ADMINISTRATIVE LAW & REGULATION

WHAT NEXT FOR NEGOTIATED RULEMAKING?

Jay Lefkowitz, *General Counsel, White House Office of Management and Budget*
Professor Philip Harter, *Director of the Program on Consensus, Democracy and Governance, and Visiting Associate Professor of Law, Vermont Law School*
Hon. Boyden Gray, *Wilmer, Cutler & Pickering and former White House Counsel*
Professor Michael DeBow, *Cumberland Law School, Samford Law School (moderator)*

PROFESSOR DeBOW: It is a pleasure to be here, and to introduce our distinguished panel.

Jay Lefkowitz is currently the General Counsel of OMB. Before joining the Bush Administration, he was a partner in the Washington office of Kirkland & Ellis, where he specialized in commercial and appellate litigation. His prior government service includes two stints in the first Bush Administration where he was the Director of Cabinet Affairs and the Deputy Executive Secretary of the Domestic Policy Council, as well as a delegate to the U.N. Human Rights Commission.

Philip Harter is currently the Director of the Program on Consensus, Democracy, and Governance at the Vermont Law School, a title I like very much, and a visiting professor of law there. Mr. Harter has been very active in the ABA section of administrative law, served as its chair during 1996 - 1997, and also as co-chair of its Task Force on Regulatory Reform. He is widely recognized as the principal architect of the Negotiated Rulemaking Act, and speaks and writes often promoting the use of negotiated rulemaking.

Boyden Gray is certainly no stranger to any member of the Federalist Society, having been instrumental in the founding and growth of the organization. He is a partner with the Washington law firm of Wilmer, Cutler & Pickering. He is a former clerk to Chief Justice Earl Warren, served as White House counsel in the first Bush Administration, and will speak last.

To begin our discussion, I will give a brief overview of the negotiated rulemaking procedure under the Federal Negotiated Rulemaking Act. Negotiated rulemaking really springs from the dissatisfaction that was widespread with informal rulemaking as practiced under the Administrative Procedure Act in the late 1970s and into the 1980s.

As most people in this room know, traditional informal rulemaking proceeding begins with an agency's staff drafting a proposed rule. A notice of proposed rulemaking is then published in the Federal Register soliciting public comment. On receiving the public comment, the agency analyzes the public's reaction to the rule. In some circumstances, they may revise the proposed rule to take account of some of the public's objections or suggestions. The final rule is then published, and is subject to the possibility of appellate litigation challenging it.

Negotiated rulemaking is an attempt to improve the substance of the rules that are adopted through this informal procedure and thereby reduce the likelihood of appellate challenge to the rules adopted in this manner. Negotiated rulemaking attempts to promote these goals by changing the process followed by the agency prior to the publication of the notice of proposed rulemaking. It does this by bringing representatives of affected interest groups into the agency's pre-NPRM decisionmaking process.

Procedures for this are provided for in the Negotiated Rulemaking Act passed in 1990. The Act commits the decision of whether to use negotiated rulemaking to the agency's head, who may use the procedure if he finds that the public interest will be served. This question is guided by a list of seven factors that are listed in the Act.

The Act is in your CLE materials, by the way. If you want to follow along with the seven factors, they are listed there. We might discuss at greater length today how that decision actually gets made.

In reaching a decision about whether to use the procedure, the agency may use a person called a convener to help answer this question, a neutral person to help the agency sort out its options.

If the agency head decides to use negotiated rulemaking, that decision itself is published in the Federal Register. The notice describes the subject and the scope of the rule to be developed and the issues to be considered and also contains a proposed agenda and schedule for the committee's work.

The notice lists the affected groups that the convener in most cases has helped identify, and also lists the people who are proposed to be representatives of these groups in the committee's work. Normally, the committee is composed of from twelve to 25 members, including the representative of the government agency. The maximum number is 25.

The notice also asks for comments on the proposal to establish the committee and on the proposed members, and gives the procedures to be used if there are interested parties out there who think they will not be adequately represented by the people who are so nominated.

If the agency, after receiving comment on this notice, decides to proceed with the negotiated rulemaking procedure, then a person known as a facilitator convenes and chairs the meetings. The committee is a federally charted advisory committee pursuant to the Federal Advisory Committees Act and the procedures it follows are procedures that are

outlined in the Federal Advisory Committee Act. This Act prescribes notice of meetings and the ability of the public to attend the meetings, but less in the way of formal record keeping of what transpires at the meetings than you would have in an informal rulemaking procedure.

A consensus is defined as unanimous agreement, unless otherwise agreed at the outset by the committee. If the committee reaches unanimous agreement on the rule they would like to propose that the agency announce, it is sent forward to the agency head, who can use the draft rule as a basis for a notice of proposed rulemaking. The typical informal notice and comment procedures pick up at that point and are carried through to the conclusion in the same way that they would have been in a traditional informal rulemaking proceeding. In the event the committee fails to reach a consensus, the agency may use standards of informal notice and comment procedures.

The statute says that the agency rule is supposed to be the consensus suggestion of the committee to the maximum extent possible, consistent with the agency's legal obligations. While that does not bind the agency to use the committee's recommendation, it does certainly indicate some obligation to use the committee's recommendation as the basis for the rule proposed in the notice of proposed rulemaking.

Nothing in the Act changes the scope of judicial review of the rule as eventually adopted. Any agency action related to the establishment, assistance, or termination of a negotiated rulemaking committee is not itself subject to judicial review. Otherwise, there aren't any changes made in the scope of the judiciary's ability to review rules adopted through the negotiated procedure.

We have had ten years of experience under the Negotiated Rulemaking Act. There continues to be some criticism of the Act and practice under it, in particular a debate about whether or not negotiated rulemaking actually delivers on the improvements that it promised, and there have been objections to the nature of the informal process followed by the committees and the possibility that the use of negotiated rulemaking committees may be at odds with the APA's promotion of public participation and openness in the informal rulemaking process.

With that said, I will turn things over to Jay Lefkowitz.

MR. LEFKOWITZ: Good afternoon. I probably, by order of experience with negotiated rulemaking, should be speaking third, after the real author and creator of the concept and after the gentleman who probably advised the President to sign the law. Negotiated rulemaking is actually something that I am relatively new to.

I imagine that negotiated rulemaking, when I was in the White House the first time ten years ago, was an agency coming into the Competitiveness Council suggesting a regulation, and then Boyden negotiating with the agency until he was comfortable with the proposed regulation, and then it would be published.

We do a lot of negotiating when we go through the rulemaking process, but formal negotiated rulemaking under the Act is a relatively rare occurrence. From just taking a quick look at some statistics, I think that agencies have used negotiated rulemaking in less than one-tenth of one percent of all of the rules since the Act's inception, so it is a little hard to get a really good baseline on its effectiveness.

The Department of Transportation and EPA used it more frequently than other agencies, although EPA has used the process a lot less frequently in recent years.

I think that it is fair to say that there are at least some people who view negotiated rulemaking as a kind of solution in search of a problem. Again, my experience with it right now at OMB and for the first several months until John Graham came on board is that we just don't see it right now. And so we are certainly open to discussion and considerations of whether we should be trying to encourage the agencies to engage in it more frequently. It is obviously a voluntary program.

Some of the critics have noted that negotiated rulemakings are very resource-intensive, both for the agency and for interested parties; that they do not actually shorten the rulemaking process and may, in fact, lengthen it because agencies have to appoint a facilitator, conduct all of these formal public meetings. And I am not sure that there is any evidence that it has, in fact, reduced litigation.

We at OMB right now are attempting to address some of the same issues that I believe the drafters of the Act were trying to deal with, in terms of openness, in terms of transparency, in terms of reaching the appropriate consensus. We have a policy that we will try to meet with any and every outside party who requests meetings. Our communications with outside parties are disclosed to the public and they are now posted on the OMB Web site.

All written materials that are received by OMB are retained for public inspection in OIRA's public docket room. They are forwarded to the rulemaking agency for inclusion in the rulemaking docket. We always invite representatives of the relevant agencies to come to these meetings with interested parties.

Let me just say a few words to frame a little bit of the way this Administration is looking at regulations generally. Regulations, as I am sure everyone here knows, are an enormous financial burden, a financial drain on the economy and on the taxpayers. I think our most recent statistical estimate is that the total costs of federal regulations right now on an annual basis are roughly half a trillion dollars. If you include transfer costs, which would be redirection of

resources from one area of the government to another, it probably rises to close to about $800 billion dollars.

We have, at OIRA, cleared some 700 rules in the last twelve months. We obviously only clear rules that reach a certain standard. We are not an administration that is anti-regulation as some people have suggested. We look at regulations much the way we look at proposed legislation. There are some regulations, like there are some pieces of legislation that make sense; there are others that do not make sense. But we look at all of the regulations with a screen: number one, fidelity to the statute; number two, compliance with APA procedures; number three, the costs and the benefits of the rule; number four, whether the proper economic factors have been considered. Are the agencies using the appropriate discount rate? For example, are they looking at risks in a linear way if, in fact, there is no evidence that it is linear risk? And indeed, we are encouraging the agencies to conduct risk analyses of their own which we at OMB and in OIRA are conducting as well as we are reviewing these regulations.

Over the last nine, or ten years, almost no rules were sent back. In fact, I do not know that the prior administration sent back a single rule to an agency. We have sent back probably 15, 20 rules already. We send them back if the regulatory standards adopted are not justified by the analyses, if the rule is not consistent with Executive Order 12866, if the rule is not compatible with other executive orders or statutes.

We do not necessarily send them back because we are opposed to the draft rule. We send them back because we want them closed back or perhaps withdrawn. It is up to the agency to review them, work with us, and then bring them back if they can satisfy the appropriate criterion.

We are also getting much more serious about looking at unfunded mandates, looking at the federalism concerns, looking at Paperwork Reduction Act violations. So from an enforcement perspective, although we are working very cooperatively with all the agencies, I think it is fair to say that OIRA is taking its regulatory responsibilities very seriously.

In addition, there are occasions when OMB believes that there are certain potential regulatory actions that are, in fact, worthy of exploration for a new regulation. We recently sent prompt letters out to a couple of agencies. We sent a prompt letter out to the Department of Transportation to look at potential regulation for the defibrillators. We also sent a prompt letter out to HHS to encourage them to think about whether or not it might be appropriate to take a look at a regulation in the area of trans-fatty acids. So we are working with the agencies, again in a sense being neutral, but always skeptical of proposed regulations.

One area, though, that I think merits considerable attention (and certainly when we have an opportunity, I would like to solicit any thoughts from Boyden and Phil and from all of you) is the way in which agencies often bypass the proper regulatory process by issuing guidelines. Guidelines are obviously much less burdensome for agencies to issue. They can bypass the intra-agency internal review process, they can bypass an interagency review process as well as OIRA review. There is no public comment. They can avoid the statutory requirements imposed by the Unfunded Mandates Reform Act and the Congressional Review Act. It is easy to amend guidelines, and at least until this last year when the D.C. Circuit stepped up to the plate, it was easy to avoid judicial review.

One of the things that we are looking very hard at is how to make the regulatory process more fair. We are looking at whether, if you are a regulated party, you are happy with a particular regulation or not, and whether your beef is with the agency or with the statute that has in effect authorized and dictated where the regulation should go. I think it's important from a fairness perspective to make sure that the government abides by the proper rules and procedures.

Guidelines tend to be a shortcut that some agencies are inclined to take and in a sense, when agencies do that, they lose their Chevron deference, so they are in a sense more susceptible to judicial review. On the other hand, there is a way in which they can do this sub-rosa without any advance notice and the regulated community often finds that it is being regulated and strangled by these types of guidelines. So that is an area that we are looking at, and certainly the Appalachian Power case and Judge Randolph's decision for a unanimous panel is very instructive.

We cannot take all this and move it aside all at once, but it is an area where I think we need to take a long, hard look. We have already made in some areas some movement in the direction of a more fair and open process.

In the area of negotiated rulemaking, I am very interested to hear the discussion and the debate, and we would certainly consider encouraging agencies to explore that option, although my initial review of the history of negotiated rulemaking is that it may be a more cumbersome process that does not, in fact, address the perceived problems that it was set out to address.

PROFESSOR HARTER: I want to begin by simply responding. The fact that criticism exists does not make it so, and I would think the current administration would be sensitive to that. So let's review some of the actual performance of negotiated rulemaking here.

I especially love the criticism, "Gee, it has only been used for a small percentage of rules; therefore, it does not work and it is cumbersome." There is no question that negotiating a rule is a resource-intensive effort. There is a footnote to that, though: agencies that have actually clocked the difference in cost between doing a reg-neg and a traditional rule find that doing a reg-neg is half as expensive. But I will get to that in a second.

What reg-neg is used for are rules that are extraordinarily complex and extraordinarily controversial. You are basically getting all the parties around the table to work out a truce in a war of attrition: these are the rules that are difficult for agencies to get out the door. This is a hard point to teach in administrative law because students, and, alas, many professors, think that agencies waive a magic wand and issue a rule. I think that everybody in this room understands that is not the case. It can be extraordinarily controversial and the agency just can't get done. It is in those instances that reg-neg has proven extraordinarily successful.

Let me go down a list of some of the ones that have been done: The rule on the reformulated gasoline; Congress imposed an extraordinarily short period of time to develop a proposed rule, and it was just a war waiting to happen. From start to finish it took five months to develop the rule that basically governs gasoline in the major cities now. That is a remarkable accomplishment.

A war had been going on for 15 years between the National Park Service and the FAA on sightseeing flights over national parks. The agreement reached in the reg-neg not only regulates how those flights work now, but it formed the basis for a revised statutory provision. Indeed, flight duty time — the amount of rest pilots have to have — something that the FAA had tried for 20 years to revise as pilots got older, planes got bigger, distances got longer was a negotiated rule after the FAA itself was not able to get it done. The rules that are really just very hard have proven successful, and in every instance that I have looked at, probably not with the intensity that OIRA has, the rule ends up being more stringent, actually achieves its overall goal, but is cheaper to operate and implement, because the people who actually have to make it work on the ground are there designing it. They have the ability to determine where we can get the biggest bang for the buck. So the rule can be tailored to work with a minimum of dislocation.

I also will address some of the recent criticism that says it does not fulfill its mandate. If you look at what agencies were seeking to accomplish when they undertook a reg-neg, it shows that the process comes out to be fully a third faster. Reg-negs shave a little over a year off the rulemaking. Let me give you an example of the problem with the research underlying the recent criticism.

In calculating the amount of time expended in the reg-neg let's look at gasoline. The final rule didn't come out until four years after the committee met. But EPA published a notice of the standard in the Federal Register that issued was six months after the committee completed its work. The actual rule didn't matter until it was actually effective, but the oil companies had to know years in advance so they could design and build new refineries. So there is a three-year sitting-on-the-shelf period that was not taken into account. If you just measure Federal Register notices, the criticism may be right, but this is Washington. That is not what the agency was doing. And, in fact, the agency accomplished its goal in an astonishingly short period. There are four or five others that are the same way that effect that.

Then also look at the judicial review. A recent article alleges, "Well, gee, it didn't reduce the incidence of judicial review." Remember the Clean Air Act requires that if you are to have any kind of judicial review, you've got to file within a very short period. So in order to preserve your ability to work out any of the kinks, you have to file a notice of appeal. But, there has never been a substantive judicial review of a rule that the agency issued that conformed with the agreement. And remember, these are the hellaciously hard ones.

So, if you want to count docket entries my colleague from Harvard may be right. But, if you want to calculate what really was going on, you need to look deeper. There is a reason that the distance between political science and Washington is measured in lite years -- that's l-i-t-e – since they just don't understand what is really going on.

I turn to an article that looked at the only statistically valid empirical study that compared reg-negs with equivalent rules. It found, and I'm going to quote – "along virtually every important qualitative dimension, all participants, whether business, environmental, or government, reacted more favorably to their experience with negotiated rules than did participants in conventional rulemaking."[1] Actually, it resulted in much greater legitimacy, a feeling that better science was used, and better economics. So there is criticism, but there is also fairly hardheaded rebuttal to it.

Let's now turn to the current topic: What is the current status of reg-neg; what is its future? As Jay mentioned, EPA was clearly. Bill Rosenberg, the Assistant Administrator for Air, understood, as they say, "the art of the deal." He understood that if you get everybody in a room, you can achieve a huge amount. And he did. He was extraordinarily successful in getting very, very controversial rules out.

Interestingly, the Clinton Administration's EPA used it in precisely zero rules even though there were several presidential requests and directives to do it. None.

DOT has continued to use it, as have other agencies, although clearly its incidence is probably not as much as it was five years ago.

To a very real extent all agencies now engage in some degree of stakeholder involvement or public participation and, indeed, Jay's proposal — let's get the people in here and we'll talk to them — really derives from the whole idea of the negotiated rules since it legitimized talking to people. We'll look back to that at the end.

In order to figure out currently what's happening and make some suggestions of what might happen in the future, I would like to review a couple cases from the last five years. Start with one in which an agency wanted and had tried on two occasions to get out a notice of proposed rulemaking and each time it was crammed down their throat; once by one

side, the other time by the other side, and so the agency simply could not get the job done. The issue had been on the agency's docket for more than 15 years! The reg-neg committee was impaneled and reached full consensus across the board. The rule ended up being much broader and much deeper than was originally proposed to the committee. The level of insight was really extensive. During the deliberations, the agency was represented by no fewer than three people at all times sitting around the committee table. The head of the agency himself signed off on the consensus. The agreement was then turned it over to the agency, and it spent the next four years rewriting, just taking a pencil and changing the language.

As one observer who was not a member of the committee — importantly not a member of the committee, so it wasn't defending a decision he had made — said that the agency's rewrite of the rule was both unintelligible and affirmatively dangerous. He continued to say, it will kill a lot of people.

The committee prevailed and basically persuaded the agency to put Humpty Dumpty back together again and reissued the rule as originally developed. Another agency was directed by a senior agency official to use a reg-neg to resolve an absolutely bitterly intractable dispute. The staff put together a very brief notice of intent to form a negotiated rulemaking committee for the Federal Register. The staff took one year to clear a seven-page typewritten document that took two pages in the Federal Register. We tried to get the agency head to intervene again, but somehow phone calls didn't get returned. One year. You can imagine what that does to a momentum. It also goes a long way to causing the private parties to doubt the commitment of the agency.

Once it got going, the assistant to same guy who urged the use of reg-neg but then wouldn't follow through, directed that the agency not say a word during the deliberations, so nobody knew where the agency was, nobody knew what is going to happen afterwards. You have no information; no way of learning what the agency itself wants to get out of the process.

But even with that, the committee, while it did not reach a full consensus, came up with a proposal. The agency then drafted something that totally disregarded the proposal, treating it as if it did not exist. Why did the committee mess around for a year to do it? Its work was just rejected. The controversy was sufficient, however, that the agency did not get that out on the street and the controversy remains. Interestingly, however, the communications that were established through the dialogues have helped alleviate some of the problems in the field.

At two other agencies, high senior officials who thought that they had a major fight on their hands wanted to use negotiated rulemaking, publicly announced it, and went through a full convening. The staff said, "No, we're just not going to do it." End of story. Neither of those rules are out, by the way, and that's three years ago.

Another agency had issued a rule that had been reversed by two separate courts of appeal. The industry had gone to Congress and had riders inserted in its appropriations that the agency was could spend no funds to issues the rule. The agency met every single Monday morning for two hours to wring their hands as to what they were going to do about this.

Well, of course, nothing was happening. And so they decided to do a reg-neg, and from start to finish, from the first meeting to final rule, not proposed rule, final rule, was six months. I absolutely loved hearing a public speech in which the staff complained it took too long. Six months. That's regulatory warp speed.

What's going on here? What happened and what lessons can we derive from this in the waning days of the Clinton Administration.

A number of these reg-neg experiences evince a clear trend towards the middle-level staff, below SES, as simply not wanting to share decision-making authority. "It's our turf". A kind of "We know best" syndrome. And it may be that they do not want to give up or do not want to share power, and yet the irony of it is if you look at the cases we are talking about, they don't have the power to get the rule out of the door in the first place. So it is a fear of giving up power that you don't actually even have, so it's almost worrying about being perceived that way. Whereas they would see if they actually participated in one , you actually get a huge amount of leverage, both in terms of information and actually achieving your overall goal.

I think there is no question in this instance that there is a difference in perspective between the staff and the political level, each wanting to keep the other away and manipulating the process.

I think another lesson, and this emphasizes the point that Jay made, is a lack of appreciation for the benefits of process, benefits of procedure. There appears to be a feeling that you don't need to do all this machinery so that you can slough off this and you can slough off that and it won't matter. But, it does.

Let me respond to the proposal as to what OIRA was doing: We're talking to people. I talked to A and I talked to B and I talked to C, and then I talked to A again. But this is a consultation, not a negotiation. Notice that each of those is coming as a supplicant trying to persuade somebody who is going to decide -- in this case, OIRA.

God forbid that A and B might ever meet and try and bring their respective insights and discussions together. Notice that this is a way of saying, I'm glad to talk to you, but I'm controlling the pencil and also, gee, I know what you want since you explained it, so I can write it.

The inattention to detail and taking shortcuts really has affected reg-neg. It means that they are not as public, they are not as open, and the committees are not set up in a way that will encourage them to reach consensus.

Let me give you an example of the benefits of consensus. Gasoline is really a perfect example. The industry wanted this big high number and the environmentalists wanted this real low number. You kept talking and pretty soon, we as the facilitators went to the industry and said it seems pretty clear you can do it. And the answer was, yeah, we can do it, but not gallon for gallon, not across the board. There are too many variables, as they explained. And then the answer was, well, can you do it on the average and work that out? Yes.

So then the proposal comes back basically at the environmental low number, and then what I think is really a neat thing, the environmentalists said, well, wait a minute, if you can meet that low number on the average, doesn't it really mean you can better it by ten percent? Yes. We want the ten percent, but figured into the average.

You cannot do that if it is not a consensus process. You can't say, I'll give you A if and only if you give me B, because you're really not sure you will get B but I would still have to give you A. And so consensus really is where you can deal with the quid pro quo to work it out, and the rule has been phenomenally successful.

There has been a lack of the attitude that we're going to see this through, we're going to get this done, we're going to put this rule out, and we are going to hold people accountable. That I think means the White House needs to hold the agency accountable, which in turn needs to hold the staff accountable for actually getting out a final rule that works, meaning withstands judicial review.

In times past, there has been too much bouncing around and saying that we the agency are going to do this and we're going to do that, but without actually doing it and without being held accountable for it -- almost the crisis du jour effect, with senior level officials running from place to place.

I think overall, there has been a fear on the part of agency staff of staking out a position publicly and working through and discussing it, of seeing this level of the government turning into itself and being afraid to talk to those on the outside, afraid to discuss their concerns, their issues. I am not quite sure why that is, but I think it is a lack of confidence in what they are proposing and a fear of being second-guessed on it by senior agency officials.

So where do we go from here? The first part is to recognize that the reg-neg really can be a powerful tool, and to take a look at the agency's experience and talk to the people that have done it.

Then I think management needs to set guidelines, provide resources, and follow through with commitments. Nobody likes to be second-guessed or harangued: "You didn't do it right", or to get bounced around.

For some reason, there is also a bias against such processes: "This is an illegitimate rule or an illegitimate government decision because you cooperated with industry", even though it was a very public process, even though the other side was there equally and you really talked about it, but there is this perception so that lower level staff may need protection against some of that kind of attack. To a certain extent we need to change the mind set on it.

There is no question that the White House, if it is interested, can play a major role, both by encouraging it and saying, "we're going to hold you to it." But also it can assist on the mechanical part. We have probably all observed that hell has no fury -- there are two furies that are greater than hell. One is a labor union that's being organized and the other is a regulator that's being regulated, and both of them fight stridently.

As a result, it is clear that agencies really hate FACA because they have to go with hat in hand and ask permission from OMB and GSA to put together a committee of ten people to give some advice. The administrator thinks, "I can impose a billion dollars of costs on the economy, but I can not talk to ten people. This is nuts."

Moreover, historically, there has been a lot of tension of getting FACA charters through. So, if there is interest in really talking to the people through the reg-neg process, then you're going to have to make sure that the FACA committees get through easily and straightforwardly.

Second, there has been a lot of confusion as to where OIRA is on all of this. The agency may well be concerned, let alone the committee members, that if the reg-neg reaches an agreement and the agency issues it as a Notice of Proposed Rulemaking, is it going to get pulled apart, second-guessed, and torn up as part of the review process? Some inside of agencies think they need to go to OIRA and get pre-clearance for conducting a reg-neg. Sometimes we hear from some OIRA folks that they are in favor of reg-negs, but at other times we here from budget examiners and the green eyeshade group that they really oppose them and will carefully scrutinize anything that emerges from one. There is a lot of confusion both inside agencies and by those who would encourage the use of more reg-negs over OMB's receptivity to them.

So it strikes me that addressing some of the management perspectives can go a long way. We are also talking about a broader issue, and it is really one of the relationship between the government and the private sector. It is one in which at least I would like to envision with the government setting or stimulating broad goals, and then charging the private sector to achieve it. But then holding them accountable if they don't, and then on the correlative side, having the private sector hold government responsible for making those goals appropriately.

Take a couple examples. Project XL at EPA. It looked very interesting, being able to modify some of the environmental regulations with a focus on achieving the overall goal via non-traditional means; but so far it has produced a very large yawn as far as performance goes.

Another one that I find interesting -- I have no idea exactly how it works -- is the Microsoft settlement, having a committee that is overseeing compliance. I have not seen any of the actual documents, but the press has been very

vague as to how it is working. Is it really going to hold the Company accountable in being able to enforce it? I think we need to look at alternative regulatory approaches like environmental audits and quality assurances — more flexible approaches, all of which I see as part of this.

When you look at the history of reg-negs or sitting down with all the various people, you can generate a huge amount of insight into the issue that is not achievable by the agency acting alone. It is the story of the five blind men and the elephant: It is only together that they can describe what that beast is.

MR. GRAY: I think Phil has given a very good history and what I want to do primarily is to talk about the biggest agency, EPA, and why it perhaps is no longer doing what it once did in the late 1980s and early '90s.

The history goes back originally to then-Vice President Bush when he was chairman of the Task Force on Regulatory Relief. The idea was that we had to change so many rules, that we did not think we could get through it all, especially without a lot of legal challenges. To the extent that we could reduce the time and the litigation, everybody would be the winner.

We did have some successful reg-negs and the gasoline rule is the best. That did not come until after the Clean Air Act of 1990 was passed, was implementing key provisions of that Act.

I would like to mention that the Act itself, Title IV, the acid rain program, which is the largest single pollution reduction program ever attempted by any country, was basically based on a negotiated allocation of baseline during the legislative process. The key players, the utilities, were thrown into a room and told not to come out until they had agreed on what year they would take as a baseline. The environmental groups were thrown in there with them. It was like a bunch of scorpions at each other. But six weeks in Mitchell's conference room was enough to cook the deal, and the Act started getting implemented right away and without any litigation, basically, and it has been a great success.

The same is true of the formulated gasoline rule. I think in the summer of 1995, after the first round went into effect, California had a 40 percent reduction in ozone exceedances. That is a big success.

Now, why might EPA have abandoned something that was working so well? I don't know, but I have a few guesses. In part, of course, Bill Rosenberg had no peer, and he loved to cut deals. Reg-neg was just up his alley. He was not a lawyer, and so he did not feel he wanted to take the lottery of the D.C. Circuit or the litigation. To him, it was a lottery because he did not fully understand how it would play out. So he much preferred to get it done, and that was part of his motivation.

But the premise of much of the Reagan-Bush years, I think you could say also of the current Bush 43. It is to use clear, transparent performance standards. Then you are looking at how many tons hit the atmosphere, not who gets screwed doing what, and not what kind of cotton you poke into the smokestack. You are looking at how many tons get through whatever it is you put in there, and using market incentives to try to reduce the cost and to increase the yield and efficiency.

EPA has a rule of thumb that for command and control regulation, they get a yield or what they call an RE factor, rule effectiveness factor, of approximately 80 percent, point-eight-zero. Point-eight they call it. In the acid rain program, Title IV, for SO2, for much of the decade of the '90s up until about 2000, the program was 160 percent ahead of schedule. That is, people were over-controlling by that much. So you were getting a yield of 100 percent and it doubled the yield for what was about a tenth of the cost.

Now, you would think that any agency that got a doubling of the yield of a regulatory goal at a tenth of the predicted cost of that goal would say, "Gee whiz, this is an interesting thing, let's see if we can extend it." But EPA has made it impossible to extend it. And there is a relationship, I think, between the use of market incentives and performance standards that let the regulated sector figure out how to do it and put the agency in the role of referee rather than micro-manager. There is a relationship between the two of them.

I think Phil Harter put his finger on it, that when they got into the gasoline rule, "Oh, you can't do it on a gallon-per-gallon basis or barrel-for-barrel basis, but across the board, yes". "Well, then, give us ten percent more". "Okay, fine". They probably would have given you 50 percent more if you had asked just to get away from the nickel and diming by the agency. But let's face it. The agency likes to nickel and dime. And why do they like to nickel and dime? Well, what else are they going to do?

I am quite serious here. You would think that an agency like the EPA would ultimately like to see as its goal a self-dissolution, that it succeeds in eliminating pollution and it can go out of business. That would be the logical thing, and as we reduce pollution over time, we continue to show great reductions.

You wouldn't know it reading the press and hearing them, but we do have a rather dramatic reduction in all pollutants over the last 30 years, even as vehicle miles traveled have doubled and the economy has quadrupled or whatever. It is really quite astonishing to look at the inverse relationship between the economy and pollution.

You would think that therefore the EPA staff might have shrunk, contracted. No. It grows and grows and grows.

I see my esteemed dear law school classmate in the back row. I grew up in the South and went to law school

at the University of North Carolina on the old saw, God bless the man who sues my client.

This is a lot of that motivation. It is part of public choice theory: one lawyer in a small town will starve, but two will do quite well, thank you very much.

EPA has to have a problem, and if they were actually to clean the air and declare a victory and go home, then what would they do? So there is an element of that there. They like to maintain control. It's sort of like a funny reverse delegation problem. They like to be delegated all of the authority without any strength by Congress, but they truly do not want to turn around and say to the private sector, "Okay, you figure out how to get there".

They are very fond of granting what are formally called waivers, but those of us in the private sector sometimes refer to them as regulatory indulgences.

And you cannot grant an indulgence if you have a market trading system where property rights are vested. You can not grant indulgences where the private sector has been forced to agree that this is what I will do and this is what you will do. What is EPA to do when you have already set out the baseline obligations, then you are out of a job and you cannot yank people around? I think that is what is at stake here.

It reminds me that maybe there is a connection between Barbara Olson's book, *The Final Days*, and why EPA has never done any market incentive or reg-negs since 1992. I hope that Jay can turn this around with the current administration.

I should point out EPA's track record in court in the last eight to ten years. (I don't want to pick 1993 as the beginning date of this track record, but that happens to be the fact if you look at the facts. Data can always be manipulated depending on what year you start with) EPA's track record for eight to ten years in the D.C. Circuit: they have lost more than half their cases. Maybe, depending on the way you identify a win or a loss, maybe as many as two-thirds of the cases. Now, it makes you wonder what *Chevron* means if an agency loses that many cases. It's really an astonishingly bad track record, and you would think the agency would wake up and say, "God, you know, I think we ought to do a little reg-neg and get these rules into place and get the ball rolling". But that is not what they enjoy doing, I think.

Let me use as an example their prime rulemaking goal now. Bear in mind, I am talking about the EPA because roughly half the rulemaking burden in the country is EPA, and roughly half of that to two-thirds of that is the Clean Air Act. That is why I am talking so much about EPA.

All of the regulatory reform efforts over the last ten to 15 years have as their target EPA. People do not say that, but that is really what they are talking about. It is the U.S. energy policy. We do have energy policies with the Clean Air Act. There was an old joke about John Harrington when he was Secretary of Energy in the second Reagan term. He would have staff meetings going over his day. He would ask, "all right, who is coming in at eleven o'clock?" "Well, X, Y, Z coming in to lobby you to lobby Lee Thomas, the EPA administrator", and he said, "Why does everyone come in to lobby me to lobby Lee Thomas? How come no one ever comes in to lobby me to lobby me?" And the staffer said, "Because Lee Thomas has all the power."

So PM2.5, 5 in particular, what is it? That's really the first question. You go, what in the hell is this stuff? I mean, you can measure it, but who contributes to it? And EPA won't tell us because if they told us, then they might be forced into a reg-neg to figure out, which industry, utilities, refineries, cars, trucks, buses, airplanes, trains, barges, who is going to take or a paint company is going to take what share of what is the ideal for figuring out a reg-neg?

But then EPA loses control once all those people have sat in a room and said, all right, we will agree to do 12.5 percent or whatever, or even worse, if you allowed the private sector to trade between the precursors of PM2.5, whatever it is, then EPA would be gone because then everyone would be off to the races, people would be glad to do twice the reductions required by EPA if they could just go about and do on their own rather than be yanked around by EPA. I think EPA just loves to yank people around.

So then I will go to the final flowering. The renaissance flowering of the medieval ethos is the new source review enforcement talk about doing rules by guidance. EPA has hijacked the entire Clean Air Act by enforcing. They tried to do a rule to change a 1992 rule called the Webco rule, which implemented Title IV of the Clean Air Act. They tried to change that by rulemaking in 1998, couldn't do it, and so then started the NSR, new source review enforcement program, the minute they lost the petition for rehearing on the ozone and PM2.5 rules in the D.C. Circuit. Basically the Clean Air Act does not exist anymore.

The only thing that exists are dozens of enforcement actions around the country. They are totally delinked from public health, totally delinked from common sense, and only the genie at EPA knows what they are trying to get at. There is no openness, there is no transparency, there is no understanding of what is in the enforcement box. It is the ultimate in discretion, of course, bringing criminal enforcement actions. That is the ultimate in discretion extortion.

I remember that the main thing EPA contributed to the 1990 amendments was not. "here's what we ought to do for acid rain", or "here's what we ought to do for air toxicants", or "here is what we ought to do for formulated gasoline". That all came out of the Public Health Service or the White House or other parts of the government.

Their main contribution was, how many criminal provisions can we pack into the enforcement side of the house. And I spent a great deal of my time ferreting out little vicarious liability provisions that were sprinkled all throughout,

none of which would have produced a single reduced ton of pollution.

Reg-neg is a great discipline because it isn't always useable. In fact, in most cases, it cannot be. But when you have multiple parties, not too many all at each other's throats, with a lot of jockeying for position, and the agency is up to its eyeballs in stakeholders who are all screaming because they think they should disadvantage their competitor, that's when you ought to throw them all in a room and lock it and not let them out until they have resolved their differences. Then you've relieved Judge Sentelle of having to go through all of this on a cold record. It does work, it is a great discipline, and I hope that it can be revived by the current administration.

PROFESSOR DeBOW: Thanks, Boyden.

We have plenty of time and I think a single microphone in the middle of the room if you have questions for the panelists. I will assert the chair's prerogative and ask first if anybody on the panel wants to respond to anything anyone else has said or ask a further question.

MR. LEFKOWITZ: I would just point out I think a lot of the concern that folks at the agencies and people at OIRA have with the reg-neg process is that it is quite cumbersome. I could not agree more with Phil about the best way to reach consensus.

I don't know that consensus for the sake of consensus is necessarily the ideal, because sometimes that just leads to the lowest common denominator approach, and obviously there is policy that you want to effectuate here.

On the other hand, I have found in the last several months that whether it is dealing with stakeholders who are interested in coming in and pleading their case or dealing with different agencies that have a different view about a particular regulation that might affect more than one industry, it is often far superior to get both of them into the room at the same time and to be dealing with both of them at the same time, and hearing each other deal with an issue than doing it in a seriatim approach.

I am not sure that you can't achieve a lot of that consensus-building in an informal way that might be less cumbersome. Obviously the D.C. Court Sierra Club decision makes clear that the APA does not require on-the-record proceedings. Obviously we disclose all of the meetings that take place, we provide copies of all the paper, but not on the record in the way that the Federal Advisory Commission Act would require.

So I think in spirit, we certainly agree about the best way to proceed in complex rulemakings from a substantive approach. I think the jury is still out and it may be that we just do not have enough of a database to work from, and it may certainly be worth exploring as we go down the line.

PROFESSOR HARTER: Let me respond. Two issues were raised here. The first was that consensus leads to the lowest common denominator. People often say, "Gee, you're going to go after consensus. Would you want it if you got it because of the lowest common denominator?" I have to say that the hair on the back of my neck goes up when I hear that because it is so diametrically contrary to what actually happens in practice. To understand why, you really need to look at what happens. Take a look at all these hellaciously complicated rules that are mentioned. These are the ones that the agency could not get out the door. But the results of the reg negs are all extraordinarily tightfor these complex rules.

As Boyden talked about, look at the effect on the air in Los Angeles of gasoline. That is not a lowest common denominator, I assure you. And let's look at why. You can walk into a room. Reg-negs are held in a room like this, a table in the middle and audience all around. Gasoline almost always had 200 people in the room with varying interests.

You can walk into that room and know — you can feel it — whether the rules of the game are to get to consensus or whether this is reg-neg lite: "We're going to do a little consulting, but nobody is going to have to really agree because there's nothing at stake if there's not a consensus."

If you have a consensus, now, all of a sudden, instead of having disparate groups, you have one group with a common problem. We are not going to unlock the door until you agree. You can feel the difference between the committee working toward a consensus. I mean, I think you can all feel the difference when you go shopping for a car. Just looking -- let's talk about price as opposed to let's negotiate a price. There is a major difference in the level of commitment and information and understanding that goes on in the process. Further, if the rules of decision are consensus, you have to deal with the concerns of the others and cannot simply roll them because you have the votes; as a results, the issues get thoroughly vetted. Each party to the negotiations will be looking to improve their position over what would occur without the negotiation — the famous BATNA — and hence at least one party would object to any backsliding in a proposal towards a "least common denominator" since by definition the result is less than other options. Simply put, those who assert the results are wimpish are those who have not examined them in comparison to what would have occurred without the negotiations.

As for cumbersome, it strikes me that to a very real extent, the cumbersomeness is self-inflicted by the government intselt. FACA is a pain to be sure. No doubt about it. It is one of the world's dumb acts because you can really make it a performance standard without having the inhibiting "Mother, may I?" part. But, an agency's asking to charter in a FACA committee ought not be a seven-month process. It is at this end of Pennsylvania Avenue that the problem lies.

Putting a notice in the Federal Register that you are going to hold a public meeting and anybody who is concerned about it is invited to attend is not terribly cumbersome. I do not understand the cumbersomeness if the process is going to have to develop a lot of very complicated information and to resolve a political problem that the agency has not been able to resolve in two decades. It gets it done; and it gets done fully a third faster than if the agency uses the traditional APA process, if indeed the agency is able to make any decision. And it is traditional notice and comment rulemaking they results in , at least frequently, the least common denominator or, to put it in the terms of Public Administration, the goal there is to "satisfice" which is to make everyone a little bit happy so they will get off the agency's back.. A very quick review of any result will show that.

AUDIENCE PARTICIPANT: I want to ask a question about why there is very little, if any, negotiated rulemaking in the health care arena, particularly as applies to Medicare and Medicaid? These are highly detailed regulations and part of the statute is highly detailed. Frequently the regulations are exceedingly complex and they are put out by people, while no doubt well-intentioned, who simply do not know the area in which they are regulating well enough. If you take it in a big picture, many times regulations they put out are completely devoid of common sense.

PANELIST: I will take a stab. One of the problems with the current regulatory regime is it is not even remotely performance-based, performance standard-based, or market-based.

There is a big push to doing a drug benefit, if you will, as opposed to the hospitalization stuff. Not the existing Medicare system, but to do a new drug benefit that would be totally market-based. Then I think you would see the kind of things you would like to see.

But if a regulatory regime is not market-based or performance-based where you are guided by outcomes and not by process, then it's very hard to deny the agency the arbitrariness of the discretion, which they just love

MR. HARTER: I will start with a semi-controversial response, I think. I want to emphasize that there are certainly problems at the staff level, senior staff and SES level, but there is also a huge problem at the political level, at the management level. That was what both Boyden Gray and I emphasized. Bill Rosenberg was wildly successful. His successors haven't even tried. Others haven't either. I think it's not fair to aim solely at the staffers. My own view is that if the political level wants to set the goals and hold people accountable and provide the resources, I think we have seen enough examples that it actually gets done.

I think using these processes on some of the civil service rules is probably a good idea, but I, for one, having been there myself in the past, in all due respect, am somewhat on the other side.

PANELIST: Much as I obviously don't like some bureaucrats, it is the posture they are put in by the incentive structure of the regulatory setup. Individually, they're well motivated people. It's just that the incentives that they are given makes them act in irrational ways.

PANELIST: Certainly there is a lot of reform to the civil service system that we could look at in terms of being able to promote people, not to be lock-stepping everybody across the board. There is a whole agenda in terms of performance standards in terms of civil service reform.

But the problem with regulatory issues tends to be a problem sometimes of political will, not so much real career intransigence. There are always some career people who may be wedded to a particular policy, but at the end of the day, they are not at the top of the chain.

We could all do a better job, any administration could do a better job, with the tools that they come in with. Sometimes you go through a lot of exercise to come up with a new regulatory process for doing your work and you get a new edifice, but you haven't actually changed the way you do the work because the problem isn't really with the structure, the tools that you have; the problem is in terms of the will.

AUDIENCE PARTICIPANT: I wonder if you could comment on whether or not you believe that a reg-neg process worsens the potential abuse whereby a will work through the process and get a solution that is uniquely beneficial to them but detrimental to their competitors.

MR. HARTER: I will jump in, I guess as the one who has seen these happen. Actually, I think that reg-neg probably lessens that on a couple grounds. First of all, if it's convened right (and this is one of the reasons why I think paying attention to detail ends up being important) you find those things out up front. You will talk to not just one party, but you will talk to a couple others and say, well, you know, this one over here has this concern. You end up having an on-the-ground understanding of a lot of the political dynamics, which may be exactly as you say, and so you want to make sure that there are going to be other people at the table to counter that.

In addition, I want to emphasize that these are open meetings. The committee will be inhibited for about half an hour, and then you forget about it. And so everybody is there seeing what is happening. So in a lot of ways, it actually makes it more difficult for that to happen.

One of the aspects of negotiated rulemaking that is a little bit different than traditional notice and comment is that there is an affirmative outreach up front. So if there is a concern with the effect on small business or some other kind of competitors, if done right, you will make sure that somebody representing that view is at the table to counter right up front, whereas they may well not participate in a traditional regulatory notice and comment. They may be aware of it, they may not think that their comment is going to be effective afterwards, whereas the big guy who is going to get the rents, as Boyden said, is going to have every incentive to go meet with everybody up the chain or to skew the notice and comment version all the way up. So in my view, it actually lessens that effect.

PANELIST: I would second that completely, and that's one of the great values of it, because, like market incentives and other performance standards, it does level the playing field and eliminate the chance that someone is going to hijack somebody else.

When I was in the government, if you went into something that was either reg-neg or something like that where we were trying to get people in a room to agree, that it wasn't a formal regulatory negotiation, I could always tell in advance that if it was not going to work out, which company was going to screw it up and which environmental group was going to screw it up. Without fail, I could guess it 99 percent of the time.

MR. HARTER: Let me just add one other aspect about it. Your question also emphasizes the need for the agency really to participate in the discussions, so it indicates, it signals where it's going, because everybody is going to negotiate in order to make yourself better off always. So you have a feel where this 800-pound guerilla is likely to sit so that you can judge what proposals are in your interest.

If this company that is seeking this indicates that it is likely to lose and the agency is going to go ahead and rule it, that may be an important part of it, to say, you know, you're not going to succeed in forestalling the rule. So the agency really has to be very clear: We're going ahead if you don't meet your deadline.

AUDIENCE PARTICIPANT: In the wake of the September 11 attacks, a couple of interesting things have happened in the administrative space. One of them is, of course, the airline bailout bill, which contains an administrative procedure for compensation of victims of the attacks in New York and in Washington replacing the judicial system; and the second, of course, is most recently, the President's proposal for military tribunals also to supplant the judicial system in some respects.

It seems to me that this turns some of our traditional notions about administrative versus judicial on their heads, and I was curious as to the panel's thoughts on that particular topic.

MR. LEFKOWITZ: Well, on the airline side of things, the airline bill, the bailout bill and the assistance bill which in effect had two principal financial components --a $5 billion cash grant, then $10 billion in available loan guarantees -- also included a victims' compensation fund. Both the victims' compensation fund part of that bill and the loan stabilization program required regulations to be written to implement that. We literally had 14 days from the date of the passage of that bill to get the loan stabilization regulation written, and we did.

Theresas a lot of question as to whether we would make it on time and whether we would punt, but I think the feedback from the airlines and from people who have been watching it have been very good. We have got a program now out there, we are taking applications from the airlines for loan guarantees. We put together a program that is going to encourage airlines to make good business cases. We put in a series of preferences for how the stabilization board will evaluate loans so that we are not just giving out the $10 billion to whomever comes in; there has got to be some security behind this. Again, that demonstrates that when the government needs to act quickly and put out regulations quickly, we can do that.

We are working right now on the other aspect of that, which is regulations to implement the victims' fund compensation program, which is hand in hand with the part of the statute that capped the airlines' liability at their insurance. People will now have the opportunity, if they want, to waive their right to go into the tort system to try to collect whatever they might be able to collect if they could get a judgment. It would all be consolidated in Federal court in New York in any event. But they are free to go after what they can get in the tort system or they can come into a compensation program which we are writing as we speak.

We have put out for public comment a series of questions which we expect to get answers to in about ten days, and then, by statute, we really have only another several weeks to get this out the door and to have an up-and-running victims' compensation fund.

AUDIENCE PARTICIPANT: What is the deadline for those regs?

MR. LEFKOWITZ: I believe December 21.

AUDIENCE PARTICIPANT: So the entire time from inception to promulgation was three months? Four months?

MR. LEFKOWITZ: Yes, about three months. And during those three months, the first two weeks were taken up writing those airline loan stabilization regulations.

AUDIENCE PARTICIPANT: That's an impressive incentive system. Thank you.

MR. HARTER: I think the quick answer, you were talking about the adjudicatory side and we've been talking about the rules. There are lots of examples of Congress or the body politic using administrative tribunals. Workers' compensation to a certain extent, andsocial security are probably the ones where you have a huge number of small cases.

AUDIENCE PARTICIPANT: I would introduce my question by saying that I have had the privilege of sitting on some three or four reg-neg panels. Unfortunately not too many of them actually came to fruition. But that is actually just something that happened. Sometimes you can not reach consensus, sometimes perhaps the wrong subject area was chosen for a reg-neg. But nonetheless, I think it is a great tool.

I think that political will is a very important part of whether or not it is used and used successfully. But I am also wondering if there isn't something else, whether FACA needs to be amended, whether or not there are some policies that come out from OMB to have some consistency amongst the agencies or to help educate them on what are the appropriate subjects to try out a reg-neg. I am wondering if there are some other tools that we can use to try to push them and make them more successful.

PANELIST: It strikes me the one that we shared was a perfect example of the agency lacking the political will to follow through. They adjourned 14 months ago; it still hasn't made up its mind.

PANELIST: I certainly do think that political will is important I mean, it's the White House, it's the President ultimately who has the obligation to see that the laws are executed, and if he wants to see this done and sends the word down through OIRA, through OMB, through the CEA, the counsel's office, whatnot, he sends it out to the Cabinet through Cabinet Affairs, I think you will see more success. It does require some pressure from the agency.

PANELIST: In this particular one, there was a huge divide between the staff and the political level that is still going on.

PANELIST: Between the staff and the political level?

PANELIST: Yes.

PANELIST: Well, that's not really helpful at all.

PANELIST: Right.

AUDIENCE PARTICIPANT: If my memory serves me correct, I believe there was a change in the language between Executive Order 12201 and 12866 from the benefits needing to outweigh the cost of regulations to the benefits needing to justify the cost. How has that perhaps increased the number of proposed regulations coming out of the agencies? Similarly, to what extent is reg-neg affected by that?

PANELIST: I don't think the two executive orders really differ on substance. How much they've been enforced, again, politically is another issue. But basically, the notion that, statutes permitting, you want the marginal cost to be in line with marginal benefit, I think that is something that there is a consensus about. But whether or not the political will to force people into a paradigm that will actually execute that, -- at EPA, it's lacking right now -- has been, anyway, for the last few years.

AUDIENCE PARTICIPANT: I identified with your comment. Actually, all around, I identified with your comments, although I would sound that funny or ironic note that's always there. While I agree with your macro conclusions, and both you and Boyden introduced the reformulated gasoline example as really where reg-neg had cut its teeth correctly, gone to the dentist and got it done right. Of course, the Erin Brokoviches of the world wouldn't agree with that.

I happen to come from a state where MTBE happens to be at the very head of consideration, and believe

me, I don't come here to celebrate Erin Brokovich. We have the trial lawyer's version of the dream team that works on MTBE now coming to our state to convince all these unfortunate people who have a horrible taste and perception problem from MTBE that they are all going to die tomorrow, and they all have to sue over this.

So it is only really the unintended consequence I was more reflecting on.

PANELIST: Let me just respond to that. I think that it would not have made a wit of difference if EPA had used regular rulemaking because we simply did not know at the time that MTBE had such a water problem. It wasn't there. It was totally focused on its effect in combustion and its effect on air and there wasn't any information.

PANELIST: We should not be drinking the stuff, anyway.

AUDIENCE PARTICIPANT: People do not care whether Ford Motor Company is doing well and they do not care how the big electric utilities are doing. But they do not have an effective voice at the table, and I would argue that AAA is not it. There is not an effective voice for that other kind of public interest at this point.

If it is clear that reg-neg is the way it's going to go, those voices will emerge. I am not being negative to neg-reg, but I am looking at your outreach on that.

MR. HARTER: In the gasoline negotiation, you're right, we simply did not identify people who were interested in a cheap car, although the comment was made, "gee, if they wanted it 50 percent lower, they would go for that."

But in that case, it was very clear. The gasoline rule, just to put it in perspective, is a $10 billion-a-year rule.

It's a good portion of what we are talking about, $10 billion a year, and everybody knew it going in, that's how much it was going to be with a very healthy capital cost up front. It is just a footnote there. The way where you're talking about it, it's Monopoly money. But two weeks after the committee reached agreement, the front page of the Wall Street Journal reported that an oil company invested $800 million dollars in a new refinery. All of a sudden, it became real.

So we were concerned about people who were worried about the cost of gasoline and yet nobody is going to have an incentive to spend six months of their life looking Exxon in the nose in order to save $200 a year.

AUDIENCE PARTICIPANT: That's exactly my point.

MR. HARTER: So it's a considerable amount of effort. You need a surrogate in order to do that. In fact, I actually walk through my class and we play these games and their first answer always is Ralph Nader. I said, hey, you know, the word cost is not in his vocabulary.

And then they say, AAA, and that was our next call, and they were not interested in participating because they had other things they were doing.

But, you need somebody. Perhaps only because of my advanced age now as opposed to ten years ago, if I had to do it over again, I would ask AARP -- all those RVs headed South, clearly well organized, clearly concerned.

But actually we found a group of small farmers — they need to be small farmers because the big farmers use diesel-power tractors -- that were certainly well organized, certainly politically sophisticated, and the cost of gasoline is a significant part of their doing business. So they were on the committee, and their explicit charge was to worry about the cost of gasoline to the farms in the areas surrounding the big cities. The Department of Defense, which also consumes a lot of gasoline, also participated.

So we did do that. We did not include somebody who was looking for the cheap car, frankly because nobody raised it during the discussions or in any of the inquiries.

PANELIST: But bear in mind that in those kinds of situations where you could use market incentives, what you are trying to do is use the reg-neg to decide how you allocate baseline burden, and then the marketplace kicks in, the competitive marketplace kicks in to produce the highest yield for the lowest cost. Then you have it inherent in the incentive structure that the consumer will be vindicated and that rent-seekers, that is, companies seeking to profit by fattening their margins off of the consumer, will loose. That's the whole point, that the consumer gets the benefit of the arbitrage.

The reason you run into trouble and can't do it is because there is a rent-seeker out there thinking that they can get a huge advantage over somebody else if they screw it all up, and that's what happens.

PANELIST: I'm talking about the implementation phase of the new ozone and particulate rules that inevitably follows on our failure to convince the court that the non-delegation doctrine should be around. What I have noticed even in the phases of arguing about setting the levels for those, and that was a notice and comment process, so this isn't a criticism of neg-reg per se, is that you had the larger collected constituencies making the arguments. For instance, the power companies made arguments in general towards the implementation phase that the burden and even the level sets should anticipate the

burdens potentially being dispersed onto automobile owners.

You know, as somebody who has fought about the IM240 program significantly, I don't consider myself a consumer advocate. I would no more stand with Ralph Nader than Bill Clinton. But I do find that there are public interests, there is such a thing as public interest groups. I just don't think Ralph Nader personifies that.

PANELIST: You raise a good question. When and if the rule comes out (and I think the D.C. Circuit has indicated there will be some rule for PM2.5) whether it's the level that EPA proposed, I don't know. That is very much up for grabs. But something will definitely come out, and at that stage, what EPA has got to do is throw all the people into a room who are supposed to contribute to this stuff and have them come out of the room saying, my allocation of the burden is X, Y and Z.

But EPA is unwilling to identify who they are because then they would loose all power to yank whoever it is around. If they can hold under their vest who is actually responsible and bring enforcement actions when they want to against whoever they want to rather than have it all done out in public. In the regulated community the automobile industry is going to be shooting at the utility industry which is going to be shooting at X industry and so on. Put them all in the room, have them shoot at each other, they all fall down dead, and then they end up with an allocation, and then they have to all go out and trade it out in the marketplace and their CFOs take over from their. Then you will actually see the cleanup start when the CFOs take over from the lobbyists, and that is what you want to have.

PROFESSOR HARTER: It is always dangerous now when you have a former student stand up.

PROFESSOR DeBOW: This will have to be very brief. We're right on the edge of our time limit.

AUDIENCE PARTICIPANT: I could not resist the chance to ask Professor Harter a question, especially as a former student. Actually, a brief two-part question. All three of you have provided, an excellent view of how the agencies have responded to reg-neg. But I wonder if you could briefly talk about the regulated community, and especially now where the certainty to the regulated community would probably be a very valuable thing that could come out of the reg-neg process with things as uncertain as the Clean Air Act, for instance.

Certain industries, the automobile industry, the power industry, know they are going to be regulated. Were reg-neg to be used, there would be a greater certainty in what they would have to prepare for down the road.

The second part to my question would just be, do you think any of the language in the recent Supreme Court decision in *Mead* would have an effect on the products of a reg-neg rulemaking with regards to *Chevron* deference?

PROFESSOR HARTER: Let me answer the first one. The empirical analysis that I talked about and studied shows the industry was strongly in favor. If you look at it, a number of the regulated entities have strongly encouraged the use of reg-neg. The one that I have been doing a lot of work with recently is OSHA. Several of the industries and unions petitioned OSHA to use it and develop standards.

As for *Mead*, I'm teaching Ad Law next semester. I will give you an answer later.

PROFESSOR DeBOW: Our time has expired. Thank you all for coming.

[1] **Jody Freeman and Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit,* 9 NYU Env. L. J. 60 (2000)**