MEMORIAL TRIBUTE

IN MEMORY OF PHIL HARTER

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INTRODUCTION

Philip Joseph Harter died in August 2023 at the age of eighty-one.

Phil loved the law, and within the law, he loved administrative law most. For forty years, Phil made fundamental contributions to our field as a scholar, as a hands-on reformer, and as a leader in the profession.

We have written this brief article to honor him and preserve his legacy.

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* Retired Partner, Perkins Coie. Bill knew Phil for over forty years. They worked on a regulatory reform project together when Phil taught at Vermont Law School.

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I. THE SCHOLAR

A. Background

Since 1947, the Administrative Procedure Act (APA)[1], with limited exceptions, has required any rule from a federal agency to be published in proposed form for public comment. After "considering" the comments, the agency may issue a final rule. It must be accompanied by a "concise general statement of [its] basis and purpose."[2]

The 1970s saw the rise of new fields of regulatory concern, such as traffic safety, environmental protection, and workplace health and safety. Congress and regulatory agencies turned increasingly to rulemaking to pursue their new goals. Under this pressure, the apparently summary APA procedures became more structured. An agency would now have to set out the justifications for the proposed action in somewhat granular detail; public comments and the agency response to them would have to be equally granular; and this entire dialogue would be gathered into an "administrative record" that would provide the exclusive basis for judicial review.

For almost fifty years without significant change, this approach has provided the matrix for agency rulemaking.[3] But it has been regularly criticized as formal, arm's length, imprecise, slow, and expensive, though plausible suggestions for improvement have been notably absent.

B. The Regulatory Negotiation Article

Phil's significant contribution rested on his recognition that for some rules—not all or even most—the key interest groups could all be better off if they negotiated a rule face to face rather than relying on an agency decision made by notice-and-comment procedures.

Phil expressed these views in a report to the Administrative Conference of the United States[4] that then became a law review article.[5] The article set out in detail the preconditions for a successful regulatory negotiation, the procedures that should be followed, and the benefits that could be expected.[6]

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1. Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551, 553–559, 701–706).

2. *Id.* § 553.

3. Phil was among many who thought that this matrix had worked well. Philip J. Harter, *The APA at Fifty: A Celebration, Not a Puzzlement*, 48 ADMIN. L. REV. 309, 310 (1996).

4. For more on the Administrative Conference, see *About ACUS*, ADMIN. CONF. OF THE U.S., https://www.acus.gov/about-acus (last visited Nov. 11, 2023).

5. *See* Phillip I. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L. J. 1 (1982).

6. *See id.*

1. The Conditions for a Successful Negotiation

Phil identified six conditions for a successful negotiation. They are:

- The interested parties must be known or knowable, and their representatives must not be too numerous;[7]
- The issues must be reasonably well defined;[8]
- No one party can easily command its preferred result—for then, why would it negotiate?[9]
- There should be numerous issues so as to allow room for bargaining and different approaches;[10]
- All parties must have an interest in successful rulemaking, either because the law requires a rule or because a rule could at least potentially benefit them all;[11] and
- The parties must be willing to bargain. If the rule raises an existential issue for one or more parties, negotiation would probably not be appropriate.[12]

2. The Negotiating Procedures

Here, Phil suggested that:

- The members of the negotiating team should be selected through an open and public process, perhaps assisted by a neutral third party, to ensure that no important interest was absent from the table.[13]
- The agency itself should be represented on the negotiating team through a representative with full power to negotiate but no power to command.[14] This would help ensure that the final result was within boundaries that were acceptable to the agency.[15] An active agency negotiator could also explain what the agency would probably do if the negotiation failed, thus making clear to the others the nature of the "default option" they would face if they failed to reach an agreement.[16]

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7. *Id.* at 7, 53.
8. *Id.* at 37.
9. *Id.* at 43, 51.
10. *Id.* at 47, 50–52.
11. *Id.* at 73.
12. *Id.* at 48.
13. *Id.* at 1392, 1416 n. 99.
14. *Id.* at 66.
15. *Id.* at 64–66, 88.
16. *Id.* at 47–49.

- Unless otherwise agreed, no negotiated result would be acceptable without the consent of all participants;[17]
- There should be an impartial and disinterested mediator—eventually called a "facilitator"—to preside and to prevent misunderstandings or personal conflicts from derailing the process;[18] and
- The agency, as the law requires, would retain final authority over the form of any final binding regulation. However, the agency should commit in advance to publish the result of a successful negotiation as a proposed rule subject to the normal right of public comment.[19]

3. The Benefits

Phil thought that regulatory negotiation would make rulemaking faster and cheaper.

But he saw the main benefits in a more precise identification of the issues and a more creative approach to addressing them. Discussions with others would lead the participants to identify both what they really had at stake and new approaches to achieving mutual satisfaction. This would provide new incentives to disclose relevant information to the other participants and to focus on the vital details needed to make the new approach work The negotiating parties would consider the resulting rule to be more legitimate than anything the agency might have promulgated on its own, partly because of their involvement and partly because it would just be a better rule.

II. THE REFORMER: IMPLEMENTING REGULATORY NEGOTIATION

A. Implementation

The academic literature to date has cited Phil's article over 850 times—a smashing success by any professorial yardstick. But unlike most other academic successes, the article had an immediate and enduring impact on the practical world. Phil helped make that happen.

Agencies began to conduct actual regulatory negotiations almost as soon as Phil's recommendations became known. Phil served as the facilitator in at least eight such proceedings covering a wide variety of topics.[20] By all

17. *Id.* at 18 n. 97.

18. *Id.* at 1416 n. 98, n. 99.

19. *Id.* at 64 n. 353, 117–18.

20. Seven are listed in Phillip J. Harter, *A Plumber Responds to the Philosophers: A Comment on Professor Menkel-Meadows Essay on Deliberative Democracy*, 5 NEV. L. J. 379 (2004) [hereinafter *A*

accounts, Phil was a forceful, practical, and effective presence.

Bill Pedersen's law partner, David Menotti, represented the industry in a negotiation to set emission standards for wood stoves. At one point Phil called him over and said:

"David, are you listening to what [the environmental group representative] is saying?"

"Of course."

"I don't think so, because if you were, you would realize that he is prepared to give you everything you need if you would only shut up."

Phil was also central to the 1990[21] enactment and 1996 reenactment by Congress of legislation to encourage regulatory negotiation.[22] This gave negotiations whatever imprimatur may rest in congressional endorsement. It also provided some guidance on how to conduct negotiations and removed some legal obstacles to the operation of negotiating groups.

B. The Legacy

Regulatory negotiations to date have followed almost to the letter the procedures Phil outlined for convening and operating a negotiating group. That by itself would be remarkable.

Phil's view of the benefits has also proved true. Regulatory negotiation in its early years attracted criticisms based both on conceptual disagreement and empirical analysis.[23] Phil pushed back forcefully several times in print, relying significantly on his actual regulatory negotiation experience.[24]

But the most comprehensive review concluded that just as Phil had

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Plumber Responds]. As indicated in the text, Phil also facilitated a negotiation to set emission standards for wood stoves. *See id.*

21. Negotiated Rulemaking Act, Pub. L. No. 104-320, 110 Stat. 3870 (codified at 5 U.S.C. §§ 561–570).

22. *See* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 11(a), 110 Stat. 3870, 3873.

23. *See, e.g.*, Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L. J. 1206 (1994); Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1207 (1994); Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L. J. 1255 (1997); Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Phillip Harter*, 9 N.Y.U. ENVTL. L. J. 386 (1997); William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L. J. 1351 (1997).

24. Phillip J. Harter, *Fear of Commitment: An Affliction of Adolescents*, 46 DUKE L. J. 1389 (1997); Phillip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L. J. 32 (2000); Phillip J. Harter, *In Search of Goldilocks: Democracy, Participation and Government*, 10 PENN. ST. ENVTL. L. REV. 113 (20002): *A Plumber Responds*, *supra* note 20.

predicted, successfully negotiated rules were viewed by all the negotiators as more legitimate than other rules precisely because they better accommodated the actual needs of each participant.[25]

In several cases, the results of negotiation proved notably creative.

The Environmental Protection Agency left to itself, would probably have implemented a congressional directive to control emissions from chemical plants by requiring the installation of controls on specific pieces of equipment. But the regulatory negotiation format enabled the industry to convince the agency and the environmental community that a specific program for identifying and fixing leaks from equipment joints and seals could produce greater emission reductions at less cost.[26]

Although the use of reg-negs has waned in recent years, it is still used for a number of highly significant regulations, including all higher education rules issued by the Department of Education and appliance energy efficiency rules issued by the Department of Energy.

In addition, several agencies have used a less formal version of the same process. Though Phil was not a big supporter of this approach, it still captures important benefits of his vision.

III. A LEADER IN THE PROFESSION

A. The ABA Section of Administrative Law

Phil served the American Bar Association Section of Administrative Law and Regulatory Practice for many years and was its Chair during the 50th anniversary of the passage of the Administrative Procedure Act—the "constitution" of federal administrative law. As Chair, Phil vigorously endorsed a statute the ABA had originally opposed. [27]

B. The Administrative Conference of the United States

The Administrative Conference of the United States (ACUS) is a very small federal agency that studies administrative procedure and provides recommendations for improving it. Phil worked as an ACUS senior staff

25. Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L. J. 60, 121 (2000) ("On balance, the combined results . . . suggest that [regulatory negotiation] is superior to conventional rulemaking on virtually all of the measures that were considered . . . .).

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

27. *See* Jeffrey S. Lubbers, *The ABA Section of Administrative Law and Regulatory Practice-From Objector to Protector of the APA*, 50 ADMIN. L. REV. 157, 157, 170 (1998).

attorney early in his career. He later served as an active member of ACUS' senior outside advisory panel, usually advocating for more collaborative government.

In 1995, Congress defunded ACUS and thus functionally abolished it, not for any compelling reason, but because the new Republican House majority had promised to abolish a lot of federal agencies, and ACUS was one of the few that they were actually able to abolish.[28]

Phil played a leading role in the successful lobbying effort to legislatively re-establish ACUS, which finally succeeded in 2010. [29]

CONCLUSION

Phil was a full-time academic for only a relatively short part of his career. But in his scholarly life, he wrote an article with enduring academic impact *and* enduring practical impact—something very few lawyers from any sector of the profession ever accomplish. Additionally, he was able to promote that practical impact personally, both in Congress and as an actual participant in regulatory negotiations.

He made the world a better place both through this and through his long service to the legal profession. We will miss him, and it is a privilege to have been his friend.

28. *ACUS in a Nutshell*, ADMIN CONF. OF THE U.S., https://www.acus.gov/newsroom/administrative-fix-blog/acus-nutshell (last visited Nov. 11, 2023).

29. For ACUS's memorial statement for Phil Harter, see *Statement on the Passing of Phillip J. Harter*, ADMIN. CONF. OF THE U.S. (Aug. 31, 2023), https://www.acus.gov/sites/default/files/documents/ACUS-Statement-Passing-Philip-Harter-083123.pdf.