. On the other hand, if the companies failed to agree among themselves on the allocation of the individual levels, some other forum, such as the EPA or a court, might impose limits on the respective companies. In such a situation, the parties may believe that it is in their interests to agree among themselves. They could reach a more satisfactory result because they would have some control over the decision. Such control would be particularly important if the prevailing norm were viewed as irrational.

6. Fundamental Values

Competing interests cannot negotiate an agreement if the disputed issue concerns fundamental values. Surely, no agreement could be reached over which of several religions is superior. As a more practical example, the parties involved in the National Coal Policy Project initially decided that because some issues were so value laden, they would not even attempt to reach an agreement on them.²⁶⁹ In the Homestake Mine negotiation, the parties decided that negotiations would not extend to issues relating to the company’s uranium mill and its disposal sites, which were the subject of hearings before state agencies.²⁷⁰ Rather than focusing on these value-laden issues, in both instances, negotiations centered on the particular, mature issues of a less global nature.²⁷¹

In the regulatory context, the more the parties agree on fundamental principles that shape the decision, the more likely it is that negotiations will be successful. If the fundamental issues cannot be resolved because the regulatory statute is vague, the situation may closely resemble a debate over the superiority of various religions and the parties may be unable to reach an agreement. If the issue is too basic for compromise among the parties, an alternative forum is

268. *Id.* Although Clark and Cummings may be theoretically correct to distinguish the “win/win” situation from negotiations, *supra* note 265, even if both parties end up better off—the “win/win” situation—a great deal of negotiation would still be conducted because neither party would achieve all of its goals. Thus, mutual sacrifice through negotiations usually occurs and true collaboration is rare.

269. We were not so naive as to believe that all differences would or could be resolved in a non-adversarial forum. On some issues the values of the protagonists are too far apart to make agreement possible, even when they agree on the facts. In these cases we state our disagreement and our understanding of the reasons for it.

NCPP SUMMARY, *supra* note 206, at xvii. The four areas of disagreement in the Air Pollution Task Force were the application of the best available control technology, the prevention of significant deterioration of air quality, the siting of plants in nonattainment areas, and the interrelationship of air and water pollution and land use. NCPP VOLUME I, *supra* note 213, at 131-47.

270. Homestake Mining Company and Coalition of Colorado Environmentalists, Joint Press Release (Apr. 15, 1981); Danielson Interview, *supra* note 162; Watson Interview, *supra* note 165.

271. See *supra* note 164 (mediation agreement between Homestake Mining Company and eight conservation organizations).

required to resolve the matter.²⁷² For example, it seems unlikely that OSHA, the unions, and industry initially could agree through negotiation on the extent to which OSHA must, or may, consider costs in setting occupational health standards.²⁷³ Once the conflict in fundamental value questions is resolved, however, the parties may use the resolution as a basis for negotiating agreements on individual regulations.

7. Permitting Trade Offs

The prime benefit of negotiations is that the parties affected by a decision can identify the issues involved, scale their respective importance, trade positions, and work out novel approaches in an effort to maximize their overall interests. Parties may yield on issues that have lower priority to improve their position on issues that have higher priority. This scenario, of course, assumes that there are multiple issues to trade. Negotiations are likely to be difficult when there is only one issue with a binary solution involved in the decision. In such a situation, because there will be a clear winner and a clear loser, there would be virtually nothing to negotiate. Thus, a regulation raising only a single issue, or even a very few issues, is an inappropriate candidate for negotiation.²⁷⁴ Very few regulations, however, involve a single or only a few issues. Most regulations raise a great number of issues suitable for discussion. For example, a regulation may encompass issues such as the extent of the problem, the stringency of the response, the manner of compliance, the components of the regulation, and the date of implementation.

8. Research Not Determinative of Outcome

Information is clearly a form of power. If one party controls information that bears directly on a regulation, its power to control the outcome is greatly enhanced. A corollary of this power is that negotiation may be inappropriate for regulations requiring basic research because a party may not wish to commit itself in advance to accepting the results of such research. The parties may

272. Harrison Loesch, a participant in the Coal Policy Project testified: "Where . . . the problems are those of attitude and philosophy not subject to scientific quantification, I have come to the belief that the only solution is through the courts." *Regulatory Negotiations Hearings*, *supra* note 221, at 8 (testimony of Harrison Loesch, Vice President, Government Relations, Peabody Coal Company).

273. See *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 506-07 (1981) (industry argues that in developing cotton dust standard, OSHA must consider whether reduction in material health impairment risks are significant relative to cost; government argues that cotton dust standard must reduce "to the extent such protection is technologically and economically feasible"); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 639 (1980) (industry argues definition of health and safety standard, "reasonably necessary and appropriate," requires benzene standards to reflect quantification of costs and benefits; government argues definition does not modify requirement that standards reduce risk to lowest level feasible).

274. Professor Stewart uses the location of a major energy facility in a scenic wilderness as an example of a single issue regulation. There is not likely to be any middle ground for compromise between industrial proponents and environmental opponents. Stewart, *supra* note 112, at 1345 n.266. Another commentator suggests that the decision whether to include air bags in cars is not amenable to negotiation. Note, *supra* note 96, at 1880. If the sole issue were whether to require air bags, that observation might be valid. There are, however, a range of negotiable issues, including the use of air bags, the use of passive restraints, the requirement that air bags be made available as an option, and their inclusion in certain sized cars but not others. Thus, because a range of choices is available on each of these issues, negotiations would be an appropriate forum for their resolution.

agree during negotiation on what research is needed and the protocol for the research.²⁷⁵ If certain research results dictate a particular regulatory result, however, the parties may not wish to participate in a joint research endeavor unless they have a relatively good idea of the results the research will generate. It may be in the parties' best interests to disown or attack the research. Thus, successful negotiation is unlikely when fundamental research is necessary, the outcome is in substantial doubt, and the outcome would dictate the regulatory result.

Nevertheless, negotiations may be appropriate when research would open up a range of regulatory alternatives or when the research results would not resolve certain issues involved in the negotiation. For example, research determining the adverse health effects of exposure to a chemical would not determine the manner and stringency of regulations governing exposure to the chemical. Moreover, negotiations may be appropriate even when fundamental research is necessary and the research findings cannot be predicted, but will dictate the resolution of the question. For example, in a dispute over the effects of dredging on neighboring wetlands, both parties agreed to accept the results of the forthcoming research because one party knew it could not win if research revealed an adverse effect and the other party knew it would withdraw its objection if no adverse effects were demonstrated.²⁷⁶

9. Agreement Implementation

The parties may be unwilling to invest resources necessary to reach an agreement if implementation of that agreement is unlikely.²⁷⁷ Thus, in the regulatory context, negotiations probably would not produce satisfactory results if the negotiators believed that the agency would not use the results of the agreement. Nevertheless, agency action would be irrelevant if the parties themselves could implement the agreement. Additionally, negotiations must be structured to protect the resulting agreement from collateral attack by people who were not parties to the negotiations. Moreover, few would be willing to negotiate if the ultimate agreement would be disregarded by an organization essential for its implementation.

10. Review of Negotiation Principles

The following negotiation principles are indicators of the situations in which negotiation is likely to be an appropriate tool for developing a regulation. Regulatory negotiation is more likely to be successful when no single party can dictate the results without incurring an unacceptable sanction from the other parties.²⁷⁸ Only a limited number of parties directly interested in the outcome

275. For an example of a negotiated agreement on research and its potential, see *infra* notes 499-500 and accompanying text (describing Mediation Agreement between Homestake Mining Company and conservationists, including agreement to undertake negotiation research).

276. See Cormick Interview, *supra* note 167 (resolution of dispute over survival of eel grass to depend on outcome of mutually agreed on research).

277. See *infra* note 547 and accompanying text (discussing hesitancy of parties to air differences fully when agreement overturned).

278. See *supra* notes 251-56 and accompanying text (discussing situations in which power unbalanced and dominant party unwilling to negotiate because it expects to vindicate its position in another forum).

of the regulation should participate in negotiations,²⁷⁹ and the issues involved in the negotiation should be relatively well-developed and ripe for decision.²⁸⁰ Moreover, it must be clear to everyone that some form of regulation will be issued in the reasonably near future.²⁸¹ The parties must believe that they can each win through negotiation.²⁸² Issues should not involve fundamental value choices; rather, the parties should be guided by existing criteria reasonably acceptable to the parties.²⁸³ Finally, the parties must have a reasonable expectation that the agency will use the fruits of their labor as the basis of public policy; otherwise, they may view the negotiations as a waste of time.²⁸⁴

We do not yet have enough empirical experience to predict with certainty whether the negotiations will be successful.²⁸⁵ The suggested criteria have been met in most of the successful negotiations involving public policy questions, such as the settlement of lawsuits challenging rules and the environmental negotiations discussed above. Thus, these criteria represent a reasonable first cut.

B. THE APPROPRIATE PARTICIPANTS

If regulatory negotiation is to be successful, the parties must participate directly in the give and take. The threshold determination, therefore, is to identify the parties entitled to participate. Certainly, any interest that would be substantially or materially affected by the regulation should be represented.²⁸⁶

In the analogous situation of writing voluntary standards, some organizations define categories of interests that are entitled to participate in the development of the standard. For example, they require that consumers, users, and producers be represented on the committee drafting the standard.²⁸⁷ Some have argued that this approach is insensitive to the particular standards under consideration²⁸⁸ and that it is illusory even to attempt to identify *all* interests that might be affected.²⁸⁹ As Robert Dixon observes, what is essential is to

279. See *supra* notes 257-58 and accompanying text (discussing inappropriateness of negotiation if it requires more than 15 parties).

280. See *supra* notes 259-60 and accompanying text (discussing prematurity of negotiation if parties still jockeying for position).

281. See *supra* notes 261-63 and accompanying text (describing difficulty in negotiations if two or more parties benefit from procrastination).

282. See *supra* notes 264-68 (discussing hesitancy of parties to engage in negotiations unless parties have opportunity for gain).

283. See *supra* notes 269-73 and accompanying text (discussing probability of unsuccessful negotiation when parties' fundamental values differ).

284. See *supra* text accompanying note 277 (discussing improbability of parties' participation if agreement not implemented).

285. See Susskind & Weinstein, *supra* note 92, at 356 (experience inadequate to develop set of criteria for environmental negotiations).

286. Murray Weidenbaum, formerly Chairman of the Council of Economic Advisers, reportedly quipped: "What scares me is that when Big Business, Big Government, and Big Labor get together, they lean on the little consumer." *Slow Rebound from Recession*, TIME, Sept. 29, 1980, at 56, 58. This statement is more an indication that not all the appropriate interests were represented in reaching an agreement than an indication that the process of reaching consensus is an inappropriate way of making policy decisions. If negotiation is to work, care must be taken to ensure that the interests significantly affected are represented, lest the process degenerate into a sham.

287. P. HARTEK, *supra* note 178, at 131 n.175 (discussing classifications of interests for Voluntary Product Standards of National Bureau of Standards).

288. *Id.*

289. The Administrative Conference of the United States has recognized the difficulty in ascertaining representatives of affected interests: "The Conference is aware that the concept of representing

include sufficiently diverse interests to ensure that the critical issues are raised²⁹⁰ and to provide *all* interests with an opportunity to make their views known.

The determination of which interests have a sufficient nexus with the regulation to merit participation must be made on an ad hoc basis, rather than by development of an abstract categorization of interests.²⁹¹ Careful judgment must be exercised to determine which interests are so central that the regulation could not be developed without their participation and which interests are so remotely affected that their participation should be limited to written comments or other limited methods.²⁹² Agencies and courts regularly make similar judgments.²⁹³ The principles developed in those contexts can be adapted and applied to the negotiation of rules. In addition, the principles that have evolved in the voluntary standards area can be used. The more immediate method of determining interested parties would be to have the parties themselves make the decisions²⁹⁴ and to reserve the principles for resolution of controversies.²⁹⁵

1. Change in Interests

The issues involved in a negotiation may either expand or contract as work progresses and may vary depending on the stage of development. Thus, the interests represented may change over the life of the negotiations. When an issue is resolved, an interest may be dropped from negotiations or when a new issue arises, new interests may desire to participate. Moreover, the individuals who actually participate may vary depending on the issues. For example, fac-

identified 'interests' in private standards developing organizations is a complex one, involving considerations such as what may be identifiable as an interest, its relevancy, its internal homogeneity, its capacity to be represented by knowledgeable spokesmen, and its political strength." Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation, 1 C.F.R. § 305.78-4 (1981). Professor Boyer gives the example of ascertaining representatives of affected interests in the development of regulations limiting water pollution in a particular stream. Boyer, *supra* note 30, at 118. Interests that might be affected include the profit interest of management and stockholders; health, employment, and taxation interests of the local population; recreational, scenic, and ecological interests of those who live in the watershed to the region and of the country as a whole; the interest of consumers in lower prices; the interest of consumers in replacing the goods and services produced in the area; and the general interest of the American people in increasing gross national product, fostering competition, and maintaining balance of payments. *Id.* Although each of these groups has some interest in the outcome, clearly some groups are affected more immediately than others. It should not be difficult for each group to rank its interests according to its stake in the outcome for purposes of determining whether it would be appropriate for that interest to be included in the negotiations.

290. DIXON, STANDARDS DEVELOPED IN THE PRIVATE SECTOR: THOUGHTS ON INTEREST REPRESENTATION AND PROCEDURAL FAIRNESS 53 (National Fire Protection Ass'n 1978).

291. An example of a sufficient nexus would be the interest of the Antitrust Division of the Department of Justice in negotiations for a proposed regulation with potentially anti-competitive effects.

292. An interest may be remotely affected but still be represented to a very real degree by a party who is more centrally affected and who is a participant in the discussions. That party could be charged with keeping the fringe elements closest to it informed of developments and carrying their concerns to the deliberations.

293. See *infra* text accompanying notes 556-61 (describing judicial review of challenges to negotiated rules).

294. See *infra* text accompanying note 371 (discussing use of preliminary inquiry to discover interested parties).

295. See *infra* notes 434-37 and accompanying text (describing potential method of determining whether a particular interest should be included in negotiations); notes 556-61 and accompanying text (detailing judicial standard for determining standing in challenges to rules).

tual matters may require technical officials, whereas policy questions may require executive personnel.

2. Who the Representatives Should Be

Identifying the appropriate interests to be represented in the negotiation is only the first step in getting to the negotiating table. The next step is finding the individuals who actually will represent the respective interests. Although the interested party usually will select the representative, some discussion about who those representatives are likely to be is merited. Trade associations often represent industry, although the actual individual representative may be a corporate official from an association member. At first glance it may seem unlikely that companies would agree to have a trade association or other individuals represent the numerous members of the industry. Today, however, most companies participate in rulemaking proceedings through trade associations rather than individual corporate representation.²⁹⁶ In some instances, of course, an industry or other interest group may not have a common, unified interest. In such a case more than one representative would be appropriate.

The regulation in question also may affect broad, general interests, such as consumers.²⁹⁷ Thus, the group affected may be too diverse or each individual may be affected so slightly that no individual has any incentive to incur the cost and trouble of representing the class.²⁹⁸ In such a case a division of the agency issuing the regulation may act as a surrogate for that interest.²⁹⁹ More frequently, however, there are active, organized groups that endorse the various values and could represent groups with similar values in the negotiations.

To be an effective representative, the individual must have sufficient stature with the constituency he represents to adapt to changing situations in the negotiations and to bargain accordingly while retaining the confidence of his constituency.³⁰⁰ The representative therefore must be a leader who cannot afford to be wrong too often, even though he lacks the authority to bind the constituency. Thus, a vice president of a represented company would be an appropriate person to head the negotiating delegation. Although a vice president is in a position to know the policies of the company and to predict its reactions, he cannot bind the company to a major agreement because only the president or board of directors have that authority. Further, the vice president cannot afford to be wrong too often in making major agreements because he might lose his prominent position. He is also in direct communication with the various parts of his constituency and can draw on them as required during the negotia-

296. It appears to be customary for the association members to negotiate among themselves to develop a position on a proposed regulation. The trade association then represents that position in the ensuing rulemaking proceedings. The same role is envisioned here.

297. For example, virtually any rule issued by the Consumer Product Safety Commission and many issued by the Department of Agriculture or the Food and Drug Administration concerning the labeling of foods affect consumer interests.

298. See *THE POLITICS OF REGULATION 367-70* (J. Wilson ed. 1980) (describing political participation based on dispersion of costs and benefits).

299. Dean Morgan proposed that Commission staff should act as a surrogate for interests of parties not part of the formal proceeding. Morgan, *supra* note 24, at 73.

300. *Regulatory Negotiation Hearings, supra* note 221, at 26 (statement of Francis X. Murray).

tion process.³⁰¹ Similarly, in less hierarchical groups, such as environmental organizations or trade associations, a person of senior leadership status would fulfill the same functions as the corporate vice president.³⁰²

A benefit of the negotiation process is the ability to identify the data required for an intelligent decision and to progress from that data to identification and resolution of the major issues. This sequence requires that the parties weigh the value of the issues to permit trade offs in reaching a mutually acceptable agreement. To be effective, the representative must be able to make decisions in the changing circumstances of the negotiations subject to subsequent ratification by the representative's constituents. Thus, the representatives should be principals of their organizations with decisionmaking authority rather than intermediaries.³⁰³ For example, in assembling the participants in the National Coal Policy Project, some corporate officers that deal with the government thought that they should represent their companies because the negotiations concerned public policy. Other participants observed that substantive trade offs were necessary for the group to be successful. Because the corporate representatives dealing with government lacked that substantive expertise, other people in the company with line authority would be more appropriate representatives.³⁰⁴

3. Financing the Enterprise

Because the political legitimacy of a negotiated rule rests largely on the concurrence of the significant affected interests, actual participation by those interests is essential. Some interests, however, may have difficulty participating because of a general lack of funds. Others may have difficulty financing participation because they are involved in many activities and, therefore, their

301. To a large extent, each interest would be represented by a team rather than by a single individual. Whereas one or a few individuals would be designated to participate in face to face negotiations, others would provide technical support. Indeed, different negotiators might participate when different issues are negotiated. For example, in the National Coal Policy Project, different individuals represented the respective constituencies in the various task forces. NCPP SUMMARY, *supra* note 206, at 4, 55. The National Coal Policy Project emphasizes, however, that each person participated as an *individual* and not as a representative of any organization. *Id.*

302. See Cormick, *supra* note 247, at 28 (describing need for parties with sufficient power to commit themselves as prerequisite for participation in negotiation). John Dunlop has eloquently stated that any negotiated agreement actually involves one more agreement than the number of parties represented: the final agreement plus an agreement internal to each coalition. Each coalition, allied for purposes of the negotiations, will have differing priorities and reactions to the proposals of the other parties. Initial positions are usually assembled into a package that reflects the multiple goals of the constituency, but before a final agreement among the parties can be reached the internal differences must be reconciled and a consensus reached. J. Dunlop, *The Negotiations Alternative to Markets and Regulation* 10-13 (Aug 29, 1979) (unpublished manuscript). Bridging the diverse interests and communicating the evolution of discussions clearly calls for someone in a leadership position.

303. See *supra* notes 118-26 and accompanying text (describing problems with adversarial process that result from use of intermediaries). One of the primary reasons negotiations for the location of a power plant next to an Indian reservation were unsuccessful was that the intermediaries involved were unable to deviate from the rigid instructions provided by their constituents. Hence, they could not identify and rank true interests, as required by the give and take of negotiations. When the principals themselves became involved, however, the parties reached a mutually acceptable agreement. Another significant factor, however, was the rigid format imposed on the negotiators by the agency in the first instance, and the hospitable forum available in the second. T. Sullivan, *supra* note 229, at 51-61 (analyzing federally mandated negotiation versus local resolution of problem).

304. Murray Interview, *supra* note 206.

resources are spread thin. Such groups currently may participate in the rulemaking process by filing comments, but may not engage in extensive research or prolonged dialogue during the rulemaking process.³⁰⁵ Their power may rest in their political clout, in the fact that they are a significant constituency of the agency, or in the threat of an appeal challenging a rule. Such a group may view regulatory negotiation as a less favorable alternative than notice and comment rulemaking simply because it would require the presence of its representative at the negotiating table over a period of time. To such interests, expenses of negotiation may be greater than those of the current rulemaking proceeding. Therefore, it may be essential to defray some expenses of such an organization if it is to participate.³⁰⁶

Funding participation in the rulemaking process recently has been much debated³⁰⁷ and is a volatile political issue.³⁰⁸ Several points are uniquely applicable to the regulatory negotiation process, however. First, if the regulatory negotiation process is successful, it will significantly reduce the agency's expense in developing a rule because the need for elaborate factual research and the defensive work that goes into issuing a final regulation would be reduced. Negotiations also should reduce expensive judicial challenges to rules. If an organization's participation is essential to the negotiation, defraying its out of pocket expenses could be viewed as an investment resulting in a net savings of government resources. Indeed, one experienced mediator estimates that a relatively complex rule could be negotiated for a fraction of the current cost to some parties.³⁰⁹ Second, because some organizations view their power as stemming from their underdog position, such organizations would be unwilling to accept full funding despite their financial need. Such a group might feel that its independence would be compromised if it received government funds because the payments could be perceived as a source of revenue for the organization.³¹⁰

305. See Boyer, *Funding Public Participation in Agency Proceedings: The Federal Trade Commission Experience*, 70 GEO. L.J. 51, 138-39 (1981) (discussing range of contributions of public interest groups participating in FTC rulemakings).

306. Professor Stewart has argued that to provide an incentive to participate in good faith in a negotiation/consensus process, advocacy groups should be compensated "for the relaxation of procedural formalities and to equip them to participate effectively in informal processes." Stewart, *supra* note 112, at 1347.

307. See generally PUBLIC PARTICIPATION, *supra* note 25, at 91-128 (overview of agency policies regarding financial assistance for participation in regulatory proceeding); Boyer, *supra* note 305 (evaluating criticisms that FTC funding of public participation expensive, one-sided).

308. See *Pacific Legal Found. v. Goyan*, 664 F.2d 1221, 1227 (4th Cir. 1981) (holding that agency does not have inherent authority to fund public participation in a proceeding; funded participation must be expressly authorized). A proposed version of § 553(d)(5) of the APA, as passed by the Senate, provides: "Nothing in this section authorizes the use of appropriated funds available to any agency to pay the attorney's fees or other expenses of persons participating or intervening in agency proceedings." S. 1080, 97th Cong., 1st Sess., § 3, 128 CONG. REC. S2,713-14 (daily ed. Mar. 24, 1982).

309. Cormick Interview, *supra* note 167. This estimate is corroborated by the relatively low out-of-pocket expenses for the National Coal Policy Project. See *Regulatory Negotiation Hearings*, *supra* note 221, at 2 (Statement of Senator Gaylord Nelson) (cost of negotiations minimal; Coal Project cost only \$400,000 over two years).

310. One of the main complaints about providing public funds to participate in rulemaking proceedings is that individuals or groups claim to advocate an interest and thus receive funding, although there are few indicia that they speak for a constituency or that their reasons for participating go beyond obtaining a means of self support. The ACUS has addressed these concerns and has recommended that the funding authority consider "whether the applicant receives contributions from members or constitu-

The Environmental Caucus of the National Coal Policy Project was financed in part by grants from foundations. A rigorous accounting was made to ensure that no corporate funds were used for funding the caucus because it could be argued that such funding would compromise the independence of the environmental groups.³¹¹ During the initial public meeting, the very first question posed was whether the environmental groups had been paid by corporations and if so, whether they had sold out.³¹² The accounting unequivocally put that question to rest and it did not arise again.³¹³ In another environmental negotiation, although a company offered to fund certain research, the environmentalists declined the offer and agreed on joint funding so that their independence would not be viewed as compromised.³¹⁴ The lesson is that whenever funding is provided, it could appear that the recipient's independence has been compromised or that the funded individual is not truly a representative of a broad-based interest. Thus, if the funding is provided, it should be administered by someone independent of the regulatory authority that will issue the ultimate regulation, or it should reimburse only expenses.

A regulatory negotiation group may require a staff, a mediator,³¹⁵ or personnel to conduct research, to compile bibliographies, or to draft initial documents for the group to review. The staff could consist of agency personnel, although a staff loyal to the agency as opposed to the negotiating group as a whole could present difficulties. Alternatively, the staff could be hired for the specific purpose of serving the group. These expenses logically should be borne by the agency because in the absence of a negotiations process, the agency would have had to use its staff to develop the regulation. Moreover, use of a staff for the negotiating group could be viewed as analogous to staff provided to an advisory committee, which agencies fund.

C. THE AGENCY AS PARTICIPANT

The agency is indisputably a party in interest and, under the analysis above, would be eligible for participation in negotiations.³¹⁶ Thus, the question is,

ents, whether the applicant has a record of advocating similar positions with apparent member or constituent approval and whether the applicant advises its members or constituents of the position it is taking or has taken in the proceeding." Administration Conference of United States Recommendation 79-5, § 1(g), 1 C.F.R. § 305.79-5(1)(g) (1981).

311. Murray Interview, *supra* note 206.

312. *Id.*

313. *Id.*

314. Cormick Interview, *supra* note 167.

315. See *infra* notes 425-32 and accompanying text (describing possible benefits of mediator in regulatory negotiation).

316. The "interest" the agency represents is necessarily a little nebulous because, unlike the other parties, the agency would not attempt to maximize its goals (except, perhaps, in ensuring ease of administration). Rather, the agency would seek to further its perception of the "public interest," as defined by its organic statute, its existing policies, and the milieu in which it operates. Thus, the agency representatives would attempt to develop a reasonable regulatory response to the problem, based on criteria similar to those that would be used if the agency itself were developing the regulation. In traditional rulemaking, the agency must anticipate the reactions of its constituencies and take appropriate action. In the negotiation context, however, because the interests of the agency's constituencies would be presented directly, the agency would be free to concentrate more directly on its own position. Under traditional rulemaking and negotiation the agency would develop its position by acting like the umpire assessing competing claims of the parties concerning the facts and policies involved in the regulation. See *supra* notes 73-75, 87-88 and accompanying text (currently agencies act as umpires in rulemaking

should the agency participate in the negotiations?³¹⁷ Although this issue has generated considerable discussion over the years with respect to agency participation in the development of voluntary standards, no clear consensus has emerged.³¹⁸ Agency participation can be viewed as inconsistent with the agency's role as the sovereign decisionmaker because participation may cloud its ability to determine independently what is the best regulation. Despite such possibility, objective analysis indicates that the agency may have a real and significant incentive to participate fully.

I. Countervailing Power

In many cases, the agency, like any other organization lacks the power to control the outcome of the rulemaking process. Its decisions are limited by the record developed during the proceeding and are subject to review by the White House, Congress, and the courts.³¹⁹ A powerful organization may be able to check the agency's ability to develop a regulation that the agency believes to be appropriate and justified by the record. Even if the agency is able to issue a regulation despite a powerful interest, the process may take a very long time and consume great resources—both monetary and political. Because the outcome of judicial review is rarely predictable, the agency cannot be confident that its views, as embodied in the regulation, will prevail. Indeed, the courts reverse agencies with some frequency and agencies take great defensive measures to prevail upon judicial review.

The traditional inability of the agency to control the outcome has been heightened by the advent of executive branch review. The Office of Management and Budget (OMB) reviews regulations to ensure that the benefits justify the costs and that a complete record exists.³²⁰ Moreover, the OMB has made it clear that it is receptive to the views of outside parties on regulations, provided that the parties submitting also have submitted their views to the issuing agency.³²¹ These review mechanisms necessarily broaden the perspective of an

process). An agency's general orientation, function, motivation, and ultimate rule would be the same in both traditional rulemaking and negotiation. In sum, negotiating is an alternative means to the end of issuing a regulation, not a fundamental alteration of the concept of the agency.

317. For example, two models of agency involvement have been proposed: the "agency oversight model" and the "agency participation model." Note, *supra* note 96, at 1875.

318. Compare OMB Circular No. 119 "Federal Participation in the Development and Use of Voluntary Standards; Invitation for Public Comment," 47 Fed. Reg. 16,919, 16,920-21 (1982) (OMB statement that agency participation in development of voluntary standards intended to eliminate need for Government standards) with Administrative Conference of United States Recommendation 78-4(1)(a), 1 C.F.R. § 305.78-4(1)(a) (1981) (ACUS recommendation that agency employees should serve on voluntary standards committees in health and safety area without power to bind agency) and Employee Membership and Participation in Voluntary Standards Organizations, 16 C.F.R. § 1031.5(f) (1980) (CPSC Product Safety Commission criteria for participation limit Commission employee status to advisory nonvoting membership).

319. See *supra* notes 77-79 and accompanying text (describing how parties can control agency decision through control over record).

320. Exec. Order No. 12,291, 46 Fed. Reg. 13,193-94 (1981). OMB has required agencies to conduct additional work or to reconsider draft final regulations that have been submitted to it for review. See *The Administration: Settling In*, REGULATORY EYE, May, 1981, at 5 (describing regulations returned to agencies because of cost, policy, and analysis problems).

321. Memorandum from David A. Stockman to Heads of Executive Departments and Agencies, *Certain Communications Pursuant to Executive Order 12,291, "Federal Regulation"* (June 13, 1981) (copy on file at *Georgetown Law Journal*).

agency beyond the narrow goal of achieving a parochial interest. They also diminish the agency's sovereignty and power because the agency must deal with outside interests. Thus, in many rulemaking proceedings, the agency's unilateral power is subject to checks similar to those imposed on private interests. Agency participation in negotiations is therefore appropriate.

2. Resources

Faced with developing a regulation from scratch, an agency first may have to amass a large scientific and technical basis for the regulation. This process can be both time consuming and enormously expensive. Although the agency may believe that the data are unnecessary for reaching a determination, it nonetheless may develop the data in anticipation of future attacks by parties seeking to participate in the ultimate decision. The agency, therefore, is compelled to conduct extensive scientific and technical research. If the parties participated directly, however, they might agree that some data is unnecessary and narrow the data base. Moreover, in face to face negotiations the parties may be more willing to furnish relevant data, which often is inaccessible to the agency, if the donor can control its use.³²² Thus, the agency may be able to conserve its resources by negotiating directly with the affected interests.

3. Timeliness

Regulations take an enormously long time to become effective. Such delay may occur because regulations have a significant impact on the economy and also require development of factual bases.³²³ Much of the time involved surely must be attributable to the wrangling and disputes among the parties through their respective exercises of power in the adversarial process. Regulatory negotiation with agency participation, properly conducted, could provide a forum for more direct reconciliation of those disputes in a less time consuming fashion.

4. The Advantages of Agency Participation

Agency participation in a negotiated solution to a regulatory problem may prove beneficial to the agency for several reasons. It can avoid the political infighting, which is a form of exercise of power among the interest groups. It can tap the expertise and resources in the private sector. It can reduce the need for development of vast factual material that may not be necessary for informed decisions. It can facilitate reaching a final decision in a shorter period of time. All of these attractive benefits assume, however, that the process would be effective and not simply add another layer of review to the hybrid rulemaking proceeding. Experience indicates that the process will not be completely successful unless the agency participates fully. Negotiations are less likely to result in a proposed regulation if the parties other than the agency develop a recommendation which is then tendered to the agency for its review

322. See *supra* note 106 and accompanying text (discussing reluctance of parties to provide data under current adversarial process).

323. See Morgan, *supra* note 24, at 24-26 (discussing causes of delay in agency ratemaking).

and consideration.³²⁴

5. The Difficulties of Agency Nonparticipation

Several difficulties result when the agency fails to participate directly. First, the parties lack guidance concerning the results that would be acceptable to the agency. This problem is not merely the result of the agency's status as a government entity. Rather, the problem occurs whenever a major interest with veto power over implementation of the agreement fails to participate in the formulation of the agreement. One frequently cited reason for failure to establish or to continue negotiations is that a particular party with the power to frustrate implementation refuses to participate.³²⁵ Others may not be willing to invest the resources necessary for reaching agreement if its implementation is uncertain. Even if negotiations do move forward, the parties must anticipate the position of the missing party and, thus, will not be in a maximum position to give and take within the range of acceptable alternatives.

A related problem occurs when agency participation is limited to monitoring the proceeding and specifying acceptable outcomes; such actions may be viewed as edicts or directives to reach particular results. Such a role is inconsistent with the concept of negotiations, in which the parties together define issues and agree on acceptable selections. Agency nonparticipation, therefore, adversely affects the definition of the boundaries of the discussions, because the parties are either insufficiently aware of the boundaries or the boundaries are too rigid.

Moreover, a recommendation developed without agency participation runs into the "not invented here" syndrome when submitted to the agency for review and consideration. The agency's staff has an incentive to find fault with the recommendation and to second guess the negotiators' judgments because it may perceive a need to prove its merit and demonstrate its expertise. It is simply human nature to demonstrate one's worth when reviewing a document submitted for consideration; by pointing out deficiencies, real or imagined, one appears to make a contribution. Alternatively, the agency may not have a position on a negotiated agreement and may have to conduct research to develop one. Such repetition reduces many of the benefits of negotiated regulation.

Experiences in regulatory and nonregulatory negotiations demonstrate the reality of these difficulties. Congress has experimented by having individuals in the private sector develop a proposed regulation. One such program was a disastrous failure.³²⁶ If regulatory negotiation is to be successful, the lessons of that failure must be borne in mind.

324. Even if the process does not lead to a proposed regulation, it still can have important beneficial effects. See *infra* text accompanying note 594 (describing enhanced ability of parties to resolve disputes because of working relationship developed in negotiations).

325. Gerald Cormick lists the following as the first inquiry in deciding whether negotiation is an appropriate way of settling environmental disputes: "Are *all* parties who have a stake in the outcome or the ability to influence implementation involved?" Cormick, *supra* note 247, at 28 (emphasis added). It is similarly first on Susskind's list of steps necessary for successful mediation. Susskind, *supra* note 83, at 14.

326. See *infra* notes 327-48 and accompanying text (discussing CPSC offeror process).

The Consumer Product Safety Act³²⁷ authorizes the Consumer Product Safety Commission (CPSC) to “promulgate consumer product safety standards.”³²⁸ A proceeding for the development of a safety standard begins with the publication in the *Federal Register* of a notice identifying the products and the risk of injury addressed by the rule, together with a summary of each regulatory alternative under consideration by the CPSC.³²⁹ The notice also includes information concerning any existing standard known to the CPSC that is relevant to the proceeding.³³⁰ Prior to the Act’s recent revision,³³¹ the notice also could include “an invitation for any person (other than the Commission). . . to offer to develop the proposed Consumer Product Safety standard”³³² The Act directed the Commission to permit one of the offerors to develop a proposed standard submitted pursuant to the invitation “if it determines that the offeror is technically competent, is likely to develop an appropriate standard within the period specified in the invitation . . . and will comply with the regulations of the Commission.”³³³ Under this process, the Commission invited either existing organizations or ad hoc groups brought together for that specific purpose to develop a proposed standard. The statute further authorized the CPSC to contribute to the offeror’s cost in developing a proposed standard.³³⁴ Interestingly, very little legislative history exists to explain why Congress chose this approach.³³⁵

By all accounts the offeror process did not work well³³⁶ and the CPSC was recently directed to develop product safety standards on its own without going through the offeror process.³³⁷ Under the offeror process standards were notoriously slow in developing,³³⁸ and the standards sometimes lacked adequate

327. 15 U.S.C. §§ 2051-2081 (1976), amended by Pub. L. No. 97-35, 95 Stat. 703 (1981) (codified at 15 U.S.C.A. § 2058(a) (West 1982)).

328. *Id.* § 2056(a)(1).

329. 15 U.S.C.A. § 2058(a) (West 1982).

330. 15 U.S.C.A. § 2058(a)(3) (West 1982).

331. Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, 95 Stat. 703 (1981).

332. 15 U.S.C. § 2056(b)(1)(D)(ii)(I) (Supp. IV 1980), repealed by Omnibus Reconciliation Act, Pub. L. No. 97-35, 95 Stat. 703 (1981).

333. *Id.* § 2056(d)(1).

334. *Id.* § 2056(d)(2). At times, the CPSC also required that representatives of certain interests be members of the offeror group. See P. HARTER, *supra* note 178, at 1338 n.178 (describing CPSC consumer representatives in voluntary standards development). Both the statute and the CPSC’s regulations required that the offeror provide for “notice and opportunity by interested persons (including representatives of consumers and consumer organizations) to participate in the development of such standards.” 15 U.S.C. § 2056(d)(3)(B) (1976); see 16 C.F.R. § 1105.6(a)(1) (1980) (requires offerors to give notice to interested persons of opportunity to participate in standard development).

335. For an analysis of the meaning and history of the offeror provision, see Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A. L. REV. 899, 906-16 (1973). They explain that the offeror process may “constitute anything from the very core of the rulemaking process to a set of troublesome but inconsequential preliminaries.” *Id.* at 908.

336. For example, the House Interstate and Foreign Commerce Committee explained: “The committee has long been concerned about the length of time it takes the CPSC to develop safety standards under the offeror process in Section 7 of the Act. Of equal concern to the Committee has been the quality of the standards being produced.” H.R. REP. NO. 1164, 95th Cong., 2d Sess. 5, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 9434, 9435; see also T. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade* (Nov. 1982) (report to ACUS discussing many problems with offeror process, including length of time required to develop regulation and lack of definition of role of offeror).

337. Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, 95 Stat. 703 (1981) (offeror provision repealed).

338. See *supra* note 336 (describing offeror process as lengthy).

supporting data.³³⁹ Offerors and the CPSC staff became embroiled in great struggles and an offeror's recommendations frequently were revised substantially before being used as a basis for a proposed standard.³⁴⁰

The CPSC began its use of the offeror process by creating distance between itself and the offeror on the grounds that it did not want to intrude into the deliberations of the private group.³⁴¹ This approach left offerors without substantial guidance concerning what the agency would deem acceptable results or how to write a standard.³⁴² Moreover, offerors could not tap the expertise and data sources of the agency.

Several offerors complained about the lack of guidance,³⁴³ and a former chairman of the CPSC acknowledged the absence of guidance as a major problem.³⁴⁴ As a result, the CPSC began providing directions for offerors, but tensions continued between the offerors and the Commission. In a joint project between industry and the agency to develop voluntary standards, the Commission accused an offeror of being comprised of "macho manufacturers" who stonewalled the agency.³⁴⁵ The offeror responded that the problem lay in "the ineptitude, bias and mismanagement casually dispensed" by the agency's staff.³⁴⁶ Although some offerors argued that the CPSC second guessed and

339. See e.g., *D.D. Bean & Sons v. Consumer Product Safety Comm'n.* 574 F.2d 643, 652 (1st Cir. 1978) (finding complete absence of evidence in record on matchhead fragmentation); *Aqua Slide 'N' Dive v. Consumer Product Safety Comm'n.* 569 F.2d 831, 844 (5th Cir. 1978) (holding that CPSC failed to produce substantial evidence to support warning sign and ladder chain requirements); H. R. REP. NO. 1164, 95th Cong., 2d Sess. 6, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 9434, 9436 (citing provisions of recommended standards lacking supporting technical rationale).

340. The House Committee stated:

The Consumer Product Safety Commission has generally given offerors great latitude to make independent judgments regarding the levels of safety required to address an unreasonable risk. The CPSC, however, has often disagreed with those judgments as incorporated in the offeror's recommended standard. In reviewing a recommended standard, the CPSC has often rewritten the offeror's work product, substituting its judgment on the levels of safety required for those of the offeror.

This *modus operandi* has severely undercut the effectiveness of the offeror process by reducing the meaningfulness of the industry and consumer participation.

H.R. REP. NO. 1164, 95th Cong., 2d Sess. 6, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 9434, 9435.

341. One participant in an early offeror proceeding described the CPSC's attitude toward the participants as "Delphic." Letter from Peter H. Schuck to Philip J. Harter (Dec. 4, 1981) (discussing negotiations in rulemaking) [hereinafter Schuck letter] (copy on file at *Georgetown Law Journal*).

342. The House Committee criticized the CPSC for directing offerors to address a broad range of hazards regardless of the data or lack thereof on the respective risks involved in such hazards. Thus, the CPSC required the offerors to consider unsolvable hazards; hazards for which there was little or no data to establish their existence; hazards over which the CPSC's jurisdiction appears highly tenuous. H.R. REP. NO. 1164, 95th Cong., 2d Sess. 9, reprinted in 1978 U. S. CODE CONG. & AD. NEWS 9434, 9438.

343. See Hamilton, *supra* note 184, at 1410-12 (American Society for Testing and Materials and Consumers Union so complained).

344. *Consumer Product Safety Commission—Oversight: Hearings on the Degree to which the Consumer Product Safety Commission is Fulfilling Its Mandate to Protect Consumers from Unreasonable Risks of Death, Injury or Serious or Frequent Illness Associated with the Use or Exposure to Consumer Products Before the Subcomm. on Oversight and Investigation, and Subcomm. on Consumer Product and Finance of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 359 (1977) (testimony of John Byington, Chairman of CPSC).

345. *What Can Sway CPSC Is Shown in King's Views*, PRODUCT SAFETY LETTER, at 3 (Jan. 26, 1981).

346. *Chain Saw Makers Blast CPSC*, PRODUCT SAFETY LETTER, at 4 (Feb. 9, 1981).

nitpicked the result, on several occasions the CPSC seemed to believe that the proposals resulting from the offeror process were inadequate because they were generally too stringent or imposed requirements based on inadequate data.³⁴⁷

These failures stem in part from the lack of direct participation by a responsible agency official in the development of the proposed standard. Because the CPSC did not participate, the offerors had to guess the agency's positions and were unable to engage in the give and take of a negotiation process. Because the offerors lacked guidance and data, they tended to develop far more elaborate and complicated standards than they would have if the agency had been present. The agency then had to develop a position based on new information. This duplicative process obviously took time and resources. Finally, and perhaps most important, some have alleged that the offerors were far too responsive to some of the interests, to the exclusion of others.³⁴⁸ The lesson seems to be that all interests significantly affected should be at the table, including the agency.

6. The Disadvantages of Agency Participation

Agency participation in regulatory negotiation raises problems of its own, some practical and some doctrinal. Many of these concerns, however, can be met. On the practical side, the fact that the agency will make the decision if negotiations break down can cause the parties to view the agency representative as a "special" interest and to accord it an unusual status. Some parties may continue to posture, to advocate extreme positions, to denounce the opposition as unworthy, and generally to preserve their positions for an ensuing adversarial contest.

A second concern arising from agency participation is that if negotiations break down and an agency decision follows, the agency may misuse the concessions and compromises made during the negotiations, as well as the data submitted during the process. A party may fear that once it deviates from its initial, adversarial position, recouping its position with the agency would be impossible if discussions break down. Thus, agency participation may cause the parties to maintain an inflexible approach, and the benefits of the negotiation process might be lost. These problems are not unlike those that arise in *any* negotiation,³⁴⁹ however, and procedural devices can, in large measure,

347. *Cf. supra* note 340 (discussing problems with offeror process from congressional perspective).

348. The House Interstate and Foreign Commerce Committee stated:

Unfortunately, the CPSC's efforts to assure that the proposed safety standard would be adequate have often been made without the advice or expertise of interested consumer or industry groups. The result has been poor quality standards, inadequately technical rationales to support the standard when challenged in court, and inefficient utilization of all parties' resources.

H.R. REP. NO. 1164, 95th Cong., 2d Sess. 6-7, *reprinted in* 1978 U.S. CODE, CONG. & AD. NEWS 9434, 9436.

349. The agency may appear to have ultimate decisionmaking authority because, if negotiations break down, the agency will develop the rule. Despite this possibility, this situation is not unlike many negotiations in which one party can take action subject to sanctions imposed by others. In the rulemaking context, the agency may write the rule, but private parties continue to participate in shaping the record and exerting the normal political pressures. Thus, the unilateral act of writing the rule remains subject to a form of countervailing power. This observation, however, does not remove the concern

remedy them.³⁵⁰

A more troubling problem arises from the concept of the agency as sovereign. Under a view of the agency as the decisionmaker, as in the New Deal vision of the agency, it would be illegitimate for the agency to negotiate with the parties in interest. According to this view, the agency may seek widespread public participation in the rulemaking process by contacting private interests before proposing a rule and by publicizing the development of a rule to permit any interest to submit material for the agency's consideration. But the agency should not jeopardize the exercise of its neutral, detached, expert judgment with too much contact with the parties.³⁵¹

With respect to regulatory negotiation, however, concerns about the concept of the agency as sovereign are misplaced.³⁵² First and foremost, the agency itself would not be bound by the position taken by its representative during negotiations, any more than any single constituency would be bound irrevocably by the position taken by its representative. Rather, the agency's senior staff would continue to review the proposal to determine whether the proposal reflected the agency's policies sufficiently to merit publication as a proposed rule.³⁵³ The officials in the agency who have final regulatory authority would assess the proposal just as they routinely do under the current process. In traditional rulemaking, the staff develops a proposed regulation, frequently after consultation with affected interests.³⁵⁴ The staff then submits it to senior officials for review and approval as a proposed regulation.³⁵⁵ The process of negotiating a proposed rule, therefore, would make more explicit and efficient a process that occurs regularly in current rulemaking.

Concern also has been expressed that the participation of an agency official in the negotiations would make a sham of the subsequent notice and comment period.³⁵⁶ That worry, however, is more apparent than real because under cur-

that agency participation may cause the parties to maintain an inflexible approach. For example, in the Homestake Mine negotiation, one of the participants expressed concern that the negotiations revealed their case to the other side. Danielson Interview, *supra* note 162; Watson Interview, *supra* note 165.

350. See *infra* notes 452-67 and accompanying text (discussing alternative solutions to problem of agency participation in negotiations).

351. See *supra* notes 38-43 and accompanying text (describing New Deal view of agency as detached, neutral experts acting in public interest); M. WESSEL, *supra* note 80, at 174-75 (describing need for neutral detachment of conferees when seeking scientific consensus); Stewart, *supra* note 3, at 1712-16 (describing agency bias and pressures to expand traditional model to include unorganized interests).

352. Not participating in the development of voluntary standards for a product or process subject to the agency's jurisdiction may be appropriate in those instances in which the agency is not called on to review the standard. In such a case the position taken by the agency representative could be perceived as the official agency position when in fact it reflected only the views of a staff member. See *supra* note 318 (comparing conflicting federal policies on agency participation in voluntary standards development).

353. If a proposed rule is negotiated among the parties, it presumably would be published in the *Federal Register* as a notice of proposed rulemaking and subjected to the normal comment and agency review process. See *infra* notes 549-51 and accompanying text (describing agency review of negotiated regulation, including negotiated rule and comment process interaction).

354. See W. MAGAT, L. GIANESSI & W. HARRINGTON, *supra* note 174, at 2-1 to 2-28 (describing EPA's best practicable technology rulemaking process for water quality standards).

355. See Pedersen, *supra* note 77, at 52-59 (describing internal rulemaking procedures at EPA).

356. Letter from Chairman James C. Miller, III to Sen. William V. Roth, Jr. (Nov. 25, 1981) [hereinafter Miller letter] (copy on file at *Georgetown Law Journal*). The letter contained the comments of the Federal Trade Commission on agency participation proposed in The Regulatory Mediation Act of 1981. S. 1601, 97th Cong., 1st Sess., 127 CONG. REC. 123, S9328 (daily ed. Sept. 9, 1981). The Regula-

rent practice comments are received and reviewed by the staff that prepared the proposed rule and are subject to the final review of senior agency officials. That practice could continue for proposed rules developed through negotiation among the parties having a significant interest in the negotiations. Moreover, an initial proposal developed through negotiation should be more balanced and reflect more diverse views than one written by the agency after informal and sequential consultation that responds to the various political pressures.

The experience of agencies in negotiating settlements for lawsuits supports this argument. In lawsuits challenging rules agencies routinely negotiate settlements in which they agree to publish a particular notice of proposed rulemaking.³⁵⁷ In these cases, senior agency officials must determine whether the agreement comports with agency policy and is within the range of acceptable regulatory alternatives. Similarly, enforcement actions are also regularly negotiated. In both situations, the agency representative negotiates subject to senior official approval; he does not act as the sovereign agency making an independent decision and holding firm.

Part of the concern about agency participation in regulatory negotiation is the fear that the negotiation decision may not be *the* one the agency would have developed independently as a regulation. Although it is unclear whether this fear is justified,³⁵⁸ the question obviously is not whether the decisions are identical, but whether the decision is within the range of acceptable alternatives. As Dean Morgan noted in an earlier ACUS project addressing the related issue of settling ratemaking cases: "Ambiguity is an inherent characteristic of the ratemaking process. . . . The most that can be hoped of any process, whether formal or compromised, is that the result will fall within a range of reasonableness."³⁵⁹ Further, the range of acceptable alternatives currently is defined in large part by the parties themselves. Negotiation merely gives them a direct voice and recognizes what happens in practice.³⁶⁰ Thus, properly structured negotiations not only fulfill the goals of the regulatory process, they do so more directly than the current practice.³⁶¹

The agency remains sovereign because it alone makes the final decision. To alleviate any persistent concerns, however, it can be made clear at the outset of a regulatory negotiation that the participation of the agency representative is not binding on the agency. For example, each of the parties in the Columbia

tory Mediation Act of 1981 would reduce the adversarial nature of the regulatory process by encouraging negotiation. Chairman Miller complained that because the participation and endorsement of a senior official would make it appear that the agency is committed to the negotiated proposal, the subsequent notice and comment procedure would appear to be a sham to those who did not participate. Miller Letter, *supra*.

357. See *supra* notes 194-99 and accompanying text (describing negotiated settlements of rule challenges).

358. For example, some European standards for vinyl chloride were negotiated and are similar to OSHA's. See generally J. BADARACCO, *supra* note 93 (overview of similarities and differences in European and American business and government relationships).

359. Morgan, *supra* note 24, at 71.

360. See *supra* notes 87-88 and accompanying text (describing political process agencies engage in without legislative directives).

361. This process is not dissimilar to that described in the legislative history of the APA. See *supra* note 28 (describing conferences among interested parties as potential substitutes for formal hearings).

River negotiations was a government agency.³⁶² After reaching a settlement acceptable to the representatives of the parties, each representative agreed to recommend approval to his respective agency and each understood that the other could not bind its agency short of that ratification. All participating agencies approved the agreement after they conducted the appropriate reviews.³⁶³

7. Appropriate Agency Representative

The agency representative, like his private sector counterparts, should be a relatively senior official. He should have the ability to assess and predict the ultimate position of his constituent, the agency. Further, the representative should be part of the substantive division of the agency that is responsible for the development of the regulation so that he can make the requisite decisions. Because the goal of the negotiations is to produce an agreement that will form the basis of a regulation issued by the agency, it is important to involve the agency's lawyers in the process. Moreover, it is critical that any legal concerns be addressed early because negotiations could be thrown off stride or discarded altogether if such questions arose late in the process. The agency negotiators should be able to tap the agency resources, including any data the agency may have collected, agency experts, and relevant staff. Thus, the negotiating team should have sufficient stature to permit it to draw on the agency's resources and coordinate its various concerns as it would if the regulation were being developed by the agency's own staff.

8. Summary of Agency Participation

Negotiations among the parties, with or without the agency, can expose the true interests of the respective parties. Negotiations thus narrow the range of disagreement, identify the research that needs to be conducted, and explore novel approaches to fulfilling the regulatory mandate. If the private parties themselves can reach agreements on all or even some of these topics, the agency's work will be greatly streamlined. Even if the agency does not participate, it can facilitate the negotiations process by providing guidance on the limits of available options and by supplying data and information available to the agency that may be unavailable to the private parties.³⁶⁴

It seems clear from the foregoing analysis, however, that to achieve the full benefits of regulatory negotiation, the agency should participate as a full party. Although care must be taken to avoid the problems attendant to that role, doing so will not be difficult. If the agency does not participate in the negotiations, the fruits of the process may be bland recommendations akin to those

362. See *supra* note 232 and accompanying text (describing Columbia River environmental negotiations).

363. Gusman Interview, *supra* note 232. Gusman served as the mediator for the negotiations.

364. In this scenario, the role of the agency would not be significantly different from its role in the development of voluntary standards. See Employee Membership and Participation in Voluntary Standards Organization, 16 C.F.R. § 1031.5(f) (1980) (describing CPSC participation in voluntary standards development); P. HARTER, *supra* note 178, at 216-35 (detailing agency actions to improve relationship between externally developed standards and government regulations).

proffered by traditional advisory committees. That result, in turn, would only add another layer and more delay to the rulemaking process.

D. ASSEMBLING THE NEGOTIATORS

The parties are likely to view the entire negotiation process with healthy skepticism.³⁶⁵ For years rules have been developed through a quasi-adversarial process in which each party views the other as an untrustworthy opponent.³⁶⁶ Negotiations could be viewed as a naive, futile effort to induce the lamb to lie down with the lion.³⁶⁷ The lamb is likely to believe that by negotiating it may give up power provided by another process. Therefore, it may be far more comfortable with the traditional process, in which it is protected by a shepherd.³⁶⁸ If the parties are to be willing to participate, they must be shown that it is in their interest to negotiate. In addition, it is rarely clear from the outset which interests should be represented and who the representatives should be. Thus, considerable effort must be expended to establish the negotiations if the entire process is to be successful.

I. Neutral Judgment

The first question is who should be responsible for empanelling the group. The parties frequently can agree among themselves who the major players are. One way of assembling the group, therefore, would be to have the parties agree upon the participants in a negotiating group. Someone, however, would have to initiate and administer even this relatively simple process. Moreover, if a regulation is to be negotiated³⁶⁹ someone would have to determine whether the significant parties in interest were actually represented.³⁷⁰

A second approach, and one likely to be more common, would require some individual to conduct a discrete preliminary inquiry to discover who the interested parties are and whether sufficient common ground for reaching an agreement through negotiation exists.³⁷¹ For example, the individual might contact the line officer in an agency and ask what interests would be affected by the subject matter of the regulation and which groups would be likely to partici-

365. See *supra* text following note 173 (discussing implausibility of hot tub theory of negotiations, which characterizes negotiated solutions as those reached in an atmosphere of beguiling honesty and openness).

366. See *supra* notes 104-27 and accompanying text (discussing criticisms of adversarial process).

367. The phrase derives from a letter concerning regulatory negotiation from Richard M. Patterson, of Dow Chemical, to Dan Bensing, Legal Counsel, Senate Governmental Affairs Committee (June 2, 1981) (copy on file at *Georgetown Law Journal*). Mr. Patterson's letter expressed concern about some regulatory negotiation proposals that were current at that time.

368. See *supra* notes 243-47 and accompanying text (describing sources of negotiating power, such as formal process for resolution of disputes).

369. Even if the initial discussion does not result in a negotiated rulemaking, the concerns addressed herein would still apply. The preliminary discussion may result in a narrowing of the differences among the interests and a series of recommended regulatory actions by a group acting as an advisory committee. See *infra* text following note 416 (discussing use of advisory committee if regulatory negotiation determined inappropriate). For example, the Federal Advisory Committee Act (FACA) requires that advisory committees "be fairly balanced in terms of the points of view represented." 5 U.S.C. app. § 5(b)(2) (1976).

370. See *infra* text accompanying notes 401-02 (describing role of convenor, including determination of feasibility of negotiation and representation of interests).

371. Cormick Interview, *supra* note 167.

pate in the rulemaking proceeding. In addition, he would inquire about the issues likely to be involved in the proceeding. The person conducting the inquiry would then contact the individuals and organizations on that list and inquire about their views as to what the interests are, what issues are likely to be raised, and who the players should be. He also would ask what issues would be inappropriate for negotiation and whether the organization believed it could work with other parties in reaching an agreement. Thus, through such multiple iterations, the parties and the issues could be defined, both inclusively and exclusively.³⁷²

The obvious organization to conduct this inquiry, or on whose behalf the inquiry would be conducted, is the agency that ultimately will issue the regulation. The agency must be comfortable with the process by which its own regulations are developed,³⁷³ and it might be hesitant to rely on a negotiating group assembled by someone outside its control.³⁷⁴ The agency thus appears to be a logical candidate.

There are, on the other hand, significant arguments for having someone other than the agency itself assemble the group. The point of the iterative process is to make discrete, confidential inquiries about a party's interests and the issues it believes reasonably can be discussed. A party may believe that its ultimate interests lie in the political or adversarial process, and it justifiably may be reluctant to talk candidly with the agency for fear of retribution if it does not agree to participate in the negotiation. In addition, a party may believe that either proposing the negotiation process or agreeing to participate before other parties agree to do so would be an acknowledgement that it is unable to achieve its goal through the normal process; this in turn would diminish its power.³⁷⁵ Thus, the preliminary inquiry into whether negotiation is feasible, which requires touching base with the various interests while narrowing the issues, must be conducted in confidence and must permit a party to say "no."³⁷⁶ Otherwise, the very purpose of the discrete inquiry would not be fulfilled because the parties would not begin the negotiation process by trusting each other.

372. This iterative process need not take long because the goal is to spot parties and issues, not resolve them. Usually the process could be completed in a few weeks.

373. An agency that is uncomfortable with the negotiation process might refuse to participate or, if it does participate, might find ways to sabotage the results. If such sabotage occurred, negotiation would consume resources without achieving its overall benefits. Therefore, it would be inefficient to try to force the agency to use a negotiation process to establish a regulation.

374. Professor Stewart believes that an agency's reluctance to "lose control" of the rulemaking process is a major inhibition on the use of negotiation to establish regulations. Stewart, *supra* note 112, at 1346. To the extent that observation is true, and undoubtedly it is, an agency may feel doubly reluctant to participate if it cannot control the establishment of the negotiating group.

375. See Eisenberg, *supra* note 127, at 672-73 (discussing willingness of parties to negotiate depending on relative bargaining powers).

376. A party might be forced to negotiate by the prospect of embarrassment from publicity of the fact that it held up full negotiations. It would still be difficult, however, to force the party to participate in good faith if it believed the subject unsuitable for negotiations. Cormick Interview, *supra* note 167. In one environmental negotiation, a party was forced to the table by such a tactic, and the whole process angered all those involved. H. Burgess, *supra* note 250. If a party states that it believes negotiations are inappropriate and that it is unwilling to participate, someone should determine whether the party's participation is essential to the negotiation and the strength of its refusal. It may be that negotiations are appropriate and that the party ultimately would participate, despite its initial statement to the contrary.

The political legitimacy of this process depends on the participation of representatives of the interested parties as negotiators. Thus, the parties and the world at large must have confidence that negotiators are indeed representatives of the significantly affected parties.³⁷⁷ Therefore, it would be inappropriate to permit any participant to be responsible for assembling the group because it might appear that one party selected interests and individuals to support its views.³⁷⁸

The agency is particularly susceptible to charges of bias. For example, one allegation against intervenor funding is that agencies have a bias toward funding those interests that support its view.³⁷⁹ One regulatory agency, which wanted to draw on diverse views of experts in a particular field, asked the National Academy of Sciences to empanel a technical committee.³⁸⁰ An official of the agency believed that the panel's recommendations would be given far greater credence if the panel was not under the agency's own auspices because people would believe that the participants were selected on the merits, rather than because of bias in favor of the agency.³⁸¹ The official indicated that he believed individuals with greater stature in their respective communities were willing to participate in the process precisely because they felt the neutral selection sustained the panel's legitimacy.³⁸² Indeed, many statutes that require an agency to consult with an advisory panel before issuing a regulation³⁸³ also require the panel either to be appointed by or selected from nominees of the National Academy of Sciences. The obvious motivation for this trend is a desire to ensure the neutrality of the panels, and in particular, to remove the possibility that parties could allege that the agency stacked the committee to favor a point of view or to exclude some position.

377. Any group that negotiates a position on a regulatory matter can assist an agency by narrowing the range of alternatives that would be acceptable to the members of the group, by spotting issues that may be troublesome, and by providing a starting point for the agency's consideration of the issues. There is, of course, no requirement that any group communicating its views and positions to an agency represent a diversity of views or even more than one interest.

If, however, the group is to have any formal relationship with the agency, as is required for the negotiation of a rule, FACA requires that the membership "be fairly balanced in terms of the points of view represented." 5 U.S.C. app. § 5(b)(2) (1976). Further, neither the agency nor any particular interest should unduly influence the position of the committee as a whole. *Id.* § 5(b)(3). Moreover, it is critical that the members of a group negotiating a rule actually represent the interests involved and that no one party is in a position to pressure the membership to favor its perspective because this proposal anticipates that the product of the negotiation would be accorded significant deference. *See infra* notes 547-56 and accompanying text (describing agency and judicial review of negotiated regulations).

378. "[T]here is a perception . . . that there is inherent, insidious bias in the panel selection process and, as a result, in the panel's studies. This view argues that the person appointing the panel, subconsciously (or perhaps consciously—it makes no difference) chooses people whom he believes will be partial to the result he favors." M. WESSEL, *supra* note 80, at 146.

379. The Magnuson-Moss Act's expense reimbursement program may not have led to bias in agency funding. Administrative Conference of United States Recommendation 80-1, Trade Regulation Rulemaking under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 1 C.F.R. § 305.80-1 (1981). Nonetheless, recommendations were made to ensure that participants were selected to provide a diversity of views as opposed to those supporting the agency. *Id.* § 305.80-1(C). The ACUS has recommended that separate parties administer the reimbursement program and the development of staff positions for a proceeding. 1 C.F.R. § 305.79-5(1)(f) (1981).

380. Seymour Interview, *supra* note 168.

381. *Id.*

382. *Id.*

383. *See supra* note 140 (listing examples of statutes requiring agency to seek advisory committee advice).

To avoid the inevitable claims of bias and conflict, as well as the difficulty of securing the initial agreement of the parties to participate, an organization other than the agency that will ultimately issue the regulation should assemble the negotiating group, at least on a preliminary basis. The use of a neutral third party would enable the parties to express themselves with candor. In addition, a neutral third party is appropriate because many of the decisions made in the initial stage of negotiations will be of a judicial nature. Such preliminary decisions would include the identification of interests and their appropriate representation.³⁸⁴ Thus, an unbiased decisionmaker of the highest probity would be required. If an organization other than the agency assembles the negotiation group, the agency would have no stake in its composition. Thus, claims of agency bias or conflict in selection of the negotiating group would be avoided.³⁸⁵

2. Convenor

Several existing Federal agencies could be used to perform the "convenor" function. The convenor would have responsibilities for the preliminary determination of the feasibility of negotiation, the interests to be represented, and the appropriate representatives of the interests.

The President's Task Force on Regulatory Relief is an interagency organization administered by the Office of Management and Budget (OMB) with the power to direct agencies to consider various regulatory alternatives and to coordinate agencies' approaches to regulatory questions.³⁸⁶ It has become the ultimate authority in the Executive Branch's management of the regulatory process.³⁸⁷ Although the Task Force could be extremely helpful in regulatory negotiations by assuring agencies of the legitimacy of the process, it is unlikely to serve as the convenor because it has no operational authority. Rather, the OMB provides staff to the Task Force.

The OMB, in addition to its general management authority and its duties under the Paperwork Reduction Act,³⁸⁸ has general authority to implement President Reagan's Executive Order 12,291.³⁸⁹ The Order requires the OMB to review regulations issued by the respective agencies and the regulatory impact analysis³⁹⁰ prepared by the agencies for major rules.³⁹¹ The OMB attempts to ensure, at least in theory, that agencies have adequate support for the factual conclusions underlying regulations and that regulations are clearly within the agency's statutory mandate.³⁹² It has become the central manager of the regu-

384. See *infra* text following note 443 (discussing judicial nature of preliminary determination of parties to negotiation).

385. Widespread confidence in the legitimacy of the negotiating group would help ensure that the results of its negotiation are accorded greater weight and that they would not be subjected to collateral attack. Therefore, it is in the agency's interest to instill such confidence. To the extent that the use of an independent third party increases such faith, it should reduce the agency's innate resistance to the notion.

386. Exec. Order No. 12,291, § 6, 3 C.F.R. 127, 131 (1981).

387. *Id.*

388. 44 U.S.C. §§ 3501-20 (Supp. IV 1980).

389. Exec. Order No. 12,291, 3 C.F.R. 127, 131 (1981).

390. *Id.* § 3; see *infra* notes 589-90 and accompanying text (discussing regulatory impact analysis).

391. *Id.* at § 6, 3 C.F.R. 127, 131 (1981).

392. *Id.* at §§ 4, 6, 3 C.F.R. 127, 130-31 (1981).

latory process.³⁹³ The OMB could make the preliminary determinations concerning regulatory negotiations as an adjunct to this regulatory management authority.

The significant drawback of this suggestion is that the White House—the Task Force and OMB—could be viewed as politically partisan and thus liable to select interests and representatives favorable to political views of the administration. Moreover, OMB's review function creates tension between the agencies and OMB that may frustrate the good working relationship necessary for such a system to work. This tension may cause the agency to use the traditional process to avoid dealing with the OMB, even if it otherwise believes negotiating would be appropriate.

Another alternative for the role of convener would be the Federal Mediation and Conciliation Service³⁹⁴ (FMCS) which, among other things, develops "the art, science, and practice of dispute resolution."³⁹⁵ Until recently, the FMCS has been concerned almost exclusively with labor/management issues. Recently, however, it has undertaken a role in age discrimination cases³⁹⁶ and other nonlabor fields.³⁹⁷ Because FMCS has an expertise in conducting negotiations, it may be an appropriate convener if it continues to expand its focus.

The ACUS³⁹⁸ itself could function as the convener in regulatory negotiations. Its traditional field of expertise is procedural, and it has not been partisan, either politically or with respect to an interest of a particular agency. Although ACUS is detached and neutral, each agency has a representative who is a member of the Conference.³⁹⁹ Consequently, the ACUS is not an alien "black box" with which the agency might be uncomfortable working. Further, the diversity of views on the Conference, both among the respective agencies and the public members, assures its continued neutrality. Thus, the Conference would be a logical choice to perform the task of convener.⁴⁰⁰

The convener would be responsible for making the preliminary determinations of whether negotiation is a feasible way of establishing the rule, which interests should be represented, and who the representatives should be. The convener should base these determinations primarily on agreement among the parties in interest.⁴⁰¹ The process used to develop the regulation must also be

393. *Id.* § 4(a), 3 C.F.R. 127, 120-31 (1981).

394. 29 U.S.C. § 172 (1976) (authorizing operation of FMCS).

395. UNITED STATES GOVERNMENT MANUAL 537 (1978).

396. See Barrett & Tanner, *The FMCS Role in Age Discrimination Complaints: New Uses of Mediation*, 32 LAB. L.J. 745 (1981) (detailing recent involvement of FMCS in resolution of age discrimination suits).

397. A mediator in the settlement of a dispute over tribal lands of the Hopi and Navajo Indian Tribes is provided for in 25 U.S.C. § 640d (1976).

398. 5 U.S.C. §§ 571-76 (1976).

399. *Id.* § 573(b)(3).

400. The ACUS could retain the services of an individual to perform the inquiries and conduct the negotiation process as opposed to using its own staff. If, however, regulatory negotiation became an established tool for developing regulations, the ACUS probably would develop its own experts, such as mediators. See *infra* notes 425-32 and accompanying text (detailing benefits of mediator in regulatory negotiations).

401. See *supra* note 255 and accompanying text (describing need for dominant parties to consider themselves equal for negotiations to succeed).

acceptable to them.⁴⁰² If the parties agree to develop a regulation through negotiation they could suggest a pre-formed group to the convenor. The group would then review the proposal to ensure that the proper interests are adequately represented and the issues involved are suitable for negotiation. If the convenor concurred with the participants and issue selection, it then would certify that decision to the responsible regulatory agency.

3. Preliminary Inquiries

As suggested above, an alternative way to initiate the regulatory negotiation process would be for a party—the agency, a private interest, or conceivably even an interloper—to suggest to the convening organization that regulatory negotiation would be appropriate in certain situations. The request would briefly explain the reasons for favoring regulatory negotiation over alternative methods. The convenor then would inquire whether there is a substantial likelihood that the agency would consider issuing a rule on that particular subject matter developed by means of regulatory negotiation. If so, the convenor would make the discrete inquiries to determine (1) whether a limited number of interests would be substantially affected by the proposed rule; (2) whether individuals could be selected who could represent those interests; (3) whether those interests would be willing to make commitments to negotiate in good faith to reach a consensus on a proposed rule; (4) the issues raised by the subject matter in question; and (5) a tentative schedule for completing the work of the committee. Each of these inquiries is important and will be considered in turn.

Limited Number of Interests and Countervailing Power. The convenor first should assess the number and relative power of the affected interests. The negotiation process will not work if the participation of a large number of diverse interests is required.⁴⁰³ If any one of them, or a group of closely allied interests, has far more power than any other, the subject may be inappropriate for negotiation because the less powerful party may need the protections afforded by the traditional process. The threshold inquiry must be whether several parties have sufficient countervailing power such that no interest can achieve its will without incurring unacceptable sanctions from the others.⁴⁰⁴ If this situation exists, the outcome of the regulation will be uncertain, and the parties may be insecure and thus may view negotiation as the way to break the deadlock.⁴⁰⁵

402. See *supra* note 242 and accompanying text (describing attempt of each party to maximize return in dispute resolution).

403. See *supra* notes 257-58 and accompanying text (describing need for limited number of parties for successful negotiations).

404. See *supra* notes 251-56 and accompanying text (describing need for countervailing powers before negotiations can begin).

405. Thus, the parties are "deadlocked" because none can control the outcome of the regulatory process. The deadlock forces them to deal with each other as equals. If they fail to do so, the process will result in a decision they cannot control, because the agency will make the decision. See *Regulation Negotiation Hearings*, *supra* note 221, at 26 (Statement of Francis X. Murray) (describing need for equal status of parties with neither party confident of victory to initiate successful negotiations); Cormick, *supra* note 247, at 28 (describing recognition of equal status of participants as prerequisite to

Individuals to Represent the Interests. Some of the interests may be so dispersed and unorganized that it would be impossible to select individuals to represent each respective interest. Simply because the impact of a regulation would be widely felt, however, does not mean that effective representation is impossible. For example, even though a regulation dealing with air pollution may affect all urban dwellers, at least one environmentally active group would likely represent those interests. A concern related to representation of such dispersed and unorganized interests is the need to identify precisely the interests that a party actually represents.⁴⁰⁶ For example, in one environmental negotiation, because the company involved was unsure of the interests the negotiators represented, it attempted to ascertain exactly which organizations would sign any agreement that was ultimately negotiated.⁴⁰⁷ The convenor may have to meet with several members of an interest to focus their attention on selecting a limited number of representatives⁴⁰⁸ because each member may believe that the representative selected as the negotiator should be its exclusive representative or that the member or it should be allowed to participate in addition to a closely aligned interest.⁴⁰⁹ If the interest cannot be persuaded to select representatives, the convenor should make the determinations described below.⁴¹⁰

Commitment to Negotiate in Good Faith. Even if the interests and their representatives are precisely identified, at least one major interest may refuse to participate. That interest may believe that it can secure its interests through the traditional rulemaking process, litigation, or legislation.

In regulatory negotiation, as in environmental negotiation, some parties may profit from delay or obstructionist tactics. If that organization is unwilling to participate, it would do little good to include the organization in negotiations. Such a party, however, may be necessary for the negotiations. Part of the preliminary inquiry with the interest groups should therefore involve a discussion of whether negotiations are the proper route.⁴¹¹ As part of this inquiry, the

participation); Fox, *supra* note 96, at 97 (describing partnership alternative to current adversarial regulatory process).

406. Thus, it would not do to simply assume that because a representative at the table is an environmentalist, he adequately represents all environmentalists. There may be many "environmentalists" with differing views and positions on a particular topic.

407. Cormick Interview, *supra* note 167.

408. Negotiations of the sort described herein are unlike traditional labor negotiations in which the union and management representatives are usually quite well defined and do not need further clarification.

409. The convenor may have to meet with various organizations that have allied interests to persuade them to band together to form a caucus, to develop a negotiating position, and to participate as a team in the negotiations. Part of this process may resemble the process of persuading the diverse interests that it is in their overall interest to negotiate as opposed to using alternative forms to develop a rule. See J. Dunlop, *supra* note 302.

410. See *infra* note 438 and accompanying text (describing factors considered in determining whether interest requires actual representation at negotiating table).

411. This informal discussion would be entirely off the record. A party would not be sanctioned for disagreeing and would not have to give up its adversarial posture. Cf. *supra* note 376 and accompanying text (describing preliminary question of feasibility of negotiations as confidential inquiry). Thus, a party could both agree to negotiate in good faith, and at the same time, file a lawsuit challenging agency action. The lawsuit would increase the group's power vis-a-vis the agency, as part of the posturing for a power position. See *supra* notes 251-53 and accompanying text (describing countervailing power as prerequisite for negotiations).

convenor could point out that the other interests have countervailing power and that *some* decision is inevitable. For example, an interest group, bent upon delay, might be convinced that the agency is likely to move ahead and that it cannot control the outcome. The convenor could convince the interest group that through participation in negotiations it might be able to exert some influence over the final decision.

If such an interest remained intransigent and refused to participate, the convenor then would have to decide whether negotiations could still be fruitful. Such a decision would involve several considerations. First, the convenor must decide whether other organizations whose interests are fairly close to those of the recalcitrant are willing to participate. Second, the convenor must determine whether the absent group's interests are significantly or only tangentially affected. Finally, the convenor must consider whether the group is such a major constituent that the agency would be reluctant to accept a negotiated agreement without its participation. Alternatively, the convenor could decide that the party ultimately would join in the discussions and participate in good faith in negotiations.

If the convenor ascertains that the appropriate interests are willing to participate in the negotiations, he should ask each party to pledge to negotiate in good faith to reach a consensus on a proposed rule. Of course, no party would be formally bound by such a pledge.⁴¹² The pledge, however, could prove to be a useful reminder to the parties of their commitment if negotiations and emotions become frayed, a circumstance that clearly should be anticipated.

Scope of Issues. The convenor should then facilitate the preliminary definition of the issues to be considered in the negotiation. One participant in an environmental negotiation commented that agreeing on the scope of the discussions was the most difficult part of the task of negotiation; once the issues were in place, negotiations proceeded in a straightforward manner.⁴¹³ The convenor would facilitate definition of the issues through the iterative process of asking the parties what they believe should be involved in regulating a particular subject matter.⁴¹⁴ The issues would not be defined in any concrete way at the preliminary stage; rather, the initial outlines would be set to make the parties aware of the scope of negotiations. Matters outside the scope of discussion, such as those irrelevant to the statute authorizing the regulation or those involving such fundamental values would be identified at this point.

412. Even though a party is not bound by its pledge, one commentator proposed that an agency "look suspiciously" at the comments and challenges of any party that fails to negotiate in good faith. Note, *supra* note 96, at 1879.

413. See Danielson Interview, *supra* note 162 (describing necessity of clearly distinguishing issues in Homestake Mine negotiation); Watson Interview, *supra* note 165 (same).

414. Defining the scope of the issues, like ascertaining the parties to the negotiation, need not be terribly time consuming. This article envisions a listing of the issues involved, rather than development of a specific agenda for negotiations, such as was done in the environmental negotiations in the Homestake Mining dispute. See *supra* notes 162-65 and accompanying text (discussing use of negotiations instead of litigation to settle specific disputes between conservationists and mining company). The parties themselves probably would be able to define the issues with relative ease, even if they initially are inclined to take an extreme view of the issues. With sufficient shuttle diplomacy, the convenor could quickly determine the basic contours of the negotiation.

Establishment of a Preliminary Schedule. A preliminary schedule for completing various stages of work should be established. Experienced negotiators have pointed out that deadlines have several beneficial effects: they provide an incentive to reach agreement and a sense of accomplishment once the deadline is met.⁴¹⁵ The parties must realize that they may lose control of the regulatory process if they do not reach an agreement.⁴¹⁶ A deadline, which may be required by that of a statute or court order, provides a reminder that some decision is inevitable and that the parties therefore need to reach a consensus. Further, a deadline enables the parties to measure the likelihood of success on the project; the inability to meet the deadline for agreement may indicate the futility of trying to negotiate the particular regulation.

4. Certification to the Agency

After making these preliminary assessments, the convenor may determine that negotiations among interested parties would be unlikely to result in an agreement on a proposed regulation. In such a situation, the convenor would issue a notice stating that negotiations were inappropriate, without blaming any party for sabotaging the result. Publicizing one party's refusal to participate would be counterproductive because it could cause communications to break down even further. If, however, negotiation would be inappropriate because the parties differ on fundamental issues, the convenor should acknowledge this reason so that the political process can attempt to resolve the conflict. The convenor might conclude that although successful negotiation of a proposed rule would be unlikely, bringing together the major parties in interest to discuss the subject matter is desirable. In such a situation, the agency should empanel an advisory committee. The advisory committee could aid in narrowing the differences, clarifying the issues and positions, and providing guidance to the agency on the data required to resolve important questions.

If the convenor determines that regulatory negotiation would be feasible and superior to traditional rulemaking for developing a proposed regulation, the convenor would recommend to the agency that the negotiations be initiated. The report would include recommendations on the interests to be included in the negotiations, representatives to lead the negotiating teams of those interests, the issues to be considered, and a schedule for completion of the work. These recommendations would comprise a "contract" among the parties that participated in the iterative preliminary process. Alternatively, if the parties did not reach an agreement informally, the convenor's own determination would form the recommendation.

In determining whether negotiations should be undertaken, the convenor should make a reasonable effort to ensure that the negotiating group is composed of individuals who are competent and qualified concerning the subject matter of the proposed rule or that knowledgeable individuals are available to them. The group also should be balanced so that no interest or group of allied

415. Cormick, *supra* note 247, at 29 (describing sense of urgency as prerequisite to negotiations).

416. See *supra* notes 262-63 and accompanying text (describing pressure to reach decision as aid to negotiation).

interests dominates⁴¹⁷ or constitutes more than a third of the members of the committee.⁴¹⁸

These criteria for determining the composition of the bargaining group are not binding on the convenor. Rather, they provide reasonable guidelines. For example, a rigorous analysis of the interests involved may reveal that a balance cannot be achieved because the number of interests is too great, or because an interest has no one who is technically competent in the subject matter of the regulation to represent the interest or to consult in the negotiations. Whether such situations would preclude successful negotiation thus would depend on whether the parties would be able to participate fully and on relatively equal footing. Consideration of these criteria is designed to aid in this determination.

If the convenor recommends that a regulatory negotiation process be established, the agency has several alternatives. The agency may decide, in its discretion, to adopt the recommendations. It may decide not to issue a rule at all or it may decide to follow more traditional procedures. If the agency decides to use regulatory negotiation, it should follow the recommendations of the convenor and use the proposed group of negotiators to ensure the effectiveness of the process. Alternatively, the agency and the convenor could agree to revise the recommendations.

The agency should take advantage of the convenor's recommendations because the agency can emphasize that the findings were made by a neutral third party and that the agency did not select the negotiating group.⁴¹⁹ Further, following the convenor's recommendations would allow the agency to build on the preliminary work performed in bringing the group together. Although the agency could negotiate its differences concerning the recommendations with the convenor, it should be willing to commit itself to the preliminary findings of the convenor unless it has substantial cause for concern. The likelihood of success of the negotiation, and ultimately the legitimacy of the resulting rule, rests on the confidence of the parties in the integrity of the negotiation group. If the agency refuses to accept the convenor's recommendations and imposes its own recommendation, the other parties may lose confidence in the group's integrity. Finally, the agency's participation in the development of the group would minimize its tendency to reject the group's report as "not invented here."

5. Existing Organization

Voluntary standards have been used in many regulatory programs.⁴²⁰ In

417. See Administrative Conference of United States, Recommendation 78-4 § (6)(c)(i), 1 C.F.R. § 305.78-4(6)(c)(i) (1981) (ACUS recommendation that voluntary standard committees in health area include a balanced array of relevant interests).

418. REGULATIONS GOVERNING COMMITTEE PROJECTS, § 5-4(c) (National Fire Protection Ass'n 1976).

419. See *supra* notes 377-78 (describing need to have disinterested party select representative negotiators).

420. See P. HARTER, *supra* note 178, at 191-97 (describing potential value of external standards to agency); Administrative Conference of United States, Recommendation 78-4, 1 C.F.R. § 305.78-4 (1981) (recommendation on agency interaction with private standard-setting organization in health and safety regulations).

many ways, their development is a form of regulatory negotiation. The subject matter of a proposed regulation may be within the jurisdiction of an existing standards-writing organization.⁴²¹ If such an organization exists and enjoys the support and confidence of the affected interests,⁴²² it would be logical to conduct the negotiations under the auspices of that organization rather than to establish an entirely new framework for negotiations. The standards-writing organization may have developed procedures for ensuring fair representation of the respective interests and for ensuring that decisions actually reflect a consensus.⁴²³ In such situations, an existing committee within the standards-writing organization could be regarded as a regulatory negotiation group, or an agreement reached by such a committee could form the basis of a proposed regulation.⁴²⁴

6. Mediator

The services of a mediator may benefit the regulatory negotiation process. If the issues are relatively well-defined or the participants have already established a good working relationship, a mediator may not be of significant help because the parties themselves could efficiently negotiate without outside intervention. In these instances, negotiations often take place within existing norms that govern their behavior.⁴²⁵ For example, in the labor context, the parties often have a well-established, ongoing relationship and the issues involved in the bargaining, such as wages, fringe benefits, seniority, and working conditions, are usually clear. Therefore, in labor negotiations the parties can confront the issues directly and neither side can afford to be preemptive with the other, lest it damage the ability to cooperate in the future.⁴²⁶ In the regulatory context, a number of interests may participate regularly in discussions on particular subjects. Despite the absence of a formal, ongoing relationship such as that of management and union, the interests may have established a working relationship that they have an interest in preserving. Thus, the negotiators may

421. For example, OSHA used the existing processes of the National Electric Code, *supra* note 186, to revise its standards on the occupational exposure to electrical hazards. 46 Fed. Reg. 4034, 4036 (1981).

422. Some interests have believed, correctly or not, that such organizations are sometimes unreceptive to their views and have either refused to participate or have been quite wary in doing so. See P. HARTER, *supra* note 178, at 112-16, 124-27 (discussing concerns about use of externally developed standards in regulatory setting, including need for participation by important constituencies). Thus, one of the questions the convenor should ask in deciding whether to recommend the establishment of a negotiation group is whether any organization currently writes consensus standards in the subject area of the proposed regulation. If so, the convenor should inquire whether the parties believe its processes are suitable for negotiating the regulation. Even if such an organization exists, some parties may believe that its processes are inappropriate, which may indicate either that negotiation is unlikely to be fruitful or that the particular concerns of the parties must be met. Nevertheless, an explanation of how the consensus process works may convince such a party that its fears are ill-founded.

423. See 1 C.F.R. § 305.78-4 (1981) (preamble to ACUS Recommendation 78-4 on agency interaction with private standard organization describing functioning of such groups).

424. See *id.* (recommendation on agency use of voluntary standards developed by private organizations).

425. See Eisenberg, *supra* note 127 at 676-80 (describing elements of negotiation, such as claims of right and dependence between otherwise independent actors).

426. See Susskind, *supra* note 83, at 6 n.14 (discussing differences between labor-management and environmental disputes). Although this observation, of course, is not always true, it differentiates this relationship from many in the regulatory context.

have developed sufficient trust and lines of communication to begin discussions and to confront relevant issues directly without the assistance of a mediator.

In most regulatory matters or environmental disputes, however, the issues are unclear and the parties may lack not only an established and ongoing relationship, but may be highly antagonistic to one another. Individuals assembled in an ad hoc manner for purposes of developing a regulation are likely to feel insecure about the process because it is novel and it requires the surrender of one form of power. A mediator or "facilitator" can help significantly in such situations. Indeed, such a person can help even when the parties do not begin the negotiation process with mutual distrust.

The first step in building the negotiating relationship among the parties occurs when the convenor establishes the initial working group of people willing to participate in the give and take of discussions. A mediator can continue that process through the negotiations. The mediator's function should be directed toward building trust and communication between the parties. Therefore, the parties must have faith and trust in the mediator.⁴²⁷ A mediator must be someone with whom each party can meet privately and discuss candidly its concerns about the positions taken by the other parties. In addition, the mediator must help each party separate its true concerns from its initial position, and define criteria by which it would measure an agreement.⁴²⁸ A mediator can focus the discussions in such private meetings and point out the extremes being taken by the parties. He can also offer creative solutions, both in private discussions and in face to face negotiations.

It is essential that the mediator preserve the trust of all parties. Therefore, he must justify his ideas and positions in terms of the parties' own interests.⁴²⁹ Unless the mediator gains the trust of the parties, they may try to capture his attention and use him as a bargaining tool. Alternatively, they may believe that he is not truly neutral and will not trust him with future communications.

As one experienced environmental mediator has observed, a mediator who has expertise in the subject matter of the regulation may interfere with this process.⁴³⁰ First, such a mediator is likely to rely too much on his own assumptions or values rather than on those of the parties. Second, he may filter information based on his own independent assessments and focus on technical differences rather than on underlying values. Finally, he is more likely to lead the parties as opposed to facilitating communication among them. Thus, to avoid these difficulties, negotiations should not utilize a mediator with substantive expertise.

During the discussions an effective mediator can also resolve problems that could break down negotiations. For example, in one environmental negotiation, allegations indicating that one party was taking action inconsistent with

427. G. Cormick, *The Ethics of Mediation: Some Unexplored Territory* 3 (Paper presented to the Society of Professional Dispute Resolution (Oct. 24, 1977)).

428. See Susskind, *supra* note 83, at 6 n.13 (describing three functions of mediator: procedural, communicative and substantive). This must be done delicately, however, lest antagonism develop between the mediator and the party.

429. *Id.*

430. Cormick, *supra* note 247, at 29.

its participation in the negotiations were published. If the allegations had been true talks would have broken down.⁴³¹ After one party raised its concerns about the allegations with the mediator, the mediator investigated the stories and was able to assure the party that no problem existed. The mediator also informed nonparticipants of the progress of the negotiations and focused parties' efforts on reaching an agreement.⁴³²

In short, the function of the mediator is to facilitate discussions between the interested parties without taking a position. This role must not be confused with that of an arbitrator or even a chairperson of a meeting. Although the mediator may explore issues, propose alternatives, help draft the agreement, and carry communications between the parties for their consideration, his function is to generate ideas and to aid the parties in focusing on issues. Thus, the mediator should not direct the course of discussions. Indeed, negotiations are likely to be most successful when the mediator is required to do very little.

The group should determine preliminarily whether a mediator would be useful. In most significant regulations, a mediator will be useful. The convenor who has worked with the parties in establishing the preliminary negotiating group would be the likely choice as a mediator. The convenor usually will have developed a trust relationship between himself and the parties. Indeed, if another person took over as the mediator he would have to rebuild such a relationship.

7. Federal Register Notice

After the agency decides to develop a regulation through the negotiation process, it would publish a notice in the *Federal Register*. The notice would include a description of the subject matter of the regulation; the representatives comprising the proposed regulatory negotiation committee, including a description of the interest represented by each member and the position held by each member; the name and position of the proposed agency representative; the name of the proposed mediator, if any; the issues the committee proposes to consider; and a proposed schedule for completing the work of the committee. The notice also would invite members of the public to comment on whether the use of regulatory negotiation in developing a rule is appropriate; whether the appropriate interests are represented; whether the members selected adequately represent their interests; whether the committee is considering the appropriate issues; whether the agency representative is appropriate; and any other matter of interest. Comments would be due thirty to sixty days after publication of the notice. The primary purpose of the notice would be to ensure that no organization with a substantial interest in the subject matter of the regulation was overlooked and that the selected representatives adequately represent the interests of members of nominal classes.

431. Watson Interview, *supra* note 165.

432. In labor negotiations a mediator is called in when the parties have reached a deadlock or discussions have broken down. In contrast, when mediators are used in other contexts, their primary function is to establish the negotiating relationship. Cormick, *supra* note 247, at 27.

8. The Final Committee

The agency and the convenor would then consider all relevant materials submitted in response to the *Federal Register* notice.⁴³³ Two instances may arise in which the agency and the convenor would determine whether someone who is not in the preliminary group should be included on the final negotiations committee. Someone may argue that an appropriate interest is not represented. A nonparticipant might argue that it too should be allowed to participate directly with a representative at the table even though someone with a similar interest would be present.

Resolution of the inclusion question requires determination of three factors. The first question is whether the interest is sufficiently close to the issues under consideration that it has "standing" to participate. An interest may simply be too remote to be included.⁴³⁴ An interest, however, should be excluded only if its connection to the rule is so remote that its allegation to the contrary is frivolous.⁴³⁵ It seems unlikely that a group would want to participate unless it actually were interested in the outcome.

The second question is whether the proposed interest is different from the interests already represented. For example, a group that believes its representative should participate in the negotiation could argue that its position is different from that of another group that was selected to represent a certain interest. Although their initial positions may differ, their views may virtually coincide in the long run. The apparent differences might be manufactured to secure a representative at the negotiating table.⁴³⁶ The agency and the convenor, therefore, must determine whether the applicant's interests really are divergent from those interests proposed in the notice, and whether one of the interests already selected for the negotiations adequately represents its interests.⁴³⁷

The final determination in the inclusion question is whether, even if the interest is already represented, the applicant nonetheless should have its own representative at the table. The negotiation committee is not composed of only

433. The entire process of convening the regulatory negotiation group, from the initial inquiry submitted to the convenor to the close of the comment period, should take only 60-90 days. At first blush, this period might appear to delay rulemaking. The time required to convene the negotiations is probably insignificant, however, if the start-up time consumed when agencies undertake projects themselves is taken into account. Start up time may be particularly long when there is a great deal of disagreement over a proposal. Because the comment period helps ensure that the proper parties are identified and included in the rulemaking process, such disagreement is minimized. Thus, the potential benefits of negotiations clearly outweigh the extra time devoted to the comment period. Moreover, negotiated regulations reduce the time spent on development of facts and on agency and judicial review of the proposed negotiated rule. See *infra* notes 550-53 and accompanying text (describing agency and judicial review of negotiated rule). Therefore, the time initially expended will be more than made up by delays avoided at later stages.

434. One environmental mediator argues that a party must meet a higher threshold to gain access to the negotiations than to influence them once the party is admitted. G. Cormick, *Environmental Mediation in the U.S.: Experience and Future Directions* 15 (Paper presented to the Annual Meeting of American Association for the Advancement of Science (1981)).

435. See *infra* note 556 (discussing judicial tests to determine standing).

436. Note, *supra* note 96, at 1878 n.42.

437. In making this determination, the agency and convenor would follow the usual legal criteria for determining the adequacy of representation, such as in class action and intervention criteria. See *infra* notes 558-61 and accompanying text (discussing judicial methods of determining whether interests are adequately represented).

one representative of each interest; rather, it includes representatives of groups that would be significantly affected. Those interests are likely to overlap to a significant degree.⁴³⁸ Thus, in determining whether to add another representative, the agency and convenor should consider the number of representatives already present, the diversity of their views, and the centrality of the new organization to the issues.

In determining whether additional organizations should participate, the agency and neutral convenor should seek the advice and consultation of the preliminary negotiation group. These interests and their representatives may be in the best position to determine whether a sufficient nexus exists between the applicant and the subject matter. The agency and the convenor, however, should not rely exclusively on the views of the preliminary negotiation group; rather, they should independently determine whether the new party should be represented. One of the main purposes of the *Federal Register* notice is to encourage interests that have not been identified by the consultative process to identify themselves and to seek admission to the negotiations. That the consultative process did not identify these interests may mean that the negotiation group, or at least some of its members, did not recognize or accept the legitimacy of the interests' positions. This possibility indicates the need for an independent assessment of the claim.

After reviewing the comment material, the agency and the convenor should agree on the final contours of the negotiating group, including its members, issues, and schedule. The agency would publish a notice in the *Federal Register* reflecting these determinations. The notice should provide the agency's reasons for the inclusion or exclusion of any interest. Because the issues, interests, and individuals engaged in the negotiations are likely to change over time,⁴³⁹ the *Federal Register* notice should not be regarded as limiting negotiations to the terms listed in the notice. Rather, its function is to provide notice of the negotiation, and like a notice of proposed rulemaking, it defines a sphere of possible actions. If, however, negotiations depart fundamentally from the terms of the original notice, another notice in the *Federal Register* should be published.⁴⁴⁰

438. For example, several chemical companies and the Chemical Manufacturers Association, as well as several environmental groups, participated in the toxic substances dialogue group. *Regulatory Negotiation Hearings*, *supra* note 221, at 55-56 (testimony of Sam Gusman, Senior Associate of Conservation Fund) (identifying members of toxic substances dialogue group). Similarly, the National Coal Policy Project had multiple representatives of allied interests organized into caucuses. *See supra* text accompanying notes 206-16 (describing National Coal Policy Project as example of formation of complex negotiation group). Also, many environmental organizations were involved in the Homestake Mine negotiations, although one was clearly dominant. *Mediation Agreement*, *supra* note 164.

439. As Susskind and Weinstein comment:

[N]ot all participants can or should participate in a dispute resolution process to the same degree or over the same period of time. Those most directly concerned, for whatever reason, will want and should be permitted to participate from the start, in greater depth, and with greater frequency than those with less direct concerns. As the process continues, the parties will change. Groups whose concerns have been satisfied or who discover they have no real interest in the outcome will depart; other groups will become involved as their interests become clearer.

Susskind & Weinstein, *supra* note 92, at 339. In addition, if new issues emerge as the negotiations proceed, new parties may have an interest in the outcome of the negotiations.

440. *See Wagner Elec. Corp. v. Volpe*, 466 F.2d 1013, 1019 (3d Cir. 1972) (holding that notice of

Assembling the final committee to negotiate the proposed rule undoubtedly will be a sensitive and important point in the regulatory negotiations. It is essential to the legitimacy of the process that each organization with a significant interest in the subject matter be offered representation in the group and that no interest should be turned away unless its connection to the regulation is remote. On the other hand, every interested individual person, firm, or organization cannot participate in negotiations because the process might become too unwieldy. If there are many potential participants, the major interests could be organized into caucuses to develop common positions and to use common representatives.⁴⁴¹ The convenor may find it necessary to meet with the respective interests to convince them to coalesce. One advantage of such caucus formation in regulatory negotiations is that the espoused interest actually would be represented more effectively than it would be in the formal, adversarial process that could result if everyone insisted on being at the table.

At this stage the process could degenerate into a fight over who gets to sit at the table, unless the similar interests band together for purposes of representation. The convenor and the agency must take great care to ensure that their decision in assessing interests and putting together coalitions is of the highest integrity. Otherwise, the time consumed and acrimony generated by this wrangling could easily vitiate the benefits of the regulatory negotiation process.

The determination of the participants should not be subjected to judicial review independent of the review of the resulting negotiated rule.⁴⁴² Judicial review at this stage would subject the entire process to delay and doubt and thus would interfere with the establishment of fruitful negotiations. Thus, a court decision could be deferred until the regulation is promulgated. The determination of the participants is not final agency action because the party seeking to participate would still be able to submit its views on the rule before it becomes final.⁴⁴³ Further, because the convenor, a neutral third party, makes the essentially judicial determination of the applicant's standing or adequate interest, subsequent judicial review would provide adequate protection for the interest against improper participation determinations.

E. THE NEGOTIATIONS

I. Establishing the Groundrules

Because the parties are unlikely to have previously engaged in negotiations among themselves, they need to establish the groundrules that will govern, or at least guide, the negotiations.⁴⁴⁴ A party who attends an unstructured session

amendment to automobile safety regulations must be comprehensible to "not so knowledgeable" as well as knowledgeable interested persons).

441. The parties coalesced in this manner in the Resource Conservation and Recovery Act settlement negotiations. Roisman Interview, *supra* note 106. The many challengers organized a steering committee and appointed representatives for each issue. *Id.*

442. *See infra* notes 552-53 and accompanying text (describing reduction in judicial challenges to rules resulting from negotiated rulemaking).

443. *See infra* notes 550-51 and accompanying text (describing procedure of publication and comment for proposed negotiated rule).

444. G. Cormick, *supra* note 427, at 9.

without guiding principles is likely to maintain a defensive, adversarial posture simply because the process is unfamiliar. Therefore, defining the rules of acceptable conduct and the procedures under which negotiations will be conducted is important if the benefits of negotiation are to be realized. Although creative problem-solving can develop only with time, the rules can foster that process.

2. Rule of Reason

Milton R. Wessel has developed a set of dispute resolution principles that he calls the "Rule of Reason."⁴⁴⁵ Perhaps the fundamental application of the guidelines to negotiations is to remind the participants periodically that their purpose is to reach a mutually acceptable agreement when possible, not to seek victory for their positions. The parties should keep in mind that they must sort out, weigh, and accommodate conflicting interests. Thus, they need to be reminded of the give and take and good faith of the negotiation process.

The National Coal Policy Project used Wessel's Rule of Reason to develop its set of negotiating principles:

Data should not be withheld from the other side. Delaying tactics should not be used. Tactics should not be used to mislead. Motives should not be impugned lightly. Dogmatism should be avoided. Extremism should be countered forcefully. . . .but not in kind. Integrity should be given first priority.⁴⁴⁶

The National Coal Policy Project found that "agreement to use these principles helped convince participants that [they] could resolve some of their differences constructively, and as it turned out, conducting project meetings in the spirit of the Rule of Reason did facilitate the search for workable solutions to the difficult issues being addressed."⁴⁴⁷ In essence, these principles establish a code of conduct designed to guide, to the extent possible, the participants in good faith negotiations.

3. Confidentiality

One significant issue the participants must face at the outset of negotiations is the extent to which the process will be open to public inspection. Under current theories agencies are accountable for reaching rational results based on the neutral exercise of their discretion. Thus, the rulemaking process is subject to public scrutiny at virtually every stage. For example, *ex parte* rules prohibit discussions and transmittal of data unavailable to others;⁴⁴⁸ advisory committees are open to public attendance;⁴⁴⁹ the Sunshine Act requires that meetings of collegial agencies be open to the public;⁴⁵⁰ and the Freedom of Information

445. M. WESSEL, *THE RULE OF REASON* 19-24 (1976) (discussing methods of dispute resolution in corporate litigation); M. WESSEL, *supra* note 80, at 94-101 (discussing dispute resolution techniques).

446. NCPP SUMMARY, *supra* note 206, at 23; *see* M. WESSEL, *supra* note 80, at 97-98 (complete list of rule of reason guidelines); M. WESSEL, *supra* note 445, at 19-24 (same).

447. NCPP SUMMARY, *supra* note 206, at 3.

448. *See supra* note 128 (judicially imposed restrictions on *ex parte* meetings result in inability to gain information and to reach consensus).

449. *See infra* note 457 and accompanying text (FACA requires meetings be open).

450. 5 U.S.C. § 552b (1976).

Act requires agencies to provide the public with many of their internal documents.⁴⁵¹ In short, the current political climate distrusts meetings and other communications between agency officials and members of the private sector unless they are open to all. Therefore, confidential exchanges are frowned upon, if not banned outright. In keeping with this theory, the parties to a regulatory negotiation may agree to conduct their affairs in public.

Several experts, however, believe that negotiation is a process best carried on in private.⁴⁵² Several examples demonstrate the benefits of privacy. First, the negotiators must make concessions on different issues to permit maximization of their own goals. Moreover, negotiators must be able to explain the results of their negotiations to their constituents and the reasons for conceding a particular issue that the negotiator believes is not of central importance. Second, a party may be reluctant to yield confidential data that can be useful to negotiations, if doing so will destroy its confidentiality.⁴⁵³ Third, a party reasonably could be reluctant to engage in the give and take of the negotiation process if it thought that a tentative position it raised in the negotiations subsequently would be held against it in another forum, such as litigation or an ensuing rulemaking process.⁴⁵⁴ Finally, and perhaps most significantly, a public forum may cause some of the parties to continue to posture and to take a hard, unyielding position. In short, public scrutiny could mean that the detrimental aspects of the adversarial process result without the correlative benefits of a neutral decisionmaker.

The negotiators therefore should be able to close their meetings in appropriate circumstances.⁴⁵⁵ The procedures of the negotiation process itself provide the safeguards that accrue from public meetings. The political legitimacy of the resulting rule derives from the acceptance of the rule by the parties in interest, and not on the public procedures by which it was developed. Further, the parties should feel no inhibition from meeting on a confidential basis with the mediator or other parties to the negotiation.⁴⁵⁶

451. *Id.* § 552 (1976 & Supp. IV 1980).

452. J. Dunlop, *supra* note 302, at 18-21 (private negotiations prevent injection of press into relationship between negotiators and constituents); see *Regulatory Negotiation Hearings*, *supra* note 221, at 57 (statement of Sam Gusman, Senior Associate, The Conservation Foundation)(favoring closed discussions between businessmen and environmentalists).

453. Although the information ultimately may be revealed in the explanation of the basis of a proposed rule, the party would be more reluctant to reveal such information initially because negotiations might break down and confidentiality lost without the corresponding benefit of having achieved a proposed rule.

454. At the Federal Trade Commission, for example, both private companies and agency representatives were reluctant to attend a meeting for precisely such reasons. Reich, *supra* note 96, at 88-89.

455. It should be noted, however, that many highly technical and controversial standards are written under procedures that ensure public access. Indeed, ACUS considers the decisionmaking process an important element in an agency's decision whether to adopt an existing standard. See Administrative Conference of United States Recommendation 78-4(6)(c)(viii), 1 C.F.R. § 305.78-4(6)(c)(viii) (1981) (discussing whether the standard proposed for adoption should be formulated under public scrutiny and review). Thus, the negotiation process clearly can work in public. Most of the experience in the standards area is with making technical judgments, however. Many of the regulations under consideration here involve questions that are more political. The distinction should not be pressed too far, however, because experience may show that the regulations could be negotiated in open meetings.

456. Indeed there would be no true *ex parte* communications because the competing parties are represented in the negotiations. Also, because the fruits of the negotiation would be published as a notice of proposed rulemaking, the public would have an opportunity to check any decisions that are

Under current law an agency likely would be inhibited from participating in a closed regulatory negotiation session. FACA⁴⁵⁷ would require that the negotiation group be established as an advisory committee. Thus, FACA also would require that notice of advisory committee meetings be published in the *Federal Register* and that such meetings be open to the public.⁴⁵⁸ On the other hand, agencies regularly meet on a confidential basis to settle lawsuits challenging rules.⁴⁵⁹ Arguably, one of the main advantages of working out rules in settlement rather than in negotiations before the final rule is issued is precisely the absence of ex parte rules which prohibit a confidential, sleeves-up working session in which the parties work out the details of a good rule. This is not to say that all meetings should be closed; rather, the committee should be able to close the meeting in appropriate circumstances.

If the committee decides to close the meeting, additional issues must be confronted. One is an agreement on how the group will release statements to the public. A basic requirement that no one may publicly characterize a position taken by another in a public statement⁴⁶⁰ could prevent pressure from being applied on parties through press releases. Or, the committee could agree that no public statement be made without review by all the parties.⁴⁶¹

A procedure should also be established whereby the parties' positions and the information exchanged cannot be held against them if negotiations are unsuccessful. This procedure would be similar to the traditional rule of evidence that prohibits the subsequent use of settlement offers⁴⁶² and the customary practice of developing a protective order that preserves privileges and confidences for documents exchanged during discovery or in settlement negotiations.⁴⁶³ Professor Reich has characterized this practice as a form of "use immunity,"⁴⁶⁴ under which the parties would agree not to use the positions taken during negotiations or the information exchanged in a subsequent proceeding.

In addition, the parties need assurance that the information generated in negotiations will not be available under the Freedom of Information Act

made. The rationale of the ex parte rules, moreover, applies with greater vigor after the notice of proposed rulemaking is published and after the close of the comment period.

457. 5 U.S.C. app. §§ 1-15 (1976 & Supp. IV 1980).

458. *Id.* § 10(a)(1) (1976). The head of the agency to which the advisory committee reports may determine that a portion of a meeting should be closed in accordance with the criteria by which agencies may close meetings under the Sunshine Act, 5 U.S.C. § 552b(c),(d)(1) (1976). A very clumsy process would result if every time a regulatory negotiation committee thought it would be advisable to conduct its sessions in private it had to obtain the permission of the agency head before doing so. Therefore if regulatory negotiation is to be used, FACA should be modified to provide a less cumbersome procedure for closing meetings.

459. See *supra* note 197 (member of press seeking admission to settlement meeting turned away).

460. This procedure was followed in dialogue groups of businessmen and environmentalists. *Supra* note 223 and accompanying text; *Regulatory Negotiation Hearings*, *supra* note 221, at 56 (statement of Sam Gusman, Senior Associate, Conservation Foundation).

461. This procedure was followed in the National Coal Policy Project. *Regulatory Negotiation Hearings*, *supra* note 221, at 36 (statement of Laurence I. Moss, Environmental Caucus, Chairman of National Coal Policy Project).

462. FED. R. EVID. 408; FED. R. CIV. P. 68.

463. See 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 2018, at 144 (1970) (discussing use of protective orders to preserve privileged information).

464. Reich, *supra* note 96, at 83.

(FOIA).⁴⁶⁵ In most cases, the negotiation group would receive the same treatment as an advisory committee, which would make FOIA applicable.⁴⁶⁶ That status might preclude the withholding of confidential information.⁴⁶⁷ If the negotiation information is not protected from disclosure, the parties may feel inhibited from writing issues and taking tentative positions for fear that they would be released and held against them if negotiations fall apart. Therefore, it should be made clear, perhaps through legislation, that the FOIA would not apply to a regulatory negotiation committee and that confidentiality could be maintained.

4. Principled Negotiations

The Harvard Negotiation Project developed a series of principles to facilitate reaching agreement or, as the title of its directors' book puts it: "Getting to Yes."⁴⁶⁸ Although the Rule of Reason defines the relationships among the negotiators, the principles suggested here are addressed to each individual negotiator. A mediator would periodically remind the parties of the following three principles.

*Focus on the respective interests, not on the initial positions.*⁴⁶⁹ Parties developed initial positions for several reasons. They might be a package compiled by the representatives from the "wish" lists of the constituents.⁴⁷⁰ They might enhance the ultimate bargaining position. They might reflect the party's belief that the initial position is the only solution to the problem. Communications can quickly break down if the parties' initial positions are the focus of discussions because each side will dig in to defend its starting point, and antagonism will result.⁴⁷¹

Fisher and Ury provide the example of two people quarreling in a library,

465. 5 U.S.C. § 552b (1976).

466. See 5 U.S.C. app. § 10(b) (1976) (all advisory committee documents subject to public inspection). *But cf.* Public Citizen Health Research Group v. HEW, 668 F.2d 537, 544 (D.C. Cir. 1981) (Professional Standards Review Organization (PSRO) not an agency subject to requirements of FOIA).

467. In addition, if the committee is regarded as an advisory committee rather than an agency, the application of the "intra-agency" memoranda exemption is unclear. 5 U.S.C. §552(b)(5)(1976) (allowing agencies to prohibit public scrutiny of inter- or intra-agency memoranda or letters).

468. R. FISHER & W. URY, GETTING TO YES (1981).

469. *Id.* at 41-57.

470. Dunlop points out:

[I]t is vital to sense the priorities sought by each side, and the severity of their opposition to proposals, in truth rather than merely in formal petitions or in public pronouncements [N]egotiations or mediation is often the art of putting together packages that recognize the true priorities on each side that will 'sell' to both parties informally as well as in any formal ratification process.

J. Dunlop, *supra* note 302, at 12-13.

471. Fisher and Ury argue:

When negotiators bargain over positions, they tend to lock themselves into those positions. The more you clarify your position and defend it against attack, the more committed you become to it. The more you try to convince the other side of the impossibility of changing your opening position, the more difficult it becomes to do so. . . . As more attention is paid to positions, less attention is devoted to meeting the underlying concerns of the parties.

R. FISHER & W. URY, *supra* note 468, at 5.

one wanting the window open and the other wanting it closed.⁴⁷² They argue back and forth, unable to reach an agreement. When the librarian asks what the problem is, one says that the library is stuffy and that he wants the window open for some fresh air; the other says that the open window is blowing his papers about. The librarian proceeds to open a window around the corner which allows ventilation without the draft. The moral is that once the parties' respective interests are addressed, negotiations can attempt to accommodate them.⁴⁷³

A concrete example of how successful negotiations resulted when parties focused on their respective interests involved the Snoqualmie Dam.⁴⁷⁴ Environmentalists opposed construction of a dam while farmers advocated it.⁴⁷⁵ If their initial positions had been maintained there would have been no way of reaching an agreement. After analysis of their interests, it turned out that agreement could be reached because both parties sought the preservation of the valley and were able to negotiate an agreement on how that could be done. Similarly, in an enforcement action, the EPA sought to force a company to change the fuel it was burning and to retrofit its boilers; the company resisted.⁴⁷⁶ By focusing on positions, the parties reached a deadlock. Focusing on their interests they were able to reach an accommodation. The company was interested in efficiency and EPA was interested in reducing air pollution. They agreed to a new, modern boiler that maintained efficiency while reducing pollution.⁴⁷⁷

Interestingly, the parties themselves do not always recognize what their interests are. They need to define what they really want,⁴⁷⁸ to sort out their priorities, and to define the criteria by which they will judge an ultimate agreement. Because the party may enter the negotiation with a particular position that does not reflect an interest analysis, the mediator or the parties themselves should probe to discover just what the respective interests are.

*Seek options that allow mutual gain.*⁴⁷⁹ The reason people enter into negotiations is that they believe they can better achieve their goals through negotiation than through some other process.⁴⁸⁰ Thus, agreement is more likely to occur if it can be cast in terms that permit each party to win, as in the library window and Snoqualmie Dam examples. The negotiators can then view themselves as a collaborative⁴⁸¹ group seeking a solution to a problem, rather than

472. *Id.* at 41.

473. *Id.*

474. See *supra* notes 160 & 233 and accompanying text (detailing Snoqualmie Dam dispute).

475. *Id.*

476. D. Gilmore, *supra* note 267, at 40-41 (describing joint problem solving from serious bargaining in open, flexible negotiations).

477. *Id.*

478. Defining what a party wants includes both what it seeks to obtain from the negotiations and what aspects of the other parties' proposals it opposes. Hence, the ranking of priorities is both positive and negative, ranging from those aspects the party strongly desires to those it strongly opposes.

479. R. FISHER & W. URY, *supra* note 468, at 58-83. This is the "win/win" condition in which both parties are better off as a result of the dispute resolution. See *supra* note 265 and accompanying text (describing win/win situation of game theory).

480. See *supra* notes 240-41 and accompanying text (discussing parties' need to believe they will profit from negotiation).

481. Although negotiations often require parties to trade interests and to make compromises, collab-

as combatants. To be sure, this goal is frequently elusive when the parties have conflicting interests that must be reconciled. The goal of attaining collaboration, however, can be borne in mind by the parties as they try to invent solutions that allow each side to win its important priorities. The parties must compare what is practically achievable in negotiations with what is likely to occur should negotiations break down.⁴⁸²

*Define objective criteria.*⁴⁸³ By agreeing during the negotiation to the objective criteria by which an ultimate agreement might be judged, the parties can facilitate negotiation. Fisher and Ury give the example of a person negotiating with an insurance company over the value of a car that was destroyed. The two sides agreed on criteria by which value is determined and then applied the criteria to the car in question.⁴⁸⁴ Similarly, during a recent give and take session among environmentalists, industry groups, and state representatives on controversial environmental issues involving the Superfund, the parties informally reached a consensus on several key issues, including a ranking model for deciding which toxic waste sites would receive immediate attention.⁴⁸⁵ This model establishes criteria that can be used to mechanically establish a priority for sites that can then be subject to expert judgment.⁴⁸⁶ Objective criteria obviate the need to wrangle over the individual parties' rankings during the negotiation process.

In the EPA enforcement case described above, one of the major contentions between the parties was how air pollution from the plant should be measured.⁴⁸⁷ The plant was able to demonstrate that its model was more accurate than the one EPA intended to use.⁴⁸⁸ Thus, once the parties established objective criteria, they could explore alternative ways of meeting their respective goals and measuring the proposed solutions against them.

5. Single Text Procedure

One way of reaching agreement is by means of the "one text procedure."⁴⁸⁹ The parties engage in a brainstorming session in which they identify the issues involved and potential solutions.⁴⁹⁰ No one is committed to the issues or solutions; rather, the goal of the process is to define the contours of a possible

oration allows all parties to achieve a common goal. *See supra* note 265 (discussing difference between collaboration and negotiation).

482. The negotiators must compare proposals to their "BATNA"—best alternative to a negotiated agreement. R. FISHER & W. URY, *supra* note 468, at 104-06.

483. *Id.* at 84-98.

484. *Id.* at 96-98.

485. *Environmentalists, Industry, State Reps, Agree on Key Superfund Issues*, INSIDE EPA, Oct. 9, 1981, 7-8.

486. *Id.* at 8.

487. *Supra* note 476 and accompanying text (discussing accommodation of company's interest in fuel efficiency and EPA's interest in reduction of air pollution).

488. *Id.*

489. R. FISHER & W. URY, *supra* note 468, at 118.

490. *Id.* at 62-63. Such brainstorming sessions are likely to be fruitful, both between the constituent elements of each party or interest represented, as well as among the representatives at the negotiations. Because the purpose of the exercise is to define potential solutions, the parties should be free to explore ideas ranging from conservative to radical extremes. *Id.*

agreement.⁴⁹¹ The fundamental groundrule of this procedure is that as thoughts develop, no one is permitted to make adverse comments or criticisms.⁴⁹² Rather, the function of the brainstorming is to develop as many ideas as possible.⁴⁹³ A mediator assists in developing the laundry list. The parties then begin weeding out the inappropriate issues and raising new ones. The text is circulated for comment and revision. The range of agreement is narrowed through the iterative process, and the remaining issues can be confronted directly.⁴⁹⁴ For example, the Mining Task Force of the National Coal Policy Project used this process to identify the issues involved.⁴⁹⁵ By pinpointing the issues, the parties defined the nature of the disagreement among themselves and they were able to focus on the reasons for the disagreements,⁴⁹⁶ which in turn lead to agreement on what research was necessary.

6. Developing the Factual Base

Obviously, no single approach to developing factual material is necessary or even the "best" way for the parties to reach an agreement. Rather, the parties themselves will have to decide what information is reasonably necessary to enable them to make a responsible judgment and how to obtain that information. The following is a brief review of three approaches that have been used in negotiated agreements: common research; review and comment; and data mediation.

Common research. The parties may be able to agree on what research is needed and may decide to conduct that research jointly. For example, the Mining Task Force of the National Coal Policy Project needed to conduct research before the Project could reach an agreement.⁴⁹⁷ Two staff members, one representing the environmentalists and one representing industry, conducted research, developed proposed findings of fact, and drafted a report.⁴⁹⁸ The report was based on observation, discussions, and literature review. The Task Force discussed the report at its meeting, revised it accordingly, and conducted new research as needed. The Task Force as a whole conducted on-site research by examining various mines. When there was disagreement about the facts, the Task Force resolved the question on the basis of the best current

491. *Id.* It would be very difficult to hold these sessions in public because each party could reasonably fear having some suggestion or observation attributed to it in a way that would make it difficult to disown in the future. Moreover, without an agreement to hold the exchange confidential, a party might fear that its suggestion would be perceived as a fixed position. Finally, the parties might fear revealing confidential information or positions if the sessions were public. These possibilities would hamper the whole process, which is designed to enhance the generation and free exchange of thoughts and ideas. Thus, these brainstorming sessions should probably remain confidential.

492. *Id.* at 62. Ridicule or criticism of one party's suggestions would probably chill its willingness to explore creative ideas and would foster adversarial relationships.

493. *Id.* Fisher and Ury further suggest that the groups' ideas be written on a paper or chalkboard. In that way, the group would coalesce and focus on solving the problems confronting it. Thus, the members would avoid confronting each other. *Id.* at 64.

494. *Id.*

495. NCPP SUMMARY, *supra* note 206, at 17-18.

496. *Id.*; Murray Interview, *supra* note 206.

497. NCPP SUMMARY, *supra* note 206, at 18 (research enabled group to focus on specific problems and solutions).

498. *Id.*

information.⁴⁹⁹ The policy discussions were thus more precisely focused than they otherwise would have been.

Similarly, the Health Effects Institute, a research organization funded by the EPA and industry, was created to conduct research on health questions pertinent to EPA regulation.⁵⁰⁰ The representatives to the Institute are currently attempting to reach agreement on research protocols.⁵⁰¹ Even though the representatives might agree on the necessary research and its protocol, they may not necessarily agree on the implications of that research. Thus, they reserve arguments over the implication of that research.

Review and Comment.

The respective parties may themselves have a great deal of information that can be used as the basis for an agreement. They may be reluctant, however, to share that information unless they share it in a context that fosters agreement and does not abuse the information exchange. Under one solution, one party provides its technical information in a session in which the other parties may ask clarifying questions, but may not challenge the data. The other parties then make similar presentations. This process was followed in the Homestake Mine regulation.⁵⁰² Although the other parties' expertise enabled them to ask probing questions, they did not challenge the information in an adversarial fashion.⁵⁰³ The parties found that agreement on the facts facilitated agreement on common principles.⁵⁰⁴

The participants in such information exchanges pointed out, however, that the success of this approach depends on the respective parties' ability to draw on sufficient expertise to question and assess the data as presented. If they lack such expertise, they will be unable to develop the common understanding on the facts, and they will retreat to a position based on principle.⁵⁰⁵ The give and

499. *Id.* One of the important aspects of this fact finding was that it was done on a regional basis, without attempting to "homogenize" the facts to fit the nation as a whole. The Task Force decided that regional differences were critically important and had to be preserved in the recommendations. *Id.*

500. Fox, *supra* note 96, at 102. One commentator explained:

The aim of the institute is to supply both the EPA and the industry with the best common base that independent scientific investigation can provide for determining appropriate regulations. . . . [T]he institute [is] "fiercely independent." Its structure was carefully devised to provide maximum protection for a set of scientific processes that will yield results whose integrity and quality will be above question.

The formation of the institute brings to fruition the efforts of many government and industry representatives to find a mechanism for improving research on health effects while reducing costs and government-industry friction. Representatives from the U.S. auto industry and from 17 importing companies have formally indicated their support of the institute.

Id.

501. Fox, *supra* note 96, at 101.

502. Danielson Interview, *supra* note 162.

503. A variant of this process has apparently been followed in some Nuclear Regulatory Commission licensing proceedings. Roisman Interview, *supra* note 106. In that case, the agency held a meeting with one of the parties in interest and invited the others to observe. The ground rules were that the observers were not permitted to ask questions. The agency representatives asked clarifying questions, but did not cross-examine. The process developed a base of information in a nonadversarial way so the parties were able to better discuss their concerns. *Id.*

504. Danielson Interview, *supra* note 162. The Mining Task Force of the National Coal Policy Project also found that "differences began to dissolve as [they] moved away from discussing generalities and began to focus on specific issues." NCPP SUMMARY, *supra* note 206, at 18; see Murray Interview, *supra* note 206 (agreement on research findings enabled group to focus on problems and solutions).

505. Badaracco describes how standards limiting occupational exposure to vinyl chloride were nego-

take of discussion among experts defines the gaps in knowledge and what information is needed for a decision on the merits. In the Homestake Mine negotiations this approach reduced the adversarial environment, and some experts that had refused to participate in a formal proceeding were willing to provide their services.⁵⁰⁶ Indeed, the contacts developed during the negotiation process continued after agreement was reached and the parties worked together toward common solutions of additional problems.⁵⁰⁷

Data Meditation. The parties may have differing views of the facts and, therefore, it may be necessary to reconcile them to form the basis for policy choices. The parties, of course, can attempt such reconciliation through peer review, in which someone reviews the research of another, critiques it, and attempts to replicate it. Through this iterative process scientific and technical agreement emerges. Frequently, however, inadequate time prohibits the use of the normal scientific methods. The parties must make a more immediate agreement to seek some other method of determining a factual base, again without agreeing to policy implications.⁵⁰⁸

For example, as part of EPA's rulemaking with respect to particulate emissions of diesels, General Motors Corporation wanted to avoid the duplication of effort, remove unconscious bias, and ensure that appropriate research was conducted before the rulemaking proceeding began. It proposed that a panel of referees evaluate the research conducted by the agency and by industry. General Motors would appoint one referee, the EPA would appoint another, and the two together would appoint a third. The panel would assess the validity and accuracy of the parties' research submissions.⁵⁰⁹ Although the EPA initially agreed to the process, it was never implemented.⁵¹⁰

Wessel has proposed holding open conferences in which all experts in a field are invited to participate in a give and take discussion designed to explore factual matters.⁵¹¹ The purpose of such a conference would be to reach a scientific consensus on scientific issues. The conference would not attempt to negotiate or reach an agreement by accommodation.⁵¹² The parties also could utilize a process similar to that followed by the Mining Task Force of the National Coal Policy Project,⁵¹³ thereby defining the factual issues involved in the question and attempting to reach a workable agreement on those facts.

tiated in three European countries. J. BADARACCO, *supra* note 93. He observes that important questions concerning available technology, costs, compliance, and medical problems, can be viewed more objectively and independently because they can be verified and confirmed by the respective parties. *Id.* at 298.

506. Danielson Interview, *supra* note 162.

507. Cormick Interview, *supra* note 167.

508. See generally, Straus & Greenberg, *Data Mediation of Environmental Disputes* in ENVIRONMENTAL COMMENT (Wash. Urban Land Inst. 1977) (discussing data mediation process).

509. Potter, *Third Party Review*, in GOVERNMENT, TECHNOLOGY, AND THE FUTURE OF THE AUTOMOBILE, at 367, 370 (1978).

510. Interview with David Potter, Vice President, General Motors Corporation (July 29, 1981) (copy on file at *Georgetown Law Journal*).

511. M. WESSEL, *supra* note 80, at 173-80.

512. *Id.* at 174-75.

513. See *supra* notes 497-501 and accompanying text (discussing joint research and reporting).

7. Keeping in Touch

The individuals participating in the negotiations must bear in mind, and sometimes be reminded, that they are representatives of broader interests. They must keep in touch with the views of their constituents and inform them of the progress of the negotiations. As talks progress toward a possible agreement, the representatives must ensure that the agreement is acceptable to their interests, lest the entire process fall apart at the end. As one experienced mediator has pointed out, the individuals at the table can end up seeing each other's points of view to such an extent that they lose touch with the positions of their constituents.⁵¹⁴ Thus, if ultimate agreement is to be reached, the group needs to know that the individuals can sell the agreement to their respective constituents.

F. EXTENT AND NATURE OF THE CONSENSUS

I. What is a Consensus

The purpose of the regulatory negotiation is to enable the parties in interest to reach an "agreement." Just what that means, however, remains unsettled. Does it mean unanimity; no "reasonable" dissent; concurrent majorities, in which a majority of each interest agrees; a substantial majority of those present; a simple majority; or some other calculation? Even the words used to describe the process are unhelpful. The definition of consensus in *Webster's Third International Unabridged Dictionary* includes: "group solidarity in sentiment and belief"; "general agreement: unanimity, accord"; "collective opinion: the judgement arrived at by most of those concerned."⁵¹⁵

What constitutes "consensus" is one of the most difficult and complex questions in regulatory negotiation.⁵¹⁶ Yet, consensus is an essential ingredient of reaching an agreement. The willingness of some parties to participate at all may depend on how consensus is defined. Moreover, it influences both the internal dynamics of the group and the deference to which the agreement is entitled. Although sound arguments support each of several definitions, there are also arguments against each. Hence, consensus probably will remain a controversial subject, at least until some experience is gained in negotiating regulations. Because no a priori definition guides negotiations, the ground rules for

514. Cormick Interview, *supra* note 167 (if negotiators become too close, constituents may accuse them of selling out). Further, as Dunlop states: "[I]t is a practical rule-of-thumb that one is nearing agreement across the table when there is more difficulty within each side than between the leading spokesmen across the table. Each principal negotiator is often as much preoccupied with handling the internal necessities as in controversy with the opposing negotiator." J. Dunlop, *supra* note 302, at 16.

515. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 482 (P. Gove ed. 1971).

516. Indeed, what constitutes consensus is one of the most difficult and complex questions that attends any group decision, and considerable academic literature has developed analyzing the various options. Two of the major contributors to this literature have characterized the question this way: "Democratic theorists, economic as well as political, have long wrestled with the intriguing ethical question of how 'best' to aggregate individual choices into social preferences and choices." R. LUCE & H. RAIFFA, *supra* note 240, at 327. For a sampling of the literature, see *id.* at 327-70. For example, Arrow demonstrates that not all of the basic assumptions of the theoretical construct of majority rule can be true at the same time. K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951). Mueller collects and analyzes much of the literature on nonmarket decisionmaking. D. MUELLER, *PUBLIC CHOICE* 68-89 (1979). In particular, he analyzes the strengths and weaknesses of alternative modes of decisionmaking, including majority rule, optimal majorities, unanimity, and logrolling. *Id.* at 19-58.

what constitutes agreement must be defined and understood before the process begins.

For these purposes, the most acceptable definition of consensus would be "general agreement," which means that no party dissents significantly from the shared position. General agreement, however, does not necessarily mean unanimity, because even if someone disagrees, the dissent may not be significant enough, either in weight or number, to destroy the agreement. Thus, the party may dissent on grounds that generally are viewed as irrational, or the party's interests may not be sufficiently affected to regard its dissent as significant. In group consensus a dissenting minor interest, one not directly and immediately affected, can be disregarded even on a major issue without destroying the consensus. The dissent of a major interest, however, could destroy a consensus even on a minor point.⁵¹⁷ An aphorism from the voluntary standards context sums up this analysis: Positions are weighed not counted. When deciding whether a consensus has been reached, the nature of any dissent is considered, including the strength of the dissenter's views, the basis for the dissent, and the relationship of the dissenter to the issues involved.

Ultimately, whether a consensus exists must be determined more by fingertip feel than by any sort of mathematical calculation. One negotiator has stated that if you have to count votes, you do not have a consensus.⁵¹⁸ Rather, like pornography,⁵¹⁹ consensus is hard to define, but you know it when you see it. Unfortunately, this uncertainty raises some difficult questions. Can procedures be developed to ensure that the committee has reached consensus? Who decides whether a consensus has been reached?

2. Structured Decision

A voluntary standards organization may be used to negotiate the regulation.⁵²⁰ The consensus process used by such organizations in developing voluntary standards ensures structured decisionmaking. The consensus process generally requires that standards be approved by considerably more than a simple majority of the committee, although unanimity is not required.⁵²¹ Moreover, it requires that negative votes and other objections to a standard be promptly and carefully considered. Finally, the consensus process provides a form of appeal by which an outvoted committee member may have the actions of the committee reviewed.⁵²² These procedures, like those of hybrid rulemak-

517. Murray Interview, *supra* note 206.

518. See Gusman Interview, *supra* note 232 (discussing inappropriateness of voting to establish consensus).

519. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (discussing definition of pornography).

520. See *supra* notes 420-24 (discussing use of voluntary standards organization in negotiation).

521. One standards organization has stated that "[c]onsensus implies much more than the concept of a simple majority, but not necessarily unanimity, which often can be achieved only by compromises that reduce the quality of the standard." AMERICAN SOCIETY FOR TESTING AND MATERIALS, THE VOLUNTARY STANDARDS SYSTEM OF THE UNITED STATES OF AMERICA 7 (1978) [hereinafter ASTM].

522. See Administrative Conference of the United States, Recommendation 78-4, 1 C.F.R. § 305.78-46(c)(vi) (1981) (development of voluntary consensus standards in health and safety context requires review of dissenting views); P. HARTER, *supra* note 178, at 117-20; REGULATIONS GOVERNING COMMITTEE PROJECTS §§ 1-4 (National Fire Protection Ass'n 1977) (describing appeal rights of dissenting members).

ing, are generally designed to ensure the rational consideration of the various views of the participants. If these procedures are followed, it may be appropriate to say that the regulatory negotiation committee has reached an agreement when less than all of those present assent.

3. Lack of Structure

Ad hoc groups formed for purposes of regulatory negotiation, unlike standards writing organizations, will not be subject to existing rules ensuring a structured decision. Hence, some other method must be developed to determine consensus. For example, an individual, or several individuals, might be entrusted with the authority to decide if any dissents are reasonable or significant. Such a judgment is inherently value laden⁵²³ and delicate because the purpose of the process is to achieve agreement. Indeed, the very legitimacy of the process rests on the agreement of the interested parties. Thus, for purposes of regulatory negotiation, it may be better to require unanimity for agreement on a proposed rule.⁵²⁴

4. Unanimity

Unanimity has several benefits. First, parties may not agree to participate in a negotiation process if they think that their interests could be disregarded and a regulation proposed over their dissent. They reasonably may decide that it is better to retain whatever power they have by refusing to participate. For example, four different interests may require representation, of which three are essentially commercial and one is a public interest group. That public interest group reasonably might fear being outvoted by the commercial interests because, although the commercial interests may differ among themselves, they at least share the common interest of being economically motivated. The public interest group may decide that its greater power lies with its ability to prompt congressional intervention. In addition, an agency might refuse to participate in a situation in which a group of commercial interests could override it because it would be unseemly if its representative were outvoted and the group nonetheless expected the agency to promulgate the agreement as a regulation. Requiring unanimity ensures that *no* interest will be outvoted. Thus, when an agreement emerges from the negotiations, there can be no doubt that a particular interest agreed to it. Requiring unanimity, therefore, preserves the essential element of power.

Unanimity also is necessary if negotiation replaces the need for extensive factual research as one of the bases of the legitimacy of the regulation. Currently, an agency must conduct factual research to demonstrate the existence of a problem and the feasibility of the proposed solution. In regulatory negotiations, such research would be unnecessary if the parties concurred on both issues. For example, when an advisory committee recommended particular regulatory action to an agency, over the dissent of the affected industry, the

523. Deciding whether someone is an idealogue or is being unreasonably intransigent requires a valuing of the position taken.

524. Unanimity would not be required under structured decisionmaking. It may be that if regulatory negotiation is attempted, experience will indicate some other manner of determining a consensus.

industry involved had a strong incentive to persuade the agency not to follow the recommendations.⁵²⁵ The agency, upon review, found the proposal did not have an adequate technical basis. Although the committee voted to recommend something that a *majority* of the participants desired, it failed to determine whether the recommendation was technically feasible. If there had been unanimity, or even substantial consensus, the technical feasibility of the recommendation would not have been an issue.⁵²⁶

The unanimity requirement also puts pressure on the negotiators to make good faith compromises in their efforts to reach an agreement.⁵²⁷ If a party knows that an agreement will be reached, even over its dissent, it can maintain a hard line and refuse to compromise. The dissenting party may continue to posture on behalf of its interest group if it believes that placing itself at a distance from the regulation is politically expedient. Unanimity requires each party at the negotiation table to take responsibility for an agreement.⁵²⁸ Because the party may not want to frustrate the committee by holding out, he may modify his position. Of course, the party could refuse to assent to the agreement if it were not in the overall interest of his constituency.

Moreover, unanimity "weighs" the strength of dissent. A party that is not completely happy with an agreement would file a dissent if permitted to do so. Under rules requiring unanimity, that party would be asked whether the dissent is strong enough to block agreement. A party faced with that situation frequently would agree that his adverse views are not sufficiently strong to stop the overall agreement. For example, virtually all of the recommendations of the National Coal Policy Project were unanimous. On at least one occasion, however, an individual agreed privately that the negotiation group's position was in the public interest in the long run, but he felt that the group's position would have such an adverse short run effect on his constituents that he should avoid public endorsement of it.⁵²⁹ Thus, in that situation, it seems unlikely that the representative would have blocked the agreement.

5. Problems with Unanimity

Requiring unanimity has its own problems, of course. Unanimity means that any party to the negotiation can stop the entire exercise by its intransigence. Such control could reward the ideologue because others might make compromises they believed are unwarranted simply to achieve agreement. Therefore, requiring unanimity could lead to a proposed regulation that reflects a

525. Safety Standards for Matchbooks, 42 Fed. Reg. 22,656 (1977).

526. See Safety Standards for Matchbooks, 42 Fed. Reg. 22,656, 22,660-61 (1977) (CPSC rejects limited burn time requirement for book matches because technical feasibility not demonstrated); Conversation with David Pittle, Commissioner of CPSC (Oct. 14, 1981). The question involved the offeror's proposal for limiting the time a match would burn.

527. Gusman Interview, *supra* note 232 (unanimity requirement provides mindset for agreement).

528. One experienced environmental mediator and careful observer of the process argues that agreements frequently can be obtained faster by requiring unanimity because the parties address the task of reaching agreement. The parties collaborate rather than try to use the system for all they can get. Interview with Gail Bingham of the Conservation Foundation (July 13, 1981)(copy on file at *Georgetown Law Journal*).

529. Letter from Laurence I. Moss to Philip J. Harter (May 12, 1981) [hereinafter Moss Letter] (copy on file at *Georgetown Law Journal*). It should be noted, however, that Mr. Moss believes unanimity should not be required. *Id.*

lowest common denominator, rather than a fair accommodation of the competing interests. A person experienced in the voluntary standards area described a requirement for unanimity as "giving each party a loaded gun."⁵³⁰ The potential failure to accommodate fairly competing interests could cause the parties to view the negotiation process with skepticism. This problem is simply the converse of the need to preserve power: although each party worries that the others will not agree, each attempts to preserve *its* ability to control the outcome.

In most negotiating situations, including those involving complex questions of policy, agreement of all the parties must be attained. The parties must all agree to the stipulation that is presented to the court settling litigation or to the agency settling a proceeding.⁵³¹ Similarly, all the parties to complex environmental settlement negotiations must agree.⁵³² Not only is unanimity important for preserving power, the fear that it is unreachable is overdrawn as evidenced by the number of different situations in which it is actually obtained.

6. Determining the Consensus

Although at a minimum, negotiating parties should try to accomplish unanimity, that may prove to be impractical. Therefore, three alternative ways of determining whether a consensus has been reached should be seriously considered: structured decisions; concurrent majorities; and substantial majority.

Structured decisions. The group may develop the regulation under rules of organizations that develop consensus standards. Such organizations have rules that assure the consideration of every dissent by an impartial and respected appeals body and that establish the criteria for determining consensus.⁵³³ If the group reached the decision by following such rules, the decision would be acceptable as reflecting a consensus.

*Concurrent majorities.*⁵³⁴ The primary benefits of unanimity can be achieved if all the represented interests concur, instead of requiring the agreement of each individual representative. In such a situation, the members of the negotiating group are identified by interest and caucuses are formed.⁵³⁵ Each caucus of the group must then support the decision. Each individual member of the negotiating group, however, need not agree specifically. This process would mitigate the disruptive effect of an ideologue because others that share a similar interest would not be persuaded by that person's position and would

530. Interview with Walter V. Cropper, American Society of Testing and Materials (Sept. 29, 1981) (copy on file at *Georgetown Law Journal*); see also ASTM, *supra* note 521 (requiring unanimity diminishes the quality of standard).

531. Cf. Morgan, *supra* note 24, at 42 (discussing Federal Power Commission's success in settling litigation); see Comment, *supra* note 195, at 789 n.587 (approximately 90% of Federal Trade Commission cases disposed of through consent orders). See generally ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE LAW JUDGE HEARINGS STATISTICAL REPORT FOR 1976-78 (July 1980).

532. See *supra* notes 226-37 and accompanying text (discussing settlements in environmental area).

533. See *supra* notes 521-22 and accompanying text (discussing procedures in structured decisions).

534. This term is adopted from John C. Calhoun. Calhoun, *Disquisition on Government*, in AMERICAN GOVERNMENT 33 (P. Woll ed. 1975).

535. Some caucuses, however, may consist of a single member.

agree with the proposed action. The National Coal Policy Project, for example, used this process.⁵³⁶

Substantial majority. Another alternative for determining consensus would be to require that a proposal be supported by a substantial majority of the group, such as two-thirds, three-fourths, or all but one individual. Even then some interests may be reluctant to participate because they fear being outvoted. Thus, this process might be better if the ground rules also provided that at least one representative of each interest must support the proposal. That requirement would make clear that each *interest*, rather than each individual, retained its power by being able to veto a proposal.

7. Lack of Consensus

The negotiation group may, of course, be unable to reach a consensus, regardless of how one defines consensus. The lack of consensus may reflect disagreement over almost every issue or it may extend only to a few aspects of a proposal.

If a consensus is not reached on a proposed regulation, the group should make the following determinations: whether the group is likely to reach consensus if discussions are continued; whether a consensus is unlikely, but a report detailing the extent of any consensus would be beneficial;⁵³⁷ whether the parties are deadlocked and it would not be profitable even to attempt to define their positions in a report.⁵³⁸ The experience and observations of the mediator, if any, can be helpful, but ultimately the parties themselves must make these decisions.⁵³⁹

G. REPORTING THE AGREEMENT

After the committee reaches a consensus it must prepare a documentary package that the agency will use to translate the agreement into a regulation. A primary element of the package is the language the group proposes that the agency adopt as a regulation. If the group simply agreed on general principles

536. Moss Letter, *supra* note 529 (discussing consensus approach).

537. If a party or interest holds out unreasonably and thus blocks the group consensus on a proposal, the remaining parties or interests could, of course, close ranks in support of the position on which they agree in any subsequent rulemaking. In such a case the dissenting party would be faced with taking on the world. The chances of its prevailing in the subsequent rulemaking proceeding might be substantially reduced unless the party has the residual power to achieve its will or others interpret its position as reasonable. Thus, before holding out, a party should bear in mind that doing so may actually diminish its ability to influence the ultimate decision, and that the route to actual participation and influence is through good faith negotiation.

538. For example, some interest may be unable to develop a position on some issues. Hence, it would do little good to attempt to define the range of disagreement among the parties because a major player was unable to do so during negotiations. Or, if the entire process simply breaks down, the parties would revert to attempting to influence the decision through the exercise of other forms of power.

539. This aspect of the proposal is in direct contrast with the Federal Advisory Committee Act (FACA), which provides that a government representative must be authorized to adjourn any meeting and the committee is not allowed to conduct any meeting without the presence of a government representative. 5 U.S.C. app. § 10(e) (1976). Although this authority to adjourn and conduct meetings is defined solely in terms of individual meetings, the government representative effectively could end the entire process by refusing to attend any future meetings. In regulatory negotiations if any major interest were to walk out, the group would have to decide whether discussions would continue.

or made specific recommendations without proposing specific regulatory language, a major obstacle to the implementation of the agreement would remain. Transforming the agreement into a regulation requires the writer to become familiar with the underlying basis of the proposal. Many details that were not foreseen in a general agreement may arise, forcing the drafters to make a myriad of policy choices, some large, some small.⁵⁴⁰ Moreover, drafting a regulation requires sustained concentration and considerable resources. The time transaction costs required to draft the regulation could inhibit the agency from moving forward. Thus, the group itself should be responsible for drafting the detailed language of a regulation.⁵⁴¹ Doing so will force the group to concentrate on the details of its agreement and to define precisely the meaning of the agreement.⁵⁴² Accordingly, the group is in the best position to codify its agreement because it is the body that reached the consensus.

The group also should prepare a preamble for the proposal when it is published in the *Federal Register*. Because the purpose of a preamble is to inform the agency, the courts, and the public of the "basis and purpose" of the proposed regulation,⁵⁴³ it should include the composition of the group; the nature of the consensus the group reached; the issues raised during the discussion; a short narrative discussion about each section of the standard, including both the purpose of the section and the reasons for its form; and the data and other information considered by the group in developing the regulation.⁵⁴⁴

540. Susskind and Weinstein point out that formalization of an agreement into a written document should not be viewed as a "pro forma chore"; rather, drafting the agreement forces the parties to re-examine past decisions in light of subsequent developments. The parties develop an overview of the entire agreement. This process may expose some areas that the parties thought were settled, but which in fact were not, or those in which a modification must be made to achieve final consensus. Susskind & Weinstein, *supra* note 92, at 345. Dunlop also emphasizes this factor: "[A]n axiom of negotiations ordinarily is that there is no agreement until all items in dispute have been resolved one way or the other, unless otherwise explicitly specified." J. Dunlop, *supra* note 302, at 17.

541. It is, of course, unlikely that the group as a whole would actually draft the proposed regulation from start to finish. Rather, the proposed regulation could evolve from the "one text" procedure. See *supra* notes 489-96 and accompanying text (discussing single text procedure to identify issues and possible solutions). Or, it could evolve from drafts prepared by group members or staff. Nonetheless, the group as a whole would endorse the final regulatory language regardless of how it actually evolved.

542. Although the group may be able to reach agreement on general principles, it may be unable to narrow the agreement to a specific regulatory proposal. Thus, requiring the group to attempt to draft the language would help define the range of the agreement. Even if the agreement falls short of regulatory language, the process is still valuable because it provides the agency with important information. Many of the benefits of a regulation developed by consensus, however, would be lost. That the parties are unable to reach agreement on the actual language may demonstrate that the agreement is more fragile than a consensus. Moreover, failure to draft the actual regulation may show that some highly controversial issues remain for the subsequent rulemaking proceeding.

543. The statement of basis and purpose would resemble the rationale statement of a voluntary standard, a topic that recently has received considerable analysis. D. SWANKIN, *RATIONALE STATEMENTS FOR VOLUNTARY STANDARDS—ISSUES, TECHNIQUES, AND CONSEQUENCES* (1981) (National Bureau of Standards Publication-GCR-81-347) (publication defining, discussing and examining consequences of rationale statements); P. HARTEK, *supra* note 178, at 141-50 (discussing the need for a procedural history and rationale of voluntary standards).

544. The statement of "basis and purpose" must enable the court "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did The paramount objective is to see whether the agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules for general application in the future." *Automotive Parts and Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968). Thus, if the agency publishes the proposed rule as a regulation it should explain the proposal in a preamble that meets these criteria. Indeed, if the agency itself is to review the standard it will require the same information to make an intelligent decision.

The preamble resulting from regulatory negotiations need not be as extensive as those currently required for technical rules.⁵⁴⁵ Under the traditional hybrid process, the legitimacy of the rule rests on a resolution of complex factual materials and rational extrapolation from those facts, guided by the criteria of the statute. Under regulatory negotiation, however, the regulation's legitimacy would lie in the overall agreement of the parties. Thus, the only facts that must be included in the preamble to a negotiated regulation are those that the negotiation group believes are necessary for an informed decision. The agency would not be required to prove either the existence of a problem or the feasibility of the proposed solution if those who would be affected agree on both issues.

The information in the preamble would be helpful in several regards. First, it would enable public commentators to point out failures to consider particular issues or to take into account information. Second, if the regulation is issued, someone may attempt to obtain an exception from it on the grounds that, although its situation is included within the letter of the regulation, the group did not consider its situation in drafting the regulation.

The preamble should also explain the areas in which the group was unable to agree. If the disagreement is one of fundamental values in which there can be no reconciliation, a statement of that fact would make it clear that the regulation in question should not be viewed as compromising these deeply held values. On the other hand, the disagreements may reflect only that the parties were unable to reconcile them by negotiations. If a decision must be reached in some other forum, such as by the agency in the traditional process or through legislation, the preamble can highlight and focus attention on the disputed issues. Thus, the preamble would serve the valuable function of narrowing the issues in disputes, identifying information that is accepted as necessary, ranking priorities, and identifying potentially acceptable solutions.⁵⁴⁶

H. AGENCY ACTION

Although the agency retains the ultimate power to issue a regulation, the purpose of a regulatory negotiation is to draft a regulation, and not merely to lend advice and consultation to an agency. The negotiation process is likely to attract talented experts to spend the time and resources in negotiating a complex topic only if they have reasonable assurance that the agency will implement their proposal. Indeed, there would be little incentive to strike the hard

545. The purpose of a regulatory negotiation is to enable the parties to address the range of issues involved in writing the regulation and to make deals in which each party attempts to maximize its own interests. Thus, the process envisions an interest giving in on one issue to achieve victory on another issue it believes is even more important. The explanation of the proposed regulation should not be so detailed that it inhibits the ability of the parties to negotiate candidly with one another or to explain the agreement to their respective constituencies. As Dunlop observes: "Negotiators desire to explain the concessions that have been made and the terms they have achieved directly to their constituents rather than have the press or media initially make that explanation and state the merits, or deficiencies, of the settlement." J. Dunlop, *supra* note 302, at 19. Although Dunlop spoke of media coverage in the context of labor settlements, the same principle applies here: the preamble should describe why the proposal meets the needs of the group and what it does, but should not go into the details of the various concessions. It should describe the regulatory result and the underlying logic of the regulation, just as modern preambles do, but not necessarily the process by which it evolved.

546. *Cf.* Schuck Letter, *supra* note 341 (listing virtues of negotiations).

bargain if the whole process could be easily overturned or "relitigated" before an agency issued the regulation.⁵⁴⁷ Therefore, an essential ingredient of the success of the regulatory negotiation process is an agreement by the agency to publish the group's proposed regulation in a notice of proposed rulemaking, unless the agency has good cause for not doing so.

The agency should view the package submitted by the regulatory negotiation group as it would view a briefing package submitted by the division of the agency entrusted with developing such a regulation. Because a senior member of the division would have participated in the development of the proposal and agreed to it, that view would be justified. He should have kept the relevant members of the agency abreast of developments during the negotiation process and should have taken into account their viewpoint. Such participation does not mean that the agency can or should prevail on every issue; the regulatory negotiation process would be a sham if that were so. The proposal, however, would reflect a reasonable accommodation of the differing views of the parties and presumably would be within the bounds of acceptable alternatives because the major interests ratified the proposal.

If the subject of the regulation raises significant political issues, the negotiation group should keep Congress and the White House abreast of negotiation developments. If a mediator participates, he should touch base with relevant congressional committees and offices within the White House to permit the negotiation group to consider their views during the negotiations and to avoid political surprises.⁵⁴⁸ The report of the consensus also should be furnished to Congress and to the White House to enable them to communicate any substantial concerns to the agency. Providing such notification to the political forces and permitting their concerns to be taken into account will help insulate the agency from political attack. In addition, this procedure would be a political prod to the agency because it would need a good reason to reject the consensus of competing forces. If the agency rejects the consensus without good reason it might appear that the agency is changing the results of the negotiations capriciously.

The agency administrator and senior staff would review the proposed regulation and its accompanying materials for consistency with applicable statutes and with the agency's existing policy, just as they would review an internal briefing package.⁵⁴⁹ They may, of course, determine that the proposal should

547. John Dunlop points out: "It is axiomatic that negotiations recognized to be preliminary to a further stage are unlikely to elicit best offers, although very important functions relating to factual information, exploring priorities among issues, alternative approaches, and sensing internal considerations may be achieved." J. Dunlop, *supra* note 302, at 22. Thus, in labor negotiations that are subject to mandatory mediation, mediation may not be effective if it is preliminary to actual bargaining. In the regulatory context, such a preliminary mediation process would be more akin to an advisory committee than to regulation negotiation. Although advisory committees serve a useful function, they lack many of the benefits described above.

548. The mediator in environmental disputes regularly acts as a liaison by keeping relevant agencies informed. Cormick Interview, *supra* note 167; Watson Interview, *supra* note 165.; see Cormick, *supra* note 247, at 27 (mediator assists in maintaining communications with those "not at the table").

549. Because the agency's team in the negotiation would include a representative of its general counsel's office, the agency's legal concerns should be considered during the committee's deliberations. Of course, the parties could develop their own legal views concerning the suitability of a proposed action. Even if the parties are unable to reach agreement on the legal issues, the negotiating group at least would provide a forum in which those issues could be discussed, unlike the current hybrid process.

be modified or supplemented. For example, the circumstances that gave rise to the regulatory proposal may have changed so significantly that no regulation on the topic will be issued. Alternatively, the factual basis of any such regulation may have changed so completely since the group completed its negotiations that the proposal must be reconsidered. Or, the agency may determine that a major interest was not represented during negotiations and that its views must be taken into account before the proposal reflects a consensus of significantly affected interests. Finally, the agency may determine that the areas of disagreement are so central to the rule ultimately proposed that traditional methods of rulemaking should be used.

The need to modify or to supplement a negotiated proposal, however, should not arise frequently because the relevant considerations should have been addressed during the negotiation process and reflected in the consensus. Therefore, the agency should have good cause for not publishing the proposal. The agency should not second guess the negotiators or attempt to regain a concession it made during negotiations.⁵⁵⁰ Nevertheless, the agency administrators are not the slaves of briefing packages proposed by their staff, and they may require additional work to be done on proposals. If the agency reasonably finds good cause for refusing to accept the proposal it could decide not to publish a proposed rule. Alternatively, the agency could ask the negotiating group to reconsider and submit a new proposal that takes its concerns into account. Except in these kinds of unusual circumstances, however, the agency would publish the group's proposed rule in a notice of proposed rulemaking.

The proposal and any changes the agency proposed should be published verbatim, even if the agency believes the proposal should be modified or amended. This procedure would allow the public to comment on the respective proposals. This procedure also would allow the agency and the group to sort out the competing contentions in developing the final regulation.

The public's comments on a proposed rule developed through a regulatory negotiation process should contain few surprises. If conducted properly, the negotiation process would have generated adequate consideration of the competing interests. Thus, the comments on the proposed rules would be aimed at perfecting the proposal rather than advocating any sort of fundamental departure from the proposed rule. If, however, an interest was overlooked or a member of an interest that was represented believes an inappropriate accommodation was struck, publication of the proposal would enable both parties to make their arguments. The regulatory negotiation process should eliminate major controversy during the period after publication of the notice, unlike the hybrid rulemaking process in which the notice is an invitation to fight. Thus, the notice and comment provisions of this proposal should be quite brief; they would not result in a protracted process such as we have become familiar with in the hybrid process.

550. The attitude of the agency in accepting the negotiation group's proposal is critical. It must accept the proposal unless there is good cause for not doing so. Stewart, *supra* note 112, at 1353 n.286. If the agency adopts an attitude of second guessing the group or rejecting the proposal because the agency did not develop it, the regulatory negotiation process will only add one more layer to an already protracted process. The agency also could alienate its important constituents by adopting such an attitude.

The agency should refer comments to the negotiating group for consideration. The group then can adapt new information to the accommodations made during the initial negotiation. The group can decide whether it adequately considered the issues raised in the comments. If it decides the issues were adequately addressed, no change would be required. If it decides that the comments raised a new issue, it would modify its initial proposal accordingly. One of the significant functions of the comments to a regulatory negotiation proposal would be to permit parties to consider whether their interests were adequately represented in the negotiations. The agency and the negotiating group together must consider that issue.

After the negotiating group considers the comments and decides how to respond to them, the agency must then consider the recommendations of the negotiating group and the comments received in response to the notice of proposed rulemaking in reaching its decision on a final regulation. It may modify the proposal in response to those comments. The agency, however, should not use this opportunity to modify the proposal unless the modification responds to a meritorious comment⁵⁵¹ because the process would quickly fall apart if the agency acted unilaterally.

I. JUDICIAL REVIEW

Negotiations may reduce judicial challenges to a rule because those parties most directly affected, who also are the most likely to bring suits, actually would participate in its development. Indeed, because the rule would reflect the agreement of the parties, even the most vocal constituencies should support the rule. This abstract prediction finds support in experience in analogous contexts. For example, there has been virtually no judicial review of OSHA's recent safety standards that were based on a consensus among the interested parties.⁵⁵² Moreover, rules resulting from settlements have not been challenged.⁵⁵³

Some parties, of course, would seek judicial review of rules developed through a regulatory negotiation process. The nature of such judicial review could have an important bearing on the success or failure of the negotiation process itself. If individuals can boycott the negotiation group and then obtain judicial review under a stringent standard, the regulatory negotiation process could unravel.

The nature of the factual determinations and the record developed during the regulatory negotiation process would differ significantly from those developed in the hybrid process. Moreover, highly qualified people may refuse to participate in the negotiation if a court, at the behest of someone who refused

551. If the agency publishes proposed amendments to the negotiation group proposal, the agency and the group should carefully appraise the comments received in response to the notice. They should determine whether the original proposal, the proposed amendments, or some other modification should ultimately be adopted. Although the agency necessarily has the final word in this matter, as in the other matters, it should restrain the exercise of this authority.

552. Seymour Interview, *supra* note 168.

553. See Cohen, *supra* note 194, at 880 (meeting between EPA and municipal officials prior to publication of regulation governing discharges and municipal sewer systems resulted in no state or municipal court challenge).

to participate, undoes their work. Therefore, a stringent standard of review would be inappropriate.⁵⁵⁴ Requiring a less stringent standard of judicial review, however, does not imply that judicial review is unimportant to the regulatory negotiation process. Rather, the nature of judicial review would have to be tailored to the regulatory negotiation process. Such adaptation of judicial review to the regulatory negotiation process would resemble the adaptation of the rulemaking process to rules with extensive factual records.

A rule should be sustained to the extent that it is within the agency's jurisdiction and actually reflects a consensus among the interested parties. If the rule is outside an agency's jurisdiction or fails to reflect a consensus, traditional standards of review should be followed. This standard of review has several major components,⁵⁵⁵ which include determinations of standing, a rule's conformity with applicable statutes and adequacy of interest representation.

1. Standing

The reviewing court would begin its analysis, just as it must under current forms of review, by determining whether the challenger has standing to bring suit. Thus, the court would determine whether a sufficient nexus of interests between the petitioner and the challenged rule exists.⁵⁵⁶ The determination of standing not only serves its traditional constitutional function, but it also helps define the appropriate interests that should be represented during the negotiation process.

2. Conformity with Law

The court also would conduct its customary review to ensure that the rule

554. Stewart, *supra* note 112, at 1348 (proposing relaxation of "hard look" standard of judicial review when negotiations yield consensus).

555. The standard of judicial review is designed to impose the proper incentives on the various players. These incentives include encouraging the relevant interests to come forward and participate; encouraging the agency to ensure that the appropriate interests are represented; encouraging the agency to refrain from unjustified modifications of the negotiated proposal; and encouraging all interests concerned with a proposed rule to make their concerns known to the agency so that appropriate action can be taken.

556. Precise formulations of a test to determine standing have proved elusive, and the concept seems to vary over time and according to the circumstances in which it is applied. Thus, no specific test is attempted here. The court simply would apply the traditional law of standing in judicial review of a rule developed by negotiations. See *Valley Forge Christian College v. Americans United for Separation of Church & State*, 102 S. Ct. 752, 758 (1982) (standing subsumes blend of constitutional and prudential considerations; at minimum plaintiff must show he suffered actual or threatened injury that can be traced to challenged action and is likely to be redressed by favorable decision); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (minimum constitutional requirement for standing are that plaintiff suffers distinct and palpable injury likely to be redressed by grant of requested relief); *Duke Power Co. v. North Carolina Envtl. Group, Inc.*, 438 U.S. 59, 72 (1978) (standing requires distinct, palpable plaintiff injury with causal connection between injury and challenged conduct); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976) (standing depends on whether plaintiff injury capable of being redressed by favorable decision); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686 (1973) ("injury in fact" element not limited to economic harm; includes harm to aesthetic and environmental well-being); *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972) ("injury in fact" test requires party to be among injured); *Barlow v. Collins*, 397 U.S. 159, 167 (1970) (judicial review of administrative action inferred when finding of congressional intent to protect interest of class of which plaintiff member); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 157 (1970) ("aggrieved persons" entitled to judicial review of ruling under Administrative Procedure Act).

conforms with all applicable substantive statutes. The court would invalidate the rule if it were outside the agency's jurisdiction. Because the respective parties concur that the rule is within the agency's jurisdiction, there is an issue whether the court should grant some deference to that determination. Thus, the court might be inclined to allow broader statutory interpretation more than it might under a traditional process. For example, assume that OSHA promulgates a regulation limiting exposure to a toxic chemical and that representatives of labor and industry agree to implement the regulation through work practices and personal protective equipment requirements rather than having industry retrofit plants to provide engineering controls. A narrow reading of the Occupational Safety and Health Act might support an interpretation requiring that protection be in the form of engineering controls if technologically feasible.⁵⁵⁷ Because the affected parties, representatives of labor and industry, agreed to the use of personal protective equipment rather than engineering controls to control exposure levels, a court should defer to this judgment so long as it is not manifestly unacceptable.

3. Interest Representation

The court should then determine whether the plaintiff's interest was in fact represented in the negotiation group. The court must determine whether the challenger had an adequate voice in the negotiations in order to distinguish between complaints that an interest did not win all that it sought and complaints that an interest's views were not considered. In its review, the court should apply standards similar to those used by courts in other situations in which they must determine whether the interests of affected groups were adequately represented. For example, the Federal Rules of Civil Procedure require the court, in assessing whether a class action should be maintained, to determine whether "the representative parties will fairly and adequately protect the interests of the class."⁵⁵⁸ Similarly, the Federal Rules authorize intervention in litigation as a matter of right if a disposition of the suit would impair the applicant's ability to protect himself "unless the applicant's interest is adequately represented by existing parties."⁵⁵⁹ The courts also make an interest representation determination in public law litigation when the decree would have a widespread and immediate effect similar to that of an agency's regulation.⁵⁶⁰ Thus, courts have evolved ways of assessing whether a party's interests are adequately represented.⁵⁶¹ Moreover, the report furnished by the group that describes the issues considered during negotiations can help the

557. *Cf.* American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 511-12 (1981) (promulgation of OSHA regulations should be guided by feasibility of ensuring employee health not by cost-benefit analysis).

558. FED. R. CIV. P. 23; *see also* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1765-70, 1799 (1972) (discussing representatives protecting interests of class, intervention in class actions).

559. FED. R. CIV. P. 24; *see also* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1909 (1972) (discussing adequacy of representation).

560. *See* Chayes, *supra* note 205, at 1310-13 (discussing problem of interest representation).

561. The issue also arises in the labor law context. The union, in return for its grant of exclusive representation of a company's employees, assumes the duty to represent the employees' interests fairly and in good faith. *Medlin v. Boeing Vertol Co.*, 620 F.2d 957, 961 (3rd Cir. 1980).

court in its assessment because it will reveal whether issues of interest to the petitioner were raised and, if so, how they were resolved.

If the court determines that the petitioner's interest was represented during negotiations, the petitioner should bear the relatively high burden of showing that the group failed to consider an issue central to the rule and that there is a substantial likelihood it would have been significantly changed if the issue had been considered. On the other hand, if the court were to determine that the interest was not represented, it would next consider whether some reason excuses participation and whether the party submitted its views to the agency in response to the notice of proposed rulemaking.

4. Failure to Participate

A party that refuses to participate fully in the negotiations should be estopped from challenging the regulation after the process has run its course. Thus, a party should not be allowed to challenge a rule on the grounds that its interest was not represented unless it can demonstrate that extraordinary circumstances excused its failure to make a similar allegation in response to the initial *Federal Register* notice establishing the regulatory negotiation committee.⁵⁶² The purpose of the preliminary notice is to ensure that the parties interested in a rule have the opportunity to argue that they should be included in the regulatory negotiation group. An interest that fails to do so should, therefore, face the same stringent standard of review as someone who was represented. Otherwise, an interest that remained silent during negotiations could achieve its aim through unilateral action before a court, thereby avoiding the give and take of discussions. Of course, the party is free to refuse to participate directly or to participate by submitting only comments, but it should not gain an advantage by doing so.

If the party applied for inclusion, and the agency and the convenor denied the application, the court should determine whether that decision was an arbitrary and capricious application of the interest representation test. If the court concludes that the applicant was arbitrarily excluded, it would apply the traditional standard of review to the rule, rather than the relatively high threshold imposed on those interests that were represented in negotiation or on parties that failed to participate in negotiation.

5. Administrative Exhaustion

Even if a party is excused for failing to participate because it was satisfied with representation or was denied admittance to the negotiations, a party should not be permitted to challenge either the substance or the procedure of the negotiated rule unless it first exhausted its administrative remedies.⁵⁶³ Thus, the challenging party must demonstrate (1) that it raised its contention during the comment period; (2) that it was impractical to raise its objection, or

562. See *supra* notes 433-43 and accompanying text (discussing representation of appropriate interests).

563. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553-54 (1978) (imposing threshold requirement on parties challenging agency action to notify agency of concerns when agency had opportunity to take appropriate action).

the grounds for it arose only after the close of the public comment period; or (3) that some truly extraordinary circumstance excused presentation of the question to the agency during the comment period.⁵⁶⁴ This exhaustion of administrative remedies enables the agency to consider the party's position and to modify a proposed rule accordingly. It is inefficient from all perspectives to allow a party that refused to participate in the rulemaking to challenge a rule in a forum in which the agency is unable to consider the position.

The requirement that a party exhaust all administrative remedies is even more applicable when the rule is developed through regulatory negotiation. It is essential to the efficient functioning of the system that the views of parties be represented during negotiations. Therefore, a party should be required to seek inclusion at the outset of negotiations or present its concerns on the rule during the notice and comment period to enable those developing the rule to take its views into account. Thus, if the petitioner submitted its concerns in response to the comment period, its interests were not represented,⁵⁶⁵ and its failure to participate is justifiable, the party's administrative remedies would be exhausted, and the court then should apply the normal standard of review.

6. Agency Modifications

When an agency modifies a proposal of a regulatory negotiation group,⁵⁶⁶ the modification should be subjected to the normal standard of judicial review rather than the standard for a negotiated rule. In that situation, the agency has substituted its judgment for that of the group. Because the rule's legitimacy rests on the agency procedure by which it was developed,⁵⁶⁷ the court should apply its normal review of the facts and of policy.

7. Factual Review

It would be inappropriate to require the negotiating group and the agency to conduct research similar to that required in the hybrid process because a negotiated regulation is generated not through development of enormous factual material, but through the agreement of the parties on the relevant facts and issues. Thus, the court should require only that the group have enough information to enable it to make an intelligent choice. The court should apply a standard of review similar to that applied in *Automotive Parts and Accessories Association v. Boyd*⁵⁶⁸ rather than the standard in *Citizens to Preserve Overton*

564. Several statutes similarly preclude judicial review of matters not raised before the agency. For example, the Securities and Exchange Act provides: "No objection to [a] . . . rule of the Commission . . . may be considered by the court unless it is heard before the Commission or there was reasonable grounds for failure to do so." 15 U.S.C. § 78y(c)(1) (1976). The Clean Air Act provides: "[O]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial review." 42 U.S.C. § 7607(d)(7)(B) (Supp. IV 1980).

565. If the petitioner's interests were represented, then he should bear a relatively high burden of showing that the negotiation group failed to consider a matter central and relevant to the rule and that there is a substantial likelihood that the rule would be significantly different if the matters had been considered. *Supra* text following note 561.

566. See *supra* note 550 and accompanying text (discussing "good cause" requirement for not publishing proposal).

567. See *supra* note 91 and accompanying text (discussing political legitimacy of rulemaking).

568. 407 F.2d 330 (D.C. Cir. 1968).

Park, Inc. v. Volpe.⁵⁶⁹ In *Automotive Parts* the paramount objective of judicial review was to determine whether rulemaking was carried out in a manner calculated to negate dangers of arbitrariness and irrationality.⁵⁷⁰ In contrast, in *Overton Park* the Supreme Court required a "searching and careful" review of the agency decision to be based on the full administrative record available at the time of the agency decision.⁵⁷¹ A rule developed through a negotiation process is the result of a consensus of interested parties. The negotiation process guarantees that the concerns of interested parties are addressed, thereby eliminating the need to review the entire factual basis of the agreement. Therefore, judicial review of the factual basis of the negotiated rule need only consider the possibility of arbitrariness and irrationality.

J. NONDELEGATION DOCTRINE

Courts and public officials periodically opine that it is inappropriate for an organization consisting primarily of private citizens to wield regulatory power. Therefore, they disapprove of regulatory decisions based on the recommendations of such a group.⁵⁷² The starkest example of such hostility arose when the Supreme Court rejected the innovative approaches of the New Deal.

The Supreme Court, in *Carter v. Carter Coal Co.*,⁵⁷³ considered a statutory provision that authorized representatives of coal producers and coal miners to set maximum hours and minimum wages.⁵⁷⁴ In a brief and powerful analysis of the legality of the delegation of power to the private group,⁵⁷⁵ the Court held that the power to regulate an industry cannot be delegated to a private group because the authority to regulate "is necessarily a government function."⁵⁷⁶

Courts also have invalidated regulatory programs that rely on licensing boards that draw their members from the regulated activity because the composition of the board itself reflects a bias against particular interests. For example, in *Gibson v. Berryhill*⁵⁷⁷ an optometry licensing board, consisting solely of private, practicing optometrists, was precluded from adjudicating charges of unprofessional conduct against optometrists employed by a corporation.⁵⁷⁸ The Court reasoned that the board's substantial pecuniary interest in eliminat-

569. 401 U.S. 402 (1971).

570. 407 F.2d at 338.

571. 401 U.S. at 420; see also *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240, 249 (2d Cir. 1977) (judicial review of informal rulemaking must be based on whole record); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 402 (D.C. Cir. 1973) (reviewing court must consider whether rulemaking based on consideration of relevant factors), *cert. denied*, 417 U.S. 921 (1974).

572. See P. HARTER, *supra* note 178, at 44-46 (discussing agency views on delegation).

573. 298 U.S. 238 (1936).

574. *Id.* at 278-83.

575. *Id.* at 311.

576. *Id.* For a discussion of the nondelegation doctrine, see generally Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650 (1975); Jaffe, *Lawmaking by Private Groups*, 51 HARV. L. REV. 201 (1937). More recently, following the evolution of the regulatory state, the United States Court of Appeals for the Fifth Circuit was concerned with reliance on recommendations of private consultants. See *Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F.2d 831, 843-44 (5th Cir. 1978) (court not as deferential to opinions of private consultants as to expertise of government regulatory agency).

577. 411 U.S. 564 (1973).

578. *Id.* at 578.

ing corporate optometrists precluded it from evaluating unprofessional conduct in an unbiased manner.⁵⁷⁹

Despite these expressions of concern over delegation of government power to private groups,⁵⁸⁰ there are many examples in which a board with some kind of regulatory authority is composed of individuals that are privately employed and that are members of the board because of the interest they represent in their private employment. For example, regulatory authority has been given to state pollution control boards consisting of diverse representatives⁵⁸¹ and to private organizations for the licensing of professions.⁵⁸² A Professional Standards Review Organization⁵⁸³ (PSRO) consisting of practicing physicians in the private sector is authorized to make many regulatory decisions concerning the provision of health care services, including the development of local norms of care, the determination of medical necessity, and the quality of health care services for purposes of federal payment.⁵⁸⁴ The Securities and Exchange Act authorizes self-regulation of the securities market, including the development of rules designed to prevent fraudulent manipulative acts and practices and the discipline of members who fail to conform to the rules.⁵⁸⁵ Both the PSRO schemes⁵⁸⁶ and the Securities and Exchange Act authorizations⁵⁸⁷ have been upheld as legitimate exercises of power against the challenge that they constituted an impermissible delegation of authority to a private group. In each of these cases, although the private board was entrusted with substantial authority, the agency had the final authority.

The regulatory negotiation scheme described herein would grant final authority to the agency. The agency, however, would act on the basis of the group's recommendations unless the agency had good cause for not doing so.

579. *Id.* at 578-79.

580. The cases that invalidate the private exercise of regulatory power indicate that care must be taken to avoid building in a structural bias. For example, in *Carter* the Court concerned itself with the parties whose interests were not only unrepresented on the code-setting panel, but whose interests also were adverse to those who did participate in the rulemaking. 298 U.S. at 311. Moreover, the parties that did not participate were not given a viable opportunity to escape the imposition of the code. *Id.* Similarly in *Gibson* the private panel was hostile to the interests of the petitioner. 411 U.S. at 578-79. Thus, both cases stand for the proposition that it is essential to include the diverse interests that will be affected and that the process by which the ultimate decision is made must afford parties the opportunity to present their views before they may be bound by the decision of the private group.

581. Vaughn, *State Air Pollution Control Boards: The Interest Group Model and the Lawyer's Role*, 24 OKLA. L. REV. 25, 25-52 (1971) (discussing the concept of "interest" in state air pollution control boards).

582. *Cf.* *Friedman v. Rogers*, 440 U.S. 1, 18 (1979) (upholding petitioner's right to fair and impartial hearing by optometry board); *Liebmann, supra* note 576, at 665-71 (discussing inappropriateness of unqualified nondelegation doctrine).

583. 42 U.S.C. §§ 1320c to 1320c-22 (1976 & Supp. IV 1980) (discussing professional standards review).

584. *Id.* § 1320c-4(a)(1) (discussing duties and functions of PSRO).

585. Maloney Act, 15 U.S.C. § 78o-3 (1976).

586. *See* *Association of Am. Physicians & Surgeons v. Weinberger*, 395 F.Supp. 125, 140 (N.D. Ill.) (PSRO not unconstitutional delegation of authority to private organization because private organization may perform government function as long as administrative scheme provides hearing on organization's determinations), *aff'd*, 423 U.S. 975 (1975).

587. *First Jersey Security, Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979) (upholding constitutionality of Maloney Act), *cert. denied*, 444 U.S. 1074 (1980); *Todd & Co. v. SEC*, 557 F.2d 1008, 1012 (3d Cir. 1977) (Maloney Act not unconstitutional delegation of power because SEC has power to disapprove association rules; SEC must make de novo findings aided by additional evidence if necessary; and SEC must make an independent decision on violation or penalty).

Because the government agency conducts the final review and makes the decision, the authority is not delegated to the private group.⁵⁸⁸ The agency would have greater control over the ultimate regulation than the Department of Health and Human Services has over some determinations of a PSRO, and about the same authority the SEC has over determinations made by a private, self-regulatory body. Finally, those affected would have an opportunity to participate by presenting their views on proposed action. The structure of the regulatory negotiation process is such that it would sustain a challenge of institutional bias such as that used to invalidate a state licensing scheme. Thus, the regulatory negotiation process would not be an impermissible delegation of government authority to a private group.

K. REGULATORY IMPACT ANALYSIS

A regulatory negotiation process would fulfill many of the functions that are provided by a Regulatory Impact Analysis⁵⁸⁹ (RIA). An RIA aids an agency in determining that its action is based on adequate information concerning the need for and consequences of proposed actions; that potential benefits to society outweigh costs; that the net benefits to society are maximized; and that the alternative regulatory approach chosen involves the least net cost to society.⁵⁹⁰

The very process of negotiation fulfills most of those functions. First, the parties will act as a group only if they believe they have adequate information. Further, the purpose of negotiation is to adjust the regulation to fit the respective interests so that the respective benefits are Pareto optimal.⁵⁹¹ Thus, if regulatory negotiation fulfills its function, an RIA would be unnecessary.

The RIA is largely an analytical surrogate designed to aid an agency in replicating the kind of decision the parties would make if they were permitted to make the kind of trade offs that would be done in the process of a regulatory negotiation. To that extent, requiring an RIA of a negotiated regulation would be superfluous. Moreover, requiring an RIA would reduce some of the significant benefits of the regulatory negotiation process because the analysis would consume valuable time and resources in developing the factual and analytical material that may not be necessary for an enlightened decision by the parties.

For example, the National Electrical Code was developed by means of a consensus process. Those that developed the Code were forced to make the careful value judgments that an RIA is designed to simulate, such as trade offs between costs and fire safety. These trade offs are reflected in the provisions that authorize the use of nonmetallic sheathed cable in individual dwellings and commercial establishments, but not in places where large numbers of people gather, such as restaurants or theaters.⁵⁹² The prohibition requires the considerable additional expense of more sophisticated wiring techniques, but results in reduced exposure to fire and electrical malfunction. Negotiating a

588: *Cf. Relco Inc. v. CPSC*, 391 F. Supp. 841, 845 (S.D. Tex. 1975) (final agency action must be made or ratified by Commission and cannot be delegated to subordinate).

589. Exec. Order No. 12,291 § 3, 3 C.F.R. 127, 128-30 (1981).

590. *Id.* §§ 2, 3, 3 C.F.R. 127, 128-30 (1981).

591. See M. INTRILIGATOR, *MATHEMATICAL OPTIMIZATION AND ECONOMIC THEORY* 259 (1971) (Pareto optimal situation one in which person can be made better off without making others worse off).

592. NATIONAL ELECTRICAL CODE § 336-(c)(3) (National Fire Protection Ass'n 1975).

safety code requires an informed judgment about the trade off involved, but there is no "right" answer. Competing interests have their say, analysis is developed to the extent necessary, and a judgment is made.

A code provision that involved the careful judgments similar to those of an RIA concerned the maximum allowable distance from the door of a room to a fire exit in a building.⁵⁹³ Drafting such a provision requires sophisticated judgment having financial implications of hundreds of millions of dollars. Vast amounts of data may be generated in the resolution of that question, but in the end each competing interest presents its case and an informed compromise accommodates those competing interests. The function of an RIA is to make an informed decision so the overall interests can be maximized. The clash of interests in the participatory decisionmaking process of negotiations effectively serves such a function.

L. BENEFITS BEYOND AGREEMENT

Even if the parties are unable to reach agreement on all issues, the regulatory negotiation process may have significant benefits. Because the areas of disagreement will be narrowed the issue will be better defined. The resolution process, whether regulatory, legislative, or judicial in nature, can focus on these narrowly drawn issues. Moreover, to the extent that the negotiation process reveals true interests as opposed to initial positions, those interests can be taken into account in the subsequent process. Thus, the regulatory negotiation process will streamline the subsequent regulatory process by enabling the decisionmakers to focus on the true issues and interests in dispute.

Participants in some of the environmental negotiations have found that working together toward a decision can bring the parties closer together so they develop an ongoing working relationship.⁵⁹⁴ That relationship in turn can enable them to work out disputes among themselves as opposed to resorting to a more intensive adversarial process. Thus, the initial working relationship may have established the norms against which subsequent dealings were conducted. Even if *no* agreement is reached on a proposed regulation, the definition of the issues involved and the establishment of a forum in which the parties may work together is alone a substantial benefit.

M. POSSIBLE ADVERSE CONSEQUENCES

Regulatory negotiation does have possible adverse consequences that must be considered. One frequently expressed concern, with respect to an agency's participation in the development of voluntary standards, involves agency participation in regulatory negotiation. In developing voluntary standards, the agency's staff member whose expertise makes him attractive to the committee writing the standard is also relied on by the agency in determining whether the standard meets the agency's regulatory needs.⁵⁹⁵ The fear, of course, is that the

593. For example, the maximum allowable distance from the door of a hotel room to the nearest exit is 100 feet. NATIONAL FIRE PROTECTION ASSOCIATION, LIFE SAFETY CODE § 11-2.2.6.1 (1976).

594. Cormick Interview, *supra* note 167.

595. Two other concerns exist. First, agency participation in a standards writing organization would be a governmental interference with what is essentially a private enterprise. Second, some people may

agency representative would be unable to make a balanced judgment concerning the appropriateness of using the standard for regulatory purposes.⁵⁹⁶ Those concerns are reduced in the regulatory negotiation context because the agency's representative would concur in the outcome. Moreover, the official participates throughout the process and, therefore, is in a position to explain to senior management the basis and purpose of the proposal. Thus, the decision of the agency concerning the regulatory proposal would be whether it conforms to existing law and policy, not whether its technical basis is sufficient to sustain judicial review.⁵⁹⁷

Another fear is that the agency would lack the technical ability to keep up with the private sector experts during negotiations and, thus, would be unable to participate as an informed member of the negotiation process.⁵⁹⁸ This concern is directed more to the quality of agency participation than to the negotiation process itself. The regulatory negotiation process presupposes that an agency will issue a regulation; that, in turn, requires the agency to be informed before it can even consider issuing the regulation. If the agency lacks its own expertise, it could hire a consultant, the services of another agency, or a temporary employee. Alternatively, the agency could develop its own expertise through research. The agency must be aware that its full participation in negotiations would require it to be able to identify the relevant issues and to know what factual material is reasonably necessary to resolve those issues. The danger always exists that the agency would be the slave of the private parties if the agency does not take that precaution, and such subservience clearly would be inappropriate.

The greatest concern over regulatory negotiation at this stage, however, is undoubtedly procedural. Will regulatory negotiation work, or will it merely add another layer to an already too protracted process? The fears include the following.⁵⁹⁹ (1) The use of a convenor may mean that yet another agency becomes involved in the regulatory process with the inherent opportunity for delay and confusion over the coordination between it and the regulatory agency. (2) The agency may be reluctant to lose control over the process.⁶⁰⁰ (3) The agency may believe that it is in a better position to assemble the negotia-

believe that the agency must adhere to the decision of the standards writing organization simply because an agency member was present during deliberation. See *supra* note 352 (discussing possibility that agency not participate in development of standard when agency not called on to review standard).

596. See Employee Membership and Participation in Voluntary Standards Organizations, 16 C.F.R. § 1031.5(a)(b) (1981) (discussing participation criteria that exclude those who give advice or make decision concerning standards); 1 C.F.R. § 305.78-4(1)(a) (1981) (agency employee who serves on committee developing voluntary consensus standards should not participate in agency decision to adopt or revise standard).

597. Senior officials would, of course, review the technical basis, just as they do when a regulation is forwarded to them after being developed internally. The staff member that participated in the development of the negotiated regulation should have been in contact with senior officials and technical staff throughout the process to ensure the proposal's acceptability.

598. Cf. Administrative Conference of the United States, Recommendation 72-4(B), 1 C.F.R. § 305.72-4(B) (1981) (expressing fear that overreliance on negotiation may inhibit development of adequate staff).

599. Many of these fears surfaced in response to The Regulatory Mediation Act of 1981, S. 1601, 97th Cong., 1st Sess., 127 CONG. REC. S9328 (daily ed. Sept. 9, 1981), which embodies many of the principles discussed above.

600. Stewart, *supra* note 112, at 1346.

tors.⁶⁰¹ (4) The process of assembling the group may itself become mired in delay and bureaucracy.⁶⁰² (5) Identifying the appropriate parties as well as knowing when to exclude those who are only tangentially involved may be difficult. (6) The parties themselves may have difficulty in selecting representatives. (7) Squabbles may develop over the decision to use a negotiation process or over who participates. (8) The process may not reduce the time and resources necessary for decision. (9) The parties may be unable to reach a decision.⁶⁰³ (10) The agency may reject the offering and make fundamental changes or begin anew. (11) Courts may strike down regulations because of failure to include some party or to develop sufficient factual material.

Each of these concerns is legitimate because virtually any of them could have a significant adverse effect on the viability of the regulatory negotiation process. These fears, however, might not materialize if the process is approached carefully. Indeed, the various aspects of this proposal were designed to minimize the chances of these problems developing. Upon analysis, the fears appear exaggerated.

CONCLUSION: WORTH A TRY

Regulatory negotiation holds promise for success when the issues are relatively well defined, when there are a limited number of parties with sufficient power to prevent the others from emerging victorious, and when it is inevitable that some decision is imminent.⁶⁰⁴

As one participant in an environmental negotiation said, there is no "magic" in the process, but it was better than going through the traditional battle.⁶⁰⁵ As in the litigation context, the problems of rulemaking will not vanish under a negotiation approach. Nevertheless, approaching the question through negotiation and reaching a consensus is likely to be, under the appropriate circumstances, better than the current hybrid process.

Although agencies could carry out a form of regulatory negotiation under current law by empaneling an advisory committee, the full benefits of the regulatory negotiation process could probably not be achieved through such devices. The Federal Advisory Committee Act requires open meetings that are controlled by the agency; the parties should be able to close the meetings when appropriate. Moreover, it is uncertain how a court would react to *ex parte* communications during the negotiation process, or challenges to a negotiated rule by interests that sat out the process or by negotiation participants that

601. Miller Letter *supra* note 356 (comment of Federal Trade Commission on The Regulatory Act of 1981, S. 1601, 97th Cong., 1st Sess., 129 CONG. REC. S9328 (daily ed. Sept. 9, 1981)). Chairman Miller criticized the amount of responsibility the Act would give ACUS and the amount of power a unanimity requirement would give the negotiators). *Id.*

602. *Id.*

603. This is the classic concern with any decision process that gives an interest a veto. D. MUELLER, *supra* note 516, at 215 (critics of unanimity fear costly impasse). Professor Schuck also expressed this concern. See Schuck Letter, *supra* note 341 (unanimity requirement places too much emphasis on producing single agreement and leaves too much power with ideologues).

604. These conditions are derived from experience with successful negotiation in analogous situations, in which many of the parties were skeptical of its efficacy. See *supra* notes 174-238 and accompanying text (describing various current procedures analogous to regulatory negotiation).

605. Danielson Interview, *supra* note 162.

wished for more participation than they received in discussions. In addition, the agency may fear a stringent form of judicial review of underlying facts akin to the review of hybrid rulemaking because the negotiation process might not generate a record suitable for such a review. These doubts over the court's reaction could inhibit the full use of the negotiation process.

Thus, regulatory negotiations could best be conducted pursuant to a statute authorizing agencies to use the proposed process, at least on an experimental basis. There would be little to lose from such an experiment because there is ample opportunity in the process to protect against abuse or unforeseen problems.⁶⁰⁶ Moreover, the potential theoretical benefits of negotiation are attractive. Experience with negotiating solutions to complex policy questions indicates that, at least in some circumstances, many of those benefits can indeed be realized. The malaise of administrative law, which has marched steadily toward reliance on the judiciary to settle disputes and away from direct participation of affected parties, could be countered with a participatory negotiation process. Regulatory negotiations would provide the legitimacy currently lacking in the regulatory process.

At the very least, regulatory negotiation is worth a try.

606. Such an experiment would test whether the fears expressed above are real or imagined. It would be important, however, that the process not be taken lightly simply because it is an experiment. It would be essential that the parties set out to prepare a regulation, and that they not act as though they were guinea pigs.

APPENDIX

The Administrative Conference of the United States adopted the following recommendation at its June 18, 1982 plenary session:⁶⁰⁷

Recommendation 82-4

Procedures for Negotiating Proposed Regulations

The complexity of government regulation has increased greatly compared to that which existed when the Administrative Procedure Act was enacted, and this complexity has been accompanied by a formalization of the rulemaking process beyond the brief, expeditious notice and comment procedures envisioned by section 553 of the APA. Procedures in addition to notice and comment may, in some instances, provide important safeguards against arbitrary or capricious decisions by agencies and help ensure that agencies develop sound factual bases for the exercise of the discretion entrusted them by Congress, but the increased formalization of the rulemaking process has also had adverse consequences. The participants, including the agency, tend to develop adversarial relationships with each other causing them to take extreme positions, to withhold information from one another, and to attack the legitimacy of opposing positions. Because of the adversarial relationships, participants often do not focus on creative solutions to problems, ranking of the issues involved in a rulemaking, or the important details involved in a rule. Extensive factual records are often developed beyond what is necessary. Long periods of delay result and participation in rulemaking proceedings can become needlessly expensive. Moreover, many participants perceive their roles in the rulemaking proceeding more as positioning themselves for the subsequent judicial review than as contributing to a solution on the merits at the administrative level. Finally, many participants remain dissatisfied with the policy judgments made at the outcome of rulemaking proceedings.

Participants in rulemaking rarely meet as a group with each other and with the agency to communicate their respective views so that each can react directly to the concerns and positions of others in an effort to resolve conflicts. Experience indicates that if the parties in interest were to work together to negotiate the text of a proposed rule, they might be able in some circumstances to identify the major issues, gauge their importance to the respective parties, identify the information and data necessary to resolve the issues, and develop a rule that is acceptable to the respective interests, all within the contours of the substantive statute. For example, highly technical standards are negotiated that have extensive health, safety, and economic effects; lawsuits challenging rules are regularly settled by agreement on a negotiated rule; public law litigation involves sensitive negotiation over rule-like issues; and many environmental disputes and policies have been successfully negotiated. These experiences can be drawn upon in certain rulemaking contexts to provide procedures by which affected interests and the agency might participate directly in the development of the text of a proposed rule through negotiation and mediation.

The Federal Advisory Committee Act [FACA] has, however, dampened administrative enthusiasm for attempts to build on experience with successful negotiations. Without proposing a general revision of FACA, the Administra-

607. 47 Fed. Reg. 30,701-10 (1982).

tive Conference urges that Congress amend the Act to facilitate the use of the negotiating procedures contemplated in this recommendation.

The suggested procedures provide a mechanism by which the benefits of negotiation could be achieved while providing appropriate safeguards to ensure that affected interests have the opportunity to participate, that the resulting rule is within the discretion delegated by Congress, and that it is not arbitrary or capricious. The premise of the recommendation is that provision of opportunities and incentives to resolve issues during rulemaking, through negotiations, will result in an improved process and better rules. Such rules would likely be more acceptable to affected interests because of their participation in the negotiations. The purpose of this recommendation is to establish a supplemental rulemaking procedure that can be used in appropriate circumstances to permit the direct participation of affected interests in the development of proposed rules. This procedure should be viewed as experimental, and should be reviewed after it has been used a reasonable number of times.

RECOMMENDATION

1. Agencies should consider using regulatory negotiation, as described in this recommendation, as a means of drafting for agency consideration the text of a proposed regulation. A proposal to establish a regulatory negotiating group could be made either by the agency (for example, in an advance notice of proposed rulemaking) or by the suggestion of any interested person.

2. Congress should facilitate the regulatory negotiation process by passing legislation explicitly authorizing agencies to conduct rulemaking proceedings in the manner described in this recommendation. This authority, to the extent that it enlarges existing agency rulemaking authority, should be viewed as an experiment in improving rulemaking procedures. Accordingly, the legislation should contain a sunset provision. The legislation should provide substantial flexibility for agencies to adapt negotiation techniques to the circumstances of individual proceedings, as contemplated in this recommendation, free of the restrictions of the Federal Advisory Committee Act and any *ex parte* limitations. Legislation should provide that information tendered to such groups, operating in the manner proposed, should not be considered an agency record under the Freedom of Information Act.

3. In legislation authorizing regulatory negotiation, Congress should authorize agencies to designate a "convenor" to organize the negotiations in a particular proceeding. The convenor should be an individual, government agency, or private organization, neutral with respect to the regulatory policy issues under consideration. If the agency chooses an individual who is an employee of the agency itself, that person should not be associated with either the rulemaking or enforcement staff. The convenor would be responsible for (i) advising the agency as to whether, in a given proceeding, regulatory negotiation is feasible and is likely to be conducive to the fairer and more efficient conduct of the agency's regulatory program, and (ii) determining, in consultation with the agency, who should participate in the negotiations.

4. An agency considering use of regulatory negotiation should select and consult with a convenor at the earliest practicable time about the feasibility of its use. The convenor should conduct a preliminary inquiry to determine

whether a regulatory negotiating group should be empanelled to develop a proposed rule relating to the particular topic. The convener should consider the risks that negotiation procedures would increase the likelihood of a consensus proposal that would limit output, raise prices, restrict entry, or otherwise establish or support unreasonable restraints on competition. Other factors bearing on this decision include the following:

(a) The issues to be raised in the proceeding should be mature and ripe for decision. Ideally, there should be some deadline for issuing the rule, so that a decision on a rule is inevitable within a relatively fixed time frame. The agency may also impose a deadline on the negotiations.

(b) The resolution of issues should not be such as to require participants in negotiations to compromise their fundamental tenets, since it is unlikely that agreement will be reached in such circumstances. Rather, issues involving such fundamental tenets should already have been determined, or not be crucial to the resolution of the issues involved in writing the proposed regulation.

(c) The interests significantly affected should be such that individuals can be selected who will adequately represent those interests. Since negotiations cannot generally be conducted with a large number of participants, there should be a limited number of interests that will be significantly affected by the rule and therefore represented in the negotiations. A rule of thumb might be that negotiations should ordinarily involve no more than 15 participants.

(d) There should be a number of diverse issues that the participants can rank according to their own priorities and on which they might reach agreement by attempting to optimize the return to all the participants.

(e) No single interest should be able to dominate the negotiations. The agency's representative in the negotiations will not be deemed to possess this power solely by virtue of the agency's ultimate power to promulgate the final rule.

(f) The participants in the negotiations should be willing to negotiate in good faith to draft a proposed rule.

(g) The agency should be willing to designate an appropriate staff member to participate as the agency's representative, but the representative should make clear to the other participants that he or she cannot bind the agency.

5. If the convener determines that regulatory negotiation would be appropriate, it would recommend this procedure to the agency. If the agency and the convener agree that regulatory negotiation is appropriate, the convener should be responsible for determining preliminarily the interests that will likely be substantially affected by a proposed rule, the individuals that will represent those interest in negotiations, the scope of issues to be addressed, and a schedule for completing the work. It will be important for potential participants to agree among themselves as to these matters, and their agreement can be facilitated by either the convener or a possible participant conducting a preliminary inquiry among identified interests. Reasonable efforts should be made to secure a balanced group in which no interest has no more than a third of the members and each representative is technically qualified to address the issues presented, or has access to the qualified individuals.

6. The subject matter of the proposed regulation may be within the jurisdic-

tion of an existing committee of a non-governmental standards writing organization that has procedures to ensure the fair representation of the respective interests and a process for determining whether the decision actually reflects a consensus among them. If such a committee exists and appears to enjoy the support and confidence of the affected interests, the convenor should consider recommending that negotiations be conducted under that committee's auspices instead of establishing an entirely new framework for negotiations. In such a case, the existing committee could be regarded as a regulatory negotiation group for purposes of this recommendation. (Alternatively, the product of the committee could be used as the basis of a proposed regulation pursuant to Administrative Conference Recommendation 78-4.)

7. To ensure that the appropriate interests have been identified and have had the opportunity to be represented in the negotiating group, the agency should publish in the *Federal Register* a notice that it is contemplating developing a rule by negotiation and indicate in the notice the issues involved and the participants and interests already identified. If an additional person or interest petitions for membership or representation in the negotiating group, the convenor, in consultation with the agency, should determine (i) whether that interest would be substantially affected by the rule, (ii) if so, whether it would be represented by an individual already in the negotiating group, and (iii) whether, in any event, the petitioner should be added to the negotiating group, or whether interests can be consolidated and still provide adequate representation.

8. The agency should designate a senior official to represent it in the negotiations and should identify that official in the *Federal Register* notice.

9. It may be that, in particular proceedings, certain affected interests will require reimbursement for direct expenses to be able to participate at a level that will foster broadly-based, successful negotiations. Unlike intervenors, the negotiating group will be performing a function normally performed within the agency, and the agency should consider reimbursing the direct expenses of such participants. The agency should also provide financial or other support for the convenor and the negotiating group. Congress should clarify the authority of agencies to provide such financial resources.

10. The convenor and the agency might consider whether selection of a mediator is likely to facilitate the negotiation process. Where participants lack relevant negotiating experience, a mediator may be of significant help in making them comfortable with the process and in resolving impasses.

11. The goal of the negotiating group should be to arrive at a consensus on a proposed rule. Consensus in this context means that each interest represented in the negotiating group concurs in the result, unless all members of the group agree at the outset on another definition. Following consensus, the negotiating group should prepare a report to the agency containing its proposed rule and a concise general statement of its basis and purpose. The report should also describe the factual material on which the group relied in preparing its proposed regulation, for inclusion in the agency's record of the proceeding. The participants may, of course, be unable to reach a consensus on a proposed rule, and, in that event, they should identify in the report both the areas in which they are agreed and the areas in which consensus could not be achieved. This could

serve to narrow the issues in dispute, identify information necessary to resolve issues, rank priorities, and identify potentially acceptable solutions.

12. The negotiating group should be authorized to close its meeting to the public only when necessary to protect confidential data or when, in the judgment of the participants, the likelihood of achieving consensus would be significantly enhanced.

13. The agency should publish the negotiated text of the proposed rule in its notice of proposed rulemaking. If the agency does not publish the negotiated text as a proposed rule, it should explain its reasons. The agency may wish to propose amendments or modifications to the negotiated proposed rule, but it should do so in such a manner that the public at large can identify the work of the agency and of the negotiating group.

14. The negotiating group should be afforded an opportunity to review any comments that are received in response to the notice of proposed rulemaking so that the participants can determine whether their recommendations should be modified. The final responsibility for issuing the rule would remain with the agency.