

5-15-1987

## Administrative Alternative Dispute Resolution: The Development of Negotiated Rulemaking and Other Processes

Henry H. Perritt Jr.

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Administrative Law Commons](#), and the [Dispute Resolution and Arbitration Commons](#)

### Recommended Citation

Henry H. Perritt Jr. *Administrative Alternative Dispute Resolution: The Development of Negotiated Rulemaking and Other Processes*, 14 Pepp. L. Rev. Iss. 4 (1987)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol14/iss4/14>

This Symposium is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact [bailey.berry@pepperdine.edu](mailto:bailey.berry@pepperdine.edu).

# Administrative Alternative Dispute Resolution: The Development of Negotiated Rulemaking and Other Processes

## TABLE OF CONTENTS

|      |  |     |
|------|--|-----|
| I.   | Introduction .....   | 865 |
| II.  | Historical Developments .....  | 867 |
|      | A. Emergence of APA from ADR .....   | 867 |
|      | B. Search For Alternatives .....   | 867 |
|      | C. The Benzene, FAA, and EPA Experiences with<br>Negotiated Rulemaking ..... | 874 |
|      | D. Recommendation 85-5 .....   | 875 |
| III. | The Dynamics of Rule Negotiation .....                                       | 875 |
|      | A. BATNA Concept .....   | 876 |
|      | B. Consensus and Mediation .....   | 881 |
|      | C. Intra-Constituency Problems .....   | 885 |
| IV.  | Selection of Subjects for Negotiation .....                                  | 889 |
| V.   | Post Recommendation 85-5 Developments .....                                  | 893 |
|      | A. MDA .....   | 893 |
|      | B. Additional EPA Rule Negotiations .....                                    | 896 |
|      | C. Federal Trade Commission Negotiation Initiative ...                       | 897 |
| VI.  | Position of Negotiated Rulemaking Under APA .....                            | 898 |
|      | A. Introduction .....  | 898 |
|      | B. Delegation Doctrine .....   | 900 |
|      | C. Prohibition of Ultra Vires Agency Action .....                            | 902 |
|      | D. Conflict Between Goals of Informality and Judicial<br>Reviewability ..... | 903 |
|      | E. Hybrid Rulemaking .....   | 904 |
|      | F. Ex-Parte Communications .....   | 906 |
|      | G. Judicial Review Under Arbitrary and Capricious<br>Standard .....          | 909 |
|      | H. Federal Advisory Committee Act Problems .....                             | 912 |
|      | I. Class Action Settlement Negotiation .....                                 | 913 |
|      |  | 863 |

|       |  |     |
|-------|--|-----|
| J.    | Representation Issues .....                            | 915 |
| VII.  | State Process .....                                    | 918 |
| A.    | Often Ignored .....                                    | 918 |
| B.    | Model State APA .....                                  | 918 |
| C.    | New Jersey, Tennessee, and Minnesota Experiences ..... | 919 |
| VIII. | Administrative Adjudication .....                      | 920 |
| A.    | Precedent .....  | 921 |
| B.    | Legal Issues .....                                     | 924 |
| IX.   | The Future .....                                       | 928 |
| A.    | Activities .....                                       | 928 |
| B.    | Need for Institutionalization .....                    | 928 |

# Administrative Alternative Dispute Resolution: The Development of Negotiated Rulemaking and Other Processes

Henry H. Perritt, Jr.\*

## I. INTRODUCTION

Administrative procedure was the original alternative dispute resolution technique. However, the administrative procedures were increasingly institutionalized and had become rigid and cumbersome by the mid-1970's. In the last decade the search for a different approach to formal administrative proceedings has produced promising alternatives. In particular, negotiated rulemaking has gained respect as an alternative to hybrid rulemaking, and many agencies are considering arbitration, fact finding, and mediation rather than formal adjudicatory hearings to resolve certain cases.

Unfortunately, discussions about Alternative Dispute Resolution (ADR) in the legal community have failed to appreciate the enormous flexibility that exists under present law to improve judicial and administrative procedures in traditional forums. Negotiated rulemaking has explored this flexibility, finding it preferable in many ways to the erection of parallel channels for dispute resolution.

Negotiated rulemaking<sup>1</sup> is a process for resolving interest disputes which is similar in many ways to the legislative process. It emerged

---

\* Professor of Law, Villanova University Law School. S.B. Massachusetts Institute of Technology 1966; S.M. Massachusetts Institute of Technology, Sloan School of Management 1970; J.D. Georgetown University Law Center 1975; Member of the Bar, Virginia, Pennsylvania, District of Columbia, United States Supreme Court; Deputy Under Secretary of Labor 1975-76; Co-Vice Chairman, Committee on Dispute Resolution, ABA Section on Administrative Law.

1. Negotiated rulemaking is a specific application of regulatory negotiation. It refers to the use of negotiation in the decision-making process associated with rulemaking. Regulatory negotiation refers to the use of negotiation in any decision-making process by an administrative agency.

as a distinct administrative law concept in the late 1970's because notice-and-comment and hybrid rulemaking<sup>2</sup> processes were inappropriate for making quasi-legislative, administrative agency decisions. Sanctioned by the Administrative Conference of the United States<sup>3</sup> (ACUS) as a worthy alternative to hybrid rulemaking, negotiated rulemaking has been used successfully by four different agencies and warrants even wider use.

In fact, negotiated rulemaking is the only one of several alternative dispute resolution techniques that can be used by administrative agencies. It is designed to facilitate resolution of "interest disputes" whereas other techniques, such as arbitration, fact finding, and mediation are more suited to "rights disputes." Each of these rights disputes resolution techniques has been used or considered to some degree.<sup>4</sup>

This article reviews the negotiated rulemaking concept in the context of the ACUS recommendations and agency experience, and considers recent efforts to simplify the handling of individual cases. It also builds on the author's report to the ACUS on four completed rule negotiations<sup>5</sup> which led ACUS to adopt Recommendation 85-5 in

---

2. Terminology is a problem in comparing negotiated rulemaking to more traditional processes. This article uses the term *adjudication* to refer to an adversarial decision-making process in which the parties present their cases to the agency by examining witnesses and introducing qualifying documents somewhat in accordance with formal rules of evidence. *Hybrid rulemaking* is a procedure imposed by statute or the judiciary under the Administrative Procedure Act [hereinafter APA] in which adjudicatory procedures are used to some degree in the rulemaking process, though the type of decision-making involved would be termed "rulemaking" and not "adjudication" as those terms are defined by the APA. Hybrid rulemaking is discussed more fully in Section VI of this article.

3. The Administrative Conference of the United States [hereinafter ACUS] was established to improve administrative procedures within federal agencies. Administrative Conference Act, Pub. L. No. 88-499, 78 Stat. 615 (1964). The President appoints a full-time chairman to the ACUS for a five-year term and he is the only person entitled to compensation for his services. The Council, which is the executive board, consists of the chairman and 10 other members appointed by the President for three-year terms. Only half of those 10 members may be drawn from federal agencies. The total membership of the ACUS may not exceed 91 members nor be fewer than 75 members. In addition to the Council, the membership is comprised of 44 government members (heads of agencies or their designees) from 36 agencies and approximately 36 nongovernmental members appointed by the chairman, with Council's approval, for two-year terms. The Council must call at least one plenary session during each year. The membership meeting in plenary session is known as the Assembly of the Administrative Conference. Administrative Conference Act, 5 U.S.C. §§ 571-576 (1983).

4. Section VIII of this article explores recent ACUS recommendations covering ADR techniques for rights disputes.

5. H. Perritt, *Analysis of Four Negotiated Rulemaking Efforts* (Nov. 15, 1985) (available from the ACUS). An edited version of the report appears in Perritt, *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625 (1986) [hereinafter *Evaluation of Recommendations*]. Abbreviated summaries of the report appeared in Perritt, *Negotiated Rulemaking in Practice*, 5 J. POL'Y ANALYSIS & MGMT. 482 (1986),

late 1985.

## II. HISTORICAL DEVELOPMENTS

### A. *Emergence of APA From ADR*

The Administrative Procedure Act<sup>6</sup> (APA) emerged from a debate over whether administrative procedure should be institutionalized according to a judicial model.<sup>7</sup> President Roosevelt vetoed an initial version of the APA in 1939 because it sought to force administrative procedures into an adversarial decision-making mode.<sup>8</sup> The Act, as finally passed, recognized a considerable variety of procedures employed by different agencies.<sup>9</sup> The modern search for ADR techniques is largely consistent with the earlier recognition that diversity among procedural techniques is as appropriate in administrative procedure as it is in judicial procedure, depending on the nature of the dispute to be resolved.

### B. *Search For Alternatives*

New administrative processes originated from the increased use of administrative litigation to address problems previously dealt with in markets, through private contractual negotiation,<sup>10</sup> or by elected representatives in legislative assemblies. The use of administrative regulations to deal with these problems stemmed from a combination of increased government intervention to deal with market imperfections<sup>11</sup> and the impracticability of legislative assemblies taking on the resultant burden of decision-making themselves.

While administrative processes evolved toward more adversarial judicially based models, negotiation was already deeply rooted as a means of setting policy. When rules for societal conduct are made in private markets or in representative assemblies, the process of negotiation is relied upon.<sup>12</sup> Negotiation occurs as part of the legislative

---

and Perritt, *Negotiated Rulemaking and Administrative Law*, 38 ADMIN. L. REV. 471 (1986).

6. 5 U.S.C. §§ 551-559, 701-706 (1982).

7. See generally *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511 (1986).

8. *Id.* at 512.

9. *Id.* at 515.

10. See L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* 172-187 (1981) (contrasting private negotiation with governmental decision-making).

11. See S. BREYER, *REGULATIONS AND ITS REFORM* 15-35 (1982); J. DUNLOP, *DISPUTE RESOLUTION: NEGOTIATION AND CONSENSUS BUILDING* 4 (1984).

12. See J. DUNLOP, *DISPUTE RESOLUTION: NEGOTIATION AND CONSENSUS BUILDING*

procedure in a representative assembly at two levels: first, as a part of the process through which representatives are elected; and second, as part of the interaction among the representatives making the compromises necessary to pass a statute. At both levels, no single interest or constituency can get everything it wants; each must set priorities for its demands, and trade off one against the other.<sup>13</sup> There is an incentive to find common ground, either to form a majority to elect a favored candidate or to form a majority to pass desired legislation.

The shift in rulemaking responsibility from markets and legislatures to administrative agencies made negotiation more difficult. Essentially, agencies make rules because the legislature has left certain issues among conflicting interests unresolved. In exercising the rulemaking responsibility delegated by the legislature, however, agencies lack many of the institutional attributes that facilitate accommodation among conflicting interests. In particular, accommodation and compromise, which result from the election of representatives are absent<sup>14</sup> and thus agencies must deal with a broad range of atomistic interests<sup>15</sup> rather than benefiting from the aggregation of interests that occurs in election politics. Additionally, there is no assurance that even a multi-member agency represents the major conflicting interests on any issue before it. Thus, the framework for the second stage of accommodation, which is typical of a legislative institution, may also be lacking.

Since an administrative agency lacks the institutional attributes which make private accommodation an integral part of the legislative process, it must find other ways to strike a balance between competing views in developing a rule which will be acceptable to those affected by it.<sup>16</sup>

---

1-22 (1984) (describing and comparing private and political negotiation); J. HURST, *DEALING WITH STATUTES* 19 (1982) (stating that legislature is basically an arena for bargaining); V.O. KEY, *POLITICS, PARTIES AND PRESSURE GROUPS* 7 (1942) (politics is a struggle among groups or interests); Dunlop, *The Negotiations Alternative in Dispute Resolution*, 29 VILL. L. REV. 1421 (1984) (describing negotiations process).

13. See generally Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1188 (1973) (describing the pervasiveness of political compromise in the context of administrative regulation).

14. Of course, some degree of accommodation occurs in connection with the appointment of administrative agency policy personnel and in legislative oversight of agency functioning. Nevertheless, agencies are only indirectly accountable to the public and are subject to political forces only when the press or the public takes an interest in an issue before an agency, or through occasional intervention by the legislature or the executive.

15. The breadth of the interests with which an agency must deal is a function of the type of program for which an agency is responsible.

16. In addition, the agency is obligated by law to pursue statutory objectives regardless of what affected interests think. Agencies can only search for accommodation consistent with their statutory mandates.

Administrative law has searched in recent years for ways to reconcile conflicting interests.<sup>17</sup> The original administrative law models emphasized judicial review to keep agencies within statutory bounds, and decisional procedures were designed to promote the accuracy, rationality, and reviewability of agency decisions.<sup>18</sup> Yet administrative procedures modeled on judicial processes do not fit the needs of administrative rulemaking. Administrative law has struggled to provide a surrogate political process to ensure the fair representation of a wide range of affected interests in the administrative decision-making process.<sup>19</sup> Until the mid-1970's, however, procedures continued to be modeled on judicial trials despite the fact that they were ill suited for a "surrogate political process."<sup>20</sup>

A major cause of the discrepancy between administrative procedure and the decision-making requirements of delegated legislative power was the failure to distinguish "rights disputes" from "interest disputes."<sup>21</sup> Adjudication is designed to deal exclusively with rights disputes,<sup>22</sup> which are concerned with the application of pre-existing legal standards or "rules of decision" to facts determined by the adjudicator. Interest disputes, on the other hand, are characterized by the absence of pre-existing rules of decision. The resolution of interest disputes requires the conflicting parties to work out the rules in a way that accommodates their interests. Although the political process and private contractual negotiation are well suited to resolving interest disputes, the adjudicatory process is not.<sup>23</sup> Nevertheless, adjudicatory procedures were superimposed on the rulemaking process.<sup>24</sup> As agencies were delegated more responsibility for legislating, the need for a process equipped to deal with interest disputes became

---

17. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

18. *Id.* at 1670.

19. *Id.* at 1670. See also Jaffe, *supra* note 13, at 1184, 1188 (criticizing model based on the assumption that Congress establishes an objective that "is capable of disinterested and nonpolitical administration," and suggesting instead a political model).

20. Stewart, *supra* note 17, at 1670.

21. See Perritt, *And the Whole Earth Was of One Language: A Broad View of Dispute Resolution*, 29 VILL. L. REV. 1221-29 (1984).

22. See Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 369 (1979).

23. See *id.* at 368.

24. See *infra* section VI, subsection E of this article regarding hybrid rulemaking. The point is not that APA "adjudication," under sections 556 and 557 is used in rulemaking, but rather that certain trial type procedures associated with adjudication have been superimposed on information rulemaking conducted under APA section 553.



more apparent.<sup>25</sup>

The development of new administrative processes accelerated in the 1970's. Harvard law professor Richard B. Stewart, writing in 1975, considered some of the alternative procedures available to agencies given responsibility for a surrogate political process.<sup>26</sup> He concluded that all of the obvious possibilities for application within traditional procedural frameworks were seriously flawed.<sup>27</sup> This prompted Stewart to explore more "explicitly political" mechanisms for interest representation.<sup>28</sup>

At the time Stewart was writing, some forms of administrative negotiations were well established, though not very visible.<sup>29</sup> It was a relatively common practice for parties who challenged a regulation to negotiate an acceptable agreement.<sup>30</sup> Rather than litigate a rule's validity in the courts, a complainant would withdraw the complaint challenging the rule in return for the promulgating agency's agreement to modify the existing rule. This is exemplified in *Environmental Defense Fund, Inc. v. Costle*.<sup>31</sup> In this case, several environmental groups<sup>32</sup> brought four separate lawsuits against the Environmental

---

25. See Harter, *Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship*, 29 VILL. L. REV. 1393 (1984).

26. Stewart, *supra* note 17, at 1760-89.

27. *Id.* Stewart observed that agencies themselves are likely to afford certain interests disproportionate influence, and that the courts are ill suited to force an alteration in the balance of interests. *Id.* at 1789-90.

28. *Id.* at 1790.

29. Harter found examples of such alternatives in the Consumer Product Safety Commission "offeror process," the National Institute of Building Sciences, innovations by Secretary Dunlop, ad hoc efforts involving dam building and uranium mine siting controversies, sequential negotiations frequently involved in formulating Notices of Proposed Rulemaking, occupational safety and health consensus standards developed by private groups, the National Coal Policy Project, site-specific environmental negotiation, and negotiated settlements of lawsuits challenging Environmental Protection Agency [hereinafter EPA] regulatory decisions. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 25-42 (1982). He might also have noted negotiations within "rate bureaus" under the Interstate Commerce Act, and the Federal Railroad Administration's experience with air brake regulations. In 1982, the Federal Railroad Administration amended rules pertaining to railroad air brakes. The resulting changes stemmed from a Notice of Proposed Rulemaking [hereinafter NPRM] adopted at the joint request of the Association of American Railroads, the main industry trade association, and the Railway Labor Executives Association, a confederation of labor organizations representing rail employees. 49 C.F.R. § 232 (1986). Comments submitted in response to the NPRM were generally supportive, and resulted in a final rule reflecting the labor-industry agreement. *Id.*

30. Harter, *supra* note 29, at 36. Harter further points out that the settlement of agency disputes is specifically provided for in the Administrative Procedure Act. *Id.* at 36 n.195 (citing 5 U.S.C. § 554(c) (1976)). Moreover, in approving agency negotiations, the legislative history of the APA pointed to the courts' use of pre-trial proceedings to dispose of much of their business. *Id.*

31. 636 F.2d 1229 (D.C. Cir. 1980).

32. These groups collectively form the Natural Resources Defense Council [hereinafter NRDC]. The groups are the Natural Resources Defense Council, Inc., Environmental Defense Fund, Inc., National Audubon Society, Inc., Citizens for a Better

Protection Agency (EPA), challenging its alleged failure to implement provisions of the Federal Water Pollution Control Act relating to toxic pollutants.<sup>33</sup> While these suits were pending, the EPA and Natural Resources Defense Council (NRDC) began settlement negotiations and later submitted a proposed settlement agreement to the district court. Four industrial companies intervened in the proceeding and vigorously opposed the proposed agreement; nonetheless, the district court approved the settlement agreement.<sup>34</sup> Subsequently, these same companies filed a motion to vacate the agreement and a proposed modification<sup>35</sup> to that agreement. Both the district court<sup>36</sup> and the Court of Appeals for the District of Columbia Circuit denied the companies' motions.<sup>37</sup> The *Costle* district court could have given the companies greater opportunity to negotiate with the EPA and NRDC about the strategy to be used in regulating toxic pollutants. However, instead of involving the companies in the initial settlement negotiations, the court simply heard opposing arguments to the agreement which had been worked out between the EPA and NRDC.<sup>38</sup>

At about the time that Stewart's article appeared, the policy currents were primarily influenced by John T. Dunlop,<sup>39</sup> who regarded

---

Environment, Inc., and Business and Professional People for the Public Interest, Inc. *Id.* at 1233 n.4, 1234.

33. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1980) [hereinafter FWPCA]. The first suit challenged the criterion that the EPA was using to determine which pollutants were toxic. The second and third suits were to compel the EPA to promulgate effluent standards for substances presently on the Agency's list of toxic pollutants. The fourth suit sought to compel the EPA to promulgate pretreatment standards for various pollutants. *Costle*, 636 F.2d at 1234.

34. *Costle*, 636 F.2d at 1235 (citing Natural Resources Defense Council v. Train, 8 Env't Rep. Cos. (BNA) 2120, 2122 (D.D.C. 1976)). The agreement was signed by the EPA, the five environmental groups and the National Coal Association and was incorporated in a consent decree signed by the district court. The settlement agreement outlined a strategy for regulating toxic pollutant discharges under the FWPCA. The agreement included details about timing, scope, and nature of the regulatory programs that the EPA agreed to initiate. *Id.*

35. *Id.* at 1237. This modification agreement was made after the NRDC complained that the EPA was not observing the initial settlement agreement. While the NRDC later withdrew its order to show cause against the EPA, the companies still sought to challenge both settlement agreements. The district court denied both of the companies' motions. *Id.*

36. *Id.*

37. *Id.* at 1259. The court remanded the case for a determination of whether it was appropriate for the EPA to enter into an agreement that might infringe upon the discretion that Congress had committed to the administrator. *Id.*

38. *Id.* at 1235.

39. Mr. Dunlop was Secretary of Labor from 1974-75, and before that, head of the Nixon wage-and-price-controls program. Mr. Dunlop had a distinguished background

negotiation as an alternative to adjudicatory litigation in making administrative rules. While Dunlop was Secretary of Labor he authored a paper, "The Limits of Legal Compulsion," which he distributed to the President, White House staff personnel concerned with developing regulatory reform ideas, and Labor Department policy officials. The paper was ultimately published in several journals.<sup>40</sup>

The paper began with an invitation to compare "essentially private methods for rule-making within a broad and general governmental context—exemplified by collective bargaining—and the more intensive approach of governmental promulgation of mandatory regulations."<sup>41</sup> After identifying eleven problems with the existing approach to regulation, the study went on to suggest that "the parties who will be affected by a set of regulations should be involved to a greater extent in developing those regulations."<sup>42</sup>

During his tenure as Secretary, Dunlop also sought to promote greater consideration of the negotiation alternative in the academic community. He directed the author of this article<sup>43</sup> to establish liaison with professors of law and political science and with former government policy makers who might have an interest in the concept. At one point, Dunlop invited Professor Stewart, Professor James Q. Wilson, William Ruckelshaus, past and future Administrator of EPA, and a number of others to discuss alternatives to traditional rulemaking in an informal seminar. During this period, Philip J. Harter was detailed from the staff of the ACUS to the Council of Economic Advisers to work with Joseph L. Kirk, Director of Policy Analysis for the Occupational Safety and Health Administration (OSHA), to examine alternatives to traditional administrative processes.<sup>44</sup>

After Dunlop resigned as Secretary of Labor in February, 1976, his successor, W.J. Usery, Jr., encouraged the author and Under Secre-

---

as a professor of economics and dean of the faculty of arts and sciences at Harvard, labor mediator, and advisor of presidents on national labor-management policy. As much as anyone in the United States at the time, he was the expert on the process of negotiation as a means of resolving workplace disputes.

40. See Dunlop, *The Limits of Legal Compulsion*, 27 LAB. L.J. 67 (1976).

41. *Id.* The paper offered, by way of example, the method used by Dunlop to implement section 13(c) of the Urban Mass Transportation Act, which precluded distribution of certain mass transit subsidy funds until the Secretary of Labor certified that employees would not be adversely affected by the federally funded activities. Mr. Dunlop also sought to mediate an agreement between the United Steelworkers and the Steel Industry on a health standard for coke oven emissions. This effort to negotiate a rule is discussed more fully in Section V of this article.

42. *Id.*

43. During the period of time discussed in the text, the author of this article was Deputy Under Secretary of Labor, responsible for assisting Dunlop with regulatory reform matters.

44. Memorandum from Paul W. MacAvoy to Executive Committee, Economic Policy Board (May 18, 1976).

tary Michael Moskow to continue the regulatory reform effort. With Usery's support, the Department sponsored doctoral research by Lawrence Bacow, which resulted in the publication of a study of how safety and health standards had been addressed through collective bargaining in the automobile and other industries.<sup>45</sup> Bacow went on to play a central role in the drafting and implementation of the Massachusetts Hazardous Waste Facility Siting Act,<sup>46</sup> which provides a statutory framework for negotiations between local communities and developers of waste disposal sites in that state.

The Department of Labor also provided seed money for an interdisciplinary effort at Harvard University, which ultimately developed into the Harvard Negotiation Project. The first executive director of the Harvard effort was William Drayton, who was Associate Administrator of EPA during the Carter Administration. Minow, an EPA attorney who worked with Drayton, subsequently helped Harter formulate the ACUS negotiated rulemaking recommendations.

Thus, the seeds were planted at the ACUS, Department of Labor, and EPA for the negotiated rulemaking idea. Bacow, Drayton, Harter, Ruckelshaus, and Stewart all played major roles in refining the negotiation concept.

Dunlop's idea of using negotiation as a regulatory procedure responded to Stewart's exploration of explicitly political processes. It was another means of permitting political bargaining that was not openly considered in Stewart's article. Yet, the negotiation idea presented difficulties, especially with respect to the representation process.

These difficulties were addressed by Harter, under ACUS sponsorship, after his experience in examining OSHA as part of the Economic Policy Board task force. Harter wrote a law review article<sup>47</sup> in which he carried the Dunlop concept further. He sought to develop criteria for generalizing the use of "explicitly political" processes<sup>48</sup> to improve administrative agency decision-making.

Harter, contemporaneously with writing his article, also drafted what became ACUS Recommendation 82-4, which concluded:

---

45. L. BACOW, *NEGOTIATING HEALTH AND SAFETY* (1976). Mr. Bacow is now on the faculty of the Massachusetts Institute of Technology.

46. MASS. GEN. LAWS ANN. ch. 21D, §§ 12-15 (West 1981). See Bacow & Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENVTL. L. REV. 265 (1982).

47. Harter, *supra* note 29, at 1. See also S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 592-607 (2d ed. 1985).

48. Harter, *supra* note 29, at 42-61.

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.<sup>49</sup>

### C. *The Benzene, FAA, and EPA Experiences With Negotiated Rulemaking*

In the three years following adoption of ACUS Recommendation 82-4, negotiated rulemaking was utilized four times by federal agencies. The following table summarizes the four negotiations.

| TABLE 1 - FOUR RULEMAKING NEGOTIATIONS |                       |           |           |                              |
|--|-----------------------|-----------|-----------|------------------------------|
| Agency                                 | Subject               | Dates     | Outcome   | Status                       |
| OSHA                                   | Benzene Health Std.   | 1983-1984 | Adjourned | Final Rule Out <sup>50</sup> |
| FAA                                    | Flight & Duty Time    | 1983-1985 | Consensus | Final Rule Out <sup>51</sup> |
| EPA                                    | Non-Confor. Penalties | 1984-1985 | Consensus | Final Rule Out <sup>52</sup> |
| EPA                                    | Pesticide Exemptions  | 1984-1985 | Consensus | Final Rule Out <sup>53</sup> |

The Federal Aviation Administration (FAA) used negotiated rulemaking to develop a new flight-and-duty-time regulation for airline flight crews.<sup>54</sup> The EPA used negotiated rulemaking to develop proposed rules on nonconformance penalties for vehicle emissions,

49. 1 C.F.R. § 305.82-4 ¶¶ 4(g), 8 (1986).

50. On December 10, 1984, the steelworkers filed a petition for a writ of mandamus in the United States Court of Appeals for the District of Columbia Circuit, seeking to require the Occupational Safety and Health Administration [hereinafter OSHA] to issue an NPRM for a benzene standard within 30 days of the court's decision, and to issue a permanent standard within seven months of the NPRM. OSHA issued its NPRM just before oral argument. *United Steelworkers of America v. Rubber Mfrs. Ass'n*, 783 F.2d 1117, 1119 (D.C. Cir. 1986). After oral argument, the court ordered OSHA to submit a timetable for post-NPRM activities. The timetable submitted required OSHA to complete its staff analysis by November 10, 1986, and to issue a final standard by February 10, 1986. The court denied the petition for faster action on the proposed rule and declined to retain jurisdiction on February 25, 1986. *Id.* at 1120. A final rule was issued on September 11, 1987. 52 Fed. Reg. 34,460 (1987) (to be codified at 29 C.F.R. § 1910).

51. 50 Fed. Reg. 29,306 (1985) (to be codified at 14 C.F.R. §§ 121, 135).

52. 50 Fed. Reg. 36,732 (1985) (to be codified at 40 C.F.R. § 66).

53. The final rule was published on January 15, 1986. 51 Fed. Reg. 1896 (1986). Comments on the proposed rule were received from 19 sources. In its preamble to the final rule, the EPA discussed these comments, referring to the negotiations with respect to two of the comments, but otherwise offering its own rationale in support of the rule.

54. For details of the Federal Aviation Administration [hereinafter FAA] negotiation, see *Evaluation of Recommendations*, *supra* note 5, at 1667-74.

and on emergency exemptions from pesticide regulations.<sup>55</sup> OSHA encouraged labor, public interest, and industry representatives to negotiate a standard for occupational exposure to benzene.<sup>56</sup> Unfortunately, the benzene negotiations did not produce a consensus among the parties on a proposed rule, but the other three negotiations did result in at least partial agreement, and in proposed rules based on the negotiations. Three of the rules have been promulgated in final form, and none has been challenged.

Other agencies have shown an interest in the negotiated rulemaking process, and other major efforts are underway.<sup>57</sup> In order to provide guidelines for use of the new process, the ACUS published an additional set of recommendations in December, 1985,<sup>58</sup> as proposed by the author of this article.

The 1982 ACUS recommendations address the role of negotiated rulemaking within the legal framework of the APA and judicially developed administrative law concepts. In contrast, the 1985 recommendations address the dynamics of the negotiation process in the rulemaking setting. Together, the two ACUS recommendations present a framework for planning a rule negotiation.

#### *D. Recommendation 85-5*

The report accompanying ACUS Recommendation 85-5 concluded that negotiated rulemaking is a practical alternative to notice-and-comment or hybrid rulemaking, and that Recommendation 82-4 was basically sound. Assuming negotiations are permitted by the APA,<sup>59</sup> Recommendation 85-5 offers guidance on how agencies and private participants can increase their chances of reaching a consensus.

### III. THE DYNAMICS OF RULE NEGOTIATION

As Recommendation 85-5 recognized, the utility of negotiated rulemaking should be evaluated by reference to the dynamics of the negotiating process in the administrative regulatory setting. This section considers those dynamics, explaining how they justify particular ACUS recommendations.

---

55. For details of the EPA negotiations, *see id.* at 1674-82.

56. For details on the benzene negotiation, *see id.* at 1647-67.

57. *See infra* Section V of this article.

58. ACUS Recommendation 85-5, 1 C.F.R. § 305.85-5 (1986).

59. *See infra* Section VI of this article.

### A. BATNA Concept

Notwithstanding efforts to impose adjudicatory procedures for the formulation of regulatory policy, regulatory program decisions are made in a political environment.<sup>60</sup> They provide a mechanism within which political accommodation can occur, but it can work only if people who are able to use other processes have an incentive to participate in negotiations and to reach an agreement. The best way to understand incentives to negotiate is to consider negotiations between two hypothetical, monolithic parties.<sup>61</sup> Having identified the incentives for these hypothetical parties, one can then overlay complications resulting from intra-constituency disagreements.

A useful conceptual structure for understanding incentives to negotiate was suggested by Professors Fisher and Ury in their popular book on the negotiation process.<sup>62</sup> They explain that the participation of any party to a negotiation will be guided by that party's "Best Alternative to Negotiated Agreement" (BATNA). A participant in negotiations will not concede to an outcome worse than its BATNA. If a party thinks that its BATNA is superior to anything that can be obtained in negotiation, the party will simply not negotiate.

The following examples may be helpful. If I am considering buying a car from you, and know that I can get the identical car from your competitor across the street for \$10,000, I will negotiate with you only if I think our negotiations may result in an agreement for less than \$10,000. The \$10,000 is my BATNA. Or, if I am a plaintiff in a personal injury lawsuit, and the expected net value<sup>63</sup> of a jury verdict to me is \$25,000, I will negotiate a settlement with you, the defendant, only if the settlement is worth more to me than \$25,000. My BATNA in these negotiations is \$25,000.<sup>64</sup>

For potential participants in a regulatory negotiation, BATNA's are determined by perceptions of what the agency will do in the absence of a negotiation.<sup>65</sup> A rational, monolithic party will participate in regulatory negotiation only if it anticipates that the negotiated outcome will be superior to its BATNA, as determined by its estimate of

---

60. See generally Jaffe, *supra* note 13, at 1188 (describing the pervasiveness of political compromise in the context of administrative regulation).

61. Negotiation between monolithic parties is addressed in this section. Complications introduced by intra-constituency disagreements are addressed in Section III, subsection C of this article.

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

63. Litigation expenses, including the cost of possible appeals, must be subtracted from the gross amount of the expected verdict, and the time-value of money must be taken into account through an appropriate "discount rate."

64. See Perritt, *supra* note 21, at 1247-51.

65. What the agency will do is affected by what courts and the legislature will do, so perceptions of these influences are important also.

probable unilateral agency action.<sup>66</sup> Since each party is likely to evaluate the unilateral agency outcome differently, or to measure the impact of agency action against different cost or utility functions, BATNA's will tend to vary appreciably.

The BATNA-determined participation incentive is also dynamic: it will change over time for each party as it gets additional information about the agency's intentions. More importantly, other negotiators, neutral mediators or conveners, and the agency itself, can influence party BATNA's, and hence party incentives to negotiate.

The most appropriate analogy to a regulatory negotiation is not a traditional labor-management negotiation where BATNA's are determined by each party's assessment of the opponent's ability to inflict injury or to offer rewards. Rather, the best analogy is to settlement negotiations in civil litigation where party predictions of the probable behavior of a nonparty, the judge or jury, determine BATNA's. In regulatory negotiations, as in settlement negotiations, the third party decision-maker can influence party perception of the likely outcome in the absence of a negotiated settlement. In other words, the agency or judge changes BATNA's by what it says about its intentions.

This model suggests that regulatory negotiations are most likely to be successful when the agency (or some other credible source) persuades each potential participant that unilateral agency action has undesirable consequences for the potential participant. Less attractive BATNA's result in greater incentives to negotiate a solution.

This part of the analysis suggests the first hypothesis for effective regulatory negotiation: parties will negotiate only if they perceive the outcome of unilateral agency action to be worse than what is attainable in the negotiation.<sup>67</sup> The hypothesis has two corollaries: (1) regulatory negotiations are more likely to be successful if the parties agree on what the outcome will be in the absence of negotiations, or, if they disagree, if they are all pessimistic rather than optimistic; (2) regulatory negotiations are more likely to be successful if the agency actively influences party perceptions of BATNA's, emphasizing the undesirable consequences of unilateral agency action in terms relevant to each party.

The first four agency experiences with negotiated rulemaking illus-

---

66. The process was explored by my former student, Robert L. Sachs, Jr. See Comment, *An Alternative to the Traditional Rulemaking Process: A Case Study of Negotiation in the Development of Regulations*, 29 VILL. L. REV. 1505 (1984).

67. This is the thrust of Recommendation Number 2 from ACUS Recommendation 85-5, 1 C.F.R. § 305.85-5 ¶ 2 (1986).



trated the validity of these hypotheses. BATNA's in the OSHA benzene negotiations were relatively attractive, reducing incentives to negotiate.<sup>68</sup> The OSHA litigation had exaggerated points of disagreement, and led to divergent perceptions of what OSHA was expected to do in response to the Supreme Court's decision. Labor expected OSHA action similar to the rule invalidated by the Supreme Court; Industry expected such a standard could be blocked in litigation or in the Office of Management and Budget (OMB) clearance process. Thus, each side perceived a relatively favorable BATNA, reducing the incentives to negotiate.

Compared to BATNA's in the OSHA negotiation, BATNA's in the FAA negotiation were relatively unattractive.<sup>69</sup> The FAA's unsuccessful attempts at flight-and-duty-time rulemaking had convinced the participants that unilateral FAA action, within a fairly wide ambit of legal permissibility, could be harmful to their interests.

The need for favorable BATNA's was the motivation behind paragraphs one and two of ACUS Recommendation 85-5.

1. An agency sponsoring a negotiated rulemaking proceeding should take part in the negotiations . . . .
2. Negotiations are unlikely to succeed unless all participants (including the agency) are motivated throughout the process by the view that a negotiated agreement will provide a better alternative than a rule developed under traditional processes. The agency, accordingly, should be sensitive to each participant's need to have a reasonably clear expectation of the consequences of not reaching a consensus. Agencies must be mindful, from the beginning to the end of negotiations, of the impact that agency conduct and statements have on party expectations. The agency, and others involved in the negotiations, may need to communicate with other participants—perhaps with the assistance of a mediator or facilitator—to ensure that each one has realistic expectations about the outcome of agency action in the absence of a negotiated agreement. Communications of this character always should consist of an honest expression of agency actions that are realistically possible.<sup>70</sup>

Paragraph one derives from the principle articulated in paragraph two. Paragraph two stresses that agencies should understand the major influence they exert on party expectations and, therefore, on party BATNA's.<sup>71</sup> This is the major lesson learned from the unsuccessful benzene negotiations. The utility of participation for a party is measured in terms of the likelihood of a negotiated settlement that is equal to or better than each party's BATNA. Hence, in the same way as a judge seeks to induce private litigants to settle a lawsuit, the agency, as decision-maker, must point out the flaws in each party's argument and position, and ensure that each party understands why

---

68. For details on the benzene negotiation, see *Evaluation of Recommendations*, *supra* note 5, at 1647-67.

69. For details on the FAA negotiation, see *id.*, *supra* note 5, at 1667-74.

70. 1 C.F.R. § 305.85-5 ¶¶ 1, 2 (1986).

71. The Best Alternative to Negotiated Agreement [hereinafter BATNA] concept is explained *supra*, at text accompanying note 62.

the outcome of agency action, in the absence of negotiated agreement, may not be as favorable as the party anticipates.

Agency participation in negotiations, addressed in Recommendation Number one, promotes realistic party expectations. The agencies should also be willing to prepare and distribute draft rules or outlines, and instead of fearing premature disclosure of tentative staff views, they should actually welcome such disclosure because it portends what an agency might do in the absence of a negotiated rule. These drafts could even serve as a useful framework or agenda for negotiations.<sup>72</sup>

Of course, much of this conditioning of party expectation can be done by the facilitators, but the facilitators' representations will not be credible for long unless the agency acts to reinforce the representations. Agency participation occurs in various ways, ranging from full participation as a negotiator to acting as an observer and commenting on possible agency reactions and concerns. Agency representatives participating in negotiations should be sufficiently senior in rank to be able to express agency views with credibility.

This recommendation states that agencies should use negotiations as the primary channel for communicating with the parties. This is another major lesson learned from the unsuccessful effort to negotiate a benzene health standard. The utility of negotiating is an inverse function of group influence outside the negotiations, by direct dealings with the agency, by contact with OMB, by litigating in the courts, and by lobbying with the Congress.

The willingness of a group to participate meaningfully in negotiated rulemaking is affected by how it perceives its ability to influence the content of the rule through other channels. A group that has a low estimate of its leverage with the agency may embrace negotiations as a way of participating equally with other interests and as an improvement over what it believes its influence would be in more traditional notice-and-comment rulemaking. Conversely, a group that believes it can effectively influence the agency may fear negotiation will reduce its impact and thus may be more reluctant to participate meaningfully. Similarly, a group that has been successful in judicial challenges to agency decisions is more likely to prefer the litigation alternative to negotiations. A group perceiving itself with

---

72. Such conditioning of party expectations by the agency is delicate; it can reinforce party fears that the agency will not participate in the negotiations in good faith, or it can chill meaningful party contributions by signaling that the agency has already reached a decision.

substantial influence at OMB or in Congress is less likely to be enthusiastic about negotiating. Of course, the willingness to negotiate is not dichotomous: the factors that make a group less willing to participate may permit it to participate, but not to be willing to make many changes in its position.

Participation by the agency—and by OMB—reduces the real or perceived potential for parties to undermine the negotiating process by making “end runs” to the agency or to OMB.<sup>73</sup> Agency participation also affords an opportunity for greater access to the agency than some parties might expect in hybrid rulemaking. Participation also increases the likelihood that the agency and OMB will support, and understand the basis of, negotiated recommendations. Furthermore, an agency’s involvement broadens the range of options available regarding consensus.<sup>74</sup> The same logic might militate in favor of congressional staff participation in some negotiations. If, for some reason, agency or OMB participation is not acceptable, the facilitator/mediator should serve as a channel between the negotiations and OMB and congressional staff.

The most striking difference between the benzene negotiations and the other negotiations is that OSHA did not participate in the benzene negotiations, whereas agencies did participate in the others.<sup>75</sup> Agency participation prevented harmful divergences in expectations about what the agency would do unilaterally, and therefore conditioned BATNA’s so as to maintain incentives for negotiated agreement. In the benzene negotiation, the participants came to believe they would do better outside the negotiations, working directly with OSHA or with OMB, and their BATNA’s shifted accordingly, rendering negotiated agreement unattractive.

The FAA and EPA were committed to the negotiating process as the primary means of developing a regulation; OSHA was not. At

---

73. Some agencies and commentators question the appropriateness of the Office of Management and Budget [hereinafter OMB] participation, arguing that it is the agency’s responsibility to obtain OMB concurrence in any proposed regulation. The whole point of negotiations, however, is to get *all* interests likely to influence the substance of a regulation to communicate directly with each other. Under Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981), *reprinted in* 5 U.S.C.A. § 601 (West 1985 & Supp. 1986), OMB has a major role to play. The cotton dust experience, described in Section V of this article, demonstrates the risk of negotiating a consensus without taking OMB’s views into account. Evidence from the benzene negotiations suggests that Industry’s position was significantly determined by what it thought OMB would do with a unilateral OSHA proposal. Such perceptions should be tested and taken into account in the negotiations themselves. At a minimum, agencies considering negotiated rulemaking in a particular proceeding should have a clear strategy for obtaining OMB support and for involving OMB as negotiations proceed. This may be accomplished using facilitator/mediators as intermediaries.

74. Consensus is discussed in Section III, subsection B of this article.

75. Paragraphs 4(g) and 8 of ACUS Recommendation 82-4, C.F.R. § 305.82-4 ¶¶ 4(g), 8 (1986), recommends agency participation.

least some of the difference in agency commitment can be attributed to the lower level of participation by OSHA. The FAA, its parent agency, the Department of Transport (DOT), and the EPA had key personnel who were enthusiastic about regulatory negotiation and who had the skills to mediate effectively, supplementing the mediation efforts of the facilitator/mediator; OSHA and the Department of Labor (DOL) did not. In particular, both DOT and EPA had policy level officials responsible for promoting regulatory negotiation; DOL did not.

There are, of course, various forms of agency participation. Harter recognized implicitly two forms of negotiated rulemaking, one in which the agency participates in the negotiations ("Agency Participation Model") and another in which it does not ("Agency Oversight Model").<sup>76</sup> The same two variants had been addressed more explicitly in a Harvard Law Review note published around the same time.<sup>77</sup> Recommendation 85-5 does not contemplate that the "agency oversight" model would never be useful. The parties might be motivated so strongly to negotiate a resolution of their disagreements that agency participation would actually be unnecessary.<sup>78</sup>

In most cases, the agency should be represented on the committee and should ask questions and try to gain information from participants in order to gain substantive knowledge and to probe the weaknesses in a party's position. Experience suggests, however, that the agency should avoid directing the participants toward one result or another since that kind of participation can stifle debate. There is a fine line between an agency's showing its hand too early and offering a proposal to stimulate movement in the negotiations and remind participants what the prospects of deadlock may be.

### B. Consensus and Mediation

The objective of negotiated rulemaking is to reach "consensus" among the participants as to the content of the proposed rule. Harter characterized the definition of consensus as "one of the most difficult

---

76. Harter, *supra* note 29, at 57-58.

77. See Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 HARV. L. REV. 1871, 1875-76 (1981) (distinguishing between "Agency Oversight Model," in which agency does not participate, and "Agency Participation Model," in which it does).

78. The cotton dust negotiation is a clear example. See *infra* Section V of this article.

and complex questions in regulatory negotiation.”<sup>79</sup> He concluded that experience was necessary before anyone could develop more concrete ideas on what consensus should entail, pointing out, however, that the existence of a consensus is more a matter of feel, than of mathematical calculation.<sup>80</sup> The Harter formulation necessarily omitted detailed formulation of the conditions conducive to closure on an agreement.<sup>81</sup>

Harter and Recommendation 82-4 also recognized that the consensus idea implies some kind of effective implementation process.<sup>82</sup> Lack of an implementation process would destroy the core prerequisite of negotiation—namely, the parties’ belief that their own interests will be furthered by negotiating.

In three of the four experiments (benzene, flight-and-duty-time, and nonconference penalties (NCPs)) the participants fell short of formal agreement on some of the major issues.<sup>83</sup> Indeed, one could argue that fewer fundamental matters separated the benzene negotiators when negotiations were adjourned than separated the flight-and-duty-time negotiators. Even so, the benzene negotiations are widely perceived as having failed, while the flight-and-duty-time negotiations are perceived as having succeeded. The explanation for different perceptions despite the similarity of results is attributable to the difference in how the agency reacted when the negotiations were adjourned. The FAA, having participated in the negotiating sessions, had an understanding of what the parties could accept. OSHA, on the other hand, who had not participated, had no such understanding. In order for the points of agreement on benzene to be communicated to OSHA, a document had to be transmitted. However, the benzene negotiators had stipulated as a ground rule that no document would be transmitted in the absence of a formal agreement on a total package. No such ground rule bound the flight-and-duty-time or the NCP participants or agency.<sup>84</sup>

---

79. Harter, *supra* note 29, at 92.

80. *Id.* at 93.

81. Paragraph 11 of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 11 (1986), addressed consensus in very general terms: “Consensus . . . means that each interest represented in the negotiating groups concurs in the result, unless all members of the group agree at the outset on another definition.” *Id.* That paragraph contemplated, however, that the negotiators might issue a report indicating agreement on some issues and disagreement on other issues.

82. Harter, *supra* note 29, at 51. This criterion is addressed in part by paragraphs 13 and 14 of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶¶ 13, 14 (1986), proposing publication of a negotiated rule in the Federal Register, and giving the negotiators an opportunity to review comments submitted by nonparticipants.

83. Paragraph 11 of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 11 (1986), addresses consensus, and contemplates the possibility of less than total agreement on all issues.

84. Paragraph 11 of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 11 (1986),

Recommendation 82-4 proved basically sound with respect to defining consensus. As it suggests, agencies and negotiators should take a flexible view toward defining consensus. Insisting on formal subscription to a "total package" recommendation may make negotiating success impossible; it may be infeasible for a participant to acknowledge agreement with a compromise.<sup>85</sup> Moreover, if the agency participates in the negotiations, a total package agreement is not necessary. Any reasonably sophisticated agency participant will sense, when negotiations are concluded, what each particular party will tolerate and what will be so offensive that the party will be moved to litigate. A sophisticated agency participant will also have a sense of what concessions are linked to gains on other issues. Furthermore, a flexible attitude toward consensus may permit substantial agreement on a framework for a rule with certain difficult issues reserved for adversarial comment and decision by the agency. In other words, a consensus can include an agreement to dispute certain issues before the agency or in the courts. Such an outcome is beneficial because it narrows the issues. The FAA experience is a good example.<sup>86</sup>

On the other hand, a total package ground rule forces the parties to make more compromises, instead of leaving tough issues for the agency to resolve. One possible standard for a consensus rule is to say that a consensus has been obtained when all participants agree informally that they will not actively oppose a particular resolution of issues, though certain of their constituents might register formal opposition.

The prospects of consensus greatly increase with the employment of a mediator in rule negotiations. Paragraph five of Recommendation 85-5 said:

5. The agency should select a person skilled in techniques of dispute resolution to assist the negotiating group in reaching an agreement. In some cases, that person may need to have prior knowledge of the subject matter of the negotiations. The person chosen may be styled "mediator" or "facilitator," and may be, but need not be, the same person as the "convenor" identified in Recommendation 82-4.<sup>87</sup>

---

contemplates that negotiators report on less than total agreement, identifying the issues on which they agree and those on which they disagree.

85. Everyone with labor-management negotiation experience is familiar with the common phenomenon in grievance dispute processing where labor and management reach de facto agreement on resolution of a grievance but need an arbitrator's decision to "take them off the hook." In some cases, the disputing parties actually write the arbitrator's decision.

86. *Evaluation of Recommendations*, *supra* note 5, at 1670-71. See also 49 Fed. Reg. 12,136, 12,137-38 (1984) (to be codified at 14 C.F.R. §§ 121, 135).

87. 1 C.F.R. § 305.85-5 ¶ 5 (1986). Convenors and mediators play different roles in

The recommendation noted that there may be specific proceedings, however, where party incentives to reach voluntary agreement are so strong that a mediator or facilitator is not necessary.

Virtually all of the participants in the four completed rule negotiations agreed that the mediators made essential contributions to the process. In fact, it is difficult to conceive how any of the four negotiations would have worked at all without the help of the facilitator/mediators. All three agencies used both convenors and mediators.<sup>88</sup> In some cases, the convenor became the facilitator or mediator. In other cases, the facilitator or mediator was a different person from the convenor. Despite differences in styles, the involvement of the facilitator/mediators was essential to keep the negotiations moving.<sup>89</sup> Few participants or observers thought that mediators ought to originate from any particular source; rather, they emphasized the importance of mediation experience and competence. Mediation skills involve more than an ability to work well with people—they involve an instinctive awareness of group functioning and how to move toward closure.

Recommendation 85-5 reinforces the import of Paragraph ten in Recommendation 82-4,<sup>90</sup> suggesting that mediators should be an integral part of rule negotiations. There are advantages and disadvantages of outside and inside facilitators. Inside facilitators may be inhibited in dealing with intra-constituency problems and in intervening with other government agencies, such as OMB. In addition, private parties may be reluctant to accept the neutrality of a facilitator from within the agency. On the other hand, the use of an inside facilitator can be effective in certain cases as the pesticide negotiations illustrated.<sup>91</sup>

Mediation skills are highly personal, and it would be unwise to establish any exclusive institutional source of rulemaking mediation services. It may be desirable, however, to organize training and edu-

---

negotiated rulemaking. Convenors assist agencies in deciding whether a particular subject is suitable for negotiated rulemaking. They determine who are the affected interests and informally contact those interests to explore the possibility of their participation in a negotiation. *Id.* § 305.82-4 ¶ 4. Mediators, on the other hand, become involved in the actual negotiation, helping the parties to agree on a procedure and to narrow their substantive differences. *Id.* § 305.82-4 ¶ 10, 305.85-5 ¶ 5. "Facilitator" is just another name for a mediator, the use of which may be desirable to reduce anxiety experienced by those who object to the idea of using a labor-management negotiation model for administrative rulemaking.

88. Paragraphs 3 and 4 of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶¶ 3, 4 (1986), recommend use of convenors in every regulatory negotiation. Paragraph 10 recommends the use of mediators in some cases. *Id.* § 305.82-4 ¶ 10.

89. This experience raised questions about the optional character of paragraph 10 of ACUS Recommendation 82-4. Paragraph 5 of ACUS Recommendation 85-5 urges that mediators be used in virtually all rule negotiations. 1 C.F.R. § 305.85-5 ¶ 5 (1986).

90. 1 C.F.R. § 305.82-4 (1986).

91. *Evaluation of Recommendations*, *supra* note 5, at 1680-82.

cational programs and to procure mediation services competitively to ensure that opportunities for potential neutrals are distributed equitably. If competitive procurement does occur, it is essential to ensure speed and to have a process for verifying the mediation experience of the bidders.

Recommendation 85-5 explicitly recognized that federal agencies such as the Federal Mediation and Conciliation Service or the Community Relations Service of the Department of Justice may be appropriate sources of mediators or facilitators.<sup>92</sup> It suggested that these agencies should consider making a small number of staff members with mediation experience available to assist in conducting negotiated rulemaking proceedings.

Some agencies considering negotiated rulemaking have expressed concern that the process might cost more than notice-and-comment rulemaking. Recommendation 85-5 encourages agencies to explore resources available from government agencies, such as mediation services from the Federal Mediation and Conciliation Service, or the Community Relations Service within the Justice Department, or negotiation training available from the Department of Justice.

Paragraph four of Recommendation 85-5 suggested that agencies consider providing the parties with an opportunity to participate in a training session in negotiation skills prior to the beginning of the negotiations.<sup>93</sup> It is worth noting that training provided in connection with the EPA negotiations was well received, and parties to the negotiation of Farmworker Protection standards requested similar training.

### *C. Intra-Constituency Problems*

The simple model of negotiation dynamics assumed monolithic parties.<sup>94</sup> In the real world, of course, parties are not monolithic, and intra-constituency disagreements complicate negotiations. Resolving intra-constituency disagreements depends upon the characteristics of interest groups. These groups play an essential role in the politics of a modern state,<sup>95</sup> providing economies of scale in the exercise of

---

92. 1 C.F.R. § 305.85-5 ¶ 6 (1986).

93. 1 C.F.R. § 305.85-5 ¶ 4 (1986).

94. See *supra* Section III, subsection A of this article.

95. See THE FEDERALIST No. 10 (J. Madison); V.O. KEY, *supra* note 12, at 7 (politics is a struggle among groups or interests). See generally J. HURST, *supra* note 12 (balance of political power generally is determined by the strength and intensity of feeling of groups perceiving that they have similar interests on a particular subject).



power, and permitting individual concerns about particular issues to be focused within representative institutions.<sup>96</sup>

Interest groups perform representation or interest aggregating functions.<sup>97</sup> They operate by intensifying member interest in particular issues, formulating concrete alternatives, and articulating member positions.<sup>98</sup>

The analysis of BATNA-driven participation choices<sup>99</sup> assumed that parties are monolithic, and that parties affected by regulatory decision-making behave like rational individuals dealing with a single estimate of risk. Real parties do not behave this way. Real parties are represented by individual human beings, but the individuals express the views of group constituencies which usually have divergent views. The relations within constituency groups and between constituency groups and individual negotiators complicate the dynamics of regulatory negotiation.

Experienced mediators know that there are essentially three agreements in any successful two-party negotiation: (1) an agreement between negotiator A and his constituents; (2) an agreement between negotiator B and her constituents; and (3) an agreement between negotiators A and B.<sup>100</sup> Agreements (1) and (2) can be called "intra-constituency agreements." Frequently, the most difficult mediation job involves achieving the intra-constituency agreements rather than achieving the negotiator-negotiator agreement.

The intra-constituency problem is more difficult in regulatory negotiations than in labor negotiations, because the parties to regulation negotiation are likely to be ad hoc groups or coalitions without formal processes worked out for internal decision-making. Ordinarily, in regulatory negotiation, there is no equivalent of the "exclusive representation" principle from the law of collective bargaining<sup>101</sup> available to bind constituents to the position taken by or agreed to by an industry representative. At any point an individual constituency may disavow its putative representative in the negotiations, take its own position on matters under negotiation, present formal positions to the agency inconsistent with positions taken by its "representative," or sue to have the negotiated rule set aside by the courts.

---

96. V.O. KEY, *supra* note 12, at 203 (referring to the representation function performed by interest groups).

97. *Id.*

98. *Id.* at 203-04.

99. See discussion of the BATNA concept, *supra*, at Section III, subsection A of this article.

100. Dunlop, *supra* note 12, at 1433 (referring to the need for three agreements to conclude a negotiation).

101. See National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1982) (exclusive representative); Railway Labor Act § 2, Ninth, 45 U.S.C. § 152, Ninth (1982) (exclusive representative).

Extreme positions by trade groups reduce intra-constituency differences, but necessarily make negotiations more difficult. When representatives must make compromises at the bargaining table, the intra-constituency problem becomes worse.

It is important for someone involved in the negotiation process, either the representatives themselves, the mediator/convenors, or the agency personnel, to be skilled at diagnosing intra-constituency problems and working creatively to facilitate intra-constituency agreement. Someone familiar with the internal structure and decision-making processes of institutions, such as labor unions, corporations, and public interest groups involved in a particular negotiation, can be indispensable. Even more valuable would be a mediator who already knows the key decision makers within a particular constituency, and therefore is trusted by them to some degree. Periodic constituency meetings may be desirable,<sup>102</sup> and full reporting to constituents as negotiations proceed is essential. Also, selecting negotiators with strong power bases can serve to permit freer exploration of compromises.

Recommendation 85-5 explicitly recognized the importance of intra-constituency disagreements. It said:

7. The agency, the mediator or facilitator, and, where appropriate, other participants in negotiated rulemaking should be prepared to address internal disagreements within a particular constituency. In some cases, it may be helpful to retain a special mediator or facilitator to assist in mediating issues internal to a constituency. The agency should consider the potential for internal constituency disagreements in choosing representatives, in planning for successful negotiations, and in selecting persons as mediators or facilitators. The agency should also recognize the possibility that a group viewed as a single constituency at the outset of negotiations may later become so divided as to suggest modification of the membership of the negotiating group.<sup>103</sup>

Constituency disagreements threatened both the FAA and OSHA negotiations. The success of the FAA negotiations resulted in part from a more timely resolution of such disagreements. Both the Air Transportation Association (ATA) (representing airlines) and the American Petroleum Institute (API) (representing petroleum companies) struggled to forge a consensus that could be communicated by their negotiation spokespersons. ATA had more success than API. Notably, the FAA proposed bringing individual company representa-

---

102. For example, this occurred with the American Petroleum Institute [hereinafter API] and the Air Transport Association [hereinafter ATA] in the benzene and flight-and-duty-time negotiations. See *Evaluation of Recommendations*, *supra* note 5, at 1670.

103. 1 C.F.R. § 305.85-5 ¶ 7 (1986).

tives into the negotiations. This may have galvanized ATA to ensure that it remained an effective participant on behalf of the entire constituency.

Students of negotiation have long recognized that the most difficult challenge to a negotiated agreement involves, not the process at the negotiating table, but the process of resolving intra-constituency disagreements away from the table. This recommendation encourages agencies to anticipate intra-constituency problems. This does not mean that the agency or the private interests know in advance exactly how to "resolve" such disagreements, only that the convenors assess the likelihood that such disagreements will occur, given the adequacy of existing institutional mechanisms for resolving them.

If internal differences are expected to be substantial, and if existing institutions are not well suited for resolving them, negotiation should not proceed in the absence of a mediator who has the experience, skill, and acquaintance with the constituency and its major personalities. Such a mediator may be able to reduce intra-constituency differences, thereby validating the authority of the spokesperson for the affected group. In some cases, a special mediator might be retained to assist the main facilitator/mediator in dealing with an internal constituency problem.

Intra-constituency problems may be more difficult under certain types of interest representation arrangements than others. For example, trade unions exist for the purpose of aggregating employee interests, and are therefore experienced in resolving differing positions within the constituency. Similarly, public interest groups have a certain authority in speaking for their otherwise diffuse constituencies. Business interests, in contrast, usually have fewer established mechanisms for resolving internal differences. Exceptions might be found in those industries long subject to economic regulation.

The potential for internal constituency disagreements should also influence the selection of interest representatives.<sup>104</sup> If a trade association is unable to represent its constituents effectively, it may be desirable to include individual company representatives. It may also be worthwhile convening groups of major subinterests to provide the mediator or facilitator with a forum in which to adjust internal constituency disagreements.

Agencies and mediators or facilitators should be wary, however, of fragmenting representation too much; permitting subinterests to be represented separately merely moves disagreements among these subinterests from other resolution forums to the bargaining table itself.

---

104. Selection of participants for a rule negotiation is considered in more detail in Section VI, subsection B *supra*.

## IV. SELECTION OF SUBJECTS FOR NEGOTIATION

Considering the dynamics of negotiation, not all issues are suitable for rule negotiation. ACUS Recommendation 82-4 and agency experience suggest rules of thumb for selecting subjects for negotiation.

Issue maturity and intensity of interest group feeling are important. One commentator, who made a study of the decision to land on the moon, has drawn the following conclusion about issue maturity: "The objective must have been the subject of sufficient political debate so that the groups interested in it and opposed to it can be identified, their positions and relative strengths evaluated, and potential sources of support have time to develop."<sup>105</sup>

Issue maturity significantly affects the way different groups feel about a particular issue and how strongly they prefer variant alternatives. It also ensures that a range of alternatives has been formulated for consideration.

Recommendation 82-4 suggested that only mature issues be considered for negotiation.<sup>106</sup> The issues must be readily apparent and the parties must be ready to decide them. If information remains to be gathered or if the parties are still establishing their positions,<sup>107</sup> negotiation cannot be utilized. Issue maturity is significant when disputants are individuals; each disputant must have time to think about his or her position on a new question or proposal. However, it becomes far more important when the disputants are groups. Constituency positions must be determined, and this requires aggregation and trading off within the group.<sup>108</sup> The more complex the issue and the more novel the possible solution, the longer it will take for constituencies to make this determination.

Interest groups interact with regulatory programs. Indeed, interest groups arose in part because of increased government regulation.<sup>109</sup> The nature of the interaction is determined by the nature of the regulatory program because the nature of the regulation influences the intensity of interest group feeling on regulatory issues.<sup>110</sup>

---

105. J. LOGSDON, *THE DECISION TO GO TO THE MOON: PROJECT APOLLO AND THE NATIONAL INTEREST* 181 (1970).

106. R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 47 (1956). This corresponds to paragraph 4(a) of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 4(a) (1986).

107. Examples of this would be lobbying for public support, media support, etc. R. DAHL, *supra* note 106, at 47 & n.259.

108. See LOGSDON, *supra* note 105, at 81.

109. V.O. KEY, *supra* note 12, at 201-02.

110. Intensity of feeling is an important variable in the calculus of public opinion. R. DAHL, *supra* note 106, at 50. The influence of a particular group or faction is a func-

Professor James Q. Wilson identifies three categories of regulatory programs according to incidence of costs and benefits likely to influence the intensity of group feeling.<sup>111</sup> In the first category, the programs concentrate their benefits on a small group and distribute their costs over wide sectors of the population. Economic regulation of railroads and airlines, milk prices and taxicabs fall into this category.

Programs in Wilson's second category concentrate on both benefits and costs. Regulatory programs relating to labor-management relations fit this category; either labor or management benefits at the expense of the other.

The third category encompasses the most recent consumer and environmental protection, health, and safety regulations. Here, benefits are diffused over large constituencies of the population while costs are concentrated on relatively narrow sectors. As Wilson points out, the development of policy is particularly difficult with respect to this category because the number of transactions subject to the regulation is likely to be far greater than in the first or second categories.

One can add a fourth category to Wilson's list. This category would include programs diffusing both costs and benefits such as automobile emissions device inspection programs.

Programs in Wilson's second category are better candidates for negotiation than programs in the fourth category, because it is easier to mobilize interest representatives for the bargaining process when the interest groups are few in number and narrow in scope. Moreover, programs with narrow impact are less likely to attract governmental or public interest.<sup>112</sup> Between the extremes of the second and fourth categories, Wilson's first and third categories present intermediate levels of difficulty in organizing interest representatives for regulatory negotiation. The regulatory program must be suitable for negotiation and satisfy the following criteria:

*Inevitability of Decision.*<sup>113</sup> There must be pressure to resolve the matter.<sup>114</sup> Effective negotiation requires compromise and compro-

---

tion of numerosity and intensity of feeling. *Id.* at 38. Transaction costs prevent a plebiscite on every public policy alternative, and reduce the desire of interest groups to have such involvement in the full range of political decisions. *Id.* at 44. In other words, the cost-benefit ratio of participation in policy formulation is unfavorable when a potential participant is indifferent to outcome. *Id.* at 42-43.

111. See Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 366-67 (J. Wilson ed. 1980) (classifications based on group perception of costs and benefits).

112. See Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, *WIS. L. REV.* 655, 670 (1985).

113. R. DAHL, *supra* note 106, at 48. This is addressed in paragraph 4(a) of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 4(a) (1986).

114. See Dunlop, *supra* note 12, at 1436 (deadline serves a vital function in negotiations).

mise involves making concessions. Most people are reluctant to make concessions unless they are coerced to do so by the fear that the decision will be taken away from the negotiators.<sup>115</sup>

*Opportunity for Gain.*<sup>116</sup> Negotiation must have the potential to benefit all parties. Negotiated solutions to "zero sum games" are difficult to achieve.<sup>117</sup> Effective mediation helps negotiating parties discover alternative formulations and to perceive the true value of their BATNA's.<sup>118</sup> The heightened perception of loss in alternative forums must be great enough to overcome any fear of loss through negotiation.<sup>119</sup>

*Absence of Fundamental Value Conflict.*<sup>120</sup> The regulation to be developed must not compromise deeply held beliefs or values since this would involve costs higher than most parties could tolerate.<sup>121</sup> This does not mean, however, that negotiation cannot be used to resolve minor issues involved in rule controversies in which fundamental values are at stake, nor does it mean that the implementation of regulations developed on a fundamental matter cannot be negotiated.<sup>122</sup> The fundamental value criterion is frequently misunderstood. The presence of substantial costs does not necessarily mean that fundamental values are involved. Rather, fundamental values are those which have ideological as opposed to merely economic significance, or economic risks of such magnitude that they seriously threaten a party's very survival.

*Permitting Trade-Offs.*<sup>123</sup> If there is only one issue to resolve or one position to assume, negotiation is unlikely to result in agreement. When there are two or more issues to resolve, however, with the attendant possibilities of gain on one issue offsetting loss on another,

115. R. DAHL, *supra* note 106, at 47-48 & n.263.

116. *Id.* at 48-49. This corresponds to paragraph 4(e) of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 4(e) (1986). This criterion is not addressed explicitly in ACUS Recommendation 82-4.

117. R. DAHL, *supra* note 106, at 48 n.284.

118. See Dunlop, *supra* note 12, at 1444-46; Perritt, *supra* note 21, at 1232-35. The BATNA concept is explained in Section III, subsection A of this article.

119. R. DAHL, *supra* note 106, at 49.

120. *Id.* at 49-50. This corresponds to paragraph 4(b) of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 4(b) (1986).

121. For example, the establishment of a public school curriculum through negotiation would be difficult if the only participants were a fundamentalist Baptist preacher and an equally committed evolutionist.

122. R. DAHL, *supra* note 106, at 49-50.

123. *Id.* at 50. This corresponds to paragraph 4(d) of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 4(d) (1986).

negotiation is more likely to be fruitful.<sup>124</sup>

*Research Not Determinative of Outcome.*<sup>125</sup> The resolution of a dispute should not depend on research results. The parties may be unwilling to formulate or compromise positions in the face of scientific uncertainty. Research results might produce a clear victory for one party.<sup>126</sup> Even if a clear win or loss could result from the research findings, the parties might still choose to negotiate parallel or peripheral issues.<sup>127</sup> Alternatively, the parties might negotiate issues to be researched and the way in which the research should be conducted.

In the four negotiations leading up to Recommendation 85-5, several differences surfaced concerning the subject matter of negotiations and the way in which candidates for negotiation were identified. Only the EPA formally solicited suggestions for candidates for negotiated rulemaking. This survey shifted the burden to major interest groups to propose subjects which they would be willing to negotiate. While agency-wide initiative may have produced some benefits in terms of communicating clear agency support for the concept, it also may have raised fears among some affected interests that EPA was overly committed to a particular process, and might force its use without sufficiently considering its utility in a particular proceeding.

The EPA picked subjects for negotiation which had not already failed in traditional processes. OSHA and the FAA, on the other hand, chose subjects that had proved intractable in traditional rulemaking and judicial review.<sup>128</sup> Other differences between the history of the benzene rulemaking effort and the history of the flight-and-duty-time effort, however, made benzene the riskier candidate. No one involved in the flight-and-duty-time, NCP, or pesticide controversies really believed that a rule could be determined by objective examination of scientific data. Some of the OSHA participants believed that the matter was simply one of analyzing scientific data.<sup>129</sup> This inhibited the realistic exchange of concessions in the benzene negotiations because of the underlying perception that the correct standard could be determined objectively rather than through bargaining.

---

124. R. DAHL, *supra* note 106, at 50 n.274.

125. *Id.* at 50-51. This criterion is not addressed explicitly in ACUS Recommendation 82-4.

126. See Perritt, *supra* note 21, at 1253-56 (explaining how similar perceptions of probable outcomes make negotiated resolution more likely). Uncertainty can improve the attractiveness of negotiated resolution to risk-averse parties, but similar predictions of outcome are probably more important. *Id.*

127. R. DAHL, *supra* note 106, at 51 n.276.

128. Both approaches are consistent with ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 4 (1986).

129. *Evaluation of Recommendations*, *supra* note 5, at 1655-64.

## V. POST RECOMMENDATION 85-5 DEVELOPMENTS

## A. MDA

The Department of Labor decided to use negotiated rulemaking to facilitate setting a standard for 4, 4' - Methylenedianiline (MDA). On October 22, 1985, the Department published a notice in the Federal Register<sup>130</sup> chartering a negotiation committee and soliciting requests for additional participants for the negotiations.

MDA is an adhesive identified by the National Toxicology Program as an animal carcinogen. Animal studies, epidemiological evidence, structure-activity relationships, and mutagenicity studies all indicate that MDA is also a potential human carcinogen.<sup>131</sup> Several thousand workers risk dermal and respiratory exposure to MDA in the chemical, rubber, and adhesive industries.

OSHA announced its intention to control workplace exposure to MDA on September 20, 1983, in an Advance Notice of Proposed Rulemaking.<sup>132</sup> Moreover, EPA has responsibility for regulating MDA under the Toxic Substances Control Act<sup>133</sup> (TSCA), but it decided to defer regulatory action to OSHA<sup>134</sup> and oblige OSHA to notify EPA by early January, 1986, what regulatory action OSHA intended to take.<sup>135</sup>

OSHA's personnel and lawyers believed MDA to be a better candidate than benzene<sup>136</sup> for negotiated rulemaking for the following reasons:

1. The possibility of EPA regulation creates special incentives for industry and labor groups to assist OSHA in developing a standard promptly. Labor has less influence at EPA than at OSHA, and Industry may fear that EPA is less sympathetic to the economic impact of health and safety standards than OSHA.
2. The absence of human carcinogenicity studies makes fundamental values less an issue for MDA than for benzene because there is room for argument as to the human health effects of MDA.
3. Fewer industries and labor organizations are concerned with MDA than with benzene.
4. The absence of large-scale health effects, already manifested, removes the tort liability issue which affected the benzene negotiations.<sup>137</sup>

---

130. 50 Fed. Reg. 42,789 (1985).

131. *Id.* at 42,791.

132. 48 Fed. Reg. 42,836 (1983).

133. 15 U.S.C. §§ 2601-2629 (1983).

134. *Id.* § 2608(a).

135. 50 Fed. Reg. 27,674 (1985).

136. Benzene was selected by OSHA for negotiated rulemaking, but now OSHA considers that benzene was, in some respects, unsuitable for negotiation.

137. See *Evaluation of Recommendations*, *supra* note 5, at 1651-52.



5. Because there is no existing standard for MDA and consequently no litigation history, party positions are less concrete and there is less polarization among parties.

6. The process OSHA intends to use for MDA standard negotiations is expected to work better than the process used for benzene negotiations.

OSHA modeled its MDA negotiations after the FAA and EPA negotiations. It chartered an advisory committee as the forum within which negotiations will occur. OSHA participated actively in the MDA negotiations, expecting that this participation would increase the usefulness of the negotiations.<sup>138</sup> Because OSHA contemplated that consensus would be defined more broadly than it was in the benzene negotiations, it expected to gain a sense of the feasibility of different types of standards, rationales for party positions, and narrowing of issues, even if the negotiators had been unable to agree on a Permissible Exposure Limit (PEL).<sup>139</sup> OSHA used a mediator assigned by the Federal Mediation and Conciliation Service as a facilitator.<sup>140</sup>

The Federal Register notice, following the example of the FAA and EPA notices, identified thirteen specific issues for the negotiations to address, listed potential participants, and invited comments on the makeup of the negotiating group.<sup>141</sup> The notice committed OSHA to use any negotiating consensus as the basis for its Notices of Proposed Rulemaking (NPRM) for MDA<sup>142</sup> but declared that OSHA would terminate the negotiations and proceed on its own if no consensus is reached within six months.<sup>143</sup> It is, of course, too early to evaluate the efficacy of MDA negotiations, because no NPRM had been published when this article went to press. The fact that OSHA attempted negotiated rulemaking for another health standard is significant because it demonstrates that the benzene effort, though not successful in producing an agreed-upon standard, was successful as a pilot effort in exploring a new process.

Negotiations on the MDA standard began in July, 1986 and proceeded until a consensus was reached in May, 1987.<sup>144</sup> The author

---

138. 50 Fed. Reg. 42,792 (1985) (OSHA representative will be a full and active participant).

139. *Id.* at 42,791 (referring to the "rank[ing of] priorities and identifi[cation of] acceptable solutions" as well as agreement on regulatory text and supporting rationale).

140. *Id.*

141. *Id.* at 42,792.

142. *Id.* at 42,790.

143. *Id.* at 42,792.

144. *Id.* at 42,787 (establishing the Negotiated Rulemaking Advisory Committee on 4,4'-Methylenedianiline [hereinafter MDA] to "advise the secretary of labor regarding the building of consensus by affected interests on issues associated with a proposed OSHA standard on MDA"); *id.* at 42,789-93 (announcing plans for MDA rule negotiation, proposing committee procedures, and identifying 13 issues to be addressed); *id.* at 48,655 (announcing an extension of time for submitting comments and requests for membership on negotiation committee); *id.* at 44,337 (regulatory agenda proposing schedule for negotiated rulemaking to result in NPRM by March, 1986); 51 Fed. Reg.

has attended MDA negotiating sessions and has met informally with most of the participants. Nevertheless, it is possible to offer some observations about the process by comparing it with the benzene negotiation process.

Active participation by OSHA was helpful. In fact, in the MDA negotiations, the OSHA participant regularly prepared draft NPRM language synthesizing OSHA's tentative views and those expressed by participants in the negotiations. This relieved participants from having to agree or disagree with language prepared by an opposing interest. In addition, OSHA prepared post-discussion drafts providing concrete material for negotiators to consider, reinforcing the view that OSHA would develop an NPRM on its own if the negotiations did not produce consensus. On the other hand, the process imposed significant administrative burdens on the OSHA participant, and posed an intellectual challenge to adequately capture the views expressed in the negotiation sessions.

Compliance with the Federal Advisory Committee Act<sup>145</sup> (FACA) did not appear to present any difficulties. The negotiation sessions were regularly open to the public and participants have not reported any particular problems with this format.

All participants were enthusiastic about the process, and reported that whether or not consensus was achieved, they had achieved a greater understanding of their opponent's legitimate difficulties. The

---

6,748-50 (1986) (responding to EPA notice of July 5, 1985, 50 Fed. Reg. 27,674 and announcing consideration of negotiated rulemaking to develop standard); *id.* at 14,202 (regulatory agenda announcing plans for mediated rulemaking, with NPRM scheduled for October, 1986, and final action by December, 1987); *id.* at 24,452 (announcing appointment of members of negotiating committee and announcing first meeting for July 22-24, 1986; stating that oral presentations by members of the public will be permitted under control of the Mediator/Chairman; relaxing requirement for verbatim transcript and providing for detailed minutes instead, and modifying quorum requirements so that two members representing employers and two representing employees must be present to conduct business); *id.* at 27,919 (announcing meetings and topics: August 5, 1986, scope and application, definitions, recordkeeping, emergencies, hygiene facilities and housekeeping; September 9, 1986, personal protective equipment, exposure monitoring, and site visit; October 7, 1986, health effects, risk assessment, medical surveillance, medical appendices, biological monitoring, and removal and rate retention; November 16, 1986, technological and economic feasibility; December 9, 1986, permissible exposure limits, including short term exposure limits and action level discussions; and January 13, 1987, review of committee recommendations for Federal Register publication); *id.* at 35,571 (announcing location changes for meetings for October 7, 1986, November 18, 1986, December 9, 1986, and January 13, 1987); *id.* at 36,876 (renewing negotiating committee and changing name to "Mediated Rulemaking Advisory Committee"); 52 Fed. Reg. 26,776 (1987) (committee's consensus standard).

145. 5 U.S.C. app. §§ 1-15 (1982).

greatest concern was the procedure that OSHA would use to implement the consensus recommendation. In addition, concerns persist as to OMB's willingness to substantially defer to a consensus recommendation.

### *B. Additional EPA Rule Negotiations*

Since ACUS Recommendation 85-5 was published, the EPA has continued to use the negotiated rulemaking process. Negotiations over a farmworker protection standard continued through the Spring of 1986.<sup>146</sup>

The committee began by framing the issues that a regulation should address and the factors that would enter into their resolution. Its work groups incorporated their first-hand knowledge of farming operations. EPA consultants wrote a working draft of a potential regulation that the committee used to focus its discussions. Although one of the major labor unions involved withdrew its participation, the remaining interests decided to continue reviewing the draft regulation and to formulate a sound, workable standard. It was clear that with one of the major interests absent, such discussions would not reflect a true consensus rule, so the group was converted into a standard advisory committee and EPA accepted sole responsibility for the proposed rule. The truncated group met twice more and reviewed the evolving draft. EPA's Office of Pesticide Programs built on the earlier discussions. EPA has not yet published its notice of proposed rulemaking, but it is expected shortly.

Although the farmworker protection negotiations, like those in benzene, did not result in consensus, some of the participants, including senior agency officials, viewed the negotiations as significantly productive and expect them to have a major effect in shaping the proposed standard.<sup>147</sup> In addition, the EPA has proposed negotia-

---

146. 50 Fed. Reg. 42,223 (1985) (announcing establishment of advisory committee to negotiate farmworker protection standards for agricultural pesticides, and initial meeting on November 4, 1985, to complete outstanding procedural matters, and to determine how to address substantive issues and begin addressing them); *id.* at 48,130 (announcing meeting of the farmworker protection standards negotiating committee for December 6, 1985, to address issues of protective clothing, reentry intervals, notification, training, enforcement, greenhouses, nurseries, and medical monitoring); *id.* at 51,748 (announcing meetings of the farmworker protection standards committee for January 7, 1986, and February 4, 1986, to continue work on substantive issues identified in November 21 notice); 51 Fed. Reg. 6,595 (1986) (announcing two-day meeting of negotiating committee for March 6th and 7th, 1986, to address procedural issues arising since last meeting and to continue work on substantive issues); *id.* at 13,091 (announcing two-day meeting of negotiating committee for May 5th and 6th, 1986, to review latest version of draft proposal).

147. Letter from Philip J. Harter to Henry H. Perritt, Jr. (Nov. 3, 1986) (reporting the breakdown in the farmworker protection negotiations and its subsequent developments).

tions to develop rules on air pollutant emissions from wood burning stoves,<sup>148</sup> hazardous waste injection wells,<sup>149</sup> and the Resource Conservation and Recovery Act<sup>150</sup> (RCRA) permits.<sup>151</sup>

### *C. Federal Trade Commission Negotiation Initiative*

On February 12, 1986, the Federal Trade Commission (FTC) announced that it was considering forming an advisory committee to negotiate a consensus on recommended revisions to the FTC's rules on informal dispute settlement procedures.<sup>152</sup> The informal dispute settlement procedure rule implemented section 110(a)(1) of the Magnuson-Moss Warranty Act.<sup>153</sup> That section provides that written warranties may require consumers to resort to an informal dispute settlement procedure before pursuing any judicial remedies available under the Act. The FTC's rule has been criticized as being both unduly burdensome and insufficiently stringent.<sup>154</sup> The Commission believed that negotiation of possible changes was particularly appropriate because of the voluntary nature of Rule 703.<sup>155</sup> Based on preliminary inquiry by two professional mediators (John A. S. McGlennon and Gail Bingham) of the Conservation Foundation, the FTC believed that negotiation could succeed with respect to the rule.<sup>156</sup> The February 12, 1986, notice proposed procedures for negotiation, identified fifteen substantive issues to be addressed in the negotiation, and listed twenty-six potential parties to be members of a negotiating committee.<sup>157</sup>

On August 20, 1986, the FTC established a "Rule 703 Advisory Committee" to develop proposed revisions to Rule 703 and an-

---

148. 51 Fed. Reg. 4,800 (1986) (requesting comments on possible establishment of advisory committee to negotiate issues leading to an NPRM on New Source Performance Standards for Residential Wood Combustion under section 111 of the Clean Air Act).

149. 42 U.S.C. § 6901-6987 (1982).

150. *Id.* at 25,401 (requesting comments on possible establishment of advisory committee to negotiate issues leading to an NPRM implementing restrictions on injection of hazardous waste mandated by sections 3004(f) and (g) of the Resource Conservation and Recovery Act).

151. *Id.* at 25,739 (requesting comments on possible advisory committee to negotiate issues leading to NPRM amending current regulations governing major and minor modifications to Resource Conservation and Recovery Act permits).

152. *Id.* at 5,205.

153. 15 U.S.C. § 2310(a)(1) (1982).

154. 51 Fed. Reg. 5,206 (1986).

155. *Id.*

156. *Id.*

157. *Id.* at 5,207-08.

nounced that its first meeting would be held on September 23, 1986.<sup>158</sup> The Commission received twenty-two comments in response to its proposal to use negotiated rulemaking in connection with Rule 703 revisions. Only one comment opposed the process, arguing that consumer groups and consumer protection agencies could not adequately represent consumer interests.<sup>159</sup> The FTC responded that a wide variety of consumer interest representatives would participate on the committee and therefore consumer views would be adequately protected. Furthermore, the Commission noted that subsequent procedural steps, after the Advisory Committee completed its work, would "provide ample opportunity for individual consumers and others to comment on any [Committee] consensus . . . ."<sup>160</sup>

The FTC identified three groups whose interests would not be represented adequately by the parties appearing on the list: organizations that assist consumers in auto industry dispute resolution proceedings, state legislatures, and the recreational vehicle industry.<sup>161</sup> The FTC added representatives of those three groups to the Committee and reported that some representatives had agreed to withdraw to prevent the Committee from becoming too large.<sup>162</sup> Representatives who appeared on the original but not the final list were the Conference of Consumer Organizations, the United States Office of Consumer Affairs, the Association of Home Appliance Manufacturers, and the Residential Warranty Corporation.<sup>163</sup> The rule negotiation is proceeding with agreement expected in 1987.<sup>164</sup>

## VI. POSITION OF NEGOTIATED RULEMAKING UNDER APA

### A. Introduction

In 1982, ACUS recommended that Congress amend the APA to explicitly authorize the use of negotiated rulemaking.<sup>165</sup> Early commentators on the regulatory negotiation concept thought that it might be necessary to alter judicial review to accommodate negotiated rulemaking.<sup>166</sup> Some discussion of APA problems associated

---

158. *Id.* at 29,666.

159. *Id.* at 29,667.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Compare* 51 Fed. Reg. 5,207-08 (1986) *with id.* at 29,668.

164. As of January 22, 1987, the parties were meeting weekly and anticipated agreement by April or May, 1987. Mr. McGlennon cautioned, however, that the negotiations had not reached the most difficult issues. Telephone interview by the author's research assistant, Scott Fegley, and McGlennon, mediator (Jan. 22, 1987).

165. *See* ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 2 (1986).

166. *See* Harter, *supra* note 29, at 102-03; Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); Note, *Rethinking Regulation: Ne-*

with negotiated rulemaking appears in the literature.<sup>167</sup>

Since 1982, however, it has become clear that rule negotiations can be accomplished within the flexible framework provided by section 553 of APA. Through the negotiated rulemaking process, agencies provide affected parties with an opportunity to influence the substance of agency rules to a far greater extent than the minimum requirements of section 553 by having notice of an agency-developed proposal and providing comments. Problems with the delegation of governmental authority to private parties, ex-parte communication in violation of the spirit of section 553, and open meeting requirements under FACA have turned out to be largely illusory.

There are some caveats, however, to these conclusions. If a negotiated rule is to withstand challenge under the standards for judicial review set forth in section 706 of APA, the agency must act within its statutory mandate and must provide its own reasoned justification for the final rule. It would not be sufficient for the agency merely to adopt the work of the negotiating parties without comment. Moreover, the requirements of FACA continue to trouble participants in negotiated rulemaking. The FACA has not been a problem because the Act has been interpreted in a practical way and no affected parties were motivated to challenge the negotiation process.

Analyzing administrative law issues is necessarily academic as no judicial challenges to negotiated rules have yet materialized. This lack of judicial challenge is perhaps the strongest endorsement of negotiation as a process that satisfies the needs of the affected interests. Consequently, there is no way to gauge the need for legislation dealing with the authority of agencies to implement negotiated rulemaking,<sup>168</sup> or the need for changes in the standards of judicial review.<sup>169</sup>

It is premature to consider amendments to the APA. The APA itself was a product of several decades of experimentation at the agency level. Further exploration is necessary to determine whether APA amendments are desirable and if they are, what form they should take. The risk of prematurely amending the APA is that flex-

---

*gotiation as an Alternative to Traditional Rulemaking*, 94 HARV. L. REV. 1871, 1883-90 (1981) [hereinafter *Rethinking Regulation*].

167. See Wald, *Negotiations of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENVTL. L. 1 (1985).

168. Paragraph 2 of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 2 (1986) recommends such legislation.

169. Harter recommended such changes. Harter, *supra* note 29, at 102.

ibility in adapting the negotiation process to the needs of different regulatory situations may be destroyed.

An example of reduced flexibility is Senate Resolution 451, introduced by Senator Levin.<sup>170</sup> The bill contains many desirable provisions, particularly those relating to coverage by the FACA and the procedure for closing negotiation group meetings. In other respects, however, it confines the negotiation process too narrowly, especially with respect to the definition of consensus,<sup>171</sup> the selection and role of mediators,<sup>172</sup> and the continued activities of a negotiating group after it has reached consensus and made a recommendation to an agency.<sup>173</sup>

### B. *Delegation Doctrine*

Superficially, negotiated rulemaking seems to pose problems with the "delegation doctrine." A central precept of democratic political theory posits that governmental decisions ought to be made only by politically accountable officials. The delegation doctrine prohibits such officials from delegating their policy-making authority to persons or institutions that are not politically accountable.

In the early years of administrative law, courts and lawyers were preoccupied with the delegation doctrine as they sought to rationalize the exercise of political power by non-elected administrative agency officials.<sup>174</sup> It is now well accepted, however, that the delegation of quasi-legislative authority to administrative agency officials is permissible if the empowering statute sufficiently circumscribes the exercise of such power so as to permit judicial scrutiny of whether the agency has exceeded its delegated authority.<sup>175</sup> Implicit in this doctrine approving delegation to administrative agencies is the idea that agency officials are themselves politically accountable to some degree. They are government officers, appointed pursuant to law.<sup>176</sup>

---

170. S. Res. 451, 99th Cong., 1st Sess., 131 CONG. REC. 1350-53 (daily ed. Feb. 7, 1985).

171. *Id.* § 4(8), at 1350.

172. *Id.* § 6, at 1351.

173. Section 7(h) of Senate Resolution 451 contemplates termination of a negotiating group before it has an opportunity to review comments submitted in response to its recommended rule. *Id.* § 7(h), at 1352.

174. See *Industrial Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 672-73 (1980) (Rehnquist, J., concurring); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating statute delegating authority to private industry group); J. DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 15 n.25 (1927); Stewart, *supra* note 17, at 1672-73.

175. *Industrial Union Dep't*, 448 U.S. at 673-75 (Rehnquist, J., concurring); *Yakus v. United States*, 321 U.S. 414, 426 (1944).

176. Political accountability is obvious, albeit indirect, when the agency officials are appointed by the President. See *Buckley v. Valeo*, 424 U.S. 1, 135 (1976) (invalidating

When cabinet level officers make decisions, for example, political accountability is assured by the political forces operating on the President in connection with high level appointments, and by the constitutional requirement of Senate confirmation. Accountability is less evident when lower level officials make decisions, but it is presumably ensured to some degree by appointment procedures set forth in the civil service laws and by various conduct restrictions.

If, however, the agency delegates *its* authority to a group of private citizens, this raises further delegation problems. One such problem is whether the power to delegate is within the agency's mandated authority. Another problem is that the private delegates are even less accountable politically than the agency officials.<sup>177</sup>

While it is appropriate to think about delegation issues associated with negotiated rulemaking,<sup>178</sup> it is important not to exaggerate the magnitude of the problem. Negotiated rulemaking does not violate the delegation doctrine for a number of reasons.

First, under all current conceptions of negotiated rulemaking, including ACUS Recommendations 82-4 and 85-5, negotiators play only an advisory role to the agency; the agency retains the final decision-making authority.<sup>179</sup> Such an advisory role has been approved by the courts in a variety of circumstances.<sup>180</sup> Delegation is obviously per-

---

the regulatory scheme depriving the President of power to appoint agency members, vesting it instead in legislative branch officers).

177. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating a statute delegating wage-and-hour standard setting to representatives of coal producers and coal miners); *Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F.2d 831, 843-44 (5th Cir. 1978) (courts should not defer to opinions of private consultants hired by government as much as to agency personnel). See generally Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937); Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650 (1975).

178. See, e.g., Harter, *supra* note 29, at 107-09; *Rethinking Regulation*, *supra* note 165, at 1880-83.

179. Harter, *supra* note 29, at 109 (acknowledging the need to grant final approval power to the agency in a regulatory negotiation scheme); *Rethinking Regulation*, *supra* note 165, at 1882-83 (noting judicial willingness to uphold delegation where the agency retains final approval power).

In all of the negotiated rulemaking efforts reviewed in this article, agencies unequivocally reserved final decision-making authority. See 50 Fed. Reg. 29,306 (1985) (involving FAA); 49 Fed. Reg. 17,576 (1984) (involving EPA nonconformance penalties); *id.* at 31,145 (involving EPA pesticide exemptions).

180. See *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 397-400 (1940) (approving, against delegation challenge, a statute permitting coal producers to propose minimum prices and other sales conditions to the public commission that could approve, disapprove, or modify them); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 697-700 (3rd Cir. 1979) (approving self-regulation in securities markets), *cert. denied*, 444 U.S. 1074 (1980); *Ass'n of Am. Physicians & Surgeons v. Weinberger*, 395 F. Supp. 125,



missible when private parties to an agency proceeding get together and compromise their differences.<sup>181</sup>

Second, the nature of negotiated rulemaking, as pursued under the ACUS recommendations, ensures adequate representation of affected groups. It provides a standard of political accountability, which is probably greater than when the agency makes rules unilaterally. Thus, negotiated rulemaking escapes the problem of unaccountable decision-making which the delegation doctrine is intended to avoid.<sup>182</sup> If the affected parties have been represented fairly in the negotiation process, political accountability exists, and there is no need to be wary of delegation because the potential harm has been avoided *ab initio*.

The delegation doctrine overlaps other requirements imposed on agency decision-making by the APA and substantive statutes.<sup>183</sup> Most delegation problems are avoided when rules are subject to judicial review under APA standards.<sup>184</sup> If the rule forged from negotiated rulemaking passes judicial scrutiny under the arbitrary and capricious, within-statutory-authority, and in-accord-with-statutory procedures standards, it perforce passes the delegation doctrine.

### C. Prohibition of *Ultra Vires* Agency Action

Inherent in the modern delegation doctrine is the idea that agencies must act within the limits of the authority delegated to them. Consequently, delegated authority must be accompanied by ascertainable standards susceptible to judicial review.<sup>185</sup> Accordingly, an essential aspect of judicial review of agency decision-making entails inquiring into whether the agency acted within statutory authority or, conversely, whether it acted *ultra vires*.<sup>186</sup>

The use of any particular procedure to aid agencies in decision-making cannot expand the authority delegated to an agency by Congress. Therefore, an essential part of judicial review of agency decisions must involve determining whether the decision is consistent

---

140 (N.D. Ill. 1975) (the private establishment of standards to govern health care was not an invalid delegation because agency provides hearing on standards). See generally *Rethinking Regulation*, *supra* note 165, at 1882 n.63 (citing other cases approving delegation to private organizations).

181. See Section V of this article *supra* regarding the cotton dust negotiation.

182. Harter, *supra* note 29, at 109; *Rethinking Regulation*, *supra* note 165, at 1883.

183. These requirements are considered in Section VI, subsection C and G of this article *infra*.

184. Stewart, *supra* note 17, at 1674-76.

185. *Industrial Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 686 (1980) (reviewing delegation doctrine) (Rehnquist, J., concurring).

186. See Section of Administrative Law, American Bar Association, *A Restatement of Scope-of-Review Doctrine*, 38 ADMIN. L. REV. 235, 246 (1986) [hereinafter *ABA Restatement*].

with the agency's statutory authority.<sup>187</sup>

*D. Conflict Between Goals of Informality and Judicial Reviewability*

Negotiated rulemaking is partly a reaction to the schizophrenic nature of informal rulemaking under APA. The APA requirements are driven by conflicting goals of informality and judicial reviewability.

As originally conceived, informal rulemaking under the APA was not adjudicatory in character. Kenneth Culp Davis, one of the deans of American administrative law, observed that the "rulemaking procedure described in [section 553 of the APA] is one of the greatest inventions of modern government. It can be, when the agency so desires, a virtual duplicate of legislative committee procedure . . . ." <sup>188</sup>

The participation norm, and all of the administrative law doctrines reviewed here militate against negotiation of a final rule without some opportunity for public comment.<sup>189</sup> Using negotiations to prepare a proposed rule, and then allowing notice-and-comment rulemaking (as occurred in all three of the successfully negotiated rulemaking experiments)<sup>190</sup> is a sound approach with few apparent disadvantages. Moreover, such publication and comment mitigates the effect of nonparticipants' complaints that they were denied a fair opportunity to influence the content of the rule.<sup>191</sup>

Negotiations can be useful at several stages of rulemaking proceedings.<sup>192</sup> For example, negotiating the terms of a final rule can be useful even after publication of proposed rule. Usually, however, negotiations should be used to help develop a notice of proposed rulemaking, with negotiations to be resumed after comments on the notice are received, as contemplated by paragraphs thirteen and fourteen of Recommendation 82-4. The Harter model and all of the completed negotiated rulemaking efforts envision negotiations over the

---

187. 5 U.S.C. § 706(2)(C) (1982).

188. K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 6.03, at 142-43 (3d ed. 1972). Davis admitted, however, that adjudicatory procedure might be "indispensable" when "facts about parties are in dispute." *Id.* at 143.

189. Paragraph 13 of ACUS Recommendation 82-4, 1 C.F.R. § 305.82.4 ¶ 13 (1986) provides for the publication of a negotiated rule for comment.

190. See *Evaluation of Recommendations*, *supra* note 5, at 1671-72, 1679, 1681-82.

191. See *id.* at 1673-74 (the FAA response to such complaints).

192. This summarizes paragraph 3 of ACUS Recommendation 85-5, 1 C.F.R. § 305.85-5 ¶ 3 (1986).

content of an NPRM before it is issued. This is actually the best time for negotiations to occur.

However, negotiations can also begin after an NPRM is published.<sup>193</sup> In post-NPRM negotiations, the NPRM can sharpen the issues to be dealt with by the negotiators, and can make certain options more concrete and less theoretical.<sup>194</sup> When negotiations begin after a record is developed on an NPRM, through hearings or otherwise, the agency can sit down with participants to decide what conclusions should be drawn from this record.<sup>195</sup> In other words, the negotiation would comprise a series of informal meetings with parties to the hybrid rulemaking hearings. The relevant statutes do not preclude this procedure. The FACA open meeting requirements might be handled under the litigation exception,<sup>196</sup> and representation problems may have been already resolved in connection with the rulemaking hearings.<sup>197</sup>

The federal courts, however, have been concerned with more than just the participation of affected interests; they have also insisted on meaningful judicial review of agency decision-making. Increasingly, courts have required that informal rulemaking be more formal. Hybrid rulemaking is prominent among the techniques employed to increase formality.

### *E. Hybrid Rulemaking*

Hybrid rulemaking refers to a set of procedures imposed by Congress or the courts.<sup>198</sup> Under hybrid rulemaking, agencies must develop an evidentiary base for rules under procedures less formal than full trial-type hearings, but more elaborate than section 553 notice-

---

193. Post-NPRM review of comments occurred at FAA and EPA as a continuation of pre-NPRM negotiations, but the point made in the text suggested that negotiations might be commenced after an NPRM is issued, as occurred with the cotton dust controversy.

194. In some respects, the benzene negotiations benefited from such sharpening because of the earlier litigation.

195. Post-NPRM negotiations are more vulnerable to APA ex-parte communication criticisms. See Section VI, subsection F of this article *infra*, but the agency can mitigate these concerns by putting minutes of post-NPRM negotiating sessions in the rulemaking record.

196. See 5 U.S.C. § 552b(c)(10) (1982), applicable to advisory committees by the Federal Advisory Committee Act [hereinafter FACA] section 10 (authorizing the closure of a meeting concerning the determination of a matter on the record after opportunity for a hearing).

197. See *Consumer's Union of the United States v. Dep't. of Health, Educ. & Welfare*, 409 F. Supp. 473 (D.D. 1976), *aff'd*, 551 F.2d 466 (D.C. Cir. 1977); *Food Chemical News, Inc. v. Davis*, 378 F. Supp. 1048 (D.D.C. 1974).

198. See generally Pederson, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975); Williams, "Hybrid Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401 (1975).

and-comment procedures.<sup>199</sup> Examples of statutory requirements for hybrid rulemaking are found in the Occupational Safety and Health Act,<sup>200</sup> and the Magnuson-Moss Act.<sup>201</sup>

Originating with *United States v. Nova Scotia Food Products Corp.*,<sup>202</sup> the idea that informal rulemaking ought to be accomplished "on the record" gained support.<sup>203</sup> In *Mobil Oil Corp. v. FPC*,<sup>204</sup> for example, the court interpreted a statute requiring that a rule be supported by substantial evidence to obligate the agency to use certain elements of adversarial or adjudicative procedures in developing the rule. Other courts have followed similar reasoning.<sup>205</sup>

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,<sup>206</sup> the Supreme Court rejected the idea that courts may require more than the minimum procedures imposed by section 553 of the APA.<sup>207</sup> The *Vermont Yankee* decision has made courts reluctant to require trial-type procedures in notice-and-comment rulemaking,<sup>208</sup> but they continue to require that the "record" in notice-and-comment rulemaking support the agency's decision.<sup>209</sup>

199. See generally ACUS Recommendation 76-3, 1 C.F.R. § 305.76-3 (1983) ("Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking").

200. 29 U.S.C. § 655(b)(3) (1970) (requiring public hearing on written objections to proposed rules).

201. 15 U.S.C. § 57a (1982) (requiring opportunity for rebuttal submissions and cross examination when the Federal Trade Commission [hereinafter FTC] determines that regulations involve disputed issues of material fact).

202. 568 F.2d 240 (2d Cir. 1977).

203. See Pederson, *supra* note 198, at 38.

204. 483 F.2d 1238 (D.C. Cir. 1973).

205. See *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973) (requiring cross examination); *Appalachian Power Co. v. Ruckelshaus*, 477 F.2d 495 (4th Cir. 1973) (requiring cross examination); *Kennecott Copper Corp. v. EPA*, 462 F.2d 846 (D.C. Cir. 1972) (requiring EPA to articulate the basis for a rule in detail).

206. 435 U.S. 519 (1978).

207. See Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823 (1978); Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805 (1978).

208. See *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1169-71 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980) (industry failed to show "compelling circumstances" requiring cross-examination); *United Steel Workers v. Marshall*, 647 F.2d 1189, 1203 n.6, 1227-28 (D.C. Cir. 1980) (denying right to cost-benefit analysis and cross-examination), *cert. denied*, 453 U.S. 913 (1981). ACUS Recommendation 76-3, 1 C.F.R. § 305.76-3 (1983) identifies, for agency consideration, some additions to notice-and-comment procedures that may be warranted in some rulemaking proceedings. As a general rule, it recommends that adversarial procedures should not be superimposed on informal rulemaking.

209. See *Cotter v. Harris*, 642 F.2d 700 (3d Cir. 1981); *Sholly v. NRC*, 651 F.2d 792 (D.C. Cir. 1981) (Judges Tamm, MacKinnon, Robb, and Wilkey dissenting from denial of rehearing en banc), *cert. granted*, 451 U.S. 1016 (1981); *PPG Indus. v. Costle*, 630

Negotiated rulemaking is a way to develop a rule and marshal facts supporting the rule without the expense, delay and rigidity associated with adversarial adjudicatory procedures. After the text of a rule is negotiated, the agency should publish it as an NPRM and articulate its own rationale for the rule adopted.<sup>210</sup> APA review of a negotiated rule can be protected by negotiating what the parties will put in the rulemaking record, and what the agency will say in support of the rule.

In the three cases where negotiators reached full or partial agreement, the agencies published the negotiated rule for comment,<sup>211</sup> clearly indicating changes from the negotiated text. In addition, both the FAA and EPA allowed the negotiators to review comments submitted in response to the Federal Register Notice.<sup>212</sup> Participants were generally satisfied with this approach to agreement implementation.

#### *F. Ex-Parte Communications*

Negotiated rulemaking potentially contravenes a policy against ex-parte communication, derived from the hybrid rulemaking concept.<sup>213</sup> This section explains the ex-parte communication prohibition and concludes that it need not impede negotiated rulemaking.

Notions of fairness and due process preclude ex-parte communication between parties and the decision-maker in an adjudicatory process. Fundamental concepts of adjudicatory decision-making contemplate that decisions be based on the formal record, and that adversaries have the right to know and to counter information included in the decision-making record.<sup>214</sup> Ex-parte communication jeopardizes these principles in two respects: first, the opposing parties do not know the content of the ex-parte conversation so they cannot respond to it; second, the ex-parte communication usually is not made a part of the record, and thus should not influence the decision.

The on-the-record requirements resulting from the hybrid rule-

---

F.2d 462 (6th Cir. 1980). See generally Rodgers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699 (1979).

210. Such an opportunity for comment is required by the APA. 5 U.S.C. § 553 (1982).

211. Paragraph 13 of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 13 (1986), envisions such publication.

212. Paragraph 14 of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 14 (1986), recommends such review.

213. See *Rethinking Regulation*, *supra* note 165, at 1887-89 (suggesting that the ex-parte problem could be avoided in negotiated rulemaking by limiting judicial review to the question of whether the party claiming harm was represented adequately in negotiations).

214. See Friendly, "Some Kind of Hearing", 123 U. PA. L. REV. 1267, 1279-94 (1975) (identifying "right to know opposing evidence," and "right to have the decision based only on the evidence presented" as basic elements of adjudicatory process).

making cases naturally raise questions about the appropriateness of ex-parte communications in informal rulemaking. In *Home Box Office, Inc. v. FCC*,<sup>215</sup> the court articulated stringent limitations on ex-parte contact in conjunction with informal rulemaking:

1. Once an NPRM is issued, agency officials or employees likely to be involved in the decision-making process should "refus[e] to discuss matters relating to the disposition of a [rulemaking proceeding] with any interested private party, or an attorney or agent for any such party prior to the [agency's] decision . . . .
2. If *ex-parte* contacts nonetheless occur . . . written documents or summar[ies] of . . . oral communications must be placed in the rulemaking file established for public review and comment."<sup>216</sup>

The *Home Box Office* restrictions have been applied reluctantly by the courts of appeal,<sup>217</sup> and have been criticized by commentators<sup>218</sup> and by the ACUS<sup>219</sup> as inconsistent with both the realities of agency decision-making and with the concept of informal rulemaking.

Major questions about the propriety of the *Home Box Office* limita-

---

215. 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1978).

216. *Id.* at 57. Another formulation of the concerns raised by ex-parte communication in notice-and-comment rulemaking was articulated in ACUS Recommendation 77-3, 1 C.F.R. § 305.77-3 (1983) ((1) decision-makers may be influenced by communications made privately, thus creating a situation seemingly at odds with the widespread demand for open government; (2) significant information may be unavailable to reviewing courts; and (3) interested persons may be unable to reply effectively to information, proposals or arguments presented in an ex-parte communication).

217. Compare *Iowa State Commerce Comm'n. v. Office of Fed. Inspector*, 730 F.2d 1566, 1576 (D.C. Cir. 1984) (rate determinations for Alaska pipeline not invalid because ex-parte contacts occurred) and *Katharine Gibbs School v. FTC*, 612 F.2d 658 (2d Cir. 1979) (complaints about contacts between decision-maker and agency staff advocates should be addressed to Congress) and *Hercules, Inc. v. EPA*, 598 F.2d 91 (D.C. Cir. 1978) (contacts between decision-maker and agency staff advocates for assistance in reviewing record reluctantly approved because of volume of record) and *Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977) (rejecting challenge to ex-parte discussions leading to acceptance of industry self-regulation in lieu of Commission's regulation of children's programming) with *United States Lines v. Fed. Maritime Comm'n*, 584 F.2d 519 (D.C. Cir. 1978) (overturning approval of industry agreement because of reliance on material outside record).

218. See Gellhorn and Robinson, *Rulemaking "Due Process": An Inconclusive Dialogue*, 48 U. CHI. L. REV. 201 (1981); Nathanson, *Report to the Select Committee on Ex-Parte Communications in Informal Rulemaking Proceedings*, 30 ADMIN. L. REV. 377 (1978); Preston, *A Right of Rebuttal in Informal Rulemaking: May Courts Impose Procedures to Ensure Rebuttal of Ex-Parte Communications and Information Derived from Agency Files After Vermont Yankee?*, 32 ADMIN. L. REV. 621 (1980); Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 228-30 (1978) (cutting off the flow of informal information would frustrate effective decision-making); Note, *Ex-Parte Communications During Informal Rulemaking*, 14 COLUM. J.L. & SOC. PROBS. 269 (1979); Note, *Due Process and Ex-Parte Contacts in Informal Rulemaking*, 89 YALE L.J. 94 (1979).

219. Recommendation 77-3 of the ACUS, 1 C.F.R. § 305.77-3 (1983) (general prohibition on ex-parte contact in informal rulemaking would be unwise).

tions were raised by the District of Columbia Circuit in *Sierra Club v. Costle*.<sup>220</sup> *Sierra Club* involved ex-parte contacts between the EPA and coal industry representatives, members of Congress, and the White House staff after the end of the comment period on a proposed limitation on sulfur dioxide emissions. The court declined to invalidate the rule because of the contacts:

Where agency action resembles judicial action, where it involves formal rulemaking, adjudication, or quasi-adjudication among "conflicting private claims to a valuable privilege," the insulation of the decision-maker from ex-parte contacts is justified by basic notions of due process to the parties involved. But where agency action involves informal rulemaking of a policymaking sort, the concept of ex-parte contacts is of more questionable utility.

....

Later decisions of this court . . . have declined to apply *Home Box Office* to informal rulemaking of the general policy making sort involved here, and there is no precedent for applying it to the procedures found in the Clean Air Act Amendments of 1977.<sup>221</sup>

Other cases have permitted agency ex-parte contact during the development of NPRM's.<sup>222</sup> Courts have also permitted agencies to use outside assistance during the deliberative phases of rulemaking after the record is closed. In *United Steelworkers of America v. Marshall*,<sup>223</sup> the union challenged OSHA's reliance on outside consultants analyzing the rulemaking record and helping to prepare the preamble to the final rule. The consultants participated in the rulemaking proceeding and submitted material for the record. As part of their deliberative assistance, the consultants prepared additional reports which were submitted to OSHA but not incorporated into the record. The District of Columbia Circuit rejected the union's argument that these were impermissible ex-parte communications.<sup>224</sup>

It is reasonably safe to offer the following conclusions about ex-parte contact in the context of negotiated rulemaking:<sup>225</sup>

1. The rule ultimately adopted by the agency must be supported by factual information contained in the official record. There is no reason that the negotiators cannot discuss and even agree upon factual information to be put in the record.
2. Persons with an interest in the content of the rule must be afforded an opportunity to know the factual basis for the rule and to challenge facts submitted by opponents in an appropriate adversarial context. This may be pro-

---

220. 657 F.2d 298 (D.C. Cir. 1981).

221. *Id.* at 400, 402.

222. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1978) (implying that ex-parte contact is limited only *after* NPRM is published); *Iowa State Commerce Comm'n v. Office of Fed. Inspector*, 730 F.2d 1566, 1576 (D.C. Cir. 1984).

223. 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

224. *Id.* at 1220 (quoting *Lead Indus. Ass'n v. OSHA*, 610 F.2d 70 (2d Cir. 1979)) (finding consultant reports to be within Exemption 5 of the Freedom of Information Act).

225. For a slightly different proposal, see *Rethinking Regulation*, *supra* note 165, at 1888-89.

vided by an opportunity to participate in the negotiations or by an opportunity to comment as part of the notice-and-comment process.

3. If the negotiation takes place among appropriately balanced interest representatives, the opportunity for adversarial exploration of policy and factual issues is preserved in the negotiation itself.<sup>226</sup>

4. Consultation between the agency and the negotiation participants after the "record" is closed should be permissible so long as such consultation focuses on policy, rather than new factual, matters.

5. Placing summaries of discussions in the "record" so that non-parties to the discussions can know of their substance and have an opportunity to respond, while not necessary in every case, enhances the likelihood that the *ex-parte* contact will be found permissible by a court.<sup>227</sup>

### G. *Judicial Review Under the Arbitrary and Capricious Standard*

Section 706 of the APA<sup>228</sup> provides that a court may overturn an agency rule if it finds that the agency's action in promulgating the rule was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>229</sup> It is common for substantive statutes authorizing agencies to make rules including similar standards for judicial review, or incorporating the APA standard by reference.<sup>230</sup> Moreover, some commentators have suggested that because Congress cannot delegate authority to act arbitrarily and capriciously, an arbitrary and capricious standard of judicial review would be a constitutional minimum.<sup>231</sup>

The Supreme Court has recently restated what "arbitrary and capricious" means:

Normally, an agency rule would be arbitrary and capricious if the agency has

---

226. See *id.* at 1887-89 (suggesting that the *ex-parte* problem could be avoided in negotiated rulemaking by judicial review limited to the questions of whether the party claiming harm was represented adequately in negotiations).

227. See *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 118 n.9 (2d Cir. 1984) (no violation of agency rules or general principles of administrative law where *ex-parte* contacts are summarized in record of notice and comment rulemaking).

228. 5 U.S.C. § 706 (1982).

229. *Id.* § 706(2)(A). See also *ABA Restatement, supra* note 186, at 235-37.

230. See, e.g., National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1392(b) (1982); Occupational Safety and Health Act, 29 U.S.C. § 655 (1982) (impliedly subjecting rules to APA, while imposing additional requirement that agency determinations in rulemaking must be supported by "substantial evidence in the record taken as a whole").

231. See JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 359, 375 (1965) (presence of discretion should not bar court from considering claim of illegal or arbitrary use of discretion); Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965) (APA section 701(a)(1) excepts lawful exercise of discretion from judicial review; abuses of discretion may be corrected judicially). Cf. BATOR, MISHKIN, SHAPIRO & WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 330-75 (3d ed. 1973) (considering constitutionality of statutory preclusion of judicial review).



[1] relied on factors which Congress has not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>232</sup>

While agencies have considerable latitude in the exercise of their discretion, "an agency must cogently explain why it has exercised its discretion in a given manner."<sup>233</sup> Agency explanation takes on added importance because "an agency's action must be upheld, if at all, on the basis articulated by the agency itself."<sup>234</sup>

Uncertainty about facts may permit agencies to choose a course of action based on policy judgments, but they must explain their decisions "from the facts and probabilities on the record to a policy conclusion."<sup>235</sup> Agencies cannot merely recite the term "substantial uncertainty" as a justification for their actions.<sup>236</sup>

The Supreme Court's *Vermont Yankee* decision<sup>237</sup> does not dilute the arbitrary and capricious standard; *Vermont Yankee* merely requires courts to scrutinize the record support for an agency rule under the arbitrary and capricious standard instead of imposing particular procedures. Negotiated rulemaking, as a procedural innovation, is entirely consistent with the spirit of *Vermont Yankee*, but the rule resulting from negotiations must nevertheless pass muster under the arbitrary and capricious standard of judicial review.

Consequently, a rule promulgated solely because it is agreed upon in negotiations among affected parties might be vulnerable to attack as being arbitrary and capricious,<sup>238</sup> unless the agency offers its own rationale and support for the content of the rule.<sup>239</sup> Part of this rationale can be the fact that affected interests reached agreement in negotiations. Because rationality requires a nexus between the rule

---

232. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The *Motor Vehicle Manufacturers* case broke new ground applying the arbitrary and capricious standard to rescind a rule, but it did nothing new or controversial with respect to the meaning of the standard itself.

233. *Id.* at 48.

234. *Id.* at 50. See also *Industrial Union Dep't. v. Am. Petroleum Inst.*, 448 U.S. 607, 631 n.31 (1980).

235. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 52.

236. *Id.*

237. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

238. See Stewart, *supra* note 17, at 1799-1800 (no logical reason exists to preserve current concepts of judicial review if rulemaking is a political process with adequate representation of affected interests, but courts are still unlikely to change their approach); Wald, *supra* note 167, at 1 (expressing wariness of requiring courts to consider adequacy of representation and opining that judicial review of negotiated rules will not change much); *Rethinking Regulation*, *supra* note 165, at 1885-87 (suggesting that the use of negotiation ought to relax judicial review standards).

239. The FAA justification for the negotiated flight-and-duty-time rule and EPA's justification for the nonconformance penalty [hereinafter NCP] rule are good examples.

and its factual support,<sup>240</sup> the agency rationale also needs to demonstrate factual support in a "record" developed in the rulemaking proceeding. While a detailed record of the negotiations could chill negotiation, there is no reason why negotiators should not discuss what should be disclosed in the record to support their consensus proposal, and what the agency should say in its rationale.

Even if the agency's articulated rationale is flawed,<sup>241</sup> it is appropriate for a reviewing court to consider whether the negotiating procedure sufficiently guaranteed that the agency considered all the relevant factors.<sup>242</sup> If the rule reflects a consensus of the affected parties, this goes a long way toward meeting the goals of *Citizens to Preserve Overton Park, Inc. v. Volpe*<sup>243</sup> and ensures that the rule is neither arbitrary nor capricious.<sup>244</sup>

If the negotiated rulemaking procedure supports an agency decision that would otherwise be vulnerable to attack under the arbitrary and capricious standard, the reviewing court must assure itself that the negotiation procedure adequately ensured the participation of all affected interests. Review of the procedure would include the following:

1. Reviewing the notice of intent to establish a rule negotiation to ensure that it adequately informed the public what issues would be considered so that all interests ultimately affected could know that their interests would be involved in the negotiation.<sup>245</sup>
2. Reviewing the merits of the consensus developed in the negotiations only if the challenger can demonstrate that its interests were not adequately represented in the negotiation and that it made a reasonable effort to participate in response to the original notice of negotiation.<sup>246</sup>
3. Reviewing the rule itself to determine if it is within the agency's authority,<sup>247</sup> and if it reflects all the factors required by statute to be considered.<sup>248</sup>

---

240. Statutory requirements for support in the record for a rule contained in substantive statutes, reinforce the need to give attention to the record support for a negotiated rule.

241. The agency's contemporaneous rationale must support the rule. See *ABA Restatement*, *supra* note 186, at 265. The agency's reasoning must also be logical. *Id.* at 255, 259.

242. Consideration of all relevant factors is one requirement of the arbitrary and capricious standard. See *id.* at 250-51.

243. 401 U.S. 402 (1971).

244. Harter, *supra* note 29, at 106-07 (discussing judicial review).

245. *Id.*

246. *Id.*

247. Use of negotiated rulemaking obviously cannot expand an agency's authority beyond what was delegated to it by the Congress. See *ABA Restatement*, *supra* note 186, at 268 (independent judgment by the court would be appropriate to determine whether agency adhered to limits and conditions of delegation, whereas more lenient standards of judicial review would be appropriate for other questions).

248. See *id.* at 250-51. Determining that the agency has complied with congressio-

In this part of the review it is appropriate to permit agency action within a wide ambit of reasonableness,<sup>249</sup> since an adequate negotiation process ensures that the agency has taken a "hard look" at relevant factors and considered alternatives.<sup>250</sup>

The same things that negotiators and sponsoring agencies should do to avoid delegation and ex-parte communication problems will also reduce the likelihood of a court declaring a negotiated rule to be arbitrary and capricious.

#### *H. Federal Advisory Committee Act Problems*

FACA<sup>251</sup> presents a serious threat to the effectiveness of negotiated rulemaking. A strict interpretation of the Act requires that regulatory negotiation sessions be open to the public. Such an interpretation, if applied by agencies or insisted upon by the courts, could inhibit interested parties from candidly exploring compromises.<sup>252</sup> Furthermore, requirements for a charter, General Services Administration (GSA) approval, advance notice of meetings, or for minutes slow the negotiation process down.

Open meetings discourage individual participants from making concessions. If representatives fear constituency reaction to tentative concessions, they will make concessions grudgingly. Such reluctance to move from initial postures hampers fruitful negotiations.<sup>253</sup>

The effect of FACA concerned everyone in the completed negotiations. Compliance with the open meeting requirement, however, created few problems in the FAA or EPA negotiations. Agencies, including OSHA, generally followed the spirit of Paragraph twelve of ACUS Recommendation 82-4, closing sessions only as necessary to protect confidential data, or to protect the deliberative process. Some participants and agency personnel believed the open meetings permitted challenges to the negotiating process to be deflected more successfully than if the meetings had been closed. In the benzene negotiations, efforts to avoid FACA requirements distorted the negotia-

---

nally mandated criteria is closely related to determining that the agency has not exceeded its authority. *Id.* at 251. The congressional mandate is not subject to change by the particular process used by the agency.

249. *See id.* at 253-56 (cautioning that judicial review should allow the agency broad discretion, once the court has determined that there has been compliance with statutory mandate).

250. The "hard look" approach is one application of the arbitrary and capricious standard, forcing careful agency examination of alternatives and a complete rationale in support of those alternatives selected. *See id.* at 259 (characterizing "hard look" line of cases).

251. 5 U.S.C. app. §§ 1-15 (1982).

252. The FACA problem is evaluated in considerably more detail in *Evaluation of Recommendations*, *supra* note 5, at 1703-07.

253. These concerns led ACUS to recommend congressional action to relax FACA requirements for negotiated rulemaking. *See* paragraph 2, ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 2 (1986).

tion process, primarily by foreclosing active agency participation.<sup>254</sup>

There are two reasons for the difference between expectations and experience. The first reason is that more sensitive exploration of concessions almost always takes place away from the formal negotiating table and outside formal meetings of the negotiating group. Therefore, the potential for harm from public scrutiny was obviated where the threat was greatest.

The second reason is that no one from the press or the nonparticipant public made much of an issue of caucuses or subgroup meetings being closed, nor did the negotiations result in much publicity. If regulatory negotiation becomes more commonplace and is utilized in highly controversial issues, press or public interest representatives will probably become more aggressive in reporting on negotiations and in insisting that FACA be observed rigorously. Such a trend could result in greater FACA impediments to the negotiations process. On the other hand, practical ways of conducting business away from public meetings will almost certainly continue to be found.

### *I. Class Action Settlement Negotiation*

A parallel framework for rulemaking negotiation exists relatively independently of the APA. When a class action lawsuit against an administrative agency decision is filed, the Federal Rules of Civil Procedure help accomplish the goals of negotiated rulemaking. The Federal Rules of Civil Procedure encourage judges to promote negotiation and settlement of disputes.<sup>255</sup> Circuit Judge Patricia M. Wald noted<sup>256</sup> that there is ample authority in the Federal Rules of Civil Procedure for judges to expand their role in encouraging settlements in appropriate cases.<sup>257</sup> District judges are more likely than circuit judges to play this role.<sup>258</sup>

---

254. See *Evaluation of Recommendations*, *supra* note 5, at 1660, 1664-66.

255. FED. R. CIV. P. 16. Subsection (a) of this rule states:

In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of the action; (2) establishing early and continuing control so that the case will not be protracted because of lack of management; (3) discouraging wasteful pre-trial activities; (4) improving the quality of the trial through more thorough preparation, and; (5) facilitating the settlement of the case.

The advisory committee notes to Federal Rule 16 encourage active judicial pretrial management. *Id.*

256. Wald, *supra* note 167, at 1.

257. *Id.*

258. Judge Wald states:

There are, however, several reasons why negotiations within the class action framework are much less satisfactory than negotiated rulemaking under the ACUS recommendations. The class action approach, for instance, requires that a lawsuit be filed, and that the plaintiffs or intervenors in the lawsuit represent a sufficiently broad range of interests for a negotiated settlement to be fair and successful. Moreover, while recent amendments to Rule sixteen of the Federal Rules of Civil Procedure permit federal judges to consider negotiations within a class action framework, there is no guarantee that a particular judge would be sympathetic to the process.

For rule negotiation in a class action to be fair, it is necessary that all interested parties be formal "parties" to the lawsuit.<sup>259</sup> In some instances, such as *Costle*,<sup>260</sup> interested groups who were not initially party to the action will intervene.<sup>261</sup> In other instances, when the parties do not intervene, the district court could take an active role in bringing all interested parties together. To accomplish this, the court could use Federal Rules nineteen and twenty-three. Federal Rule nineteen provides that parties who have such an interest in the litigation must be joined in the action. Specifically, the rule states that a party shall be joined in the action if relief cannot be granted in his absence or if he claims an interest in the action and is so situated that the disposition of the action may as a practical matter impair his ability to protect that interest.<sup>262</sup> *Costle* acknowledges that when a set-

---

[T]he district courts have at their disposal both proven and unexplored techniques for promoting negotiation and settlement. The appellate courts, by contrast, have far fewer tools. Direct appeals from EPA orders and rules are, of course, most often brought in the circuit court of appeal, not the district courts. But very few courts of appeal, including my own, admit to any responsibility for promoting settlement.

*Id.* at 15.

The pre-argument conference procedure utilized by the Second Circuit Court of Appeals may be an exception. The author of this article has participated in several such conferences and knows that the encouragement to negotiate a settlement of the appeal can be impressive.

259. One of the problems in negotiating a rule is the possibility that an interested party will simply boycott the negotiations and later obtain judicial review of the decision. Mr. Harter suggests a novel solution to this problem: require a less stringent standard of review for negotiated rules. Harter, *supra* note 29, at 102-03.

260. See *supra* notes 31-38 and accompanying text.

261. A party's right to intervene in an action is governed by FED. R. CIV. P. 24.

262. Subsection (a) of Federal Rule 19 provides:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses

tlement involves a rule, those persons who would be affected by this rule are entitled to a notice-and-comment hearing.<sup>263</sup> It follows that these parties could also be joined in the negotiations through Federal Rule nineteen by the district court.<sup>264</sup>

### *J. Representation Issues*

The APA does not address representation problems that may arise in selecting participants for negotiated rulemaking. Of course, there are models that could be borrowed from the Labor Management Relations Act,<sup>265</sup> the Railway Labor Act,<sup>266</sup> or from the class certification procedures under the Federal Rules of Civil Procedure.<sup>267</sup> These models suggest the issues which should be addressed when large numbers of persons or entities are to be represented in negotiations: 1) whether the representative shall be the exclusive representative of the constituency; 2) if representation is to be exclusive, how the unit to be represented shall be defined; 3) how frequently the unit can be redefined and an election held for a new representative; and 4) what duties the representative has in representing its constituents fairly.

Despite the intellectual utility of the labor law or class action models, important differences exist between representation problems in negotiated rulemaking and in collective bargaining or class action liti-

---

to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

*Id.* 19(a).

263. *Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229, 1255 (D.C. Cir. 1980).

264. In *Costle*, the court held that the settlement between the EPA and NRDC did not involve a rule but merely established preliminary investigations as a first step toward determining whether to promulgate a rule. Because this was not a rule, the court denied the motion to vacate the settlement agreement.

While the companies may not have been entitled to a notice-and-comment hearing because this was not strict rulemaking, they probably had a sufficient interest in the negotiations to be properly joined by the district court. Specifically, the court could have found that their absence would, as a practical matter, impair their ability to protect their interests since rules may issue from these investigatory procedures which the EPA and NRDC established. Alternatively, if the proposed modification did relate to a rule, then the companies' presence in negotiations under the district court's supervision would be adequate.

265. See 29 U.S.C. § 159 (1984) (providing for elections to select exclusive representation for an appropriate unit of employees).

266. See 45 U.S.C. § 152 (1984) (providing for elections to select exclusive representation for employees in a particular class or craft).

267. FED. R. CIV. P. 23.

gation. First, interests affected by agency rules often already have some representation arrangements through trade associations, trade unions, or public interest groups. These arrangements are determined by the constitutions or bylaws of the private association, by powers of attorney given in specific cases, or by tradition. In the majority of negotiated rulemaking proceedings these arrangements can be expected to work well, and there is no need to superimpose another process to designate representatives.

Second, many rule negotiations do not envision long-term relations among the parties like collective bargaining.<sup>268</sup> In this respect, the similarity is greater between negotiated rulemaking and class action litigation than between negotiated rulemaking and collective bargaining.

Third, erecting a formal statutory mechanism to select representatives for rule negotiations could cause more harm than good by creating additional opportunities and incentives to litigate compliance with the representation procedures.

Recognizing that representation should be addressed in the context of specific negotiations, ACUS simply recommended that agencies be mindful of representation issues, and be creative in finding ways to solve anticipated representation problems.<sup>269</sup> Agencies might, of course, wish to use the labor law or class action procedures as rough models to define options for approaching negotiated rulemaking representation disputes, possibly even holding "elections" through the notice-and-comment procedure.

The representation issues discussed in the preceding paragraphs are vertical, involving relations between representative and constituents. Horizontal relationships, between representative and representative, should also influence the designation of representatives for rule negotiation. ACUS Recommendation 305.82-4 identified two characteristics of the relationship among representatives that would increase the likelihood of a negotiated agreement: countervailing power<sup>270</sup> and a limited number of parties.<sup>271</sup> Negotiation can be effective only if no one party has sufficient power to overwhelm the others.<sup>272</sup> Increased power on one side does, however, strengthen in-

---

268. To a certain extent, however, the same interest group representatives deal with one another repeatedly in rulemaking proceedings before the same agency.

269. See ACUS, 1 C.F.R. § 305.85-5 ¶ 7 (1986).

270. *Id.* § 305.25-4 ¶ 4. This corresponds to paragraph 4(e) of ACUS Recommendation 82-4, *id.* § 305.82-4 ¶ 4(e).

271. *Id.* § 305.25-4 ¶ 5. This corresponds to paragraph 4(c) of ACUS Recommendation 82-4, *id.* § 305.82-4 ¶ 4(c).

272. For example, negotiation would not effectively resolve a conflict between a power company which seeks to build a dam, town residents which support the power company, and a small group of environmentalists which oppose the dam. The environmentalists would bring little power to the table. If the dispute resolution was carried

centives for opposing sides to seek a negotiated solution. Each party must have the power to affect the decisional outcome through either the capacity to influence the legislature, the ability to run an effective public relations campaign, substantial litigation resources, or some other way of obtaining a favorable outcome or inflicting costs on opponents.

There was little controversy over who should participate in the negotiations in the completed rule negotiations. In all of the initiatives except the one involving benzene, the agencies published lists of proposed participants, permitting excluded interests to make a showing as to why they should be included in the negotiating group.<sup>273</sup> Agencies experienced no difficulties with this approach to representation and inclusion/exclusion issues. One could infer, however, that the benzene negotiations would have proved less difficult if some nonparticipating labor unions could have been more involved instead of objecting to various aspects from the sidelines.<sup>274</sup> In other words, the representation problem in the benzene negotiation was not the exclusion of interests wishing to participate, but rather a more subtle one of failing to identify and include everyone who had the incentive and the power to block a negotiated resolution. The process of identifying participants in the FAA negotiation focused on potential intra-constituency disagreements within the major airline industry association, creating an incentive for the association to address such disagreements.

Some participants in EPA negotiations, particularly environmental groups, may have found negotiation processes more attractive than the participants in the OSHA or FAA negotiations because they believed they wielded relatively little influence over the agency notice-and-comment or hybrid rulemaking. The negotiation process enhanced their perceived influence with the agency. Conversely, organized labor has long enjoyed substantial informal influence with Labor Department agencies. Therefore, negotiations threaten to weaken Labor's relative power advantage. The airlines and pilot organizations have comparable power to affect FAA policy, but each side perceived its opponent as having substantially equal power.

---

out in a courtroom or a congressional committee, on the other hand, the environmentalists would have the advantage of procedural safeguards. The presence of these safeguards would ensure the protection of their interests—provided they have sufficient funds or political clout and sophistication.

273. This approach is recommended by paragraph 7 of ACUS Recommendation, 1 C.F.R. § 305.82-4 ¶ 7 (1986).

274. *Evaluation of Recommendations*, *supra* note 5, at 1654-64.



The decision to include a particular party is made according to the same criterion which determines whose consent to the negotiating result is vital. Thus, if X, by litigating or inducing OMB or the Congress to intervene, is unlikely to be able to affect the result, there is no need to include X in the negotiations. Nor is it important whether X, having been included, agrees with the negotiation result. On the other hand, if X is likely to be able to affect the result significantly, there are stronger incentives to include X and to ensure that X agrees with the result of the negotiation.

Representation should be addressed through an initial Federal Register notice, providing an opportunity for additional parties to request participation. The approach followed by the FAA and EPA worked well, and has been adopted in subsequent rule negotiations.<sup>275</sup> The agency sponsoring negotiated rulemaking should publish an initial list of participating interests and representatives, allowing comment and requests for additional participation.

## VII. STATE PROCESS

### A. *Often Ignored*

A final comment is appropriate on the use of negotiated rulemaking at the state level. Most states have far fewer resources for the administrative process than the federal government. Accordingly, administrative litigation before state agencies is not as complex as it is before federal agencies. Indeed, a measure of informal negotiation between affected interests is a regular feature of the state process. Additionally, a number of states have adopted procedures to permit legislative veto or advice on specific rules proposed by agencies. Legislative participation in the rulemaking process facilitates negotiation among affected interests.

### B. *Model State APA*

The Model State Administrative Procedure Act<sup>276</sup> recognizes the appropriateness of administrative ADR. Its rulemaking provisions explicitly provide for informal consultation before publication or notice of proposed rulemaking<sup>277</sup> and for appointment of committees to comment before publication of a notice of proposed rulemaking.<sup>278</sup>

---

275. See 50 Fed. Reg. 42,789 (1985) (involving MDA); 51 Fed. Reg. 5,205 (1985) (involving FTC).

276. MODEL STATE ADMINISTRATIVE PROCEDURE ACT (Uniform Law Commissioners 1981) *reprinted in* 14 UNIFORM LAWS ANNOTATED 357 (master ed. 1980 & Supp. 1987) [hereinafter MODEL ACT]. The National Conference of Commissioners on Uniform State Laws adopted the first model state administrative procedure act in 1946. Approximately half the states have adopted parts of the model act. *Id.* at 359.

277. *Id.* § 3-101(a).

278. *Id.* § 3-101(b).

The Act also allows more flexibility for adjudicatory procedure than the federal APA's single formal adjudication procedure.<sup>279</sup> It explicitly contemplates four types of adjudicatory proceedings: formal adjudicative hearings,<sup>280</sup> including a provision for a pre-hearing conference at which settlement could be discussed,<sup>281</sup> conference adjudicative hearings,<sup>282</sup> emergency adjudicative proceedings,<sup>283</sup> and summary adjudicative proceedings.<sup>284</sup>

A conference adjudicative hearing is applied to cases involving monetary amounts less than \$1,000, prisoner disciplinary proceedings not involving expulsion or discharge, and license disciplinary actions not involving revocation.<sup>285</sup> The procedure eliminates discovery and only permits the parties to present evidence.<sup>286</sup>

A summary procedure is applicable only when a rule has been adopted by the agency,<sup>287</sup> and when the judgments involve only reprimands or monetary amounts less than \$100.<sup>288</sup> The procedure requires notice to the party of the action contemplated and permits the party to comment on the proposed action.<sup>289</sup>

The Model State Administrative Procedure Act does not address arbitration, and state case law raises questions about the consistency of arbitral resolution of public law disputes with the nondelegation doctrine.<sup>290</sup>

### *C. New Jersey, Tennessee, and Minnesota Experiences*

At the American Bar Association annual meeting in New York, in August, 1986, the Dispute Resolution Committee of the Section on Administrative Law presented a program on negotiated rulemaking as an alternative dispute resolution technique. The author was the

---

279. Compare *id.* §§ 4-101 to 4-221 with 5 U.S.C. §§ 554, 556-557 (1982).

280. MODEL ACT, *supra* note 276, at §§ 4-201 to 4-221.

281. *Id.* § 4-204 comment.

282. *Id.* §§ 4-401 to 4-403.

283. *Id.* § 4-501.

284. *Id.* § 4-502.

285. *Id.* § 4-401(2).

286. *Id.* § 4-402.

287. In other words, the agency may not use the summary procedure to make policy. Cf. *NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267 (1974) (approving the National Labor Relations Board [hereinafter NLRB] making rules in individual case adjudication).

288. MODEL ACT, *supra* note 276, at § 4-502(3).

289. *Id.* § 4-503.

290. *Id.*

program organizer and moderator.<sup>291</sup> The panel reviewed the federal agency initiatives with negotiation of rules analyzed in this article, and considered their use at the state level. Experience with negotiated rulemaking as a separately defined decision-making process has been limited at the state level. It is common, however, for state agencies to meet informally with affected groups to develop rules. Such informal interaction occurs more often through bilateral contact between the agency and a single representative in preparing a proposal than with all parties simultaneously. Some states, notably New Jersey, send a pre-proposal notice to affected interests. In Minnesota, agencies have an incentive to come to agreement on proposed rules with affected interests to avoid the necessity of a formal hearing which would be held by the independent office of administrative law judges. This office charges an hourly fee to the agency for Administrative Law Judge (ALJ) services, and the ALJ has veto power over the agency's proposed rule.

The participants agreed that the further use of negotiated rulemaking at the state level depends upon all parties (including the agency) having a clear incentive to negotiate a consensus rather than following the usual formal process.<sup>292</sup>

#### VIII. ADMINISTRATIVE ADJUDICATION

The search for alternative ADR techniques has not been limited to techniques for resolving interest disputes. A substantial portion of administrative agency resources are devoted to adjudicating disputes in individual cases.

Administrative law has always permitted agencies considerable latitude in the procedures to be used in adjudicatory decision-making,<sup>293</sup> and the universe of alternatives has been enriched by the ADR dialogue. In 1986, ACUS adopted Recommendation 86-3,<sup>294</sup> recommending that agencies consider greater use of arbitration, fact finding and mini-trials in lieu of trial-type procedures under the APA. ACUS also made the following recommendations: voluntary arbitra-

---

291. Panel members were Philip J. Harter, Chairman of the Dispute Resolution Committee; Chris Kirtz, Director of Policy for the United States Environmental Protection Agency; Duane Harves, Chief Administrative Law Judge of the state of Minnesota; Steven LeFelt, Deputy Director of the New Jersey Office of Administrative Law; William Penny, Assistant Commissioner and General Counsel of the Tennessee Department of Environment; and Warren Kaplan, law student liaison.

292. The panel also discussed the use of alternative dispute resolution techniques in adjudication (resolution of "contested" cases). Although significant resistance to governmental bodies submitting to arbitration continues to be common, the represented states have been energetic in trying to use settlement conferences and other forms of informal resolution to a greater extent.

293. See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

294. 51 Fed. Reg. 25,641, 25,643 (1986) (proposing greater agency use of arbitration, mediation, fact finding, and mini-trials).

tion of disputes between private parties and the government; statutory provision for mandatory arbitration of disputes (1) not requiring development of precedent in connection of major new policies, (2) application of an ascertainable norm, or (3) involving disputes between private parties; agency provision for mediation, by use of a settlement judge or other neutral agency official to mediate disputes; and agency use of mini-trials.<sup>295</sup>

At least three agencies are actively experimenting with adjudicatory ADR. The EPA has distributed "Draft Guidance on the Use of Alternative Dispute Resolution Techniques in Enforcement Cases,"<sup>296</sup> endorsing the use of ADR in enforcement actions and soliciting program office reaction to proposed criteria for case selection and management of arbitration, mediation, mini-trials and fact finding.<sup>297</sup>

The Secretary of the Navy has endorsed a test program to evaluate the use of mini-trials in Navy contract disputes.<sup>298</sup>

Positive response to Recommendation 86-3 depends on how certain legal issues are resolved. This section focuses on these legal issues.

#### A. *Precedent*

Mr. Harter's Report,<sup>299</sup> supporting Recommendation 86-3, reviewed administrative dispute resolution techniques used by thirty federal agencies.<sup>300</sup> He also identified five existing arbitration programs,<sup>301</sup> and other programs involving agency oversight of private arbitration.

##### 1. FIFRA

The Federal Insecticide, Fungicide and Rodenticide Act<sup>302</sup>(FIFRA) provides for mandatory arbitration to resolve claims involving the

295. *Id.*

296. Memorandum from Thomas L. Adams, Jr., Assistant Administrator for Enforcement and Compliance Monitoring, to Assistant Administrators, Regional Administrators, and Enforcement Policy Work Group (Dec. 2, 1986).

297. *Id.* at 1-2.

298. Memorandum from the Secretary of the Navy to the Chief of Naval Operations, Commandant of the Marine Corps, Assistant Secretaries of the Navy, and General Counsel to the Navy (Dec. 23, 1986).

299. P. Harter, Points on a Continuum: Dispute Resolution Procedures and the Administrative Process (June 5, 1986) (report prepared for consideration by the Administrative Conference of the United States) [hereinafter Points on a Continuum].

300. *Id.* at 118-40.

301. *Id.* at 141-215.

302. 7 U.S.C. § 136 (1982).

use of proprietary data by applicants for pesticide registration.<sup>303</sup> This procedure was upheld against constitutional attack in *Thomas v. Union Carbide Agricultural Products Co.*<sup>304</sup>

## 2. MEPPA

The Multiemployer Pension Plan Amendments Act of 1980<sup>305</sup> (MEPPA) provides for arbitration to resolve disputes concerning the liability of an employer who withdraws from a multiemployer pension plan.<sup>306</sup>

## 3. Commodity Futures Trading Commission Reparations

The Futures Trading Act<sup>307</sup> provides for arbitration to resolve claims by individuals for damages resulting from violations of the Act by commodities traders.<sup>308</sup>

## 4. Superfund

The Comprehensive Environmental Response, Compensation and Liability Act<sup>309</sup> authorizes arbitration procedures to resolve disputes over EPA determinations of claims asserted against the Act's Hazardous Substance Response Trust Fund.<sup>310</sup>

## 5. Merit System

The Civil Service Reform Act of 1978<sup>311</sup> provides for arbitration to resolve certain statutory claims under the civil service laws as well as claims based on collective bargaining agreements.<sup>312</sup> The Merit Systems Protection Board has also established, by regulation, a voluntary arbitration procedure to resolve statutory claims.<sup>313</sup>

## 6. SEC

Standard arbitration clauses in contracts between investors and brokerage houses have produced disagreement among the courts of

---

303. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

304. 473 U.S. 568 (1985).

305. 29 U.S.C. § 1381 (1982).

306. *Id.* § 1401.

307. 7 U.S.C. § 18(b) (1982).

308. *Id.* § 18(b). See 17 C.F.R. §§ 12.1 to .408 (1986) (implementing dispute resolution procedures).

309. 42 U.S.C. §§ 9601-9657 (1982).

310. *Id.* § 9612(b)(3). See 50 Fed. Reg. 51,196 (1985) (EPA regulations implementing arbitration provisions).

311. 5 U.S.C. §§ 1201-1209 (1982).

312. See generally A. Adams & J. Figueroa, *Expediting Settlement of Employee Grievances in the Federal Sector*, REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (1985) (evaluation of arbitration to settle federal employee appeals).

313. 48 Fed. Reg. 11,399 (1983).

appeal on the merits of arbitrating statutory claims.<sup>314</sup> The prevailing judicial opinion, however, is that Congress has the power to authorize arbitration of statutory claims.<sup>315</sup> When the courts have found investors entitled to judicial resolution of securities act or associated civil Racketeer Influenced and Corrupt Organization (RICO)<sup>316</sup> claims, they have based this finding on perceptions of congressional intent.<sup>317</sup> The Supreme Court has said, in evaluating congressional intent, that courts should not proceed from the proposition that arbitration is an inherently inferior forum.<sup>318</sup>

## 7. NRAB

The Railway Labor Act<sup>319</sup> establishes an arbitration panel to resolve employee grievances. In *Andrews v. Louisville & Nashville Railroad*,<sup>320</sup> the Supreme Court held that common law claims by qualified employees for wrongful dismissal were preempted by the statutory arbitration process.<sup>321</sup>

## 8. Medicare Claims

Part B of the Medicare Program authorizes a form of arbitration to resolve disputed benefit claims.<sup>322</sup> The statute empowers the Secretary of Health and Human Services (HHS) to contract with private insurers to administer benefits in particular localities.<sup>323</sup> The private carrier makes an initial determination of benefit entitlement<sup>324</sup> and a

---

314. *Compare* *Page v. Moseley, Hallgarten, Estabrook & Weeden*, 806 F.2d 291, 298 (1st Cir. 1986) (permitting arbitration of section 10(b)-5 of the Securities Exchange Act claims but not of civil Racketeer Influenced and Corrupt Organization [hereinafter RICO] claims) *with* *Shearson/Am. Express, Inc., v. McMahon*, 107 S. Ct. 2332 (1987) (both securities act and RICO disputes arbitrable) *and* *Wolfe v. E.F. Hutton & Co.*, 800 F.2d 1032 (11th Cir. 1986).

315. *See Page*, 806 F.2d at 295 (citing cases from the Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits).

316. 18 U.S.C. § 1964(c) (1982).

317. *See Page*, 806 F.2d at 298-99 (finding that section 10(b)-5 claims are arbitrable but that civil RICO claims are not).

318. *Id.* at 297 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)).

319. 45 U.S.C. § 153 (1982).

320. 406 U.S. 320 (1972).

321. *But see id.* at 330-31 (Douglas, J., dissenting) (questioning constitutionality of requiring that common law claims be arbitrated).

322. Part B of Medicare covers "supplementary" medical costs of aged and disabled persons, such as physicians' services and physical therapy. 42 U.S.C. § 1395j-w (1982).

323. *Id.* § 1395(a).

324. 42 C.F.R. §§ 405.803 to .806 (1986).

"review determination."<sup>325</sup> In cases involving more than \$100, a subsequent oral evidentiary hearing is conducted before another impartial person appointed by the insurance carrier.<sup>326</sup> The resulting decision is final, with no provision for administrative or judicial review if the amount in controversy is less than \$1,000.<sup>327</sup>

In *Schweiker v. McClure*,<sup>328</sup> the Supreme Court considered a due process challenge to this dispute resolution procedure. The district court decided the procedure was a violation of due process because the decision-makers were not sufficiently impartial,<sup>329</sup> and that *Mathews v. Eldridge*<sup>330</sup> required a *de novo* hearing or record conducted by an administrative law judge of the Social Security Administration.<sup>331</sup> The Supreme Court reversed, finding no evidence of bias<sup>332</sup> and little value in imposing additional procedural requirements. The Court was motivated in part by the "strong presumption in favor of the validity of congressional action,"<sup>333</sup> and its holding does not necessarily mean that a decision by a private decision-maker would be valid absent explicit congressional authorization.

## B. Legal Issues

### 1. Constitutional

ADR techniques such as mediation, or fact finding through mini-trials raise a few legal issues because they supplement the regular processes and are effective only to the degree that affected parties consent and reach negotiated agreement. Arbitration, on the other hand, though used more widely than most people realize, raises several difficult issues relating to judicial review and the delegation of governmental decision-making to private parties.<sup>334</sup>

If the nature of the dispute entitles the disputants to an Article III forum, arbitration is not necessarily more vulnerable than administrative adjudication under the APA.<sup>335</sup> For the most part, adminis-

---

325. *Id.* §§ 405.807 to .812.

326. 42 U.S.C. § 1395u(b)(3)(C) (1982); 42 C.F.R. §§ 405.820 to .835 (1986).

327. 42 U.S.C. § 1395ff(b) (1982); 42 C.F.R. § 405.835 (1986). See *McClure v. Harris*, 503 F. Supp. 409, 411-12 (N.D. Cal. 1980) (describing decision-making process), *rev'd sub nom.*, *Schweiker v. McClure*, 456 U.S. 188 (1982).

328. 456 U.S. 188 (1982).

329. *Id.* at 192.

330. 424 U.S. 319, 335 (1976) (articulating a three-factor balancing test for determining what procedures satisfy procedural due process requirements).

331. *Schweiker*, 456 U.S. at 195.

332. *Id.* at 197.

333. *Id.* at 200.

334. See *infra* text accompanying notes 344-53.

335. Compare *Crowell v. Benson*, 285 U.S. 22 (1932) (considering, and largely rejecting, the argument that administrative adjudication of a workers' compensation claim infringed the right to Article III forum) and *Atlas Roofing v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977) (considering and rejecting a

trative adjudication has been validated by the availability of judicial review under the APA standards.<sup>336</sup> Administrative arbitration should be subject to the same standards of review.

It is erroneous to assume that the standards for judicial review of administrative arbitration awards should be the same as those for labor arbitration awards. Statutory arbitration suffers from disadvantages not present with collectively bargained arbitration. Individual claimants, unlike unions, are largely ignorant as to the qualifications and biases of potential arbitrators. Arbitrator selection may thus be more of a problem in administrative arbitration than in labor arbitration. Of course, institutional litigants are likely to develop knowledge about potential arbitrators commensurate with that acquired by unions which litigate on behalf of grievants.

Another problem with arbitration is accountability. When agency officials review initial ALJ decisions subject to judicial review, the appellate process can correct major deviations from rules of decision that accurately reflect statutory and agency policies. If arbitrators are insulated from meaningful substantive review, as in the labor arbitration model, the loss of accountability is potentially greater. This is not a problem in collective bargaining because union and management negotiators can change the basic document that arbitrators are interpreting or make it more definitive. The statutory wrongful discharge actions of an arbitrator's ability to give his own interpretation to a statutory term is troublesome. It is difficult to control the arbitrator's discretion in specific cases without vitiating the advantage of arbitration.<sup>337</sup>

The Supreme Court recently addressed some of these issues. In *Thomas v. Union Carbide Agricultural Products Co.*,<sup>338</sup> the Court rejected a challenge to statutory binding arbitration with only limited judicial review<sup>339</sup> under the data-consideration provisions of FIFRA. The Court worked from the proposition that, "[m]any matters that

---

claim that the seventh amendment precluded administrative adjudication of an alleged OSHA violation) with *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972) (forcing a railroad wrongful dismissal claim into arbitration infringes one's right to Article III forum).

336. See generally section VI of this article, *supra*.

337. See H. PERRITT, *EMPLOYEE DISMISSAL AND PRACTICE* § 3.17, at 146 (2d ed. 1987) (explaining that courts do not require opinions or reasoning from arbitrators as a prerequisite to enforcing their decisions.)

338. 473 U.S. 568 (1985).

339. 7 U.S.C. § 136a(c)(1)(D)(ii) (1982) provided that the findings and determination of the arbitrator shall be final and conclusive, and no officer or court of the United States shall have the power or jurisdiction to review any such findings and determina-



involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts."<sup>340</sup> It concluded that shifting the task of evaluating data from agency personnel to civilian arbitrators does not diminish the likelihood of impartial decision-making.<sup>341</sup> The Court suggested that judicial review of the kind traditionally afforded administrative decisions might be available if arbitration awards were to be the basis for judicial enforcement,<sup>342</sup> and suggested that the fraud/misconduct/misrepresentation review standard would permit courts to prevent arbitrators from exceeding their authority.<sup>343</sup> In *Commodity Futures Trading Commission v. Schor*,<sup>344</sup> the Court reaffirmed the power of an administrative agency to decide common law claims.

The following is a reasonable summary of the legal framework in which the recommendations of 86-3 can be considered. First, Congress has the power to provide for entirely private dispute resolution procedures resembling arbitration when the quality of the decision-making process adequately provides for accuracy under the *Mathews v. Eldridge* formula. This is the lesson of *Schweiker v. McClure*. In other words, Congress can specifically authorize agencies to rely on private arbitration, at least when disputes involve claims to governmental benefits. This can be done even when no form of administrative or judicial review of the arbitration is available.

Greater questions arise when Congress tries to force claims involving private rights (those existing at common law when the Constitution was adopted) to arbitral resolution rather than judicial resolution. The case of *Thomas v. Union Carbide*, however, suggests that a minimal kind of judicial review can satisfy separation of powers and seventh amendment requirements and further suggests that the private rights category may be fairly small.

Therefore, the difficult question is whether an agency can refer adjudicatory disputes to arbitration in the absence of explicit statutory authorization. Two questions arise with this kind of procedure: does it comply with the requirements of the APA for adjudication, and do the principles of *Thomas* and *Schweiker* apply in the absence of a clear congressional policy decision?

---

tion, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator . . . .

340. *Thomas*, 473 U.S. at 583.

341. *Id.* at 590.

342. *Id.* at 590-92.

343. *Id.* at 592.

344. 106 S. Ct. 3245 (1986).

## 2. APA

The Administrative Procedure Act does not explicitly address arbitration as an adjudicatory process nor does it contain provisions for "informal adjudication."<sup>345</sup> The APA imposes procedural requirements for disputes only when some other statute requires determination "on the record after opportunity for an agency hearing."<sup>346</sup> The question of whether arbitration comports with APA requirements can be further defined to the question of whether arbitration comports with the APA requirements of APA sections 554, 556, and 557 when the substantive statute contains the quoted words.

Many of the procedural requirements for formal adjudication can be met in an arbitral proceeding, such as the requirement that interested parties have an opportunity to submit facts, arguments, offers of settlement and proposals of adjustment;<sup>347</sup> present oral and documentary evidence;<sup>348</sup> cross-examine witnesses;<sup>349</sup> have counsel;<sup>350</sup> and receive evidence.<sup>351</sup>

The principal difficulty is the requirement in section 556 that hearings must be presided over by the agency, one or more members of the body which comprises the agency, or one or more administrative law judges appointed under title five.<sup>352</sup> Some flexibility with respect to the hearing officer may be provided. Agencies can provide for the conduct of "specified classes of proceedings" before "other employees specially provided for by or designated under statute."<sup>353</sup> The question is whether an agency could, consistent with this language, designate an arbitrator for certain classes of cases under general statutory authority not explicitly mentioning arbitration.

## 3. Comptroller General Prohibition on Claims Arbitration

Paragraph three of ACUS Recommendation 86-3<sup>354</sup> urged Congressional action to "permit executive branch officials to agree to binding arbitration to resolve controversies."<sup>355</sup> This recommendation was

---

345. See generally comments to MODEL ACT, *supra* note 276.

346. 5 U.S.C. § 554(a) (1982).

347. *Id.* § 554(c)(1).

348. *Id.* § 556(d).

349. *Id.*

350. *Id.* § 555(b).

351. *Id.* § 554(c)(2).

352. *Id.* § 556(b).

353. *Id.*

354. 51 Fed. Reg. 25,643 (1986).

355. *Id.*

motivated by Comptroller General opinions holding that no executive branch official may agree to binding arbitration to resolve a claim unless specifically authorized to do so by statute.<sup>356</sup> The report supporting the recommendation sharply criticized the opinions as not based on statutory law, but rather on a negative implication of statutes specifically authorizing binding arbitration.<sup>357</sup>

## IX. THE FUTURE

### A. *Activities*

The section on Administrative Law of the American Bar Association is considering a proposal to endorse ACUS Recommendation 86-3. At the present time, it appears that such an endorsement will be forthcoming.

### B. *Need for Institutionalization*

A built-in conflict exists in the search for meaningful administrative ADR. On the one hand, meaningful simplification of procedure is unlikely to extend very far unless it is institutionalized to facilitate the transfer of information about what works well, and to reduce the transaction costs of setting up a rule negotiation or an adjudicatory ADR technique. Such institutionalization is consistent with the maxim that the government should be "of laws, not of men."

Many of the advantages of ADR, however, depend on the personal skills of a mediator, the sensitivity of a policy maker to the real needs of interest groups, and the creativity of an administrative lawyer in structuring a process that serves the spirit of the APA and the substantive statute. Too much institutionalization makes it difficult to bring these inherently personal traits to bear on particular problems.

---

356. See 7 Op. Comptroller Gen. 541 (1928); 8 Op. Comptroller Gen. 96 (1928); 19 Op. Comptroller Gen. 700 (1940). But see 22 Op. Comptroller Gen. 140 (1942) (approving "arbitration" to determine factual questions, so long as arbitrators do not decide government's liability); 32 Op. Comptroller Gen. 333 (1953).

357. Points on a Continuum, *supra* note 299, at 37-40.