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NEGOTIATED RULEMAKING AND ADMINISTRATIVE LAW

Henry H. Perritt, Jr.¹

There is a new type of administrative rulemaking procedure called negotiated rulemaking. In 1982, the Administrative Conference of the United States (ACUS) recommended that agencies consider the use of negotiations to produce rules that satisfy the interests of the affected parties.² Since the 1982 recommendation was issued, four agencies have utilized the negotiation process in an effort to develop rules without resorting to the increasingly adversarial litigation that has accompanied informal rulemaking in recent years. Three of the four efforts were successful in producing agreement on the basic outlines of a proposed rule. Two of the rules have been promulgated in final form, and neither has been challenged yet.

Other agencies have shown an interest in the process, and two other major negotiated rulemaking efforts are under way. In order to provide guidance for use of the new process, the Administrative Conference published an additional set of recommendations in December 1985,³ proposed by the author of this article.

The concept of negotiated rulemaking arose from dissatisfaction with notice-and-comment and hybrid rulemaking under the Administrative Procedure Act (APA),⁴ which had become increasingly adjudicatory and adversarial in character since the 1960s.

Negotiated rulemaking is a realistic alternative to adversarial administrative procedures. The technique permits affected interests to retain greater control over the content of agency rules, while ensuring fairness and balance. It also permits agencies to obtain a more accurate

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²ACUS Recommendation 82-4, 47 Fed. Reg. 20708 (Jul. 15, 1982), codified at 1 C.F.R. § 305.82-4 (1984).

³ACUS Recommendation 85-5, 50 Fed. Reg. 52893, 52894 (Dec. 27, 1985).

⁴5 U.S.C. §§ 551-706 (1982).

perception of the costs and benefits of policy alternatives than can be obtained from digesting voluminous records of testimonial and documentary evidence presented in adversarial hearings.

The 1982 ACUS recommendations address the place of negotiated rulemaking within the legal framework represented by the APA and judicially developed administrative law concepts. The 1985 recommendations, in contrast, address the dynamics of the negotiation process in the rulemaking setting. Together, the two ACUS recommendations present a framework for planning a rule negotiation. This article summarizes the political and legal developments that led to negotiated rulemaking becoming a reality, and considers why negotiated rulemaking is consistent with the APA. It then describes briefly the four completed experiences with the negotiation process, and explains the justification for the 1985 ACUS recommendations. The article is based on my report to the Administrative Conference on an investigation of the four completed rule negotiations,⁵ which led to ACUS Recommendation 85-5.

It is important to view both the 1982 and the 1985 recommendations as a conceptual framework for negotiated rulemaking and not as a formula for success. Negotiations cannot be designed in advance like an engineering project. Accordingly, whether negotiations will succeed in a particular case depends on the substantive issues, the perception of the agency's position by affected parties, past relationships among the parties, the authority of party representatives in the negotiations, the negotiating style of the representatives, the number and divergence of views among individual units within each constituency represented, and the skill of agency personnel and mediators. Some of these variables, or particular configurations of variables, existing when negotiations commence almost certainly will change several times before negotiations conclude. An agency cannot expect that the pattern followed successfully by another agency, or even by itself on another issue, can be transplanted automatically to another negotiation without modification.

The APA need not be amended to provide for negotiated rulemaking. Indeed, amending the APA now could destroy the flexibility to adapt the negotiation process to the needs of different regulatory situations. Also, the four agency experiences do not show that the

⁵H. Perritt, *Analysis of Four Negotiated Rulemaking Efforts* (Nov. 15, 1985) (available from the Administrative Conference of the United States). The benzene negotiation was investigated by interviews with virtually all the participants and with selected OSHA personnel. Other negotiations were investigated through more selective interviews and by reviewing agency and contractor documentation.

Federal Advisory Committee Act (FACA),⁶ as interpreted by the sponsoring agencies and participants, was a serious impediment to effective negotiations. There is no reason to believe, under current judicial and agency interpretation of the Act, that caucuses and other working group meetings may not be held in private, where this is necessary to promote an effective exchange of views.

Perhaps the most important insight to be gained from an assessment of the four completed negotiated rulemaking efforts is that an agency sponsoring a negotiated rulemaking should take part in negotiations, recognizing that negotiations are unlikely to succeed unless all parties are motivated throughout the negotiations by a perception that a negotiated rule would be preferable to a rule developed under traditional processes. To foster this belief, as an incentive to negotiating an agreement, the agency should help create realistic expectations 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 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. Parties will agree only on something they perceive as preferable to what the agency will do unilaterally through traditional administrative procedures.

Negotiated rulemaking⁷ is only one of several alternative dispute resolution techniques that can be used by administrative agencies. Negotiated rulemaking is designed to facilitate resolution of “interest disputes.”⁸ Other techniques are more suitable for rights disputes, such as arbitration, fact finding, and mediation. Each of these rights disputes resolution techniques has been used or considered to some degree.⁹

⁶ 5 U.S.C. App. II (1982).

⁷ “Regulatory negotiation” is a term that refers to use of negotiation in any decision-making process by an administrative agency. “Negotiated rulemaking” is a specific application of regulatory negotiation, referring to the use of negotiation in the decision-making process associated with rulemaking. This article concentrates on negotiated rulemaking.

⁸ Perritt, *And the Whole Earth Was of One Language: A Broad View of Dispute Resolution*, 29 VILL. L. REV. 1221–29 (1984).

⁹ The Administrative Conference also sponsors work on other forms of regulatory negotiation. See Recommendation 86-3, 51 Fed. Reg. 25641, 25643 (Jul. 16, 1986); Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process* (Report to the Administrative Conference of the United States, June 20, 1986); A. Adams & J. Figueroa, *Expediting Settlement of Employee Grievances in the Federal Sector* (Report to the Administrative Conference of the United States, Jan. 1985) (evaluation of arbitration to settle federal employee appeals).

An additional technique for resolving interest disputes in the administrative process deserves brief comment. When a class action law suit is filed, either against agency action or to compel agency action, the Federal Rules of Civil Procedure provide the opportunity to accomplish some of what can be accomplished in negotiated rulemaking.¹⁰ There are, however, several reasons why negotiations within the class-action framework are much less satisfactory than negotiated rulemaking under the ACUS recommendations. For one thing, the class action approach requires that a lawsuit be filed, and that the plaintiffs in the lawsuit, or intervenors, represent a sufficiently broad range of interests for a negotiated settlement to be fair and successful. Moreover, while federal judges presumably are permitted to consider negotiations within a class action framework by recent amendments to Rule 16 of the Federal Rules of Civil Procedure, there is no guarantee that a particular federal judge would be sympathetic to the process.

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 has not reached the level of complexity that it has before federal agencies. Rather, a measure of informal negotiation between affected interests is a regular feature of the state process. Such negotiations are not very visible though. In addition, a number of states have adopted various procedures to permit legislative veto of or advice on specific proposed agency rules.¹¹ Participation by the legislative branch in the rulemaking process also facilitates negotiation among affected interests of the kind commonly conducted in the legislative arena. Additional research and reporting of the negotiated rulemaking process and similar processes at the state level should be undertaken.

I. GENESIS OF NEGOTIATED RULEMAKING IDEA

Negotiated rulemaking emerged as a distinct administrative law

¹⁰See FED. R. CIV. P. 23 (class actions); FED. R. CIV. P. 16 (court's right to encourage negotiated settlement). See Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L. J. 1, 36-38 (1982) (discussing negotiations in the context of litigation); Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENV. L. 1, 7-15 (1985) (discussing judicially supervised negotiations in the lawsuit context).

¹¹See Uniform Law Commissioners, Model State Administrative Procedure Act §§ 3-201 to 3-204 and accompanying comments (1981) (proposing various forms of executive or legislative review of agency rules and commenting on states adopting similar provisions). The Administrative Law Section of the ABA sponsored a program on negotiated rulemaking by state and federal administrative agencies in August 1986. The author moderated that program.

concept in the late 1970s as a reaction to the unsuitability of notice-and-comment and hybrid rulemaking.¹²

When rules for societal conduct are made in private markets or in representative assemblies, the process of negotiation is relied upon. Negotiation occurs as part of the legislative process in a representative assembly at two levels: first, as a part of the process through which representatives are elected, and second, as a part of the interaction among the representatives in making the compromises necessary to pass a statute.

The migration of rulemaking to administrative agencies from markets and legislatures made negotiation more difficult. Administrative law historically emphasized judicial review as a means of keeping agencies within statutory bounds. It also emphasized agency decisional procedures designed to promote the rationality of agency decisions, and to facilitate judicial review.¹³ These objectives led courts to force agencies to follow adversarial procedures aimed at creating a formal record to support agency decisions.¹⁴

The problem with these developments is that the adversarial process, modeled on a court trial, is not well suited for making decisions formerly made through negotiations in markets or legislative assemblies. A major part of the mismatch between administrative procedure and the decisionmaking requirements of delegated legislative power arose from the failure to distinguish "rights disputes" from "interest disputes."¹⁵ Adjudication is designed only to deal with rights disputes.¹⁶ Rights disputes involve application of pre-existing legal standards or "rules of decision" to facts determined by the adjudicator. This is what the adjudicatory process, modeled on a judicial trial, is designed to

¹²Hybrid rulemaking is a procedure imposed by statute or by the courts under the APA in which adjudicatory procedures are used to some degree in the rulemaking process, though the type of decisionmaking involved would be termed rulemaking and not adjudication as those terms are used under the APA.

¹³Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1670 (1975); Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1184, 1188 (1973) (criticizing model based on assumption that Congress establishes an objective that "is capable of disinterested and nonpolitical administration," and suggesting instead a political model).

¹⁴The paradigm case imposing adversarial rulemaking procedures is *Mobil Oil Corp. v. FPC*, 483 F.2d 1238 (D.C. Cir. 1973) (statute requiring that a rule be supported by substantial evidence obligates agency to use certain elements of adversary, adjudicative procedures to develop the rule). *But see* *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) (courts may not routinely require more than minimum procedures imposed by § 553 of the APA). *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); Note *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975).

¹⁵*See* Perritt, *supra* note 8, at 1221-29.

¹⁶*See* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 369 (1978).

accomplish. Interest disputes, in contrast, are characterized by the absence of pre-existing rules for decision. Resolution of interest disputes requires that the disputing parties work out the rules according to an accommodation of their interests. Disputes involved in agency rulemaking are predominantly interest disputes.

John T. Dunlop, Secretary of Labor from 1974–75, identified negotiation as a process that should be examined as an alternative to adversarial litigation in making administrative rules. Dunlop authored a paper which suggested that “the parties who will be affected by a set of regulations should be involved to a greater extent in developing those regulations.”¹⁷ At Dunlop’s urging, the Department of Labor provided seed money for an interdisciplinary effort at Harvard University which subsequently developed into the Harvard Negotiation Project.

The next step in the conceptual development of negotiated rulemaking was undertaken by Philip J. Harter, who had worked on a task force to reform OSHA regulation during Dunlop’s incumbency as Secretary. Harter wrote a law review article in which he amplified the Dunlop concept.¹⁸ Harter synthesized an “explicitly political” process to improve administrative agency decision making: negotiated rulemaking. Formulation of ACUS Recommendation 82–4, encouraging the use of negotiated rulemaking by federal agencies, proceeded contemporaneously with Harter’s writing of his article.

II. DYNAMICS OF NEGOTIATED RULEMAKING

Negotiation succeeds only when persons able to use other processes have an incentive to participate in negotiations and to reach negotiated agreement.

A useful conceptual structure for understanding incentives to negotiate is the one offered by Professors Fisher and Ury in their popular book on the negotiation process.¹⁹ They explain that the participation of any party in a negotiation will be guided by that party’s “Best Alternative to Negotiated Agreement” (BATNA). If a party’s BATNA is superior to what can be obtained in negotiation, the party will not participate. A participant will not agree to an outcome worse than its BATNA. The BATNA idea is similar to the idea of a “reservation price” in negotiations, but the BATNA concept captures the idea that reservation price is determined exogenously.

¹⁷Dunlop, *The Limits of Legal Compulsion*, 27 LAB. L.J. 67, 72 (1976).

¹⁸Harter, *supra* note 10.

¹⁹R. FISHER & W. URY, *GETTING TO YES*, at 106–112 (1981).

For potential participants in a regulatory negotiation, BATNAs are determined by perceptions of what the agency will do in the absence of a negotiation.²⁰ A rational, monolithic party will participate in regulatory negotiation only if it perceives the potential negotiation outcome to be better than its BATNA, determined by its estimate of probable unilateral agency action. Different parties are likely to have different BATNAs because they predict the unilateral agency outcome differently, or because they place different values on the outcomes they predict.

Relations within constituency groups complicate the regulatory negotiation dynamics. Experienced mediators know that three agreements are really involved 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.²¹ Agreements (1) and (2) can be called intra-party agreements. Frequently the most difficult mediation job involves achieving the intra-party agreements rather than achieving the negotiator-negotiator agreement.

It is important for someone involved in the negotiation process—the representatives themselves, the mediators, and the agency personnel—to be adroit at diagnosing intra-constituency problems and working creatively to facilitate intra-constituency agreement.

Negotiated rulemaking involves interaction among interest groups.²² The negotiations themselves occur between or among interest groups. Intra-constituency disagreements arise because any one interest group rarely is monolithic. The negotiation process is heavily influenced by factors such as group access to institutions with the power to impose decisions, issue maturity, and intensity of feeling. Interest groups perform important representation, or interest aggregating, functions that are essential to practical negotiation.²³ Interest groups function to intensify member interest in particular issues, to formulate concrete alternatives, and to articulate member positions.²⁴

It is especially when the issues involved are complicated that group members may defer almost entirely to the decisions of group repre-

²⁰What the agency will do will be affected by what courts, the President, and Congress will do. Therefore, perceptions of these influences are important also.

²¹Dunlop, *The Negotiations Alternative in Dispute Resolution*, 29 VILL. L. REV. 1421, 1433 (1984) (referring to the need for three agreements to conclude a negotiation).

²²V. O. KEY POLITICS, PARTIES AND PRESSURE GROUPS 7 (1942) (politics is a struggle among groups or interests).

²³*Id.* at 203.

²⁴*Id.* at 203–204. See generally Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

sentatives more fruitful. Trade unions or trade union federations dealing with complex technical regulatory disputes are an example of this phenomenon. The level of awareness of rank-and-file members of the technical issues is low and the members of such organizations tend to defer to a handful of staff experts.

Issue maturity plays an important role in the development of how intensely different groups feel about a particular issue and how strongly they prefer different alternatives. Intensity of feeling is an important variable²⁵ in determining the number of groups who should be involved in rule negotiations. Transaction costs induce individual citizens to act through groups and also reduce the desire of interest groups to have major involvement in the full range of political decisions.²⁶

The nature of the regulatory program also influences the utility of negotiations among interest groups because the nature of the regulation determines the likely intensity of interest group feeling on regulatory issues.²⁷ Programs that concentrate both benefits and costs are better candidates for negotiation than programs whose costs and benefits are both diffused. This is so because it is easier to mobilize interest representatives for the bargaining process when the interest groups are few in number and narrow in scope. Presenting intermediate levels of difficulty in organizing interest representatives for regulatory negotiation are programs that concentrate their benefits on a small group and distribute their costs over wide sectors of the population or programs that distribute benefits over large parts of the population and concentrate costs on relatively narrow sectors.

The characteristics of interest groups and the dynamics of negotiation over agency rules means that negotiated rulemaking can succeed only when sponsoring agencies understand the forces at work and can influence effectively the incentives for interest groups to agree. Usually this requires influencing interest group expectations of the probable outcome in the absence of negotiated agreement. Of course these outcomes are not determinable unilaterally by the agency—some outcomes result from judicial decision, Presidential action, or Congressional intervention.

²⁵R. DAHL, A PREFACE TO DEMOCRATIC THEORY 50 (1956).

²⁶*Id.* at 44.

²⁷See Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 366–67 (J. Wilson, ed. 1980) (classifying regulatory programs).

III. ADMINISTRATIVE LAW ISSUES

A. Introduction

Initially, it was thought that negotiated rulemaking could be successful only if it were authorized specifically by Congress. In 1982, ACUS recommended that Congress amend the APA to authorize explicitly the use of negotiated rulemaking.²⁸ The commentators whose reassessment of administrative law gave rise to the regulatory negotiation concept thought that judicial review might need to be altered to accommodate negotiated rulemaking.²⁹ Some discussion of other APA problems associated with negotiated rulemaking appears in the literature.³⁰

Since 1982, however, it has become clear that rule negotiations can be accomplished within the flexible framework provided by § 553 of the 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 under the minimum requirements of § 553 merely by having notice of an agency-developed proposal and providing comments. Apparent problems with delegation of governmental authority to private parties, *ex parte* communication, and open meeting requirements under FACA have turned out to be largely illusory.

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

The following analysis of administrative law issues is necessarily somewhat speculative because no judicial challenges to negotiated rules have materialized so far. The fact that no one has sued to invalidate a negotiated rule is perhaps the strongest endorsement of negotiation as a process that satisfies the needs of the affected interests.

²⁸ACUS Recommendation 82-4, ¶ 2, 47 Fed. Reg. 30708, 30709 (1982).

²⁹See Stewart, *supra* note 13; Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 HARV. L. REV. 1871, 1875-76 (1981); Harter, *supra* note 10.

³⁰See Wald, *supra* note 10.

B. Delegation Doctrine

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

In the early years of administrative law, courts and lawyers were much preoccupied with the delegation doctrine as they sought to rationalize the exercise of political power by nonelected administrative agency officials.³¹ It is well accepted now, however, that delegation of quasi-legislative authority to administrative agency officials is permissible when the statute delegating the power adequately circumscribes the exercise of the power and permits judicial scrutiny of whether the agency has stayed inside its delegated authority.³² 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.³³ 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 for Senate confirmation. Accountability is less evident when lower level officials make decisions, but it presumably is ensured to some degree by appointment procedures set forth in the civil service laws and various restrictions on conduct.

If, however, the agency delegates its authority to a group of private citizens, further delegation problems are presented. One such problem is whether such delegation is within the agency's authority delegated from Congress. Another problem is that the private delegates are even less accountable politically than the agency officials.³⁴

³¹See J. DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* (1928); Stewart, *supra* note 13, at 1672-73; *Industrial Dept. v. American Petroleum Inst.*, 448 U.S. 607, 671, 672 (1980) (Rehnquist, J. concurring in the judgment); *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).

³²*Industrial Dept.*, 448 U.S. at 686 (Rehnquist, concurring in the judgment); *Yakus v. United States*, 321 U.S. 414, 426 (1944).

³³Political 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 regulatory scheme depriving President of power to appoint agency members, vesting it instead in legislative branch officers).

³⁴See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating statute delegating wage-and-hour standard setting to representatives of coal producers and coal miners);

Compliance with the delegation doctrine has concerned proponents of negotiated rulemaking.³⁵ While it is appropriate to think about delegation issues associated with negotiated rulemaking, it is equally important not to exaggerate the magnitude of the problem. There are a number of reasons why violation of the delegation doctrine does not result from negotiated rulemaking.

First, under all the current conceptions of negotiated rulemaking, and clearly reflected in the 1982 and 1985 ACUS recommendations, negotiators play only an advisory role to the agency; the agency retains the final decisionmaking authority.³⁶ Such an advisory role has been approved by the courts in a variety of other circumstances.³⁷ Impermissible delegation obviously does not occur, for example, when private parties to an agency proceeding get together privately and compromise their differences.³⁸

Second, the nature of negotiated rulemaking, if it is pursued under the ACUS recommendations, ensures adequacy of representation of affected groups. It provides its own form of political accountability, which probably is greater than when the agency makes rules unilaterally. Thus negotiated rulemaking avoids the problem of unaccountable decisionmaking that the delegation doctrine is intended to avoid.³⁹

Third, the delegation doctrine overlaps other requirements imposed on agency decisionmaking under the APA and substantive statutes.⁴⁰ In a real sense, delegation problems are avoided when rules are subject to judicial review under APA standards. In other words, the

Aqua Slide 'N' Dive Corp. v. CPSC, 569 F.2d 831, 843–44 (5th Cir. 1978) (courts should not defer to opinions of governmental consultants as much as to agency personnel); Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650 (1975); Jaffe, *Lawmaking by Private Groups*, 51 HARV. L. REV. 201 (1937).

³⁵See Harter, *supra* note 10 at 107–109; Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 HARV. L. REV. 1871, 1880–83.

³⁶Note, *supra* note 35 at 1882–83; Harter, *supra* note 10 at 109. In all of the negotiated rulemaking efforts reviewed in this article, agencies unequivocally reserved final decisionmaking authority.

³⁷See *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940) (approving, against delegation challenge, statute permitting coal producers to propose minimum prices and other sales conditions to public commission that could approve, disapprove, or modify them); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 697–700 (3d 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, 140 (N.D.Ill. 1975) (private establishment of standards to govern health care not invalid delegation because agency provides hearing on standards); see generally Note, *supra* note 35, at 1882 n.63 (citing other cases approving delegation to private organizations).

³⁸Such a private agreement was used in 1984 to resolve disagreements over an OSHA cotton dust standard.

³⁹Note, *supra* note 35, at 1883; Harter, *supra* note 10 at 109.

⁴⁰These requirements are considered in the text accompanying notes 46 to 90.

delegation doctrine is embodied in APA requirements and need not be addressed separately.⁴¹

There are thus two entirely independent ways for negotiated rulemaking to satisfy the delegation doctrine. First, if the rule ultimately resulting from negotiated rulemaking passes judicial scrutiny under the arbitrary-and-capricious, within-statutory-authority, and inaccord-with-statutory-procedures standards, it perforce has passed muster under the delegation doctrine. Second, if the affected interests have been represented fairly in the negotiation process, political accountability exists, and there is no need to be wary of delegation because the harm it seeks to avoid has been avoided *ab initio*.

C. Conflict Between Goals of Informality and Judicial Reviewability

Negotiated rulemaking is a reaction, in some respects, to the schizophrenic nature of informal rulemaking under the APA. APA requirements for rulemaking 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, writing in 1972, had this to say:

The rulemaking procedure described in [§ 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. . . .

Rulemaking procedure is superior to adjudicative procedure in many ways, including the following: An administrator who is formulating a set of rules is free to consult informally with anyone in a position to help, such as the business executive, the trade association representative, the labor leader. An Administrator who determines policy in an adjudication is usually inhibited from going outside the record for informal consultation with people who have interests that may be affected. In policymaking through adjudication, either the quest for understanding is likely to be impaired or the tribunal's judicial image is likely to be damaged.⁴²

He admitted however, that adjudicatory procedure might be "indispensable" when "facts . . . are in dispute."⁴³

Section 553, as described by Professor Davis, emphasizes the participation norm. That participation norm militates against negotiation of a final rule without some opportunity for public comment.⁴⁴ Using

⁴¹See Stewart *supra* note 13, at 1674-76.

⁴²K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 6.03 at 142-43 (3d ed. 1972).

⁴³*Id.* at 143.

⁴⁴ACUS Recommendation 82-4, ¶ 13, 47 Fed. Reg. 30708, 30710 (1982), provides for publication of a negotiated rule for comment.

negotiations to prepare a proposed rule, and then allowing notice-and-comment rulemaking, as occurred in all three of the successful negotiated rulemaking experiments, is a sound approach, with few apparent disadvantages. Moreover, such publication and comment mitigates the effect of complaints by non-participants in the negotiations that they were denied a fair opportunity to influence the content of the rule.⁴⁵

The federal courts have been concerned however, with more than participation by affected interests; the courts have also insisted on meaningful judicial review of agency decisionmaking. Increasingly, they have required that informal rulemaking be more formal. Prominent among the techniques employed to increase formality was hybrid rulemaking. Hybrid rulemaking envisions adjudicatory procedures which negotiated rulemaking is designed to replace.

D. Hybrid Rulemaking

Hybrid rulemaking refers to a set of procedures imposed by Congress or the courts.⁴⁶ Under hybrid rulemaking, agencies must develop an evidentiary base for rules under procedures less formal than full trial-type hearings but more elaborate than § 553 notice-and-comment procedures as they originally were envisioned.⁴⁷ Examples of statutory requirements for hybrid rulemaking are found in the Occupational Safety and Health Act,⁴⁸ and the Magnuson-Moss Act.⁴⁹

Beginning with *United States v. Nova Scotia Food Products*,⁵⁰ the idea gained currency that informal rulemaking ought to be accomplished "on the record."⁵¹ The paradigm case imposing hybrid rulemaking procedures is *Mobil Oil Corp. v. FPC*,⁵² in which the court interpreted a statute requiring that a rule be supported by substantial evidence to obligate the agency to use certain elements of adversary, adjudicative procedures to develop the rule. Other courts have followed similar reasoning.⁵³

⁴⁵See the FAA response to such complaints, discussed in § 4.11.

⁴⁶See generally Williams, "Hybrid Rulemaking" *Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401 (1975); Pederson, *Formal Records and Informal Rulemaking*, 85 YALE L. J. 38 (1975).

⁴⁷See 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).

⁴⁸29 U.S.C. § 655(b)(3) (1982) (requiring public hearing on written objections to proposed rules).

⁴⁹15 U.S.C. § 57(a) (1982) (requiring opportunity for rebuttal submissions and for cross examination when FTC determines that regulations involve disputed issues of material fact).

⁵⁰568 F.2d 240 (2d Cir. 1977).

⁵¹See Pederson, *supra* note 46.

⁵²483 F.2d 1238 (D.C. Cir. 1973).

⁵³See *Kennecott Copper Corp. v. EPA*, 462 F.2d 846 (D.C. Cir 1972) (requiring EPA to

In *Vermont Yankee Nuclear Power Corp. v. NRDC*,⁵⁴ the Supreme Court rejected the idea that courts routinely may require more than minimum procedures by § 553 of the APA.⁵⁵ The *Vermont Yankee* decision has made courts more reluctant to require trial-type procedures in notice-and-comment rulemaking,⁵⁶ but it allows courts to require that the record in notice-and-comment rulemaking support the agency's decision.⁵⁷

ACUS Recommendation 76-3 identifies, for agency consideration, additions to notice-and-comment procedures that may be warranted in some rulemaking proceedings, while recommending that adversarial procedures not be superimposed on informal rulemaking as a general rule.⁵⁸

Negotiated rulemaking is yet another way to develop a rule and to marshal facts supporting the rule without the expense, delay, and rigidity associated with adversarial adjudicatory procedures.

E. Ex Parte Communications

Negotiated rulemaking potentially contravenes a policy against ex parte communication, derived from the hybrid rulemaking concept.⁵⁹ This section explains the ex parte communication prohibition and considers the degree to which it may constrain negotiated rulemaking.

Notions of fairness and due process preclude ex parte communication between parties and the decisionmaker in an adjudicatory process. Fundamental concepts of adjudicatory decisionmaking contemplate that decisions be based on a formal record, and that adversaries have

articulate basis for rule in detail); *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).

⁵⁴435 U.S. 519 (1978).

⁵⁵See Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805 (1978); Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823 (1978).

⁵⁶See *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1169-71 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1042 (1980) (industry failed to show "compelling circumstances" requiring cross examination); *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1203 n.6, 1227-28 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 3148 (1981) (denying right to cost-benefit analysis and cross examination).

⁵⁷See *Cotter v. Harris*, 642 F.2d 792 (3d Cir. 1981); *PPG Industries v. Costle*, 630 F.2d 462 (6th Cir. 1980); *Sholly v. NRC*, 651 F.2d 792 (D.C. Cir. 1981) (Tamm, MacKinnon, Robb, and Wilkey, J. J., dissenting from denial of rehearing en banc), *cert. granted*, 101 S. Ct. 30094 (1981). See generally Rodgers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO L. J. 699 (1979).

⁵⁸1 C.F.R. § 305.76-3 (1983).

⁵⁹See Note, *supra* note 35, at 1887-89 (suggesting that ex parte problem could be avoided in negotiated rulemaking by judicial review limited to question of whether party claiming harm was represented adequately in negotiations).

the right to know and to counter information being put on the decisionmaking record.⁶⁰ Ex parte communication jeopardizes these two principles in two respects: the ex parte communication usually is not made a part of the record, and thus should not influence the decision; and because the opposing parties do not know the content of the ex parte conversation, they are deprived of their opportunity to respond to it.

Remedies for violation of a ban on ex parte communication include setting aside the agency's decision and remanding for reconsideration of the decision after all interested parties are given an opportunity to participate in proceedings where all the information available to the agency is available for challenge.⁶¹

The on-the-record requirements resulting from the hybrid rulemaking cases naturally raised questions about the appropriateness of ex parte communication in informal rulemaking.

In *Home Box Office, Inc. v. F.C.C.*, 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 decisionmaking process should refuse 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 summaries or oral communications must be placed in the rulemaking file established for public review and comment.⁶²

The court was motivated by three considerations: the possibility that the APA notice-and-comment process and the official record would be a sham, with the real decisional process based on secret communications; the need for adversarial comment on matters communicated to the agency; and the inconsistency between secrecy and "fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits."⁶³ These considerations impli-

⁶⁰See *Friendly, Some Kind of Hearing*, 123 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).

⁶¹See *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied* 434 U.S. 829 (1978).

⁶²*Id.* at 57.

⁶³Another 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) decisionmakers may be influenced by communications made privately, thus creating a situation seemingly at odds with the widespread demand for

cate both the judicial-reviewability and the participatory goals of the APA.

The *Home Box Office* restrictions have been applied unenthusiastically by the courts of appeals,⁶⁴ and have been much criticized by commentators⁶⁵ and by the Administrative Conference⁶⁶ as inconsistent with the realities of agency decisionmaking and the concept of informal rulemaking.

Major questions about the correctness of the *Home Box Office* limitations were raised by the D. C. Circuit in *Sierra Club v. Costle*.⁶⁷ *Sierra Club* involved ex parte contacts between EPA and coal industry representatives, members of Congress, and 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 decisionmaker 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 policy-making sort, the concept of *ex-parte* contacts is of more questionable utility.

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).

⁶⁴*Compare* Iowa State Commerce Comm'n v. Office of Federal Inspector, 730 F.2d 1556, 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 decisionmaker and agency staff advocates should be addressed to Congress); and Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978) (contacts between decisionmaker 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 regulation of children's programming) with United States Lines, Inc. v. Federal Maritime Comm'n 584 F.2d 519 (D.C. Cir. 1978) (overturning approval of industry agreement because of reliance on material outside record).

⁶⁵See Gellhorn & Robinson, *Rulemaking "Due Process": An Inconclusive Dialogue*, 48 U. CHI. L. REV. 201 (1981); 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 decisionmaking); Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 AD. 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 AD. L. REV. 621 (1980); Note, *Due Process and Ex Parte Contacts in Informal Rulemaking*, 89 YALE L.J. 94 (1979); Note, *Ex Parte Communications During Informal Rulemaking*, 14 COLUM. J.L. & SOC. PROBS. 269 (1979).

⁶⁶ACUS Recommendation 77-3, 1 C.F.R. § 305.77-3 (1983) (general prohibition on ex parte contact in informal rulemaking would be unwise).

⁶⁷657 F.2d 298 (D.C. Cir. 1981).

... Later decisions of this court ... have declined to apply *Home Box Office* to informal rulemaking of the general policymaking sort involved here, and there is no precedent for applying it to the procedures found in the Clean Air Act Amendments of 1977.⁶⁸

In addition to meetings of a policymaking nature in *Sierra Club*, documents also were submitted to EPA ex parte. Important to the court's conclusion that these ex parte communications were permissible was the fact that the rule was supported by information in the record, and there was no indication that the documents submitted after the comment period played any significant role in the agency's support for the rule, or that the challenger was deprived of an opportunity to respond to anything that was outcome determinative.⁶⁹

Other courts have permitted agency ex parte contact during the development of NPRMs.⁷⁰ The courts also have permitted agencies to use outside assistance during the deliberative phases of rulemaking, after the record is closed. In *United Steelworkers of America v. Marshall*,⁷¹ for example, the union challenged OSHA's reliance on outside consultants to analyze the rulemaking record and to help prepare the preamble of the final rule. Both the consultants had participated in the rulemaking proceeding and had submitted material for the record. As part of their deliberative assistance, both consultants prepared additional reports, which were submitted to OSHA but not made part of the record. The union argued that these were impermissible ex parte communications.

The D. C. Circuit rejected this argument: "[T]he communications between the agency and the consultants were simply part of the deliberative process of drawing conclusions from the public record. The consultants acted after the record was closed as the functional equivalent of agency staff."⁷²

Relying on an opinion by Judge Friendly in a Freedom of Information Act suit involving the same proceeding,⁷³ the court concluded that, "while the reports might contain some factual matter, ... such information was necessarily incident to and not severable from the process of summary and analysis. ... To the extent the reports drew inferences

⁶⁸*Id.* at 400.

⁶⁹*Id.* at 398-99.

⁷⁰See *Home Box Office*, 567 F.2d at 57 (implying that ex parte contact is limited only after NPRM is published); *Iowa State Commerce Comm'n v. Office of Federal Inspector*, 730 F.2d 1566, 1576 (D.C. Cir. 1984).

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

⁷²*Id.* at 1218.

⁷³*Lead Industries Assoc. v. OSHA*, 610 F.2d 70 (2d Cir. 1979) (finding consultant reports to be within Exemption 5 of the FOIA).

from and weighed the evidence they were more truly 'deliberative' and thus better candidates for exemption than mere summaries of the record." The reports were no less deliberative merely because they responded to criticisms of earlier on-the-record evidence by the same consultants. The response contained no new evidentiary material, but only analysis and evaluation of the record. "Thus, the earlier participation of these consultants as expert witnesses in no way disqualifies them as aides in the final decision."⁷⁴

Based on this body of decisional law, it is reasonably safe to offer the following conclusions about *ex parte* contact in the context of negotiated rulemaking:⁷⁵

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 opportunity may be provided by an opportunity to participate in the negotiations or by notice-and-comment process after negotiations conclude.

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.⁷⁶

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 matters, rather than new factual matters.

5. Placing summaries of post-comment-period 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.⁷⁷

⁷⁴United Steelworkers of America v. Marshall, 647 F.2d 1189, 1220 (D.C. Cir 1980).

⁷⁵For a slightly different proposal, see Note, *supra* note 35, at 1888-89.

⁷⁶See Note, *supra* note 35, at 1887-89 (suggesting that *ex parte* problem could be avoided in negotiated rulemaking by judicial review limited to question of whether party claiming harm was represented adequately in negotiations).

⁷⁷See Carlin Communications v. F.C.C., 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 summarized in record of notice and comment rulemaking).

F. Judicial Review Under Arbitrary and Capricious Standard

Section 706 of the APA provides that a court may overturn an agency rule if it finds the agency's action in promulgating the rule was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁷⁸ Substantive statutes authorizing agencies to make rules frequently include similar standards for judicial review, or incorporate the APA standard by reference.⁷⁹ Moreover, some commentators have suggested that Congress may not delegate authority to act arbitrarily and capriciously, and therefore that an arbitrary and capricious standard of judicial review would be the minimum constitutionally allowed.⁸⁰

The Supreme Court recently has reiterated what arbitrary and capricious means:

Normally an agency rule would be arbitrary and capricious if the agency has [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.⁸¹

While considerable latitude is given for agency discretion, the Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner."⁸² Agency explanation takes on added importance because "an agency's action must be up-

⁷⁸5 U.S.C. § 706(2)(A) (1982).

⁷⁹*See, e.g.*, Occupational Safety and Health Act, 29 U.S.C. § 655 (1982) (impliedly subjecting rules to APA review by exempting emergency standards from APA, while imposing additional requirement that agency determinations in rulemaking must be supported by "substantial evidence in the record taken as a whole"); National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1392(b) (1982).

⁸⁰*See* Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965) (APA § 701(a)(1) excepts from judicial review only lawful exercise of discretion; abuses of discretion may be corrected judicially); 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). *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).

⁸¹*Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983). The *Motor Vehicle Manufacturers* case ploughed new ground with respect to applying the arbitrary and capricious standard to a decision to rescind a rule, but it did nothing new or controversial with respect to the meaning of the standard itself.

⁸²*Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 48.

held, if at all, on the basis articulated by the agency itself.”⁸³ The obligation to explain is not trivial. OSHA’s explanation of the original benzene standard, for example, filled 184 pages of an appendix to the standard in the *Federal Register*,⁸⁴ but the Supreme Court nevertheless invalidated the standard.

Uncertainty about facts may permit the agency to take one course of action or another based on its policy judgment, but the agency must explain its movement “from the facts and probabilities on the record to a policy conclusion.”⁸⁵ It is not sufficient for an agency merely to recite the terms “substantial uncertainty” as a justification for its actions.⁸⁶

The Supreme Court’s *Vermont Yankee* decision⁸⁷ does not dilute the arbitrary and capricious review; *Vermont Yankee* merely requires courts to scrutinize the record supporting 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 nevertheless must pass muster under the arbitrary and capricious standard of judicial review.

This means that a rule promulgated merely because it is agreed upon in negotiations among affected parties might be vulnerable to attack as being arbitrary and capricious,⁸⁸ unless the agency offers its own rationale and support for the content of the rule.⁸⁹ Of course part of the rationale can be the fact that affected interests reached agreement in negotiations. Because rationality also requires a nexus between the rule and factual support for it,⁹⁰ the agency rationale also needs to demonstrate factual support in a record developed in the rulemaking

⁸³*Id.* at 50; *Industrial Dept. v. American Petroleum Inst.*, 448 U.S. 607, 631 n.31 (1980).

⁸⁴*Industrial Dept.*, 448 U.S. at 631.

⁸⁵*Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 52.

⁸⁶*Id.*

⁸⁷*Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

⁸⁸See Stewart, *supra* note 13, at 1799–1800 (no logical reason to preserve current concepts of judicial review if rulemaking is a political process with adequate representation of affected interests, but courts unlikely to change approaches); Note, *supra* note 35, at 1885–87 (suggesting that use of negotiation ought to relax judicial review standards); Wald, *supra* note 10 (expressing wariness of requiring courts to consider adequacy of representation and opining that judicial review of negotiated rules will not change much).

⁸⁹The FAA justification for the negotiated Flight and Duty Time rule and EPA’s justification for the NCP rule are good examples. See text and accompanying notes 123 to 130 *infra*.

⁹⁰Requirements for support in the record for a rule, contained in substantive statutes, reinforces the need to give attention to the record support for a negotiated rule.

proceeding. While a detailed record of the negotiations could chill interchange among negotiators, there is no reason negotiators should not discuss what needs to be put in the record to support their consensus proposal and what the agency should say in its rationale.

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

G. Federal Advisory Committee Act Problems

The Federal Advisory Committee Act⁹¹ (FACA) 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 make candid exploration of compromise by interested parties difficult.

FACA was enacted in 1972 after 15 years of intermittent Congressional concern over the utilization of advisory committees by administrative agencies.⁹² The Act regulates the creation, composition, and functioning of advisory committees. It requires that committee meetings be open to the public. Exceptions to the open meetings requirement originally were available only when the subjects to be discussed qualified for an exemption under the Freedom of Information Act.⁹³ In 1976, however, the Act was amended to apply the Sunshine Act's⁹⁴ open meeting exceptions to advisory committees.⁹⁵ As amended, the Act permits advisory committee meetings to be closed to the public only when the meeting will involve (1) matters covered by exemptions 1-7 of the Freedom of Information Act, (2) criminal accusations directed at a person or other formal censures of a person,

⁹¹FACA, *supra* note 6.

⁹²See Perritt & Wilkinson, *Open Advisory Committees and the Political Process: The Federal Advisory Committee Act After Two Years*, 63 GEO. L.J. 725, 731-35 (1975).

⁹³5 U.S.C. App. I (1982). See Perritt & Wilkinson, *supra* note 92, at 735 (describing original exceptions to open meeting requirement).

⁹⁴5 U.S.C. § 552b (1982).

⁹⁵Section 10(d) of the amended FACA reads as follows:

Subsections (a)(1) and (a)(3) [requiring meetings to be open and affording interested persons the right to attend meetings and to file statements] of this section shall not apply to any portion of an advisory committee meeting where the . . . agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination.

- (3) frustration of proposed agency action if prematurely known, or
- (4) agency participation in formal rulemaking or litigation.⁹⁶

Remedies for violation of the Act are limited, and probably do not include invalidation of agency decisions made in reliance on advisory committee proceedings that violate the Act.⁹⁷

GSA regulations implementing FACA⁹⁸ permit certain meetings to occur without compliance with the Act,⁹⁹ including meetings for the purpose of exchanging facts or information;¹⁰⁰ meetings initiated by a private group (rather than by the agency) for the "purpose of expressing the group's view," providing the agency does not use the group as a "preferred source of advice or recommendations;¹⁰¹ and meetings for the purpose of "obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations."¹⁰²

In addition, the preamble to the GSA regulations¹⁰³ suggests that subcommittees of advisory committees are covered by the Act only when they are structured so as to report directly to the agency rather than through the main advisory committee, and that informal meetings of two or more members of advisory committees are not covered when the purposes of the meetings are: (1) to gather information, (2) to conduct research, or (3) to draft option papers for the full advisory committee.

Two impediments to successful negotiated rulemaking flow from FACA. First, the requirement in the statute and in implementing regulations for a charter, for GSA approval, for advance notice of meetings, and for minutes slow the negotiation process down. Second, and more fundamentally, some lawyers think that FACA and the implementing regulations require that meetings, not only of the full negotiating committee, but also of subgroups and caucuses, be open to the public. Such a requirement could prevent effective negotiation.

Open meetings increase the risks to individual participants of mak-

⁹⁶See generally Note, *Government in the Sunshine Act: Opening Federal Agency Meetings*, 26 AM. U. L. REV. 154, 172-195 (1976) (discussing ten Sunshine Act exemptions).

⁹⁷See *Braniff Master Executive Council v. CAB*, 693 F.2d 220 (D.C. Cir. 1982); *Pan American World Airways v. CAB*, 684 F.2d 31 (D.C. Cir. 1982) (remedies for violation of FACA limited to disclosure of minutes).

⁹⁸1 C.F.R. §§ 101.6.1001-6.1035 (1984).

⁹⁹1 C.F.R. § 101-6.1004 (1984). See 48 Fed. Reg. 19325 (Apr. 29, 1983) (preamble to GSA regulations).

¹⁰⁰48 Fed. Reg. 19325, at ¶ h(1) (Apr. 29, 1983).

¹⁰¹*Id.*, ¶ (2).

¹⁰²*Id.*

¹⁰³48 Fed. Reg. 19325 (Apr. 29, 1983).

ing concessions. On one occasion in the benzene negotiations, trade publication reports led to strong constituency reaction, impairing the authority of an industry representative. If representatives fear constituency reaction to tentative concessions, they will make concessions grudgingly. Such reluctance to move from initial postures makes fruitful negotiations difficult.¹⁰⁴

Some interests prefer keeping the threat of open negotiating sessions alive, however. Closing meetings may have an adverse effect on the power of public interest representatives.

The concerns about the influence of FACA on the regulatory negotiation process warrant an attempt to characterize the magnitude of the constraints imposed by FACA. Three questions frame the characterization: (1) Is a regulatory negotiation group an "advisory committee" within the meaning of the Act? (2) If it is, does the Act compel that meetings of the group and of any subordinate bodies be open to the public? (3) If the meetings must be open to the public, does this represent a real threat to the efficacy of negotiation? The three questions are hierarchical, in the sense that question (2) need not be addressed if one can give a confident negative answer to question (1). Similarly, question (3) need not be addressed, if the answer to question (2) is "no."

The answer to the first question is that regulatory negotiation groups probably are advisory committees under a literal interpretation of the Act. It is difficult to argue that a regulatory negotiation group is not "established by [an] agency . . . in the interest of obtaining advice or recommendations."¹⁰⁵ The agency, not having delegated its final authority to the negotiators,¹⁰⁶ must be seeking advice. Since, in negotiated rulemaking, the agency is seeking consensus advice, it is seeking advice from a group. This reasoning leads to the conclusion that FACA is applicable. However FACA is concerned with communication of advice to the agency, not how the advice is developed as among private interests. Under this view, FACA applies only to sessions at which the agency is present, not negotiation sessions or caucuses from which the agency is absent.¹⁰⁷ Some case law suggests that an agency might be able

¹⁰⁴These concerns led ACUS to recommend Congressional action to relax FACA requirements for negotiated rulemaking. *See* ACUS Recommendation 82-4 ¶ 2, 47 Fed. Reg. 30708, 30709 (1982).

¹⁰⁵The quoted phrases are the predicates for satisfying the definition of advisory committee, contained in § 3 of the Act. 5 U.S.C. App. II (1982).

¹⁰⁶Such a delegation would present other legal problems. *See* notes 31 to 41 *supra* and accompanying text.

¹⁰⁷Some support for this position and other theories supporting closed meetings of caucuses and subgroup meetings can be found in cases decided under the Sunshine Act.

to structure a negotiated rulemaking in a manner that would permit a court to find that no advisory committee was involved,¹⁰⁸ but an agency hardly could be assured that a court would sustain a position that no advisory committee is involved in negotiated rulemaking.

Assuming a regulatory negotiation group is an advisory committee, the second question that must be answered is whether the meetings must be open to the public. Here also, the answer is probably, "yes," although arguments exist that meetings might be closed to protect effective deliberations, especially where the committee membership is balanced.¹⁰⁹

GSA regulations permit meetings to be closed under the conditions set forth above. Conceivably a regulatory negotiation group could be structured to come within these conditions, i.e., by meeting with the agency only for the purpose of exchanging facts or information; initiating meetings rather than having the agency initiate meetings, when the purpose is "expressing the group's view," providing the agency does not use the group as a "preferred source of advice or recommendations"; and meeting with the agency only for the purpose of communicating "the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations."¹¹⁰ Proceeding within these limitations, however, would distort the negotiation process and would not alleviate entirely the possibility that a court would find that the spirit of the GSA regulations were violated, or that the regulations contravene the statute. The purpose of regulatory negotiation manifestly is to reach some sort of consensus, and most regulatory negotiation is in fact initiated by the agency.

Even if full meetings of the negotiation group must be open, how-

See *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 104 S.Ct. 1936 (1984) (informal background sessions or negotiations are not "meetings").

¹⁰⁸*See* *National Anti-Hunger Coalition v. Executive Committee of President's private Sector Survey on Cost Control*, 557 F. Supp. 524 (D.C. 1983), *aff'd* 711 F.2d 1071 (D.C. Cir. 1983) (task forces chaired by members of Presidential Commission were not advisory committees); *Consumers Union v. Dept. of Health, Education & Welfare*, 409 F. Supp. 473 (D.C. 1976), *aff'd* 551 F.2d 466 (D.C. Cir. 1977) (presentation by industry group on voluntary program was not advisory committee, where agency lacked authority to regulate subject); *Nader v. Baroody*, 396 F. Supp. 1231 (D.C. 1975) (White House meetings with selected private groups not advisory committee).

¹⁰⁹*Compare* *Nader v. Dunlop*, 370 F. Supp. 177 (D.C. 1973) (Act does not permit closing all meetings to protect deliberative consultations among members) *with* *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101 (D.C. Cir. 1976) (approving closure of portions of three meetings out of total of 20 because intra-agency memoranda within exemption 5 of FOIA had been discussed). *See generally*, *Perritt & Wilkinson*, *supra* note 92, at 743-47 (advocating applicability of FOIA exemption 5 to protect deliberative process of advisory committee).

¹¹⁰48 Fed. Reg. 19325 at ¶ h(1), h(2), j (Apr. 29, 1983).

ever, strong arguments exist that caucuses and subgroup meetings can be closed.¹¹¹ Support for this argument is found in *National Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control*.¹¹² In that case, the court found that subgroups formed by an advisory committee to provide information and recommendations for consideration to the committee were not themselves advisory committees.¹¹³ It reached this conclusion because the subgroups were not "established or utilized by the agency creating the full advisory committee." Rather the subgroups were established and utilized by the advisory committee, thus taking them out of the literal definition of advisory committee in FACA.¹¹⁴ Moreover, the court reasoned that Congress could not have intended that "interested parties . . . should have access to every paper through which recommendations are evolved, have a hearing at every step of the information-gathering and preliminary decisionmaking process, and interject themselves into the necessary underlying staff work so essential to the formulation of ultimate policy recommendations."¹¹⁵

Additional support for the right to close meetings of subgroups of a negotiating committee is found in the Supreme Court's decision, *FCC v. ITT World Communications, Inc.*¹¹⁶ In that case, the Court decided that the Sunshine Act¹¹⁷ did not require that meetings between a panel of the FCC and foreign officials be open to the public. It concluded that the Congress recognized that "'informal background discussions that clarify issues and expose varying views' are a necessary part of an agency's work,"¹¹⁸ and found that applying the Act's requirements to such discussions would "impair normal agency operations without achieving significant public benefit."¹¹⁹

Assuming that at least some of the meetings of a regulatory negotiation group must be open, the final question is presented: does it matter? The conventional wisdom conflicts somewhat with the evidence drawn from the completed negotiated rulemaking experiments. The conventional wisdom is that public meetings will chill the negotiation process. The experience of the benzene, flight and duty time,

¹¹¹48 Fed. Reg. 19325 (Apr. 29, 1983) (preamble to GSA regulations).

¹¹²557 F. Supp. 524 (D.C. 1983), *aff'd*, 711 F.2d 1071 (D.C. Cir 1983).

¹¹³*Id.* at 529.

¹¹⁴*Id.*

¹¹⁵*Id.*

¹¹⁶*FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 104 S.Ct. 1936 (1984).

¹¹⁷As explained above, exceptions to the FACA requirement for open meetings are linked to exceptions to the Sunshine Act open meeting requirement).

¹¹⁸466 U.S. at 463, 104 S.Ct. at 1940 (quoting Senate Report on Sunshine Act).

¹¹⁹*Id.*

NCP, and pesticide exemption participants, however, suggests that the nominally open meetings made little difference to the negotiations, remembering that FACA was interpreted in those negotiations as permitting closed meetings of subgroups and caucuses.

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 thus outside formal meetings of the negotiating group. Therefore where the potential for harm from public scrutiny was greatest it could not easily penetrate: luncheon or cocktail conversation, telephone calls, or informal meetings of fewer than all the participants. The second reason is that no one from the press or the non-participant public made much of an issue of caucuses or subgroup meetings being closed, nor did the negotiations result in much publicity. There is reason to believe that public and press interest in regulatory negotiation may increase, increasing the potential risk posed by the public meeting requirement. If regulatory negotiation becomes more common, and is applied to highly controversial issues, press or public interest representatives probably will 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 almost certainly will continue to be found.

H. Representation Issues

The APA does not address representation problems that may arise in selecting participants for negotiated rulemaking. There are, of course, models that could be borrowed from the National Labor Relations Act¹²⁰ or the Railway Labor Act¹²¹ or from the class certification procedures under the Federal Rules of Civil Procedure.¹²² These models suggest that the following issues may need to 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,

¹²⁰29 U.S.C. § 159 (1984) (providing for elections to select exclusive representative for an appropriate unit of employees).

¹²¹45 U.S.C. § 152 ¶ 4 (1982) (providing for elections to select exclusive representative for a class or craft of employees).

¹²²Fed. R. Civ. P. 23.

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 usefulness of the labor law or class action models, important differences exist between representation problems in negotiated rulemaking and in collective bargaining or class action litigation. First, interests affected by agency rules usually already have some representation arrangements through trade associations, trade unions, or public interest groups. These arrangements are determined by the constitutions or by laws of the private association, by powers of attorney given in specific cases, and by traditional practice. 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, rule negotiations do not envision long term relations among the parties like collective bargaining. 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 for selecting representatives for rule negotiations could cause more harm than benefit, in creating additional opportunities and incentives to litigate compliance with the representation procedures.

Therefore, the most practicable approach appears to be that adopted by ACUS: encouraging agencies to be mindful of representation issues and to be creative in finding ways to solve anticipated representation problems. Agencies might, of course, wish to use the labor law or class action procedures as rough models to define options for dealing with negotiated rulemaking representations disputes, possibly even holding "elections" through the notice-and-comment procedure.

IV. THE FOUR NEGOTIATIONS

Four major negotiated rulemaking efforts have been completed, involving three different agencies. The four efforts permit tentative conclusions to be drawn about the efficacy of the negotiation process and the ACUS recommendations. The following table summarizes the four negotiations.

Table 1—Four Rulemaking Negotiations

<i>Agency</i>	<i>Subject</i>	<i>Dates</i>	<i>Outcome</i>	<i>Status</i>
OSHA	Benzene Health Std.	1983–1984	Adjourned	Agency Drafted NPRM ¹²³
FAA	Flight & Duty Time	1983–1985	Consensus	Final Rule Out ¹²⁴
EPA	Non-Confor. Penalties	1984–1985	Consensus	Final Rule Out
EPA	Pesticide Exemptions	1984–1985	Consensus	NPRM Published

The Federal Aviation Administration (FAA) used negotiated rulemaking to develop revisions to flight-and-duty-time regulations after two failures to revise the regulations through traditional rulemaking. The EPA has shown particular enthusiasm for regulatory negotiation. Beginning in April 1984, EPA used negotiated rulemaking to develop an NPRM on Nonconformance Penalties under § 206(g) of the Clean Air Act,¹²⁵ resulting in agreement on a proposed rule issued 11 months later,¹²⁶ and a final rule issued on August 30, 1985.¹²⁷ EPA used negotiated rulemaking successfully a second time in revising regulations to implement exemptions to pesticide regulations. Negotiations resulted in agreement on a proposed rule, which was published in the spring of 1985.¹²⁸ EPA is now well underway in negotiating farmworker protection standards.

In the summer of 1983, OSHA tried negotiated rulemaking to develop a revised standard for occupational exposure to benzene, after an earlier OSHA benzene standard had been invalidated by the Supreme Court.¹²⁹ Negotiations proceeded for a little more than a year, producing near agreement on a standard. The parties did not make consensus recommendations to OSHA, however, because they could not agree on certain details and because changes in the political climate

¹²³50 Fed. Reg. 50512 (Dec. 10, 1985).

¹²⁴50 Fed. Reg. 29306 (Jul. 18, 1985).

¹²⁵49 Fed. Reg. 15576 (Apr. 24, 1984).

¹²⁶50 Fed. Reg. 9204 (Mar. 6, 1985).

¹²⁷50 Fed. Reg. 35374 (Aug. 30, 1985).

¹²⁸50 Fed. Reg. 13944 (Apr. 8, 1985).

¹²⁹*Industrial Dept.*, 448 U.S. at 662.

and dissension within affected constituencies made agreement too risky for the participants. More than a year later, OSHA issued an NPRM on its own.¹³⁰

The four negotiations studied were similar in important respects. In all four cases, the sponsoring agency picked a limited number of interest representatives to participate in the negotiations, based on past interest in the subject matter and on their potential to force consideration of their views through Congress, the Executive Office, or the courts. The negotiators thus selected defined their own protocols and decided what would constitute "consensus" to be reported to the agency. In all four cases, the sponsoring agency and the participants anticipated that, if consensus were reached, the resulting recommendation would be published in the Federal Register for public comment before the agency adopted a final rule based on the negotiated recommendation.

Despite these basic similarities, there were significant differences in subject matter, cohesiveness of interests represented in the negotiations, specific procedures followed, and commitment and competence of the agencies sponsoring negotiations.

OSHA and the FAA picked subjects for negotiation that had proved intractable in traditional rulemaking and judicial review. EPA picked subjects with which the agency had not already failed in traditional processes. Benzene, the OSHA candidate, was the riskiest candidate of all. At least some of the OSHA participants believed that determining an appropriate benzene standard should be a matter of analyzing scientific data, not of compromising positions between interested groups. Moreover, the OSHA litigation had exaggerated points of disagreement between labor and management, and led to divergent perceptions of what OSHA was expected to do in response to the Supreme Court's decision. Negotiation theory says that such divergent expectations make agreement more difficult. In contrast, 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.

Somewhat surprisingly, there was little controversy over who should participate in the negotiations. In all of the initiatives except the one involving benzene, the agencies published lists of proposed participants in the Federal Register, permitting excluded interests to make a showing as to why they should be added to the negotiating group.

Mediators were used in all four negotiations. Only one mediator

¹³⁰50 Fed. Reg. 50512 (Dec. 10, 1985).

came from within the sponsoring agency. Despite differences in styles, involvement of the mediators almost certainly was essential to keep all of the negotiations moving.

The most striking difference between the benzene negotiations and the other negotiations is that OSHA did not participate in the benzene negotiations, while the sponsoring agencies did participate in the others. In the benzene negotiation, the participants came to believe they would do better outside the negotiations, working directly with OSHA or with the Office of Management and Budget (OMB), and therefore, a negotiated agreement became unattractive.

Intra-constituency differences were manifest in both the benzene and flight-and-duty-time negotiations. Both the Airline Transport Association (ATA), representing airlines in the flight-and-duty-time negotiations, and the American Petroleum Institute (API), representing petroleum companies in the benzene negotiations, struggled to forge a consensus that could be communicated by their negotiation spokespersons. ATA had more success than API, probably because the sponsoring agency exerted more credible efforts to force the ATA to resolve constituency differences. The FAA left open the possibility of direct representation at the bargaining table by individual company members of the ATA. This created an incentive for the ATA itself and for members of the ATA who might not be afforded direct representation to formulate a coherent industry position that could be presented by the ATA. The mediators struggled to accomplish the same thing with API, but changes in OSHA leadership and intransigence of some industry members delayed resolution of constituency differences until the very end of the benzene negotiating effort.

In three of the four experiments (benzene, flight-and-duty-time, and NCP) the participants fell short of formal agreement on at least some of the major issues; indeed one could argue that fewer fundamental matters separated the benzene negotiators when negotiations were adjourned than separated the flight-and-duty-time negotiators. But the benzene negotiations are perceived widely as having failed, while the flight-and-duty-time negotiations are perceived as having succeeded. The explanation for different perceptions despite similarity of results is attributable to the difference in what the agency did when the negotiations were adjourned. The FAA, having participated in the negotiating sessions, had an understanding of what the parties could accept. OSHA, not having participated, had no such understanding. For the points of agreement on benzene to be communicated to OSHA required the transmission of a document. Yet the benzene negotiators had agreed that no document would be transmit-

ted in the absence of a consensus on a total package. No such ground rule operated in the flight-and-duty-time or the NCP negotiations.

The FAA justification for the negotiated flight-and-duty-time rule and EPA's justification for the NCP rule are good examples of sufficient independent agency commentary supporting the final rules to permit the rules to survive an arbitrary and capricious test in federal court, though no judicial challenges to the rules have materialized.

V. BASIS FOR ACUS RECOMMENDATIONS

The four agency efforts show that ACUS Recommendation 82-4 is basically sound. ACUS adopted additional recommendations on December 13, 1985, based on my report of the four negotiations.

The 1982 recommendations concentrated on the place of negotiated rulemaking in administrative law; the 1985 recommendations, in contrast, venture more deeply into the dynamics of the negotiation process. Assuming negotiations are permitted by the APA, Recommendation 85-5 offers guidance on how agencies and private participants can increase chances of a consensus being reached.

Some issues addressed in Recommendation 82-4 were not revisited by Recommendation 85-5. For example, the provisions of Recommendation 82-4 relating to defining participation in negotiations proved sound. Who needs to be included at the outset is determined by the same criterion as who needs to agree with the negotiating result: whoever's opposition to the negotiating result is likely to be fatal—or at least to pose a risk unacceptable to the participants. Thus if X, by litigating or inducing OMB or 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. In other words, the need for X's agreement is a continuous function of X's power to litigate successfully in the rulemaking proceeding and in the courts. This, in turn, is a function of how much X cares, X's resources, and the probable merits of X's position.

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. The agency sponsoring negotiated rulemaking should specify an initial list of participating interests and representatives, allowing comment and requests for additional participation. The FAA experience

shows the utility of this step. It permits subsequent criticisms of the process to be deflected.

Recommendation 82-4 also 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.¹³¹ Especially if the agency participates in the negotiations, formal, total-package agreement is not necessary. Any reasonably sophisticated agency participant will have a sense when negotiations are concluded as to what a given party can live with and what will be so obnoxious to that party that it will be moved to litigate. A sophisticated agency participant also will have a sense of what concessions are linked to gains on other issues. Moreover, 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 still provides the benefit of narrowing the issues. The FAA experience is a good example.

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 rule of thumb 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.

After the text of a rule is negotiated, the agency should publish it as an NPRM, allowing public comment, and articulating its own rationale for the rule finally adopted.¹³² APA review of a negotiated rule can be protected by negotiated agreement as to what the parties will put in the rulemaking record, and what the agency will say in support of the rule.

ACUS concluded that the four agency experiences did not show that FACA, as interpreted by the sponsoring agencies and participants, was a serious impediment to effective negotiations. The purpose of the Act is satisfied when a properly balanced rulemaking negotiation is con-

¹³¹Everyone 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.

¹³²Such an opportunity for comment is required by the APA. 5 U.S.C. § 553 (1982).

ducted, and the statute should not impose additional requirements that jeopardize the success of negotiation. There is no reason to believe, under current judicial and agency interpretation of the Act, that caucuses and other working group meetings may not be held in private, where this is necessary to promote an effective exchange of views. Agencies should not be deterred from considering negotiated rulemaking by a perception that the negotiating group will be an "Advisory Committee" under the Act. Accordingly, the Administrative Conference made no further recommendation in 1985 pertaining to FACA. Some uncertainty can be reduced, however, if the GSA amends its regulations to make it clear that meetings of caucuses and subgroups can be closed.¹³³ The recommended amendment is consistent with judicial interpretations of the Act.¹³⁴

The following paragraphs summarize and explain the rationale for ACUS Recommendation 85-5.

1. *An agency sponsoring a negotiated rulemaking should take part in negotiations.*¹³⁵ This is the major lesson learned from the unsuccessful effort to negotiate a benzene health standard. Agency participation can occur in various ways, for example, participating fully as a negotiator, or being present as an observer and commentator on possible agency reactions and concerns. Agency representatives in negotiations should be sufficiently senior in rank to be able to express agency views with credibility. Agencies should use negotiations, when they are undertaken, as the agencies' primary channel for communicating with the parties. 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 Congress. The willingness of a group to participate meaningfully in negotiated rulemaking is likely to be affected by the group's perception of its ability to influence the content of the rule through other channels.

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. Some agencies and commentators question the appropriateness of 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* the interests likely to influence the substance of a

¹³³See ACUS Recommendation 82-4, *supra* note 2, at ¶ 2.

¹³⁴See notes 111 to 119, *supra*.

¹³⁵Recommendation No. 1, 50 Fed. Reg. 52893 (Dec. 27, 1985).

regulation to communicate directly with each other. Under Executive Order 12291,¹³⁶ OMB has a major role to play in agency rulemaking. If, for some reason, agency or OMB participation is not acceptable, the mediators should serve as a channel between the negotiations and OMB and Congressional staff.

2. *Negotiations are unlikely to succeed unless all parties, including the agency, are motivated throughout the negotiations by a perception that a negotiated rule would be preferable to a rule developed under traditional processes.*¹³⁷ This also is a major lesson learned from the unsuccessful benzene negotiations. To foster this belief, as an incentive to negotiating an agreement, the agency 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 may need to communicate with other participants—perhaps with the assistance of a mediator—to ensure that each one has realistic expectations about the outcome of agency action in the absence of a negotiated agreement. Just like a judge encouraging private litigants to settle a lawsuit, the agency, as decisionmaker, must point out the flaws in each party's argument and position, and ensure that each party understands why the outcome of agency action in the absence of negotiated agreement may not be as favorable as the party thinks.

3. *Agencies should recognize that negotiations can be useful at several stages of rulemaking proceedings.*¹³⁸ Usually, negotiations should be used to help develop a notice of proposed rulemaking, with negotiations to be resumed after comments are received on the notice, as occurred in the four completed negotiations. Sometimes, however, negotiating the terms of a final rule could be a useful procedure even after publication of a proposed rule developed by the agency. When negotiations begin after a record is developed through hearings or otherwise, the agency could sit down with participants to decide, "what conclusions should we draw from this record?"

4. *An agency sponsoring a negotiated rulemaking proceeding should select a person skilled in techniques of dispute resolution to assist the negotiating group in reaching an agreement.*¹³⁹ Virtually all of the participants in the four completed rule negotiations agreed that the mediators made essential

¹³⁶46 Fed. Reg. 13193 (Feb. 17, 1981), reprinted as note to 5 U.S.C.A. § 601 (West 1985 Supp.).

¹³⁷Recommendation No. 2, 50 Fed. Reg. at 52895.

¹³⁸Recommendation No. 3, 50 Fed. Reg. at 52895.

¹³⁹Recommendation No. 5, 50 Fed. Reg. at 52895.

contributions to the process. The person selected may be styled "mediator" or "facilitator." There are advantages and disadvantages of outside and inside mediators. Inside mediators may be inhibited in dealing with intra-constituency problems and in intervening with other agencies of government, such as OMB. In addition, private parties may be reluctant to accept the neutrality of a mediator from within the agency. On the other hand, the use of an inside mediator in the pesticide negotiations worked well, and in appropriate cases, inside mediators may be effective.

5. *The agency, the mediator or facilitator, and, where appropriate, other participants in negotiated rulemaking, should be prepared to address disagreements within a particular constituency.*¹⁴⁰ Constituency disagreements threatened both the FAA and OSHA negotiations. The success of the FAA negotiation resulted in part from more timely resolution of such disagreements. Agencies should consider the potential for constituency disagreements in choosing representatives, in planning for successful negotiation, and in selecting persons as mediators. Students of negotiation long have 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.

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 therefore are 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.)

If such 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.

The potential for internal constituency disagreements also should influence the selection of interest representatives. If a trade association may be unable to represent its constituents effectively, it may be desirable to include individual company representatives. It also may be desirable to convene subgroups of major sub-interests, to provide the

¹⁴⁰Recommendation No. 7, 50 Fed. Reg. at 52895.

mediator with a forum in which to adjust internal constituency disagreements. Agencies and mediators should be wary, however, of fragmenting representation too much; permitting sub-interests to be represented separately merely moves disagreements among these sub-interests from other resolution forums to the bargaining table itself.

VI. CONCLUSION

Negotiated rulemaking is a credible alternative to traditional adversarial procedures before administrative agencies, and thus has become a respectable part of the search for "regulatory reform." Agencies are likely to consider its use in connection with a variety of future rule changes. EPA has begun a third negotiation over farmworker protection rules,¹⁴¹ and OSHA has begun a negotiation to develop standards for MDA.¹⁴² The FTC and the Department of Interior are considering negotiated rulemaking for specific rulemaking proceedings.

It is important, however, for agencies and students of the administrative process to understand the dynamics of negotiation in the regulatory context, to understand how negotiation fits within the constraints of administrative law, to think hard about the ideas embodied in the ACUS recommendations, and to be sophisticated about creating incentives for interest groups to resolve their own differences rather than advocating rigid positions for agencies and courts to sort out.

¹⁴¹50 Fed. Reg. 38030 (Sep. 19, 1985).

¹⁴²50 Fed. Reg. 42789 (Oct. 22, 1985).