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## Approaches to Regulatory Reform in the United States: A Response to the Remarks of Professors Levin and Freeman

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# APPROACHES TO REGULATORY REFORM IN THE UNITED STATES: A RESPONSE TO THE REMARKS OF PROFESSORS LEVIN AND FREEMAN

JEFFREY S. LUBBERS\*

It is a great pleasure to meet with the Japanese American Society for Legal Studies at a time when both the Japanese administrative law system<sup>1</sup> and legal education system<sup>2</sup> are undergoing such a sea-change. As one who has had a chance to participate in the latter change, I would say I think the new system of “American-style” law schools in Japan will surely help to bring our two academic communities into a very collaborative relationship in the years to come.

I only have a short time to supplement the excellent presentations by my colleagues, so let me take them in turn.

## I. I AGREE WITH PROFESSOR LEVIN!

First, let me simply add a few words to Professor Levin’s presentation, with which I fundamentally agree. It should not be too surprising that he and I tend to broadly agree on our views of administrative law. We graduated from the same law school one year apart,<sup>3</sup> and we both had the good fortune to have taken administrative law from the most famous scholar in the field at the time, Kenneth Culp Davis, who helped draft our APA and later developed the leading treatise on the subject.<sup>4</sup> Professor Davis once famously wrote that the notice-and-comment rulemaking

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\* Fellow in Law and Government, Washington College of Law, American University; Visiting Professor, Ritsumeikan University School of Law, Kyoto, Japan (summer of 2004 & 2005). This talk was presented at the meeting of the Japanese American Society for Legal Studies, Tokyo (September 12, 2004). I especially appreciated the efforts of Professors Takehisa Nakagawa of Kobe University and Setsuo Hiyama of Osaka University of Economics and Law for their “collaborative governance” of this program.

1. See Katsuya Uga, *Development of Concepts of “Transparency” and “Accountability” in Japanese Administrative Law*, 1 U. TOKYO J.L. & POL’Y 25 (2004) (describing the recent acceleration of administrative law reform in Japan).

2. For a short discussion of this development, see Annie Murphy Paul, *Land of the Rising Lawyer: A bold solution to Japan’s floundering economy: 68 American-style law schools*, LEGAL AFFAIRS (July/Aug. 2005) at 64.

3. University of Chicago Law School. I graduated one year before Professor Levin.

4. See Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315 (2005).

procedures (that he had helped to devise) were “one of the greatest inventions of modern government.”<sup>5</sup>

Perhaps that is one reason why Professor Levin and I also tend to agree that our APA is, in general, a remarkably good law that has stood the test of time quite well. Of course we both think it has some flaws and that it could use some updating, but we both oppose the kind of major and sometimes radical changes that have been proposed by the business community and their supporters in Congress.<sup>6</sup> This is especially true with regard to rulemaking, but that does not mean that no reforms need to be considered. Rather, I believe that the APA forms a good template from which to proceed with reforms at the margins.

#### A. *The ACUS Approach of Incremental Administrative Reform*

Indeed, the Administrative Conference of the United States (ACUS), for which I served as Research Director from 1982–1995,<sup>7</sup> took this approach when it issued a “summing up” recommendation in 1993 that set out a “coordinated framework of proposals aimed at promoting efficient and effective rulemaking.”<sup>8</sup> The recommendation addresses the increasing complexity of rulemaking caused by the impacts of presidential oversight and congressionally mandated additional procedures and analysis requirements, and by changes in the timing and intensity of judicial review. It also suggests some relatively minor amendments to the APA as well as some agency management initiatives.

In its early years, ACUS proposed the elimination of certain exemptions from the APA’s rulemaking requirements for rules involving

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5. KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6.15 at 283 (1st ed. Supp. 1970). See also Paul Verkuil, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 520 (1986) (interviewing Kenneth Culp Davis and Walter Gellhorn).

6. See Ronald M. Levin, *Administrative Procedure Legislation in 1946 and 1996: Should We Be Jubilant at This Jubilee?*, 10 ADMIN. L.J. AM. U. 55, 57–60 (1996) (discussing the influence of business groups in the regulatory reform debates of the 1980s and 1990s).

7. ACUS existed as an agency of the U.S. Government from 1968 until October 1995, when the Appropriations Committees of the 104th Congress terminated funding for its operations. See Symposium, *Administrative Conference of the United States*, 30 ARIZ. ST. L.J. 1 (1998). In October 2004, shortly after this presentation, Congress enacted legislation reauthorizing ACUS, Pub. L. No. 108–401, 118 Stat. 2255 (2004), but as of February 2006, no appropriations have been made. See Jeffrey S. Lubbers, *Consensus-Building in Administrative Law: The Revival of the Administrative Conference of the U.S.*, 30 ADMIN. & REG. L. NEWS 3 (Winter 2005).

8. *Improving the Environment for Agency Rulemaking* (Recommendation No. 93–4), 58 Fed. Reg. 4670 (Feb. 1, 1994). ACUS made over 200 recommendations from 1968 to 1995, many of which were implemented. These recommendations are available on the internet today at: <http://www.law.fsu.edu/library/admin/acus/acustoc.html>.

grants, benefits, loans and contracts.<sup>9</sup> The recommendation, emphasizing that the rules covered by the exemption “bear heavily upon nongovernmental interests,”<sup>10</sup> stated that the exemption was “unwise” and its elimination will “make for fair, informed exercise of rulemaking authority.”<sup>11</sup> Although Congress never eliminated the exemptions from the APA, the recommendation proved to be quite influential because many major rulemaking agencies agreed to follow it and voluntarily adopted policies declining to invoke the APA exemption.<sup>12</sup> In addition, Congress, in many subsequent statutes, expressly required the use of notice-and-comment rulemaking for particular government grant, benefit, loan, and contract programs. For example, the Social Security Act provides that regulations prescribing standards for benefits eligibility are subject to Section 553 rulemaking procedures.<sup>13</sup> Congress also required federal procurement regulations to be issued after notice and comment.<sup>14</sup>

In 1988, ACUS adopted a recommendation entitled “Presidential Review of Agency Rulemaking.”<sup>15</sup> This recommendation approved of the then controversial practice of presidential review of agency regulations begun in the Nixon Administration, but also suggested guidelines for the enhanced transparency and timeliness of that review, recommended the periodic reconsideration of existing rules, and proposed inclusion of independent agencies within the presidential review mechanism. The Clinton Administration, in its 1993 Executive Order No. 12,866,<sup>16</sup>

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9. Elimination of Certain Exemptions from the APA Rulemaking Requirements (Recommendation No. 69–8), 38 Fed. Reg. 19,782, 19,784 (July 23, 1973).

10. *Id.* at 19,785. Federal grant, loan, and procurement programs affect the lives of millions of persons and the character of the federal system as a whole. The extent of this impact today is of a far greater magnitude than it was when the APA, with its exemptions, was enacted in 1946.

11. *Id.*

12. *See, e.g.*, Department of Transportation Regulatory Policies and Procedures, 44 Fed. Reg. 11,034 (Feb. 26, 1979); *see also* Department of Housing and Urban Development, Rulemaking: Policy and Procedures, 24 C.F.R. § 10.1 (2005); Department of Labor, Rulemaking, 29 C.F.R. § 2.7 (2005); Department of Defense, 32 C.F.R. § 296.3 (2005); Department of Health, Education, and Welfare, 36 Fed. Reg. 2532 (Feb. 5, 1971); Department of Agriculture, 36 Fed. Reg. 13,804 (July 24, 1971); Department of the Interior, 36 Fed. Reg. 8,336 (May 4, 1971); Small Business Administration, 36 Fed. Reg. 16,716 (Aug. 5, 1971).

13. 42 U.S.C. § 421(k)(2).

14. *See, e.g.*, Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub. L. No. 98–577, § 302(a), 98 Stat. 3066, 3076 (codified at 41 U.S.C. § 418b (2000)) (requiring any “procurement policy, regulation, procedure, or form (including amendments or modifications thereto) relating to the expenditure of appropriated funds that has (1) a significant effect beyond the internal operating procedures of the agency issuing the procurement policy, regulation, procedure or form, or (2) a significant cost or administrative impact on contractors or offerors” to be issued only after a public comment period of (normally) sixty days).

15. Recommendation 88–9, 54 Fed. Reg. 5207 (Feb. 2, 1989).

16. Regulatory Planning and Review, Exec. Ord. No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

responded by adopting the openness proposals and periodic review procedures suggested by ACUS, adding time limits, and partially bringing the independent agencies within the presidential review mechanism. The Bush II Administration has continued to adhere to E.O. 12,866.<sup>17</sup>

In its last decade, ACUS was at the forefront of evaluating regulatory reform initiatives and in encouraging agency use of alternative dispute resolution (ADR). The Administrative Conference's work in promoting ADR in the government included applied research, educating agency personnel, offering legislative drafting and technical aid to Congress, and providing individual agencies with policy advice, systems design, and other implementation help. It produced more than a dozen separate recommendations. Beginning with its first major ADR recommendation, issued in 1986,<sup>18</sup> ACUS developed theoretical underpinnings—helping agencies begin to think in terms of adapting unfamiliar ADR concepts to their various activities, or even creating new ones, such as negotiated rulemaking. ACUS then took a lead role in drafting, and getting introduced, the Administrative Dispute Resolution Act and Negotiated Rulemaking Act, then working (with others, especially the ABA) to obtain passage of these laws in 1990.<sup>19</sup> The laws encouraged ADR use, mandated appointment of dispute resolution specialists in each agency, and named the ACUS as the lead agency for implementation. After enactment of the Acts, ACUS worked to build agencies' capacity to implement them. It organized and maintained a roster of neutrals, helped newly appointed agency dispute resolution specialists develop policies and start new ADR programs, and brought them together in interagency working groups—staffed by the Administrative Conference, to present materials, seminars, and training that no single agency would have done on its own.

Despite a great deal of support from the bar, members of Congress from both parties, the academic community, and unusual letters of support from Justices Breyer and Scalia,<sup>20</sup> ACUS ran afoul of budget cutters in the appropriations subcommittees in the 104th Congress, and rather suddenly,

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17. President Bush did amend the order to remove the Vice President from the process. Exec. Order 13,258, 67 Fed. Reg. 9384 (Feb. 28, 2002).

18. *See* Agencies' Use of Alternative Means of Dispute Resolution (Recommendation No. 86-3), 51 Fed. Reg. 25,641, 25,643 (July 16, 1986).

19. *See infra* notes 29–30.

20. These two letters are published in Jeffrey S. Lubbers, "If It Didn't Exist, It Would Have to be Invented"—Reviving the Administrative Conference, 30 ARIZ. ST. L. REV. 147, 162–67 (1998). The two Justices later testified in support of the re-establishment of ACUS. *Oversight Hearing on the Reauthorization of the Administrative Conference of the United States: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 108th Cong. 10-17 (2004) (testimony of Antonin Scalia and Stephen Breyer).

after an appropriations conference committee failed to follow the Senate's earlier floor vote to restore its budget, had to close down with one month's notice in October 1995. Its functions went unassigned by the Congress—not surprisingly leaving a fragmented approach to administrative law reform and resource sharing. Only a few aspects of ACUS's functions have since been picked up by other agencies.

### *B. Reinventing Government*

The same year that ACUS issued its major rulemaking recommendation, 1993, I was asked to lead a team for President Clinton's "Reinventing Government" initiative and helped to produce a report entitled "Improving Regulatory Systems."<sup>21</sup> Perhaps the most important feature of this report (and its approval by the White House) was that it did not really recommend "reinvention" of the regulatory system but instead a series of incremental improvements.

The report recommended better coordination among the agencies and the President on regulatory policy.<sup>22</sup> It urged the increased use of market-oriented and other innovative approaches to regulation whenever they are appropriate.<sup>23</sup> It suggested ways of enhancing public awareness and participation both in developing and implementing regulatory programs<sup>24</sup> and the streamlining of agency internal rulemaking processes.<sup>25</sup> It urged agencies to set better priorities to concentrate their regulatory resources on the most serious environmental, health, and safety risks and to engage in long-term regulatory planning<sup>26</sup> and also to make better use of science advisory boards as tools to use scientific data more widely in agenda-setting and decisionmaking.<sup>27</sup>

But, importantly, despite the mood of "reinvention" that pervaded the entire project, our team concluded that no fundamental procedural changes in the regulatory process were necessary. The report's two primary procedural recommendations subscribed to two of ACUS's major recommendations—that the President should encourage agencies to use

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21. OFFICE OF THE VICE PRESIDENT, ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW: IMPROVING REGULATORY SYSTEMS (1993) [hereinafter IMPROVING REGULATORY SYSTEMS], available at <http://govinfo.library.unt.edu/npr/library/review.html>.

22. *Id.* at REG01: Create an Interagency Regulatory Coordinating Group.

23. *Id.* at REG02: Encourage More Innovative Approaches to Regulation.

24. *Id.* at REG04: Enhance Public Awareness and Participation.

25. *Id.* at REG05: Streamline Agency Rulemaking Procedures.

26. *Id.* at REG07: Rank Risks and Engage in "Anticipatory" Regulatory Planning.

27. *Id.* at REG08: Improve Regulatory Science.

negotiated rulemaking and that in enforcing regulations, the President should strongly encourage agencies to use alternative means of dispute resolution.<sup>28</sup> These were included in our report because of the success of two statutory supplements to the APA, enacted in 1990, that have been mentioned by my colleagues today, the Negotiated Rulemaking Act<sup>29</sup> and the Administrative Dispute Resolution Act.<sup>30</sup>

### *1. The Negotiated Rulemaking Act*

The Negotiated Rulemaking Act was enacted with the strong joint support of ACUS (which developed the idea)<sup>31</sup> and the ABA (which became an enthusiastic supporter).<sup>32</sup> It established a statutory framework for agency use of negotiated rulemaking to formulate proposed regulations. It largely codified the practice of those agencies that had previously used the procedure, allowed each agency a lot of discretion about using negotiated rulemaking, and should be viewed as a supplement to the rulemaking provisions of the Administrative Procedure Act. This means that the negotiation sessions generally take place prior to issuance of the notice and the opportunity for the public to comment on proposed rules that is required by the Act. In some instances, negotiations may also be appropriate at a later stage of the proceeding and have sometimes been used effectively in drafting the text of a final rule based on comments received.

In her presentation and in her writings, Professor Freeman has described negotiated rulemaking quite well. Since 1982 it has been used perhaps seventy times by various agencies, most prominently the EPA and Department of Transportation. It has had many successes, and even when the negotiating group has failed to reach unanimous agreement, the

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28. See Jeffrey S. Lubbers, *Better Regulations: The National Performance Review's Regulatory Reform Recommendations*, 43 DUKE L. J. 1165 (1994); IMPROVING REGULATORY SYSTEMS, *supra* note 21, at REG03: Encourage Consensus-Based Rulemaking; *Id.* at REG06: Encourage Alternative Dispute Resolution When Enforcing Regulations.

29. Pub. L. No. 101-648, 104 Stat. 4969 (codified at 5 U.S.C. §§ 561-570 (2000)). The Act was permanently reauthorized by the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 11, 110 Stat. 3873 (codified at 5 U.S.C. §§ 561-570).

30. Pub. L. No. 101-552, 104 Stat. 2736 (codified primarily in 5 U.S.C. §§ 571-584); permanently reauthorized by the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870.

31. See Procedures for Negotiating Proposed Regulations (Recommendation 82-4), 47 Fed. Reg. 30,708 (July 15, 1982); Procedures for Negotiating Proposed Regulations (Recommendation 85-5), 50 Fed. Reg. 52,895 (Dec. 27, 1985).

32. See American Bar Association Resolution urging permanent reauthorization of Administrative Dispute Resolution Act and Negotiated Rulemaking Act (Feb. 1995).

agencies have gained valuable information and momentum from these proceedings.<sup>33</sup>

However, as shown by the small overall total of “reg-negs,” the technique is still used in a relatively small percentage of agency rulemakings. I think there are several reasons for this. For one thing, since 1995 ACUS has not been there to provide assistance and encouragement to agencies to use it.<sup>34</sup> Another reason is that budgeting process tends to skew priorities in favor of short-term thinking: there are some distinct front-end costs of hiring conveners and facilitators and holding negotiating sessions that must be paid during the current fiscal year while the ultimate benefits in terms of rapid completion of the process and reduced likelihood of judicial challenge all tend to accrue in the next fiscal year. And, finally, the Office of Management and Budget (OMB), which has the power to

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33. There remains a lively debate on the pros and cons of negotiated rulemaking. *See generally*, Symposium, *Twenty-Eighth Annual Administrative Law Issue*, 46 DUKE L.J. 1255 (1997). Several critics have argued that negotiated rulemaking allows agencies to transfer too much control to private parties. *See* William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351 (1997); William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA’s Woodstove Standards*, 18 ENVTL. L. 55 (1987) (arguing that EPA’s negotiated woodstove emissions rule went beyond the bounds of the Clean Air Act); Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206 (1994). Cary Coglianese has challenged empirically the basic assumption that regulatory negotiation has produced faster and less litigated rules. *See* Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL. L.J. 386 (2001); Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997).

On the other hand, the authors of several empirical studies have strenuously objected to the critics’ claims. *See* Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60 (2000) (finding significant legitimacy benefits); Philip J. Harter, *A Plumber Responds to the Philosophers: A Comment on Professor Menkel-Meadow’s Essay on Deliberative Democracy*, 5 NEV. L.J. 379 (2004–05) (summarizing his arguments in response to critics of regulatory negotiation); Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32 (2000) (rebutting Professor Coglianese); Laura I. Langbein & Cornelius M. Kerwin, *Regulatory Negotiation Versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence*, 10 J. PUB. ADMIN. RES. & THEORY 599 (2000) (finding that participants felt negotiated rules were superior, and more likely to be implemented, than conventional rules); *see also* Andrew P. Morriss, Bruce Yandle, Andrew Dorchak, *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179, 195–202 (2005) (finding good arguments on both sides, but generally siding with Coglianese on empirical debate with Harter); Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis For Flexible Regulation*, 41 WM. & MARY L. REV. 411, 458 (2000) (“The collaborative process is most promising, however, if used as a tool to guide agency discretion, rather than as an alternative mechanism to promulgate regulations backed by the coercive power of the state.”). For commentary on EPA negotiated rulemakings, *see* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 33–55 (1997) [hereinafter Freeman, *Collaborative Governance*]; Siobhan Mee, Comment, *Negotiated Rulemaking and Combined Sewer Overflows (CSOs): Consensus Saves Ossification?*, 25 B.C. ENVTL. AFF. L. REV. 213 (1997) (lauding the success of this particular negotiated rulemaking).

34. *See supra* note 7.

review agency rules pursuant to presidential executive order, is at best lukewarm about this process because it can reduce OMB's leverage over the agencies.<sup>35</sup>

Nevertheless, I am a strong supporter of using negotiated rulemaking whenever the conditions are right, and I think that the advent of electronic rulemaking<sup>36</sup> can only make it easier to conduct such proceedings.

## 2. *The Administrative Dispute Resolution Act*

The other major statutory supplement to the APA was the Administrative Dispute Resolution Act (ADRA). Again this law was enacted with the joint support of ACUS and the ABA (which also has a special Section of Dispute Resolution).

The ADRA, like its cousin the Negotiated Rulemaking Act, is not mandatory. It sets out a framework for agencies to use in employing various ADR techniques such as mediation, arbitration, minitrials, early neutral evaluation, settlement judges and ombudsmen. It also explicitly authorizes agencies to use these techniques, thus removing potential legal questions about their authority to do so. Finally, it encourages such activity by protecting the confidentiality of ADR proceedings conducted under this Act.<sup>37</sup> One way it does this is to ensure that ADR communications in the hands of government neutrals are exempt from the Freedom of Information Act.<sup>38</sup> It also streamlines the process for government contracting with outside neutrals.<sup>39</sup>

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35. I base this on candid conversations with members of OMB's career staff. Officially, however OMB implements Executive Order 12,866, Regulatory Planning and Review, which, among other things, specifies that agencies are "directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking." Exec. Order No. 12,866, 58 Fed. Reg. 51,735, § 6(a) (Oct. 4, 1993).

36. For a succinct history of the "rise of e-rulemaking," see Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353, 363-366 (2004). See also Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening Our Civil Infrastructure*, 54 ADMIN. L. REV. 1421 (2002); Jeffrey S. Lubbers, *The Future of Electronic Rulemaking: A Research Agenda* (Kennedy School of Government, Harvard University, Regulatory Policy Program, Paper No. RPP-2002-04, 2002), reprinted in ADMIN. & REG. L. NEWS, Summer 2002, at 6; Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433 (2004); Stuart W. Shulman, *E-Rulemaking: Issues in Current Research and Practice*, 28 INT'L J. OF PUB. ADMIN. 621 (2005); Stephen Zavestoski & Stuart W. Shulman, *The Internet and Environmental Decision Making: An Introduction*, 15 ORG. & ENV'T 323, 326 (2002). Links to some of these and many other related papers and studies are available on the website of the Harvard University's John F. Kennedy School of Government's Regulatory Policy Program, at <http://www.ksg.harvard.edu/cbg/rpp/erulemaking/papers&reports.htm>.

37. See 5 U.S.C. § 574 (2000).

38. See *id.* § 574(j).

39. See *id.* § 573(e). To expedite the hiring of neutrals, § 7 of the 1996 ADRA also amended the

Government use of ADR is a win-win situation when it is done correctly. The government and private parties both benefit by having reduced litigation costs, and the resulting agreements are often more acceptable and durable as well. Of course there are times when the use of ADR is not appropriate, and the Act spells those out—such as when an authoritative precedential decision is required or when the outcome might significantly affect persons or organizations who are not parties to the dispute.<sup>40</sup>

In 1996 Congress added some perfecting amendments to each of these two Acts and also made them both permanent. Congress has thus implicitly confirmed that the federal government's use of collaborative processes have just as much place in agencies' activities as do formal adjudication, notice-and-comment rulemaking, and other more formal procedures. In short these were two statutory reforms that have been excellent additions to the APA.

## II. PROFESSOR FREEMAN'S "COLLABORATIVE REGULATION" APPROACH

These reforms are also very consistent with the thrust of Professor Freeman's work. In a short time, she has become one of our leading commentators on collaborative regulation.<sup>41</sup> She begins with the proposition that traditional regulation is not working well, that the rulemaking process is too rigid ("ossified"), that implementation is inconsistent, and that enforcement is at best sporadic. While this is certainly true about some rulemakings, many rulemakings are successful, so I would not want our Japanese colleagues to underestimate the basic success of the notice-and-comment model in many situations.

Nevertheless, U.S. rulemaking does have some undue complications these days and Professor Freeman argues that different types of collaborative relationships between government and multiple stakeholders can help solve this problem. She points to the successes of negotiated rulemaking and of EPA's Project XL—a program that allowed companies

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competitive requirements of defense agency (10 U.S.C. § 2304(c)(3)(C)) and federal civilian agency (41 U.S.C. § 253(c)(3)(C)) contracts to use non-competitive contracting procedures to hire such neutrals.

40. See 5 U.S.C. § 572(b) (2000).

41. See, e.g., Freeman, *Collaborative Governance*, *supra* note 33; Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155 (2000) [hereinafter Freeman, *The Contracting State*]; Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60 (2000).

to deviate from specific pollution control performance requirements if they proposed alternative approaches that were acceptable to affected stakeholders, including environmental groups.<sup>42</sup>

I agree with her that these approaches are promising ones<sup>43</sup>—and should be considered on a case by case basis. But their success depends almost entirely on the adequacy of the participation and representativeness of the stakeholder groups. Success will ultimately depend on the implementation of the agreement reached in the collaborative proceeding. If the environmental group, for example, is not given enough opportunity to make its case, or does not adequately represent the needs of the relevant community (or communities), the negotiations will either fail or will not hold in the end.

As I indicated before, I also believe that such proceedings can and should operate within the traditional boundaries of the APA. Negotiated rules should still be subject to public comment and judicial review. Moreover, it is the agency that maintains the ultimate responsibility for the policy choice made. Agency accountability should not be shirked.

### III. CONCLUDING REMARKS—GROWING REGULATORY DEMANDS AND SHRINKING REGULATORY RESOURCES

Of course there is something else going on in our regulatory state that Professor Freeman recognizes. The federal government workforce is shrinking. It is at the lowest level since the Eisenhower Administration.<sup>44</sup> But the demands of the modern regulatory state are not shrinking; in fact they are growing. This requires alternative techniques for achieving regulatory goals. One way is for the government to depend more on the so-called “shadow government”—the world of government contractors.

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42. Freeman, *Collaborative Governance*, *supra* note 33, at 55–66. See also Dennis D. Hirsch, *Project XL and the Special Case: The EPA's Untold Success Story*, 26 COLUM. J. ENVTL. L. 219 (2001); Nathaniel O. Keohane, Richard L. Revesz & Robert Stavins, *The Choice of Regulatory Instruments in Environmental Policy*, 22 HARV. ENVTL. L. REV. 313 (1998). For a more critical view, see Rena I. Steinzor, Dialogue, *Regulatory Reinvention and Project XL: Does the Emperor Have Any Clothes?*, 26 ENVTL. L. REP. 10,527 (1996).

43. A similar approach was added to the Endangered Species Act in the 1982 amendments—the negotiation of “habitat conservation plans” (HCP) under 16 U.S.C. § 1539(a)(2)(A) (2000). See, e.g., J.B. Ruhl, *Taking Adaptive Management Seriously: A Case Study of the Endangered Species Act*, 52 U. KAN. L. REV. 1249, 1273–84 (2004) (discussing the unfulfilled potential of the HCP program).

44. Executive Branch civilian employment in September 2005 was 2.636 million, see <http://www.opm.gov/feodata/html/2005/september/table9.asp>. Between 1953 and 1961, the total number hovered between 2.382 million (1958) and 2.558 million (1953). See U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, PART 2, available at <http://www2.census.gov/prod2/statcomp/documents/CT1970p2-01.pdf>.

Thus, there has been a recent growth in what might be called “non-government government”—or to use a term Professor Freeman has used—“subgovernment.”<sup>45</sup>

Professor Freeman cleverly titled one of her articles, “The Contracting State.”<sup>46</sup> This word “contracting” has a double meaning. It can mean “contracting” in the sense of awarding government contracts. And it can mean “contracting” in the sense of shrinking. Her article addresses the blurry distinction between government contracts and regulation. This is helpful because administrative law has always treated them as rather distinct activities.

To show how far we have come, recall the APA’s exemption from public notice and comment for rules dealing with government grants and contracts.<sup>47</sup> These matters were once thought to be strictly proprietary activities of the government. Now, of course, government procurement programs are multi-million dollar programs with huge social consequences.

The upshot of this, as she explained in her article, is that government contracts (and their first cousin, government grants—which she aptly calls “conditional awards of funding”<sup>48</sup>) are now being used to implement government policies that are traditionally associated with government regulations—rules.

So the result is that we now have a process for agency rulemaking that is laden with public participation requirements, external reviews by OMB and Congress, and intensive judicial review. But with respect to individualized government agency agreements with regulated interests (nursing homes or polluters, for example), we typically do not have notice and comment, OMB review, congressional oversight, or intensive judicial review.

These government activities operate under the radar screen, which may be one reason they are increasing. But is this trend salutary or worrisome? The answer is that it is both.

One fundamental question is the appropriateness (legally, ethically, and consequentially) of the executive agencies sub-delegating their power to private sector, privatized entities like stock exchanges, voluntary consensus standard-setting bodies, managed healthcare organizations, and

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45. Freeman, *The Contracting State*, *supra* note 41, at 187.

46. Freeman, *The Contracting State*, *supra* note 41.

47. 5 U.S.C. § 553(a)(2). *See also supra* notes 8–12 and accompanying text.

48. Freeman, *The Contracting State*, *supra* note 41, at 166.

private prisons.<sup>49</sup> For example, we have seen recently, with some of our Wall Street scandals, that it was not enough for the Securities and Exchange Commission to rely on self-regulatory organizations set up by the large accounting firms. In some situations it may be enough for the federal agency to serve as the backstop—overseeing the activities of the self-regulatory organization. In other situations, direct federal government regulation is necessary.

I also think it is unsustainable for the federal government to continue to reduce its regulatory workforce while the agencies are assigned so many more tasks in their regulatory role. Agency regulators now have to conduct about ten separate analyses for every major regulation, and OMB is about to add new peer reviews requirements.<sup>50</sup> How can agencies do all this with fewer employees? The only way is to outsource many of these tasks. EPA and other agencies have long relied extensively on contractors to review comments in rulemaking. I would suspect that the agency would rather hire its own employees to do this kind of work. And indeed there are civil service rules against overusing consultants to undertake work normally done by civil service employees.<sup>51</sup> This is a large potential problem for our government.

Finally, I can agree that use by agencies of contracts or intermediaries to achieve regulatory ends may be potentially a good thing if there are enough safeguards and accountability mechanisms. One suggestion that occurred to me is the possibility of instituting public participation requirements for certain types of government contracts—perhaps there should be notice and comment before the Justice Department agrees to award a contract to a private prison or before EPA allows a special arrangement with a polluting company.

With that last, possibly constructive, suggestion, let me conclude by saying that I have learned a lot from the stimulating remarks by my colleagues and I hope our presentations have been valuable to you as well as you proceed with your reform agenda in Japan.

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49. See, e.g., Douglas Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 ADMIN. L. REV. 171 (1995); Paul R. Verkuil, *The Nondelegable Duty to Govern* (Cardozo Sch. of Law, Institute for Advanced Legal Studies, Working Paper No. 149, 2005), available at <http://ssrn.com/abstract=871455>.

50. See OFFICE OF MANAGEMENT AND BUDGET, FINAL INFORMATION QUALITY BULLETIN FOR PEER REVIEW (2004), available at <http://www.whitehouse.gov/omb/inforeg/infopoltech.html>.

51. See, e.g., Jeffrey Lovitky, *The Problems of Government Contracting for Consulting Services*, 14 PUB. CONT. L.J. 332 (1984) (detailing the legal complications governing government agency use of contractors instead of employees); William V. Luneburg, *Contracting by the Federal Government for Legal Services: A Legal and Empirical Analysis*, 63 NOTRE DAME L. REV. 399, 410–35 (1988) (discussing similar problems).