U.S. Department of Justice

Office of Legal Policy

file:
Office of
Legal Policy

Washington, D.C. 20530

MEMORANDUM

February 24, 1983

TO: Stephen J. Brogan
Deputy Assistant Attorney General

FROM: Michael Robinson mer
Trevor Potter TP
Attorney-Advisers

RE: Dispute Resolution

Attached are some background materials on alternative dispute resolution. There should be a final report on the midyear meeting of the Center for Public Resources (Legal Program). When that arrives we will send it on to you.

Attachment

CPR Legal Program

Reprinted from *The National Law Journal*, June 28, 1982

NEW YORK — A think tank here is trying to bolster the practice of using private judges to avoid litigation by sponsoring a panel of nationally known lawyers who have agreed to act as "father figures" in disputes between corporations.

The organization, the Center for Public Resources, has received a $285,000 grant from the Aetna Life and Casualty Foundation to finance administrative costs of the panel's activities for two years.

The 23 members of the "Judicial Panel" — including a dozen ex-federal judges — will be available to help parties cut down on the delay and cost of litigation, explained James F. Henry, president and chairman of the center, a 6-year-old non-profit corporation.

A member of the panel might preside over a mini-trial of a particular issue and then render a non-binding opinion that could provide the basis for an out-of-court settlement, Mr. Henry said. Or a panelist might work with lawyers and executives on both sides to develop some other method to find a solution to their dispute. Panelists will charge fees comparable to what they get for more conventional legal services, he indicated.

Besides saving on the costs of litigation and permitting direct contact between managers of two companies, the other advantage of a private solution is the secrecy of the process, Mr. Henry said.

The process requires "somebody with the perception, experience and reputation, or credibility, to counsel disputing parties. I call them father figures, or mother figures," Mr. Henry said.

Permitted in Seven States

The center's program is by no means the only experiment in private justice in the country. At least seven states permit private judges to resolve disputes with binding decisions, and several lawyers have founded companies that offer private judging services. (NLJ, 6-8-81.)

But the center's program certainly involves more prominent attorneys than any other. Mr. Henry said part of the purpose of the program was to put together such an impressive roster that lawyers who have their doubts about private dispute resolutions would be impressed by the caliber of those who believe in it.

"The private process is subject to some uncertainties, and some criticisms, perhaps from clients, because it isn't familiar," Mr. Henry said. "There's a certain inertia that we have to overcome."

Corporations have settled their disputes with the help of private judges in several instances in the past few years, but "at this point no one's quite certain whether the idea will really take off," said Joy Chapper, staff liaison to the American Bar Association's Action Commission to Reduce Court Costs and Delay.

Ready to Serve

Among those who have agreed to serve on the center's panel are G. Wallace Bates, president of the Business Roundtable; former Attorney General Griffin Bell, now a partner at Atlanta's King & Spalding; former Watergate Special Prosecutor Archibald Cox, a Harvard law professor; former White House counsel Lloyd Cutler of Washington, D.C.'s Wilmer, Cutler & Pickering; former Education Secretary Shirley M. Hufstedler, now at Los Angeles' Hufstedler, Miller, Carlson & Beardsley; Sol M. Linowitz, a former ambassador and special diplomatic envoy who is now a partner at Coudert Brothers in New York; and Robert B. McKay, director of the Institute of Judicial Administration.

Also agreeing to serve are Elliot Richardson, a former U.S. attorney general and now a partner in the Washington, D.C., office of Milbank, Tweed, Hadley & McCloy; Irving Shapiro, former chief executive officer of E.I. du Pont de Nemours and now a partner in the Wilmington, Del., office of Skadden, Arps, Slate, Meagher &

Flom; former Securities and Exchange Commission Chairman Harold M. Williams, now head of the J. Paul Getty Museum in Malibu, Calif., and former law professor Irving Younger, now a partner with Washington's Williams & Connolly.

Mr. Bell and Ms. Hufstedler are former federal appeals judges, as is another member of the panel, Skadden Arps partner William H. Mulligan.

Former federal district judges on the panel are Arnold Bauman of New York's Shearman & Sterling; Marvin Frankel of New York's Proskauer, Rose, Goetz & Mendelsohn; Arthur Lane of Smith, Stratton, Wise & Heher in Princeton, N.J.; Joseph W. Morris, general counsel of the Shell Oil Co.; Charles Renfrew of San Francisco's Pillsbury, Madison & Sutro; Simon H. Rifkind of New York's Paul, Weiss, Rifkind, Wharton & Garrison; Harold R. Tyler of New York's Patterson, Belknap, Webb & Tyler; and Lawrence E. Walsh of Oklahoma City's Crowe & Dunlevy. Another member of the panel, James Davis of Washington's Howrey & Simon, is a former trial judge in the U.S. Court of Claims.

The two remaining panel members — Charles D. Breitel of New York's Proskauer Rose and Stanley Fuld of New York's Kaye, Scholer, Fierman, Hays & Handler — both served on the New York Court of Appeals, the state's highest tribunal.

By David Berreby

The CPR Judicial Panel

A Cost-Effective Alternative to Litigation

Members of the CPR Judicial Panel

E. WALLACE BATES
New York; President, The Business Roundtable

HAROLD R. MEDINA
New York; Shearman & Sterling; Formerly, U.S. District Court Judge, Southern District of New York

GRIFFIN B. BELL
Atlanta; King & Spalding; Formerly, U.S. Court of Appeals Judge, 5th Circuit; U.S. Attorney General

CHARLES D. BREITEL
New York; Proskauer Rose Goetz & Mendelsohn; Formerly, Chief Judge, New York Court of Appeals

ARCHIBALD COX
Cambridge; Professor, Harvard Law School; Formerly, U.S. Solicitor General; Watergate Special Prosecutor

LLOYD N. CUTLER
Washington, D.C.; Wilmer, Cutler & Pickering; Formerly, Counsel to the President

JAMES F. DAVIS
Washington, D.C.; Howrey & Simon; Formerly, Trial Judge, U.S. Court of Claims

MARVIN E. FRANKEL
New York; Proskauer Rose Goetz & Mendelsohn; Formerly, U.S. District Court Judge, Southern District of New York

STANLEY H. FULD
New York; Kaye, Scholer, Fierman, Hays & Handler; Formerly, Chief Judge, New York Court of Appeals

SHIRLEY M. HUFSTEDLER
Los Angeles; Hufstedler, Miller, Carlson & Beardsley; Formerly, U.S. Court of Appeals Judge, 9th Circuit; U.S. Secretary of Education

ARTHUR S. LANE
Princeton, New Jersey; Smith, Stratton, Wise, Heher & Brennan; Formerly, U.S. District Court Judge, District of New Jersey

SOL M. LINOWITZ
Washington, D.C.; Coudert Brothers; Formerly, U.S. Ambassador to the Organization of American States; Special Middle East Negotiator for President Carter

ROBERT B. MCKAY
New York; Director, Institute of Judicial Administration; Formerly, Dean of New York University Law School

JOSEPH W. MORRIS
Houston; Vice President and General Counsel, Shell Oil Company; Formerly, U.S. District Court Chief Judge, Eastern District of Oklahoma

WILLIAM H. MULLIGAN
New York; Skadden, Arps, Slate, Meagher & Flom; Formerly, U.S. Court of Appeals Judge, 2nd Circuit

WILLIAM PIELET, JR.
New York; Retired partner, Sullivan & Cromwell

CHARLES B. RENFREW
San Francisco; Pillsbury, Madison & Sutro; Formerly, U.S. District Court Judge, Northern District of California; U.S. Deputy Attorney General

ELLIOT L. RICHARDSON
Washington, D.C.; Milbank, Tweed, Hadley & McCloy; Formerly, U.S. Secretary of Health, Education & Welfare; Secretary of Defense; Secretary of Commerce; Attorney General; United States Ambassador to the Court of St. James

SIMON H. RIFKIND
New York; Paul, Weiss, Rifkind, Wharton & Garrison; Formerly, U.S. District Court Judge, Southern District of New York

IRVING S. SHAPIRO
Wilmington; Skadden, Arps, Slate, Meagher & Flom; Formerly, Chairman, Du Pont; Chairman, The Business Roundtable

PHILIP W. TONE
Chicago; Jenner & Block; Formerly, U.S. Court of Appeals Judge, 7th Circuit

HAROLD R. TYLER, JR.
New York; Patterson, Belknap, Webb & Tyler; Formerly, U.S. District Court Judge, Southern District of New York; U.S. Deputy Attorney General

LAWRENCE E. WALSH
Oklahoma City; Crowe & Dunlevy; Formerly, U.S. District Court Judge, Southern District of New York; U.S. Deputy Attorney General

HAROLD M. WILLIAMS
Los Angeles; President, J. Paul Getty Museum; Formerly, Chairman, Securities & Exchange Commission

IRVING YOUNGER
Washington, D.C.; Williams & Connolly; Formerly, Trial Judge, New York City Civil Court; Professor, Cornell University Law School

New Members of the CPR Judicial Panel

KINGMAN BREWSTER
New York; Winthrop, Stimson, Putnam & Roberts. Formerly, President, Yale University; U.S. Ambassador to the Court of St. James.

WARREN CHRISTOPHER
Los Angeles; O'Melveny & Myers. Formerly, U.S. Deputy Secretary of State; U.S. Deputy Attorney General.

HARRY H. WELLINGTON
New Haven; Dean, Yale University Law School.

CPR Judicial Panel

For many business disputes, there is a cheaper, more effective method of resolution than a traditional lawsuit. The alternatives range from informal counseling to more formal procedures resembling court adjudication.

Helping companies find and use private alternatives in particular disputes is the business of the CPR Judicial Panel.

Judicial Panel members are some of the most eminent, experienced lawyers and former judges in the country. Judicial Panelists can act as neutral counselors, helping parties define the best alternative to costly litigation. They can also serve as neutral, third-party decision-makers, fact-finders, advisors or mediators in an agreed-to alternative dispute resolution procedure.

Why Alternatives?

Litigation is a significant management problem for American business. Its costs and consequences have taken a heavy toll on executive time and on corporate finances. Even conventional arbitration is often less than satisfactory as a substitute for the traditional lawsuit.

"Anyone with experience in major litigation knows that the cost and wear and tear of litigation are no longer acceptable. Alternative means of resolving problems have to be found."

IRVING S. SHAPIRO, ESQ.
Skadden, Arps, Slate, Meagher and Flom
Formerly, Chairman, Du Pont

Disputes between corporations—which can be the most expensive and time-consuming kind of litigation—are often the disputes most readily resolved by private means. Out of necessity, many business managers and lawyers are developing alternatives to traditional corporate lawsuits.

Departing from the concept of casting the fate of business interests and relationships to unknown judges or unsophisticated juries, these alternatives lead the parties to negotiate their own resolutions, or to rely on decisions of knowledgeable, experienced persons who merit the confidence of both parties. Results are more rapid, economical, businesslike, and satisfactory.

A Qualitative Dispute Resolution Service

CPR Judicial Panel members can serve disputing parties in several important ways.

— *They act as dispute resolution counselors helping parties discuss and resolve their differences at the earliest stages of a dispute, before litigation is under way.*

Once parties have assumed litigation stances, their dispute quickly takes on a life of its own, seemingly beyond the control of business managers. In many cases this can be avoided by the intervention of a respected neutral party early in the conflict. Acting as the "honest broker," Judicial Panelists can help parties reach a mutual accommodation as soon as they recognize their differences and before litigation pre-positioning begins.

— *They help parties agree to, or design, a fair and cost-effective private dispute resolution procedure.*

If parties have already assumed litigation postures, the Judicial Panel can offer a variety of alternatives to a traditional lawsuit: the mini-trial, the private trial (popularly known as "rent-a-judge"), neutral expert fact-finding, neutral advisory opinions, informal arbitration, mediation and conciliation, as well as procedures custom-tailored to particular disputes.

— *They act as neutral decision-makers, fact-finders, advisors or facilitators in private dispute resolution procedures.*

Given their eminence and experience, Judicial Panelists are well qualified to help resolve complex business issues.

The Mini-Trial—An Innovative Alternative

The mini-trial is one of the most innovative and cost-effective of the private dispute resolution alternatives currently in use. Not a trial in the conventional sense, it is a highly structured settlement negotiation. It is voluntary, confidential and non-binding.

A mini-trial typically involves a stay of court proceedings, a period of limited discovery, and a one or two-day "information exchange" at which attorneys for each side present their best case before managers with authority to settle the dispute and a "neutral advisor." This is followed by a required period of settlement negotiations between the managers. The neutral advisor may be called upon to give his opinion on how a court would decide the dispute, if this would be helpful in the course of settlement negotiations.

Though a relatively new development, the mini-trial has been highly successful in effecting speedy, cost-effective resolution of disputes because:

— It narrows the dispute.

— Unlike traditional settlement talks, it promotes a dialogue on the merits of the case rather than just the dollars at issue.

— It eliminates many of the legalistic, collateral issues in the case.

— *It reconverts the typical lawyer's dispute back into a businessman's problem, which can then be solved with the creativity and flexibility of business managers.*

"A mini-trial is likely to provide a better solution for business disputes than prolonged and bitter litigation. From the many alternatives available, executives can decide for themselves, in light of the mini-trial, how to resolve their dispute. No judge or jury has that latitude."

THE HONORABLE JOSEPH W. MORRIS
Vice President and General Counsel, Shell Oil Company

The mini-trial has been used with great success in cases involving breach of contract, unfair competition, unjust discharge, proprietary rights and product liability claims, in multi-party cases, and in disputes involving the government. TRW, Shell, Intel, Austin Industries, Telecredit, and Space Communications Company are among the corporations which have used the mini-trial to resolve disputes quickly, cost-effectively and creatively.

Judicial Panelists can help disputing parties negotiate an agreement to "mini-try" a case, or act as a mini-trial neutral advisor.

Cost of Judicial Panel Services

Judicial Panelists' fees are determined in consultation with the parties in advance of each Judicial Panel engagement. Administrative and other costs of operating the Judicial Panel are funded by voluntary contributions to the CPR Legal Program from parties using Panel services.

A limited early investment in the kind of high quality dispute resolution counseling the Judicial Panel provides can avoid uncontrolled litigation expenses.

The costs of alternative dispute resolution procedures are small in comparison to the enormous costs of full-scale litigation. In two recent mini-trials, for example, the neutral advisor's fees were in the $4,000 to $5,000 range. The parties estimated that their total mini-trial expenses—including neutral advisors' fees and attorneys' fees for preparation and presentation at the information exchange—were 10 percent of what full-scale litigation would have cost. Moreover, all felt that even if the mini-trials had not succeeded, they would have recouped their mini-trial expenses in shortened trial preparation time.

"Commercial litigation takes business executives and their staffs away from the creative tasks of development and production and often inflicts more wear and tear on them than the most difficult business problems."

CHIEF JUSTICE WARREN BURGER

CPR Legal Program

Reprinted from *The New York Times*, November 1, 1982

New Alternatives to Litigation

Business litigation may be a necessary evil, but many corporate executives are beginning to think that there are times when it is more evil than necessary.

In a quiet revolution against the traditional practice of commercial law, many large corporations are now showing serious interest in finding ways to solve business disputes without going to trial.

If both sides can be convinced to stay away from the courthouse, they find that alternative dispute resolution — a term that covers everything from mediation to minitrials to hiring a private judge — can often deal with their problems more quickly and more cheaply than the traditional system of justice.

"In many cases, private proceedings are a better alternative than litigation and one that can provide the added advantage of confidentiality," said James F. Henry, president of the Center for Public Resources Inc., a leading proponent of alternative dispute resolution.

TRW Inc. was the first major corporation to take that message to heart. Five years ago, the Cleveland-based conglomerate took part in the first minitrial. The plaintiff was Telecredit, which charged that TRW had infringed on its patents. Both sides agreed to a two-day secret hearing in which each would present its case before a neutral adviser. The presentations were made by lawyers, directly to the executives involved. By 30 minutes after the arguments ended, Richard A. Campbell, a TRW vice president, and Lee A. Ault 3d, Telecredit's president, had worked out a compromise, at an estimated savings of at least $1 million in legal fees.

Since that minitrial, TRW has used the same approach in a $15 million suit filed by Automatic Radio, and, earlier this year, in a two-year-old contract dispute with the National Aeronautics and Space Administration. In each case, the parties were able to work out their differences.

Outside Lawyers 'An Impediment'

"Outside legal costs have just gone out of sight," said James McKee, vice president for law of TRW's electronics and defense operations. "And lots of times, the outside lawyers are the obstacle to quick settlement, because it's in their self-interest to keep the litigation going so they can get higher fees.

"With a minitrial or the other private hearings we've tried," Mr. McKee continued, "you can get control back into the hands of the businessmen, who will bring some common sense to bear. It's an idea that's very much in vogue right now, partly because it takes about four years to get to trial in Los Angeles Superior Court."

Indeed, speed is one of the chief advantages of keeping cases out of the courthouse. According to the American Arbitration Association, the average arbitration takes 141 days from filing to award, in contrast with the nationwide average of 20 months for a civil suit to get from filing to trial in the Federal courts.

The cost-cutting is usually just as dramatic: most experts familiar with minitrials agree that the costs can be less than one-tenth those of litigation.

"I think the main reason these alternate techniques are beginning to get so much attention is that the transactional costs of doing legal business are so enormous," said Stephen Middlebrook, general counsel of the Aetna Life and Casualty Company.

Aetna is one of the strongest believers in alternative dispute resolution. This fall, John H. Filer, Aetna's chairman, sent 100 other chief executive officers a letter asking them to consider handling some of their legal problems through the Center for Public Resources' new judicial panel, whose members — including such heavy-hitters as Marvin E. Frankel, Lloyd Cutler, Simon Rifkind, Harold Tyler Jr. and Sol Linowitz — have agreed to serve as judges or neutral advisers in minitrials or other private

Companies Bypass Courts

resolution mechanisms.

Cases have been slow to materialize, but the breakthrough may be at hand. In the wake of the Manville Corporation bankruptcy filing, the center has been in trying to set up a forum for resolving the asbestos disputes in a way that would be acceptable to the injured workers, the asbestos companies and the insurance companies.

Corporations Seek Seminars

Even though the center has not yet resolved any cases, a number of major corporations, including International Business Machines, International Telephone and Telegraph, Bristol-Myers and Xerox, have been interested enough to ask the center to provide workshops or seminars on alternative dispute resolution.

"I'm confident that we will have several cases under way by the end of the year," said Mr. Henry. "There are 12 to 18 specific disputes we are looking at. Among other things, we've been asked to provide a proposal to a Federal Government agency for using private procedures to resolve part of its sizable caseload."

The center, a nonprofit organization, is not the only player in the game. In addition to research-oriented foundations, such as the newly established National Institute for Dispute Resolution in Washington, some of the developers of the alternative dispute resolution movement have joined to form Endispute Inc., a Washington-based company with offices in Los Angeles and Chicago.

One of Endispute's first clients was Aetna, which asked the company to review several pending cases and recommend appropriate mechanisms for resolving them. One of the cases was simply settled through negotiations. In the others, Endispute proposed several different approaches ranging from a specially tailored form of arbitration to hiring a former judge to hear and decide the matter.

Popular in California

That last approach, commonly known as rent-a-judge, has been enjoying a boom in California. Under California law — and that of many other states, including New York — the parties to a lawsuit can hire someone,usually a retired judge, to resolve their dispute, and can then have the judge's report entered as the judgment of the trial court, with full rights of appeal.

"There are a couple hundred of these proceedings a year in Los Angeles County alone," said Eric Green, a Boston University law school professor who is one of the principals in Endispute.

Endispute is hoping to get in on the rent-a-judge action.

"By offering the facilities of Endispute, we can help retired judges who don't want the administrative hassles of scheduling and contacting the parties," said Jonathan Marks, another Endispute principal who, like Mr. Green, worked on the first TRW minitrial. "But we can also help parties think about which form of alternative dispute resolution would be most helpful in their particular case. It's not always a private judge or a minitrial."

Officials at the Chrysler Corporation, which has also hired Endispute, think the attention to new ways of resolving disputes may help the corporation regain control over the whole litigation process.

"There will always be many disputes that can only be solved through litigation," said Daniel Gaitley, assistant general counsel at Chrysler. "But there are many case which get caught up in such a long expensive system of pretrial discovery that the process begins to control the destiny of the dispute more than the parties do. That's what we hope to stop."

By TAMAR LEWIN

CPR Legal Program

Reprinted from *Legal Times*, May 24, 1982.

In an effort to help disputants avoid the costs and delays of litigation, the Center for Public Resources in New York has organized a panel of 23 high-profile figures, including many former judges, who will be available to act as neutral third parties or consultants in private dispute resolution.

The nonprofit center has been a leader in the development of alternative dispute resolution procedures, particularly the minitrial, which is intended to promote an informed dialogue between top management representatives of parties to a conflict. The panel members will serve as minitrial advisers, private judges, fact-finders, or mediators for parties hoping to avoid traditional litigation.

The Aetna Life & Casualty Foundation Inc. has awarded the center a $285,000 grant to start the program. The grant will allow the center to administer the panel's operations, to develop a caseload, and to monitor and evaluate various forms of private resolution techniques, according to Susan Scott, the center's vice president for communications. At the end of two years, the panel is expected to be self-financing.

Panel members will receive their usual rates of compensation from the parties involved. In addition, the center will charge participating parties a fee. No rate has been determined yet; it will depend on the complexity of the case and the amount of time required of judicial panel staff.

Despite the fact the plan calls for some rather highly paid lawyers to serve at their usual hourly rates, Deirdre Henderson, vice president in charge of the center's legal program, is convinced that parties will find the use of panel members to be cost effective. "I have absolutely no doubt . . . that it will be infinitely cheaper than going to full-scale litigation," Henderson said.

Alternative dispute resolution, she noted, involves abbreviated procedures that often dispense with the most costly aspects of litigation, such as formal discovery. The parties to the first and most widely publicized minitrial—TRW Inc. and Telecredit Inc., who used the process five years ago to resolve a commercial dispute between them—estimate that preparing for and implementing the minitrial cost only one-tenth the amount they would have spent on litigation, Henderson said.

The panel has no definite cases yet, but the center's president, James F. Henry, has pinpointed about a dozen disputes that "look like very likely prospects," Scott said. The center expects the first cases to come from members of the center's legal program. That program—supported by funds from 100 corporations, many of which are Fortune 500 companies—is one of the center's main activities. Founded in 1979, the program seeks ways to avoid or decrease litigation costs.

"Anyone with experience in major litigation knows that the cost and wear and tear of litigation are no longer acceptable. Alternative means of resolving problems have to be found," said one panel member, Irving S. Shapiro of the Wilmington, Del., office of New York's Skadden, Arps, Slate, Meagher & Flom. The panel is "in principle a good concept," said Shapiro, former chairman of the Du Pont Co. "Whether businessmen will have the foresight to sit down and talk rather than shoot cannons at each other remains to be demonstrated. Traditionally, people want to draw blood for a while before being reasonable."

Institution of the judicial panel is an important attempt "to give some structure" to alternative dispute resolution concepts that many corporations are finding intriguing, according to another panel member, James F. Davis of Howrey & Simon in Washington, D.C. Davis, a former U.S. Court of Claims trial judge, was the adviser in the TRW-Telecredit minitrial. That minitrial was the event that "got things rolling," Davis said. "The panel is an outgrowth of the idea that that kind of seed ought to be nurtured."

In the minitrial, lawyers and experts for each party, in an informal proceeding under the eye of a jointly selected neutral adviser, give summary presentations of their best case before top management representatives. The businessmen then attempt to negotiate a resolution. The adviser can help by indicating what a likely trial outcome would be.

According to center officials, the minitrial is an especially useful technique in cases in which only one or two issues divide the parties and in which questions are not ones primarily of law or credibility.

Although most minitrials have involved two corporate parties, Scott said that a number of the center's possible prospects for use of the judicial panel involve disputes between businesses and regulatory agencies.

Another method touted by the center is the "general reference," known popularly as the "rent-a-judge" technique. It involves a binding, private trial conducted pursuant to a state statute authorizing such private judging. Parties can agree to modify or disregard formal rules of procedure, evidence, and pleading.

CPR officials said that the panel will be expanded, but as the program begins, the following lawyers have agreed to become members:

G. Wallace Bates, president of the Business Roundtable, New York; **Arnold Bauman** of Shearman & Sterling, New York, a former federal district judge; **Griffin B. Bell** of King & Spalding, Atlanta, a former federal circuit judge and attorney general; **Charles D. Breitel** of Proskauer, Rose, Goetz & Mendelsohn, New York, formerly a state supreme court chief justice; **Archibald Cox**, a professor at Harvard University Law School; **Lloyd N. Cutler** of Wilmer, Cutler & Pickering, Washington, D.C., formerly a presidential counsel; **Davis** of Howrey & Simon; **Marvin E. Frankel** of Proskauer, Rose, formerly a federal district judge; **Stanley H. Fuld** of Kaye, Scholer, Fierman, Hays & Handler, New York, formerly a state supreme court chief justice; **Shirley M. Hufstedler** of Hufstedler, Miller, Carlson & Beardsley, Los Angeles, a former federal circuit judge and secretary of education; **Arthur S. Lane** of Smith, Stratton, Wise & Heher, Princeton, N.J., formerly a federal district judge; and **Sol M. Linowitz** of New York's Coudert Brothers (D.C. office), formerly U.S. ambassador to the Organization of American States and conegotiator of the Panama Canal Treaty.

Members also include **Robert B. McKay**, director of the Institute of Judicial Administration, New York; **Joseph W. Morris**, general counsel of Shell Oil Co., Houston, Tex., a former federal district judge; **William H. Mulligan** of Skadden, Arps in New York, a former federal circuit judge; **Charles B. Renfrew** of Pillsbury, Madison & Sutro, San Francisco, formerly a federal district judge and deputy attorney general; **Elliott L. Richardson** of New York's Milbank, Tweed, Hadley & McCloy (D.C. office), formerly secretary of the departments of Health, Education and Welfare, Defense, and Commerce, and attorney general; **Simon H. Rifkind** of Paul, Weiss, Rifkind, Wharton & Garrison, New York, a former federal district judge; **Shapiro** of Skadden, Arps; **Harold R. Tyler Jr.** of Patterson, Belknap, Webb & Tyler, New York, a former federal district judge and deputy attorney general; **Lawrence E. Walsh** of Crowe & Dunlevy, Oklahoma City, formerly a federal district judge and deputy attorney general; **Harold M. Williams**, president and chief executive officer, J. Paul Getty Museum, Los Angeles, formerly chairman of the Securities and Exchange Commission; and **Irving Younger** of Williams & Connolly, Washington, D.C., formerly a law professor and a city court trial judge. ■

Union Carbide GC Boosts Litigation Alternatives

A very simple proposition motivated John A. Stichnoth, general counsel and vice president of Union Carbide Corp., to get involved in the legal program of New York's Center for Public Resources (CPR). As he said in a recent interview, "Nobody will help us if we don't help ourselves."

Corporate general counsel across the country are up in arms over the rising cost of litigation, and Stichnoth, who is recognized as a leader in the corporate counsel world, is no exception. His concern caused him to respond favorably three years ago when CPR president James F. Henry suggested a concerted attack in the form of a new program to be organized by the center.

Stichnoth ultimately became the chairman of the CPR legal program's executive committee. The program brings corporate counsel together to study the causes of spiraling costs and to explore alternative methods of dispute resolution. One hundred corporations now contribute annually an average of $5,000 each to fund the program; corporate counsel also devote their time to writing articles, attending workshops, and trading ideas.

"There is a legal program because there is a John Stichnoth," said Deirdre Henderson, CPR vice president in charge of the program, referring to Stichnoth's "pivotal" role in circulating Henry's idea among fellow general counsels. Stichnoth drummed up support despite some skepticism of his own. When he talked to colleagues, he was "very careful not to paint too rosy a picture of what could be accomplished," he said. He told them, "This may be pie in the sky." But he also told them, "If the business community doesn't make an attempt in our own behalf, no one will make the attempt for us."

Stichnoth was pleasantly surprised when he found the state of the art in the field of alternative dispute resolution to be more advanced than he had anticipated. "It developed that there are techniques," he said, "some usable now, others that are worth studying and have potential for being developed into something worthwhile."

One currently usable technique that has impressed Stichnoth is the minitrial. The minitrial is now used primarily in disputes between two business entities, and in that setting, he said, "there is no question that it's a nuts and bolts, practical technique." He is interested to see whether the minitrial and other techniques can be expanded to resolve disputes between companies and individuals and multiparty disputes, including environmental controversies and consumer class actions.

Stichnoth, 58, has been general counsel of Union Carbide since 1976, but he has been in the company's legal department since 1955. Before that, he was an associate at New York's Willkie Farr & Gallagher.

Stichnoth is known as a lawyer who dedicates a lot of his time to broad professional issues. One key commitment has been his chairmanship of the Corporate Law Departments Committee of the American Bar Association's Corporation, Banking and Business Law Section.

"He works through organizations," said Robert S. Banks, general counsel of Xerox Corp. and a member of the CPR legal program's executive committee. "He uses organizations as a means to accomplish ends, and he does that effectively. He believes that things will work because of the organization, not in spite of the organization."

Banks speaks highly of Stichnoth, although the two disagreed recently over the formation of a new group, the American Corporate Counsel Association. While Banks has been active in that organization, Stichnoth believes that general counsel "can accomplish more by working through the organized bar rather than separately from it."

—Larry Lempert

CPR

CENTER FOR PUBLIC RESOURCES

CPR LEGAL PROGRAM
TO REDUCE THE SOCIAL AND ECONOMIC COSTS OF LITIGATION

In the last two decades, America has experienced an explosion of corporate litigation and regulatory disputes. This litigious trend has overloaded the courts and has proved to be a costly approach to resolving legal disputes.

Chief Justice Warren Burger devoted his 1982 Annual Report on the Judiciary exclusively to this problem. "Commercial litigation," he said, "takes business executives and their staffs away from the creative paths of development and production and often inflicts more wear and tear on them than the most difficult business problems."

He called for the creation of new dispute resolution tools by using "the inventiveness, the ingenuity and the resourcefulness that have long characterized the American business and legal community."

Three years ago, with leading corporate counsel, CPR initiated the Legal Program precisely to develop these new dispute resolution tools. Today, the Program is a rapidly growing coalition of 100 general counsel of major corporations, together with leading law firms, academics and government regulators.

The Legal Program was organized on the premise that the corporation, particularly corporate counsel, has strong incentives to reduce the cost of litigation and has the resources to do so. That premise has proven sound. While useful methods for avoiding and resolving disputes have originated in the public organizations involved in the Program, corporations have supplied the most promising innovations. Examples of these models are:

- TRW and Telecredit developed the "mini-trial," a form of private trial that abbreviates prolonged major litigation to one or two days.

- Control Data has created an "employee ombudsman" program to promote cost-effective and equitable disposition of employee disputes, an area of conflict that could reach major proportions in the 1980's.

680 Fifth Avenue NY, NY 10019 212-541-9830

- Allied Chemical's internal environmental programs have significantly reduced the incidence and costs of Allied's environment-related disputes.

- Xerox Corporation developed a Litigation Cost Control Program to control and budget litigation expenses. The program has saved money in several ways, by delaying costs that subsequently proved unnecessary, and by avoiding overkill in the assignment of legal manpower. It also facilitates management review of litigation strategies and techniques.

Corporate counsel play an active role in developing Program directions. In addition to Program governance, they provide expertise from their law departments and contribute information on models of dispute prevention and resolution that heretofore were uncommunicated.

The Program also benefits from the participation of leading academics, several of whom play an active consultative role in directing several Task Forces.

PROGRAM OBJECTIVES

The agenda of the CPR Legal Program is:

- Development of private processes and practices that reduce the cost of litigation and regulatory disputes.

  A growing number of private alternatives to litigation, commonly referred to as alternative dispute resolution, have been identified and developed by the Program.

  The Program is also committed to the full development of dispute management, namely those internal practices that serve to (a) prevent disputes and (b) manage litigation cost-effectively.

- Communication of pragmatic information to business, the bar, the judiciary, law and business schools, and public institutions.

Corporations and leading law firms increasingly require information about the processes and practices developed by the Program.

At the same time, many methods of dispute prevention, dispute management, and alternative dispute resolution developed by the Program are applicable to government and to public institutions and municipal corporations which are also experiencing a litigation explosion. Others have been of interest to the judiciary as case settlement techniques. Communication to law and business schools is also an important agenda of the Program to increase the interest of those institutions in academic research and teaching about alternatives to litigation.

- o Implementation of experiments and new resources to decrease the costs of litigation and regulatory disputes.

  An important example is the Judicial Panel, a group of outstanding former jurists and lawyers organized to assist disputing parties to design and implement private alternatives to litigation.

DEVELOPMENT OF EXISTING AND NEW ALTERNATIVES TO LITIGATION

At the beginning of this Program, little was known about private alternatives to costly litigation. Individual and institutional resources were not recognized, nor were they organized in any critical mass of effort. To develop existing and new models of dispute prevention, litigation management and alternatives to litigation, the Program has undertaken the following:

Task Forces

The Legal Program has organized Task Forces of leading corporate, law firm, academic and public experts in such areas as: Intercorporate Disputes, Employee Disputes, International Business Disputes, Consumer Disputes, Environmental Disputes, Disputes Involving Science and Technology, and Dispute Management, including the corporate policies and systems that serve to prevent, reduce and manage disputes effectively.

The purpose of each Task Force has been to:

- Coalesce relevant individual and institutional expertise from business, the bar, academe and the public sector.
- Develop existing and new models of private dispute prevention and resolution.
- Define and implement opportunities for research, experimentation or new resources that will increase the use of private alternatives to litigation.

Each Task Force has also sponsored workshops to expand the network of experts, and the substantive understanding, specific to each area.

Task Force and workshop outcomes have included: organization of the Judicial Panel; a joint venture with the UCLA Law and Business Schools to produce and distribute a videotape of a mini-trial, an innovative form of private trial; and the Dispute Management Education Program.

Surveys

Two surveys have been completed by the Program: in 1980, a survey of corporations to identify existing models of dispute prevention and resolution practices and, in 1981, a survey of business schools, law schools and legal institutes to identify relevant expertise among legal and other academics.

An additional survey of major companies is being undertaken by the Employee Disputes Task Force to develop useful information on employee dispute processing practices.

The Program will survey industrial, trade and professional associations for private dispute resolution processes developed by these organizations. Some industries have developed mechanisms for the private resolution of, for example, consumer disputes and disputes involving complex technology unique to that industry. The Program has already analyzed models of self-regulation.

Research

The Program has from the outset supported academic research related to the prevention and resolution of disputes.

Task Forces have identified research needs in such areas as disputes involving scientific and technological issues, environmental disputes, and disputes in the international business arena.

The Legal Program has also received inquiries about whether it will provide research for individual companies, organizations and professional publications. Where such requests contribute to Program purposes, this work will be done by Legal Program staff and academic experts.

Information Clearinghouse

CPR is now a recognized leader in communicating information about alternatives to litigation. As a consequence, the Legal Program will commit increased effort to:

- Analyzing information from domestic and international sources.
- Building sound working relationships with individuals and organizations having a contribution to make to dispute prevention, management and resolution.
- Increasing the availability of information to the institutions involved in the Program and others.

COMMUNICATION OF ALTERNATIVES TO LEGAL CONFLICT

A primary objective of the Program is to communicate effectively the models and leading thought on private alternatives to litigation. To accomplish this, several communications tools are being employed, including:

Publications and Videotapes

Corporate Dispute Management, to be published annually by Matthew Bender, is the first compilation of successful corporate practices to reduce or avoid legal and regulatory conflicts.

To keep Committee members currently informed on new developments in alternative dispute resolution, we have inaugurated a monthly newsletter, Alternatives, with special quarterly supplements.

With UCLA and twelve major corporations, CPR produced a videotape on the "mini-trial," a private dispute resolution procedure which can reduce major litigation to a few days. Other instructional videotapes are planned.

Dispute Management Education Program

Our Dispute Management Education Program offers public and in-house seminars on alternative dispute resolution and cost-effective conflict management. American Express, Standard Oil of Indiana, Norton Simon, Xerox and ITT are among the corporations using the Education Program. A public seminar with Northwestern Law School was held in Chicago this fall.

IMPLEMENTATION OF NEW RESOURCES

The Program is committed to the organization of new resources and projects to facilitate the use of dispute resolution alternatives.

The Judicial Panel

For many disputes between companies, there are cheaper, quicker, more effective methods of resolution than litigation.

Helping companies define and use such alternatives in particular disputes is the business of the CPR Judicial Panel, which was initiated with a major grant from the Aetna Life & Casualty Foundation.

Judicial Panel members are some of the most eminent lawyers and former judges in the country who can serve disputing parties in several important ways. They act as dispute resolution counselors helping parties to discuss and resolve their differences at the earliest stages of a dispute before litigation is threatened, or to agree to and design a fair and cost-effective private dispute resolution procedure if the parties have already assumed litigation postures. They can also act as the neutral decisionmaker or umpire in an alternative dispute resolution procedure. Thus, a Judicial Panelist may be the:

- o adjudicator in a statutorily authorized private trial or an arbitration proceeding;

- o advisor in a "mini-trial" or neutral fact-finding proceeding, or in the rendering of a neutral advisory opinion;

- o facilitator in mediation or conciliation.

Regulatory Disputes

The regulatory system is a source of costly conflict for American society, particularly the business community. Building on the work of the Legal Program to date and its unique coalition of corporate, academic and regulatory experts, the Program will place increased emphasis on identifying and developing dispute prevention and resolution methods applicable to the government.

Effort has targeted on:

- o Preventive corporate techniques, such as the environmental audit, product liability audit or EEO audit.

- o Consensus-building efforts, such as the National Coal Policy Project or the Wisconsin Mining Conference, aimed at negotiating agreements and narrowing areas of disagreement on a particular set of issues in advance of formal regulatory action.

- o Coordinated permitting review procedures, such as the Colorado Joint Review Process, which provides for coordinated review by regulatory agencies and the public to reduce the high costs of delays and disputes surrounding major mineral, energy, waste, and utility development.

- o The use of private processes to resolve governmental legal actions. The recent NASA/Spacecom/TRW mini-trial establishes an important precedent for developing this area further.

- o Development of an audit procedure for government to assess the assignment of prosecutorial resources.

Comments on the final pages project the enthusiasm and professional commitment to the Program of several General Counsel and Judicial Panelists.

"There must be a better way to resolve genuine disputes between companies. We have been drawn to the CPR Legal Program because its stated objective is to find and promote those better ways. We have derived substantial benefits from our participation in the Program."

Stephen B. Middlebrook
Vice President and General Counsel
Aetna Life Insurance Company

"The CPR Legal Program has received unprecedented support from the counsel of major corporations. I believe Atlantic-Richfield will recapture our donations to the Program (in reduced legal costs) at a very early date."

Francis X. McCormack
Senior Vice President and General Counsel
Atlantic Richfield Company

"We are concerned with the increasing costs associated with our corporate litigation and believe that the CPR Legal Program offers great promise in exploring alternate, less costly methods of resolving disputes."

Howard J. Aibel
Senior Vice President and General Counsel
International Telephone & Telegraph Corporation

"The CPR Legal Program is the driving force behind a major movement in the United States."

Lawrence Perlman
Vice President, Corporate Services
Control Data Corporation

"CPR was the first to articulate the concerns for the seemingly limitless escalation in the costs of resolving business disputes. The concerns were felt in the executive and law offices of corporations around the country but at that time everyone was wrestling with the problems by themselves. CPR provided the initiative and brought together an impressive group of people to study the basic problem and propose creative solutions. Others have now joined the lists of finding more efficient methods for dispute resolution, but CPR has been in the forefront and I expect it to continue in that role."

Robert S. Banks
Vice President and
General Counsel
Xerox Corporation

"Anyone with experience in major litigation knows that the cost and wear and tear of litigation are no longer acceptable. Alternative means of resolving problems have to be found."

Irving S. Shapiro, Esq.
Skadden, Arps, Slate, Meagher
& Flom

"A mini-trial with a 'neutral advisor' from the CPR Judicial Panel is likely to provide a better solution for business disputes than prolonged and bitter litigation. From the many alternatives available, executives can decide for themselves, in light of the mini-trial, how to resolve their dispute. No judge or jury has that latitude."

The Honorable Joseph W. Morris
Vice President and General
Counsel
Shell Oil Company

"Better than costly, often protracted, litigation -- better even than arbitration or mediation -- is an innovative device: a mini-trial advocacy summary presentation of issues and facts before an experienced neutral, with lawyers and principals present to see their cases as others would see them."

The Honorable Charles D. Breitel
Proskauer, Rose, Goetz &
Mendelsohn

"The CPR Legal Program is an effort to initiate new ways of thinking about how we compose our differences. Even if it succeeds in only a small area of the larger problem, it will be a move in the right direction."

George A. Birrell
Vice President & General
Counsel
Mobil Corporation

"I continue to be impressed with the quality of the work done by CPR and the valuable contribution it is making toward developing innovative alternatives to costly litigation."

Jesse P. Luton, Jr.
General Counsel
The Gulf Companies

Regulation by confrontation or negotiation?

Robert B. Reich

Reprinted from

Harvard
Business Review

May-June 1981

Harvard Business Review

May-June 1981

Volume 59, Number 3

The Harvard Business Review, a bimonthly journal for professional managers, is a program in executive education of the Graduate School of Business Administration, Harvard University (John H. McArthur, Dean; Derek C. Bok, President).

Editorial offices, Boston, MA 02163.
Second-class postage paid at Boston, MA and at additional mailing offices; POSTMASTER: send address changes to Harvard Business Review, Boston, MA 02163.

Regulation by confrontation or negotiation?

Business and government should limit the role of intermediaries in the regulatory process

Robert B. Reich

The federal regulation of industry has suffered through a long history of bitter confrontation, tactical infighting, strategic delay and deception, and the mutual insensitivity of both business and government to each other's legitimate needs. In today's troubled economic climate, however, neither regulator nor regulated can tolerate this unproductive status quo without ill effect. Important social goals are unnecessarily postponed; the competitive health of companies and industries is unnecessarily sacrificed. In fact, the only actors in the regulatory process who profit from this state of affairs are the professional intermediaries—the lawyers, consultants, staff members, and public relations experts whose numbers in Washington, D.C. have increased so rapidly of late. Too often, these intermediaries help maintain hostility between business and government on regulatory matters. The author provides a useful description of how these intermediaries work and suggests several practical methods for moderating their influence in Washington.

Since 1976, Mr. Reich, a lawyer and economist by training, has been director of policy planning at the Federal Trade Commission. Prior to that, he was assistant to the solicitor general of the United States. Starting July 1, he will join the faculty of the John F. Kennedy School of Government at Harvard University, where he will teach business and government policy. He has written extensively about government regulation and economic policy.

The business community's complaints about government regulation are legion. It is not so much the goals of regulation to which business objects, however, as it is the impractical, often insensitive, means by which regulations are devised and implemented. After all, most business executives would agree with government that the public deserves some protection from toxic wastes, nuclear accidents, air and water pollution, monopoly, unsafe products, fraudulent claims, and unfair trade practices.

Despite the substantial resources of money (estimated to exceed $2 billion annually) and management attention expended on the regulatory process, the business community has had remarkably little success in affecting either the design or the implementation of regulations. This failure stems, in large part, from the business community's negative, defensive, and reactive attitude. Rather than seeking practical solutions jointly arrived at, business has often denied that problems exist, argued that problems do not warrant government interference, or sought to place the blame elsewhere.

On their side, the regulatory agencies have also contributed to this adversarial relationship. They have often threatened massive subpoenas, broadcast adverse publicity, and installed cumbersome mechanisms of compliance.

As a result, the process of designing and implementing regulations has become a terribly expensive zero-sum game: if business wins, the proposed regulation is stymied; if government wins, a new and seemingly oppressive regulation is imposed. These war games are suspended only at times of genuine crisis, such as the imminent financial collapse of a major company, industry, or city. Then, at the eleventh hour, business executives and gov-

ernment officials sit down together, roll up their sleeves, and seek workable solutions.

To be sure, confrontation between business and government as adversaries does serve important public ends, not the least of which is the visible assurance it gives the public that its interests are being protected. Not many years ago, regulatory agencies were accused of being "captured" by the very industries they sought to regulate. Cozy relationships between regulator and regulated—including secret meetings, expense-paid vacations, and promises of future employment—spelled collusion rather than collaboration. Though an adversarial process can help ensure the legitimacy of regulation, it is highly doubtful that even this noble goal requires the present degree of hostile confrontation.

Common explanations of regulatory confrontation

Why have business and government been unable to cooperate in devising regulations? Why has the regulation-making process become such an unproductive exercise? Several plausible explanations have been offered, but none seems entirely satisfactory in light of what is already known about the nature of the regulatory process.

Legal constraints

One common explanation derives from the legal procedures that constrain regulatory decision making. To an ever-increasing extent, this activity has come to resemble a courtlike adjudication, often permitting the involved parties to make oral presentations, cross-examine opposing witnesses, and appeal rulings to the federal courts. Admittedly, these courts and Congress have continually pushed regulatory agencies in this "judicialized" direction.

The legal constraints, however, cannot fully account for the extent to which business and government fight over regulation. The constraints apply only after a federal agency has proposed a new regulation—a point that comes late in the decision-making process, when battle lines have already been well established. Yet it is precisely during the period before the constraints take hold that constructive participation by business could help ensure that the ultimate regulation would be sensible. By the same token, confrontation at this stage virtually guarantees a protracted, inefficient, and dysfunctional process for both business and government.

'New class' conflict

Another common explanation is that the key officials and staff of regulatory agencies comprise what has been dubbed a "new class" of public policy professionals—a class that is opposed to both economic growth and corporate power and that views regulation as a means of putting an anticapitalist philosophy into effect. Given so fundamental a clash of ideologies, collaboration between business and government is just not feasible.

On close inspection, this theory also proves unconvincing, for, in my experience at least, most regulatory officials and staff members have been committed to a free enterprise economy. Of the higher-level civil servants who leave government employment within six years—some 90% of agency officials and 65% of professional staff members—most go on to represent corporate interests to the government by taking jobs in the private sector.

Thus, far from comprising a new class, most regulatory agency personnel share precisely the same upwardly mobile, middle-class values held by their counterparts in corporations.

Cultural contentiousness

A third explanation is that hostility in the regulatory process is merely one aspect of the ethos of competition and conflict that characterizes so much American history and culture. In this view, corporations and regulatory agencies naturally find themselves pitted against each other because they are competing for economic control of particular industries, social status, and political autonomy.

But this theory fails to account for the extraordinary history of cooperation between business and government in such sectors as agriculture and aerospace, where detailed regulatory controls to ensure high quality and performance have long been administered in conjunction with policies to support industry through procurement, research and development, loan guarantees, price supports, special tax advantages, and the like. Furthermore, both these sectors have been among our most productive and innovative, and neither has been marred by the sort of collusive, public-be-damned relationship that has on occasion characterized the regulatory agencies and their regulated industries.

Controversiality of issues

A fourth explanation is that the tensions between business and government over regulation often re-

flect the controversial nature of many regulatory issues. Controversy is inevitable in, for example, decisions about the location of nuclear power facilities and toxic waste dumps, workplace safety, permissible levels of air pollution, and the degree of risk allowed in new drugs. Only through explicit conflict can the necessary bargains be struck, competing interests accommodated, and workable consensus established.

There is, however, an important difference between those conflicts that are necessary precursors to fair and expeditious compromise and those that represent merely tactical maneuver and zero-sum gamesmanship. All too often, the regulatory process has served less to address the political and moral issues implicit in the proceedings than to cloud them, less as a vehicle for consensus building than as a means for driving parties further apart.

Business-government intermediaries

Neither the legal restraints placed on regulatory decision making nor the ideological predispositions of regulators, neither the contentiousness of American culture nor the controversiality of the issues at stake can fully account for the extent to which government and business do regulatory battle.

An additional, though often neglected, explanation can be found in the behavioral norms and institutional incentives of the professionals who specialize in communicating between government and business on regulatory matters. This group possesses such unusual skills and represents so particular an economic interest that it seems fair to refer to them as an industry unto themselves—an industry that is growing rapidly in an environment that it has done much to create.

A problem of communication

Unlike such capital cities as London, Paris, and Tokyo, which serve as national centers of trade, finance, education, and the arts, Washington, D.C. has only the federal government to give it prominence. Major business, intellectual, and creative enterprises are, for the most part, located elsewhere. Thus, while in other capitals government leaders meet frequently and informally with the leaders of other influential communities, no such easy communication takes place in Washington. This fact, especially when coupled with the relatively short tenure of most U.S. regulatory officials, prevents federal policymakers and business executives from enjoying the same casual give-and-take, comfortable candor, and long-term familiarity that often characterize business-government relationships elsewhere.

Whatever dangers such frequent and informal contact may pose to the democratic control of the policymaking process, it does at least facilitate efficient communication between the public and the private sector. Advanced industrial societies—with their complex technologies, intricate trading and financial arrangements, and labyrinthine government bureaucracies—require extensive internal coordination if they are to run smoothly, and such coordination requires, in turn, efficient communication. In Washington, communication has come to depend on specialized professionals who act as intermediaries between government policymakers and business executives.

A new kind of professional

Who are these intermediaries? They are the approximately 12,000 Washington-based lawyers who represent business before regulatory agencies and the federal courts, the 9,000 lobbyists who represent business before Congress, the 42,000 trade association personnel who keep close watch on pending regulations and legislation, the 8,000 public relations specialists who advise business executives about regulatory issues, the 1,200 specialized journalists who report to particular industries on government developments that might affect them, the 1,300 public affairs consultants who help business organize to deal with regulation, and the 3,500 business affairs consultants who provide regulatory officials with specialized information about particular industries.

Together with the 15,500 lawyers, lobbyists, and public relations specialists within regulatory agencies and large corporations, these intermediaries comprise a virtual industry of their own.

Members of the industry usually work in Washington for several years in a variety of related positions—first, say, on a congressional staff, then on a regulatory agency staff or a trade association, then in a Washington law firm or public relations firm, then perhaps again in a senior congressional agency position, and then in a senior trade association position. They circulate freely among the points of the Washington compass and change jobs frequently.

Their skills are for the most part strategic, not substantive. They know how to "position" a client to reduce unfavorable exposure, minimize risk, gain a positive image, fend off threats to its autonomy, enlarge its domain, reduce its vulnerability, or generally thwart its rivals. And though they may on occasion consult with economists or scientists, they are not so much interested in the truth or falsity of what these specialists have to say as in its tactical value—the extent to which it can bolster a client's argument or discredit the argument of a specialist on the other side.

A supplier of services

These intermediaries are in the business of providing several types of service to their clients:

- ☐ Information about what the "other side" is doing in the form of newsletters, briefings, conferences, seminars, "insiders' " trade reports, and lawyers' opinion letters.
- ☐ Representation of each side's arguments, analyses, and data to the other in the form of corporate legal briefs and memoranda, scientific reports, economic analyses, and marketing surveys as well as agency speeches, enforcement guides, advisory opinions, and press briefings.
- ☐ Manipulation of administrative procedures. On behalf of the corporation, this manipulation may involve "stonewalling" requests for information through interminable litigation, filing endless motions over minute procedural matters, seeking frivolous injunctions and interlocutory appeals in the federal courts, and inundating regulatory staff members with so much data that they are unable to sift through it; on behalf of the agency, such manipulation may entail issuing overly broad subpoenas, initiating "fishing expeditions" through business files, and harassing businesses for failing to comply with picayune legal requirements.
- ☐ Political pressure on each side in the form (again, on behalf of the corporation) of organizing political coalitions opposed to pending agency action, arranging visits for business leaders with their legislative representatives, urging employees and citizens within affected districts to write to their legislators in opposition to agency action, placing advertisments in major newspapers, sending canned editorials and press releases to appropriate local media, and conducting public opinion polls. Tactics on behalf of the agency may include releasing studies and reports that purport to show the need for the agency's action, instigating newspaper investigations of particular industries for allegedly harmful activities, and meeting with legislators to convince them of the need for regulatory action.

Most of the major regulatory controversies of recent years have involved platoons of intermediaries providing each of these services. The Food and Drug Administration's proposed ban on saccharin, for example, pitted consumerists, nutritionists, and FDA staff against the Calorie Control Council, a trade association representing the soft drink industry. The council, which ultimately "won" by staying the hand of the FDA, worked closely with several teams of Washington lawyers who specialized in food and drug regulation and a public relations firm that organized a coalition of diabetics and weight watchers.

In the confrontation over the Federal Trade Commission's proposed rule concerning television advertising directed at children, the U.S. Chamber of Commerce, the Grocery Manufacturers of America, the American Association of Advertising Agencies, several sugar refiners and cereal manufacturers, and the National Association of Broadcasters teamed up against the FTC staff and its allies—the Consumer Federation of America, Action for Children's Television, the AFL-CIO, and the American Association of Retired Persons. Intermediaries on both sides drafted testimony and legal briefs, prepared witnesses for congressional hearings, sent information to editorial writers around the country, and organized visits to key members of Congress.

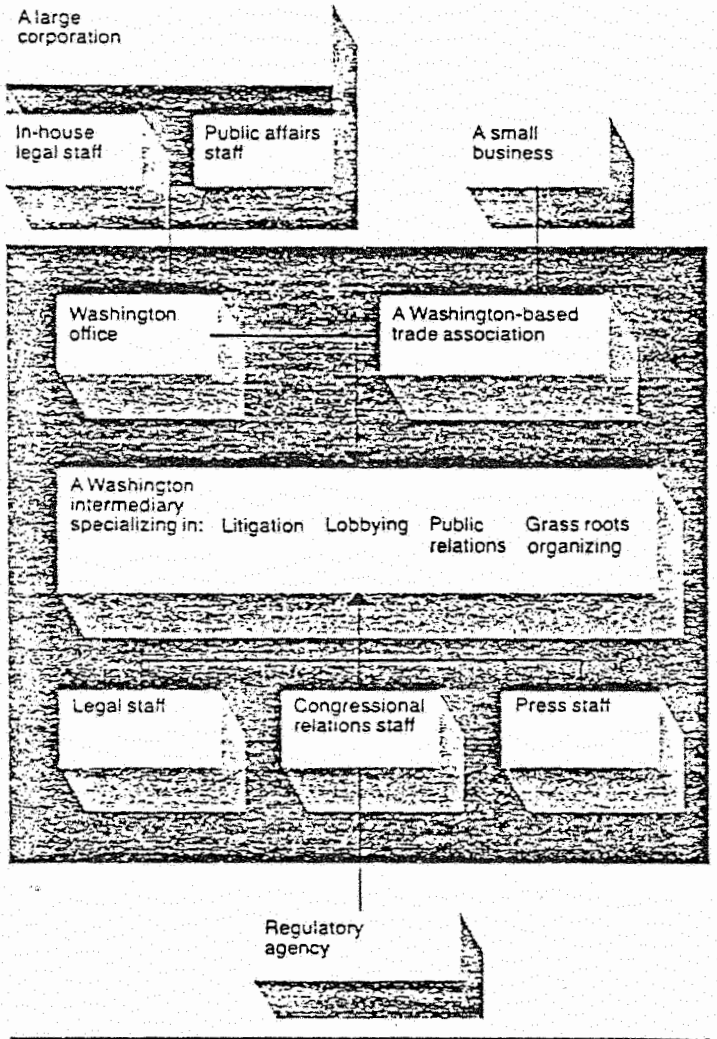
A new growth industry

More and more, these services are being supplied by integrated "full service" organizations modeled after the public interest groups that since the mid-1960s have coordinated information, legal representation, administrative tactics, and political pressure within a single, overall strategy (see *Exhibit I*). In much the same fashion, Washington-based law firms that specialize in lobbying are merging with law firms that specialize in regulatory litigation, and both are affiliating with public relations firms and advertising agencies.

Similar developments are taking place in larger corporations and in the regulatory agencies themselves, as specialists in congressional relations, public relations, press relations, government affairs, and legal tactics are increasingly assigned to the same managerial units.

This broad trend toward integration of services permits economies of scale and coordination, but it also allows the intermediaries to function as entre-

Exhibit I
The channel of communication between business and the regulator



preneurs: they identify groups of businesses that can be organized to take advantage of their services, create new trade associations, broker among associations that are already in existence, and forge new coalitions that will hire them to manage particular issues.

And hire they do. The number of lawyers specializing in regulatory matters has grown by more than 18% each year for the past five years, and major Washington law firms have doubled in size over the past seven years. One hundred seventy-eight law firms now have branch offices in Washington, a 100% increase since 1975. Trade associations are moving to and being created in Washington at the rate of more than two per week; there are now over 2,000 of them located in Washington, a 250% increase during the past decade.

Public relations firms specializing in regulatory issues are also burgeoning, their billings increasing by more than 20% a year. Moreover, large corporations are opening Washington offices at a fast clip: 500 U.S. corporations now have full-time Washington staffs, double the number of corporations that had them in 1970 (see *Exhibits II-VI*). Meanwhile, the size of these Washington staffs has tripled.

Principles of intermediaries' success

Obviously, tension between business and government is necessary if intermediaries are to sustain or enlarge their economic base. This is not to suggest that intermediaries seek to foment business-government confrontation or that they do not often provide valuable help and information. Confrontation is, however, an unstated principle of their calling. It is a premise on which they operate, a precondition necessary to everything they do, and therefore a state of affairs that they encourage and cultivate by virtue of the role they assume. Confrontation is their professional frame of reference, and it is within this frame that they measure their own success.

Several principles, therefore, can be observed to guide their actions:

Seek to achieve clear controversies in which a client's position can be sharply differentiated from that of its regulatory opponent.

A sharply drawn regulatory dispute serves an intermediary's interest in several related ways. It can be used to justify the services provided a client and can perhaps even convince that client that still more resources are needed to carry on the battle. It can also be used to demonstrate to other potential clients the intermediary's virtuosity in mounting an aggressive campaign of legal maneuver, media management, and political pressure tactics.

Finally, a dispute provides a standard by which an intermediary's services can be evaluated: a victory in the dispute strengthens the intermediary's reputation and thus provides a vehicle for self-promotion in the future. Even a "loss" can be advantageous, for it can be used to show how ruthless and mighty is the opposition and how important is continued vigilance in the face of such odds.

This principle manifests itself in a variety of ways. First, it encourages intermediaries to take extreme positions that tend to exaggerate the differences be-

Exhibit II
Prevalence of government relations units according to size of company

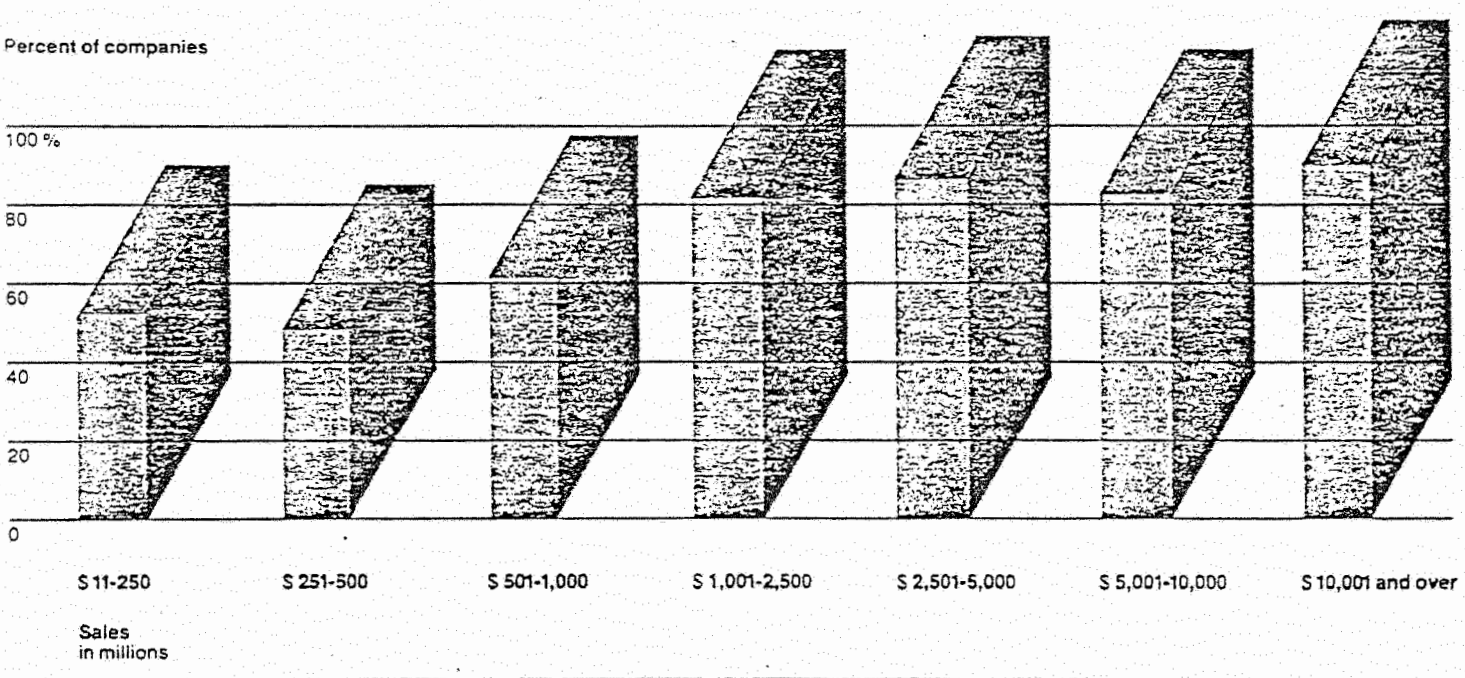
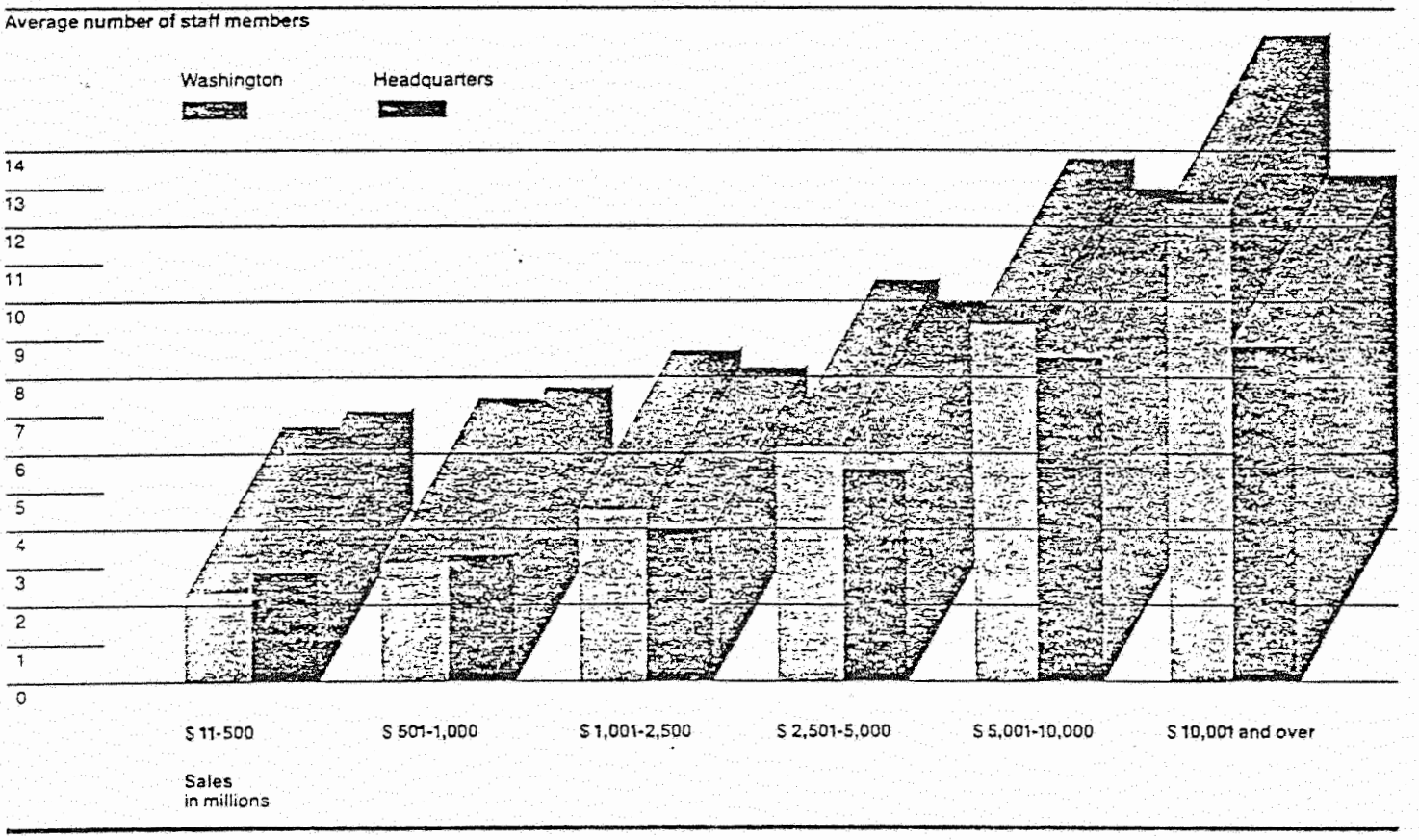


Exhibit III
Average size of headquarters unit and Washington office according to size of company



tween the two sides. More important, it actively discourages intermediaries from heading off regulatory disputes—by engaging in informal problem solving at an early point, by seeking voluntary solutions that would prevent the necessity for regulation, by taking steps to avoid problems before they occur, or by seeking out areas of agreement on which compromise might be based.

Intermediaries seldom, if ever, gain credit for preventing regulatory problems from arising. Those who represent business cannot make their mark by dissuading regulators from proposing a particular regulation, since this sort of victory is difficult to document. On the contrary, they can do far better by waiting until regulatory action has begun (or even by quietly encouraging it) and then going into battle with guns blazing.

The same is true, of course, for lawyers, investigators, and regulation writers within regulatory agencies. They do not stand to gain professionally from engaging in quiet diplomacy with business aimed at minimizing the need for regulation. Their careers depend on more visible victories—a regulation finally promulgated, a penalty imposed, a favorable court decision.

Not long ago the National Highway Transportation Safety Administration (NHTSA) conducted tests of the crashworthiness of various automobiles. Afterwards, in an effort to obtain voluntary agreement about how the models could be made safer, NHTSA officials sought meetings with the manufacturers of cars, both domestic and foreign, that had failed the tests.

The U.S. manufacturers, represented at the meetings by their lawyers and government relations staffs, refused to discuss possible improvements. They argued instead that the tests were flawed. The foreign manufacturers, represented at the meetings by the engineers who had designed the cars in question, wanted to know precisely why their cars had failed. They brainstormed with NHTSA staff about the best means of increasing safety and, largely on the basis of those discussions, eventually devised low-cost improvements that enabled their automobiles to pass the test.

This distinctively American thirst for controversy also expresses itself in a myopic concern for gaining tactical advantage in regulatory battles. Some months ago I invited several corporate executives to a meeting to discuss a consumer problem that had arisen within their industry. The Federal Trade Commission had been inundated with complaints for months, and it seemed clear that, if the complaints were well founded, some sort of regulatory action would be necessary unless the industry took steps to mend its ways.

Exhibit IV
Companies with government relations units more than three years old shown by industry grouping

Industry	Percent at headquarters	Percent in Washington
Transportation	89 %	100 %
Lumber and paper	88	78
Metals	88	72
Chemicals	80	75
Life insurance	75	57
Food	74	77
Petroleum	67	93
Retail and wholesale goods	64	100
Banks	63	100
Utilities and communications	63	57
Diversified finance	57	100
Manufacturing	56	78
Machinery	53	58

Each of the executives agreed to the meeting. Some expressed surprise and even gratitude that, before taking formal action, the agency was willing to talk informally about the problem and seek voluntary solutions to it. Within 10 days of my invitation, however, each of the executives called back with a similar message: each had been advised against attending such a meeting by legal counsel, a government affairs vice president, or a trade association representative.

A few of the executives were particularly candid about the advice they had received. It was not in their interest, so they were told, to "stick their necks out" by attending such a meeting at this early stage. The visibility could be dangerous. Moreover, it would, by lending credence to the agency's concerns, almost certainly encourage the agency to take some sort of regulatory action. It would be better to wait until the issue became crystallized—that is, until they could get a clearer idea of what the agency was planning to do and how seriously the agency was taking the problem.

I received a similar message from the FTC staff members responsible for regulating the industry. They were also opposed to such a meeting because, they argued, it might "tip our hand." The industry might learn what information we at the agency had about the problem, how far we were prepared

to go in fighting it, and what strategies we might use in attempting to regulate against it. It would be far better, they warned, to wait until we had more information about the problem—that is, until we had a much better idea of what we wanted from the industry—and until we could readily threaten the industry with a specific set of regulatory initiatives.

Both sets of advice came from people who believed they were acting in the best interests of their clients. Given the frame of reference in which these intermediaries work, their advice was probably correct. Regulatory battle could not be waged successfully if both sides talked candidly at an early stage about how to remedy the problem at issue. But their frame of reference was, of course, inappropriate. The proper goal was not to wage battle successfully but to remedy the problem quickly and efficiently.

When informing a client about its regulatory opponent, exaggerate the dangers that the opponent's activities and designs imply.

Providing the worst possible interpretation of an opponent's activities and motives often alarms a client and stiffens its resolve to fight. Such an extreme characterization may also elicit additional resources from the client and may even enable the intermediary to convince several other clients to join in the fray.

This principle is most evident in trade association newsletters, bulletins, and conferences, which regularly excoriate regulatory agencies and caricature their activities.

Several years ago, before I knew better, I met with the editor of a trade association newsletter who wanted a "background briefing" about the sorts of initiatives the FTC might undertake in the next few years. After explaining to him that my list of possibilities was extremely tentative (the five commissioners had not as yet approved any of them and comparatively few of them had any likelihood of reaching fruition), I let loose.

Three weeks later I was aghast to see the entire list printed in the trade association newsletter under the headline "FTC Maps Future Policy." The article described the list as "what we can expect from FTC activists" and cautioned association members about the FTC's "ambitious designs" on their industry. The article ended with an ominous warning that "unless we take effective action now, these initiatives will be undertaken within the next [illegible]."

Exhibit V
Companies with government relations units more than three years old according to size of company

Size of company shown by sales in millions	Percent of headquarters units	Percent of Washington offices
Under $ 250	70 %	61 %
$ 251-500	68	40
$ 501-1,000	63	64
$ 1,001-2,500	72	72
$ 2,501-5,000	76	88
$ 5,001-10,000	67	94
Over $ 10,001	67	100
Total sample	70 %	75 %

Dire warnings are also sounded by legal counsel. Lawyers are, after all, trained to foresee the worst possible consequences stemming from any given situation and to prepare a client for them. This skill, when finely honed, necessitates not only a skeptical and somewhat pessimistic attitude toward all undertakings but also a degree of suspicion (occasionally bordering on paranoia) concerning the plans and motives of any potential opponents.

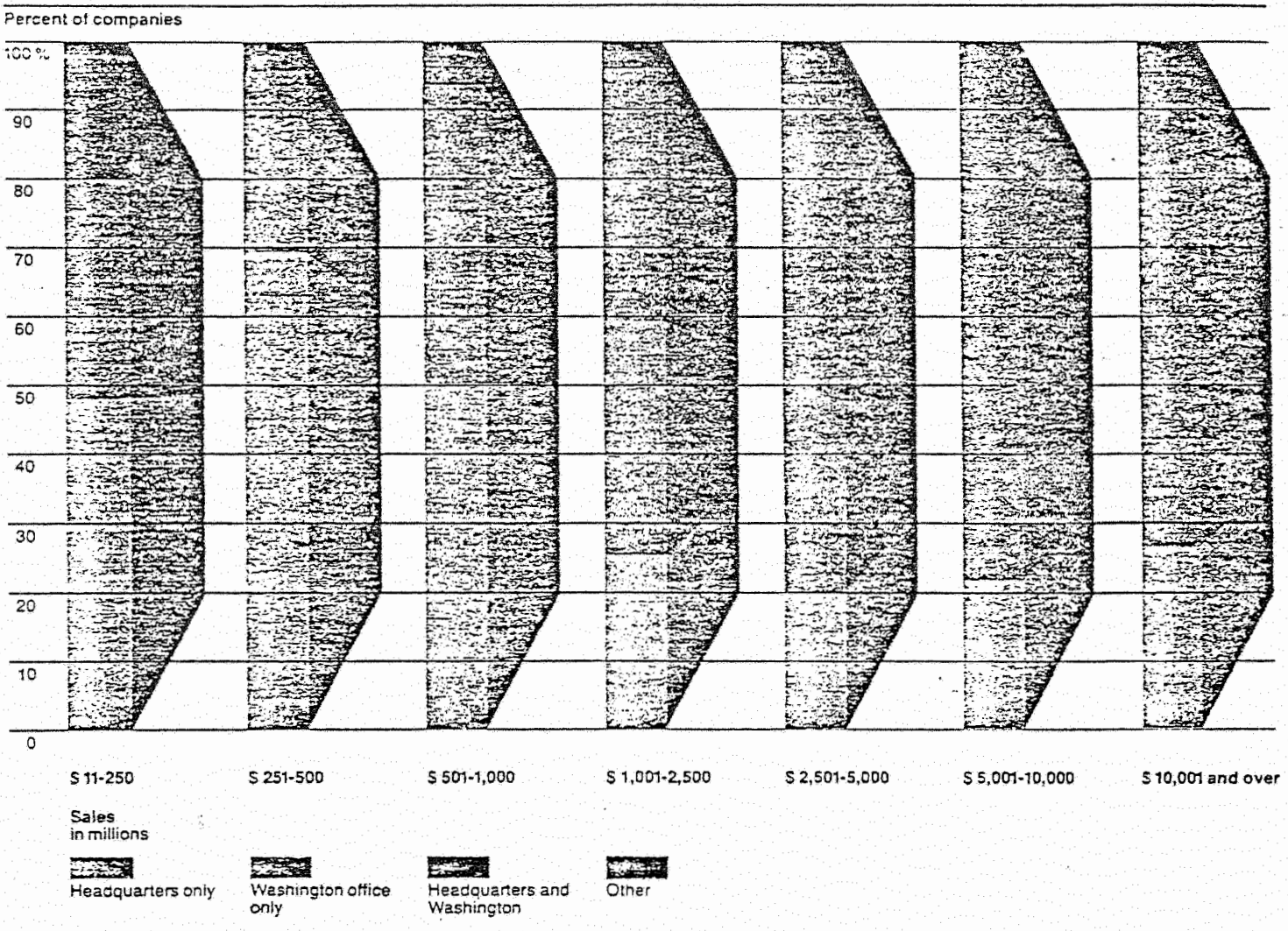
This kind of advice can be of enormous value, but it can also become dysfunctional when business executives and regulatory officials lose sight of the fact that legal counsel naturally conjure up worst-case scenarios. Their job is primarily to avoid such eventualities rather than to accomplish some positive goal.

In recent years, within both regulatory agencies and executive suites, legal counsel have been delegated substantial responsibility for business-government relations, and the officials to whom they report frequently accept their advice without question. Warnings of possible legal problems can intimidate all but the most fearless executive. Too often, the worst possible implications to be drawn from an opponent's actions or intentions are accepted as fact, and confrontation strategies are perceived to be the only rational means of dealing with them.

Once conflict has begun, prolong and intensify it.

A regulatory skirmish is by no means so useful a vehicle for advancing an intermediary's career as is an intense and protracted battle. Reputations of lawyers, lobbyists, and public relations specialists have been established on the basis of such major conflicts as the continuing furor over automobile

Exhibit VI
Types of unit according to size of company



airbags, the deregulation of natural gas, and the disclosure of health risks in certain foods and drugs.

Prolonged hostilities provide a continuing showcase for tactical acumen and warlike aggressiveness. They usually involve many parties—industries, corporations, trade associations, law firms, public relations firms, consulting firms, congressional committees, and regulatory agencies. Intermediaries who follow a typical career path often wish to demonstrate their political savvy and adversarial skill to as wide a range of potential employers as possible. I know of some successful intermediaries who, rising to ever more responsible positions as the original conflict grew and spread into new battles and second-order skirmishes, have worked on various sides of the same major issue for 15 years in a half-dozen different organizations.

Besides facilitating career advancement, these regulatory marathons can also provide intermediaries with a secure source of income for many years. Lawyers may spend a large portion of their working lives on a few such controversies, and public relations specialists who represent clients in a protracted battle may gain semipermanent employment. For example, when in 1959 the Food and Drug Administration proposed a standard for the content of peanut butter, it launched a regulatory battle that kept a goodly number of intermediaries gainfully employed for 12 years.

Of course, their motives are not solely pecuniary. Pride in their work, a concern for punctiliousness, a desire to win for the sake of winning, and a limited understanding of the broad goals of business-government cooperation all play a part.

Keep business executives and regulatory officials apart.

Direct contact between business executives and regulatory officials, under any but the most formal circumstances, can jeopardize the intermediary's efforts to create and maintain regulatory conflict. Since these leaders, given a chance, are liable to discover their mutual interest in avoiding conflict and solving problems, they may also discover that they have little need for the elaborate infrastructure of intermediaries they support.

Intermediaries, therefore, usually seek to maintain a monopoly over the channels of communication between business executives and regulatory officials. They must be kept at a safe distance from each other, and on the few occasions when they do meet, intermediaries must be in attendance to ensure that tensions are sustained.

Washington lawyers, trade association officials, and public relations specialists usually advise business executives against meeting directly with regulators to discuss mutual problems. Their reasoning is that the executives are not sufficiently knowledgeable about issues that could arise and may, as a result, inadvertently say something prejudicial to their own interests. Not surprisingly, staff members of regulatory agencies proffer much the same advice to regulatory officials.

When one small midwestern trade association recently offered to set up a meeting between a dozen of its member executives and several regulatory officials to discuss issues affecting the region's industry, a national trade association and its Washington counsel, which also represented several of the businesses, objected violently. They argued that such a meeting would jeopardize the delicate relationship they had established with the regulatory agency. The agency staff also objected on similar grounds.

A compromise of sorts was reached: a predictably useless meeting took place with 150 people in attendance, including all the Washington lawyers, trade association staff, and regulatory staff whose "delicate relationship" could not risk a less formal setting.

Breaking the circle

These four principles have in recent years contributed significantly both to the atmosphere of hostility currently existing between the business community and government regulators and to the dramatic growth of the intermediary industry itself. These two phenomena are, of course, interrelated: as hostility mounts, the intermediary industry grows and prospers; as the industry grows, it facilitates yet more confrontation and hostility.

This vicious circle has been broken only at times of genuine economic crisis, but the level of crisis sufficiently compelling to engender real business-government collaboration has grown ever higher as the intermediary industry has increased in size and effectiveness.

Hence, the only hope for breaking this circle of fruitless confrontation before things get entirely out of hand lies in reforming—and at times circumventing—the intermediary industry. Business executives and regulatory officials can promote responsible collaboration on regulatory matters by restructuring their relationship in several ways.

Invest in problem solving

Both sides should take as their primary goal the finding of solutions to problems rather than the winning of battles. As a first step, both should determine the total sums currently spent for the legal, government relations, public relations, and lobbying services of their intermediaries and then reduce that total by at least one-third. The money saved should be used to purchase the services of engineers, scientists, economists, marketers, epidemiologists, and other technical specialists who could help devise genuine solutions.

To be effective, this strategy would require both sides to anticipate problems and begin searching for solutions to them long before they reach the level of crisis—or scandal. The disposal of toxic wastes, for example, was recognized as a potentially serious problem 25 years ago, but government and business did not begin to address it in earnest until quite recently. By that time, public demand for immediate action had prompted the Environmental Protection Agency unilaterally to propose regulations that forced industry to take the defensive.

Other issues now on the horizon will become major regulatory battles five years from now unless solutions are found in the interim. The sudden closing of factories, the safeguarding of personal privacy with the advent of interactive cable TV and centralized banking services, the sexual harassment of female employees, the dangers of genetic engineering—these and many other emerging issues cry out for substantial anticipatory research by both business and government.

There is also the model of the royal parliamentary commission in Britain, within the framework of which academicians, business and community leaders, and various specialists can examine and make recommendations for expected public problems. These bodies usually hold hearings and undertake research sufficiently in advance of any formal lawmaking to be able to serve as constructive vehicles for problem solving.

Develop an early warning system

Some problems, of course, simply cannot be anticipated. Business executives and regulatory officials should warn each other of problems as early as possible. Evidence of a higher than normal incidence of product defects or consumer accidents, an outbreak of illness among workers, epidemiological data showing a troubling pattern of disease within a particular region or occupational group, and reports of fraudulent marketing practices within an industry—this sort of information should be conveyed quickly so that steps can be taken immediately on both sides to remedy the problems before further harm is done and regulatory confrontation encouraged.

Business executives may be reluctant to convey this type of preliminary evidence, however, if they believe that government officials will use it against them in subsequent legal proceedings or release it to the public before it is properly evaluated. To allay this concern, government officials might agree in advance that such early warnings will be neither used in formal proceedings nor revealed to the public until carefully evaluated. The establishment of such "free fire zones," in which business executives can speak candidly to regulatory officials about potential problems without fear of reprisal, would go a long way toward encouraging early exchange of potentially damaging information.

Engage in public negotiation

No good reason exists for business executives and regulatory officials to await formal regulatory proceedings before they attempt to reach a consensus on how best to solve an emerging problem. Informal negotiations with consumers, employees, shareholders, community representatives, or any other affected group should be undertaken as soon as an issue becomes sufficiently crystallized that they are willing and able to seek resolution.

These negotiations might be held under the auspices of public mediators deemed acceptable to all sides or of universities or other nonprofit institutions that could act as neutral third parties. The negotiations would seek to narrow areas of disagreement, identify disputed facts, and establish as wide an area of consensus as possible *before* formal regulatory proceedings began.

Public negotiations have been attempted with some notable success. The National Coal Policy Project, for example, brought together industrialists and environmentalists for discussions aimed at clarifying their positions and seeking areas of agreement. These discussions resulted in more than 200 recommendations concerning mining, air pollution, conservation, energy pricing, emission charges, and transportation. Some of them—such as support for the full marginal cost pricing of energy and rules for the location of coal-burning power plants—were quite specific. Others established a broad framework for further negotiation.

Review & monitor intermediaries' performance

None of the foregoing recommendations will have any lasting effect, however, unless business executives and regulatory officials change the incentives operating in the intermediary industry. As a first step, they should scrutinize the strategies, activities, and recommendations of their intermediaries as rigorously as they review the performance of the other specialists on whom they rely.

Protracted regulatory battles should be recognized as signs of intermediary failure, and problem solving that prevents conflict as the mark of success. Outside counsel might, for example, be compensated on a schedule of diminishing rates over the duration of an assignment. As the battle continues, their marginal rate of compensation would decline. Similarly, when choosing counsel to represent them before regulatory agencies, business executives might first ask whether the lawyers had successfully avoided regulatory conflict in the past or had devised creative solutions to problems.

Finally, regulatory staff who have gained the voluntary agreement of business to a particular remedy might receive special bonuses amounting to a percentage of the funds saved by preventing protracted battle.

In addition, steps should be taken to ensure that Washington staff do not become so insular that they lose sight of broad goals because they are mesmerized by the lure of battle. Companies with their own Washington-based government relations offices might bring in staff from other departments

for limited tours of duty rather than hire former congressional aides and regulatory personnel.

Companies without such offices might select trade associations or public relations firms on the basis of the practical business experience of their staffs rather than their touted Washington savvy. And regulatory officials might try to attract to their staffs people with working experience outside the political-regulatory confines of Washington.

Negotiation, not confrontation

New winds are now blowing through Washington. At this writing, the Reagan administration is taking steps to ease the regulatory burden on American business. But such steps will poorly serve both business and the nation if they postpone the attainment of a cleaner, safer, and more humane environment. The public will continue to demand these goals, and responsible businesses will respond. Our problems derive not from the goals themselves but from the processes through which we have sought to achieve them.

We can no longer afford the high price of regulatory warfare. It saps the scarce resources of business and government and fails to solve critical public problems. The regulatory process should never become a free-for-all of confrontation. It should facilitate compromise and flexibility, not unblinking rigidity. Above all, it should encourage creative problem solving, not tactical gamesmanship.

In this, as in so many other aspects of business strategy, we can perhaps take a lesson from the Japanese and West Germans. Although their health and safety regulations are no less stringent than ours, the processes by which they devise them are far less adversarial. In both countries, business and government leaders collaborate conscientiously to develop workable standards. They place little reliance on formal legal proceedings or on specialized intermediaries. Indeed, only 1 out of every 10,000 Japanese citizens is a lawyer; out of the same number of Americans, 20 are lawyers.

The business-government relationship in the United States is ripe for responsible collaboration. But to achieve it, business executives and regulatory officials must first restructure the means by which they communicate. They must be willing to meet directly to discuss regulatory problems—long before the problems become scandals and long before regulators must respond with sudden, dramatic initiatives. They must actively seek solutions to such problems. And, above all, by penalizing delay and pointless strategem and by rewarding flexibility and cooperation, they must alter the incentives of their intermediaries.

The politics of regulation

When both costs and benefits are widely distributed, we expect to find *majoritarian* politics. All or most of society expects to gain; all or most of society expects to pay. Interest groups have little incentive to form around such issues because no small, definable segment of society (an industry, an occupation, a locality) can expect to capture a disproportionate share of the benefits or avoid a disproportionate share of the burdens. . . .

When both costs and benefits are narrowly concentrated, conditions are ripe for *interest-group politics*. A subsidy or regulation will often benefit a relatively small group at the expense of another comparable small group. Each side has a strong incentive to organize and exercise political influence. The public does not believe it will be much affected one way or another; though it may sympathize more with one side than the other, its voice is likely to be heard in only weak or general terms. . . .

When the benefits of a prospective policy are concentrated but the costs widely distributed, *client politics* is likely to result. Some small, easily organized group will benefit and thus has a powerful incentive to organize and lobby; the costs of the benefit are distributed at a low per capita rate over a large number of people, and hence they have little incentive to organize in opposition—if, indeed, they even hear of the policy. . . .

Finally, a policy may be proposed that will confer general (though perhaps small) benefits at a cost to be borne chiefly by a small segment of society. When this is attempted, we are witnessing *entrepreneurial politics*. Antipollution and auto-safety bills were proposed to make air cleaner or cars safer for everyone at an expense that was imposed, at least initially, on particular segments of industry. Since the incentive to organize is strong for opponents of the policy but weak for the beneficiaries, and since the political system provides many points at which opposition can be registered, it may seem astonishing that regulatory legislation of this sort is ever passed.

From
"The Politics of Regulation,"
by James Q. Wilson, in
The Politics of Regulation,
edited by James Q. Wilson,
pp. 367-370; copyright ©
1980 by Basic Books, New York.
Reprinted with the permission
of the publisher.

Breaking the regulatory deadlock

A new kind of partnership can prevent extreme stands and provide solutions that satisfy all factions

Our regulatory procedures encourage conflict among the parties at interest. Lacking any formal mechanism except the courts for settling differences, business takes rigid positions and falls back on delays, partial compliance, and lawsuits to oppose constraining and conflicting regulations. Opposing groups such as consumers and environmentalists, often egged on by the news media, take equally extreme and adversarial views. The rules and regulations that result from this chaotic process rarely find favor with any of the groups involved. But, says this author, we already have working models of a way out of this series of stalemates. He points to the cooperative efforts between business and government in Europe and Japan and describes several U.S. organizations that have become successful partners in accommodating their divergent views.

J. Ronald Fox

Mr. Fox is a lecturer at the Harvard Business School, where he teaches courses in general management and business-government relations. He has worked in government as assistant secretary of the army and as deputy assistant secretary of the air force. He is the author of Arming America: How the U.S. Buys Weapons *(Harvard Business School, Division of Research, 1974) and founder of three companies.*

Illustrations by Elliott Negin.

A campaign commitment and pleas from business leaders for relief from the growing number of problems resulting from government involvement in business have created great pressure on the Reagan administration to bring about changes in the relationship between business and government. The question now facing the administration and business leaders is how the relationship should change and what form it should take.

Today, most of the dealings between business and government in the United States are adversarial, as government probes, inspects, taxes, influences, regulates, and punishes. In this setting, trade-offs evolve haphazardly as the often unforeseen and unintended effects of regulation work their way through the economy. Business managers at all levels negotiate delays, develop means for partial compliance, defend themselves in lawsuits, and otherwise seek to minimize the impact of government on their operations while responding to the many disparate agencies with which business comes into contact.

Further, the rule-making and adjudicatory procedures of the regulatory agencies in the United States do not include formal mechanisms for accommodating conflicting interests. Public hearings encourage dramatic presentations and exorbitant demands.[1] Regulatory agencies, often ignorant of the real positions of contending parties, are forced to guess at the true priorities of each group. Thus the regulatory process encourages conflict rather than reconciliation of opposing groups. Reliance on public and highly formal proceedings makes the development of a consensus difficult, if not impossible.

Where highly technical issues are involved, as in energy regulation, consumer product safety, occupational health and safety, and environmental pollution, reasonable and effective solutions to problems rarely result from the adversary process. Rulings usually come from a judge who is not an expert on an issue and who must rule among the extreme claims presented by all sides during the formal judicial process.

1. John T. Dunlop, "Regulatory Analysis and Reform," unpublished paper (Boston: Harvard Business School, 1975).

The lack of unanimity on all sides further complicates the situation. Government does not speak with one voice or one objective: federal departments and agencies often compete over turf; congressional committees and their staffs have conflicting views; state and local governments develop rules that differ from those of the federal government; and the courts add another voice to the business-government confrontation.

Business is not a monolith, either; large and small companies have differing needs and concerns; competing companies and industries have divergent interests and goals; regional concerns conflict; and international companies may hold views that clash with those of purely domestic companies.[2]

Before 1960, the few industries that came under government regulation (for instance, transportation, communications, banking) each dealt with a single federal agency that established and enforced the ground rules of participation in the market. Since 1960, this situation has changed.

Managers in most industries now have to deal with a variety of government agencies, many of which were established to respond to social demands or to ensure conformity with new standards of individual rights. This change is evident in the range of such agencies as the Consumer Product Safety Commission (CPSC), the Environmental Protection Agency (EPA), the Equal Employment Opportunity Commission (EEOC), the Department of Energy (DOE), the Cost Accounting Standards Board (CASB), the National Bureau of Fire Prevention (NBFP), the Mining Enforcement and Safety Administration (MESA), the National Highway Traffic Safety Administration (NHTSA), and the Occupational Safety and Health Administration (OSHA).

From the 26 federal agencies created between 1965 and 1975 and others emanate regulations estimated to cost business annually from tens of billions to over a hundred billion dollars. Such expenditures divert capital from investment in new technology and improvements in productivity and result in sharply increasing prices when companies pass on to their customers the additional costs of complying with these regulations.

The staffs operating these new agencies are far less schooled in the workings of business than are their counterparts in the old-line regulatory agencies, which are replete with specialists in—and often from—the industries they regulate. The new regulators are functional specialists: environmentalists, safety officers, and the like. As Robert Fri, former deputy administrator of the EPA, observed, "Because they regulate all businesses, they are expert in none."

Problem of trade-offs

Conflicting requirements or goals often impinge on business from a wide variety of fragmented and unrelated government agencies. Charles Schultze, formerly chairman of the Council on Wage and Price Stability in the Carter administration, describes the confusing effects of this proliferation of contradictory government controls:

"Consider for a moment the chain of collective decisions and their effects just in the case of electric utilities. Petroleum imports can be conserved by switching from oil-fired to coal-fired generation. But barring other measures, burning high-sulfur eastern coal substantially increases pollution. Sulfur can be scrubbed from coal smoke in the stack, but at a heavy cost and with devices that turn out huge volumes of sulfur wastes that must be disposed of and about whose reliability there is some question.

"Intermittent control techniques—installing high smokestacks and switching off burners when meteorological conditions are adverse—can, at lower cost, reduce local concentrations of sulfur oxides in the air but cannot cope with the growing problem of sulfates and widespread acid rainfall. Use of low-sulfur western coal would avoid many of these problems, but this coal is obtained by strip mining.

"Strip mining reclamation is possible but substantially hindered in large areas of the West by lack of rainfall. Moreover, in some coal-rich areas the coal beds form the underground aquifer, and their removal could wreck adjacent farming or ranching economies.

"Large coal-burning plants might be located in remote areas far from highly populated urban centers in order to minimize the human effects of pollution. But such areas are among the few left that are unspoiled by pollution, and both environmentalists and the residents (relatively few in number compared with those in metropolitan localities but large among the voting population in the particular states) strongly object to this policy."[3]

Business cannot respond to all these divergent concerns without sacrificing part or all of them. Clearly, trade-offs among goals must often be made if a company is to continue to operate. The question is, Who should determine the appropriate trade-offs? Increasingly, the courts make these judg-

2. John T. Dunlop, "Business and Government," unpublished paper (Boston: Harvard Business School, 19[illegible]).

3. Charles Schultze, *The Public Use of Private Interest* (Washington, D.C.: The Brookings Institution, 1977).

ments, as special interest groups, including business, file suits to challenge government-made decisions.

The partnership alternative

U.S. business is by now familiar with the dominant European and Japanese approach—a partnership, or at least close cooperation between business and government. These partnerships often include, besides business and government, representatives of labor and special interest groups who work to resolve problems and to build a consensus on industry rules and standards in such areas as health, safety, and environmental protection.

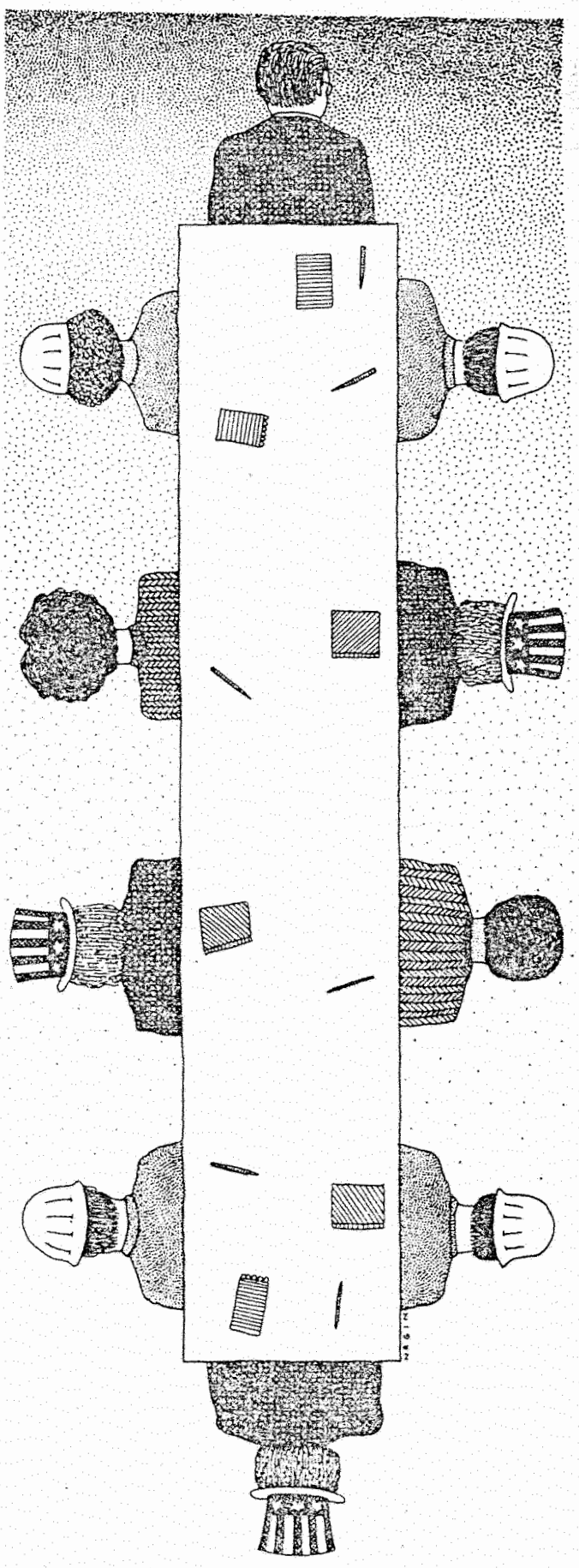
In the United States, the situation is far different. Most U.S. corporations adopt a negative position on major regulatory issues and limit their approval to legislation that will liberalize depreciation or otherwise provide a tax or other near-term financial advantage for a corporation.

Nevertheless, chief executive officers of large corporations stress more and more often the need for a partnership between business and government to solve major economic problems. In view of this trend, let us explore the forms such partnerships might take.

If two or more groups become partners, their presumed intention is to work together and jointly contribute to the achievement of objectives they can agree on. In businesses today, certainly one set of objectives should be to increase their international competitiveness and general productivity as well as to reduce the cost and delay that are inherent in complying with government regulations.

But such partnerships will need to include a second set of objectives involving joint efforts to solve the basic problems of pollution, unsafe products and workplaces, and employment for unskilled minority workers. A partnership committed to only the first set of objectives would hardly be considered satisfactory by those persons both in and out of government who have been working to achieve the second set.

In the final analysis, all governments have the authority—indeed the responsibility—to mediate the rights and duties of their citizens and to make trade-offs among the often conflicting claims of various interest groups. At the same time, business, labor, and other interest groups should have ways of participating in the decision process to help ensure that the government takes into ac-



count all the significant information when it makes trade-offs.

A new approach

One way for government to gain the active cooperation of the major participants is to establish organizations or forums outside the formal judicial process. More sensible rules and standards could result if interested parties could meet without being in the spotlight of the conflict-hungry media. Indeed, several examples of this approach are already operating on a limited scale in the United States. Let us examine four instances here.

National Institute of Building Sciences

An act of Congress established the institute in 1974 with a charter to serve as an interface between public and private interests in housing and building, to advise public and private sectors on building regulations, and to facilitate the introduction of new technology.

Its broad representation includes members of industry, labor, architectural groups, engineering societies, and consumer and public interest groups. The board of directors is appointed by the president of the United States and, during its first five years, confirmed by the Senate. The institute deals with conflict, overlap, omission, and unnecessary rules due to government regulation. It seeks to resolve the problems openly and with the participation of both regulator and regulated.

One situation the institute successfully addressed was preventing the duplication that would have been caused by eight federal agencies, each of which was planning to establish separate insulation standards for the building industry.

Since its founding, the institute has worked successfully with a wide spectrum of federal agencies, including the Department of Housing and Urban Development, the Department of Energy, the Federal Trade Commission, and the Consumer Product Safety Commission, to resolve conflicts and to discuss setting aside or modifying proposed rules and regulations.

The meetings of the institute's various bodies, although completely open, have taken place largely outside the spotlight of the press, so the parties have felt little pressure to grandstand and present extreme positions. Their motivation to achieve agreement comes from the prospect that some unknown but well-meaning regulator might impose rulings that would be unreasonable and costly to all sides.

Congress agreed to provide initial capital funding to the institute for the first five years—through fiscal 1982. Even in its first year of operation (1978), however, 47% of the funding came from private sources. By fiscal 1980, congressionally appropriated funds, as a percentage of all funds, had declined to 17%.

In the past three years, the widely divergent groups at the institute have worked together, expanded their knowledge, and resolved or minimized apparently irreconcilable differences in setting standards for energy performance, insulation, mobile home construction and safety, housing rehabilitation, and earthquake safeguards.

Today some 800 individuals and organizations are members of the institute's Consultative Council. Members of the council elect a 36-person governing body under rules and procedures approved by the institute's board of directors. By law, the board and the council must represent public interest groups as well as the total spectrum of interests within industry, labor, and government in the building industry.

Already the organization has had a constructive impact on the regulatory process in influencing an array of federal regulations that could have led to much higher housing and building costs without compensating benefits for the consumer. The institute now gets requests for help from federal agencies and congressional committees on a variety of building-related issues and has been cited as a required source of counsel in a number of pieces of building legislation.

The institute has begun to reach down to the state and local levels of government—as Congress intended—to effect constructive change and to seek coordination among the several levels. The Consultative Council now has statewide counterparts (chapters) in West Virginia and Ohio, and other groups are forming in Southern California, Houston, and Kansas City.

Joint Labor-Management Committee

A second partnership that has made encouraging progress is the Joint Labor-Management Committee of the retail food industry. This group had its beginning in 1973 when John Dunlop,

then director of the Cost of Living Council, urged representatives of business and labor in that industry to resolve their wage and price problems because if they did not, they would face reimposition of some type of wage and price controls, which were just being removed.

In response, 12 retail food companies and 3 of their unions, organizations representing about half the retail food sales in the United States, formed the Joint Labor-Management Committee.

In 1974, after more than two years' experience working together in the resolution of wage demands and work stoppage disputes, the committee faced a new challenge. The companies and unions had to deal with OSHA citations of more than 1,000 safety violations in meat handling due to an OSHA requirement that all workers wear metal mesh gloves and full metal mesh aprons when cutting meat, although the standards had been developed for wholesale meat packing, where meat cutting is more dangerous.

In response to this problem, the committee, with OSHA's encouragement but minimal participation, organized a task force that included representatives of labor and management as well as neutral third-party staff.

The task force visited approximately 100 retail meat-cutting operations and developed a new safety standard that OSHA subsequently accepted. The citations were withdrawn, and labor, management, and OSHA were pleased with the new standard worked out by persons most knowledgeable about the process.

National Coal Policy Project

A third and somewhat different model of partnership is the National Coal Policy Project (NCPP), organized by representatives of leading environmental groups and the coal-producing and coal-using industries to resolve differences over environmental regulations for mining and burning coal. In this case, the participants in the project had been dissatisfied with the high costs and great uncertainties associated with extended legal, legislative, and regulatory battles that frequently resulted in rulings unsatisfactory to both sides. Further, the long delays as the proceedings dragged on had reduced the use of coal in areas that suffered from energy shortages.

The Environmental Protection Agency showed interest in the project but did not actively participate. Foundation grants and contributions from the industry representatives underwrote it. Here, as in the previous example, the group took field trips to the sites where complaints had arisen. In this case, the participants were representatives of industry, environmental groups, and Georgetown University as an independent third party.

After the field trips, the members spent hundreds of man-days in developing rules and standards to satisfy both environmentalists and industry representatives. Both groups began to understand and trust each other.

As in the two previous examples, the pressures for these initially adversarial groups to search for areas of agreement resulted from their experience with the judicial process. As of this writing, the NCPP has reached more than 200 agreements, to the satisfaction of both environmentalists and industry representatives. With joint industry and environmentalist backing, it has presented to Congress a number of significant amendments to the Clean Air Act. Representative Donald Pease (Democrat, Ohio) and Senator Carl Levin (Democrat, Michigan), with Senator William Roth (Republican, Delaware) as cosponsor, have introduced two additional bills in Congress to formalize the NCPP process for the development of new regulations in a procedure called "regulatory negotiation."

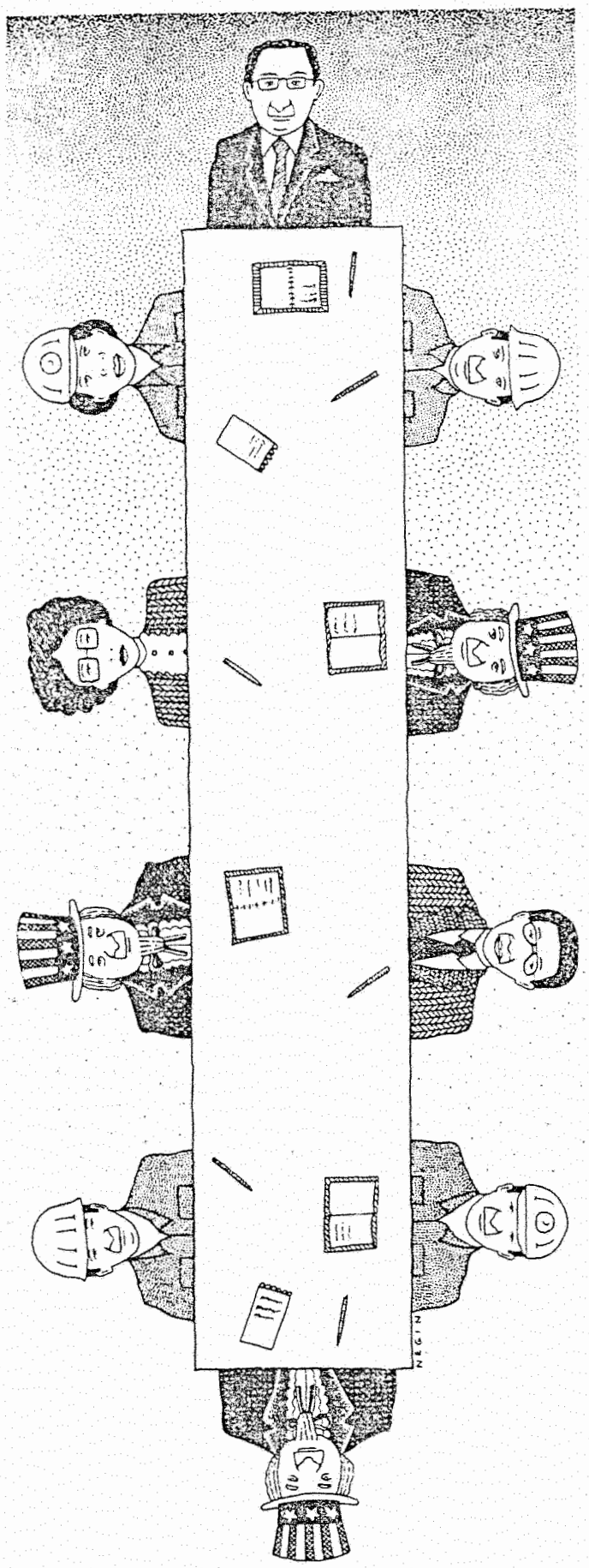
Health Effects Institute

The fourth and newest example of a partnership between business and government is the Health Effects Institute, formed in December 1980 by the EPA and the automotive industry as an independent organization to do research on automobile and truck emissions. The institute grew out of deep differences over air pollution regulations between the Environmental Protection Agency and the major auto makers. The industry had frequently complained that government regulations were based on unsound scientific evidence and were unnecessarily stringent and costly.

The passage of the 1977 amendments to the Clean Air Act heightened the animosity between the EPA and the automobile industry. These amendments increased the responsibility of both manufacturers and the EPA to generate and evaluate additional health data on auto emissions. Thus they served as an incentive to both parties to find a mechanism for addressing some long-standing problems:

Inefficiencies. Unnecessary duplication of substantial research costs and efforts by both public and private sectors.

Inequities. Research requirements that place a burden on small manufacturers.



Lack of consistency and comparability. Use of inconsistent research methods that make cross-checking difficult.

Lack of credibility. Public suspicion that the contending parties skew data to serve their own interests.

Poor use of scarce research facilities and personnel plus administrative delays. Duplication of research studies.

The Health Effects Institute is headed by a three-member board of directors consisting of Harvard Law School Professor Archibald Cox, chairman, the former Watergate special prosecutor; Donald Kennedy, president of Stanford University; and William O. Baker, chairman of Rockefeller University.

The directors oversee the institute's operations and, after consultation with government bodies and affected groups, appoint two scientific boards.

One, the Health Research Board, determines the research to be performed and oversees its implementation. This board, still being formed, will consist of six to nine eminent scientists selected to represent the diverse disciplines necessary to the institute's program.

The second group, the five-member Health Review Board, examines research results for methodological integrity and substantiation of data and directs their immediate publication. The review board consists of highly respected experts on air health effects.

The aim of the institute is to supply both the EPA and the industry with the best common base that independent scientific investigation can provide for determining appropriate regulations. Cox describes the institute as "fiercely independent." Its structure was carefully devised to provide maximum protection for a set of scientific processes that will yield results whose integrity and quality will be above question.

The formation of the institute brings to fruition the efforts of many government and industry representatives to find a mechanism for improving research on health effects while reducing costs and government-industry friction. Representatives from the U.S. auto industry and from 17 importing companies have formally indicated their support of the institute.

The institute began its first year (1981) with $1 million contributed by the EPA. The Reagan administration has recommended to Congress an EPA contribution of $3 million. Motor vehicle manufacturers are expected to contribute an amount that is equal to or greater than that contributed by the EPA.

Charles Powers, executive director, estimates that the institute will have an annual budget of $10 million to $15 million at maturity.

This is by no means an exclusive list of organizations that have made progress in nonadversarial approaches to solving public policy issues. The Conservation Foundation in Washington, D.C. has been active in resolving conflict among corporations, environmentalists, and the Environmental Protection Agency. Regional environmental mediation activities now exist in New England, Wisconsin, Colorado, and Washington State. An organization called RESOLVE was launched in 1978 in California with $1 million in support from Atlantic Richfield Co. to mediate in energy matters such as power plant siting and the location of nuclear waste depositories.

Government's role

All four models represent forms of partnership, either between business and government or among business, labor, environmentalists, and other special interest groups, and each takes care not to usurp the authority of government. Indeed, the groups recognize the fact that government has the authority to make the final ruling and to enforce that ruling.

In the partnerships these models represent, government is clearly the final arbiter of the rule or standard. But at the same time, the partnerships take advantage of the fact that the knowledge of the situations involved and the ability to identify and interpret the relevant data does not exist within a government agency or in the mind of a judge. Rather, it rests with the principals involved—the representatives of business, labor, and special interest groups.

A glance at the history of business-government relations in the United States clarifies the importance of protecting the senior position of government in these partnerships. In 1933, President Franklin Roosevelt signed the National Industrial Recovery Act, thereby creating hundreds of business-labor-government partnerships to develop and enforce controls pertaining to wages, prices, production, and working conditions.

These so-called partnerships actually operated as price and production cartels dominated by industry, with little or no participation by labor or government. Because government leadership to ensure a range of views was lacking, the partnerships failed to establish programs that could deal with the social and economic problems involved. Further, in 1935, the Supreme Court issued a unanimous ruling against these partnerships because they represented an unconstitutional delegation of legislative power to the business groups involved.

Conditions for a partnership

It appears that working partnerships of the kinds I have described can be useful for all parties involved under the following four conditions:

1 A problem is clear and well defined. (For example, OSHA issues a thousand complaints to unions and industry, or environmental regulations have stopped the use of coal during a serious energy shortage, or regulations conflict on the application of building insulation.)

2 Each party sees an issue as a threat.

3 No party will accept a delay. (Delays cause high legal fees, put off the resolution of problems, and increase the chance that a judge will establish a rule or standard that is unsatisfactory to all sides.)

4 One or more government agencies with authority are available to serve as government representatives in the partnership. (In the absence of such a government agency, no organization will exist to accept and enforce the ruling or standard.)

Several other conditions are favorable, if not necessary, to the success of these partnerships:

First, the constituencies on either side of an issue should be organized, well defined, and willing to participate; otherwise, partnerships will have short lives. For example, because of the differing positions in the business community with respect to the provisions of the 1977 amendments to the Clean Air Act, many parts of the legislation proved to be unsatisfactory to all parties that were involved.

Second, the problem areas should be those where joint fact-finding has some chance of identifying common ground, where all sides have room to compromise despite the problems' complexity (the issue of abortion, for instance, is unlikely to be resolved under this format).

Third, a reasonable balance of power should exist among the opposing groups.

Fourth, the proceedings should allow sufficient time to create a mood for exploration and compromise and a commitment to a set of operating rules.

Government action

To make this procedure work, all sides have to change their behavior. Government managers need to bring about changes in the regulatory process to encourage cooperative fact-finding and mutual exploration of problem-solving alternatives by those directly affected by regulations.

Indeed, the Reagan administration may be well advised to amend the role of the commerce and/or labor departments to include major responsibility for promoting and assisting permanent organizations that would consist of business, labor, and special interest groups and that would be directed toward the resolution of problems pertaining to government regulations.

A favorable interpretation of the Administrative Procedures Act by the Office of Management and Budget (OMB) would encourage informal consultation among government, business, and other interested parties before and during the regulatory comment period. Unfortunately, many in government who draft regulations believe incorrectly that the Administrative Procedures Act prohibits conversation with interested parties at any stage of the regulation development process.

The president should push to have the Federal Advisory Committee Act substantially revised soon. The act forbids any more than one meeting between government officials and representatives of business or other interested groups without a notice in the *Federal Register*. The meeting is open to the public, including the press, and minutes are taken to record the proceedings for the public.

In addition, OMB must authorize the group meetings—a procedure that may take months. Clearly, the Federal Advisory Committee Act as now written seriously hinders the informal exchanges that are a necessary part of the development of reasonable regulations.

OMB should draw up a plan for fundamental reorientation of government employees responsible for writing regulations. The first step could be to direct all executive departments to incorporate the views of affected parties at the earliest stages of the regulatory process and to devote their efforts to developing a consensus among them.

Such an orientation would reflect the concept that 60% of an ideal goal achieved this year is better than 90% achieved only after ten years of litigation.

If theses changes are to be achieved, heads of government agencies will need to spend much more time working with their regulators and enforcers and rewarding those who act according to the new guidelines. This practice would mean a dramatic change from the present system of rewarding those who minimize the risk of outside criticism by avoiding informal meetings with the affected parties.[4]

Business contributions

At the same time, it is also the responsibility of business to contribute to the solution of public problems before positions harden unalterably. To become more effective participants in the regulatory process, corporations must strengthen the capabilities of their internal staffs to anticipate the development of public issues and to formulate solutions designed to cope with major social and economic problems.

Representatives of government contribute the authority to make trade-offs where necessary among the interests of the parties involved, while representatives of business, labor, and special interest groups contribute the information and technical skills on which thoughtful trade-offs must be based.

Results of inaction

Now that the Democrats and liberal Republicans have lost much of their strength, business has the opportunity to strike back and attempt to dismantle the regulatory agencies.

If this happens, millions will be outraged, and public interest groups will rebuild their strength through national programs that may recall the divisive actions of the 1960s. Career civil servants in the regulatory agencies may decide to do battle with the new administration, even if the battle to frustrate or impede its programs has to be conducted underground. In either case, the adversarial relationships between government and business could easily escalate to new and more destructive levels of combat. While this was going on, the United States could continue its decline in produc-

tive output and its ability to compete in international markets with the Japanese, West Germans, South Koreans, and other strong competitors.

The creation of partnerships could prevent these destructive results. It seems clear from the progress so far that such partnerships can help correct the overlap, conflict, and inefficiency of the present regulatory maze. Indeed, many within business and government believe that it is possible to reduce the cost and burden of government regulation substantially while maintaining a strong visible commitment to the correction of environmental pollution, energy shortages, unsafe products, and unhealthy or unsafe working conditions.

A decision on the part of business to build partnerships with government does not mean that business managers can suddenly cease to be active business advocates in the government process; indeed, the new regulatory agencies will continue to make decisions on issues that involve high stakes for business. Business managers will still need to be active, knowledgeable advocates in the public policy process who get to know key government decision makers and provide them with information and arguments early in the process, who build coalitions to support business positions and make campaign contributions to legislators who support business positions, and who search for ways to develop grass roots support.

Managers are becoming aware that their options decline sharply as an issue proceeds through the public policy process, beginning with the formation of public opinion and proceeding through the development of options, the drafting of legislative proposals, legislative debate, administrative rule making, and the setting of standards. The company that understands how these stages evolve and masters the strategies and tactics appropriate to, and effective in, the various stages will enhance its own long-term prospects.[5]

As a means of settling matters of personal and property rights, the adversary process has major advantages. But it is a poor way to resolve government-business-labor disputes on highly technical issues involving health, safety, or pollution. The deficiencies of the court system to resolve complex industrial problems become particularly clear in situations where the economic health of the United States depends on its ability to develop and operate productive businesses able to compete with similar businesses in other countries.

Regardless of whether Republicans or Democrats are in office, the United States will probably never return to the nineteenth-century economic structure of competition among many small businesses that operate autonomously in the domestic market without the control of government regulations. Shortages of resources and increasing interdependence among peoples and nations have ruled out that possibility. Within the new environment, business managers clearly need to become positively involved in government processes.

The problem-solving models described in this article are based on a recognition that expanding entitlements, the need to protect clean air and water, the need to improve workers' health and safety, and the need to ensure that products are safe all mean that the large publicly held corporation is not the autonomous manifestation of private property that it was in the sparsely populated, economically independent United States of a century ago. Many foreign corporations came to this realization more than a decade ago and have now developed partnerships that are leading to strong gains in their international competitiveness and that have environmental and health standards as high as or higher than those that exist in the United States.

American business managers must demonstrate what they mean when they call for business-government partnerships. The declining standard of living in the United States indicates that there is little time to waste.

These recommendations were developed in conversation with Cynthia Kelly and Richard Tropp of the EPA.

5. Kirk O. Hanson, unpublished paper (Boston: Harvard Business School, 1980).

RETHINKING REGULATION: NEGOTIATION AS AN ALTERNATIVE TO TRADITIONAL RULEMAKING

Several observers have recently proposed an alternative to the current system of notice-and-comment rulemaking under the Administrative Procedure Act (APA):[1] regulatory negotiation. The proposal responds to criticism that the regulatory process is slow,[2] cumbersome,[3] and excessively adversarial.[4] Although formulations of the proposal have varied,[5] they share

---

[1] 5 U.S.C. §§ 551–706 (1976 & Supp. III 1979).

[2] *See* Cramton, *Causes and Cures of Administrative Delay*, 58 A.B.A. J. 937 (1972). *See generally* 4 SENATE COMM. ON GOVERNMENTAL AFFAIRS, STUDY ON FEDERAL REGULATION PREPARED PURSUANT TO S. RES. 71 TO AUTHORIZE A STUDY OF THE PURPOSE AND CURRENT EFFECTIVENESS OF CERTAIN FEDERAL AGENCIES, 95th Cong., 1st Sess. 7 (1977) (average rulemaking by Consumer Product Safety Commission takes 16 months, average agency licensing proceeding 19 months, and average ratemaking 21 months); FORD FOUNDATION, NEW APPROACHES TO CONFLICT RESOLUTION 10–12 (1978); B. OWEN & R. BRAEUTIGAM, THE REGULATION GAME 3–7 (1978); Greenspan, *Economic Policy*, in THE UNITED STATES IN THE 1980S, at 33, 36–37 (P. Duignan & A. Rabushka eds. 1980); Weidenbaum, *Government Power and Business Performance*, in THE UNITED STATES IN THE 1980S, *supra*, at 205, 207–08; R. Darman, Government-Business Relations — And the Prospect for U.S. Competitiveness 8 (1980) (unpublished paper prepared for the Harvard University Conference on U.S. Competitiveness; on file in Harvard Law School Library).

Delay may contribute to business' hesitance to invest in new technology. *See, e.g.*, Greenspan, *supra*; Weidenbaum, *supra*; C. DeMuth, Domestic Regulation and International Competitiveness 17–19 (1980) (unpublished paper prepared for Harvard University Conference on U.S. Competitiveness; on file in Harvard Law School Library).

[3] *See generally* Neustadt, *The Administration's Regulatory Reform Program: An Overview*, 32 AD. L. REV. 129 (1980); Panel Discussion, *Improving the Administrative Process — Time for a New APA?*, 32 AD. L. REV. 287 (1980).

[4] B. OWEN & R. BRAEUTIGAM, *supra* note 2, at 23–24; Darman & Lynn, *The Business-Government Problem: Inherent Difficulties and Emerging Solutions*, in BUSINESS AND PUBLIC POLICY 54–55 (J. Dunlop ed. 1980); Johnston, *How to Be a Better Regulator*, N.Y. Times, Mar. 22, 1981, § 3 (Business), at 3; Reich, *Regulation by Confrontation or Negotiation?*, HARV. BUS. REV. May–June 1981, at 82–86; Yellin, *High Technology and the Courts: Nuclear Power and the Need for Institutional Reform*, 94 HARV. L. REV. 489, 505–08, 529–31, 546–49 (1981).

[5] *See* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1790–802 (1975); Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111, 164–68 (1972); Darman & Lynn, *supra* note 4, at 60–61; Reich, *supra* note 4, at 34–35; Schuck, *Litigation, Bargaining and Regulation*, REG., July–Aug. 1979, at 26, 32–34.

The most specific negotiation proposal is the Regulatory Negotiation Act, S. 3126, 97th Cong., 1st Sess., 126 CONG. REC. S13,021 (daily ed. Sept. 18, 1980), introduced by Senator Levin. Various provisions would grant funds to private "regulatory negotiation commissions," *id.* §§ 102–103; include on the commission "a balanced representation of the major affected interests in an area," including significant representation for business and environmental groups, workers, consumers, local governments,

a common vision of regulatory negotiation as an informal process of bargaining among groups affected by a proposed regulation, which culminates in an agreement that becomes the basis for a rule.

Negotiation can be applied to all types of administrative action — adjudication and rulemaking, formal and informal. Since negotiation already plays a role in both sorts of adjudication,[6] this Note considers its potential application to rulemaking only. Further, because most rulemaking is informal[7] and because the relatively relaxed procedural requirements of informal rulemaking leave room for experimentation,[8] this Note is concerned only with informal rulemaking. Part I describes current informal rulemaking procedures and presents two proposals for the institutionalization of regulatory negotiation. Part II examines the claimed advantages of regulatory negotiation in both forms, and some of its practical problems. Finally, Part III studies two potential legal barriers to regulatory negotiation: the nondelegation doctrine and the requirements of judicial review, including the judicial prohibition of ex parte communications.

I. The Rulemaking Process

A. Current Informal Rulemaking

Traditional rulemaking lies toward the adversary end of a spectrum that ranges from purely adversary dispute reso-

and other "major interests . . . [with] a significant contribution to make," *id.* § 201(d), (e); allow agencies to send an observer to the commission, *id.* § 202; require agency comment on commission reports, although the reports would have no greater procedural status than other comments filed in response to proposed regulations under current laws, *see id.* § 203; allow a majority of commissioners to close meetings to the public, *id.* § 201(i); and exempt exchanges between agencies and commissions from prohibitions on ex parte communications, *id.* § 301(a).

[6] *See* Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 Va. L. Rev. 585, 594–97 (1972); Comment, *Public Participation in Federal Administrative Proceedings*, 120 U. Pa. L. Rev. 702, 789 n.587 (1972) (90% of FTC complaints during 1960's settled through negotiation); R. Melnick, Into the Regulatory Thicket: The Impact of Court Decisions on Federal Regulation of Air Pollution 118–25, 284–95 (Nov. 1979) (unpublished Ph.D. thesis in Harvard University Library) (negotiation used extensively in Clean Air Act enforcement). *See generally* MacIntyre & Volhard, *Intervention in Agency Adjudications*, 58 Va. L. Rev. 230 (1972).

[7] *See* 1 K. Davis, Administrative Law Treatise § 6:8 (2d ed. 1978) (formal rulemaking "is in process of disappearing").

[8] *Compare* 5 U.S.C. § 557(c), (d)(1)(A) (1976) (prohibiting ex parte contacts during formal rulemaking on penalty of banning communicator from proceeding and requiring findings and conclusions on all material issues) *with* pp. 1885, 1887–88 *infra* (discussing qualified ban on ex parte communications for informal rulemaking and requirement of only a concise statement of basis and purpose).

lution techniques, like litigation, to methods relying solely on bargaining, like legislation.[9] Although APA procedures for informal rulemaking are flexible,[10] the statute assumes parties will participate in rulemaking through the characteristically adversarial techniques of formal argument and proof. Groups interested in a proposed regulation attempt to sway agency decisions by having representatives — lawyers, lobbyists, and others — submit written comments and occasionally argue the issue at hearings.[11] To the statute's skeletal provisions, courts have added requirements of oral hearings, cross-examination, and opportunity to rebut.[12] A vision of rulemaking as an adversary process has guided decisions establishing these requirements.[13]

Negotiation is not foreign to this process.[14] For example, the Environmental Protection Agency regularly bargains with affected parties. Before it publishes a proposed rule on a controversial issue, high EPA officials notify Congress, industry, environmentalists, and state and local officials.[15] Informal discussions with these groups may help resolve the controversy.[16] It is not clear, however, how frequently such nego-

---

[9] *See* Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 114–15 (1976).

[10] *See* pp. 1884–85 *infra*.

[11] 5 U.S.C. § 553(c) (1976).

[12] *See* pp. 1884–85 *infra*.

[13] *See, e.g.*, Home Box Office, Inc. v. FCC, 567 F.2d 9, 55 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393–94 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

[14] The Occupational Safety and Health Administration adopts rules negotiated by advisory committees composed of representatives of labor, business, and the public. *See* 29 U.S.C. § 655 (1976); Kelman, *Occupational Safety and Health Administration*, in THE POLITICS OF REGULATION 236, 242–43 (J. Wilson ed. 1980). For examples of negotiation by other agencies, see Writers Guild of Am. v. American Broadcasting Co., 609 F.2d 355, 359–60 (9th Cir. 1979) (FCC), *cert. denied*, 101 S. Ct. 85 (1980); Center for Auto Safety v. Cox, 580 F.2d 689 (D.C. Cir. 1978) (Federal Highway Administration); Marketing Assistance Program, Inc. v. Bergland, 562 F.2d 1305, 1307 & n.3 (D.C. Cir. 1977) (Department of Agriculture); Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970); Public Utils. Comm'n v. United States, 356 F.2d 236 (9th Cir.) (telephone ratemaking), *cert. denied*, 385 U.S. 816 (1966); Food Chem. News, Inc. v. Davis, 378 F. Supp. 1048 (D.D.C. 1974) (FDA); Spritzer, *Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices*, 120 U. PA. L. REV. 39, 43 (1971) (utility ratemaking).

[15] Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 57 (1975). *See also* R. Melnick, *supra* note 6, at 152–53.

[16] Negotiation also enters EPA rulemaking during settlement discussions on suits challenging agency rules. Settlement discussions in a suit challenging rules issued under the Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901–6987 (1976)), included representatives from industry, agencies, and environmental groups. The negotiators reached agreement on several, though largely technical, "good government" issues. Telephone interview with Lisa Friedman, EPA attorney (Mar. 17, 1981).

tiation occurs.[17] And those negotiations that take place usually involve discussions between an agency and individual parties,[18] rather than the face-to-face negotiations among the parties themselves that characterize regulatory negotiation.

B. Regulatory Negotiation Models

Although rulemaking by negotiation might take many forms,[19] this Note suggests two models for purposes of analysis. The models grow from the "interest representation" vision of the administrative process. This approach, conceived by Professor Stewart,[20] dismisses as unrealistic the traditional "transmission belt" view that agencies exist merely to implement legislative intent.[21] In the interest representation model, agencies set rules by "the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy."[22] Regulatory negotiation is a type of interest representation.[23] In applying general legislative mandates to specific situations, it relies not on the opinions that appointed administrators have developed through an adversary process but on the views of those directly affected. If negotiators effectively represent all interests, negotiation should make the administrative process more democratic while

---

[17] *See generally* Reich, *supra* note 4, at 23–25, 29–31; Schuck, *supra* note 5, at 28.

[18] *See, e.g.*, Marketing Assistance Program, Inc. v. Bergland, 562 F.2d 1305, 1307 & n.3 (D.C. Cir. 1977); Schuck, *supra* note 5, at 28.

[19] *See* note 5 *supra*. As defined, regulatory negotiation is distinct from several methods that share some of its goals. These methods include interest group representation on agency boards, *see, e.g.*, Economic Stabilization Act Amendments of 1971, § 204, Pub. L. No. 92-210, 85 Stat. 743 (reprinted as amended at 12 U.S.C. § 1904 note (1976)) (boards composed of industry, labor, and public representatives help regulate wages and prices); 29 U.S.C. § 792(a) (1976) (board whose members include handicapped citizens sets and enforces guidelines for access by the handicapped to federal buildings); A. LEISERSON, ADMINISTRATIVE REGULATION 107–08 (1942) (government boards composed of private sector representatives regulated many industries during the Depression); Vaughn, *State Air Pollution Control Boards: The Interest Group Model and the Lawyer's Role*, 24 OKLA. L. REV. 25, 32–44 (1971) (bargaining on state pollution control panels composed of representatives of industry, labor, and other state agencies), and self-regulation, *see, e.g.*, P. HARTER, REGULATORY USE OF STANDARDS: THE IMPLICATIONS FOR STANDARDS WRITERS 4 (1979); Hamilton, *The Role of Non-governmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329 (1978).

[20] Stewart, *supra* note 5.

[21] *Id.* at 1681–84.

[22] *Id.* at 1683 (footnote omitted).

[23] Stewart proposes two similar techniques: popular election of agency officials and selection of agency officials by interest groups. Like regulatory negotiation, these plans provide that representatives of affected interests would bargain to set policy. Unlike negotiators, the representatives would serve as government officials and thus would wield state power. *Id.* at 1790–802.

enhancing regulatory efficiency. By inviting affected groups to negotiate rules, the agency would create a social microcosm, replicating the interest balancing process that underlies current rulemaking procedures.

1. Agency Oversight Model. — Under the agency oversight model, an agency would initiate informal rulemaking by publishing in the Federal Register not only a description of the topic, but also a general invitation to participate in negotiations. It would specifically invite affected groups and offer to assist participation by unorganized interests. From those responding, it would select a manageable number, while seeking representation for all interests with distinct viewpoints. The agency would then invite the representatives to a closed[24] bargaining session. Agency officials would not be present at this session. After the group reached agreement,[25] standard APA informal rulemaking procedures would begin. The agency would publish the agreement as a proposed rule along with a statement of basis and purpose composed by the negotiators.[26] Though more abbreviated than the explanation that currently accompanies proposed rules, the statement would summarize negotiators' arguments for the rule that emerged, opposing arguments, and the reasons the negotiators rejected them. The agency would then receive and respond to comments on the rules, as it does in current rulemaking. Although it would accord the negotiated agreement considerable weight, the agency would examine anew, and in light of the governing statute and its policies, the data, comments, and statement of basis and purpose; it would then reach an independent conclusion on the final rule.

2. Agency Participation Model. — Under the agency participation model, the process would begin as in the agency oversight model, but the agency itself would participate in the

---

[24] Commentators argue that negotiators require privacy. When negotiations are public, the press may prejudice constituents before representatives can communicate with them. Privacy enables negotiators to explain deals directly to constituents, permitting appeals to a group's special concerns and differing characterizations of the costs and benefits of both sides' concessions. Publicity might harden initial positions or discourage compromising offers. *See* R. FISHER, PRINCIPLED NEGOTIATION: A WORKING GUIDE 142–47, 202 (1979); J. Dunlop, The Negotiations Alternative to Markets and Regulation 18–20 (1979) (unpublished paper on file in Harvard Law School Library).

[25] If negotiators reached only partial agreement, the agency would fill in the gaps and publish the package as a proposed rule. For issues on which no agreement was reached, the agency would initiate notice-and-comment as though no negotiation had occurred. If no rule drew unanimous support, negotiators could release majority and dissenting rules.

[26] 5 U.S.C. § 553(b), (c) (1976).

negotiation. It would present to the negotiators its policies and its interpretation of the statute, and would respond to their suggestions. As one of the negotiators, the agency would have to agree to all bargains before they could be promulgated as rules. If the parties could not agree, notice-and-comment would begin as it does under the current system. If all agreed, however, the agency would publish the bargain as a proposed rule and then accept public comment. If the comments indicated that the session had omitted a distinct interest or ignored a possible solution, the agency would remedy the flaw and reconvene the negotiation. The agency would repeat the cycle until a rule emerged that drew no significant, novel comments.

II. Evaluating the Proposal

A. Negotiation's Advantages over Adversary Rulemaking

1. Superior Substantive Outcomes. — Negotiation would yield better rules than current informal rulemaking for several reasons. First, rulemaking involves polycentric problems — conflicts in which the resolution of any part of a dispute affects that of all other parts,[27] weaving a complex fabric that adversary proceedings cannot unravel.[28] A process that brings interested parties together to consider all parts of a dispute at once can better accommodate such an interaction of concerns.[29] Second, while the adversary system encourages "exaggerated, inflexible posturing,"[30] negotiation yields a pragmatic search for intermediate solutions.[31] Because negotiators learn other parties' economic and political constraints, they may realize the impracticability of their own bargaining posi-

---

[27] *See* Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 394–95 (1978).

[28] *Id.* at 393–405. Courts have remedied such polycentric problems as segregated schools, prisons, and mental institutions, *see* L. Sargentich, Complex Enforcement 22–43 (Mar. 1978) (unpublished paper on file in Harvard Law School Library), but such remedies generally require negotiation rather than a purely adversary process. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1298–302 (1976); Fuller, *supra* note 27, at 401.

[29] *See* Fuller, *supra* note 27, at 400–01. After learning of parties' views through notice-and-comment, an agency might adopt its version of a compromise, but such a rule is less likely to solve polycentric problems than is a negotiated compromise. *See id.*

[30] Darman & Lynn, *supra* note 4, at 54. *See also* B. Owen & R. Braeutigam, *supra* note 2, at 4–7; Johnston, *supra* note 4; Yellin, *supra* note 4, at 546–49.

[31] *See* pp. 1879–80 *infra*. Negotiators also bluff and overstate their positions, but the pressure to compromise ultimately exposes exaggerations and produces moderate solutions.

tions[32] and discover more common ground than they would as adversaries.[33] Negotiation exposes genuine preferences by forcing parties to rank their goals and trade lesser items for desiderata.[34] Finally, while lawyers and lobbyists — who by training and business interest thrive on disputes[35] — run the adversary process, leaders of the affected groups — who are more interested in the outcome than the fight — would themselves be the principals in the negotiation process. Because leaders generally have authority to bargain for and bind their groups, they may negotiate flexibly without constantly having to seek approval.[36]

2. Increased Post Hoc Acceptability. — The adversary process usually declares winners and losers and designates a "right" answer.[37] Thus, adversaries may see each other and the agency as enemies and grow alienated from the result.[38] Negotiation, by contrast, fosters detente among participants and has few clear-cut losers. All suggest solutions and ultimately believe they have at least partly consented to the compromise rule. Thus, parties to a negotiation identify with and defend the resulting agreement[39] and are less likely to resist its enforcement or to challenge it in court, especially if the resulting rules are substantive improvements over those the adversary process would have generated.

The oversight model is less likely to improve post hoc acceptability than is the participation model. This is so because oversight model negotiators must guess whether the agency will approve their agreement and because the agency

[32] *See* Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 658–60 (1976).

[33] *Regulatory Negotiation: Joint Hearings Before the Select Comm. on Small Business and the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 96th Cong., 2d Sess. 12–14 (1980) [hereinafter cited as *Hearings*]; 126 CONG. REC. S13,025 (daily ed. Sept. 18, 1980) (report introduced by Sen. Nelson indicating participants in coal negotiations found many unexpected areas of agreement).

[34] *See* S. BREYER, REGULATION AND ITS REFORM 43–44 (forthcoming from Harvard University Press). Because an administrator is present at the participation model negotiation, however, these sessions may devolve into hearings, undercutting this advantage.

[35] *See* Reich, *supra* note 4, at 19–31. *See also* B. OWEN & R. BRAUETIGAM, *supra* note 2, at 4–7; Johnston, *supra* note 4.

[36] *See* Darman & Lynn, *supra* note 4, at 54–55.

[37] An agency using adversary rulemaking may choose compromise rules, but such solutions will be less likely to attract party support than will negotiated compromises. *See* Sander, *supra* note 9, at 120–21.

[38] *Cf.* R. Darman, *supra* note 2, at 7–9 (identifying a "cycle of distrust" due to "excessive adversarialism"). *See generally* FORD FOUNDATION, *supra* note 2, at 8–12.

[39] *See Hearings*, *supra* note 33, at 99–100 (statement of Kate C. Beardsley, Deputy Director, U.S. Regulatory Council); J. Dunlop, *supra* note 24, at 26.

may hesitate to approve solely on the recommendation of interested parties an agreement in which it played no part. In the participation model, parties may discuss proposals with agency representatives; as a result, the process is more likely to generate a rule acceptable to the agency.[40]

B. Hurdles to Successful Negotation

The claimed advantages of regulatory negotiation assume the presence of a number of favorable conditions. If these conditions are not present, negotiation will simply add a useless layer to rulemaking.

1. Adequate yet Manageable Representation. — Although complex issues inevitably affect many groups, negotiators must be few enough to keep the negotiation manageable.[41] On some issues, however, the number of distinct policy positions or interests[42] may be unacceptably large, even though some groups may be willing to economize by joining forces.[43] To

[40] In practice, it appears that both models will display these advantages. Participation model negotiation often occurs in ratemaking proceedings by means of settlement conferences. Court challenges to negotiated rates are rare, and ratemaking proceeds much more quickly when settlement is attempted than when hearings are used. *See* Morgan, *Toward a Revised Strategy for Ratemaking*, 1978 U. ILL. L.F. 21, 43–44. Oversight model negotiations occurred in the National Coal Policy Project. During its three years of operation, the nongovernment project brought together environmentalists and leaders of labor and business in coal and related industries, all of whom participated as individuals rather than as group representatives. Participants reached agreement on more than 200 issues; 90 of these later formed the basis for environmental, safety, and other coal regulations, although the agreements were general and required additional development before their issuance as rules. *Hearings*, *supra* note 33, at 11–12 (statement of F. Murray, Project Director); 126 CONG. REC. S13,024–26 (daily ed. Sept. 18, 1980). *See generally* Alexander, *A Promising Try at Environmental Detente for Coal*, FORTUNE, Feb. 13, 1978, at 94–102.

Other nations have successfully employed techniques similar to regulatory negotiation. *See, e.g.*, E. VOGEL, JAPAN AS NUMBER ONE 70–84, 87–90 (1979); Vogel, *Guided Free Enterprise in Japan*, HARV. BUS. REV., May–June 1978, at 161.

[41] *See* Darman & Lynn, *supra* note 4, at 60.

[42] Guaranteeing representation for each viewpoint will be crucial to satisfying the nondelegation doctrine, *see* p. 1883 *infra*, and meeting the requirements of informal rulemaking, *see* pp. 1886, 1888–89 *infra*. Requiring separate representation for each group with a distinct policy position may cause problems, because it permits groups to distinguish their positions solely to hold a seat at the bargaining table; it ensures, however, that negotiators will hear all novel proposals. Granting a representative to each distinct interest guards against loss of representation when positions shift during discussions. *See* Comment, *supra* note 6, at 731–34; *cf.* FED. R. CIV. P. 24(a) (allowing intervention in a lawsuit by parties whose interests are not "adequately represented" by others).

[43] This may be especially true of groups with limited resources. Environmental groups have informally acknowledged certain groups as leaders in a single field, in order to develop expertise and avoid overlap. Telephone interview with Lisa Friedman, EPA attorney (Mar. 17, 1981).

limit participants, the agency should require groups[44] with a common viewpoint to choose a single representative. A further problem is that some interests may be insufficiently organized or too poor to participate. Because the administrative model that underlies regulatory negotiation presumes representation of all affected interests,[45] their absence would cast doubt on the legitimacy of an agreement. Therefore, the agency should either subsidize their involvement or provide an agency official to speak for them.[46]

2. Inducing Good Faith Negotiation. — Groups who benefit from the status quo or who believe notice-and-comment would treat them better than negotiation would rather obstruct than bargain. Agencies must thus devise incentives for good faith negotiation.[47] In the agency participation model, the agency negotiator and reviewing courts could look suspiciously at comments and challenges by parties showing bad faith.[48] If negotiators failed to agree in the agency oversight model, they could send the agency the rule that drew widest support along with dissenters' reasons for opposition. The agency, in considering a final rule, could ignore bad faith dissents.[49] Such a process would make good faith negotiation the only road to regulatory influence and would persuade obstructionists to make concessions of their own so that they might extract

---

[44] *Cf.* Comment, *supra* note 6, at 709–22, 805–06 (must ensure that chosen group speaks for its constituents).

[45] *See* p. 1874 *supra*.

[46] For proposals to subsidize participation by the poor in agency proceedings, see S. 262, § 560, *Regulatory Reform Legislation: Hearings Before the Senate Comm. on Governmental Affairs*, 96th Cong., 2d Sess. 668 (1979) (providing for subsidization of participation by underrepresented groups in agency proceedings and establishing criteria for the selection of those groups); H.R. 1, § 591(a), 97th Cong., 1st Sess. (1981) (current version of S. 262); Gellhorn, *Public Participation in Administrative Proceedings*, 61 YALE L.J. 359, 396 (1972). This problem is not unique to negotiation; even in current rulemaking, an agency must consider all interests affected by agency action. *See, e.g.*, Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 615–17 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). *See generally* Stewart, *supra* note 5, at 1756–60. Similar problems have arisen for government consumer advocates. *See, e.g.*, Murphy & Hoffman, *Current Models for Improving Public Representation in the Administrative Process*, 28 AD. L. REV. 391, 395–96 (1976).

[47] Good faith requires that the parties bargain with an "open mind and a sincere intention to reach an agreement," though it does not compel them to accept a given proposal. Sign & Pictorial Union v. NLRB, 419 F.2d 726, 731 (D.C. Cir. 1969) (labor negotiations); *see* NLRB v. Columbia Tribune Publishing Co., 495 F.2d 1384, 1391 (8th Cir. 1974); H. ROSS, SETTLED OUT OF COURT 150–51 (1970).

[48] *See* pp. 1883–84 *infra*; *cf.* Chayes, *supra* note 28, at 1300 (judicial enforcement of good faith bargaining in complex litigation).

[49] *See* note 25 *supra*.

concessions from others. Finally, parties are likely to cooperate when they must maintain a long-term relationship.[50]

3. Appropriate Issues for Regulatory Negotiation. — The problems outlined above suggest that regulatory negotiation will encounter fewer difficulties on some issues than on others. For negotiation to be successful, the issue must be one around which interest groups capable of bargaining are already well developed. This will more likely be true when the costs and benefits of a regulation are narrowly concentrated on a few entities rather than spread over many individuals.[51] Moreover, some very broad issues that require not a hammering out of details but a political choice between competing values will be better resolved by the legislature.[52] Finally, all-or-nothing issues on which compromise is impossible — such as the decision whether to have airbags in cars — are not amenable to negotiation.

III. Legal Limits to Regulatory Negotiation

In addition to practical considerations, legal principles must guide the design of a regulatory negotiation system. The major legal limits[53] on negotiation are those the nondelegation doctrine imposes on private assumption of public authority and the requirements of judicial review under the APA, including the judicial prohibition of ex parte communications.

A. Nondelegation Doctrine

Because society is complex and the process of legislative compromise difficult, Congress can legislate only in general, leaving agencies to resolve particulars.[54] But this delegation

---

[50] *See* Eisenberg, *supra* note 32, at 675–77; Sander, *supra* note 9, at 120–21. The agency could also hire professional mediators who could suggest compromises and narrow the issues. Mediators could also encourage the parties jointly to hire consultants to achieve agreement on the underlying data. *See* Fuller, *Mediation — Its Forms and Functions*, 44 S. Cal. L. Rev. 305, 312–39 (1971); *cf.* Spritzer, *supra* note 14, at 91–92 (1971) (FPC uses these mediation techniques in ratemaking).

[51] *See* Wilson, *The Politics of Regulation*, in The Politics of Regulation 357, 366–72 (J. Wilson ed. 1980).

[52] *See* Boyer, *supra* note 5, at 166.

[53] The Federal Advisory Committee Act, 5 U.S.C. app. 1 (1976), might also provide an obstacle to regulatory negotiation. Because negotiation groups would constitute advisory committees, *see id.* § 3(2)(c), they would have to publish notice of each session and meet in public or make minutes of each session public. *Id.* §§ 10(b), (c), 11. Because these provisions restrict the flexibility and privacy of negotiation, amendment of the Act might be necessary. *See, e.g.*, Food Chem. News, Inc. v. Davis, 378 F. Supp. 1048 (D.D.C. 1974).

[54] Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935); *see* Currin v. Wallace, 306 U.S. 1, 15 (1939); McGowan, *Congress, Courts, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1127–30 (1977); Stewart, *supra* note 5, at 1695–96.

of authority has constitutional limits. Under the "contractarian" theory of democracy, laws derive their legitimacy from the consent of the governed.[55] Since members of Congress are elected, the governed can be said implicitly to approve the laws Congress passes. The actions of agency officials, by contrast, do not rest on public approval, but gain legitimacy only through congressional enactments.[56] To ensure the legitimacy of administrative action, courts have demanded that Congress pass guidelines that provide agencies with meaningful standards.[57]

Judicial scrutiny of congressional delegation intensifies when private groups replace presumably neutral agency officials and gain power themselves.[58] For one thing, courts suspect that private representatives favor their supporters and thereby violate the due process rights of unrepresented individuals.[59] More importantly, courts fear that delegation to private individuals may further attenuate voter control of government; private representatives owe allegiance only to their supporters, while administrators must account to the elected officials who appointed them.[60] Several decades ago, in *Carter v. Carter Coal Co.*,[61] the Supreme Court thwarted Congress' attempt to authorize a majority of coal producers and miners to set industry-wide wages and hours. Similarly, in *Schechter*

---

[55] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5–17, at 286–88 (1978).

[56] *Id.*; *see* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 100 S. Ct. 2844, 2885–86 (1980) (Rehnquist, J., concurring in the judgment) (The doctrine "ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our government most responsive to the popular will."); United States v. Robel, 389 U.S. 258, 276 (1967) (Brennan, J., concurring in the result); J. ELY, DEMOCRACY AND DISTRUST 131–32 (1980).

[57] Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 144 (1941).

[58] The Court has called delegation to private groups "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

[59] Courts have seen the due process and nondelegation doctrines as closely related. *See, e.g., id.* at 311. *Compare* Gibson v. Berryhill, 411 U.S. 564 (1973) (invalidating on due process grounds decision by state board, composed of independent optometrists, to revoke licenses of competitor corporate optometrists), *with* First Jersey Sec., Inc. v. Bergen, 605 F.2d 690 (3d. Cir. 1979) (upholding similar self-regulation of securities industry because regulated parties participated in licensing process and neutral government board oversaw decisions), *cert. denied*, 100 S. Ct. 1020 (1980). *See also* Rite Aid Corp. v. Board of Pharmacy, 421 F. Supp. 1161, 1169–78 (D.N.J.) (three-judge panel), *appeal dismissed*, 430 U.S. 951 (1977); Wall v. American Optometric Ass'n, 379 F. Supp. 175 (N.D. Ga.) (three-judge panel) (finding due process violation in industry disciplinary board because of economic self-interest of board members) *aff'd mem. sub nom.* Wall v. Hardwick, 419 U.S. 888 (1974).

[60] *See, e.g.*, Hetherington v. McHale, 458 Pa. 479, 329 A.2d 250 (1974).

[61] 298 U.S. 238 (1936).

Poultry Corp. v. United States,[62] the Court invalidated a congressional plan to allow representative trade associations to set hours, wages, and other industry conditions. Despite the nondelegation doctrine's ebb since the high water mark of these cases, the doctrine itself, and the court's hostility to private exercise of public authority, survive to this day.[63]

When courts believe that private groups play only an advisory role — when, for example, the groups propose rules for a neutral agency's approval — they turn back delegation challenges. In *Sunshine Anthracite Coal Co. v. Adkins*,[64] the Supreme Court upheld a congressional scheme permitting coal producers to propose minimum prices and other sales conditions to a public commission that could approve, disapprove, or modify them. More recently, the Third Circuit upheld against a delegation challenge a law permitting self-regulation of the securities market, because the Securities and Exchange Commission could disapprove rules so promulgated and could independently determine violations and penalties.[65]

---

[62] 295 U.S. 495 (1935).

[63] The Supreme Court has not held a statute invalid on nondelegation grounds since *Schechter* and has approved many broad delegations. *See* Plum Creek Lumber Co. v. Hutton, 608 F.2d 1283, 1288 (9th Cir. 1979). As a result, many believe the doctrine dead. *See, e.g.*, FPC v. New England Power Co., 415 U.S. 345, 352–53 (1974) (Marshall, J., concurring). But the Court has intimated continued hostility to private delegations. *See, e.g.*, United States v. Mazurie, 419 U.S. 544, 556–57 (1975) (permitting delegation to Indian tribes because they are "more than 'private, voluntary organizations'") (quoting United States v. Mazurie, 487 F.2d 14, 19 (10th Cir. 1973)); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 150–51 (1963) (presuming that Congress did not intend that agricultural standards drafted by regulated parties, "not by impartial experts," would apply nationally). *See also* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 100 S. Ct. 2844, 2885–86 (1980) (Rehnquist, J., concurring); AFL-CIO v. Kahn, 618 F.2d 784, 811 (D.C. Cir.) (MacKinnon, J., dissenting), *cert. denied*, 443 U.S. 915 (1979); R.H. Johnson & Co. v. SEC, 198 F.2d 690 (2d Cir.) (approving self-regulation of securities industry), *cert. denied*, 344 U.S. 855 (1952); J. ELY, *supra* note 56, at 131–34; Liebmann, *Lawmaking by Private Groups*, 51 IND. L.J. 650 (1975); McGowan, *supra* note 54, at 1127–30; Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 582–86 (1972).

State courts have exhibited similar delegation fears. *See, e.g.*, Kenai Peninsula Borough v. Kenai Peninsula Educ. Ass'n, 572 P.2d 416 (Alaska 1977); State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal. 2d 436, 254 P.2d 29 (1953); Mount Vernon Memorial Park v. Board of Funeral Directors & Embalmers of the Dep't of Consumer Affairs, 79 Cal. App. 3d 879, 145 Cal. Rptr. 275 (1978); Allen v. California Bd. of Bar Examiners, 25 Cal. App. 3d 1014, 102 Cal. Rptr. 368 (1972); Makowicz v. County of Macon, 68 Ill. App. 3d 322, 385 N.E.2d 917 (1979) (invalidating law giving authority to veterans' groups to disburse state funds); Fink v. Cole, 302 N.Y. 216, 225, 97 N.E.2d 873, 876 (1951); Palmer Oil Corp. v. Phillips Petroleum Co., 204 Okla. 543, 231 P.2d 997, *appeal dismissed*, 343 U.S. 390 (1952); Hetherington v. McHale, 458 Pa. 479, 329 A.2d 250 (1974) (invalidating law giving authority to three private farm organizations to disburse state agricultural research funds).

[64] 310 U.S. 381, 399 (1940).

[65] First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 697–700 (3d Cir. 1979), *cert. denied*, 100 S. Ct. 1020 (1980). Like the *First Jersey* statute, the *Schechter* law gave

Under the literal requirements of this doctrine, negotiation would have to stop short of granting de jure rulemaking authority to private groups. This limitation poses no problem for the participation model, for agency assent is a prerequisite to the model's agreements. The oversight model, though, is caught in a scissors — agency oversight must be sufficiently strict to calm nondelegation worries, yet sufficiently relaxed to make the negotiation meaningful. In practice, agency supervision in the oversight model would probably satisfy courts. The agency would review all data de novo and would not defer to the negotiated rule if it conflicted substantially with the public interest. The model could further avoid delegation woes, while keeping the negotiation meaningful, by setting guidelines for negotiators — bounds within which the negotiated rule must fall. The setting of reasonably strict standards would provide as much agency oversight as review of negotiated results after the fact, because in both cases the agency would define the range of acceptable rules.

Even if it involved a significant delegation, negotiation might nonetheless avoid nondelegation problems if all interests were effectively represented.[66] By replicating the process of pluralistic decision at the agency level, adequate representation would calm the fear that agencies will evade popular control and would thus satisfy the underlying concern of nondelegation cases, if not their precise holdings.

B. Statutory and Judicially Imposed Requirements for Informal Rulemaking

Challenges to negotiated rules would come either from unhappy negotiators or from parties excluded from the process. Both groups would face obstacles to their challenges. Courts might look suspiciously at suits by dissenting negotiators and require some special explanation for their inability to influence the negotiation. If absent groups declined an opportunity to

---

private groups a merely advisory role. 295 U.S. at 521–22. But this did not save the statute, because the Court also invalidated the oversight provision as a delegation without sufficient standards. *Id.* at 537–42. The Court implied that it would have upheld the law if the oversight provision had stood, because that provision would have established a government official — not interested parties — as decisionmaker. *Id.* at 537. *See also* Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737, 763 (D.D.C. 1971) (three-judge panel) (Leventhal, J.).

[66] Several courts have suggested the importance of balance in private groups exercising governmental authority, especially when considering due process challenges to delegation. *See, e.g.*, *Carter Coal*, 298 U.S. at 311; Potter v. New Jersey Supreme Court, 403 F. Supp. 1036 (D.N.J. 1975) (upholding rule admitting to bar only graduates of law schools accredited by American Bar Association, in part since ABA is a broad-based representative group with "the highest traditions"), *aff'd mem.*, 546 F.2d 418 (3d Cir. 1976).

participate, courts would not receive their challenges kindly.[67] Groups denied participation might have to show they were not effectively represented.[68] But when a challenge did arise, the negotiation would survive judicial scrutiny under the APA in its current form only if courts believed that negotiation followed the procedures they have imposed on informal rulemaking or that it addressed the concerns those procedures satisfy. An examination of these procedures and the concerns that underlie them is thus necessary for an understanding of whether courts will accept negotiation.

1. Notice-and-Comment Rulemaking Requirements. — Despite the apparent simplicity of the APA vision of informal rulemaking,[69] courts have added procedures that have made rulemaking significantly more formal.[70] One important requirement is that the agency construct a record containing all the facts on which the agency based its decision.[71] The agency's decision must result *only* from material in the record; the courts have required that ex parte communications[72] be placed in the record and have reacted hostilely to agency use of nonrecord material.[73] In addition, the agency must make the record complete early enough in the proceeding to allow interested parties to comment on, and thus test the strength of, relevant facts.[74] These requirements allow parties to com-

---

[67] Stewart, *Mechanisms of Environmental Regulatory Control and Decisionmaking and Their Relation to Innovation: The Present System and Potential Alternatives* (forthcoming in *California Law Review*).

[68] *See* note 42 *supra*.

[69] *See* p. 1875 *supra*.

[70] *See* DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 259–72 (1979).

[71] United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 251–52 (2d Cir. 1977); Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 475–76, 488 (D.C. Cir. 1974); Portland Cement Ass'n v. Ruckleshaus, 486 F.2d 375, 393 & n.67 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

[72] The APA defines an ex parte communication as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." 5 U.S.C. § 551(14) (1976); *see* pp. 1887–88 *infra*.

[73] *See* WNCN Listeners Guild v. FCC, 610 F.2d 838, 846–47 (D.C. Cir. 1979), *cert. granted*, 445 U.S. 914 (1980); United States Lines v. FMC, 584 F.2d 519, 533–36 (D.C. Cir. 1978); Aqua Slide 'N' Dive Corp. v. Consumer Prod. Safety Comm'n, 569 F.2d 831, 838 (5th Cir. 1978); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394, 401–02 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); Wright, *The Courts and the Rulemaking Process*, 59 CORNELL L. REV. 375 (1974). In addition, courts may require that the record be in a coherent, usable form. *E.g.*, Texas v. EPA, 499 F.2d 289, 297 (5th Cir. 1974), *cert. denied*, 427 U.S. 905 (1976); *see* Ethyl Corp. v. EPA, 541 F.2d 1, 67–68 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976); Wright, *New Judicial Requisites for Informal Rulemaking*, 29 AD. L. REV. 59, 61–62 (1977).

[74] *See* WNCN Listeners Guild v. FCC, 610 F.2d 838, 846 (D.C. Cir. 1979), *cert. granted*, 445 U.S. 914 (1980); United States Lines v. FMC, 584 F.2d 519, 533–36

ment fairly on all data, and provide the basis for intelligent review by the courts.[75]

In addition, the agency must explain its rule in a concise general statement of basis and purpose.[76] The statement "must identify the major issues, show the agency's reasoning on those issues, and establish that the agency has indeed identified and taken a hard look at all the relevant factors."[77] It must set forth the data and test procedures used to investigate the issue[78] and the assumptions employed when data is insufficient.[79] The agency must demonstrate that it has seriously considered alternative rules and conducted a meaningful dialogue with interested persons.[80]

Procedures that courts have devised for an adversary process, however, are not necessarily good evidence of what courts would require of regulatory negotiation. Therefore, if the two models of negotiation fail to satisfy these requirements, it is necessary to ask whether they comport with the rationale that underlies the requirements.

2. The Record Requirement's Application to Negotiation. — The requirement of an adequate record may threaten the oversight model. If negotiations are private, a crucial part of the model's rulemaking will be unrecorded — namely, the data employed in negotiations, on which the agreement will be based. Although technically the oversight model does not meet the mandate for a complete public record, it might still satisfy the purposes behind the record requirement — guaranteeing that the court know enough about the issues to judge whether the agency acted arbitrarily and allowing public examination of the data. It might do so by requiring negotiators to release all data that would not damage the privacy of the negotiations, along with a summary of the discussions. Nevertheless, the data package might lack vital information, since the most important data could easily be the most sensitive. Courts

---

(D.C. Cir. 1978); Aqua Slide 'N' Dive Corp. v. Consumer Prod. Safety Comm'n, 569 F.2d 831, 838 (5th Cir. 1978).

[75] *See* United States Lines v. FMC, 584 F.2d 519, 533–36 (D.C. Cir. 1978); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394, 402 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

[76] 5 U.S.C. § 553(c) (1976).

[77] DeLong, *supra* note 70, at 270–71 (footnotes omitted); *see* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252–53 (2d Cir. 1977); Portland Cement Ass'n v. Ruckleshaus, 486 F.2d 375, 393–95 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968).

[78] Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394, 401–02 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

[79] *See id.* at 393, 400.

[80] *See* Wright, *The Courts and the Rulemaking Process*, *supra* note 73, at 381.

would thus lack sufficient information to judge agency decisions.

A preferable solution would have courts examine the record in camera. Of the record requirement's two purposes — educating the court sufficiently about the issue to allow intelligent review and permitting public scrutiny of the record — this solution clearly satisfies the first, since the court would view all relevant data. Meeting the second would be more difficult. Courts might feel uneasy about a decision based on a record that had never been tested in public, fearing that some groups may have unfairly influenced the decision.[81] But if the negotiation included representatives of all interests, courts could believe that the process would simulate public scrutiny and thus be acceptable.

3. The Statement of Basis and Purpose. — Both models fail to satisfy the literal requirements courts have established for the statement of basis and purpose.[82] The presentation of negotiators' reasoning process is impossible; the give-and-take of a negotiation yields agreements based as much on horse-trading and bargaining skill as on expert analysis.[83] To impute reasoned logic to a negotiated settlement is to rewrite history.

Negotiation will thus have to comply with the purposes of the statement. One of these purposes is to ensure that the agency gave fair consideration to all interests. In *Moss v. CAB*, the CAB held private, informal meetings with airlines.[84] The District of Columbia Circuit rejected the resulting fare structure, in part because the agency had considered only the carriers' interests.[85] Dicta in *Moss* and later cases indicate that the technique might have passed muster had the agency included consumer and other representatives in its meetings.[86]

To satisfy this concern for balanced participation, negotiators should compose a statement of basis and purpose sum-

---

[81] *See* Action for Children's Television v. FCC, 564 F.2d 458, 477 (D.C. Cir. 1977) (approving informal contacts because they did not materially influence the action ultimately taken); Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970).

[82] *See* pp. 1884–85 *supra*.

[83] *Cf.* Citizens Ass'n of Georgetown v. Zoning Comm'n of D.C., 477 F.2d 402, 409 n.28 (D.C. Cir. 1973) (noting the difficulty in discerning reasons for a decision by a quasi-legislative zoning commission).

[84] 430 F.2d 891, 894–95 (D.C. Cir. 1970).

[85] *Id.* at 900–02.

[86] *Id.* at 900; *see* Writers Guild of Am. v. American Broadcasting Co., 609 F.2d 355, 359–60, 364–66 (9th Cir. 1979) (approving private "jawboning" of industry because agency understood situation better than court), *cert. denied*, 101 S. Ct. 85 (1980); Action for Children's Television v. FCC, 564 F.2d 458, 476 (D.C. Cir. 1977); Consolidated Edison Co. v. FPC, 512 F.2d 1332, 1341–42 (D.C. Cir. 1975) (approving agency order while noting no private bargaining with particular interests).

marizing the arguments and facts supporting the negotiated rule.[87] Like a legislative history and preamble,[88] the outline would trace the rule's development and the arguments for and against it. These efforts might not satisfy reviewing courts, which lack the agency's expertise and may be unsure of the rule's implications. This uncertainty would prevent them from determining whether the rule is consistent with other rules and with the authorizing statute.[89] Looking for the logic that genuinely motivated the choice, a court might dismiss the compromise statement as merely a post hoc rationalization.[90] Yet a properly drawn statement could meet the concerns that representation be balanced and that all views be adequately considered.

The agency might also accomplish the goals of a statement of basis and purpose by holding an abbreviated notice-and-comment proceeding, specifying before the negotiation a spectrum of acceptable rules[91] and justifying this range in a statement of basis and purpose. In the oversight model, the negotiating agency would announce the range beforehand and not accept an agreement that exceeded it; in the participation model, the agency would employ its veto power to keep the agreement within the range. If the range were sufficiently narrow to be within the agency's nonarbitrary discretion, courts would view it as the equivalent of a rule; the agency would simply be announcing the options it finds acceptable before choosing one as the best. Yet the spectrum would have to be broad enough to leave room for flexible negotiation. In addition, the setting of acceptable guidelines might be costly and time consuming for the agency, because it would require a brief notice-and-comment period before negotiations began. These disadvantages might undercut support for, and dissuade agencies from experimenting with, negotiation.

4. The Ban on Ex Parte Communications. — Courts have limited private contacts between agency officials and affected groups. Such contacts are undesirable because they escape the scrutiny of adversarial testing and include information impor-

---

[87] *See* p. 1885 *supra*.

[88] *But cf.* J. ELY, *supra* note 56, at 16–18 (noting limited utility of legislative histories).

[89] *Cf.* Citizens Ass'n of Georgetown v. Zoning Comm'n of D.C., 477 F.2d 402, 408–09 (D.C. Cir. 1973) (requiring reasons for decision despite difficulty of determining them for a quasi-legislative zoning commission).

[90] *See* Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1030 (D.C. Cir. 1978); Baltimore & Ohio Chicago Terminal R.R. v. United States, 583 F.2d 678, 687–88 (3d Cir. 1978), *cert. denied*, 440 U.S. 968 (1979).

[91] *See* p. 1883 *supra*. This proposal would operate only in situations allowing for a gradation of alternatives.

tant to the agency's decision that is kept from reviewing courts.[92] In *Home Box Office, Inc. v. FCC*,[93] the FCC communicated extensively on an ex parte basis with numerous parties to a cable television rulemaking.[94] Because the Commission kept this information secret, the District of Columbia Circuit held, "[T]he elaborate public discussion in these dockets . . . [was] a sham."[95] The court banned ex parte contacts during rulemaking and required that a summary of any contact that occurred despite the ban be made public.[96]

Another panel of the District of Columbia Circuit has questioned the *Home Box Office* holding. In *Action for Children's Television v. FCC*,[97] the court limited the application of the ban to situations in which private groups are competing "for a specific valuable privilege";[98] however, neither *Action for Children's Television* nor any subsequent case has overruled *Home Box Office*.[99] A reasonable assumption is that records of all ex parte contacts the agency receives after issuing its notice of proposed rulemaking must be placed in the public record.[100]

The rule against ex parte communications poses substantial problems for the participation model; if negotiations are secret, agency participation arguably involves ex parte communications. The model could survive the rule, however, in either of two ways. First, courts could eliminate the ban. Because the doctrine is still unsettled, this is a possibility, though not a strong one. Second, courts might accept a procedural analogue that satisfies the function of the ex parte ban. In notice-and-comment rulemaking, the ex parte ban guarantees public scrutiny of all data. Negotiation accomplishes this goal through participants' critical examination of other parties' data; it will simulate thorough public scrutiny only if all interests

---

[92] Home Box Office, Inc. v. FCC, 567 F.2d 9, 55–57 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *see* Note, *Ex Parte Contacts Under the Constitution and the Administrative Procedure Act*, 80 COLUM. L. REV. 379, 380–81 (1980).

[93] 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

[94] The Commission's list of ex parte communications during the proceeding was 60 pages long and included discussions with broadcasters, members of Congress, trade journalists, and performing art group representatives. *Id.* at 52–53 & nn.108, 109.

[95] *Id.* at 54.

[96] *Id.* at 57.

[97] 564 F.2d 458 (D.C. Cir. 1977).

[98] *Id.* at 477–78.

[99] *See id.* at 474; National Small Shipments Traffic Conference, Inc. v. ICC, 590 F.2d 345, 350 (D.C. Cir. 1978); United States Lines, Inc. v. FMC, 584 F.2d 519, 539–40 (D.C. Cir. 1978); *cf.* Association of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1169 n.40 (D.C. Cir. 1979) (noting confusion in law), *cert. denied*, 100 S. Ct. 3011 (1980).

[100] *See* 1 C.F.R. § 305.77-3 (1980); 1 K. DAVIS, *supra* note 7, § 6:18.

are represented. The following process will ensure full representation: Upon promulgation of a rule, an absent party, by examining the statement of basis and purposes, would decide if its interest had been adequately represented. If it decided in the negative, the party would petition to be represented at a reconvened session. If the agency refused, a reviewing court would scrutinize the statement to determine whether the party had made a colorable showing of lack of representation. If it had, the court would inspect a transcript of the session in camera or would require that a summary be made available to the party. The court would determine from this information whether the party had a spokesman at the bargaining table. If it did, the challenge would be dismissed. If it did not, the court would order the party admitted to the reconvened session. In this way the purposes of the ex parte ban would be met, while publicity would be kept to a minimum and the selection of negotiators would be open to judicial scrutiny.

The oversight model would fare better under the rule against ex parte communications for two reasons.[101] First, although the ban forbids agency officials to *receive* private communications, it appears to allow them to *speak* to the parties on an ex parte basis.[102] Thus, the agency could stimulate bargaining by notifying the parties of the issue and rules the agency is considering, summoning them to a session, and suggesting areas of compromise. The agency's expertise would permit it to offer wise suggestions that might prod negotiators to agree. Second, *Home Box Office* prevents private communications only with officials "involved in the decisional process."[103] Agency mediators could therefore participate fully in negotiations if a "Chinese wall" divided them from rulemakers.[104] The Chinese wall would prevent them from commu-

[101] A third possible reason is illusory. The ban only operates after the issuance of a notice of proposed rulemaking. *Home Box Office*, 567 F.2d at 57; *see* 1 C.F.R. § 305.77-3(2). But the prohibition does apply to prenotice communications that "form[] the basis for agency action." *Home Box Office*, 567 F.2d at 57. Thus, although negotiation would take place before the notice-and-comment period, it would contribute heavily to the final rule and would not come within this exception. However, since the ban covers only the notice-and-comment period, it does not prevent ex parte discussions during settlement negotiations for suits challenging rules. These negotiations must wait for the promulgation of a final rule, but may still play a role in a rule's development.

[102] *See Home Box Office*, 567 F.2d at 57 ("information gathered *ex parte* from the public . . . will have to be disclosed").

[103] *Id.* at 57.

[104] *Cf.* Morgan, *Toward a Revised Strategy for Ratemaking*, 1978 U. ILL. L.F. 21, 74–75 (proposing Chinese wall in agency adjudication). Ex parte contacts between mediators and the rest of the staff might be permissible, as long as they did not transmit relevant information and did not involve bad faith efforts to circumvent the

nicating what they learned in these negotiations to those involved in the decision.[105]

The oversight proposal might tread on the ex parte prohibition if courts viewed the agreement itself as an ex parte communication. Although the agreement would become public, its significance to the agency might exceed its public significance; in other words, the agency would accept the agreement not on its merits but simply because all affected groups had agreed. To block this back door influence, the agency could publicize the special status of the agreement, allowing other parties to criticize it, for example, as the product of an unbalanced negotiation.

IV. Conclusion

Regulatory negotiation faces major legal problems. Although it would probably survive nondelegation challenges, the procedural strictures that reviewing courts have imposed may strangle negotiation. Three possible solutions exist. First, negotiation might be made public. This would satisfy reviewing courts, because the record and reasons for the decision would be open to public scrutiny. Although the glare of publicity might wilt negotiations, open negotiations might succeed on technical and noncontroversial issues. Second, standards could limit negotiators' discretion. By means of a brief, informal rulemaking process, the agency could define a range of acceptable rules, supported by a record and statement of basis and purpose. Negotiators would then settle on a rule within the range. If the range were no broader than the spectrum of rules a reviewing court would find to be within the agency's nonarbitrary discretion, the procedure would survive. Of course, the initial rulemaking and the narrowed scope of negotiation would limit the value of negotiation.

As a preferable solution, courts could devise a new set of procedural safeguards for negotiation. Because the current safeguards arose in an environment of adversary rulemaking, they may be inappropriate for regulatory negotiation. In designing the safeguards, courts would balance negotiators' need for privacy against the fear that representatives might co-opt the agency at the expense of unrepresented groups. Such safe-

---

Home Box Office doctrine. *See* Hercules, Inc. v. EPA, 598 F.2d 91, 123–28 (D.C. Cir. 1978).

[105] Such an arrangement would violate the doctrine if mediators used their knowledge of agency policy to influence the negotiations. To avoid doing so, agency mediators should use only public data obtained through discovery and should function only as intermediaries, not as advocates of agency views.

guards might include scrutiny of the choice of negotiators to ensure balance and effective representation of constituents. Courts could demand that the agency review the agreement and justify its approval with a statement of basis and purpose.

Regulatory negotiation risks both exclusion of unorganized or marginally affected interest groups and failure to agree. But if these problems can be overcome, it can provide the traditional advantages negotiation offers over trials. Regulatory negotiation allows for multilateral debate, encourages parties to cooperate flexibly, allows them to trade unimportant provisions for those they value, and involves them in the decisionmaking process, thus improving chances for acceptance of the resulting rules. If, given these advantages, courts are willing to relax judicially imposed procedural requirements, regulatory negotiation may offer an opportunity to improve our slow, expensive, and ineffective system of regulation.