An Alternative to the Traditional Rulemaking Process: A Case Study of Negotiation in the Development of Regulations

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Comment

AN ALTERNATIVE TO THE TRADITIONAL RULEMAKING PROCESS: A CASE STUDY OF NEGOTIATION IN THE DEVELOPMENT OF REGULATIONS

I. INTRODUCTION

During the last decade, increasing attention has been paid to the forms and functions of administrative agencies in the United States. What began as a new assertion of governmental power in the late nineteenth century is now described as the “fourth branch” of the American government.

Administrative agencies perform a variety of functions in modern society; as a group, these functions defy generalization. However, one type of agency action which can be identified is rulemaking. The focus of this comment will be limited to a critical analysis of a theory which suggests regula-

1. See generally E. BARDACH & R. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (1982) (significant economic costs and other less tangible costs are symptoms of current state of regulatory unreasonableness); Breyer, Analysing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform, 92 HARV. L. REV. 547 (1979) (inherent problems in present regulatory system render it inherently ill-designed to meet its objectives); Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1667 (1975) (traditional model of administrative law has disintegrated and current responses to the disintegration fail as structures for legitimating agency action).

2. See E. BARDACH & R. KAGAN, supra note 1, at 8; Stewart, supra note 1, at 1671. The challenge of administrative law during the nineteenth century was to “reconcile the new . . . governmental power with a long-standing solicitude for private liberties by means of controls that served both to limit and legitimate such power.” Stewart, supra note 1, at 1671-72.


4. Stewart, supra note 1, at 1670-71 n.5. There are “significant differences in administrative functions, agency forms, and the sources and operative foci of various administrative law doctrines” which render all attempts at generalization about administrative agencies perilous. Id.


The other major type of agency action is adjudication. See 5 U.S.C. §§ 551(6), (7), 554 (1982) (adjudication is the process by which agencies formulate orders). Adjudications typically apply to “specific individuals” and “operate concretely” upon those individuals. See B. SCHWARTZ, ADMINISTRATIVE LAW § 55 (1976).

For a discussion of the notice of proposed rulemaking which is required by
tory negotiation as a method of reform for agency rulemaking.\textsuperscript{6}

Administrative rulemaking procedures have been undergoing development and change for a number of years. After examining the current problems with agency rulemaking and their historical roots, this comment will set forth and explain a recently proposed cure for some of these problems: negotiated rulemaking. The development of one set of regulations which involved substantial negotiation will be examined as a case study of the viability and predictive accuracy of the negotiated rulemaking procedure.\textsuperscript{7} Finally, this comment will evaluate the viability of negotiated rulemaking and suggest some modifications in the procedures to improve this alternative form of administrative action.

II. PROBLEMS WITH THE CURRENT REGULATORY STRUCTURE

To understand the proposed changes in the rulemaking process, it is important to review briefly the history of American administrative agencies and the procedures they have employed to develop rules.\textsuperscript{8} The early era of American administrative law followed the advent of the industrial revolution, and was an attempt to “reconcile” claims of governmental authority with private sector autonomy.\textsuperscript{9} This reconciliation was achieved by prohibiting official “intrusions on private liberty or property” except when the leg-

\textsuperscript{6}§ 553, see note 68 \textit{infra}. For a discussion of the opportunity to participate which must be offered in rulemaking proceedings pursuant to \textsection{} 553, see note 56 \textit{infra}.

\textsuperscript{7}The scope of this comment will not encompass agency adjudications in order to permit a more detailed analysis of a recent proposal which advocated the use of negotiated rulemaking. \textit{See generally} Harter, \textit{Negotiating Regulations: A Cure for Malaise}, 71 \textit{Geo. L.J.} 1 (1982) (proposing a comprehensive agenda for the negotiation of rules); Note, \textit{Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking}, 94 \textit{Harv. L. Rev.} 1871, 1872 (1981) (relaxed procedural rules for rulemaking leave room for experimentation with new ideas). For a discussion of Mr. Harter’s proposals for the use of negotiated rulemaking, see notes 34-74 and accompanying text \textit{infra}.

\textsuperscript{8}For a discussion of the Office of Federal Contracts Compliance Programs (OFCCP) regulations which were developed through a process which included substantial negotiations between interested parties, see notes 75-115 and accompanying text \textit{infra}.

\textsuperscript{9}\textit{See generally} Stewart, \textit{supra} note 1 (comprehensive review of traditional model of administrative law; explication of view that agencies were originally “transmission belts” intended to fulfill specific legislative directives).

\textsuperscript{10}Id. at 1669-70; Harter, \textit{supra} note 6, at 8. Professor Stewart explained the development of administrative law in post-Industrial Revolution America: The direct control by state, and then federal, administrative officials of rates, services, and other practices, first of railroads and then of a wide variety of other enterprises, grew so pervasive and intrusive that it could not be justified by reference to past executive practices. Accordingly, a body of doctrines and techniques developed to reconcile the new assertions of governmental power with a long-standing solicitude for private liberties by means of controls that served both to limit and legitimate such power. Stewart, \textit{supra} note 1, at 1671-72.

In addition to the “explosion of modern regulatory . . . programs” after the Industrial Revolution, it is important to recognize that regulation of commercial practices occurred in colonial America. E. \textit{BARDACH} & R. \textit{KAGAN}, \textit{supra} note 1, at 8. Just as regulation has a long history in America, those regulated have long resented
isalure had authorized such intrusions.10 Because so much of the regulatory activity in this era was designed solely to transmit legislative directives to the regulated public, the early administrative agencies have been described as "transmission belt[s]."11 As a corollary to the "transmission belt" theory, administrative discretion was explicitly limited in the early regulatory programs.12

In contrast to the narrow roles played by the early regulatory agencies, and been dissatisfied with the regulations affecting them. Id. (citing E. Freund, Standards of American Legislation 77 (1965)).


The concern for safety manifested in the regulation of food production was also demonstrated by the increased attention paid to workplace safety and health, railroad safety, and safe housing. Id. at 8-9. See also Locomotive Inspection Act, Pub. L. No. 61-383, 36 Stat. 913 (1911) (codified as amended at 45 U.S.C. §§ 22-34 (1976)) (requiring railroads to establish self-inspection system for boilers and locomotive parts using Interstate Commerce Commission inspectors).

11. Stewart, supra note 1, at 1675. Under the "transmission belt" theory, intrusion "into private liberties by agency officials not subject to electoral control" was only permitted when "such intrusions . . . [were] commanded by a legitimate source of authority—the legislature." Id.

The narrow role accorded to the "transmission belt" agencies reflected the late 19th century belief that the most effective protection "against dangerous products and processes usually . . . [had] been the economic market and the incentives it creates." E. BARDACH & R. KAGAN, supra note 1, at 9. An additional source of protection was liability law—employers and producers feared the damage awards and adverse publicity which would occur unless steps were taken to improve safety. Id. at 10.

12. Harter, supra note 6, at 8. One reason for the lack of administrative discretion was the absence of a constitutional grant of "inherent administrative powers over persons and property." Stewart, supra note 1, at 1672. As a result, any control which limited private conduct had to be "authorized by the legislature, and, under the doctrine against delegation of legislative power, the legislature must promulgate rules, standards, goals, or some 'intelligible principle' to guide the exercise of administrative power." Id. (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)).

An example of the limits placed on the early regulatory programs was the "comparatively limited" mandate which empowered the Interstate Commerce Commission to protect the public against unreasonable charges but failed to give the Commission the authority to prescribe future rates. Id. at 1677 n.28 (citing I.L. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 11-35 (1931)); see Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended at 49 U.S.C. §§ 1-27 (1982)) ( Interstate Commerce Commission established to protect general public against unreasonable and discriminatory charges). Further illustrations of the limited mandate granted to the Interstate Commerce Commission were the narrow amendments enacted by Congress when difficulties arose concerning the scope of the Commission's powers and the "limiting construction" given to the amendments by the courts. Stewart, supra note 1, at 1677 n.28 (citing Intermountain Rate Cases, 234 U.S. 476 (1914)).
the agencies created as part of President Roosevelt's New Deal were granted extensive powers to fulfill very general legislative directives. The operative assumption behind these broad powers was that the agency staffs were "detached, neutral, technocratic experts" who were capable of making the complex decisions inherent in a regulatory program. Despite the increased discretion granted to agencies in the 1930's, critics disapproved of the broad powers which, in their view, violated the doctrine of separation of powers.

The Administrative Procedure Act (APA) was enacted after protracted criticism of the administrative process. The APA was designed to assist agency personnel in their exercise of discretion by requiring an "outreach... for information" and an opportunity for the public to make its views known. For approximately two decades after the APA was passed, courts applied its limitations as the sole method of checking agencies' discretion.


14. Harter, supra note 6, at 9; Stewart, supra note 1, at 1678. Those who favored the unprecedented grant of power to the agencies argued that such action was necessary in order to meet the economic crisis posed by the Depression. See Stewart, supra note 1, at 1677 n. 31 (citing J. Landis, The Administrative Process 10-16, 46-50 (1938)). Further, it was argued that broad "discretion was necessary if the agencies were to discharge their planning and managerial functions successfully..." Id. at 1677.

For a discussion of the shortcomings of the theory that administrative agencies are experts who should be entrusted with vast discretion, see note 105 infra.

15. Stewart, supra note 1, at 1678-79 (citing McGuire, Federal Administrative Decisions and Judicial Review Thereof; or, Bureaucracy Under Control, 48 Va. State B.J. 301 (1936)). See also K. Davis, Administrative Law Text § 1.01, at 2 (1972) (first stage in development of administrative law focused on constitutional underpinnings of the administrative process, and emphasized separation of powers and the delegation of power).


17. K. Davis, supra note 15, § 1.04, at 9-10. Professor Davis explained that criticism of the administrative bureaucracy began in 1932 and was exacerbated through the New Deal by the proliferation of new agencies until "antagonism toward bureaucracy...[approached] the breaking point." Id. at 8. During the late 1930's, the American Bar Association and President Roosevelt both investigated the need for procedural reform in administrative law. Id. Efforts to reform administrative law were cut off during World War II, but in 1946 Congress unanimously passed the APA. Id. at 9.

18. Harter, supra note 6, at 9. See Stewart, supra note 5, at 1274. The APA was initially perceived as an information-gathering procedure to aid the agencies in decisionmaking, but this perception has changed during the last 38 years: "The [APA notice-and-comment rulemaking] procedures were not originally conceived as adversary mechanisms whereby outside parties could check agency power and lay the groundwork for judicial review." Id. (footnote omitted). For a discussion of the adversarial "posturing" typically found in a modern rulemaking procedure, see note 41 infra.

19. Stewart, supra note 1, at 1678-81. Professor Stewart has identified three judi-
In the late 1960's, however, the balance of power which had controlled
the exercise of discretion by administrative agencies was called into question.
In order to insure that technical issues were resolved more carefully and ac-
curately, reviewing courts began to require procedures to supplement those
procedures required by the APA.\textsuperscript{20} In addition, the courts began to apply
more stringent standards of review such as the "hard look" approach which
necessitated the development of an "extensive [administrative] record" prior
to the APA was enacted:

First, by undertaking a more searching scrutiny of the substantiality of
the evidence supporting agency factfinding and by insisting on a wider
range of procedural safeguards, the courts have . . . promoted more accu-
rate application of legislative directives. Additionally, more rigorous en-
forcement of procedural requirements, such as hearings, may have
influenced agencies' exercise of their discretion and may have served as a
partial substitute for political safeguards by, for example, facilitating input
from affected interests. . . .

A second technique . . . was the requirement of reasoned consistency
in agency decisionmaking. Under this doctrine, an agency might be re-
quired to articulate the reasons for reaching a choice in a given case even
though the loose texture of its legislative directive allowed a range of possible
choices. . . .

Third, courts began to demand a clear statement of legislative purpose
as a means of restraining the range of agency choice when fundamental
individual liberties were at risk.

\textit{Id.} (footnotes omitted). For a discussion of the requirement that substantial evidence
support agency factfinding, see Universal Camera Corp. v. NLRB, 340 U.S. 474
(1951) (Congress intended that courts of appeals should determine whether there is
substantial evidence on the record as a whole to support agency findings). For an
example of the wider range of procedural safeguards upon which courts have insisted,
see Wong Yang Sung v. McGrath, 339 U.S. 33, 50-51 (1950) (§ 5 of the APA covers
deportation hearings conducted by the Immigration Service despite absence of ex-
press requirement for hearings in Immigration Act). For a discussion of the require-
ment that agencies demonstrate reasoned consistency, see Hammond v. Lenfest, 398
F.2d 703, 715 (2d Cir. 1968) (a validly promulgated regulation binds the government
as much as the individuals subject to the regulation). \textit{But cf.} NLRB v. Bell Aerospace
Co., 416 U.S. 267, 294 (1974) (agencies can choose between promulgation of rules or
case-by-case adjudication, and their determination that adjudication is appropriate is
entitled to great weight). For a discussion of the clear legislative purpose in cases
involving individual liberties, see Kent v. Dulles, 357 U.S. 116, 129 (1958) (if "lib-
erty" is to be regulated by a delegated power, the delegation must be narrow and
courts will construe all such powers narrowly).

\textsuperscript{20} See Stewart, supra note 5, at 1274. Among the requirements judges began to
impose in the late 1960's were: disclosure requirements concerning the documents
and analysis which underlaid rulemaking proposals; additional rounds of notice-and-
comment rulemaking if the initial proposed rules were "significantly modified or if
public comments raised new issues," and inclusion of "all relevant documentary
analysis and data (including that generated within the agency or otherwise relied upon
by it in making decisions) in the materials available to the court on judicial review."
\textit{Id.} at 1274-75 n.56 (citing Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C.
Cir. 1973), \textit{cert. denied}, 417 U.S. 921 (1974); International Harvester Co. v. Ruckel-
shaus, 478 F.2d 615 (D.C. Cir. 1973); Kennecott Copper Corp. v. EPA, 462 F.2d 846
(D.C. Cir. 1972)).
to more thorough judicial review.\textsuperscript{21}

Congress also contributed to this movement to increase agency accountability with the passage of the Freedom of Information Act of 1966,\textsuperscript{22} the Federal Advisory Committee Act of 1972,\textsuperscript{23} and the Government in the Sunshine Act of 1976.\textsuperscript{24} The executive branch also "undertook an increasingly activist role in influencing the exercise of agencies' discretion" by taking steps which included the imposition of cost analyses, impact analyses and

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  \item The function of the court is to . . . [insist] that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts . . . [An agency's] findings must cover all the substantial differences between the applicants . . . .
  \item Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making . . . . If satisfied that the agency has taken a hard look at the issues with the use of reasons and standards, the court will uphold its findings . . . .
\end{itemize}

Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 851 (D.C. Cir. 1970) (footnotes omitted) (emphasis supplied), cert. denied, 403 U.S. 923 (1971); see also B. SCHWARTZ, supra note 5, § 204 (judicial review is at a watershed and a more positive role is demanded by the changing character of administrative litigation).

One criticism of the "hard look" was that agencies were forced both to serve as arbiters between the affected interests and to attempt to adjust those interests in what amounted to an "essentially legislative process." Stewart, supra note 1, at 1683.


Professor Breyer has described the recent changes in administrative procedure as attempts "to improve the legitimacy of agency decision making." S. BREYER, REGULATION AND ITS REFORM 350 (1982).

23. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended as 5 U.S.C. app. §§ 1-15 (1982)). The purpose of the Federal Advisory Committee Act was to "promote the effective use of advisory committees in the executive branch of the Government." H.R. REP. NO. 1017, 92d Cong., 2d Sess 1, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 3491. An "advisory committee" is any "committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof" created by statute or reorganization plan, or by the President or one or more agencies in order to obtain advice or recommendations. Id. at 3, reprinted in 1972 U.S. CODE CONG. & AD. NEWS at 3493.

Advisory committees have been criticized recently as favoring "those who have vested economic interests in the panels' decisions." Phila. Inquirer, Feb. 29, 1984, at 5A, col. 1. The effectiveness of advisory committees as safeguards to increase agency accountability could be undermined unless the government administers them more carefully. Id.

24. Pub. L. No. 94-409, § 3(a), 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 522b (1982)). The Sunshine Act, which is codified as part of the APA, requires agency heads to open to the public every meeting of an agency unless the agency finds that the public interest requires otherwise. Id. § 522b(b), (c).

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other controls.\textsuperscript{25} As a result of these changes, rulemaking has become a more formalized process.\textsuperscript{26} The new formalities have created an adversarial rulemaking environment, causing the parties to adopt litigious "postures" which frequently block the free flow of ideas and information.\textsuperscript{27} In light of these problems, commentators have discussed the pressing need for new rulemaking procedures that will improve the efficiency and effectiveness of administrative action.\textsuperscript{28}

One suggestion for reform of the rulemaking process is the adoption of regulatory negotiation.\textsuperscript{29} The advantages of regulatory negotiation include

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\item[26.] See Administrative Conference of the United States, Recommendation No. 82-4, 1 C.F.R. § 305.82-4 (1984) (Recommendation 82-4). When the APA was passed, the rulemaking process was a "brief, expeditious notice and comment" procedure. \textit{Id.} (introduction notes). However, as the scope of government regulatory activity expanded, the rulemaking process was formalized in order to keep the agencies' power in check. \textit{Id.} For a discussion of the procedural limitations imposed to preserve agencies' accountability, see notes 19-25 and accompanying text supra.
\item[27.] See Recommendation 82-4, supra note 26 (introductory comments); Harter, \textit{supra} note 6, at 19; see generally Regulatory Negotiation: \textit{Joint Hearings Before the Senate Select Comm. on Small Business and the Subcomm. on Oversight of Gouv't Management of the Senate Comm. on Governmental Affairs}, 96th Cong., 2d Sess. 107 (1980) [hereinafter cited as \textit{Joint Hearings}] (statement of Kate C. Beardsley, Deputy Director, U.S. Regulatory Council) (present system of establishing regulatory policy has many adversary aspects with poor lines of communication between parties). The adverse consequences of increased formalization were described by the Administrative Conference of the United States:
\begin{quote}
The participants . . . tend to develop adversarial relationships with each other causing them to take extreme positions, to withhold information from one another, and to attack the legitimacy of opposing positions. . . . Moreover, many participants perceive their roles in the rulemaking proceeding more as positioning themselves for the subsequent judicial review than as contributing to a solution on the merits at the administrative level.
\end{quote}
Recommendation 82-4, supra note 26 (introductory comments); see Schuck, \textit{Litigation, Bargaining, and Regulation}, 3 REG., July-Aug. 1979, at 26, 27.
\item[28.] See generally E. \textsc{Bardach} \& R. \textsc{Kagan}, \textit{supra} note 1; S. \textsc{Breyer}, \textit{supra} note 22; Harter, \textit{supra} note 6; Popper, \textit{An Administrative Law Perspective on Consensual Decision-making}, 35 AD. L. REV. 255 (1983); Stewart, \textit{supra} note 1; Stewart, \textit{supra} note 5; Volner, \textit{supra} note 3.
\item[29.] See generally Harter, \textit{supra} note 6 (procedural agenda for the negotiation of regulation). For a discussion of Mr. Harter's suggestions concerning regulatory negotiation, see notes 34-74 and accompanying notes infra.
\end{itemize}

There have been a variety of other suggestions for reform of the regulatory system. See generally S. \textsc{Breyer}, \textit{supra} note 22, at 156-83 (suggestions for reform include mandatory disclosure augmenting the preconditions of market entry, taxation as a substitute for regulation intended to transfer income, creation of marketable property rights in order to allocate permission to engage in the regulated behavior, changes in tort liability laws, bargaining, and nationalization); A. \textsc{Stone}, \textit{Regulation and Its Alternatives} 237-74 (1982) (identifying three groups which favor regulatory reform but disagree as to how reform should occur). Professor Stone discussed three
affording interested parties an opportunity to maximize the benefits they will realize from regulation, enabling parties to negotiate their real expectations rather than adopting adversary postures, and promoting more flexible and consensual results. Although negotiation of regulations has been discussed as a viable option, only recently has a viable agenda for the negotiation of regulations been proposed.

“orientations” toward regulatory reform which demonstrate the breadth of reform proposals in addition to negotiated rulemaking. See A. Stone, supra, at 246-49 (citing D. Welborn, Taking Stock off Regulatory Reform (paper presented at the annual meeting of the American Political Science Association, Washington, D.C., Sept. 1, 1977)). The first group of reformers discussed by Professor Stone, the “traditionalists,” “advocate improved procedures, organization, and personnel as well as clearer statutory mandates and additional powers to be given to regulators” in order to impose “‘higher’ social ends” upon the “narrow self-seeking ends of the unbridled marketplace." Id. at 247-48. The second group, the “restrictivists,” harbor a general dislike for government intervention and prefer that regulation, if it must exist, impose the lightest burden possible on the regulated entities. Id. at 248. Finally, the “populists” accept “regulation when it performs socially acceptable goals but [reject] it in instances where regulation is viewed as aiding corporate interests.” Id. In order to further their ends, populists have “sought certain procedural and organizational reforms designed to reduce corporate influence at the legislative and administrative levels . . . .” Id. at 249.

30. S. Breyer, supra note 22, at 177; see also Kerwin, Assessing the Effects of Consensual Processes in Regulatory Programs: Methodological and Policy Issues, 32 Am. U.L. Rev. 401, 406-7 (1983) (consensual processes allow affected parties to negotiate their expectations). For a discussion of the ordering of parties’ expectations that is enhanced by regulatory negotiation, see notes 48-49 and accompanying text infra.

31. See Joint Hearings, supra note 27, at 107 (statement of Kate C. Beardsley, Deputy Director, U.S. Regulatory Council). In discussing the potential benefits which could be realized from regulatory negotiation, Ms. Beardsley explained that improving communication among parties could eliminate much of the adversariness that pervades the development of regulatory policy. Id. For a discussion of the decrease in adversary posturing which could result from regulatory negotiation, see note 41 and accompanying text infra. For a discussion of the decreased posturing in the development of the OFCCP regulations, see note 86 and accompanying text infra.

32. See S. Breyer, supra note 22, at 178. One aspect of the flexibility that is possible with regulatory negotiation arises in an industrial context where issues may differ from one locale to another:

[B]argaining can adapt readily to the need for decentralized decision making. Bargainers can negotiate one set of issues at the industry level, while other issues are sent to local plants for resolution. . . .

This ability of a bargaining system to produce decentralized decision making, to respond flexibly to differing local needs, and to bring about decentralized administration of the resulting agreements contrasts strongly with classical regulatory systems, where rules tend to be broad, uniform, and resistant to change.

Id.

For a discussion of the flexible structure of negotiated rulemaking which enabled the OFCCP negotiators to meet in smaller groups to discuss issues which did not involve all of the participants, see notes 88 & 97 and accompanying text infra.

III. REGULATORY NEGOTIATION AS AN ALTERNATIVE PROCEDURE FOR THE DEVELOPMENT OF RULES

A recent report and recommendation presented by Mr. Philip Harter to the Administrative Conference of the United States (ACUS) urged the adoption of regulatory negotiation as an alternative method of drafting proposed regulations. The ACUS unanimously adopted Mr. Harter's proposal. The ACUS' adoption of the Procedures for Negotiating Proposed Regulations was an important event because it was a rare example of an official body formally criticizing the rulemaking process and suggesting regulatory negotiation as an alternative.

Mr. Harter's proposal contained six "components" which discussed how a regulatory negotiation ought to be conducted. The first component of the recently proposed "agenda" for regulatory negotiations, see notes 34-74 and accompanying text infra.

In 1978, President Carter issued an executive order which instructed agencies to consider using "open conferences" in order to "give the public an early and meaningful opportunity to participate in the development of agency regulations." Exec. Order 12,044, 3 C.F.R. 671, 672 (1981). However, no regulatory negotiation procedures were promulgated with President Carter's order. For a discussion of the relationship between Executive Order 12,044 and the OFCCP regulations discussed in Part Four, see note 78 and accompanying text infra.

34. Recommendation 82-4, supra note 26. The report which Mr. Harter prepared to accompany the ACUS' Recommendation 82-4 was the basis for a subsequent article which elaborated upon the proposed regulatory negotiation procedures. See Harter, supra note 6, 1 n. At the time he prepared the report and recommendation, Mr. Harter was counsel to the ACUS. Popper, supra note 28, at 285. For a discussion of Mr. Harter's procedures for regulatory negotiation, see notes 36-74 and accompanying text infra.

35. Popper, supra note 28, at 285. The ACUS adopted Harter's proposal at its June 18, 1982 plenary session. Id.

36. See Recommendation 82-4, supra note 26. The introductory comments to Recommendation 82-4 criticized the increased formalization, development of adversarial relationships among the parties, extensive factual records, and long periods of delay which pervade rulemaking proceedings. Id. (introductory comments). The ACUS suggested "provision of opportunities and incentives to resolve issues during rulemaking, through negotiations" in order to improve the process and yield improved rules. Id.

37. Recommendation 82-4 was the official action taken by the ACUS in response to the report on which Mr. Harter based his article. See Harter, supra note 6, at 1 n. In contrast with Recommendation 82-4, Mr. Harter's article explains the rationale for every step of the proposed regulatory negotiation procedure. See id. at 42-102. One commentator has identified Mr. Harter's proposed agenda for the negotiation of rules as a "seminal" work in the area of consensual alternatives to rulemaking. Kerwin, supra note 30, at 406 n.15.

38. See Harter, supra note 6, at 42. For a discussion of the "components" of Mr. Harter's plan for regulatory negotiation, see notes 39-74 and accompanying text infra. Mr. Harter discussed 13 components which encompassed the regulatory negotiation process from the beginning, through promulgation, to judicial review of negotiated rules. See Harter, supra note 6, at 42-112. This comment will only discuss the first six components which suggested how a regulatory negotiation might be conducted; the remaining components go beyond the actual negotiation process and thus beyond the scope of this comment. See id. Despite the interrelation of the components, the overall success of the negotiation does not turn on the success of any single component.
was a set of conditions intended to help convince the parties of the benefit to be derived from regulatory negotiation and, as a result, "improve the likelihood of successful negotiations."39 To improve the prospects for successful negotiation, a threshold condition which should be satisfied prior to negotiation is that the relative power among the parties should be "countervailing," so that no single interest can unilaterally impose a settlement upon any other party.40 Once each party's power is countervailed, it will be difficult for negotiators to remain in the intransigent, adversarial postures which pervade the regulatory process.

See id. at 42. For example, even if a rule is not proposed following the negotiation, the negotiation may nevertheless be "successful" because of the resulting reduction of hostilities between the parties. Id.; see generally Harter, Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship, 29 Vill. L. Rev. 1393 (1984) (participants in negotiations concerning occupational exposure to benzene did not reach consensus on a draft of a rule but the two groups were nevertheless brought closer together by the experience).

39. Harter, supra note 6, at 42-51. Parties in a rulemaking procedure will not participate in a regulatory negotiation merely because of the consensual nature of negotiations; they must perceive some benefit to be derived from their negotiation of the issues. Id. at 42-43. One characteristic of negotiations which will allow parties to anticipate some additional benefit is that the consensual process allows participants to "maximize the benefits they can obtain." Breyer, supra note 1, at 582. For a discussion of the conditions which constitute Harter's first component, see notes 40-50 and accompanying text infra.

An advantage of the negotiation process is that it allows a settlement to be structured that addresses the concerns of each party. See Dunlop, supra note 33, at 1423. Professor Dunlop explained further that negotiation allows "[c]ontestants [to] achieve a more satisfactory . . . settlement . . . than would be likely were the proceedings to run their full litigious course." Id. An additional benefit from negotiation is the significant reduction in cost derived solely from the shorter period of time needed for a negotiated resolution. Id.

40. Harter, supra note 6, at 45-46. See also S. Breyer, supra note 24, at 179. An in-depth discussion of bargaining power is beyond the scope of this comment. It should be noted, however, that the requisite "countervailing power" would exist, despite significant disparities in financial resources, if the "weaker" party has recourse to procedures or actions which the "stronger" party deems unacceptable either because of the cost, delay, adverse publicity, or any other reason. See Harter, supra note 6, at 45-46. For a discussion of bargaining power, see H. Raiffa, The Art and Science of Negotiation (1982).

An additional form of countervailing power would exist if the parties were aware that their failure to develop a negotiated rule would result in the initiation of the traditional notice-and-comment procedures; this awareness may provide some of the stronger interests with an incentive to avoid the costs and delays typically incurred in the more adversarial rulemaking process. See Note, supra note 6, at 1876.

The impact of legal recourse and judicial precedent will help to equalize the power among the parties: "[T]he possibility of reverting to a court, to an administrative agency or to legislative bodies is likely to be a continuing influence, and the emerging precedents of litigation are likely to influence relative positions and bargaining tactics." Dunlop, supra note 33, at 1426.

41. See generally Joint Hearings, supra note 27, at 2 (statement of Sen. Gaylord Nelson) (attempts to solve all regulatory problems through adversarial processes have gone too far because each side stakes out a position it believes will maximize its bargaining power); id. at 107 (statement of Kate C. Beardsley, Deputy Director, U.S. Regulatory Council) (adversary aspects of current regulatory process forces parties to
The second condition, a fifteen party limit, was intended to improve the interaction among the participants and thus enhance the free flow of issues. Ideas will also be exchanged more readily if the issues to be resolved by the negotiation are "concrete," and "ripe for decision," rather than imprecise and vacillating. Despite the ripeness of the issues, some parties may nevertheless benefit from maintenance of the status quo which would result be "reactive" rather than "proactive"). For a discussion of the disadvantages that result from adversary posturing, see note 27 and accompanying text supra.

Despite the disadvantages which arise from adversary posturing, such behavior can play an extremely important role in the negotiation strategy of a party who is committed to reaching a consensual agreement:

In negotiations the initial proposals for an agreement by any party tend to be large or extreme relative to eventual settlement terms, except in the case of a few negotiators. It is important for observers or negotiators to understand the reasons for such inflated proposals and the functions that large initial proposals play in the negotiations process.

Many initial proposals are large because they reflect the way they were put together, usually by simply assembling the aspirations of the divergent groups which comprise each party to the negotiations. In order to cut back or scale down proposals, it is essential to establish priorities among groups within the negotiating organizations.

The process of priority setting and scaling back proposals for one party or another is often an integral part of the bargaining process itself.

Dunlop, supra note 33, at 1433. In addition, a substantial initial proposal may be intended to facilitate a strategic concession in response to subsequent movements by the other party. Id. at 1433-34. Parties might also propose impracticable ideas which seem unduly adversarial, but are actually exploratory ideas intended to set the stage for the negotiation of that issue in future years. Id. at 1433.

42. Harter, supra note 6, at 46; Harter, The Political Legitimacy and Judicial Review of Consensual Rules, 32 Am. U.L. Rev. 471, 479 (1983); see also Joint Hearings, supra note 27, at 22 (statement of Francis X. Murray, Director, National Coal Policy Project) (it is important that negotiating group be limited in size to permit an effective negotiation; large group with varying interest levels is not likely to be successful). In addition to the negotiation literature, "political science literature strongly indicates that the likelihood of success decreases as the number of parties increases." Kerwin, supra note 30, at 413 (footnote omitted). But see Popper, supra note 28, at 287. Professor Popper criticized the choice of 15 participants in the negotiation: "To arbitrarily draw the line at fifteen persons seems unrealistic. . . . [L]imiting participants without reference to the particular situation seems unwise." Id. For a criticism of the 15 party limitation in light of the OFCCP experience, see notes 116-18 and accompanying text infra.

43. Harter, supra note 6, at 47. Mr. Harter indicated that the parties to a negotiation should not be "jockeying for position by filing lawsuits or threatening to do so, building a media campaign, lining up political support, or exercising other methods of generating and demonstrating power . . . . " Id. (footnote omitted). Despite the fact that parties should not be threatening to file lawsuits, in order to maintain the appropriate countervailing power, the weaker parties must always have the capability of filing a lawsuit and the stronger parties must be aware of this potential. See id. at 45-47.

One commentator has suggested that a more accurate description of the "ripe issues" condition would explain that negotiations should only occur "where the positions of [the] parties have been clearly defined." Popper, supra note 28, at 286. Thus if the parties had not yet resolved their stand on a set of issues, negotiations would not be fruitful until their positions were established. See id.
from the delays inherent in the decisional process.\textsuperscript{44} However, if a decision were “inevitable” or “imminent,” then the parties would have a sense of urgency which would foster resolution of the issues.\textsuperscript{45}

Mr. Harter also felt that the negotiation process would be more viable if all parties would benefit from their participation in the negotiation.\textsuperscript{46} Such

\textsuperscript{44} Harter, supra note 6, at 47. The time required for regulatory processes to be completed under current methods can be significant; thus, any delay would prolong the status quo and permit a benefit to inure to those interests that oppose the regulatory change. See generally S. Doc. No. 72, 95th Cong., 1st Sess. 7 (1977) (Consumer Product Safety Commission average rulemaking takes 16 months, average agency licensing takes 19 months, and average ratemaking 21 months); Note, supra note 6, at 1879 (groups who benefit from the status quo would rather obstruct than bargain).

In light of this tendency for delay by parties who will benefit from the status quo, one commentator has suggested that agencies devise incentives for parties to bargain with open minds and “a sincere intention to reach an agreement.” Note, supra note 6, at 1879 n.47 (quoting Sign & Pictorial Union v. NLRB, 419 F.2d 726, 731 (D.C. Cir. 1969) (good faith defined in context of labor negotiation)).

\textsuperscript{45} Harter, supra note 6, at 47. A variety of factors could make the parties perceive an imminent decision. Id. For example, statutes or court orders may require agency action within a particular period of time, or the agency may commit itself to a “regulatory agenda” which lists the proposed regulations the agency expects to issue by a given date. Id.

The reason for the imminence condition was that when the parties perceive a sense of urgency “the most favorable climate for negotiation” exists. Id. One mechanism that enhances the imminence of a decision is the imposition of a deadline:

A deadline serves a vital function in negotiations. It compels each side to reach decisions and establish priorities that would not otherwise occur, at least not so rapidly. . . . In the absence of a deadline, as . . . in . . . mandated decision-making in government regulatory agencies, the negotiators or mediators often create artificial deadlines to try to bring issues “to a head” and to resolution.

. . . A deadline is an institutional design to reduce dilatory postponement. It could be a natural deadline, as in the expiration of an old collective bargaining agreement, or a synthetic one, created by no less a necessity than to catch an airplane or report to another scheduled meeting.

\textsuperscript{46} Harter, supra note 6, at 48.

Despite the possibility that delay in the regulatory process may benefit some parties by continuing the status quo, prompt decisions may also benefit other participants:

For example, a company may wish to manufacture a new product or build a new plant and an agency plans to issue regulations that will control aspects of the decision. The company may be afraid to proceed because it fears that it may incur the substantial cost of modifying the product or plant in response to the new regulation. The company then would prefer a prompt decision by the agency.

Harter, supra note 6, at 48.

\textsuperscript{46} Harter, supra note 6, at 48-49. The initial benefits derived from negotiations can be grouped roughly into procedural benefits and substantive benefits. See generally id. at 29 (substantive benefits); Dunlop, supra note 33, at 1448 (procedural benefits). The procedural benefits of negotiated rulemaking arise from the reduced costs to the parties and the shorter time needed for resolution as compared with a more adversarial process. Dunlop, supra note 33, at 1448. The substantive benefits of negotiated rulemaking were demonstrated by Harter in the context of a 1974 negotiation concerning the placement of a proposed dam on the Snoqualmie River near Seattle, Washington:
mutual benefit is possible where the nature of the issues permits a negotiated resolution, but it is impossible where the issues are irreconcilable "fundamental values" which should be resolved by the legislature. Assuming that fundamental regulatory issues cannot be negotiated fruitfully, the remaining negotiable issues can be ranked according to the importance they hold for each party. Ranking issues allows the development of agreements which

[A group of environmentalists opposed the construction of a dam because they feared it would lead to the development of a nearby valley. The proponents of the dam were farmers in the valley who were adversely affected by periodic floods. Negotiations between the two groups . . . revealed a common interest in preserving the valley. Without the negotiations the environmentalists would have undoubtedly sued to block construction, and necessarily would have employed adversarial tactics. Negotiations, however, demonstrated the true interests of the parties and permitted them to work toward accommodation.

Harter, supra note 6, at 29 (citing Sviridoff, Recent Trends in Resolving Interpersonal, Community and Environmental Disputes, Arb. J., Sept. 1980, at 3, 8).

47. Harter, supra note 6, at 49. Other commentators have also argued that fundamental issues should be resolved by the legislature. See Kerwin, supra note 30, at 410; Note, supra note 6, at 1880. If the legislature "fails to resolve conflicts in fundamental policy goals, it is unlikely that the subsequent regulatory programs that implement those goals will be able to resolve such conflicts, irrespective of the procedures used to make decisions." Kerwin, supra note 30, at 410 (footnote omitted). Despite Mr. Harter's suggestion that successful negotiations should not attempt to resolve fundamental issues, Congress nevertheless "enacts legislation containing vague provisions that belie serious conflicts over fundamental values" principally because of "political pressures and inadequate information." Id. at 405 (citing Fiorina, Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?, 39 PUB. CHOICE 1, 33-36 (1982)).

Other commentators have explained that many fundamental values are particularly susceptible to resolution through consensual process: "[T]he problems around which many (and perhaps the most important) social conflicts turn have no 'right' or 'wrong' answer in any moral or even technical sense. Such conflicts are best resolved through a mechanism based not upon principle but upon pragmatic accommodation and adjustment." Schuck, supra note 27, at 31; see also Kerwin, supra note 30, at 410-11. Caution must be used in the weight accorded this condition lest parties discover an easy "out" from negotiations simply by alleging "that a fundamental tenet is at stake." Popper, supra note 28, at 286.

48. Harter, supra note 6, at 50. Ranking of issues presumes multiple issues exist about which the parties will negotiate. Id. Because of the bargaining that would occur in a regulatory negotiation, the true preferences of the parties would be exposed. Schuck, supra note 27, at 31. Discerning the priorities of the parties is the key to successful negotiations: "Indeed, negotiations . . . [are] often the art of putting together packages that recognize the true priorities on each side that will 'sell' to both parties informally as well as in any formal ratification process." Dunlop, supra note 33, at 1432-33.

Ranking the priorities of the participants also enhances the likelihood of compliance with the resulting regulation: "The process of . . . trading off objectives . . . at the bargaining table produces a result that may satisfy those involved more than would an exogenously imposed standard." S. BREYER, supra note 22, at 178. Another benefit derived from the negotiation process is that the participants are more aware of what is important to each other. See Joint Hearings, supra note 27, at 20-21 (statement of Francis X. Murray, Director, National Coal Policy Project).

Despite benefits which can be realized from ranked priorities, the ranking process may prove very difficult. See Dunlop, supra note 33, at 1435. Ranking priorities
are "novel approaches" because they maximize each party's interests and permit more constructive solutions than the traditional, more adversarial procedures allow.\textsuperscript{49} Frequently, the veracity or reliability of research becomes an issue in regulatory proceedings; as a final condition of the first component, Mr. Harter cautioned that regulatory negotiation may be inappropriate if one interest controls information and excludes others from access.\textsuperscript{50}

Once most of the requirements of the first component have been met\textsuperscript{51} and the parties are convinced of the benefits of regulatory negotiation, it becomes necessary to determine the correct participants.\textsuperscript{52} One characteristic which is relevant to this second component of the Harter proposal is the mutability of the participants. As issues are resolved and new issues arise, those parties directly interested in the subject at issue will change.\textsuperscript{53} The format of the negotiation should be capable of accommodating the representation of different interests at different times.\textsuperscript{54} Mr. Harter suggests that consideration should be given to the ascertainment of which group or individual would be the appropriate representative of each interest in the

necessitates an "internal ordering" by each participant and "forces each group to consider not only whether it wants a specific objective—say, a health benefit—but also how much it wants the benefit in comparison to other objectives, such as higher pay or longer vacations." S. BREYER, supra note 22, at 177. "Internal ordering" is not only an important intra-group concern: "[E]ach negotiator [should] appreciate the informal governance of each side in order to understand the proposals and counterproposals made in the negotiations." Dunlop, supra note 33, at 1432.

49. See Harter, supra note 6, at 50.

50. Id. If the parties agree on the need for research, however, negotiation can resolve the subject of the research, and can determine who has the burden for gathering the data. See id. at 51. For a discussion of how the negotiation procedure facilitated shared research between parties to the OFCCP consultations, see note 105 and accompanying text infra.

51. Mr. Harter felt that the success or failure of a regulatory negotiation would not be predicated upon the satisfaction of all of the components he suggested: "the components of a proposal should be assessed separately." Id. at 42.

52. See id. at 52-57.

53. See generally id. at 53-54 (issues may expand or contract and interests represented may change during negotiations). For a discussion of the expansion and contraction of issues which necessitated ex parte meetings in the OFCCP negotiations, see note 97 and accompanying text infra.

54. Although the "participants will change depending upon the issue being considered," only "those with direct and vital interests in the outcome" should be negotiating. Joint Hearings, supra note 27, at 21-22 (statement of Francis X. Murray, Director, National Coal Policy Project); see Schuck, supra note 27, at 31. For a discussion of the selection criteria for the OFCCP negotiations, see note 101 and accompanying text infra.

Mr. Harter illustrated the flexibility of interests which participate as follows: "[F]actual matters may require technical officials, whereas policy questions may require executive personnel." Harter, supra note 6, at 53-54. Mr. Harter's example is inapposite. The concern is that different interests may warrant participation at different times, the example merely demonstrated that different representatives of an interest may negotiate different issues. For an example of different interests participating in the OFCCP negotiations, see note 97 and accompanying text infra.
negotiations.\textsuperscript{55}

The Harter proposal discussed a series of financial considerations which he felt would minimize the possibility that an appropriate representative would be kept from participating because of a shortage of funds.\textsuperscript{56} One such

\textsuperscript{55} Harter, supra note 6, at 54-55. The representative should have “sufficient stature with the constituency he represents to adapt to changing situations in the negotiations and to bargain accordingly while retaining the confidence of his constituency. . . . [H]e must be able to make decisions in the . . . negotiations subject to subsequent ratification by the representative’s constituents.” \textit{Id.} (footnote omitted).

For a discussion of the difficulties inherent in any attempt to represent divergent intragroup interests, see note 48 supra. Professor Dunlop has pointed out that over the course of negotiations “more and more tension tends to arise within each group . . . .” Dunlop, supra note 33, at 1435 (emphasis added). Professor Dunlop explained further that “it is a practical rule-of-thumb that as one is nearing agreement across the table, there is more difficulty within each side than between the leading spokesman across the table.” \textit{Id}. Because a straightforward two-party negotiation requires three agreements in order to resolve the negotiated issue, one agreement between the parties and one agreement among the constituents of each negotiating party, the choice of an appropriate representative of an interest must be sensitive to the group dynamics which will affect the representative’s ability to negotiate. \textit{Id.} at 1430-33.

Given the sensitive role played by an interest’s representative in a regulatory negotiation, Mr. Harter suggested that appropriate choices would be trade associations for industry groups, and consumer groups for consumer interests. Harter, \textit{supra} note 6, at 54-55. For a discussion of how the appropriate interests for the OFCCP consultations were selected, see note 98 and accompanying text infra. Despite the complications which may arise in the selection of appropriate representatives, the procedure for assembling representatives to assist in the development of health and safety regulations in Sweden suggests that these difficulties may be overcome:

When ASU, the Swedish safety agency, considers promulgating a safety rule, it convenes a committee composed of labor, business and agency representatives to consider the matter. The labor representative comes from LO, Sweden’s central organization of blue-collar workers, and the business representative from SAF, the leading employers’ association, which negotiates nationwide collective bargaining agreements. Both organizations employ full time OSH (occupational safety and health) experts. The committee sends out standard proposals in draft form to local unions for comment. Committee meetings are informal and no transcript is kept. ASU decides who will be represented and the number of persons involved is small. ASU has the ultimate decision-making power if agreement is not reached.


The choice of an appropriate representative also entails an inquiry into what individual from the representative group will serve as negotiator. Harter, \textit{supra} note 6, at 54. Harter explained that the negotiators “should be principals” rather than subordinates in their organization. \textit{Id.} at 55. One reason for the use of principals is that intermediate-level spokesmen are often bound by instructions from superiors and incapable of being flexible as the negotiations require. \textit{Id.} at 55 n.303; \textit{see also} Note, \textit{supra} note 6, at 1877.

\textsuperscript{56} Harter, supra note 6, at 56. The current rulemaking process allows participation by many parties because of the relative ease with which they can submit their views to the agency. \textit{See generally} B. SCHWARTZ, supra note 5, § 61, at 167-69 (cases interpreting APA rulemaking provision emphasize that APA requires only an “op-
consideration was that through negotiation of regulations, agencies would realize a significant savings because funds currently expended to research and defend proposed rules would not be needed. Thus, while the costs of being represented at the promulgation stage would be greater with negotiation, the consensual nature of the rule as promulgated should lead to total costs no greater than, and perhaps less than, those under the current system.

Mr. Harter’s third component involves a determination of whether the agency which has chosen to submit a proposed rule to negotiation should participate in those negotiations. Despite concerns that there should be

portunity” to submit written materials. The procedural requirements for rulemaking that agencies must follow are codified in the APA: “After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.” 5 U.S.C. § 553(c) (1982).

As compared with current processes, regulatory negotiation may appear prohibitively expensive to some interests. See Harter, supra note 6, at 56. If regulatory negotiation is to offer a practicable alternative, agencies may have to “defray some expenses” for interests whose participation is critical but lack sufficient funds. Id. For a discussion of the financial assistance offered to participants in the OFCCP negotiations, see note 100 and accompanying text infra.

Mr. Harter noted that the Senate had recently passed an amendment to § 553(d)(5) of the APA which would prohibit “the use of appropriated funds available to any agency . . . [for the payment of] attorney’s fees or other expenses of persons participating or intervening in agency proceedings.” Harter, supra note 6, at 56 n.308 (quoting S. 1080, 97th Cong., 1st Sess., § 3, 128 CONG. REC. S2713-14 (daily ed. Mar. 24, 1982)). However, after the Senate passed this bill no further action was taken on it. 1 CONG. INDEX 1981-82, 97th Cong., Senate (CCH).

57. Harter, supra note 6, at 56. One reason the costs of rulemaking will decrease for the agencies is that the number of judicial challenges to rules would be reduced by negotiation. Id. Professor Kerwin has explained that one advantage of consensual processes is that they can “reduce the operational costs of reaching regulatory decisions.” Kerwin, supra note 30, at 408. Professor Kerwin noted that one reason for the savings was the “inherent efficiency of regulatory negotiations that function similarly to the procedure of common law litigation.” Id. at 408 n.23 (citing R. Posner, ECONOMIC ANALYSIS OF LAW (2d ed. 1977); Priest, The Common Law Process and the Selection of Efficient Rules, 6 J. LEGAL STUD. 65 (1977); Rubin, Why is The Common Law Efficient?, 6 J. LEGAL STUD. 51 (1977)); see generally R. Posner, supra, at § 23.4 (goal of administrative process is efficient legal regulation but structure of process is a source of weakness because it is too political).

58. See Harter, supra note 6, at 57-67. Under the analysis used to determine the appropriate participants, Mr. Harter noted that a strong argument could be presented in favor of agency participation:

[T]he agency would seek to further its perception of the “public interest,” as defined by its organic statute, its existing policies, and the milieu in which it operates. Thus, the agency representatives would attempt to develop a reasonable regulatory response to the problem, based on criteria similar to those that would be used if the agency itself were developing the regulation. Id. at 57 n.316.

An additional observation about an agency’s eligibility to participate goes to the very heart of the question: “An agency’s general orientation, function, motivation, and ultimate rule would be the same in both traditional rulemaking and negotiation. In sum, negotiating is an alternative means to the end of issuing a regulation, not a fundamental alteration of the concept of the agency.” Id. at 58 n.316 (emphasis added).

Agency participation can also help make “the regulators aware of the underly-
countervailing power among participants, agency participation may be appropriate because administrative agencies have realized a diminution of power from their former status as "sovereign decisionmaker[s]." If an agency participated in a regulatory negotiation, it could conserve resources currently devoted to the "scientific and technical basis" of regulations. An additional benefit the agency would realize comes from the shorter period of time which its staff must devote for the development of a negotiated rule.

Most importantly, if the agency chose not to participate, the negotiators would be forced to reach an agreement absent any indication of what result would be acceptable to the agency.

Despite these advantages, there may be some disadvantages of agency participation in the negotiation. In order to avoid potential problems, Mr.

59. Harter, supra note 6, at 58. For a discussion of the restrictions on agency actions, see notes 20-25 and accompanying text supra. Because of the more restricted powers of agencies, they would be subject to countervailing powers just as the other participants in a negotiation. Harter, supra note 6, at 58. For a discussion of the Department of Labor's dual role as participant and ultimate decisionmaker in the OFCCP negotiations, see notes 101-05 and accompanying text infra.

60. See generally Dunlop, supra note 33, at 1448 (negotiations would speed resolution); Harter, supra note 6, at 59 (regulatory negotiation offers more direct forum for reconciliation of regulatory issues that currently take a long time to resolve and agency will realize savings in amount spent on technical research if regulatory negotiations used). For a discussion of the contributions of research from all of the participants in the OFCCP consultations, see note 105 infra.

61. Harter, supra note 6, at 60. An absence of "boundaries" indicating a range of results acceptable to the agency would be antithetical to the concept of negotiations. See id. Nonparticipation by the agency would be akin to a model of regulatory negotiation called the "Agency Oversight Model." See Note, supra note 6, at 1873. Under the agency oversight model the agency would not attend the negotiations: "After the group reached agreement, standard APA informal rulemaking procedures would begin." Id. (footnote omitted). Some difficulties inherent in this model are that "the agency may hesitate to approve solely on the recommendation of interested parties an agreement in which it played no part." Id. at 1877-78.

Mr. Harter has referred to an agency's potential hesitation to approve an agreement as the "not invented here" syndrome. Harter, supra note 6, at 60. This occurs when the agency staff supplants "the negotiators' judgments because it may perceive a need to prove its merit and demonstrate its expertise." Id. Such action may thwart any hope for an open exchange and good faith bargaining in future negotiations involving that agency. See Popper, supra note 28, at 288.

For a discussion of the guiding role played by the preestablished parameters set by the Department of Labor in the OFCCP negotiations, see note 103 and accompanying text infra.

62. Harter, supra note 6, at 63-66. For example, the other negotiators may view the agency as a "special" interest and . . . accord it an unusual status." Id. at 63. Alternatively, parties may withhold information from the agency:

Effective regulation requires regulated enterprises to tell enforcement officials about suspected hazards, past failings, and constraints on abatement efforts. However, a regulated enterprise will not voluntarily disclose its
Harter proposes that agencies participate, subject to the countervailing powers that affect them. Mr. Harter also suggests that the agency retain final regulatory authority by clearly informing all participants that the agency will not be bound by the representations of its agent in the negotiations.

The fourth component identified by Mr. Harter in the development of a regulatory negotiation is the process of "assembling the negotiators." Initially, this component involves an "iterative process" conducted by a neutral party to identify the interested parties and to determine whether sufficient common ground for attaining an agreement exists. Following a neutral evaluation, the agency should select a convener to determine the feasibility problems to an agency unless it feels confident that information about its weaknesses and mistakes and experiments will not become the basis of prosecution, adverse publicity, or competitive disadvantage.

E. BARDACH & R. KAGAN, supra note 1, at 109; see also Harter, supra note 6, at 63 (agency might misuse concessions and compromises made during negotiations).

63. Harter, supra note 6, at 64-65. Current practices by agencies indicate that the balance between sovereignty and negotiation as a party is attainable:

In lawsuits challenging rules agencies routinely negotiate settlements in which they agree to publish a particular notice of proposed rulemaking. In these cases, senior agency officials must determine whether the agreement comports with agency policy and is within the range of acceptable regulatory alternatives. . . . [T]he agency representative negotiates subject to senior official approval; he does not act as the sovereign agency making an independent decision and holding firm.

Id. at 65 (footnote omitted). For a discussion of the agency's role as negotiating party and ultimate decisionmaker in the OFCCP negotiations, see notes 101-05 and accompanying text infra.

64. See Harter, supra note 6, at 66. An agency's negotiator should be a senior official who has the ability to "assess and predict" the agency's position on a given issue in order to ensure that the resulting regulation is acceptable. Id. For a discussion of the consistency lent to the OFCCP negotiations by the participation of senior agency officials, see note 107 and accompanying text infra.

65. Harter, supra note 6, at 67. Whereas Mr. Harter's first component sought to convince the parties of the benefits of negotiating rules as a general proposition, the fourth component was intended to demonstrate to each party that it will be in their best interest to participate. See id.

One commentator has suggested that negotiation offers general benefits to all interests because it "fosters detente among participants and has few clear-cut losers. All [participants] suggest solutions and ultimately believe they have at least partly consented to the compromise rule." Note, supra note 6, at 1877; see also Popper, supra note 28, at 255 (benefits of negotiation include: access to basic decisional process; greater expectation of compliance; decreased cost of acquiring information; increased reliability of information; and reduced cost of government regulation).

66. Harter, supra note 6, at 67-68. The initial determination of which interests may be affected is important lest any group be inadvertently excluded:

[In the National Coal Policy Project] there were no consumer or Indian representatives on the group. Mediators should be appointed at the outset of negotiations and the mediator should be given at least 30 days to determine whether all of the significant parties are willing to participate and whether they can agree on how to proceed.

Joint Hearings, supra note 27, at 85 (statement of Roy N. Gamse, Deputy Asst. Administrator for Planning and Evaluation, Environmental Protection Agency).

The individual in charge of the iterative process may be an agency official, but Mr. Harter cautioned that inquiries conducted by an agency official may intimidate
of negotiations, which interests should be represented, and who should represent those interests.\textsuperscript{67} The final step in this component involves publication of a notice in the 	extit{Federal Register} to ensure that "no organization with a substantial interest in the subject matter of the regulation was overlooked."\textsuperscript{68}

The fifth component of Mr. Harter's regulatory negotiation procedure describes how the negotiations should be conducted.\textsuperscript{69} In order to facilitate the negotiation process, the participants should establish a set of ground rules to guide the negotiations.\textsuperscript{70} One of the most important ground rules

\begin{itemize}
  \item a party or cause unnecessary fears of retribution to arise if the party chooses not to comply with the negotiation process. \textit{See} Harter, \textit{supra} note 6, at 68.
  \item Harter, \textit{supra} note 6, at 70-71. If the ACUS or the Federal Mediation and Conciliation Service chose to expand their current functions, convenors could be drawn from their ranks. \textit{Id.} at 71; \textit{see also} Joint Hearings, \textit{supra} note 27, at 98 (statement of Roy N. Gamse, Deputy Assistant Administrator for Planning and Evaluation, Environmental Protection Agency) (American Arbitration Association or Federal Mediation and Conciliation Service would be good source for [convenors]).
  \item The convenor's role is to determine whether regulatory negotiation would be "feasible and superior to traditional rulemaking." Harter, \textit{supra} note 6, at 75. A convenor would not be appointed when a private, voluntary standards-writing organization exists which would be competent to conduct the negotiations without having to establish "an entirely new framework for negotiations." \textit{Id.} at 76-77. The use of private standards-writing organizations has received wide acceptance lately and could provide a significant tool for the development of better rules. \textit{See generally} Administrative Conference of the United States, Recommendation No. 78-4, 1 C.F.R. \textsection 305.78-4 (1983) (recommendation for agency use of nongovernmental standards after standards have been developed and periodically revised by an open and regular procedure).
  \item In addition to the role played by a convenor, Mr. Harter suggested that the services of a mediator may be required. Harter, \textit{supra} note 6, at 77. The distinction between the functions of a convenor, who facilitates negotiations by bringing the parties together, and a mediator, who tries to "aid the negotiators in their quest to find a compromise agreement," clarifies the procedure recommended by Mr. Harter. \textit{See} H. RAIFFA, \textit{supra} note 40, at 23.
  \item Harter, \textit{supra} note 6, at 79. Notice of proposed rulemaking must be published in the \textit{Federal Register}. \textit{See} 5 U.S.C. \textsection 553(b) (1982). The APA requires that notice shall include: "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." \textit{Id.} at \textsection 553(b)(1)-(3). Mr. Harter suggested that the notice should include the following:
    \begin{itemize}
      \item A description of the subject matter of the regulation; the representatives comprising the proposed regulatory negotiation committee, including a description of the interest represented by each member and the position held by each member; the name and position of the proposed agency representative; the name of the proposed mediator, if any; the issues the committee proposes to consider; and a proposed schedule for completing the work of the committee.
    \end{itemize}
  \item Harter, \textit{supra} note 6, at 79. In order to comply with the APA, this notice should also include a "reference to the legal authority under which the rule is proposed." 5 U.S.C. \textsection 553(b)(2) (1982).
  \item \textit{See} Harter, \textit{supra} note 6, at 82-92. For a discussion of the absence of formal negotiation procedures in the OFCCP negotiations, see note 79 infra.
  \item Harter, \textit{supra} note 6, at 82-83. Mr. Harter discussed Milton R. Wessel's \textit{Rule of Reason}, a set of dispute resolution principles, as an example of the ground rules that
\end{itemize}
which the parties should agree upon is that the negotiations will remain confidential in order to preserve intragroup support for the negotiator. Finally, each negotiator should "focus on the respective interests, not on the initial positions[,] . . . [s]eek options that allow mutual gain[s] . . . [and] define objective criteria" in order to enhance his or her ability to pursue a negotiated resolution.

The final component which affects the negotiation of rules was brief but should guide negotiations. Id. at 83 (citing M. Wessel, The Rule of Reason (1976)). Wessel's Rule of Reason was developed as a method of dispute resolution for corporate litigation, but it is nevertheless instructive as a set of negotiation guidelines: Data will not be withheld because "negative" or "unhelpful." Concealment will not be practiced for concealment's sake. Delay will not be employed as a tactic to avoid an undesired result . . . . Motivation of adversaries will not unnecessarily or lightly be impugned . . . . Dogmatism will be avoided. Complex concepts will be simplified as much as possible so as to achieve maximum communication and lay understanding . . . . Relevant data will be disclosed when ready for analysis and peer review— even to an extremist opposition and without legal obligation . . . . Research and investigation will be conducted appropriate to the problem involved. Although the precise extent of that effort will vary with the nature of the issues, it will be consistent with stated overall responsibility to solution of the problem.


71. Harter, supra note 6, at 83-86. The requirement of confidentiality is critically important to the negotiation process. See Schuck, supra note 27, at 31. However, confidentiality in the regulatory process may be frustrated by statute. See Federal Advisory Committee Act (FACA), 5 U.S.C. app. §§ 1-15 (1982) (negotiation groups would be advisory committees and must be open to the public except when elaborate procedures are followed to make meetings private). Despite the apparent complication caused by the FACA, Harter inferred that the agency could comply with the criteria of the Sunshine Act and still have closed meetings. Harter, supra note 6, at 85 & n.458; see 5 U.S.C. § 552b (1982) (Sunshine Act). One way to avoid the complications of the FACA is to conduct open meetings but break into private "caucuses" when confidential discussions are needed. Interview with Philip Harter, Panelist in the 1984 Villanova Law Review Symposium: "Alternative Dispute Resolution," Villanova, Pa. (Feb. 25, 1984).

Confidentiality of the negotiations is very important in order to preserve the intragroup support of the negotiator:

Negotiators desire to explain the concessions they have made and the terms they have achieved directly to their constituents rather than have the press or media initially make that explanation and state the merits, or deficiencies, of the settlement . . . . Moreover, the performance in negotiations and the appraisal of the results of negotiations is a major feature of the political life of an organization that is decisive to the performance of leadership . . . .

The injection of the press into negotiations would make it even more difficult for the principal negotiator, or the committee, to change positions. The press reports would encourage those opposed to generate hostility as the negotiations proceeded, before the settlement can be considered as a whole.

Dunlop, supra note 33, at 1440. For a discussion of the effect of intragroup dynamics upon the selection of an appropriate representative, see note 48 supra.

72. Harter, supra note 6, at 86-88 (emphasis and footnotes omitted). Mr. Harter explained that "once the parties' respective interests are addressed, negotiations can attempt to accommodate them." Id. at 87 (footnote omitted). The negotiators
central to Mr. Harter’s recommendations. In order for the parties to “reach an agreement,” they must have achieved a consensus of “all the represented interests.” To “mitigate the disruptive effect of an ideologue,” the consent of all members of the negotiating group is not necessary: a consensus is reached when the representatives of each interest, operating as one through a caucus, can agree with the result.

IV. CONSULTATIONS OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS IN THE DEVELOPMENT OF EQUAL EMPLOYMENT OPPORTUNITY REGULATIONS

Since the ACUS’ adoption of the Harter proposal, two agencies have conducted regulatory negotiations following his model; neither negotiation reached a consensus. In contrast to these unsuccessful efforts to use Mr. Harter’s recommendations. In order for the parties to “reach an agreement,” they must have achieved a consensus of “all the represented interests.” To “mitigate the disruptive effect of an ideologue,” the consent of all members of the negotiating group is not necessary: a consensus is reached when the representatives of each interest, operating as one through a caucus, can agree with the result.

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Harter’s procedures, there have been other attempts to increase public participation in the regulatory process.76 One such attempt, which involved substantial discussion among affected interests and resulted in the promulgation of a proposed rule, was conducted by the Office of Federal Contract Compliance Programs (OFCCP), an agency of the Department of Labor.77 In conformance with an executive order issued by President Carter directing agencies to increase public participation in the regulatory process,78 the OFCCP held “extensive consultations” prior to the promulgation of proposed rules regulating equal employment opportunities among government contractors.79 These consultations were conducted during 1979 and 1980 among participants who had been invited to participate by the Director of

nevertheless come closer together than virtually anyone thought they would over so controversial a regulation” during the negotiations. Harter, supra note 38, at 1409. For a discussion of the pilots’ flight duty status time negotiations and the benzene exposure negotiations, see generally Harter, supra note 38. For a discussion of Recommendation 82-4 (the A.C.U.S.’ adoption of the Harter proposal), see notes 34-74 and accompanying text supra.

The Environmental Protection Agency (EPA) has begun an evolution of the usefulness of “negotiations as a supplement to the current adversarial system of regulatory development.” A.L.I.-A.B.A., COURSE OF STUDY MATERIALS: ENVIRONMENTAL LAW 153 (1984). The EPA is currently screening regulations to determine which rules might be appropriate subjects of a regulatory negotiation. Id. at 155.


77. 44 Fed. Reg. 77,006 (1979). The OFCCP promulgated a proposed rule on affirmative action requirements for government contractors which had been “the subject of extensive consultation with . . . [protected] groups . . . and contractor groups.” Id.


Agencies shall give the public an early and meaningful opportunity to participate in the development of agency regulations. They shall consider a variety of ways to provide this opportunity, including (1) publishing an advance notice of proposed rulemaking; (2) holding open conferences or public hearings; (3) sending notices of proposed regulations to publications likely to be read by those affected; and (4) notifying interested parties directly. Id. (emphasis added).

79. 44 Fed. Reg. 77,006 (1979). The OFCCP developed revised regulations during the Carter administration, using a consultation procedure which was similar to the procedure which Mr. Harter proposed. Interview with Donald E. Elisburg, Esq., former Assistant Secretary of Labor for Employment Standards, in Washington, D.C. (January 4, 1984) [hereinafter cited as Elisburg Interview]. Despite the similar procedures, the OFCCP consultations were held prior to the publication of Harter’s proposals in 1982. See id.; Harter, supra note 6. The consultation procedure brought representatives of various interests together to react to proposed regulations which the OFCCP had promulgated. Id. The purpose of the revised regulations which emerged from the consultations was “to promote and ensure equal opportunity for all persons, without regard to race, color, religion, sex, or national origin, employed or

Prior to publication in the Federal Register, the consultations were subject to intensive participation by the public. Persons thought to have an interest were contacted directly, and several open conferences were held. 45 Fed. Reg. 86,220 (1980) (from analysis of § 60-1.21 which was to be codified at 41 C.F.R. § 60-1.21 prior to its indefinite postponement); see also 44 Fed. Reg. 77,006 (1979) (to be codified at 41 C.F.R. Parts 60-1, 60-2, 60-20, 60-30, 60-50, 60-60, 60-250, and 60-741) (proposed December 28, 1979) (prior to publication as a proposed rule, extensive consultations were held with all groups which are protected by laws which the OFCCP administers).

The Department of Labor previously had employed informal procedures such as preparation of drafts of proposed rules by affected interests, but the OFCCP regulations were the first set of regulations in which all of the parties were “brought under one umbrella.” Id. For a discussion of the procedure followed during the OFCCP consultations, see notes 83-115 and accompanying text infra.

The revised regulations which were negotiated during the Carter administration are not currently codified as the OFCCP regulations. See generally 41 C.F.R. § 60-1 to -741 (1983) (OFCCP regulations which were in effect prior to indefinite postponement of regulations developed under Carter administration); 41 C.F.R. app. § 60-1 to -741 (1983) (OFCCP regulations which were negotiated under the Carter administration but postponed indefinitely by the Reagan administration). The Carter administration revision of the regulations had been promulgated in final form and was scheduled to take effect on January 29, 1981. It did not take effect, however, because President Reagan ordered a 60 day postponement of the effective date for the new OFCCP regulations on January 29, 1981. 41 C.F.R. app. § 60 (1983) (citing President’s Memorandum of January 29, 1981, 46 Fed. Reg. 11,227 (1981)). Since the initial postponement of the effective date, the revised OFCCP regulations were postponed four times prior to their indefinite postponement on August 25, 1981. Id. (citing 46 Fed. Reg. 9,084 (1981); 46 Fed. Reg. 23,742 (1981); 46 Fed. Reg. 33,033 (1981); 46 Fed. Reg. 36,144 (1981); 46 Fed. Reg. 42,865 (1981)).

One participant in the development of the revised OFCCP regulations opined that the Carter administration did not expedite the promulgation of the new regulations because of its belief that President Carter would be re-elected in 1980, thus leaving four years to promulgate the final form of the regulations. Telephone Interview with Nancy Kreiter, Research Director of Women Employed (February 28, 1984) [hereinafter cited as Kreiter Interview]. Ms. Kreiter stated that after President Carter lost the election, there was a flurry of activity and a rush to promulgate the revised regulations in final form. Id. The final form of the revised regulations was not promulgated until December 30, 1980. See 41 C.F.R. app. § 60 (1983). After only nine days in office, President Reagan postponed the effective date of regulations which had taken two years to develop. Kreiter Interview, supra.

Despite their promulgation in final form, the indefinite postponement of the OFCCP regulations has not yet been challenged in court. Kreiter Interview, supra. The postponement of a set of Environmental Protection Agency regulations regarding publicly owned water treatment plants, however, which were postponed by the same Presidential Memorandum as the OFCCP regulations, has been challenged on the ground that it operated “effectively as a repeal, [and thus] constituted rulemaking” and should have been subject to the APA rulemaking requirements. Natural Resources Defense Council, Inc. v. EPA, 683 F.2d 752, 761-64 (3d Cir. 1982) (EPA’s indefinite postponement of regulations was an action which fit the definition of a “rule” under APA and was subject to the notice and comment procedures required by the APA). The Third Circuit Court of Appeals explained why a postponed effective date constitutes rulemaking as follows:

In general, an effective date is “part of an agency statement of general or particular applicability and of future effect.” It is an essential part of any rule: without an effective date, the “agency statement” could have no “fu-
the OFCCP, Mr. Weldon Rougeau.\textsuperscript{80}

The consultation procedure was not intended to test Mr. Harter's proposal or any other recommendations concerning the viability of negotiation as a new method of rulemaking.\textsuperscript{81} One participant in the OFCCP consultations explained that the procedure used was, in part, the result of extensive lobbying by affected interests which wanted to be included in the development of new OFCCP regulations.\textsuperscript{82} The OFCCP's successful use of consultations offers a unique opportunity to study the regulatory negotiation process in light of Mr. Harter's recommendations.

At the beginning of the OFCCP consultations there was a possibility

\textit{ture effect,"} and could not serve to "implement, interpret, or prescribe law or policy." In short, without an effective date a rule would be a nullity because it would never require adherence.

If the effective date were not "part of an agency statement" such that material alterations in that date would be subject to the rulemaking provisions of the APA, it would mean that an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date. The APA specifically provides that the repeal of a rule is rulemaking subject to rulemaking procedures.

\textit{Id.} at 761-62 (quoting 5 U.S.C. § 551(5) (1982)); see also Environmental Defense Fund, Inc. v. Gorsuch, 713 F.2d 802, 812-16 (D.C. Cir. 1983) (effect of an EPA decision to defer processing of operating permits for existing hazardous waste incinerators and storage impoundments was to suspend regulations which created standards; such action was rulemaking, and, absent notice and opportunity for comment on decision to defer processing, must be vacated).


\textsuperscript{81} Elisburg Interview, supra note 79. Negotiation in the development of rules was not a new process in the Department of Labor when the OFCCP regulations were being developed. Id. Mr. Elisburg explained that despite the fact that the Department of Labor generally employed more information processes than other departments, the development of the OFCCP regulations was the first time that the parties were brought together "all under one umbrella." Id.

\textsuperscript{82} Kreiter Interview, supra note 79. Kreiter explained that lobbying for the consultations between the OFCCP and the affected interests began at the end of the Ford Administration. Id. Efforts to establish consultations continued during the early months of the Carter Administration, especially in the Senate hearings on the appointment of Department of Labor officials. Id. As a result of this lobbying, many of the officials ultimately appointed in the Carter Administration had indicated a willingness to conduct prepromulgation consultations with interests which would be affected by any new equal employment opportunity regulations. Id.
that the power of the interests participating would not be countervailing.\textsuperscript{83} However, as the discussions developed, the strength and experience of the contractor groups was quickly countervailed by a coalition among the women's, black, and Hispanic groups.\textsuperscript{84} This development of a balance of power, which kept any one interest from dominating the process, was one factor that Mr. Harter felt would convince the parties that they could benefit from the negotiation procedures.\textsuperscript{85}

Despite the countervailing power between the participants, they nevertheless adopted negotiating postures which resembled adversarial postures. However, these postures were used principally as negotiation tools, not for litigious arguments.\textsuperscript{86} One example of an adversarial posture was the initial demand of the women's groups that pregnancy disability rights had to be included in the regulations. The negotiated resolution of this demand was that the issue had been adequately addressed by title VII.\textsuperscript{87}

\textsuperscript{83} Elisburg Interview, supra note 79. Mr. Elisburg stated that at the beginning of the discussions the employer groups were well-organized and experienced at dealing with the negotiation process. Id. In contrast, Elisburg explained that many of the women's and Hispanic groups had been organized only recently, and were “feeling their way” in the administrative process. Id.

\textsuperscript{84} Kreiter Interview, supra note 79. Prior to the consultations, the women's groups and the other civil rights interests met in order to coordinate their efforts in preparation for the development of the new OFCCP regulations. Id.

In response to the questions: “How many other groups had interests that were similar or related to your group's,” Barry Goldstein, from the NAACP Legal Defense and Educational Fund, replied that a number of groups shared similar interests, including “many women's groups.” Goldstein Interview, supra note 80. Nancy Kreiter, from Women Employed, stated that approximately 10 or more groups had similar interests and as many as 5 or 6 other women's groups were participating. Kreiter Interview, supra note 79.

Barry Goldstein opined that because a Democratic President was in office while these regulations were being developed, the minorities and women carried more weight than they would have under a Republican administration. Goldstein Interview, supra note 80.

For a discussion of countervailing power in Mr. Harter's recommendation, see note 40 supra.

\textsuperscript{85} For a discussion of the conditions which comprise Mr. Harter's first component, i.e., convincing the parties of the benefits of negotiation, see notes 39-50 and accompanying text supra.

\textsuperscript{86} Kreiter Interview, supra note 79. For a discussion of the benefits of adversarial posturing in a negotiation context, see note 41 supra.

Donald Elisburg explained that when the parties began the consultations, there was a lot of loud disagreement until “the extremes were worked out.” Once the extremes were moderated, the parties “began to talk with each other” and constructively discuss proposals for the new regulation. Elisburg Interview, supra note 79. For a discussion of the strong guiding role played by the agency which helped foster negotiation and end adversarial posturing during the OFCCP consultations, see notes 101-05 and accompanying text infra.

\textsuperscript{87} Kreiter Interview, supra note 79. Under title VII of the Civil Rights Act of 1964, it is an “unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .” 42 U.S.C. § 2000e-2 (1982) (emphasis added).
The OFCCP consultations were conducted in two discrete forms: large and small.\textsuperscript{88} Although the larger consultations, which typically had twenty-five to thirty participants, exceeded Mr. Harter's recommended maximum of fifteen participants, Donald Elisburg, a former agency official, stated that OFCCP consultations would not have been fruitful if any interest with "clout" had not participated.\textsuperscript{89}

Another condition in the Harter proposal was that the subject matter of

\textsuperscript{88} Elisburg Interview, supra note 79; Goldstein Interview, supra note 80. The large consultations had between 20 and 30 participants representing the OFCCP and all of the affected interests. \textit{Id.} The OFCCP took part in two types of small meetings. The first small meeting format typically involved the OFCCP and all of the groups which made up a discrete interest—such as the women's groups. \textit{Id.} The second small meeting format entailed ex parte meetings which took place between the OFCCP and one group. \textit{Id.}

Nancy Kreiter recalled that the "big, overall meetings" only occurred "three times at most." Kreiter Interview, supra note 79. Despite Ms. Kreiter's recollection, Donald Elisburg explained that there were "at least 20-25 participants at the table for most discussions." Elisburg Interview, supra note 79. The advantage of these larger consultations was that parties could explain their position directly to the opposing interests rather than to government officials in a more formal regulatory proceeding. Goldstein Interview, supra note 80; Kreiter Interview, supra note 79.

Ms. Kreiter stated that there were many occasions when she and representatives of the other women's groups met with OFCCP officials without the presence of any other interests. Kreiter Interview, supra note 79. The group which Ms. Kreiter represented, Women Employed, also met one-on-one with agency officials because it was one of the leading women's groups which took part in the OFCCP consultations. \textit{Id.}

Despite Women Employed's significant role, Nancy Kreiter explained that a consensus could not have been reached without the inclusion of the other women's groups. \textit{Id.} When asked whether any one women's group could have adequately represented the interests of women in order to facilitate the 15 party limit suggested by Mr. Harter, Ms. Kreiter replied: "The women's groups would never agree." \textit{Id.}

As Ms. Kreiter explained, the OFCCP conducted ex parte meetings with participants throughout the consultations. Elisburg Interview, supra note 79. The agency was careful to maintain a record of these meetings, however, in order to avoid allegations of impropriety. \textit{Id.} see Home Box Office, Inc. v. FCC, 567 F.2d 9, 57, (D.C. Cir.) (if ex parte contacts occur, any written document or a summary of any oral communication must be on the record immediately after receipt so that interested parties may comment on the ex parte contacts), cert. denied, 434 U.S. 829 (1977).

\textsuperscript{89} Elisburg Interview, supra note 79. Mr. Elisburg was the Assistant Secretary of Labor for Employment Standards when the OFCCP held its consultations. He felt that more than 15 participants could be accommodated in a regulatory negotiation without compromising the integrity of the give-and-take which occurs among the participants. \textit{Id.}

An additional reason why a limitation of 15 parties would be too restrictive is the profusion of special interest groups which have emerged from the post-World War II era. \textit{See generally} T. LOWI, \textit{THE END OF LIBERALISM} 50-51 (1969) (discussing the development of "interest-group liberalism"). Organized labor, for instance, has spawned splinter groups which remain within the ambit of organized labor but which also pursue the interests of highly differentiated classes of employees. Elisburg Interview, supra note 79. Despite the apparent commonality of interests between special interest groups, such as the women's groups in the OFCCP consultations, the groups would have refused to yield total negotiating responsibility to any one group. Kreiter Interview, supra note 79. Thus, in some regulatory negotiations the breadth of issues and profusion of interested parties may require that more than 15 partici-
the negotiations should be “concrete” and “ripe for decision.” The condition was met in the OFCCP consultations because Executive Order 11,246, which authorized the regulations, had narrowed the subject matter by resolving the political issues in favor of affirmative action. Thus the only task which the discussions had to accomplish was the development of a plan to implement the order. The OFCCP consultations also satisfied Mr. Harter’s negotiation-enhancing condition of imminence. All of the participants were aware that it was in their best interest to reach an agreement because the promulgation of proposed rules by the Department was imminent. The concreteness of the issues combined with the imminence of a regulation in the absence of a negotiated proposal helped to convince the participants that the consultations were the one mechanism that would offer all participants an opportunity for gain.

For a discussion of Mr. Harter’s 15 party recommendation, see note 42 and accompanying text supra.

90. See Harter, supra note 6, at 47; Elisburg Interview, supra note 79. The OFCCP consultations were held in order to develop procedures for implementing equal employment opportunity regulations pursuant to Executive Order 11,246. See 41 C.F.R. App. § 60.1-1 (1983). When the parties began consultations, their points of view were well-defined. This refinement facilitated a more efficient exchange of ideas. Kreiter Interview, supra note 79. For a discussion of ripe issues in regulatory negotiations, see note 43 and accompanying text supra.


92. Elisburg Interview, supra note 79. As Mr. Elisburg commented: “[H]ow you get there is what was left to regulate.” Id.

93. See Goldstein Interview, supra note 80; Kreiter Interview, supra note 79. One of the most important factors which caused “at least grudging acceptance” of the consultations was the participants’ knowledge that if the discussions failed to reach an agreement then the Secretary of the Department would promulgate new regulations which might not have been as favorable as those that would come from the consultations. Elisburg Interview, supra note 79. From the beginning of the consultations the participants were aware of the Department of Labor’s stated objectives. Goldstein Interview, supra note 80. Those objectives consisted of about “ten broad topics [on which the Department was] trying to get [a] broad consensus.” Kreiter Interview, supra note 79. In addition to full knowledge of the Department’s goals, the parties were informed that the “Department had a strong enforcement posture” regarding the regulations. Elhsburg Interview, supra note 79. Awareness of the goals and of the likely enforcement of the regulations contributed to a perception of imminence which enhanced the discussions. Id.

94. Id. The OFCCP consultations were the sort of situation in which all could realize gains and thus be “better off for having negotiated.” Harter, supra note 6, at 48-49 (describing a “win/win” situation in which both sides realize gains from their participation). The Department was given a broad mandate from the President which called for affirmative action to combat employment discrimination but was left with the task of implementing and enforcing the mandate. Elisburg Interview,
Mr. Harter's second component dealt with the selection of appropriate parties for a regulatory negotiation. As mentioned above, the consultations were conducted through both large and small discussions. The smaller sessions were among groups with common interests or ex parte discussions between the OFCCP and various interests. This flexible format enabled the resolution of problems specific to an interest group without hindering the overall progress of the consultations. The interest groups invited to participate in the consultations were chosen by the Director of the OFCCP, and each participating organization chose its own representative to attend the consultations. The OFCCP employed some representatives as "consultants" in order to promote the participation of the financially disadvantaged.

95. For a discussion of Harter's second component, see notes 53-57 and accompanying text supra.

96. For a discussion of the types of consultations which took place in the development of the OFCCP regulations, see note 88 and accompanying text supra.

97. Elisburg Interview, supra note 79. Mr. Elisburg stated that the Director of the OFCCP, Weldon Rougeau, met frequently with various interests in order to allay the participant's fears of an adverse regulation and to maintain the progress of the consultations. Id.

98. Elisburg Interview, supra note 79; Kreiter Interview, supra note 79. Nancy Kreiter recalled that the invitation to participate in the consultations was extended by Weldon Rougeau, Director of the OFCCP, but "in reality, there had been groups expressing interest [in consultations], and these 'lead groups' were each suggesting other groups." Kreiter Interview, supra note 79. Many interests, such as Women Employed, had been dealing with the OFCCP over the years and were logical selections for the consultations. The selection process for the OFCCP consultations was less of an "iterative process" than Harter foresaw because many of the interests were self-selecting. See id.; Harter, supra note 6, at 67-68. However, the OFCCP consultations demonstrated that the agency can serve as "convenor" in a regulatory negotiation. Cf. Harter, supra note 6, at 67-68 (noting that agency is the "obvious organization" to assemble the negotiators, but discussing potential benefits from having some other entity assemble the group).

99. Goldstein Interview, supra note 80; Kreiter Interview, supra note 79. Barry Goldstein explained that the NAACP Legal Defense and Educational Fund "did not engage in a formal [intragroup selection] process." Goldstein Interview, supra note 80. Goldstein had done employment discrimination work since 1971. This experience and his presence in the Washington office of the NAACP Legal Defense and Educational Fund contributed to his selection for the OFCCP consultations. Id.

On the other hand, Women Employed did not use such an informal selection process. Kreiter Interview, supra note 79. Nancy Kreiter, research director for Women Employed, was Director of Advocacy, and because of her "training as an economist, dealt with all regulations." Id.
The Department of Labor’s participation in the OFCCP consultations served to stabilize the consultations. Because of the Department’s participation, potentially volatile disagreements were successfully defused in the early stages of discussion. In addition, in situations where the participants were unable to narrow the distance separating their positions, they were guided by preestablished parameters which the agency deemed acceptable. Despite the potential problems which Mr. Harter felt could result from agency participation, the Department of Labor was a welcomed party to the OFCCP consultations. Donald Elisburg explained that the agency’s participation enhanced communication between the public and private sectors because it allowed for the exchange of ideas between two interests which did not previously understand each other.

100. Elisburg Interview, supra note 79. The Department of Labor retained representatives of needy interests as “consultants” to the OFCCP consultations. Id. Mr. Elisburg explained that this arrangement was “open and straightforward” and did not foster any allegations of impropriety. Id.

Although her airfare may have been paid by the Department of Labor, Nancy Kreiter did not recall receiving any additional financial assistance. Kreiter Interview, supra note 79. Nor did the NAACP Legal Defense and Educational Fund receive any financial assistance from the government. Goldstein Interview, supra note 80. Both Kreiter and Goldstein expressed the opinion that government financing may be an important idea for the future. Id.; Kreiter Interview, supra note 79.

101. Elisburg Interview, supra note 79.

102. Id. Elisburg explained that in the early stages he spent a significant amount of time “defusing the yelling.” Id. After the difficulties of the early consultations subsided, the government found itself in a novel role: rather than hearing arguments and then striving to develop a regulation, the agency encouraged a dialogue among the groups. Goldstein Interview, supra note 80; Kreiter Interview, supra note 79.

103. Elisburg Interview, supra note 79. The Department of Labor informed all of the parties to the negotiation that it planned to pursue a strong enforcement posture and that the regulations would reflect that policy. Id. As a result, the regulations ultimately promulgated “were very close to what the parties had been told [by the Department of Labor] all along.” Id. The advantage of the negotiations, however, was that the resultant regulation, though necessarily within the predetermined parameters, reflected a consensus among the interested parties. Id.

104. Goldstein Interview, supra note 80. Barry Goldstein agreed “strongly” with the proposition that the Department of Labor was an appropriate participant in the consultations. Id. For a discussion of the potential disadvantages Mr. Harter sees in agency participation in regulatory negotiations, see note 62 supra.

105. Elisburg Interview, supra note 79. Mr. Elisburg felt that the consultations enhanced government’s perception of the private sector and vice versa: “Most people in government have no sense of how business is run as a business, [and at the same time] the business community has no comprehension of how government does business.” Id. Because many of the equal employment opportunity issues involved understanding how business operates, the consultations helped the parties “understand what the other [party] is doing.” Id.

Mr. Elisburg opined that in an era when agencies are no longer regarded as experts, it is not surprising that “the OFCCP had to rely on industry to know what was going on in business.” Id.; see generally S. Breyer, supra note 22, at 3 (persons appointed to regulatory offices are not necessarily experts).

The agency’s participation also enhanced other types of information exchanges.
Mr. Harter identified potential disadvantages which could arise from agency participation in regulatory negotiation. As particularly disruptive complications which could result from agency participation, he discussed the participants' fear of misuse of negotiated concessions in further dealings with the agency, and the parties' prolonged posturing caused by their belief that the agency would promulgate a proposed rule regardless of the outcome of the negotiation.\textsuperscript{106} Despite these potential disadvantages, the OFCCP officials found that their active participation was important to the success of the consultations.\textsuperscript{107}

Harter's fourth component discussed assembling the negotiators.\textsuperscript{108} Some of the parties for the consultations were selected by Weldon Rougeau, Director of the OFCCP, based upon their prior interest in equal employment opportunity consultations. Other parties were chosen following a modified iterative process conducted by Mr. Rougeau.\textsuperscript{109} Rougeau's function

In the course of the consultations, a difficult issue was how regulated employers could determine the availability of qualified minorities and women. Goldstein Interview, \textit{supra} note 80. To resolve this issue, the Department of Labor funded a study to develop a model for availability analysis. \textit{Id.}; see generally D. Berry, M. Phillips, S. Wilson, Apt Associates Publications No. 81-17, Restructuring Availability Analysis for Affirmative Action Planning (1981) (photocopies available at a nominal charge from Apt Associates, Cambridge, Mass.).

\textsuperscript{106} For a discussion of the potential disadvantages arising from agency participation in regulatory negotiation, see note 62 \textit{supra}.

\textsuperscript{107} Elisburg Interview, \textit{supra} note 79. One potential problem which could have arisen from the agency's participation, the treatment of the OFCCP as a special participant, did not occur in the consultation. \textit{Id.}

The agency's representatives in the consultations were Weldon Rougeau, Director of the OFCCP, and Donald Elisburg, Assistant Secretary of Labor for Employment Standards. \textit{Id.} One participant pointed out that in addition to the top-level agency employees acting as the OFCCP's representatives, the consultations might have benefited from the participation of middle-level employees. Goldstein Interview, \textit{supra} note 80. Mr. Goldstein felt the middle-level should take part because of the "critical information they have" concerning past regulations, and because "they are the ones who will have to enforce the new regulation." \textit{Id.} Nevertheless, the participation of senior officials was important because the officials were able to allay any fears that the resulting regulations would not fulfill the OFCCP's stated objectives. For a discussion of the OFCCP's firm enforcement posture as an example of its stated objectives, see notes 101-05 \textit{supra}.

\textsuperscript{108} For a discussion of Mr. Harter's fourth component, see notes 65-68 and accompanying text \textit{supra}.

\textsuperscript{109} Elisburg Interview, \textit{supra} note 79; Goldstein Interview, \textit{supra} note 80; Kreiter Interview, \textit{supra} note 79. For a discussion of the prior interest some groups had demonstrated in consultations with the Department of Labor, see note 98 \textit{supra}. Weldon Rougeau invited the groups which had previously expressed their interest to take part in consultations concerning equal employment opportunity. Kreiter Interview, \textit{supra} note 79. In addition, Mr. Rougeau's dialogue with these groups resulted in the suggestions of other groups which would be interested in participating in the consultations. \textit{Id.} Without consciously planning an iterative search to identify interests, Rougeau pursued a course of action which was similar to the method Mr. Harter suggested for the identification of interests. For a discussion of the iterative process which Harter recommended, see note 66 and accompanying text \textit{supra}.
was equivalent to the role which Mr. Harter labelled "convenor." Once Mr. Rougeau invited the participants, the agency did not attempt to publish a notice of the consultations in the Federal Register.

The consultations were not subject to a set of ground rules such as those suggested in Mr. Harter's fifth component. Despite the absence of ground rules, the confidentiality of the consultations was maintained by precluding the press from the discussions.

The regulations, which were promulgated in final form following the consultations, were not supported by a "consensus" as Mr. Harter defined the term. In fact, Donald Elisburg explained that some interests felt the results of the consultations were "terrific" while others felt the results were "awful." However, the unifying factor among the groups was their awareness that the consultations had resulted in an agreement that they would have to live with regardless of any post-agreement discord.

IV. RECONCILING THE HARter PROPOSAL WITH THE OFCCP EXPERIENCE

The negotiation of administrative rules and regulations constitutes a viable alternative process for agency rulemaking. However, the development of the OFCCP regulations illustrated that several aspects of Mr. Harter's procedures may require modification if negotiated rulemaking gains widespread acceptance.

Mr. Harter suggested that a maximum of fifteen participants should take part in the negotiation of a rule. Although he noted that his choice of fifteen participants was initially based on consideration of comfort at the negotiating table, Mr. Harter has, on four separate occasions, confirmed

110. For a discussion of the role played by a convenor in regulatory negotiation, see note 67 and accompanying text supra.

111. See 44 Fed. Reg. 77,006 (1979) (proposed Dec. 28, 1979) (publication of proposed rule by OFCCP which was first public solicitation of comments by OFCCP).

Although no notice was published prior to the consultations, the OFCCP did consult with, or offer to consult with, the "groups protected under the three laws administered by the" OFCCP, as well as "contractor groups . . . [and] other interested groups such as unions and public interest groups." Id.

112. Kreiter Interview, supra note 79. Nancy Kreiter explained that regardless of the advantages of confidentiality during the actual consultations, she has found that her ability to remind various employer groups of the concessions they made during the consultations has been especially helpful in light of the indefinite postponement of the regulations. Id.

113. For a discussion of Harter's definition of a consensus, see notes 73-74 and accompanying text supra.

114. Elisburg Interview, supra note 79; see Kreiter Interview, supra note 79 (contractor groups were unhappy with regulation as ultimately promulgated, which is why they lobbied extensively and successfully for President Reagan to postpone the effective date).

115. Elisburg Interview, supra note 79.

116. Harter, supra note 6, at 46 n.257. Harter has explained that his choice of a 15 participant limit was arbitrary. Philip J. Harter, address before Administrative
this number as being optimal for negotiated rulemaking.\textsuperscript{117} Nevertheless, the OFCCP negotiations indicated that fruitful negotiations can occur with larger groups. It is submitted that Mr. Harter should revise this portion of his proposal in order to provide a more flexible approach to negotiation which would allow a more complete representation of the interested parties.\textsuperscript{118}

Another benefit which Mr. Harter predicted would inure to all affected parties was a decrease in adversarial contentiousness. It is perhaps unrealistic to expect a decrease in litigious posturing from negotiators when such posturing may constitute an integral component of a party’s negotiating strategy.\textsuperscript{119} Mr. Harter’s proposal fails to recognize that the parties will often vehemently disagree at the beginning of the negotiation, but that the intensity of the disagreement will be mitigated by subsequent negotiations.\textsuperscript{120}

One force which helped to foster a constructive exchange of ideas was the OFCCP’s willingness to mediate in the early, adversarial stages of the negotiation.\textsuperscript{121} In addition, the availability of agency officials to meet privately with affected interests allayed the fears that stronger interests would dominate the discussions. This action helped to provide the countervailing power between the parties which Mr. Harter felt was central to a successful regulatory negotiation.\textsuperscript{122} Although some of the benefits from agency participation arise from the representative’s seniority and the concomitant respect which the other negotiators will have for him, it is submitted that Mr.

\textsuperscript{117} See Harter, \textit{supra} note 38, at 1405; Harter, \textit{supra} note 42, at 479; Harter Interview, \textit{supra} note 71; Harter Speech, \textit{supra} note 116. For a discussion of the 15 party limit which Harter proposed, see note 42 and accompanying text \textit{supra}.

\textsuperscript{118} Harter’s limit of 15 participants is not too low per se. There may be situations when all of the interests can be represented by fewer than 15 participants. See Harter, \textit{supra} note 38, at 1409 n.75 (benzene negotiation had 8 participants). The intent of this suggested modification is to demonstrate that the number of participants should be more flexible. Perhaps a more workable rule of thumb for convenors would be that they should strive to include all of the groups with “clout,” but at the same time they should remember that discussions with more than 25 or 30 participants may become unmanageable. For a discussion of the appropriate number of participants, see notes 42 & 89 and accompanying text \textit{supra}.

\textsuperscript{119} For a discussion of how adversarial posturing can be used to enhance a party’s negotiating position, see notes 41 & 86-87 and accompanying text \textit{supra}.

\textsuperscript{120} For a discussion of the utility of an adversarial posture at the outset of negotiation, see note 41 \textit{supra}.

\textsuperscript{121} Elisburg Interview, \textit{supra} note 79.

\textsuperscript{122} For a discussion of the effect of private meetings between OFCCP officials and the affected interests, see note 88 and accompanying text \textit{supra}.
Harter erred when he failed to include the middle-level agency employees in his agenda for a rulemaking negotiation.\textsuperscript{123} One participant in the OFCCP negotiations has suggested that participation by the middle-level employees, who will be charged with the ultimate enforcement of the rule, can lend an important insight to the feasibility of solutions to the problems being negotiated.\textsuperscript{124} Thus, regulatory negotiations will be enhanced by the participation of senior and middle-level agency officials. Broader participation will result in negotiated rules which more accurately reflect the agency's policy goals and are more feasible to implement and enforce.\textsuperscript{125} The added benefits from the participation of middle-level officials will arise from the increased exposure they have had to the actual situations which are the subject of regulation.\textsuperscript{126}

A natural complement to full representation of the agency in rulemaking negotiations is full representation of all affected interests. Although Mr. Harter suggested that some financial assistance may be required to ensure the participation of all interests,\textsuperscript{127} it is submitted that a more formal financial aid system would enhance regulatory negotiations. The OFCCP consultations demonstrated that financial assistance can be rendered without raising any allegations of impropriety.\textsuperscript{128} In order to ensure honesty and further the goal of participation, it is suggested that a federal trust fund be established to provide financial aid to those interests which were chosen to participate in the negotiation but lacked the funds.\textsuperscript{129} In addition, in order to guarantee impartiality, the trust should be administered by a board of trustees who are free from political influence.\textsuperscript{130}

\textsuperscript{123} See Goldstein Interview, supra note 80 (rulemaking negotiations should have middle-level agency employees because they will have ultimate responsibility for enforcement of the regulations upon promulgation). For a discussion of the appropriate agency representative, see notes 64 & 110 supra.

\textsuperscript{124} See Goldstein Interview, supra note 80.

\textsuperscript{125} For a discussion of the benefits from the participation of a broader range of agency employees, see note 107 supra.

\textsuperscript{126} Goldstein Interview, supra note 80.

\textsuperscript{127} Harter, supra note 6, at 56.

\textsuperscript{128} See Elisburg Interview, supra note 79 (OFCCP provided funds to some participants and the financial assistance was never questioned because it was all done openly).

\textsuperscript{129} The trust fund should be funded by the federal government. There are no agencies or other bodies currently in existence which would be appropriate to perform the functions which are envisioned for the regulatory trust. Although the ACUS is an independent agency and has greater familiarity with the administrative process than any other organization, it too would be an inappropriate conduit for the funds because making decisions about funding would be beyond the current scope of ACUS activities. See 1 C.F.R. § 301.2 (1984) (purpose of ACUS is to develop improvements in the legal procedures used by agencies).

\textsuperscript{130} It is submitted that an appropriate board of trustees would be composed of three trustees. Each trustee would serve a three year term with a maximum of one term per person. The first board would be appointed with one trustee serving for one year, another serving for two years, and the third serving a full three year term. The result would be a board of trustees whose composition is more balanced politically.
Finally, one must recognize that the parties to the negotiations may not always reach a consensus. It is submitted that the absence of a consensus should not cause the negotiation to be described as unsuccessful. For instance, although the OFCCP consultations resulted in the promulgation of regulations without the parties reaching a consensus, the disagreements between the parties were nevertheless narrowed. In essence, an understanding between the parties that they have narrowed their differences to the extent possible should be an appropriate agreement in rulemaking negotiations. The most important benefit from such an understanding would be that in the absence of complete agreement, the agency would be able to initiate traditional rulemaking with confidence in its knowledge that the affected interests disagree on only a limited number of issues.

VI. CONCLUSION

Mr. Harter's proposal for negotiated rulemaking is a harbinger of the change that new methods of dispute resolution will bring to administrative agencies; perhaps it is best expressed as a progression from a "reactive" to a "proactive" process. Additionally, the reduced contentiousness in the regulatory process will ameliorate the current "malaise" caused by the formal-

because of the staggered appointment, and subject to less political pressure because of the fixed term.

It is further submitted that the political accountability of the board could be heightened if the board were required to publish its funding grants in the Federal Register.

131. Elisburg Interview, supra note 79.

132. Id.

133. A major stumbling block for the two recent attempts to use Harter's procedures was their inability to achieve a consensus according to Harter's definition. Harter, supra note 38, at 1407-09. It is submitted that negotiations should be considered successful when they have narrowed the chasm of differences which had previously separated the parties. Mr. Harter has speculated that in the absence of a totally negotiated agreement, the parties to the benzene negotiation, who did not achieve a consensus, may nevertheless agree when faced with the imminent promulgation of a proposed rule by OSHA. Harter Interview, supra note 71. It is further submitted that even though the parties may never totally agree, any resolution of differences is bound to enhance the regulatory process.

The Environmental Protection Agency (EPA) has recently indicated its willingness to negotiate the rest of proposed rules. See A.L.I.-A.B.A., supra note 75, at 153. The goal of the EPA's negotiations "will be to reach consensus . . . . The Administrator of the EPA will use any consensus—so long as it is within his statutory authority—as the basis of the proposed rulemaking." Id. (emphasis added). The EPA's willingness to use "any consensus" indicates the pragmatism which should underlie the assessment of a negotiated agreement concerning a proposed rule.

134. If the participants were able to achieve a consensus as defined by Harter, that would be an optimal result. It is suggested, however, that such a consensus will be very difficult to achieve in practice. It is further submitted that when an agency initiates traditional rulemaking after negotiations have occurred, at worst the distance between the various interests will have been clearly defined, realistically that distance will have narrowed, and at best the parties will have reached a consensus.

135. Joint Hearings, supra note 27, at 107 (Statement of Kate C. Beardsley, Deputy Director, U.S. Regulatory Council) (improving the lines of communication be-
zation of the rulemaking process. This amelioration will largely result from the special interests, which had previously clogged the process, seeking ends beyond their narrow self-interests.

Negotiated rulemaking, as proposed by Mr. Harter, is a viable option which would remedy many of the difficulties inherent in modern rulemaking. The procedural issues which arise in a regulatory negotiation were accurately predicted by Mr. Harter. In addition, most of his suggestions regarding the negotiation of rules were corroborated by the fairly successful experience of the OFCCP consultations. In light of the OFCCP experience, Mr. Harter's proposal is a practicable alternative which agencies should adopt in rulemaking proceedings which satisfy the conditions outlined above.

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136. For a discussion of the "malaise" caused by the increased formalization of the administrative process, see notes 20-28 and accompanying text supra.

137. The use of an alternative form of rulemaking which requires participants to negotiate and pursue a solution which looks beyond their narrow self-interest is especially timely in light of recent concessions by labor unions which required the subordination of self-interest to the common good. See generally 105 MONTHLY LAB. REV. 56-58 (Aug. 1982) (discussion of 15 corporations which either gained concessions from union employees through bargaining or unilaterally imposed concessions on nonunion employees in order to deal with adverse economic conditions).

138. For a discussion of Harter's predictions concerning the procedural issues which would arise in a regulatory negotiation, see notes 34-74 and accompanying text supra.