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Regulatory Policy and the Consensus Trap: An Agency Perspective

Abstract: Regulatory agencies in the United States have relied increasingly on consensus-based decision processes to build public support for their policies. If they are well-designed and managed effectively, consensus-based processes may increase support for an agency's policies and enhance its institutional legitimacy. But poorly-designed processes may lead to a consensus trap, in which an agency commits to making decisions based on a consensus the participants will never be able to achieve. Two recent initiatives of the U.S. Environmental Protection Agency—negotiated rulemaking and the Common Sense Initiative—suggest factors that may be associated with more and less sucessful consensus-based processes.

1. Introduction

Administrative agencies have always occupied an uncertain ground in American government. In a system in which government legitimacy is based upon the pillars of elected representation and constitutional recognition, administrative agencies enjoy neither status. Francis Rourke has written (1987, 229) that "there is a certain aura of illegitimacy about bureaucracy" in the American political system. Agencies are an adaptation of democracy to the economic and social complexity of modern society. Much of the history of public administration in the United States may be seen as an effort to establish the legitimacy of agencies in light of their uncertain constitutional and political status.

Early in this century, administrative agencies were viewed as value-free implementors of legislative intentions. They were seen as neutral 'transmission belts' that translated the intentions of Congress into administrative policy. Over time, however, it became clear that administrative agencies, especially those with regulatory powers, exercised formidable discretion in their own right, and the conception of agencies as value-free implementors began to erode (Bernstein 1955; Sabatier 1975; Garland 1985). The vagueness of many statutory delegations of regulatory power, the competition for influence among

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interest groups, and the openness of the American administrative process to outside influences made agencies active participants in policy making. They thus have found it more difficult to establish their political legitimacy than their counterparts in other countries.

This need for legitimacy is especially acute for regulatory agencies. By definition, regulatory agencies restrict the behavior of private parties and other levels of government in the name of the public good (Mitnick 1980). They restrict behavior by issuing rules that are binding generally upon the affected parties, under authority delegated to them by Congress. They have authority to impose rights and obligations on the private sector, and thus to allocate costs and benefits on behalf of society. Regulatory agencies exercise lawmaking power, similar to that exercised by a legislature (Kerwin 1994). Because they lack the constitutional and electoral legitimacy of the legislature, however, agencies seek other means of justifying their authority to make law. Regulatory agencies in the United States have sought to justify their authority in two principal ways: (1) by accumulating and applying expertise or (2) by granting constituencies a role in the exercise of regulatory discretion. This is especially the case in environmental, health, and safety regulation (Lilley/Miller 1977).

The accumulation and application of expert knowledge has long been a foundation of the administrative state (Eisner 1993). In the late nineteenth and early twentieth centuries, when the administrative state emerged, agencies were seen as a new, fourth branch of government that allowed democracy to cope with the complexity and interdependence of industrial society (Landis 1938).

Contemporary health and safety regulators use expert knowledge to justify their authority. In environmental regulation, for example, quantitative risk assessments are used to identify problems and determine the need for regulatory action (Fiorino 1995a). These and other technical analyses are subject to critical review by panels of scientific experts (Jasanoff 1990). Cost-benefit and other forms of economic analysis are used to evaluate policy options. The technical analyses conducted by the agencies are only part of the picture. In the highly adversarial setting of U.S. regulatory politics, the regulated industry and outside interest groups apply their own expertise to the critical evaluation and deconstruction of agency analyses. Nearly any technical dispute of consequence becomes politicized. As a result, agencies have found that technical expertise is rarely determinative. Only when the technical issues are beyond dispute can it be said that the experts determine the outcome in the end.

Given these limits in the use of expertise to establish legitimacy, agencies have turned to their other option—that of sharing their regulatory discretion with constituencies. This strategy is, in many respects, an illustration of

traditional American pluralist politics. Administrative agencies in the U.S. have always cultivated outside constituencies as sources of political support (Rourke 1969). In a pluralist political system, agencies seek political support where they may find it. But it is old-style pluralism with a twist. American politics has changed from the days when regulated industries could 'capture' the very institutions that had been created to regulate them; agency strategies for sharing power and building support with political constituencies have changed as well. In the "new politics of public policy" (Landy/Levin 1995), agencies must find ways to share power with competing, often conflicting constituencies in an open, participatory setting. The openness of the American regulatory process, the growth of 'watchdog' public interest groups that monitor agency decisions, and the ready access to the federal courts for reviews of agency actions, among other factors, mean that regulatory agencies in the U.S. must maintain a delicate balance among political constituencies.

It is acceptable, even desirable in a pluralist democracy for administrative agencies to share power with relevant interests. Consultation and consent are the foundations of a democratic state. When agencies base their decisions on a consensus of the affected interests, they may increase their institutional legitimacy and promote public acceptance of their decisions. Yet agencies that use poorly-structured consensus-based processes may fall into a 'consensus trap', in which the agency commits to making decisions based on a consensus that the parties will not be able to achieve. Agencies that commit to sharing their discretion but are unable to preserve enough authority to bring the parties to agreement on how to exercise that discretion may fall into this trap. Agencies that fall into the consensus trap undermine not only their ability to resolve the issues at hand but their long term institutional legitimacy as well. Agencies may share power, but in the end they must govern.

This article provides an agency perspective on the use of consensus-based processes to resolve public policy issues. The two case studies are drawn from the recent experience of the United States Environmental Protection Agency (EPA). The two cases are negotiated rulemaking, first used by EPA in the middle-1980s, and the more recent Common Sense Initiative (CSI). Under some circumstances, agencies may succeed in bringing diverse outside constuencies to consensus on policy issues, as negotiated rulemaking illustrates. Under other circumstances, this goal is probably not achievable. The search for legitimacy through consensus may, in the end, undermine governmental authority and legitimacy. EPA's experience with the Common Sense Initiative (CSI) illustrates this case. This article compares the two cases, then considers why one (negotiated rulemaking) is likely to turn out to be a more successful application of a consensus-based process than the other (the CSI).

2. Negotiated Rulemaking: Consensus Through a Well-Structured Process

The process of negotiated rulemaking was first used by several federal agencies in the early 1980s to overcome weaknesses in conventional rulemaking. It has received attention as a common sense way to reduce conflict and distrust in the regulatory process, or what one of its leading proponents identified as the 'malaise' in conventional, adversarial rulemaking (Harter 1982). It was designed to build upon the experience in the U.S. with mediation, negotiation, and dispute settlement techniques in developing consensus-based approaches to solving policy problems (Bingham 1986).

Among federal agencies, the Environmental Protection Agency, Occupational Safety and Health Administration, and Department of Transportation have used negotiated rulemaking the most (Fiorino 1988; 1995b; Funk 1987; Perritt 1986; Susskind/McMahon 1985; Rushefsky 1991). These negotiations complemented but did not replace the conventional rulemaking process in the U.S., as defined under the Administrative Procedure Act (APA), authorizing statutes (such as the Clean Air Act), and numerous court rulings that have been issued over the years (Kerwin 1994).

The experience with EPA, which has conducted more negotiations than any other agency, illustrates the process. A negotiated rulemaking begins with an initial convening effort to identify parties with an interest in a rulemaking, determine whether or not the issues in the rulemaking are negotiable, form a negotiating committee, and develop procedural groundrules for the process. A senior EPA official represents the agency as a party to the negotiations. A neutral, professional 'facilitator' is selected by the parties to serve as a process manager. The committee is balanced with a cross-section of interested parties, typically including (in addition to EPA), regulated companies, trade associations, environmental groups, state and local officials, union officials, and other interested parties. Once they are constituted, the committees retain the authority to add or drop participants. The committees generally have been open to participation by parties that claim an interest in the proceedings and commit to good faith in the negotiation process. Typically 20–25 parties participate.

The negotiations usually take place over a six to nine month period. The goal is to reach an agreement on the content and often the language of a proposed rule that is published for public comment, as required under the Administrative Procedure Act. For its negotiations, EPA has defined consensus as an outcome that is at least minimally acceptable to all the parties to the negotiation. In most of the completed negotiations, the committees reached a full consensus. For example, on the very first negotiation, regarding nonconformance penalties for heavy-duty engines, the committee was able to agree

on the language of the proposed rule itself. In other cases, such as the negotiation on state exemptions for emergency uses of pesticides, the committee agreed at a conceptual level on all of the issues, and EPA translated this consensus into a proposed regulation. In the protocols that have been adopted for the negotiations, consensus usually is defined as an outcome that is at least minimally acceptable to all of the parties. In the negotiation on underground injection of hazardous wastes, one party withdrew from the negotiation. The committee continued its work and agreed on a proposed regulation, but noted the lack of agreement of a member of the original committee.

The committees have avoided strict voting procedures as a way to make decisions. In most cases, parties have been able to trade off issues so that, on the whole, they conclude that they are better off with the results of the negotiations than without them. In some cases, however, such as the underground injection rule cited above, the committee decided to propose a rule even though one or two parties did not sign the agreement (Fiorino 1995b). This decision reflected a consensus of the parties remaining at the table. In the few cases when several parties were unable to agree to a proposal, EPA dissolved the negotiations and issued a proposed rule through the conventional rulemaking process.

Once the rule is published in the *Federal Register* for public comment, it follows the standard procedure for notice and comment rulemaking. Members of the negotiating committee are free to comment formally on the proposal. Because the affected interests usually are part of the negotiation, however, negative comments on the proposals are rare. Lawsuits also have been rare in the sixteen or so rules that EPA has issued through the negotiation process (Nelson 1994). When the parties most likely to file a lawsuit are part of the negotiation, the likelihood of litigation is low. Many participants have cited the reduced number of lawsuits as an advantage of the process (Fiorino 1988).

As of late 1995, EPA had conducted some sixteen negotiated rulemakings. In most of them, the committees were able to reach a consensus that formed the basis for a proposed rule (Fiorino 1995b). Participants thought that the negotiations held several advantages over conventional rulemaking. They saw benefits in having representatives of diverse interests at the same negotiating table. They developed a greater understanding of the views and policy objectives of different parties. They were able to build relationships that served them well not only in the negotiations but in discussions of other issues as well. Industry representatives thought that cumbersome or unrealistic requirements were less likely to be adopted, because they had a chance to educate the agency and environmental groups about their operations and the way they made decisions. Nongovernmental parties appreciated the opportunity to meet face-to-face with agency officials and present their concerns.

The fewer lawsuits meant that issues were resolved in less time and with less demand on everyone's resources.

Participants also cited disadvantages. Although the process may save resources in the long run, demands on the parties during the concentrated periods of the negotiations are high. For the environmental groups in particular, senior staff must devote large portions of their time for several months to the rulemaking. In a few cases, the negotiations failed, because the issues were too complex or the parties simply were too distrustful. Representatives of environmental and consumer interests complain that they are at a disadvantage in resources compared to industry. Some critics have argued that the negotiated rulemaking process diminishes the agency's role, because it has the effect of delegating an agency's rulemaking authority to private parties (Funk 1987).

On the whole, however, evaluations of negotiated rulemaking have been positive (Kerwin/Langbein 1995). It illustrates one of the more successful efforts to use consensus-based processes to make policy decisions. It has been useful to EPA in resolving several rulemaking issues, and probably has enhanced the agency's authority and legitimacy with the many interest groups that have participated. Congress endorsed the process through legislation passed in 1990. In 1993, President Bill Clinton issued an executive order directing federal agencies to use negotiated rulemaking more frequently. For selected rules, negotiation has been accepted as an effective and legitimate mechanism for resolving policy issues.

3. The Common Sense Initiative: Consensus Through an Unstructured Process

An EPA initiative launched in the mid-1990s illustrates a second consensus-based process. Labeled the Common Sense Initiative (CSI), its goal was to reorient environmental policy making in the U.S. from a program-based to industry sector-based approach. U.S. environmental laws and programs have been organized on the basis of the medium through which exposure occurs (air, water, waste, or chemical use, for example) rather than on the basis of the activity that generates pollution. Many people have argued that, in regulating industrial pollution, it would be more effective and efficient to set performance goals and then allow industrial facilities and sectors greater flexibility in determining how to achieve them (Fiorino 1996). The Netherlands has made the most progress in implementing a sector-based approach to environmental management. For the CSI, EPA selected six industry sectors (metal finishing, iron and steel, auto assembly, computers and electronics, printing, and petroleum refining) and set out to determine how to achieve

'cleaner, cheaper, smarter' environmental policies and management in each of them (EPA 1994).

What is of greatest interest here is the process EPA has used to implement the CSI. It draws upon the recent U.S. experience with consensus-based approaches. The CSI program includes two levels of representation from interests outside of the federal government. A top-level CSI Council, chaired by the EPA administrator and made up of heads of environmental organizations, corporate vice-presidents, state agency directors, and others, serves as a board of directors for the overall sector initiatives. Under this Council, EPA established six subcommittees, each of which is responsible for developing and implementing projects in a sector. As with negotiated rulemaking, EPA retained a neutral, professional facilitator to serve as the process manager for each subcommittee. In addition to the standard list of participants from industry, environmental groups, and state agencies, each CSI subcommittee included an 'environmental justice' advocate, in recognition of the special concerns about the unequal exposure of poor and minority populations to sources of industrial pollution.

EPA committed, when it formed the subcommittees, to make decisions only by consensus of the parties. In the procedural groundrules put before the first meeting of the CSI Council in 1995, EPA proposed that the Council and subcommittees "shall operate by consensus decision-making", and that "Consensus shall be considered reached when all participating members can accept or support a particular position, even though the position may not be their first choice" (EPA 1995). Because some of the participants objected to this definition, it was not formally adopted, either at this or at subsequent CSI Council meetings. Thus a consensus-based process has been working without an agreed-upon definition of consensus. In the absence of a formal definition in the procedural groundrules, many of the parties have insisted on a definition of consensus that enables any one or a bloc of participants to exercise a veto over any projects or issues that the subcommittee considers. This ambiguity regarding the definition of consensus has been a recurring issue in CSI discussions.

A related problem with the CSI process is the lack of agreement on procedural groundrules. The agency did not press the participants to agree on procedures for adding or removing members of the subcommittees, reaching agreement on substantive policy issues, or dealing with minority opinions on policy recommendations and policy proposals. Because, as one participant observed, "EPA has failed to issue ground rules or guidelines on how the process should work", the CSI Council and the six sector subcommittees have been distracted by debates over procedures that have impaired their ability to make progress on more substantive policy issues (*Inside EPA* 1996b, 12).

Although the CSI was announced by the EPA administrator in July 1994,

the Council and subcommittees did not formally begin operation until January 1995, so it is too soon to render a final judgment on the success of the process. After more than a year, however, weaknesses in the design of the CSI as a consensus-based process are becoming clear. A first problem is that the goal of the CSI and of the six subcommittees is unclear, except for the administrator's statement that they should seek a "new generation of 'cleaner, cheaper, smarter'" environmental solutions (EPA 1994). The administrator listed six categories for change (regulation, pollution prevention, reporting, compliance, permitting, and environmental technology), but policy goals within each were left vague. What the participants would do to achieve 'cheaper, cleaner, smarter' results was left to them to determine.

The roles of the agency and the various participants in the CSI were also largely undefined. EPA has never clearly articulated policy goals for the program, except at a very broad level that most participants would not challenge. After all, who could argue against the propositions that permitting processes should be more efficient, that pollution prevention should be a standard business practice, or that regulation should yield better environmental results at less cost? Yet this was the level at which the initial EPA policy goals were stated. The vagueness in EPA's policy goals has been matched by its relatively passive policy leadership on the CSI Council as a whole and on the six sector subcommittees. In nearly all of the sector groups, the senior EPA officials at the table have not articulated policy goals beyond the vague ones announced at the start of the process. With a few exceptions, leadership in the subcommittee discussions has been left to the professional facilitators, who by definition are policy neutral. Efforts by the participants to assert policy leadership have often been countered by representatives of opposing points of view. EPA's assumption is that a consensus will somehow emerge from the participants. However, without strong agency leadership, it is unlikely that 25 people with diverse, often conflicting policy goals will agree on major policy changes. EPA has not provided the kind of policy leadership it provided in most of the negotiated rulemakings.

4. Comparing the Two Processes

The two processes are similar in many respects. In both, a regulatory agency offers diverse constituencies an opportunity to share in the exercise of its regulatory discretion. In the negotiated rulemakings, EPA commits to publishing a notice of proposed rulemaking that reflects a consensus of the parties, so long as EPA determines that the rule is consistent with its legal authority. In the CSI, it is less clear what the agency is sharing, given the open-ended nature of the process. The goal and expected outcome of the process are not well-defined. But the agency has committed to sharing authority with the

CSI Council and subcommittees for any EPA policy decisions regarding the sector.

The composition of the committees in the two processes is similar. Both are corporativist; a standard set of representatives of different interests are at the table: EPA and other federal agency officials, industry representatives (both companies and trade associations), state and local officials, environmental and other 'public interest' organizations, unions, and community groups. Many of the procedures are similar as well. Both rely on neutral, professional facilators to manage the process and relationships. Both have created workgroups to focus on particular issues or projects. Both are chartered under the U.S. Federal Advisory Committees Act, which defines legal requirements for public notice and participation in federal agencies' use of formal advisory groups.

Beyond these similarities, however, lie important differences. These differences reveal the limits of a consensus-based approach and suggest reasons why it may be used more appropriately in some cases than others. They also suggest factors to consider in the design of consensus processes.

One clear difference is in the definition of goals and products. In a negotiation, the goal is to agree on the content and, if possible, the language of a proposed rule. The goal is explicit from the start, and the parties agree to work in good faith to achieve it. In CSI, the goal is defined only as the effort to implement 'cleaner, cheaper, smarter' policies for the sector. There is no explicit product that the parties commit to try to reach consensus on and issue at the end of the process.

A second difference is in the role the agency has taken. In the negotiated rulemakings, EPA played an active role in shaping the negotiations and influencing the committees. It was one of several parties to the negotiations, but it was clear that, at the end of the day, only EPA held legal authority to issue a rule. If the process bogged down, the parties were not participating in good faith, or the committee appeared to be heading toward a result that the agency decided was not consistent with its legal authority, the goundrules allowed EPA to bring the process to a halt. Although EPA was a party-at-interest, it was also more than a party-at-interest; it was the institution to which Congress had delegated authority to make a choice that was binding on the parties. In the end, most negotiators would agree, the agency retained both the appearance and fact of authority. The agency's role in the CSI is more ambiguous. It selected the sectors and the members of the overarching CSI Council and the six sector subcommittees. It defined the general policy goal of achieving 'cheaper, cleaner, smarter' environmental management in consultation with the interested stakeholders. It listed the six categories (regulations, permitting, and so on) for which stakeholders were asked to recommend improvements. But its role beyond these initial choices has been vague. In none of the six sectors has it identified specific policy goals or pref-

erences that would guide the stakeholders and provide a set of constraints and policy directions for the subcommittees. In nearly all of the sectors, the agency appears to have reduced itself to being just another stakeholder. Not only does the status of the agency as stakeholder lessen the prospects for achieving consensus, it may also undermine the agency's legitimacy as an authoritative institution of government.

A third difference in the two processes is in the definition of consensus and the mechanisms for implementing it. In the negotiated rulemakings, EPA and other participants adopted a pragmatic definition of consensus, as a result that was at least minimally acceptable to parties to the negotiation. The CSI subcommittees have not been as explicit. It is clear from the way the discussions have progressed so far, however, that many of the participants have concluded that a consensus is any decision that the participants support unanimously. This means, in effect, that any one participant has a virtual veto over any agreements that the subcommittees reach. At times, one or two parties have been able to block projects or policy recommendations accepted by the rest of the subcommittee.

Even when a subcommittee agrees on a policy change, the mechanism for implementing it is unspecified. In a recent assessment of EPA, the National Academy of Public Administration (NAPA) expressed support for the goals of the CSI but concern about its design and implementation. NAPA agreed with many CSI participants that "EPA needs to refine and articulate more clearly the policy instruments it intends to use in ensuring that the environmental goals of CSI are met" (99). NAPA found that both environmentalist and industry participants were concerned that the process could be used to damage their policy interests. EPA left itself open to such concerns, NAPA concluded, "by launching the initiative before it had thought out how to set standards and support alternative pollution reduction strategies" (99). This lack of structure may make consensus difficult to achieve.

EPA has more than a decade of experience with negotiated rulemaking. Although some of the groups have failed to reach consensus, the relative success of all but a few of the negotiating committees and the generally positive assessments of the process suggest it as an example of a well-designed consensus process. The goal and desired product are defined clearly; the agency has generally retained final authority over the result; EPA has taken an active leadership role; and the participants have agreed for the most part on operating protocols and a definition of consensus. The CSI is still relatively new, and a final assessment is premature. But it is fair to say at this stage that problems in its design and implementation do not auger well for its success as a consensus process. The goal and desired outcomes and products are undefined, except at a vague level; the agency appears to have adopted a passive role in determining the policy outcome; the ambiguity about operating pro-

tocols and the right of any one set of interests to impede consensus has been an obstacle in the full CSI Council and several of the six sector subcommittees. The contrasts between the two and relative likelihood of success suggest lessons for agencies wanting to avoid the consensus trap.

5. Administrative Legitimacy and Consensus Processes

What I call the consensus trap is a product of the questionable constitutional and political standing of administrative agencies in the American policy system. In their quest for legitimacy, agencies have stressed technical expertise or shared their regulatory discretion with constituencies. Both negotiated rulemaking and the Common Sense Initiative illustrate the latter strategy. In both, EPA grounds its authority on a consensus of the parties who are in a position to oppose its choices.

When they use a consensus process, regulatory agencies walk a tightrope. If they are too passive, and too willing to go along with whatever course the other parties will accept, they risk either a stalemate or, should the parties agree on a course of action, a result that undermines rather than enhances the agency's legitimacy. Stalemate is likely because representatives of diverse interests with different, often conflicting goals will not reach agreement without strong leadership from an authoritative institution (that is, government). Even in the negotiated rulemakings, where goals were clear and the process carefully structured, the parties reached consensus only when the lead EPA official took an active role in framing the issues, defining the legal and political limits for choice, and actively engaging the parties in the drive for consensus. When government takes a passive role, as it has so far in most of the CSI sectors, at least some participants have an incentive to use the process for their own policy or symbolic goals. The narrow interests of interest groups take precedence over the collective goals of the process. The results are predictable: the parties fail to agree at more than a symbolic level; the agency is perceived as just another stakeholder; the expectations of participants in the process are dashed; and people may point to yet another instance of governmental failure.

This comparison of two consensus processes demonstrates how important it is, at least in the U.S. policy system, for a regulatory agency to maintain final decision authority if groups with diverse, often conflicting policy goals are to reach agreement on controversial issues. Indeed, a principal difference between the two processes lies in the default options should the consensus process fail. In a negotiated rulemaking, the default option is a rule issued unilaterally by EPA; in the CSI, the default option is the status quo. In the negotiated rulemakings, the participants knew that EPA was committed to issuing a rule; in all but a few cases, they decided that they would rather have

EPA issue a rule that reflected the negotiators' point of view rather than one issued by EPA on its own. In the CSI, the default was no change in existing policy. Especially for environmental groups participating in the CSI, who have been skeptical of the process from the start (*Inside EPA* 1996a, 5), the status quo default was seen as preferable to policy changes that *could* have reduced the stringency of existing regulation. The lesson may be that so long as an agency retains final authority over a decision, it may have enough leverage over the parties to bring them to agreement. In a pluralist policy system, such as the U.S., it is difficult to bring interest groups to an agreement on broad policy issues without the agency retaining final decision authority. In the absence of such authority, the centrifugal tendencies of a fragmented, pluralistic policy system will assert themselves. The other aspects of the CSI—the vagueness of the policy goals, the agency's passive stance, the ambiguity in procedures—reinforced these tendencies and further undermined the process.

Poorly-designed consensus processes with ambiguous policy goals and passive agency participation threaten not only short-term policy failure but a long term diminution in governmental authority. By avoiding the consensus trap, agencies may be able to enhance their own legitimacy and increase public support for their policies. This brief comparison of negotiated rulemaking and the CSI suggest lessons for policy makers to consider when they design and implement consensus processes. At least in the U.S. policy system, agency leadership may be essential if consensus-based processes are to resolve public policy issues and to enhance rather than diminish an agency's authority.*

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* The views expressed in this article are those of the author and not necessarily those of the United States Environmental Protection Agency.

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