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Collaboration: The Future of Governance

*Philip J. Harter**

The country has been buffeted by bitter political controversy virtually non-stop for the past fifteen years. Both sides of the divide accuse the other of extremism and attack its very legitimacy. Civil dialogue, debate, and deliberation have been replaced by attacks and are close to extinct. On the one side, the political theater this summer in the Health Care Town Meetings and the loss of decorum in the House of Representatives are certainly examples. On the other, the current administration has attacked the previous administration for everything from war crimes to being so cozy with the financial institutions that it produced the worst recession in a generation.

A corollary of this is that public policy debates are more contentious, and hence, making public decisions through legislation or regulation is more difficult than in quieter times. Yet important issues need to be considered in a relatively short time frame: what to do about global warming and the limitation on greenhouse gases; the manner in which the financial sector is regulated and which firms will be regulated; the delivery of health care; the rebuilding of our transportation infrastructure; the role of the federal government in education and the standards that it may impose. No matter what the ultimate decision as to the particular issue or the role of the government in addressing it is, some decision needs to be made in these areas, as well as many others.

But here, too, difficulties arise. Many of our traditional responses are no longer as effective as they once were, largely because the original targets for which they were designed have already been addressed or are no longer relevant. Thus, we need to create new approaches or, in many cases, recognize and hence legitimize approaches that have recently emerged. By and large, these new structures will need to be more flexible and adaptive than those deployed in the past.

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Further, many tend to blur any sort of rigid dichotomy between “public”—only the government—and “private”—only *not* government. Rather, the two will be intertwined as to who makes what decisions based on what sort of process and with what type of participation by the other. As a consequence, we need to look beyond the procedures and conceptual models we have relied on for seventy-five years. A new archetype is needed both as to the tools that are available to address social issues and the procedures by which they will be developed and function.

We are therefore at a critical juncture with respect to the role of government and how it operates. Resolving this debate will require the careful attention across society—we as a body politic; government officials; academics; leaders of the private sector.

The thesis of this paper is that collaboration—the public and private spheres working together while recognizing the legitimate role of each—should play a major role in making these important decisions. Can collaboration diminish the rancor? Certainly not on its own, but it can lead people to recognize that others are listening and trying to reach appropriate decisions. That alone has powerful political consequences.¹ Should the procedures described here be used for all public decisions? Of course not. But they should be considered for major ones precisely because they are effective, and a form of collaboration—a recognition that others have important viewpoints—should indeed pervade decision-making. Importantly, collaboration calls for strong and confident leadership on the part of both government and private parties. It is not to be confused with either being a bully or a wimp.

I. THE PROMISE OF THE NEW ADMINISTRATION

President Obama issued a Memorandum to the Heads of Executive Departments and Agencies on his very first full day in office that says:

Government should be participatory. Public engagement enhances the Government’s effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits

1. See Micheal A. Neblo et al., *Who Wants to Deliberate And Why?* 37 (John F. Kennedy School of Government, Faculty Research Working Paper Series, RWPO9-27, Sept. 15, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1476461. Neblo provides experimental evidence for this proposition:

[M]any citizens are de-mobilized precisely by the peculiarities of partisan and interest-group politics that political sophisticates take as exclusively constitutive of political participation. . . . [W]illingness to deliberate is much higher than research in political behavior might suggest, and that those most willing to deliberate are precisely those turned off by standard partisan and interest group politics. If the standard forms of participation can be embedded in a more deliberative framework, the tension between the two may well lessen. Far from rendering deliberative democratic reforms ridiculous or perverse on their own terms, these findings suggest that the deliberative approach represents opportunities for practical reform quite congruent with the aspirations of normative political theorists and average citizens alike.

Id.

of their collective expertise and information. Executive departments and agencies should also solicit public input on how we can increase and improve opportunities for public participation in Government.

Government should be collaborative. Collaboration actively engages Americans in the work of their Government. Executive departments and agencies should use innovative tools, methods, and systems to cooperate among themselves, across all levels of Government, and with nonprofit organizations, businesses, and individuals in the private sector. Executive departments and agencies should solicit public feedback to assess and improve their level of collaboration and to identify new opportunities for cooperation.²

A little over a week later, he issued another memorandum to heads of agencies announcing that he was going to conduct a thorough review of Executive Order 12,866, which governs how the White House reviews regulations.³ As such, a revised executive order on White House review could have a significant effect on the practical application of the earlier exhortations to use collaborative processes by adding both political encouragement and practical enforcement.

It therefore appears that the new administration is seriously considering just how to harness collaboration as a form of public participation and whether or not to codify procedures in a new executive order.

This article has an intentionally arrogant title that is a cover-up for some hard and fast opinions. But I have been thinking about these issues for a long time, and I thought I would use the opportunity to build on my observations and develop the resulting ideas. Collaboration is an extraordinarily powerful means for developing policy to the benefit of the public and private sectors alike. As will be developed, however, productive, true collaboration is a highly flexible process, but it is *not* formless or *ad hoc*. Rather, some important details need to be addressed; without them, the effort can fall far short of its potential and may even be counter-productive. My goal, therefore, is to highlight some of those issues so that the

2. Memorandum for the Heads of Executive Departments and Agencies on Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 26, 2009). Another example of the White House's commitment to Open Government, the Administration announced, via the White House Blog, an initiative popularly known as White House 2.0. These initiatives included Twitter, Facebook, and MySpace. The goal is to allow the public to "stay tuned in" to the Administrations workings, both popularly known and not, and have the public submit their ideas. See Vivek Kunda & Katie Statton, *New Technologies and Participation* (2009), <http://www.whitehouse.gov/blog/New-Technologies-and-Participation> (last visited Nov. 18, 2009). It will be interesting to see where this leads; I, frankly, am skeptical. Wherever it may lead, it is not the sort of collaboration and exchange of information envisioned in this article.

3. Memorandum for the Heads of Executive Departments and Agencies on Regulatory Review, 74 Fed. Reg. 5977 (Jan. 30, 2009); Exec. Order No. 12,866, 58 Fed. Reg. 51735 (1993). Exec. Order No. 12,866 requires executive branch agencies to submit both proposed and final rules to the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) for review. Exec. Order No. 12,866, 58 Fed. Reg. 51735. The intensity of the review depends on the impact of the rule as measured against the criteria of the Order. *Id.* The agency is prohibited from publishing the proposed or final rule until authorized to do so by OIRA. *Id.* As a result, if OIRA objects to part of a proposal, it will negotiate with the agency to reach an agreement on a mutually acceptable rule. The order provides a means of appeal if the two are unable to reach an agreement, although that process is rarely, if ever, used. See *id.*

new administration can capitalize on the full power of using the range of expertise available.

II. COLLABORATIVE GOVERNANCE

My original article, now more than twenty-five years old, advocated trying negotiated rulemaking—a form of collaborative governance.⁴ The idea was tentative. Indeed, there was supposed to be a question mark at the end of the title.⁵ A major purpose of the undertaking was to encourage the parties to talk and to share insights in the development of new rules since it was clear they were not doing so at the time⁶ and to provide a structure by which that might occur.⁷ Virtually all of the theory is equally applicable to other forms of policy, however. Similar issues arise with respect to the policy dimension of settling cases, such as Superfund's how to clean up the mess,⁸ developing permits,⁹ and crafting public-private relationships that will implement public issues.

The initial notions were generalized in Jody Freeman's wonderful article, which dubbed the relationship "collaborative governance," of which reg-neg¹⁰ is a part.¹¹ So, while many of my examples are from reg-neg, which is the most developed form of collaborative governance at the federal level, the points are more broadly applicable. My original article also identified a number of potential problems: the agency may be reluctant to lose control over the process; the agency may believe that it is in a better position than a neutral convener to assemble the negotiators; the process may not reduce the time and resources for a decision; and the agency may make fundamental changes in the recommendation.¹² These clearly remain challenges.

4. Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982). The Administrative Conference of the United States subsequently formally recommended the use of negotiated rulemaking. Rules and Regulations of the Administrative Conference of the United States, Recommendation 82-4, 47 Fed. Reg. 30,701-01, 30,708 (July 15, 1982).

5. There was also supposed to be a "the" before malaise to indicate it was a term of art in administrative law instead of a "general sense of depression or unease" as the American Heritage Dictionary defines it. Somehow, the final copy changes did not get made.

6. A particularly vivid example of that phenomenon arose in the first case I mediated after the adoption of the ACUS Negotiated Rulemaking recommendation. The standard in question was OSHA's benzene standard. The negotiations started after the Supreme Court had reversed and remanded OSHA's initial standard. By the time the negotiations started, OSHA had been working on the benzene standard for nine years. Yet the representatives of the major interests had only once been in the same room together—they all watched the oral arguments at the Court but they certainly did not speak to each other then.

7. See Harter, *Negotiating Regulations*, *supra* note 4.

8. See generally U.S. ENVTL. PROT. AGENCY, COMMUNITY INVOLVEMENT HANDBOOK, available at http://www.epa.gov/superfund/community/cag/pdfs/ci_handbook.pdf.

9. See generally U.S. ENVTL. PROT. AGENCY, PUBLIC INVOLVEMENT IN ENVIRONMENTAL PERMITS—A REFERENCE GUIDE, available at <http://www.epa.gov/permits/publicguide.pdf>.

10. "Reg-neg" is the colloquial term for negotiated rulemaking. The terms are reversed because an earlier version of the bill that became the Negotiated Rulemaking Act used the term "regulatory negotiation" and the abbreviation arose then.

11. See Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, (1997).

12. See Harter, *supra* note 4, at 111-12.

A vast array of collaborative processes are used at all levels of government and at all stages of public decision process—policy and adjudicative. One form that has grown in strength and breadth recently is called “deliberative democracy.”¹³ It is designed to strengthen understandings between different groups and interests—for working out disagreements and to involve a broad range of people and organizations in meaningful, productive, and respectful ways to ensure public decisions are responsive to public needs.¹⁴ Techniques run the gamut, from small discussion groups to broad polling. Many are locally oriented and encourage citizens to express ideas and needs. Many, indeed probably most, are legislative—broad policy—oriented. The term “deliberative democracy” is highly popular at the moment with or without any broadly accepted definition as to just what it is.

Other techniques focus on strengthening and clarifying views of various groups,¹⁵ resolving cases,¹⁶ setting local goals,¹⁷ resolving land use issues,¹⁸ or on tackling issues that transcend statutes or jurisdictions.¹⁹

Within the regulatory process itself, collaboration can take many forms and be employed at many different points. It might be used in a “scoping session” to develop the issues that need to be taken into account in a new rule. Or a “policy dialogue” or “roundtable” might be held in which the scientific or other important components are discussed.²⁰ The group may come together to develop recommendations to the agency concerning a proposed rule, or it might reach an agreement with the agency on the policy itself.²¹ Each of these techniques has an important role and contribution, but it is absolutely essential to be clear on the goal from the outset. The process to be used is a function of the outcome desired. It

13. Carri Hulet, *A Glossary of Deliberative Democracy Terms*, 12 DISP. RESOL. MAG. 27, 27 (Winter 2006), providing:

Deliberative democracy is a contemporary theory of civic engagement placing public deliberation at the heart of democratic governance. In contrast to traditional political theories that emphasize voting for elected representatives, deliberative democrats claim that, to produce democratic outcomes, citizens should be involved directly in formulating public policy and even in lawmaking.

14. A readily seen example of this are the 21st Century Town Hall meetings, along with many other components, of the AmericaSpeaks organization. See AmericaSpeaks, <http://www.americaspeaks.org/> (last visited Nov. 19, 2009).

15. Such as governmental or other regulatory body hearings where interest groups identify (usually through testimony) and explain their position and what stake the group has in the decision.

16. At the core of collaboration is the ability to settle issues, whether that is through rulemaking or through adjudicative decision-making. Collaboration can and is utilized in an agency’s decision-making process to settle cases.

17. This is most prevalent in policy issues that are technical in nature and thus “experts” are desirable in order to adequately craft rules. This is seen in environmental issues, such as EPA developing pollution standards, and economic regulation, such as economists discussing technical aspects of the market.

18. Such as local subdivision town hall meetings and council meetings for zoning allocation, proposed modifications to the environment, or utilization and allocation of natural resources.

19. Collaboration is useful when the law, or intersection of laws, leads to unclear direction. For example, collaboration and discussion is important when countries need to determine how differing national law effects their interaction and dealing with each other on an issue.

20. DEBORAH DALTON & PHILIP J. HARTER, BETTER DECISIONS THROUGH CONSULTATION AND COLLABORATION 11, (U.S. EPA Conflict Prevention and Resolution Center 2009), available at <http://www.epa.gov/NCEI/collaboration/>.

21. This, of course, is the purpose of a negotiated rulemaking. See 5 U.S.C. § 562 (2006) (“The purpose of a negotiated rulemaking committee is to reach “a consensus in the development of a proposed rule.”).

can be counterproductive either to be unclear or vague from the outset or to switch after the discussions are over.²²

Moreover, there is an ongoing debate as to whether the term “collaborative governance” includes simply the process of parties with varying interests working together or whether it requires an actual decision that will be implemented—the “governance” side of things. I agree with Chris Ansell in his insightful article that collaborative governance requires an agreement.²³ Indeed, I would augment this definition with one more observation: part of the agreement must be that it will be implemented by at least one of the parties to the agreement and that it will be supported by the rest.²⁴ An agreement is required for seriousness of purpose—talk is cheap without commitment. I have seen agreements when at least one major party had no intention of fulfilling any result of the collaboration—it may be the government or may be a private party—but in either event the lack of seriousness greatly affected the dynamics of the process. You can literally *feel* the difference when the decision is real as opposed to merely a recommendation that is distant from implementation. Numerous times I have watched a group put forward a recommendation and felt very good about it indeed, only to have it languish or be picked apart since direct implementation was not part of the agreement.²⁵

22. Judith Kaleta, Assistant General Counsel and the Dispute Resolution Officer of the U.S. Department of Transportation who has both convened reg negs and represented the Department in them, quipped: “You have to know where you are going before you can know whether you’ve arrived!” But far worse, the manner of participation and of the exchange of information can depend significantly on the use to be made of it. The prime example of this is when someone can agree to something only if a condition is met but the agency changes its mind and instead of treating what was done as an agreement, it converts it into a recommendation and then imposes part of the first part of the bargain but without the underlying precondition. Anyone would be justifiably outraged at such treatment.

This observation has been highlighted in a set of basic principles for agency engagement in environmental conflict resolution and collaborative problem solving that was jointly developed by the Office of Management and Budget and the Council on Environmental Quality. Those principles include: “ensure all participants and public are fully informed in a timely manner of the purpose and objectives of [the] process.” OFFICE OF MGMT. & BUDGET & COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM ON ENVIRONMENTAL CONFLICT RESOLUTION: BASIC PRINCIPLES FOR AGENCY ENGAGEMENT IN ENVIRONMENTAL CONFLICT RESOLUTION AND COLLABORATIVE PROBLEM SOLVING, available at <http://www.ecr.gov/Basics/Principles.aspx>.

23. See generally Chris Ansell & Alison Gash, *Collaborative Governance in Theory and Practice*, 18 J. OF PUB. ADMIN. RESEARCH & THEORY 543 (2008).

24. The Basic Principles for Agency Engagement in Environmental Conflict Resolution and Collaborative Problem Solving provide: “Implementation- Ensure decisions are implementable consistent with federal law and policy; parties should commit to identify roles and responsibilities necessary to implement agreement; . . . ensure parties will take steps to implement and obtain resources necessary to agreement.” MEMORANDUM ON ENVIRONMENTAL CONFLICT RESOLUTION, *supra* note 22.

25. For example, OSHA seems to have a systemic difficulty translating full consensus into a final rule, and that has generated considerable consternation among the participants to the negotiations, let alone the beneficiaries of the rule. For particularly vivid, and bitter, accounts of OSHA’s inexcusable and outrageous delay in implementing a full agreement, see Celeste Monforton, *Crane Industry Disgusted with OSHA Delay*, THE PUMP HANDLE, June 16, 2008, <http://thepumphandle.wordpress.com/2008/06/16/crane-industry-disgusted-with-osha-delay/>; see also Susan Podziba, *Safety Starts at the Top*, N.Y. TIMES, June 13, 2008, at A-31 (Ms. Podziba was the mediator for OSHA’s negotiated rule-making on crane safety standards). The root cause seems to be that there are those in OSHA that think that only they can reach the right result and that it is illegitimate to have others participate in developing a standard. Indeed, I have heard OSHA staff make precisely that assertion. That perspective is particularly interesting given the widespread view concerning OSHA’s institutional incompetence.

III. WHY ENGAGE THE PUBLIC

A. *Public Participation and Stakeholder Involvement*

“Public participation” and “stakeholder involvement” are popular sentiments in government circles.²⁶ Agencies virtually always use procedures well beyond the bare minimum of notice and comment for establishing any policy of significance, typically affording representatives of those interested in a new policy the opportunity to interact directly with officials responsible for its development.²⁷ Agencies do so for a variety of reasons:

- *Information.* Undoubtedly the most significant reason is that the outreach enhances the knowledge available to the agency when making its policy choices. That information is both substantive (illuminating the topic at hand) and political (describing the preferences of public).
- *Customers or clients.* Part of the current theory of agency management is to view the agency as an organization that provides services to the public. Thus, the public is seen as analogous to customers of a commercial firm, in that the agency needs to solicit and be responsive to their wants and needs. Gaining first-hand insight and providing an opportunity for some sort of dialogue is seen as being responsive.
- *Defuse Politicized Situations.* Expanding public involvement is one way of reducing the wrangling that surrounds some controversial policy choices. While to be sure not everyone will be happy with the outcome whatever it may be, ensuring that all can readily express their views can make it more likely that everyone will accept the outcome as a legitimate decision. Contrariwise, if little outreach is attempted, those who oppose the outcome will also denounce it as the product of a flawed, closed process that did not adequately consider opposing views. Further, broad consultation reduces the pres-

26. See, e.g., U.S. ENVTL. PROT. AGENCY, STAKEHOLDER INVOLVEMENT & PUBLIC PARTICIPATION AT THE U.S. EPA: LESSONS LEARNED, BARRIERS, & INNOVATIVE APPROACHES, EPA-100-R-00-040 (January 2001), available at <http://www.epa.gov/publicinvolvement/pdf/sipp.pdf>.

27. For example, agencies now routinely accept comments via e-mail, which has greatly reduced the transaction costs of commenting and enabled virtually anyone who cares about a proposal to submit their views. Sometimes the number of comments extend into the hundreds of thousands and many are simply indications of a person's political views as opposed to the presentation of new information or analysis. Agencies also will regularly hold public meetings to explain a proposal and take public comment. As perhaps an example of this phenomenon: “This is the second notice to producers and users of veterinary biological products, and other interested individuals, that we will be holding our 13th public meeting to discuss regulatory and policy issues related to the manufacture, distribution, and use of veterinary biological products.” Veterinary Biologics, 70 Fed. Reg. 5963 (Dep’t of Agriculture Feb. 4, 2005) (notice of public meeting).

sure on the agency since it can be made to appear that the decision is the product of a democratic choice.²⁸

- *Democratic Legitimacy.* Although administrative law has focused on increasing public participation at least since the early 1970s, it has taken on a new emphasis as government has decentralized and the potential contributions of the private sector have become recognized and embraced. Thus, a more recent reason for stakeholder involvement is the notion that it is more in keeping with democratic theory if those interested in and affected by a political decision have an opportunity to express their views to those who will make the decision. Decisions made with greater public participation are seen as more legitimate than those issued by the agency after minimal outreach.

These processes clearly result in a dialogue or negotiation in which the agency articulates its initial position through a form of consultation, such as public meetings or workshops, and then publishes a notice of proposed rulemaking; the public expresses its views in one form or another, the agency next modifies its proposal, and the whole thing may start over again for several iterations. A form of negotiation therefore is common in the development of policy. It may be direct and personal when representatives of one interest meet individually with agency officials; it may be in the form of an exchange at a public meeting; it may be through sequenced responses to public comment. But, it is usually either one-sided or formal and stilted.²⁹ While “public participation” and “stakeholder involvement” would logically connote that the public actually shares in making the final decision—after all that is the dictionary definition of “participate”³⁰—typically that is not the case. Instead, the agency remains firmly in control, and the processes are used as a means of informing the agency—substantively, procedurally, and politically.

B. Negotiating the Actual Policy

Experience has shown rather dramatically, however, that considerable benefits can result if the agency actually shares the decision-making by engaging representatives of those who will be substantially affected by the policy in its devel-

28. Surely this explains in large part the extraordinary effort the Forest Service has undertaken with respect to its “Roadless Rule” which would limit the construction of new roads in National Forests. Overall, the agency conducted more than 600 public meetings and received more than 1.5 million public comments. Dep’t of Agriculture Roadless Area Conservation Rule, 66 Fed. Reg. 3244, 3248 (Jan. 12, 2001) (codified at 36 C.F.R. pt. 294).

29. A public meeting in which members of the public are limited to a few minutes to explain their concerns or an expanded notice and comment period, even if it involves the informal media of the internet, result is in a relatively formal exchange of ideas and information. For example, I regularly ask my class in Environmental Dispute Resolution if anyone has attended a public meeting and, if so, whether they left angry because of the lack of a substantive exchange; the answer to both is inevitably “yes.”

30. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 955 (William Morris ed., Houghton Mifflin Co. 1976) (participate: take part; join or share with others).

opment.³¹ Thus, what is discussed below is a relatively structured process³² by which those representatives are identified and assembled to reach agreement on a policy with the agency that will actually be adopted.³³ Doing so frequently results in considerable benefits.

31. An extensive empirical analysis was conducted that compared rules developed through negotiated rulemaking with similar rules that were developed traditionally. Participants were extensively interviewed to understand their actual experience with negotiated rulemaking, and it was quite positive. An analysis of the study concluded:

On balance, the . . . study suggests that reg neg is superior to conventional rulemaking on virtually all of the measures that were considered. Strikingly, the process engenders a significant learning effect, especially compared to conventional rulemaking; participants report, moreover, that this learning has long-term value not confined to a particular rulemaking. Most significantly, the negotiation of rules appears to enhance the legitimacy of outcomes. [The] data indicate that process matters to perceptions of legitimacy. Moreover, . . . reg neg participant reports of higher satisfaction could not be explained by their assessments of the outcome alone. Instead, higher satisfaction seems to arise in part from a combination of process and substance variables. This suggests a link between procedure and satisfaction, which is consistent with the mounting evidence in social psychology that "satisfaction is one of the principal consequences of procedural fairness." This potential for procedure to enhance satisfaction may prove especially salutary precisely when participants do *not* favor outcomes.

Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 121 (2000) (footnotes omitted). This finding was confirmed through an intense analysis of 239 published case studies of stakeholder involvement in environmental decisions. The author concluded:

The majority of cases contained evidence of stakeholders improving decisions over the status quo; adding new information, ideas, and analysis; and having adequate access to technical and scientific resources. Processes that stressed consensus scored higher on substantive quality measures than those that did not. Indeed, the data suggested interesting relationships between the more "political" aspects of stakeholder decisionmaking, such as consensus building, and the quality of decisions.

Thomas C. Bierle, *The Quality of Stakeholder-Based Decisions: Lessons from the Case Study Record* (Resources for the Future Discussion Paper 00-56) (2000), available at <http://www.rff.org/rff/documents/rff-dp-00-56.pdf>.

Thus, the actual empirical evidence demonstrates that the consensus process of negotiated rulemaking is highly successful.

Some controversy has arisen, however, over the efficacy of negotiated rulemaking with respect to saving time and judicial review. Virtually all of it is based on a study in which Professor Cary Coglianese purported to make an empirical analysis of negotiated rulemaking by simply counting days and found that, based on the numbers he used, that it did not result in rules being developed quicker. Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1284 (1997). His research fails to take into account what actually happened in the negotiations and the goals of the sponsoring agencies, as opposed to simply assuming, as he did and which was contrary to fact, that in each instance the agency's endpoint was a notice of proposed rulemaking. See Philip J. Harter, *A Plumber Responds to the Philosophers: A Comment on Professor Menkel-Meadow's Essay on Deliberative Democracy*, 5 NEV. L.J. 379, 381-83 (2005). Indeed, when the dynamics of what the agency sought are understood, it is clear that reg-neg was fully a third faster than traditional processes. Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 49 (2000).

32. I emphasize the structure since experience has also shown that the process will not be nearly as powerful if significant shortcuts are taken. Each of the components that are outlined below serves an important purpose. See Philip J. Harter, *Fear of Commitment: An Affliction of Adolescents*, 46 DUKE L.J. 1389, 1404 (1997) (beginning the discussion of the necessity of paying heed to how the negotiators are assembled and the orientation of the entire process).

33. As will be discussed below, some policies, such as rules, require additional procedures before they can become final. It may be that during this process the agency will be required to change the decision it made during the negotiations or, indeed, the agency may—and is constitutionally entitled to—change its mind before the policy is finally adopted. The distinction between this process and the typical "stakeholder involvement" or "public participation" is that the agency actually engages in

An agency might choose to use direct negotiations among the affected interests for any of several reasons:

- *Agency is stuck.* The agency may be ensnared in controversy and simply unable to issue a final decision on the subject. It may try and yet be stopped before fruition. Frequently, such situations arise when a significant party feels that its views have not been heeded sufficiently. Gathering the relevant parties together enables them to work together, with the agency, and under the policy limits imposed by the authorizing statutes to work out a mutually agreeable solution. For example, the Occupational Safety and Health Administration (OSHA) was unable to revise its antiquated standard governing steel erection until it empanelled a negotiated rulemaking committee to develop the standard. When the Steel Erection Negotiated Rulemaking Advisory Committee reached consensus on an extraordinarily controversial rule, the issue had been on OSHA's docket for nearly twenty years, and OSHA itself had failed on two attempts to revise the standard.³⁴ Similarly, the Federal Aviation Administration unsuccessfully tried several times to revise its standards governing flight time and duty time of pilots,³⁵ until achieving its goal through negotiated rulemaking.
- *Diminish Debilitating Controversy.* It is certainly not unusual for political controversy to swirl around important regulatory decisions. Oftentimes, the controversy will cause some parties to build power in an attempt either to positively achieve its policy goal or to stop one it opposes. The volume of the discord can escalate precisely because the parties are attempting to sway those who will decide. Directly involving those affected in the decision can focus those energies and diminish the resulting entropy.
- *Acquire Better Information.* The information that is necessary to develop a good rule may be unique to the private sector. That could be hard data, "know-how," or insight as to how to address a particular problem. It may be that the best way to deploy that information is to involve those who have it in the deliberations. Otherwise, companies may be reluctant to reveal their information for fear that it will

direct negotiations with the interested parties in a quest to reach a consensus—private and public participants alike—on a new policy.

34. OSHA Construction Safety and Health Standards for Steel Erection, 29 C.F.R. pt. 1926 (2001).

35. As Neil Eisner, Assistant General Counsel for Regulation and Enforcement of the Department of Transportation explained:

The FAA was twice unsuccessful in getting to a final rule with the normal process. They were not sure they could ever successfully use the normal process to get to a rule. So they tried reg-neg and got to a final rule. . . . Similarly with the Chicago drawbridge rule, the [Coast Guard] kept getting sued and losing and having to start over.

Interview with Neil Eisner, Assistant Gen. Counsel for Regulation and Enforcement, U.S. Dep't of Transp.; and Chair, President's Comm. on Negotiated Rulemaking (as described in Harter, *Assessing the Assessors*, *supra* note 31, at 45 n.65).

be used against them in some inappropriate way.³⁶ Typically, these situations arise in technical, state-of-the-art issues.

- *No Clear Choice.* It may be that after the agency has conducted its initial investigation and research into the topic, no clear direction emerges but rather several alternatives, each with positive and negative attributes so that there is no clear policy alternative. In such a situation, the agency may wish to engage those who will be affected by the decision to see if others have insights that can lead to one route being seen as optimal.
- *Political Legitimacy.* As with public participation and stakeholder involvement, direct negotiations among the interests that lead to an actual decision (instead of mere consultation) is a way to achieve political legitimacy—indeed a far better way. The ensuing agreement has an important legitimacy that stems from the simple result of who made it.
- *Changing Public-Private Relationship.* Although the public and private spheres have never been as separate as is sometimes alleged, over the past several years it has been recognized that the two are far more interdependent than previously envisioned. The private sector is in fact responsible for a considerable amount of standard setting and enforcement, often with the prodding and oversight of the government; likewise, the government is often quite dependent on the private sector to accomplish its goals.³⁷ In fact, much of what is commonly thought of as government-imposed regulation is, in fact, a series of negotiated agreements. Moreover, command-and-control regulation has largely run its course, so new approaches are needed. The use of direct negotiations among representatives of the affected interests is a means of implementing this newly articulated relationship.
- *Synergy.* Overarching all of the other advantages of direct negotiations is the synergy that results when a group of individuals with experience, insight, and interest in a common issue come together to

36. For example, in one negotiated rulemaking in which I served as the mediator, a group of companies could agree to undertake something *but only if* certain specified conditions were also met. They would clearly not have been willing to come forward and describe their ability to undertake this action in response to a traditional notice and comment rulemaking since they could not be assured that the necessary condition would be met. Such assurance could be provided, however, in the direct negotiations. I have personally witnessed similar circumstances several times. As a variant on this theme, a trade association recently took the position during negotiations with a congressional committee that it would readily agree to a statutory requirement that the appropriate agency issue a rule *but only if* the legislation also provided that rule be developed through negotiated rulemaking.

37. See, e.g., Orly Lobel, *The Renew Deal: The Fall of Regulation and Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 343-44 (2004); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 546-47 (2000).

solve the problem in a mutually acceptable manner.³⁸ They can stimulate each other's thinking; foster creative ideas; refine and extend promising leads while weeding out less promising suggestions; determine what information is necessary for a responsible decision without wasting time and expense on unnecessary defensive work and actually obtain that data; or determine what approach will yield "the biggest bang for the buck."

- *Better Rules.* Indeed, using collaboration frequently results in considerable benefits. For example, many of the negotiated rules I am familiar with are both more stringent and yet cheaper to implement than would have been the case had the agency used traditional rule-making. How could that be? The answer is, to a very real extent, the wisdom of crowds or the benefits of a variety of expertise: those who prepare the rule have the benefit of a "shop floor expertise"—practical insights into how to solve the problem—and hence are able to judge the biggest bang for the buck. This form of participation and the resulting negotiations lead to an elusive theoretical benefit that actually materializes: an ability to reach the "sweet spot" in regulatory decisions. It is the means of overcoming the Coasean dilemma as to how to reach the point in regulation where the marginal costs equal the marginal benefits precisely because it sets up the bargaining posited by Coase,³⁹ which is virtually impossible to achieve in customary regulatory proceedings. By its nature, such a rule is designed to reach Pareto optimal values.⁴⁰ Thus, agency officials yield their putative power to impose a unilateral decision as an investment in making a better one that will be implemented.

In short, agencies use direct negotiations to achieve better results in complex, controversial issues.

38. The question might logically be asked just why the parties would do this as opposed to fight the imposition of a rule or other policy. In these cases, the agency has the authority to make the policy and will at least attempt to do so. Moreover, as will be discussed further below, all the parties taken together have sufficient countervailing power that the outcome is in doubt. Thus, no one party can be sure of what will result, other than the fact that *something* likely will happen. It is therefore in each party's interest to participate in the negotiations as a means of controlling—or at least participating in—the outcome. It is this threat of government action that is essential to stimulating the type of involvement described here. It is, therefore, a "stimulated collaboration." To put the matter in dispute resolution terms, each party's BATNA (see discussion, *infra* at IV.G) is what will happen when the policy choice is made; but that is unknown given the countervailing power. In that case, it is in their interest to help craft that choice.

39. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960).

40. "Pareto efficiency, also referred to as allocative efficiency, occurs when resources are so allocated that it is not possible to make anyone better off without making someone else worse off." OECD.org, OECD Glossary of Statistical Terms, <http://stats.oecd.org/glossary/detail.asp?ID=3275> (last visited Dec. 6, 2009).

IV. THE PROCESS OF NEGOTIATING POLICY

So much of the discussion of collaborative governance is at a high level of abstraction or philosophy. Before one can be serious about it, however, one needs to understand or at least examine a bit of plumbing: the details are important. Ironically, even those who are ardent supporters of collaboration often overlook the essential details.⁴¹ But, as was urged early on, some important fixed points—nodes in the system—need to be addressed. Thus, before we can fully appreciate collaborative governance, we need to examine a bit of just how it is done.

Federal agencies are authorized to use alternative means of dispute resolution to resolve issues in controversy that relate to an administrative program.⁴² The Negotiated Rulemaking Act (Act) makes this general authority explicit with respect to developing regulations via consensus among the interests that would be significantly affected by the rule.⁴³ The Act then sets out the procedures to be followed in negotiating a consensus on a proposed rule.⁴⁴ While the Act only addresses negotiating rules,⁴⁵ the same process can be used to develop other forms of policy. What follows is an elaboration on that process.

A. Purpose

In a negotiated rulemaking, representatives of the interests that will be significantly affected by the rule negotiate a consensus—an actual agreement—on a proposed rule or policy. The agency typically agrees to use the agreement as the basis for a Notice of Proposed Rulemaking (NPRM), and the private parties agree to support that proposal. The agency will also frequently express its intent to issue a final rule based on the notice and hence on the agreement.⁴⁶

B. A Representative Democracy

The quest in putting together the committee that will negotiate the rule or policy is to assemble a group of individuals who together represent the interests that will be significantly affected by it. While to be sure not every interest, narrowly defined, will be identified, the goal is to ensure that together the members will

41. See, e.g., Harter, *A Plumber Responds to the Philosophers*, *supra* note 31, at 381.

42. 5 U.S.C. § 572(a) (2006).

43. *Id.* §§ 561, 563(a)(2). Section 563 provides: “An agency may establish a negotiated rulemaking committee to negotiate and develop a proposed rule, if the head of the agency determines that the use of the negotiated rulemaking procedure is in the public interest.” *Id.* § 563(a).

44. See *id.* §§ 563-566. The Act makes clear, however, that while it provides a “safe harbor” of authorized and recommended procedures, it “should [not] be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process or with other innovative rulemaking procedures otherwise authorized by law.” *Id.* § 561.

45. When the procedures of the Negotiated Rulemaking Act are followed, the process is formally known as “negotiated rulemaking.”

46. See, e.g., Ground Rules of the Liquefied Compressed Gas Negotiated Rulemaking Advisory Comm. of the Research and Special Programs Admin. § 5(h) (Dep’t. of Transp.) (on file with author) (“Recognizing that it is DOT’s responsibility to issue safety regulations, DOT intends to issue a final rule that is based on the written agreement concurred in by the Committee as modified pursuant to Paragraph (e).”). The modification that is mentioned recognizes that the agency may be required to change its proposal in response to meritorious comments that are filed in response to the NPRM.

raise and debate the important facts and policies. It should be such that anyone who has an interest in the decision will be able to point to someone on the committee, or several on the committee, who will represent that person's views. Thus all may be assured that the issues of importance to them will in fact be ventilated during the deliberations on the policy.

The customary way of apportioning representatives in a democracy is by geography. The territory is divided up into funny looking shapes that are often rigged to enhance a political outcome, and a representative is chosen from within each of these polygons. In this process, people in a district whose views are shared by only forty-nine percent of the population can be relatively confident that their views will not be considered *at all* in the legislative meeting, unless by happenstance a representative from another district does so. In the case of negotiated rulemaking, instead of the territory being divided geographically, it is divided by interests.⁴⁷ Different interests will have different representatives, and together—just as the geographical model—everyone is included in some group or another. And, this way, all can be assured that their interests will in fact be raised and considered in the plenary session instead of being suppressed because it is a minority view. The goal of assembling the committee, therefore, is to collect sufficient representatives that together they will in fact represent the general populace.⁴⁸

Putting together the committee must recognize the relative benefits and roles of the public and private spheres and indeed the extent to which they are intertwined. The government reflects the public will as distilled through the legislature. As such, it sets—and enforces—the goals and boundaries of the result and consequently the deliberations themselves.⁴⁹ It customarily is the one that gathers and analyzes the data that will be used to inform the decision, although to be sure it will be refined by the other participants. Since the agency is the one with the ultimate clout, it will be the one to push recalcitrant players as to the need for change.⁵⁰ The private parties bring their insights into what is needed and how to achieve those goals; they provide the state of the art. And it is they who will feel the effects, both positive and negative, of the policy. The negotiations, therefore, are a cost-benefit analysis (CBA) on the hoof; perhaps more poignantly, CBA as currently practiced is a surrogate for this form of direct participation. Another dimension of the private sector activity is the opportunity for the beneficiaries and their nongovernmental organizations (NGOs) to push for their views in implementation.

47. Note, importantly, that this process does not give undue sway to any "special interests" or "factions" as Madison called them precisely because everyone is represented in the negotiation and no interest is accorded special treatment. Indeed, the very fact that the opposing interests will be at the table will serve to sharpen and refine the debate into a better policy.

48. Of course, not everyone will in fact be represented. But, if the committee is assembled appropriately, the information base on which the decision is made will be far broader than would result without the outreach of convening, and those who think their views were not considered will still be able to submit them in the ensuing comment period.

49. For example, one of the goals is to "communicate agency authorities, requirements, and constraints." MEMORANDUM ON ENVIRONMENTAL CONFLICT RESOLUTION, *supra* note 22, at 1.

50. It is an "If you don't, we will," situation.

C. *Convening—Assembling the Committee*

What follows is based on reg-neg, but it applies to any collaborative process in varying degrees of intensity. Some of the major questions underlying any collaboration are the following: Who were the collaborators? Was anyone left out? If so, why? Was it padded with friends and compliant folks? If so, why? How hard did anyone look when seeking diverse views? These questions are critical since the value of what you have depends on who produced it, both inclusively and exclusively.

Congregating the committee is an essential element of the reg-neg process. It is critical for three reasons. First, it is a must for political legitimacy to be sure that the appropriate interests will in fact be represented in the deliberations and the resulting agreement. Second, it is important in order to acquire the full range of insight and information on which to base the decision. Third, it is necessary to ensure that your handiwork does not get knocked down. I have seen several instances when parties were intentionally excluded, only to have them attack the proposal after the fact. While the sponsors appeared shocked at the explosion, it was certainly no surprise to any informed observer.

Thus, someone—called the “convener”⁵¹—needs to make a concerted effort to identify what issues will be raised by the rule and what interests will be significantly affected by it.⁵² To be effective, the convener needs to be rigorously impartial with respect to the policy being developed⁵³ so that he or she can speak candidly and confidentially with the potential parties about their interests and concerns.⁵⁴ As a result, the convener is often someone from outside the agency.

Parties need to be candid with the convener, and the convener needs to be candid with the agency. If a party tries to game the convener, it will be caught, and it will likely lead to delay and problems. And if the convener and the agency do not deal with each other in a relationship of mutual trust, bad things can happen.

For example, the relationship between agency and convener needs to preserve confidentiality.⁵⁵ At the moment, however, an agency is demanding that its neu-

51. A “convener” [is] a person who impartially assists an agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate in a particular rulemaking.” 5 U.S.C. § 562(3) (2006).

52. *See id.* § 563(b).

53. The Administrative Dispute Resolution Act (ADRA) provides:

[a] neutral may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.

5 U.S.C. § 573(a). A convener is a neutral under ADRA. *Id.* § 562(3).

54. A party may be reluctant to share information that would get back to the agency with attribution, which makes confidentiality important.

55. Sometimes, the convener will secure important confidential information from parties that they would not share with the agency for a variety of reasons, only to have the agency demand that the convener reveal everything. The potential conflict between promising a party confidentiality and having an agency demand that all information be turned over is examined in Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 ADMIN. L. REV. 315, 320-24 (1989). This article underlies the confidentiality section of the Administrative Dispute Resolution Act. *See* 5 U.S.C. § 574.

tral turn over all notes of confidential discussions the neutral had with the parties. The demand is substantively absurd since it flies in the teeth of the Administrative Dispute Resolution Act. Indeed the goal of the agency and its hysteria over the issue are truly bizarre. It is bad lawyering and bad policy that together taints a powerful process: why would anyone trust such an agency in the future?

The convener conducts independent research but predominately gains insight into the political dynamics of the issue by talking to those—including the agency—who will be affected. Convening does not simply rely on “the usual suspects” to come forward, which would reward the organized repeat players, but rather is a focused form of outreach. The convener works with those interests in identifying the issues that need to be resolved⁵⁶ and individuals who can suitably represent each of the interests.⁵⁷ Since this is a representative process, it is up to each interest to select its representative, not to the agency in appointing one.⁵⁸

As part of the process, the convener also assesses whether it would be likely that a committee could be assembled that would reach agreement on the policy. Criteria have developed over the years to predict when collaboration might be successful in reaching an agreement. There are a number of ways of stating them; by and large they are aimed at determining whether the parties have an incentive to converge. Factors that enter into that recommendation are:

- Are there a limited number of interests that will be significantly affected? The Negotiated Rulemaking Act provides that the committee should be limited to twenty-five participants unless the agency head determines that more are needed to ensure balanced membership.⁵⁹
- Whether appropriate individuals can represent those interests.
- Whether the issues are known, mature, and ripe for decision. Basically, this means that the issue is on the political agenda: some deci-

56. Not infrequently those in the private sector will have different views as to what is important or place different emphases on the issues. Convening identifies these differences up front so they can form the basis for the negotiations.

57. It may be that no individual would have the incentive to participate in the negotiations since the individual stake is so small even if the aggregate amount for the constituency as a whole might be very large. In such a case it may be possible that a “surrogate” could be found that would have the same interests as that of the constituency. For example, in the negotiations that led to EPA’s Reformulated Gasoline Standard, it was clear from the outset that the resulting rule would raise the price of gasoline. In the aggregate the price increase might total \$10 billion per year, yet most individuals would only incur \$200 or so of increased costs—hardly enough to merit spending several months negotiating the standard. But there are organizations that buy millions of gallons of gasoline, and they have a significant incentive to participate. In the process, they also represent the average consumer. Similarly, an insurance company may be a suitable representative in a proceeding involving safety.

58. For some reason, agencies sometimes think they can better select the representatives than can the parties themselves. My strong guess is that this is done to ensure compliant folks at the table, but it is at the cost of destroying the notion of a representative democracy and along with it the leadership that comes from having one’s own representative at the table. My strong hunch is that negotiations in which this occurs are not nearly as productive as they should be.

59. 5 U.S.C. § 565(b) (2006). A member of the committee may also represent a caucus of allied interests, each with a slightly different orientation within that interest. Experience has shown that committees get a bit unwieldy if they are larger than twenty-five.

sion will be made in the relatively near future. This provides a sense of urgency or a deadline that can inspire interests to participate precisely so they can share in making the actual decision as opposed to trusting their fate to others making suitable choices.

- Whether a party will have to compromise a *fundamental* value—one that goes to the core of its existence. These are akin to articles of faith or belief. For example, one does not negotiate which of several religions is better. Nor would it be appropriate in a negotiation to ask a company simply to go out of business or an environmental organization to sanction intentional pollution. Each would violate the very basis for the organization's existence. Fundamental does not mean large, even very large, or important. It means an essential component of the organization or interest.⁶⁰
- Whether the rule involves diverse issues of varying importance to the parties.
- Whether the outcome is genuinely in doubt. This can result, for example, if there is countervailing power on the committee so that no interest can achieve what it wants without incurring a sanction it is unwilling to accept. If one of the parties could achieve its goal directly, then it will do so and there is no point in engaging in negotiations.⁶¹
- Whether the parties view it in their interest to engage in the negotiations. Negotiation—here as elsewhere—is a voluntary process that parties engage in to make themselves better off. Thus, if some parties are forced to the table, they are not likely to be productive participants. Instead, the decision should be made as to whether those who think the negotiations should not go forward are indispensable parties, either because the interests they represent are essential or because they might have the wherewithal to prevent any resulting agreement from being implemented.
- Is the *agency* willing to rely on the process to develop the policy⁶² and to participate fully and robustly as a member of the commit-

60. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (Houghton Mifflin Company, 4th ed. 2000).

61. It is sometimes hard for agency officials to accept or admit that it may be difficult for the agency to issue the policy directly because other interests will be able to delay or change it.

62. Agencies are nothing if not extraordinarily creative in sabotaging that which they do not like. If an agency feels forced to use collaboration, it might well say, send us the report and we'll get back to you in five years or so (alas, that isn't so far-fetched given OSHA's experience with several reg-negs that it willing convened that reached full agreement) or we only changed a few words—like the essential numbers (which does occur, based on my experience).

tee?⁶³ Do the political appointees and the staff more or less agree on the important issues, and are they willing to work together?

The convener then prepares a report with recommendations to the agency.⁶⁴ The report describes the issues that need to be addressed when developing the policy;⁶⁵ identifies the interests that will be significantly affected; analyzes whether the criteria are met for predicting a successful outcome to the negotiations; and, assuming the conclusion is positive, makes a recommendation as to an appropriate committee.⁶⁶ The report is a public document⁶⁷ and is usually distributed to everyone the convener interviewed. It serves the important role of providing a common information base to those who will engage in the negotiations: everyone will then have a common understanding of the issues that will be on the table, of the varying interests that will be involved, and of the information that is likely to be important for reaching a responsible agreement. This has two important functions. First, it reduces the parties' anxiety as they approach the negotiations since they now know what is on the table (and perhaps even more important, what is *not* on the table). Second, it greatly expedites the negotiations themselves since the parties do not have to establish that common understanding as part of the negotiations but instead can begin immediately with the substance.

D. Notice of Intent

While the convening, if done right, customarily identifies interests, individuals, and issues that neither the agency nor others who were initially involved would have thought of, there is no way any convening can identify everyone or each interest. Since the negotiations can be perceived as an exercise of a representative democracy, each interest needs to have the opportunity to participate should it wish. To that end, the next stage of a reg-neg is the publication of a notice both in the Federal Register and in other publications that are likely to be read by those affected.⁶⁸ The notice announces the agency's intent to negotiate the rule and describes the issues that are anticipated to be involved in its development.⁶⁹ It also lists the interests that were initially identified and proposes a schedule for the activities of the committee.⁷⁰ Finally, it solicits comments both on the preliminary decision to negotiate the rule and on the proposed membership of the committee.⁷¹ Critically, it must provide an explanation as to how those who think they would be significantly affected by the rule but who are not represented on the committee may apply for membership.⁷²

63. See *supra* note 26, and *infra*, IV.E.-G..

64. 5 U.S.C. § 563(b)(2).

65. *Id.* § 563(b)(1)(B). While, to be sure, the agency generally has a very good grasp on those issues, sometimes during convening the private parties have different views as to what is important. That range of perspectives is articulated in the report.

66. *Id.* § 563(b)(2).

67. See *id.*

68. *Id.* § 564(a).

69. *Id.* § 564(a)(1).

70. *Id.* § 564(a)(5).

71. *Id.* § 564(a)(7).

72. *Id.* § 564(b).

An important function of the notice is that it means none can be excluded from the committee (unless, of course, one applied and was denied membership).⁷³ It also means that if some want to participate, they will need to do so in the negotiations as opposed to waiting until later.

The notice serves the vital function of a check on the accountability of the convener that ensures the job was done right.

E. Formal Establishment of the Committee

A reg-neg committee is formally an advisory committee and hence governed by the Federal Advisory Committee Act (FACA).⁷⁴ Thus, the agency must prepare a charter describing its activities and have it approved both within the agency and by the General Services Administration (GSA).⁷⁵ One of FACA's requirements is that the membership of the committee must be fairly balanced in terms of the views represented.⁷⁶ That is sometimes construed as requiring a roughly equal number of those espousing each point of view so that no one view can out vote the others. As described below, a negotiated rulemaking functions by consensus⁷⁷ so that each interest has a veto over the decision; as a result, voting is not important. Numerical balance is therefore not nearly as important for a reg-neg committee as for a committee that makes decisions by majority vote. What is important, however, is that there are enough representatives of each perspective so that no committee member will feel overwhelmed and unable to make a point because of the sheer weight of those with opposing viewpoints.

F. Role of the Agency

The agency plays an absolutely critical role in a negotiated rulemaking. If it does not take its obligation seriously, both substantively and procedurally, the result will be neither legitimate⁷⁸ nor successful. The agency, after all, represents the sovereign in the negotiations. It is responsible for implementing, for better or

73. The D.C. Circuit has held that someone who wanted to be on a reg neg committee but who was not selected lacks standing to challenge the composition of the committee. *Ctr. for Law and Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1155-61 (D.C. Cir. 2005).

74. 5 U.S.C. app. § 2 (2006). "In establishing and administering [a negotiated rulemaking] committee, the agency shall comply with the Federal Advisory Committee Act [5 U.S.C. app 2.] with respect to such committee, except as otherwise provided in this subchapter." *Id.* § 565(a)(1).

75. Federal Advisory Committee Act, 5 U.S.C. app. 2 § 7; 41 CFR § 102-3.100. For a general description of what is required before an advisory committee can actually meet to develop a recommendation to an agency, see the brochure published by GSA. See U.S. GENERAL SERVICES ADMINISTRATION, OFFICE OF GOVERNMENTAL POLICY, THE FEDERAL ADVISORY COMMITTEE ACT (FACA) BROCHURE ¶¶ 4, 9-10 (2009) available at http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_BASIC&contentId=11869&noc=T.

76. 5 U.S.C. app. 2 § 5(b)(2).

77. See 5 U.S.C. § 563(a)(3)(B). For a further discussion of how consensus works, see *infra* § IV.I.

78. That is, if an agency were to simply rubber stamp a decision made by a committee without its active participation, it would be no more legitimate than if the agency were to adopt a proposal submitted by a party or group of parties in a Notice and Comment proceeding. Instead, legitimacy comes through deliberation and careful consideration on the part of the agency, be it in a negotiation or in the hierarchical process of traditional APA rulemaking. While the result would likely be more balanced and acceptable to a broader range of constituents, it still cannot be said to be the work of the agency.

for worse, the policy choices made by the body politic as embodied in legislation. Statutes typically afford considerable latitude in making policy choices, and agencies enjoy broad discretion in enforcement matters. Organic statutes rarely dictate a single “right” answer, but rather they usually afford leeway as to how to achieve the statutory goal. That is the stuff of negotiation: it is the agency’s obligation to ensure that the result is within the bounds of the statute,⁷⁹ and the negotiations concern how to get to the desired goal. Thus, the agency is clearly the primary player in a negotiation—the first among equals. That is the case not just because the agency represents the government, but because the agency will forcibly implement the decision.⁸⁰

But it would destroy the entire purpose of a negotiation if the agency were to attempt to dictate a result. That would not only undermine the very function of the negotiation—which is to build on the collective expertise and acceptance of the committee and its constituents—but it will also likely result in angering committee members; since they would feel the agency misled them into believing they could contribute to the development of a policy important to them. Since the private parties customarily deal with the agency in a hierarchical manner in which the agency alone makes the decision, they frequently are not accustomed to an open give-and-take among committee members. Thus, while the agency needs to

79. That said, it is also appropriate to provide some deference to a committee’s collective judgment that its decision is within the statutory precepts. For example, Patricia M. Wald, formerly Chief Judge of the D.C. Circuit, wrote:

My own feeling is that the court should be able to take account of consensus as a factor suggesting the reasonableness of the rule. That in turn may justify a more modest amount of factual justification and explanation of rationale than is required in the usual statement of basis and purpose for a rule. When the agency follows that course, however, it always runs some risk that an outlier, or even one who has previously signed on, will later bring a challenge on the merits or even challenge the negotiation process during the comment period. And the reviewing court must still have an irreducible minimum of backup evidence; one can’t expect courts to abdicate their responsibility of ensuring that the agency has given some plausible reasons for all aspects of the rule that affect the public interest. A reviewing court must be ever mindful of the bare possibility that the parties have conducted their horse-trading without regard for some public interest meant to be protected by the statute. Indeed, the best insurance against reg neg deteriorating into the interest-bargaining paradigm . . . lies in the requirement that judicial review accord with the APA’s baseline standards of rationality.

Patricia M. Wald, *ADR and the Courts: An Update*, 46 DUKE L.J. 1445, 1468 (1997).

The prospect of judicial review is certainly a powerful incentive for the parties to adhere to the various requirements. That said, however, if a rule is developed through the deliberation of a diverse group which reaches a consensus that it is within the scope of the authorizing statute, it would seem appropriate for a reviewing court to provide at least a bit of play in the statutory interpretation. As I argued in an earlier article, after reviewing a number of the points of judicial review, “If [the] range of interests is broad enough so that one may be confident that the relevant issues are raised and thrashed out, the court should at least require a challenger to come up with a good explanation as to why” the interpretation is invalid. Philip J. Harter, *The Role of Courts in Regulatory Negotiation—A Response to Judge Wald*, 11 COLUM. J. ENVTL. L. 51, 69 (1986). (Given the respective dates, this article was obviously part of an earlier exchange and was not in response to the one above.)

Further, the very process by which the committee functions ensures that its decision will not likely stray from a statutory mandate. See *infra* § IV.1.

80. Reg-negs are decisions about employing force, coercion; they direct private sector participants as to what must be done and determine the rights of beneficiaries. It is therefore essential that they comply with the criteria that the citizenry has decided are appropriate. If, on the other hand, the decision to be made lacks force and is to be implemented “voluntarily,” then the government’s role is different and its participation in such a negotiation—such as the development of a consensus standard—is as an interested party with insight and expertise, but not as one implementing a collective will.

guide the negotiations and determine its boundaries, it often needs to stimulate that discussion, encouraging the parties to put forth ideas and assuring them that it is “safe” to talk. It is precisely the resulting synergy that is so important and beneficial in developing a powerful result.

Since the parties—public and private alike—work together to develop a mutually acceptable policy, the process is seen as a form of collaboration, as a form of “collaborative governance,”⁸¹ in which responsibilities are shared between public and private spheres. It is indeed that, but it is more. It is a “stimulated collaboration” since one of the parties—the agency—has the authority and responsibility to achieve a societally determined goal, and the threat that it may act can be a major stimulus towards undertaking the collaborative effort and keeping it within bounds.

G. Agency Must Be an Active Participant

Sometimes the agency takes the position in a negotiation among its stakeholders that it will accept and implement the result if all of them agree to a particular outcome. The reasoning, of course, is that the parties would not agree to anything outside the statutory mandate, and if all of them agreed, it must be a good result. If that is the agency’s view, it then takes a passive role in the negotiations, frequently serving almost as an observer. The agency often says that it will remain silent so as not to interfere with the ability of the private representatives in reaching an agreement.

This attitude and behavior are problematic for three reasons:

- As has already been argued, a major component of the legitimacy of a negotiated policy is that the agency has made its *own* decision that it fits within the agency’s authority.
- If the agency itself is passive, then it is not able to enhance its own interests in the negotiation, whatever they may be.
- Instead of fostering convergence, the agency’s lack of robust participation actually inhibits the committee from reaching agreement. While this is certainly counterintuitive, it results directly from negotiation theory. The only reason parties negotiate is to improve their positions. In order to improve your position, you must have a fairly decent idea as to what will happen if you are not able to negotiate an agreement. Or, in the now popular term coined by Fisher and Ury,⁸² each party needs to determine its best alternative to a negotiated agreement (BATNA). Since the premise of the negotiation is that a decision on a new regulation will likely be made in the near future, a

81. See Freeman, *supra* note 11, at 2 (“Collaborative governance requires problem solving, broad participation, provisional solutions, the sharing of regulatory responsibility across the public-private divide, and a flexible, engaged agency.”).

82. See ROGER FISHER & WILLIAM URY, GETTING TO YES 104 (Bruce Patton, ed., Penguin Books 1983).

party's BATNA is its prediction as to what the regulation will provide if the negotiations are not successful. But the agency, the one that presumably would issue the rule, remains silent, so none can determine its BATNA, and hence none can determine what position it should take in the negotiations. The classic response to that dilemma is to continue discussions in the hope that the situation will be clearer; the parties keep talking but do not converge. And, alas, that is precisely the situation that usually happens when the agency remains passive in a negotiation.⁸³

The agency therefore needs to play a carefully balanced role: it needs to actively stimulate creative problem solving, participate robustly in the problem solving, and not be perceived as dictating the result.

H. The Mediator

This is not the place to discuss the role and qualities of a good mediator.⁸⁴ But, given the primacy of the agency's representative in a policy negotiation, the roles of the agency and the mediator can sometimes be confounded.

The negotiations take place in two dimensions: substantive (what is being decided) and procedural (how is the decision being made). The agency's lead role is in the substantive arena; it needs to guide and shape the substantive outcome of the deliberations. If the process is to function well, however, the mediator needs to be in the control of the procedural dimension. The committee, including the agency, needs to authorize the mediator to lead and stimulate the committee into making a creative, informed decision. That may at times require the mediator to deliver bad news or to push a party or to point out inappropriate behavior. To do so, the mediator needs to be trusted by all of the parties and not be seen as an agent of one of them. Thus, the process breaks down if anyone—in this case, especially the agency—tries to direct or control the behavior of the mediator in an effort to influence the conduct of the negotiations. If that does happen, other parties will likely not be as forthcoming or open as they otherwise would and convergence into a good rule is less likely. Moreover, allowing the mediator to take the lead procedurally frees the agency to focus on its primary goal, that of the substance of the rule.

To function effectively, the parties need to regard the mediator as an independent professional who is equipped by education and experience to guide the committee towards the resolution of a complex, controversial issue of high impor-

83. I have personally observed the phenomenon several times. The first time I saw it, I thought it was odd since the agency had provided full freedom to come up with a creative solution. Exactly the same thing happened the second time I was in a negotiation where the agency was passive. I then concluded that the first was not an aberration and that led to the preceding analysis that explained it.

84. In addition to the general literature on mediation, see SOC'Y OF PROF'LS IN DISPUTE RESOLUTION, *BEST PRACTICES FOR GOVERNMENT AGENCIES: GUIDELINES FOR USING COLLABORATIVE AGREEMENT-SEEKING PROCESSES* (1997), available at http://acnet.org/acrlibrary/more.php?id=13_0_1_0_M.; see also SOC'Y OF PROF'LS IN DISPUTE RESOLUTION, *COMPETENCIES FOR MEDIATORS OF COMPLEX PUBLIC DISPUTES* (1992), available at <http://www.odrc.state.or.us/documents/COMPETENCIESFORPUBLICDISPUTERESOLVERS.pdf>.

tance. Otherwise the mediator's effectiveness is significantly curtailed, and the role is reduced to that of a facilitator at best.

I. Consensus

Consensus is often misunderstood. It is typically used, derisively, to mean a group decision that is the consequence of a "group think" that resulted from little or no exploration of the issues, with neither general inquiry, discussion, nor deliberation. A common example would be the boss's saying, "Do we all agree? . . . Good, we have a consensus!" In this context, consensus is the acquiescence to an accepted point of view. It is, as is often alleged, the lowest common denominator that is developed precisely to avoid controversy as opposed to generating a better answer. It is a decision resulting from the *lack of diversity*. It is in fact actually a cascade that may be more extreme than the views of *any* member!⁸⁵ Thus, the question legitimately is, if this is the understanding of the term, would you want it if you could get it, or would the result be too diluted? A number of articles posit, with neither understanding nor research, that it *always* results in the least common denominator.⁸⁶

Done right, however, consensus is exactly the opposite: it is the wisdom of crowds. It builds on the insights and experiences of diversity. And it is a vital element of collaborative governance in terms of actually reaching agreement and in terms of the quality of the resulting agreement. That undoubtedly sounds counterintuitive, especially for the difficult, complex, controversial matters that are customarily the subject of direct negotiations among governments and their constituents. Indeed, you often hear that it can't be done.⁸⁷ One would expect that the controversy would make consensus unlikely or that if concurrence were obtained, it would likely be so watered down—that least common denominator

85. Cass R. Sunstein, *Deliberating Groups Versus Prediction Markets (Or Hayek's Challenge To Habermas)*, (Univ. of Chicago Law & Econ., Olin Working Paper No. 321, 2007; Univ. of Chicago Pub. Law Working Paper No. 146), available at http://ssrn.com/abstract_id=956189; see also Cass R. Sunstein, *The Law of Group Polarization*, (Univ. of Chi. Law School, John M. Olin Law & Econ. Working Paper No. 91, 1999), available at <http://ssrn.com/abstract=199668>.

86. See, e.g., Cary Coglianese, *Collaborative Environmental Law: Pro and Con*, 156 U. PA. L. REV. 289, 297-98 (2007).

87. See, e.g., *id.* at 296 ("As appealing as this Rawlsian aspiration may be, it is not at all feasible for making real-world decisions about major environmental problems. Environmental impacts are inherently diffuse, affecting large numbers of people; it is simply not possible for everyone affected by major environmental problems to sit down and talk things over."); RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO, & PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 335-36 (Foundation Press 3d ed. 1999) (1985) ("Reg-neg will never prove effective as a means of issuing a major rule that has disparate [sic] effects on many interests, however. No amount of negotiation can yield consensus with respect to such a rule.") These bald assertions are supported by precisely zero citations and an equal amount of analysis of some of the truly complex rules that have been negotiated. That is bombast, not scholarship. Pierce, Shapiro, and Verkuil added a new sentence at the end of this section: "An empirical study of the use of Reg-Neg found it does not save time, money, or resources, and that it does not reduce conflict." Richard J. Pierce, Jr., Sidney A. Shapiro, & Paul R. Verkuil, *ADMINISTRATIVE LAW AND PROCESS* 348-49 (Foundation Press 5th ed. 2009). They cite Coglianese, *supra* note 31, for this proposition. They do not, however, cite another empirical study that casts serious doubt on Coglianese's research. See, e.g., Harter, *supra* note 31. Nor do they undertake a review of any of the extraordinarily dramatic results that have been achieved through collaboration. The allegation of bombast remains.

again—that it would not be worth much. But, interestingly, it has exactly the opposite effect.

Consensus can mean many things so it is important to understand what is consensus for these purposes. The default definition of consensus in the Negotiated Rulemaking Act is the “unanimous concurrence among the interests represented on [the] . . . committee.”⁸⁸ Thus, each interest has a veto over the decision, and any party may block a final agreement by withholding concurrence.

Consensus has a significant impact on how the negotiations actually function:

- It makes it “safe” to come to the table. If the committee were to make decisions by voting, even if a supermajority were required, a party might fear being outvoted. In that case, it would logically continue to build power to achieve its will outside the negotiations. Instead, it has the power inside the room to prevent something from happening that it cannot live with. Thus, at least for the duration of the negotiations, the party can focus on the substance of the policy and not build political might.
- The committee is converted from a group of disparate, often antagonistic, interests into one with a common purpose: reaching a mutually acceptable agreement. During a policy negotiation such as this, you can actually feel the committee snap together into a coherent whole when the members realize that.
- It forces the parties to deal with each other which prevents “rolling” someone: “OK, I have the votes, so shut up and let’s vote.” Rolling someone in a negotiation is a very good way to create an opponent, to you and to any resulting agreement. Having to actually listen to each other also creates a friction of ideas that results in better decisions—instead of a cascade, it generates the “wisdom of crowds.”
- It enables the parties to make sophisticated proposals in which they agree to do something, but only if other parties agree to do something in return. These “if but only if” offers cannot be made in a voting situation for fear that the offeror would not obtain the necessary quid pro quo.
- It also enables the parties to develop and present information they might otherwise be reluctant to share for fear of its being misused or used against them. A veto prevents that.
- If a party cannot control the decision, it will logically amass as much factual information as possible in order to limit the discretion available to the one making the decision; the theory is that if you win on the facts, the range of choices as to what to do on the policy is considerably narrowed. Thus, records are stuffed with data that may well

88. 5 U.S.C. § 562(2) (2006).

be irrelevant to the outcome or on which the parties largely agree. If the decision is made by consensus, the parties *do* control the outcome, and as a result, they can concentrate on making the final decision. The question for the committee then becomes, how much information do we need to make a responsible resolution? The committee may not need to resolve many of the underlying facts before a policy choice is clear. Interestingly, therefore, the use of consensus can significantly reduce the amount of defensive (or probably more accurately, offensive) record-building that customarily attends adversarial processes.

- It forces the parties to look at the agreement as a whole—consensus is reached only on the entire package, not its individual elements. The very essence of negotiation is that different parties value issues differently. What is important to one party is not so important to another, and that makes for trades that maximize overall value. The resulting agreement can be analogized to buying a house: something is *always* wrong with any house you would consider buying (price, location, kitchen needs repair, etc.), but you cannot buy only part of a house or move it to another location; the choice must be made as to which house—the entire thing—you will purchase.
- It also means that the resulting decision will not stray from the statutory mandate. That is because one of the parties to the negotiation is very likely to benefit from an adherence to the statutory requirements and would not concur in a decision that did not implement it.⁸⁹
- Finally, if all of the parties represented concur in the outcome, the likelihood of a successful challenge is greatly reduced so that the decision has a rare degree of finality.

89. It may be, of course, that all parties might be better off by a different scheme for achieving the goal. For example, some scholars have argued that for some of the workplace hazards that are addressed by the Occupational Safety and Health Administration, everyone would be better off—employee and employer alike—under a regime where better information as to the hazards were developed and then addressed through collective bargaining instead of the engineering standards dictated by the Occupational Safety and Health Act. See generally Thomas A. Lambert, *Avoiding Regulatory Mismatch In The Workplace: An Informational Approach to Workplace Safety Regulation*, 82 NEB. L. REV. 1006 (2004). If this is indeed the case, then all parties may have an incentive to forget the statutory mandate and agree to the more efficient and effective scheme. But, that is what courts are for: judicial review is available for anyone who is aggrieved by the deviation.

There has been an interesting debate over one negotiated rule that some allege is outside the scope of the authorizing statute, but no one challenged it. Some have argued that the result is illegitimate; others contend that it was obviously “close enough” and undoubtedly achieved the statutory goal did better than if the statute’s means had been rigorously met. Compare William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L. J. 1351 (1997) with Philip J. Harter, *In Search of Goldilocks: Democracy, Participation, and Government*, 10 PENN ST. ENVTL. L. REV. 113 (2002). Whatever else, it also seems relevant to the debate that the structure that was ultimately adopted was proposed by EPA, not some renegade committee. In that case, the real problem seems to be that everyone liked the result, and that is obviously unacceptable for a regulatory action.

J. Agreement on a Proposed Rule

The goal of the committee is to reach an agreement on a proposed—not final—rule.⁹⁰ The agency must still use its normal process to convert the proposal into a final rule, and it must comply with generally applicable norms of administrative law in doing so. Thus, if someone files a meritorious comment, the agency will be required to change the proposal.⁹¹ And, indeed, the agency likely is not bound by the agreement and could change its mind either at the NPRM or final rule stage. Judge Posner has questioned the ability of an agency to make such a commitment, but his assertion came in a case in which it appeared there was in fact no actual agreement.⁹² Moreover, it seems likely that as a constitutional matter, it is fully authorized to change its mind when it believes that doing so would better serve the public interest within the meaning of the operative statute.

While the agency likely has the legal authority to change its mind, it should take the agreement, and its commitment under the agreement, very seriously lest it both develop an immediate political problem for itself—the participants would understandably be irked at spending considerable resources only to have the agency jilt them, and others might be reluctant to participate in the future if the agency were to regard their contributions so callously. In short, the agency should have a very good reason for changing its mind and should do so in only very unusual situations.⁹³

K. A Variant of Collaborative Rulemaking

The process as has been developed is a relatively structured endeavor that is designed to ensure that representatives of the affected parties identify the significant issues, develop the relevant information, and work together to reach a mutually acceptable outcome. The focus has been on the structure. But the structure is in many ways a means to an end: an open-minded collaboration with the shared quest of reaching an agreement that will be implemented. There are other important ways by which this can be achieved besides empanelling a group of representatives that meet as a group.

90. 5 U.S.C. § 563(a)(7) (2006). The Negotiated Rulemaking Act provides: “[T]he agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.” *Id.*

91. Some agencies empanel the reg neg committee after the NPRM to review the comments and to provide its recommendation to the agency as to whether any changes are appropriate. For example, the Coast Guard did that in its negotiated rulemaking for Vessel Response Plans under the Oil Pollution Control Act of 1990. Vessel Response Plans, Notice of Proposed Rulemaking, 57 Fed. Reg. 27,514 (proposed June 19, 1992) (to be codified at 33 C.F.R. pt. 155); Vessel Response Plans, Interim Final Rule, 58 Fed. Reg. 7376, 7378 (Feb. 5, 1993) (to be codified in 33 C.F.R. pt. 155).

92. See *USA Group Loan Servs., Inc., v. Riley*, 82 F.3d 708 (7th Cir. 1996).

93. Meritorious comments submitted in response to an NPRM that point out information or policy that was not adequately considered by the committee and hence the agency would be such exigent circumstances.

The Environmental Protection Agency (EPA), for example, used a variant of the typical reg-neg process to develop its rule regarding the control of emissions from nonroad diesel engines.⁹⁴ As the agency explained:

EPA's strategy for the collaborative process required intensive stakeholder outreach, involving one-on-one interaction with individual companies and groups. This approach was effective for fostering a sense of trust for the collaboration, and, moreover, the stakeholders claimed ownership of the rule, and were able to see their efforts in the final product.

What Made the Clean Air Nonroad Diesel Rule Unique

The Nonroad Diesel Rule was distinguished by the level and manner of public involvement that went into creating it. EPA took time to actively engage industry stakeholders early and all throughout the process. In contrast to standard practice, the Office of Management and Budget (OMB) was also involved early in the process. The collaboration between OMB and EPA allowed the rulemaking effort to proceed on an expedited basis. Additionally, EPA employed a shuttle diplomacy approach. Essentially, the Agency communicated directly with the broadly represented individual stakeholders rather than convening large groups from disparate sectors. . . . Large gatherings impeded open communication because stakeholders were concerned about revealing—thus compromising—competitive advantage.⁹⁵

EPA's analysis of the success of the undertaking included:

- a convener of stature (in this case, it was EPA, OMB, and the White House itself);
- the agency was a committed leader in the collaborative process;
- the appropriate representatives were present; and
- a clearly defined purpose.⁹⁶

This variant of the process clearly worked very well.⁹⁷

I have been told that another example of this approach is the very recent proposed rule on auto mileage and emissions that was announced on September 15,

94. See EPA Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel, 69 Fed. Reg. 38,958 (June 29, 2004) (codified in 40 C.F.R. pts. 9, 69, 80, 86, 89, 94, 1039, 1048, 1051, 1065 & 1068).

95. U.S. EVNT'L. PROT. AGENCY, SOLVING ENVIRONMENTAL PROBLEMS THROUGH COLLABORATION—A CASE STUDY, available at <http://www.epa.gov/ncei/collaboration/nonroaddiesel.pdf>.

96. *Id.*

97. In addition to the positive description provided by the agency itself, I interviewed a number of the participants and they were of a like mind as to its success.

2009.⁹⁸ There are many indications that a process similar to the one described above was used to craft a general agreement on the proposal.

V. CONCEPTUAL CRITICISMS

A number of conceptual criticisms have been leveled against the notion of collaborating on policy, many of which really are rooted in the idea that only an agency can determine and impose policy and that it should do so unilaterally.⁹⁹ Much, indeed probably most, of the conceptual criticism of collaboration is a repudiation that the private sector has a substantive role in making public decisions. And this, in turn, relies on a misconception of the New Deal, expert model so wonderfully articulated by Professor Stewart:

Defenders flaunted the breadth of the discretion afforded the new agencies by Congress, maintaining that such discretion was necessary if the agencies were to discharge their planning and managerial functions successfully and restore health to the various sectors of the economy for which they were responsible. Given the assumption that the agencies' role was that of manager or planner with an ascertainable goal, "expertise" could plausibly be advocated as a solution to the problem of discretion if the agency's goal could be realized through the knowledge that comes from specialized experience. For in that case the discretion that the administrator enjoys is more apparent than real. The policy to be set is simply a function of the goal to be achieved and the state of the world. There may be a trial and error process in finding the best means of achieving the posited goal, but persons subject to the administrator's control are no more liable to his arbitrary will than are patients remitted to the care of a skilled doctor. This analysis underlay the notion that administrators were not political, but professional, and that public administration has an objective basis. It also supported arguments by New Deal defenders that it would be unwise for the Congress to lay down detailed prescriptions in advance, and intolerably inefficient to require administrators to follow rigid judicial procedures.¹⁰⁰

Note, importantly, the argument is that the existence of technocratic expertise limits discretion and hence legitimizes a broad grant of authority to the agency. It does not say that the body politic should defer to agencies *because* they are experts. Rather, the expertise must come first. Nor does the theory say that only the agencies are experts and that only they have the answers.

98. Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49,454 (proposed Sept. 28, 2009).

99. Indeed, that argument even extends to excluding the White House and the Executive Office of the President: the agency and the agency alone decides. See, e.g., Public Comments on OMB Recommendations for a new Executive Order on Regulatory Review, available at <http://www.reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp>. See also Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 462 (1987).

100. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1677-78 (1975).

Let's examine some of the criticisms.

A. *Inappropriate Departure from an Agency-centric Process*

Although collaboration might appear to be an abrupt, and perhaps illegitimate or even illegal, departure from the traditional “agency-centric” process, if properly done, it is not: no policy will be made without the explicit concurrence of the agency. Hence it is *not* delegation by the agency to private actors.¹⁰¹ This may seem naïve and far more theoretical than reflecting what actually occurs—it is often alleged in the literature that agencies “sell out” in order to achieve agreement.¹⁰² But, as one who has seen a lot of these things in action, I have never seen that happen. Indeed, if it did, the agency would quite logically and realistically be concerned about getting hammered by Congress, if not a court. To be sure, some in the agency may not be happy with the outcome, just as they would not be in any policy process; that is the nature of the internal policy debate since agencies are not monoliths. Is the result different than if the agency went it alone? To be sure! That is precisely why you do it.

But the result must still be within the agency's envelope, and it probably achieved its initial goal better. Indeed, the objective of the agency in the negotiations should be to achieve whatever goal it would seek to achieve in a traditional policy process. Thus, the agency's role in a negotiation is precisely the same as in the traditional concept of an agency:

- the negotiations supplement its information base, just as notice and comment or hybrid procedures do;
- the agency is still as much of an expert as it was before;
- the final decision is the agency's—even though the others agree with it; and
- the agency—in all its magic—divines just what the public interest is, but with a little help from its friends.

B. *Only Agencies Know Where to Find the Public Interest*

Another criticism is that collaborating in a decision changes the nature of the agency. In this view, only agencies are able to determine just what is the “public interest.”¹⁰³ This, of course, raises some interesting questions: foremost is just what we mean by the “public interest.” What are its components; what goes into its calculations? It is treated almost as if it were something real, something tangi-

101. One senior agency official quipped that she and she alone was empowered to make the decision, but it sure didn't hurt to have the others agreeing with her!

102. Cary Coglianese, *Is Consensus an Appropriate Basis for Regulatory Policy?*, in ENVIRONMENTAL CONTRACTS: COMPARATIVE APPROACHES TO REGULATORY INNOVATION IN THE UNITED STATES AND EUROPE 93, 93-113 (Eric Orts & Kurt Deketelaere, eds., 2001).

103. Funk, *supra* note 89; William Funk, *When Smoke Gets In Your Eyes: Regulatory Negotiation And The Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55 (1987).

ble, something explicit. If so, where does it live? Where is stored? It is asserted as if it were the famously rejected “brooding omnipresence.”¹⁰⁴ But even if it did exist, why is it that only government officials can see it or interpret it like the Oracles at Delphi, and likely with similarly accurate results? Instead, the “public interest”—whatever it may be—is determined through careful analysis and the clash of ideas and interests: precisely the stuff of deliberative collaboration.

Indeed, collaboration does not change the duty of the agency in ensuring that the decision is within statutory bounds and achieves the evanescent public interest.¹⁰⁵ What is different, however, is the attitude of the agency. Instead of the traditional process in which it functions as if it were acting unilaterally after consultation, the agency recognizes the legitimate views and welcomes the actual participation of those affected in making the decision.

C. Civic Republicanism

Collaboration is also consistent with the ideas of civic republicanism that celebrate careful deliberation.¹⁰⁶ In the traditional concept that deliberation takes place within the agency itself, it is now largely enforced by tenets of administrative law that push a “rational” decision. But the deliberation of civic republicanism can also be coupled with modern notions of democracy in the form of collaboration under procedures that foster the vaunted deliberation across a broader reach of participants.

D. The New Order

It would be better to recognize a new, more realistic concept of the agency in the post command-and-control era. Now is the time to recognize that much, if not the vast bulk, of the technical expertise lies in the private sector. And yet, much of the criticism is as if Dick Stewart’s transmission belt¹⁰⁷ was still cranking away with agencies delivering the goods for Congress through their dispassionate expertise. That level of expertise probably never existed, and it certainly does not now. Clearly, as any observer or even remote participant can see, agencies do not make technocratic decisions in isolation. Rather, they are already buffeted by multiple forces: the Office of Information and Regulatory Affairs (OIRA); the Office of Management and Budget (OMB); the other parts of the Executive Office of the President (ExOp); the President himself; Congress as a whole but more likely its many, many committees; the courts; and, finally, by public participation itself. It

104. *Guaranty Trust Co. v. York*, 326 U.S. 99, 102 (1945). After reviewing such a conception of the common law, Mr. Justice Holmes famously asserted: “[b]ut there is no such body of law.” *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting). Nor eighty years later does the public interest exist as an ascertainable doctrine with independent existence.

105. ECR Basic Principles are as follows: ensure decisions are implementable consistent with federal law and policy. INTERAGENCY INITIATIVE TO FOSTER COLLABORATIVE PROBLEM SOLVING AND ENVIRONMENTAL CONFLICT RESOLUTION, BRIEFING REPORT FOR FEDERAL DEPARTMENT LEADERSHIP, June 2004 (Revised May 2005), available at <http://www.ecr.gov/pdf/BR.pdf>.

106. Cass R. Sunstein, *Beyond The Republican Revival*, 97 YALE L.J. 1539 (1988).

107. Stewart, *supra* note 100, at 1676-1677.

is time to appreciate that agencies are part of a constellation and to adapt the underlying theory of administrative law to that political reality.

There are many ideas and ways to achieve the public goal. Statutes rarely dictate a single result; rather the agency retains discretion. If not, there is nothing to negotiate anyhow; for that matter using notice and comment would be superfluous. If the agency is sure of the result, it should not use collaboration since, as the criteria described above indicate, it should be used only when the outcome is genuinely in doubt. Agency officials and staff have no monopoly on seeing the public interest. While the role of the agency is to ensure conformance to legislative and public policy requirements, the *means* of doing so may be better developed by a broader involvement. Or, as the old expression has it: agency steers; private sector rows.¹⁰⁸

VI. RECENT EXPERIENCE WITH COLLABORATION

What follows is a bit harsh and intentionally provocative. But the core is real and needs to be addressed if we are to tap the potential of collaborative governance. It is based on my own observations and experience, as well as discussions with public and private participants, senior agency officials, and many senior mediators.

A. *Convening*

It appears to be fairly common now for agencies to take significant shortcuts in convening the committee—assembling those with whom it will negotiate or collaborate.¹⁰⁹ A consequence is that agencies not infrequently appoint the representatives of the respective interests—indeed the interests themselves—even though that violates the theory of what is at stake, as has been recognized repeatedly.¹¹⁰ As a result, less effort is being made to ensure that all of the parties are there and that the issues are carefully defined *before* the deliberations start. Most mediators, on the other hand, view it as a—if not *the*—critical phase of the process. And, indeed, a convening usually expedites the deliberations themselves by providing a common framework and orientation to all the parties on which the can build collectively. As a result, convening is more an investment as opposed to a bother.

108. DAVID OSBORNE AND TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 25 (1993).

109. Either the agency will simply choose from among those whom it already assumes would be interested, or in might put out a call for those who are interested to identify themselves to the agency. In either event, there is little or no outreach to identify other interests—those who are *not* the usual suspects—or to understand the political dynamics of their varying perspectives.

110. MEMORANDUM ON ENVIRONMENTAL CONFLICT RESOLUTION, *supra* note 22 (ECR Basic Principle: all parties should be willing and able to participate and select their own representative).

B. Consensus

Although agencies continue to collaborate, more of their effort is directed towards a collaboration—working together¹¹¹—shy of agreement. In such a process, the agency makes it clear from the outset that it will make the final choice; the agency remains in charge. The argument goes that you get “almost everything” from such an arrangement, as contrasted with one that seeks a consensus on an agreement. But, of course, some major things are missing: most importantly a resolution of the controversial, difficult issues and help in implementation. This naturally raises serious concerns over implementation: how many of these “collaboration lite” processes are actually implemented in a timely fashion?¹¹² Moreover, it would be interesting to assess the quality of the results—my experience is that they are nowhere near as deep.

C. Agency Expertise

When the agency is in fact an expert in the subject of the negotiation, the process is exciting indeed. The agency can lead, and the private sector challenges and extends the ideas developed. A form of peer review results in a collaborative quest for that elusive public interest. A retired career agency participant recently wrote in response to my sending him the brochure for a conference on collaborative governance and said the reg-neg “project is one I was most proud of—both in terms of the process and the . . . good that it accomplished.” Exciting indeed.

But when the agency is not really an expert that is intimate with the state of the art, there are frequently problems with the negotiations: the issues are not joined nearly as intensely, and the agency often hides behind a rouge notion of expertise. Instead, the exchange will degenerate into, “We’re right simply *because* we are the agency,” while it mindlessly invokes the notion—if not the fact—of expertise as the reason for deference. The insecurity is accompanied by a need to control the results of the process, and senior officials will often not confront the other participants for fear of not prevailing. Rather, it will simply change the result after the agreement or recommendation.¹¹³

It appears to me and to many that I interviewed, both in and out of government, that the level of expertise—knowledge of the state of the art—is decreasing for many reasons. One, certainly, is the lack of funding for the agencies to do their jobs right after being assigned their duties by Congress. As a result, agencies simply cannot afford to hire or retain the expertise on their internal staffs. Moreover, until very recently, government service has not been as fashionable as it once was. For thirty years, Presidents have run against those who work for the government and demeaned their efforts. The new hires often lack broad, technical experience. Expertise is not as valued for promotion as it used to be since the

111. See Ansell, *supra* note 23; Jeffery Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning Of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 1001-1002 (2008).

112. While I have not conducted such an analysis recently, when I did a number of years ago, it was clear that such procedures lagged significantly in actually achieving their desired results.

113. I wish to emphasize that this particular observation was raised in interviews I conducted with several senior agency officials. It was not originally my own.

current theory seems to be that everyone needs to be a manager.¹¹⁴ But technology is moving too fast, and hence agencies cannot keep up the current state of the art. If this is true, as indeed it appears to be, we need to get rid of the 1930s notion of expertise as a basis for legitimacy and deference once and for all.

Parties that have on-going relationships with the agency find it difficult to be open and honest in a negotiation for fear that it will be held against them in future dealings. This is, of course, a difficult issue in which an agency occupies a number of different positions at the table. Overcoming this requires concentration and an explicit effort to disentangle the relationship.

D. Communication within the Agency

The staff and political appointees within the agency seem estranged from one another. While that alone is difficult enough, there is an additional dimension when the relationship between the agency politicians and those in ExOp are factored in: it seems to me that those in the agency are far more sensitive and suspicious of being preempted than has been customary. All of this is likely a function of the current hyper-partisanship in Washington, and I surely hope that will die down soon since it is so counterproductive on so many fronts.¹¹⁵ As an example of this, I have been in negotiations at more than one agency where the senior staff representative on the committee would not be in the same room as the political level boss—if you got one, you didn't get the other. Moreover, I have frequently been instructed not to talk to *any* political appointee.

The operational staff and the political appointees had very different views, and each tried to keep decisions away from the other.¹¹⁶ Each seems to feel they are protecting the final decision from the depredations of the other. Another dimension of the struggle is that some staff reported they fear retribution for making a wrong decision and hence temporized until the political winds were more clear; this too is indicative of a serious lack of communication and management.

It is certainly hard—no, impossible—to negotiate or reach closure that way! There is no view, position, or interest because there is no internal agreement and certainly no leadership. This has to be having an effect broader than negotiations.

We clearly need leadership within the agency. Staff would logically be reluctant to use a collaborative process if they thought they would be blamed or demoted for doing so. If management wants to look tough, staff certainly won't want to do this stuff. More fundamentally, collaboration is a means to achieving your pre-existing interests in a way that better fulfills your objective. If there is no objective, collaboration is merely unproductive talk.

If, as has been reported on several occasions, staff feel significantly inhibited from initiating collaborative processes, management needs to emphasize that no retaliation, or any other adverse action, will result from initiating a collaborative process. Moreover, staff need to be encouraged to do so, and promotions should

114. See generally PAUL C. LIGHT, *THE NEW PUBLIC SERVICE* 8-13 (1999).

115. I emphasize that this is not a function of which party is in power—it started when the political wars started a decade ago.

116. The SES seems caught in the middle of this tug of war and consequently seem less effective to me than is typical.

be based on doing it well.¹¹⁷ Thus, how well an agency manager and the immediate staff perform in a collaboration should be taken into account in a performance review. While that is currently a standard, it is not rigorously implemented.

E. Lack of Commitment to the Result

Even when the agency has signed off on an agreement or recommendation, it often feels free to change it without new evidence or a reason that did not exist at the time to repudiate its explicit concurrence. This cavalier attitude simply destroys the idea of collaboration. During my interviews, several people—in and out of agencies—thought that agencies put together a committee just so they could say they did it but with no intention of abiding by any sort of recommendation or agreement. Not surprisingly in such circumstances outsiders become reluctant to do it again: why bother? Lack of good faith is never a good idea.

F. Professionalism of the Process

An agency obviously does not need a neutral for all collaborations. Rather, the need is proportional to the degree of entropy—the greater the chaos and complexity, the greater the need for a skilled professional. Unfortunately, however, concomitant with the breakdown in communication, a second guessing of the neutrals as to process design and implementation of collaborative processes has also increased; they are related through a common desire to control. Neutrals are then treated as “contractors” as opposed to “professionals.” A contractor (in legal parlance, the servant) can be directed by the master: we hired you so we can tell you precisely what to do! They are clearly not viewing the neutral as a peer or person with valuable experience and expertise. That has serious consequences for the efficacy of the process since it strips away the experience and expertise of the neutral. Surely the agency would not—at least this law professor hopes not—say to a lawyer, “We hired you so change your opinion to authorize us to do what we want.”

A collaborative process requires skill and dexterity to do right; it is not something that functions well on an *ad hoc* basis. Collaboration will, therefore, be significantly enhanced when it is recognized that it, like other procedures, requires and merits professional guidance.

117. For example, the SES has five Executive Core Qualifications. U.S. Office of Personnel Management, *Executive Core Qualifications (ECQs)*, <http://www.opm.gov/ses/recruitment/ecq.asp> (last visited Dec. 29, 2009). Among them are the following:

ECQ 3 is *Results Driven*. “This core qualification involves the ability to meet organizational goals and customer expectations. Inherent to this ECQ is the ability to make decisions that produce high-quality results by applying technical knowledge, analyzing problems, and calculating risks.” *Id.* Desired competencies include accountability; customer service; decisiveness; entrepreneurship; problem solving; and technical credibility. *Id.*

ECQ 5 is *Building Coalitions*: “This core qualification involves the ability to build coalitions internally and with other Federal agencies, State and local governments, nonprofit and private sector organizations, foreign governments, or international organizations to achieve common goals.” *Id.* Desired competencies include partnering; political savvy; and influencing/negotiating. *Id.*

VII. LACK OF ENCOURAGEMENT/ACTIVE DISCOURAGEMENT BY OMB AND THE WHITE HOUSE

Executive Order 12,866 provides:

Each agency shall . . . provide the public with meaningful participation in the regulatory process. . . . Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.¹¹⁸

Soon after this encouraging development, however, it became clear that OMB actively discouraged the use of negotiated rulemaking/collaboration and made it difficult for agencies to implement the directive. The putative reason for this opposition was that the President is entitled to make the final decision on all regulations—he is, as it has been recently termed, “the decider,” or, as the more prosaic administrative law term has it, “presidential rulemaking” has replaced the traditional agency-centric version.¹¹⁹ Under this view, the notion was that the President’s plenary power would be diminished if a rule were developed through collaboration since the President would have to buck the expressed will of potentially important constituents if he chose to take a different approach.¹²⁰ The argument followed that the President would be inhibited from exercising this constitutional prerogative if his decision would be revealed, and that revelation would raise the stakes since the reason for the reversal had better be good to thwart the collective views of the public as expressed in the consensus. The sunshine that results seems to inhibit the political apparatus.

OIRA, under OMB, argued by extension that it, too, enjoyed similar prerogatives since, under the Executive Order, the President has entrusted it, at least in the first instance, to review rules.¹²¹ Thus, it sees itself as the President’s political surrogate.

These views are wrong in a number of dimensions. By way of an introductory background, let me emphasize that I am a strong supporter of White House review of rules. Twenty years ago, I was on a panel at American University Law School—directly across the street from the collaborative governance conference at which this paper was initially presented—defending White House oversight of rules.¹²² It was not a popular position that day. Indeed, I was one of the original designers of White House involvement that led to Executive Order 12,044.¹²³

118. Exec. Order No. 12,866, *supra* note 3.

119. See Peter Strauss, *Presidential Rulemaking*, 72 CHI-KENT L. REV. 965 (1997) (for the origin of the term “Presidential Rulemaking”); see also Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (for a description of current practices).

120. Note that this would be the case whether the President purported to be able to unilaterally change the rule without the concurrence of the agency as is embodied in the term “decider” or whether the President directed the agency to change the rule. Under the later approach, the President does not have the authority to change the rule itself, but could remove the agency official for not complying with his request. In either event, the rule is changed.

121. See Exec. Order No. 12,866, *supra* note 3.

122. See Philip Harter, *Executive Oversight of Rulemaking: The President Is No Stranger*, 36 AM. U. L. REV. 557 (1987).

123. See generally Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (Mar. 23, 1978).

Hence, I am a long time advocate for *review*, but not of preemption or substitution of judgment.

The assertion of a “decider” is not only wrong from a constitutional perspective,¹²⁴ it is also wrong politically. As President Obama’s Memorandum for the Heads of Agencies emphasizes, openness and transparency are critical for “public trust” and to provide important accountability.¹²⁵ Thus, there is positive value in requiring public officials—including the President—to explain why they are reversing an agency’s decision to go in a different direction. Moreover, there needs to be a creative tension between the President and the “officers” to whom Congress entrusted the decision. I have personally observed two occasions when the President said he wanted to do something and the agency head said, “No, you can fire me, but I will not make the change.” In both cases the official was not fired; the President did not want to take the political heat.¹²⁶ That is an important check on excessive and stealthy presidential directives.

Presidential rulemaking—and excessively frisky OMB review—is also a major factor in the breakdown of communication within agencies. It diminishes the role of agencies, and, hence, makes them less attractive places to be. It also raises the political ante. Finally, an arrogant substitution of judgment frequently results in less-informed decisions. The recent failure of General Motors is a vivid example of the efficacy of this type of top-down decision-making.

The new administration appears poised—at least in the abstract—to address these concerns. That first memo from the new administration begins with the following statement, “My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government.”¹²⁷

Perhaps that will extend to ExOp as well. Moreover, one can still preserve the prerogatives of the President and OMB without inhibiting the other important goals of that statement: public participation, collaboration, democracy, efficiency, and effectiveness. Those are powerful attributes indeed.

As has been developed throughout this paper, it is essential for the agency to set the parameters of a regulatory decision when entering into a collaboration. So, too, for ExOp: like the agency, it needs to set boundaries in advance for the agency. A manager should set the variables and perimeters in advance, not second-guessing after the fact. As the negotiations/deliberations begin to converge towards resolution, the agency should check with its management (ExOp) to ensure its views are taken into account.¹²⁸ Those views can then be addressed by the

124. See generally Peter Strauss, *Overseer, or “The Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

125. Memorandum, Transparency and Open Government, *supra* note 2.

126. It seems to me that it would have been far better if EPA Administrator Whitman had forced Bush to fire her instead of quitting quietly. In that way, the American people could have known directly what the issues were instead of being led to believe that all was well. See, Nicholas Rabinowitch, *Bringing New Source Review Back: The Supreme Court’s Surprise (And Disguised) Attack on Grandfathering Old Coal Plants in Environmental Defense v. Duke Energy*, 31 ENV. L. & POL. J. 251, 266-267 (2008).

127. Memorandum, Transparency and Open Government, *supra* note 2.

128. See *supra* text accompanying note 89.

collaborators—refined or perhaps even rejected but with a solid explanation—and, of course, management could then reject the rejection but it would be public, as it should be.

Indeed, in this case, the review by ExOp of a policy developed through collaboration should receive less, not more, scrutiny: it is the marketplace of ideas in operation. Someone, likely ExOp, still needs to ensure that the proper players were there operating under procedures designed to ensure deliberation within the boundaries expressed by ExOp. Such willingness would be a major incentive to use the process and would result in better rules. That was the process largely followed in the Reagan and the first Bush administrations, and it certainly seems consistent with the Obama memorandums.

VIII. RECOMMENDATION FOR NEW EXECUTIVE ORDER

As part of its review of Executive Order 12,866,¹²⁹ OMB established a docket for interested people to submit comments and proposed revisions.¹³⁰ In keeping with the analysis above, I proposed the following:

Use of Collaboration

Each agency is directed to consider the use of collaboration where appropriate to develop new rules and policies. In doing so, the agency needs to determine what form of collaboration will best fulfill its needs. When making this decision, the agency should consult with representatives of the major interests that will be affected by the decision and clearly define the goals to be achieved through the collaboration.

If the agency decides that its goal is to develop a rule or policy collaboratively, which is encouraged, then it should:

1. engage in an outreach to identify representatives of the interests that would be substantially affected by the decision. A successful collaboration must reflect a sufficient diversity of views that the agency can be reasonably assured that the major issues will be addressed in the deliberations;
2. publish in the Federal Register, on its Web site, and in places where affected individuals are likely to read it, a notice that the agency is:
 - a. planning to use a collaborative process to develop the policy, and

129. Exec. Order No. 12,866, *supra* note 3.

130. General Services Administration, *Public Comments on OMB Recommendations for a New Executive Order on Regulatory Review*, <http://www.reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp> (last visited Dec. 29, 2009).

- b. inviting anyone to participate if they believe they will be substantially affected by the policy in a way that is significantly different from any one already participating;
3. actively participate in the deliberations;
4. consult with OIRA with respect to the issues to be addressed, the deliberations thus far, and the range of potential outcomes before reaching a final agreement on a rule that is subject to this Executive Order so that OIRA's views may be taken into account in developing any agreement;
5. explicitly concur in any final agreement;
6. consistent with its legal obligations, use the result of the collaboration as the basis for its proposed rule or policy; and
7. when submitting a rule or other policy to OIRA pursuant to this Order, describe any collaborative process the agency used in its development, including whether or not the rule or policy reflects a consensus of the participants in the collaboration. If it does not, the agency shall provide a brief description as to why.

IX. THE FUTURE OF COLLABORATIVE GOVERNANCE

Collaboration can be powerful indeed. Government can leverage its role and view of the public interest while gaining state-of-the-art technical information. It can tap creative ideas from those directly affected and who have extensive practical insight into the issues to be resolved. But before that can be achieved, the government must repair internal communication. It cannot hide behind control to make up for a lack of expertise, and it must recognize the *unique* qualities of the government and do them very well. Mutual commitment is essential to achieving those goals.

It will need to build on the procedures that ensure broad views and participation: a rigorous convening to ensure the appropriate parties are there to negotiate the issues in controversy. Collaboration solely between the agency and the regulated may ignore the beneficiaries and those otherwise affected; the agency, therefore, needs to make sure the others are appropriately represented as a check on rent seeking. The notice of intent is designed to serve as such a check and to improve the dynamics at the table, and it clearly signals that the issues will be decided at the table instead of in another forum.

With suitable attention to detail, collaboration can be a powerful means of achieving the public goals, whatever they may be.