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# Negotiated Rulemaking in Practice

*Henry H. Perritt, Jr.*

## **Abstract**

*Until recently, parties interested in rulemaking by federal agencies were forced to voice their views primarily through adversarial procedures. An alternative, negotiated rulemaking, was proposed by the Administrative Conference of the United States (ACUS) in 1982. Since then, negotiated rulemaking has been used four times by federal agencies. The four completed negotiations show that negotiated rulemaking 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 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. This article summarizes the results of a recently completed report prepared by the author for the Administrative Conference. It reviews the genesis of negotiated rulemaking, presents a framework within which to understand dynamics of the negotiation process and related administrative law issues, and presents recommendations for future agency use of negotiated rulemaking recently adopted in substance by the Administrative Conference.<sup>1</sup>*

In the civil litigation system, the threat of adversarial hearings and a decision by a judge or jury often encourages the parties in disputes to resolve their differences through negotiation.<sup>2</sup> Until recently, parties interested in rulemaking by federal agencies were forced to voice their views primarily through adversarial procedures. An alternative, negotiated rulemaking, was proposed by the Administrative Conference of the United States (ACUS) in 1982.<sup>3</sup> Since then, negotiated rulemaking has been used four times by federal agencies. I recently completed a major review of these four negotiations.<sup>4</sup> My objectives here are to provide a brief summary of my review and to speculate on the potential for effective use of

negotiated rulemaking under the ACUS recommendations in the future.

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 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 important question for policy research is: Under what circumstances can negotiated rulemaking be used effectively?

#### GENESIS OF NEGOTIATED RULEMAKING IDEA

Negotiated rulemaking<sup>5</sup> emerged as a distinct administrative law concept in the late 1970s as a reaction to the unsuitability of notice-and-comment and hybrid rulemaking.<sup>6</sup> 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 statutes.

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, and decisional procedures designed to promote the rationality of agency decisions.<sup>7</sup> These objectives led courts to force agencies to follow adversarial procedures aimed at creating a formal "record" to support agency decisions.<sup>8</sup>

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."<sup>9</sup> Adjudication is designed only to deal with rights disputes.<sup>10</sup> Rights disputes involve application of preexisting legal standards or "rules of decision" to facts determined by the adjudicator. This is what the adjudicatory process, modelled on a judicial trial, is designed to accomplish. Interest disputes, in contrast, are characterized by the absence of preexisting 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, "The Limits of Legal Compulsion,"<sup>11</sup> which suggested that "the parties who will be affected by a set of regulations should be involved to a greater extent in developing those regula-

tions."<sup>12</sup> 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,<sup>13</sup> in which he amplified the Dunlop concept. Harter synthesized an "explicitly political" process to improve administrative agency decision making: negotiated rulemaking. Formulation of ACUS Recommendation 82-4, which encourages the use of negotiated rulemaking by federal agencies, proceeded contemporaneously with Harter's writing of his article.

**ANALYTICAL CONTEXT OF NEGOTIATED RULEMAKING** Negotiation succeeds only when persons able to use other processes have an incentive to participate in negotiation and to reach agreement.

A useful conceptual structure for understanding incentives to negotiate is the one offered by Roger Fisher and William Ury in their popular book on the negotiation process.<sup>14</sup> 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 emphasizes the idea that reservation price is determined exogenously.

For potential participants in a regulatory negotiation, BATNA's are determined by perceptions of what the agency will do in the absence of a negotiation.<sup>15</sup> 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 BATNA's 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.<sup>16</sup> Agreements (1) and (2) can be called "intraparty agreements." Frequently the most difficult mediation job involves achieving the intraparty agreements rather than achieving the negotiator-negotiator agreement.

It is important for someone involved in the negotiation process—the representatives themselves, the mediators, or the agency

personnel—to be adroit at diagnosing intraconstituency problems and working creatively to facilitate intraconstituency agreement.

Negotiated rulemaking involves interaction among interest groups.<sup>17</sup> Accordingly, 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. 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 variable in the calculus of public opinion.<sup>18</sup> Transaction costs prevent a plebiscite on every public policy alternative, and reduce the desire of interest groups to have such involvement in the full range of political decisions.<sup>19</sup>

Interest groups perform important representation, or interest aggregating, functions, that are essential to practical negotiation.<sup>20</sup> Interest groups function to intensify member interest in particular issues, to formulate concrete alternatives, and to articulate member positions.<sup>21</sup>

Especially when the issues involved are complicated, group members may defer almost entirely to the decisions of group representatives. This deference can make negotiations involving such representatives 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.

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.<sup>22</sup> 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 diffuse benefits over large parts of the population and concentrate costs on relatively narrow sectors.

The dynamics of interest group 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—especially interest group perceptions of the probable outcome in the absence of negotiated agreement.

**ADMINISTRATIVE LAW  
ISSUES**

Negotiated rulemaking can be accomplished within existing administrative law doctrines. For example, the “delegation doctrine” is not a serious impediment. The delegation doctrine prohibits

government officials from delegating their policymaking authority to persons or institutions that are not politically accountable.<sup>23</sup> Under all the current conceptions of negotiated rulemaking, negotiators play only an advisory role to the agency; the agency retains the final decision making authority.<sup>24</sup> Moreover, negotiated rulemaking provides its own form of political accountability, which probably is greater than when the agency makes rules unilaterally.<sup>25</sup>

Negotiated rulemaking also does not contravene a policy against “*ex-parte*” communication, derived from the Administrative Procedure Act.<sup>26</sup> Under the leading cases, limitations on *ex parte* contact should not impede negotiated rulemaking when: (1) the rule ultimately adopted by the agency is supported by factual information contained in the official record; (2) the negotiation takes place among appropriately balanced interest representatives; (3) the agency gives nonparticipants with an interest in the content of the rule an opportunity to comment on the rule; (4) consultation between the agency and the negotiation participants after the “record” is closed focuses on policy, rather than new factual matters; and (5) summaries of such discussions are placed in the “record” so that nonparties to the discussions can know of their substance and have an opportunity to respond.

A rule promulgated merely because it is agreed upon in negotiations among affected parties might be vulnerable to attack as being arbitrary and capricious,<sup>27</sup> unless the agency offers its own rationale and support for the content of the rule.<sup>28</sup> Of course, there is no reason negotiators may not discuss what needs to be put in the record to support their consensus proposal, and what the agency should say in its rationale.

All of these administrative law doctrines militate against negotiation of a final rule without some opportunity for public comment. Using negotiations to prepare a proposed rule, and then allowing notice-and-comment rulemaking, as occurred in all three of the successful negotiated rulemaking efforts, is a sound approach with few apparent disadvantages.

The Federal Advisory Committee Act<sup>29</sup> (FACA) presents a potential threat to the effectiveness of negotiated rulemaking. A strict interpretation of the Act requires that regulatory negotiation sessions be open to the public. The danger of publicity is that constituents can become alarmed by fragmentary or inaccurate reports of positions taken or compromises considered by their representatives, thus endangering the minimum level of constituent support necessary to make the participation of any representative meaningful. General Service Administration regulations implementing FACA,<sup>30</sup> however, permit certain meetings to occur without compliance with the Act. There is no reason to believe, under current judicial<sup>31</sup> 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.

If, however, press or public interest representatives become more aggressive in insisting that all negotiating sessions be

**Table 1.** Four rulemaking negotiations.

Agency	Subject	Dates	Outcome	Status
OSHA	Benzene health standard	1983–1984	Adjourned	Agency drafting NPRM
FAA	Flight and duty time	1983–1985	Consensus	Final rule out <sup>32</sup>
EPA	Nonconformance penalties	1984–1985	Consensus	Final rule out
EPA	Pesticide exemptions	1984–1985	Consensus	NPRM published

open to the public, FACA could become a greater impediment to the negotiations process.

#### 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. Table 1 summarizes the four negotiations.

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 Environmental Protection Agency (EPA) has shown particular enthusiasm for regulatory negotiation. Beginning in April 1984, EPA used negotiated rulemaking to develop a Notice of Proposed Rulemaking (NPRM) on Nonconformance Penalties under §206(g) of the Clean Air Act,<sup>33</sup> resulting in agreement on a proposed rule issued 11 months later,<sup>34</sup> and a final rule issued on August 30, 1985.<sup>35</sup> 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.<sup>36</sup>

In the summer of 1983, the Occupational Safety and Health Administration (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.<sup>37</sup> 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 and dissension within affected constituencies made agreement too risky for the participants.

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 of the President 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 also were significant differences in subject matter, cohesiveness of interests represented in the negotiations, specific procedure 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 range 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 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.

Intraconstituency 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 some 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 all 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 agencies 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 transmission of a document. Yet the benzene negotiators had agreed that no document would be transmitted 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 four agency experiences show that the Federal Advisory Committee Act, as interpreted by the sponsoring agencies and participants, was not a serious impediment to effective negotiations. But it is important to note that many participants were concerned about the need to shield certain discussions from public disclosure and the ability to close caucuses and other working group meetings to the public was considered to be essential to successful negotiation.

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.

**APPLICATION OF 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.

It is important to view both the 1982 and the 1985 ACUS recommendations as a guide to issues to be considered rather than a formula to be followed. Negotiation intrinsically is a process that cannot be specified entirely in advance. What will “work” 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 before negotiations conclude. Proponents of negotiated rulemaking must recognize that neat formal solutions to questions of who should participate and the definition of consensus, either in general or in the context of a particular proceeding, are not feasible.

The following paragraphs summarize and explain my recommendations to agencies considering negotiated rulemaking. These recommendations were adopted in substance by the Administrative Conference on December 13, 1985.

1. *An agency sponsoring a negotiated rulemaking should take part in negotiations.* 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 exercised through direct dealings with the agency, through contact with OMB, through litigating in the courts, and through lobbying with the 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 regulation to communicate directly with each other. Under Executive Order 12291,<sup>38</sup> 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.* 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.* 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.* Virtually all of the participants in the four completed rule negotiations agreed that the mediators made essential 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 some 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.* 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 a 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 intraconstituency disagreements away from the table.

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

**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,<sup>39</sup> and OSHA has begun a negotiation to develop standards for MDA.<sup>40</sup> The Federal Trade Commission and the Department of Interior are also 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.

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- NOTES**
1. This paper is based on research completed by the author for the Administrative Conference of the United States.
  2. See Perritt, Jr., Henry H., "And the Whole Earth Was of One Language—A Broad View of Dispute Resolution," *Villanova Law Review*, 29 (6) (November 1984): 1221–1338.
  3. Recommendation 82–4, 47 Fed. Reg. 20708 (July 15, 1982), codified at 1 C.F.R. §305.82–4 (1984).
  4. Perritt, H., Analysis of Four Negotiated Rulemaking Efforts (November 15, 1985) (available from the Administrative Conference of the United States).
  5. "Regulatory negotiation" is a term that refers to use of negotiation in any decisionmaking process by an administrative agency. "Negotiated rulemaking" is a specific application of regulatory negotiation, referring to the use of negotiation in the decisionmaking process associated with rulemaking.
  6. "Hybrid rulemaking" is a procedure imposed by statute or by the courts under the Administrative Procedure Act (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.
  7. Stewart, Richard, "The Reformation of American Administrative Law," *Harvard Law Review*, 88(8) (June 1975): 1667–813; Jaffe, Louis L., "The Illusion of the Ideal Administration," *Harvard Law Review*, 86 (6) (April 1973): 1183–99 (criticizing model based on assumption that Congress establishes an objective that "is capable of disinterested and nonpolitical administration," and suggesting instead a political model).
  8. The 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," *Yale Law Journal*, 85 (1975): 38–88.
  9. See Perritt, "And the Whole Earth Was of One Language: A Broad View of Dispute Resolution," *Villanova Law Review* 29 (1984): 1221–29.
  10. See Fuller, Lon, "The Forms and Limits of Adjudication," *Harvard Law Review*, 92 (2) (December 1978): 353–409.
  11. See Dunlop, John T., "The Limits of Legal Compulsion," *Labor Law Journal*, 27 (2) (February 1976): 67–74.
  12. *Ibid.*, p. 72.
  13. Harter, Philip J., "Negotiating Regulations: A Cure for Malaise," *Georgetown Law Journal*, 71 (1982): 1–118.

14. Fisher, R., and Ury, W., *Getting to Yes* (Penguin Books, 1983).
15. What the agency will do will be affected by what courts, the President, and the Congress will do. So perceptions of these influences is important also.
16. Dunlop, John T., "The Negotiations Alternative in Dispute Resolution," *Villanova Law Review*, 29 (1984): 1421–48. (referring to the need for three agreements to conclude a negotiation).
17. Key, V. O., *Politics, Parties and Pressure Groups* (Thomas Y. Crowell Company, 1942), p. 7. (Politics is a struggle among groups or interests.)
18. Dahl, Robert A., *A Preface to Democratic Theory* (University of Chicago Press, 1956), p. 50.
19. *Ibid*, p. 44.
20. Key, *op. cit.*, 203.
21. Key, *op. cit.*, pp. 203–204.
22. See Wilson, James Q., "The Politics of Regulation", J. Wilson (ed.), *The Politics of Regulation*, (1980), pp. 357, 366–67. (classifying regulatory programs).
23. See *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 671, 672, 686 (1980) (Rehnquist, J., concurring in the judgment); *A. L. A. Schecter Poultry v. United States*, 295 U.S. 495 (1935) (invalidating statute delegating authority to private industry group).
24. *Harvard Law Review*, 94: 1882–83; Harter, *Georgetown Law Journal*, 71: 109. In all of the negotiated rulemaking efforts reviewed in this report, agencies unequivocally reserved final decisionmaking authority.
25. *Ibid*.
26. See Note, "Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking," *Harvard Law Review*, 94 (1981): 871–91 (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). Restrictions on *ex-parte* communication in informal rulemaking derive from *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied* 434 U.S. 829 (1978). Major questions about the correctness of the *Home Box Office* limitations were raised by the D.C. Circuit in *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).
27. 5 U.S.C. §706(2) (A) (1982). See Stewart, Richard, "The Reformation of American Administrative Law," *Harvard Law Review*, 88 (8) (June 1975): 1667–813 (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, "Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking," *Harvard Law Review*, 94 (1981): 871–91 (suggesting that use of negotiation ought to relax judicial review standards); Wald, Patricia, "Negotiation of Environmental Disputes: A New Role for the Courts?," *Columbia Journal of Environmental Law*, 10 (1985): 1–33 (expressing wariness of requiring courts to consider adequacy of representation and opining that judicial review of negotiated rules will not change much).
28. *Motor Vehicle Manufacturers Ass'n. v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 48 (1983).
29. 5 U.S.C. App. II (1982).

30. 1 C.F.R. §§101.6.1001–6.1035 (1984). See 48 Fed. Reg. 19325 (April 29, 1983) (preamble to GSA regulations).
31. See *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 529 (D.D.C. 1983) (subgroups formed by advisory committee to provide information and recommendations for consideration to the committee were not themselves advisory committees).
32. 50 Fed. Reg. 29306 (July 18, 1985).
33. 49 Fed. Reg. 15576 (April 24, 1984).
34. 50 Fed. Reg. 9204 (March 6, 1985).
35. 50 Fed. Reg. 35374 (August 30, 1985).
36. 50 Fed. Reg. 13944 (April 8, 1985).
37. *Industrial Union Dept. v. American Petroleum Institute*, 448 U.S. 607, 662 (1980).
38. 46 Fed. Reg. 13193 (February 17, 1981), reprinted as note to 5 U.S.C.A. §601 (West 1985 Supp.).
39. See 50 Fed. Reg. 38030 (September 19, 1985).
40. 50 Fed. Reg. 42789 (October 22, 1985). "MDA" is 4,4'—Methylene-dianiline.